

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO.93/2025 FILED ON 27TH AUGUST 2025

BETWEEN

PALAK DEVELOPERS LIMITEDAPPLICANT

AND

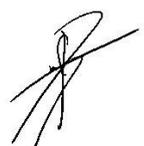
**THE PRINCIPAL SECRETARY, MINISTRY OF LANDS,
PUBLIC WORKS, HOUSING & URBAN DEVELOPMENT
STATE DEPARTMENT OF HOUSING &
URBAN DEVELOPMENT.....1ST RESPONDENT**

**MINISTRY OF LANDS, PUBLIC WORKS
HOUSING & URBAN DEVELOPMENT 2ND RESPONDENT**

AND

DUMPKEN ENTERPRISE LIMITED.....INTERESTED PARTY

Review against the decision of the Accounting Officer, State Department of Housing & Urban Development, in relation to Tender No. MLPWHUD /SDHUD/AHP/178/2024-2025 – Proposed Construction of Upper Kanyakwar Phase 2 AHP in Kisumu East Constituency, Kisumu County.



BOARD MEMBERS PRESENT

Mr. George Murugu FCI Arb & IP Chairperson

Eng. Lilian Ogombo Member

Mr. Daniel Langat Member

IN ATTENDANCE

Mr. Abdalla Issa Holding Brief for the Board Secretary

PRESENT BY INVITATION

APPLICANT

PALAK DEVELOPERS LIMITED

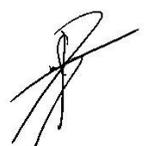
Mr. Oketch Advocate, James Oketch & Company
Advocates

Mr. Githinji Advocate, James Oketch & Company
Advocates

1ST AND 2ND

RESPONDENTS

**THE PRINCIPAL SECRETARY,
MINISTRY OF LANDS, PUBLIC
WORKS, HOUSING & URBAN
DEVELOPMENT STATE DEPARTMENT
OF HOUSING & URBAN DEVELOPMENT
MINISTRY OF LANDS, PUBLIC WORKS
HOUSING & URBAN DEVELOPMENT**



Ms. Edna Makori

Advocate, State Department of Housing &
Urban Development

INTERESTED PARTY

DUMPKEN ENTERPRISE LIMITED

Mr. Obatch

Advocate, Odhiambo Adhiambo Advocates
LLP

BACKGROUND OF THE DECISION

THE TENDERING PROCESS

1. The State Department of Housing & Urban Development (hereinafter referred to as "the Procuring Entity") invited tenders through the open tendering method pursuant to Tender No. MLPWHUD /SDHUD/AHP/178/2024-2025 – Proposed Construction of Upper Kanyakwar Phase 2 AHP in Kisumu East Constituency, Kisumu County (hereinafter referred to as "the subject tender"). Interested bidders were required to submit their bid documents to the specified address on or before 12th February 2025.

Addenda/Clarification

2. According to the confidential documents submitted to the Public Procurement Administrative Review Board (hereinafter "the Board") by the Procuring Entity pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act (hereinafter "the Act"), the



Procuring Entity issued four Addenda and five Clarifications addressing various issues.

3. Addendum No. 1 dated 10th February 2025 extended the tender submission deadline to 19th February 2025 at 9:00 a.m. and provided clarification on several issues. Addendum No. 2 dated 17th February 2025 similarly offered clarifications and further extended the submission deadline to 13th March 2025. Addendum No. 3 dated 18th February 2025 provided additional clarifications and extended the deadline to 19th March 2025. Addendum No. 4 dated 5th March 2025 issued clarifications while retaining the submission deadline.
4. Similarly, the Procuring Entity issued five Clarifications providing further guidance on various issues.

Submission of Bids and Tender Opening

5. According to the Tender Opening Minutes dated 19th March 2025 a total of six (6) tenders were received in response to the subject procurement. The tenders were recorded as follows:

No.	Tenderer
1.	Blueswift Contractors & General Supplies Limited
2.	Palak Developers Limited
3.	Dumpken Enterprises Limited
4.	Sovit International Limited
5.	Chridal Enterprises Limited



6.	Polish Contractors Company Limited
7.	Nolads Engineering Limited
8.	Enercom Technologies Limited

Evaluation of Bids

6. According to the Evaluation Report dated 21st May 2025 (hereinafter referred to as "the 1st Evaluation Report"), the Tender Evaluation Committee (hereinafter referred to as "the Evaluation Committee") convened to evaluate the tenders received. The evaluation was conducted in three distinct stages, as outlined below:
- a. Preliminary Evaluation
 - b. Technical Evaluation
 - c. Financial Evaluation

Preliminary Evaluation

7. At the first stage, the Evaluation Committee undertook a preliminary evaluation to determine the responsiveness of each tender, based on the criteria set out under Section III – Evaluation and Qualification Criteria at pages 31 to 32 of the blank Tender Document. Only those tenders that satisfied all the mandatory requirements at this stage were deemed responsive and consequently eligible to proceed to the Technical Evaluation stage.



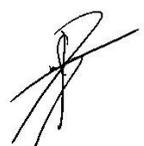
8. Upon conclusion of the preliminary evaluation, two tenders, including that of the Applicant, were declared non-responsive, while the remaining four, including that of the Interested Party, were found responsive and consequently proceeded to the Technical Evaluation stage.

Technical Evaluation

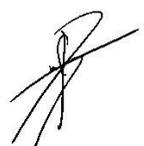
9. At the Technical Evaluation stage, the Evaluation Committee assessed the tenders for compliance with the technical requirements outlined under Section III – Evaluation and Qualification Criteria at pages 33 to 36 of the blank Tender Document. To qualify for progression to the Financial Evaluation stage, a tender was required to attain a minimum technical score of seventy percent (70%).
10. Upon conclusion of the Technical Evaluation stage, all tenders that had progressed to this stage attained scores exceeding the minimum required technical score of seventy percent (70%). Accordingly, the four tenders were advanced to the Financial Evaluation stage.

Financial Evaluation

11. At the Financial Evaluation stage, the Evaluation Committee was required to undertake its assessment in accordance with the test set out under Section III – Evaluation and Qualification Criteria at page 36 of the blank Tender Document, and more specifically as outlined below.



- a) Completeness of the Bills of Quantities: The Bills of Quantities section of the submitted Tender Document must be complete as issued, with no alteration, addition or qualification of any kind whatsoever made by the Tenderer to the text of the document. Any alterations, additions or qualifications shall be considered as material deviations as per ITT 31 and shall lead to Disqualification.**
- b) Examination of unit rates: Each bid shall be subjected to an evaluation of unit rates. Bids shall be assessed to confirm uniformity and consistency in rates of similar individual line items. Bids not meeting this criterion shall be disqualified and error checks shall not be undertaken.**
- c) Error checks: Successful bids from the examination of unit rates shall be evaluated for arithmetic errors. All arbitrary additions to the tender document shall be considered as arithmetic errors. An assessment of the bids taking into consideration the Tender Sum, corrections relating to arithmetic errors and any discounts offered shall be done to determine the bids' Evaluated Tender Sum.**
- d) Conformance with the estimated cost: The estimate for the project is KES. 914,680,000.00 with a plinth area of**



22,867.00 SQM. The development cost (all-inclusive for the built-up structures and all the external works) shall be up to Ksh. 40,000 per square meter based on the plinth areas.

e) Ranking of the bids: Ranking of the bids using their Evaluated Tender Sums shall be undertaken. The ranking shall be used to determine the bid with the Lowest Evaluated Tender sum, which shall be considered for award.

i. Completeness of the BoQ

The Evaluation Committee observed that the Bills of Quantities in the submitted tenders were complete as issued, without any alteration, addition, or qualification.

Examination of unit rates for major items

The Evaluation Committee thereafter examined the rates for the selected items as set out in the table below.

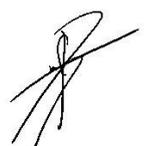


Table: Comparison of Rates

Item	Description	Unit	SDHUD QS Estimate	Bidder 3 Rates	Bidder 4 Rates	Bidder 5 Rates	Bidder 6 Rates
1.	Excavation	CM	1094	300	350	300	300
2.	300mm thick Hardcore Filling	CM	545	456	500	350	400
3.	50mm thick Concrete Class 15/20 in blinding	SM	400	750	400	400	400
4.	Concrete Class 25/20	CM	13500	10,000	13500	12800	12800
5.	Steel reinforcement	KGS	500	145	160	170	170
6.	200mm thick natural stone foundation walling	SM	1,500	1250	1450	1500	1400
7.	200mm thick stone for masonry walling	SM	1,400	1250	1500	1350	1400

Item	Description	Unit	SDHUD QS Estimate	Bidder 3 Rates	Bidder 4 Rates	Bidder 5 Rates	Bidder 6 Rates
8.	Clear glass glazing - 4mm	SM	1,100	900	1200	1000	1100
9.	Ceramic Floor tiles	SM	1,750	1250	1300	1500	1400
10.	Painting	SM	300	280	320	350	450

Observation on comparison and consistency of rates:

The Evaluation Committee noted that the bidders' rates were consistent for most items, and that the majority of the selected items compared favourably with the Quantity Surveyor's estimates, save for Item No. 3, where Bidder No. 3, the Interested Party, quoted a higher rate than the estimate.

Arithmetic Error Checks

Table 13: Arithmetic Errors

Bidder No	Bidder Name	Bid Amount (KES)	Corrected Bid amount (KES)	Error Amount (KES)	% Error
3	Dumpken Enterprises LTD	826,830,743.06	826,832,069.06	1,326	0.0001%
4	Sovit International LTD	937,198,141.61	940,938,481.10	3,740,339.49	0.4%
5	Chridal Enterprises LTD	861,596,632.60	-	-	-
6	Polish Contractors Company LTD	866,632,893.51	866,372,061	260,832.51	0.0003%

ii. Conformance with the estimate cost

At this stage of the financial evaluation, the Committee was required to verify the conformity of all bids to the estimated cost. The Tender Document stipulated that the development cost of KES 914,680,000.00, being all-inclusive for the built-up structures and external works, should not exceed KES 40,000 per square metre based on the plinth areas.

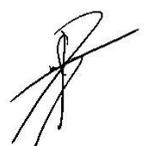


Table 14: Cost per Square Metre

Bidder No	Bidder Name	Bid Amount (KES)	Corrected Bid amount (KES)	Total Plinth Area	Cost Per Square Metre
3	Dumpken Enterprises LTD	826,830,743.06	826,832,069.06	22,867.00	36,158
4	Sovit International LTD	937,198,141.61	940,938,481.10	22,867.00	40,984.74
5	Chridal Enterprises LTD	861,596,632.60	-	22,867.00	37,678.60
6	Polish Contractors Company LTD	866,632,893.51	866,372,061	22,867.00	37,898.85

From the table above, the Committee observed that three bidders conformed to the project's estimated cost, save for Bidder No. 4, M/s Sovit International Ltd, whose rate of KES 40,984.74 exceeded the stipulated KES 40,000 per square metre plinth area.



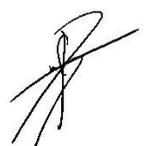
iii. Ranking of Bids

The Evaluation Committee thereafter ranked the bidders in accordance with the evaluated amounts as set out in the table below.

Table 15: Ranking of Bids

Bid No.	Name of Tenderer	Bid amount (KES)	Corrected Bid amount (KES)	Rank
3	Dumpken Enterprises LTD	826,830,743.06	826,832,069.06	1
5	Chridal Enterprises LTD	861,596,632.60	861,596,632.60	2
6	Polish Contractors Company LTD	866,632,893.51	866,372,061	3
4	Sovit International LTD	937,198,141.61	940,938,481.10	4

12. The Evaluation Committee notified M/s Dumpken Enterprises Limited, the Interested Party, of an arithmetic error of KES 1,326, which the Interested Party accepted. The Evaluation Committee thereafter treated the error as a minor deviation that did not affect the substance of the tender and accordingly recommended M/s Dumpken Enterprises Limited at their tender sum of Kenya Shillings Eight Hundred Twenty-



Six Million, Eight Hundred Thirty Thousand, Seven Hundred Forty-Three and Six Cents (KES 826,830,743.06), being the lowest evaluated bidder.

1st Due Diligence Report

13. According to a Due Diligence Report dated 22nd May 2025 (hereinafter "the 1st Due Diligence Report"), the Evaluation Committee conducted due diligence on the Interested Party, the outcome of which was positive.

Evaluation Committee's Recommendation

14. The Evaluation Committee recommended award of the subject tender to the Interested Party, having been determined to be the lowest responsive evaluated bidder, at a total sum of KES 826,830,743.06.

1st Professional Opinion

15. In a Professional Opinion dated 19th June 2025 (hereinafter referred to as "the 1st Professional Opinion"), the Head of Supply Chain Management Services of the Procuring Entity, Mr. John Maina, reviewed the procurement process, including the evaluation of tenders, and concurred with the Evaluation Committee's recommendation to award the subject tender to the Interested Party.
16. The 1st Professional Opinion was subsequently approved on 27th June 2025 by the 1st Respondent, who added comments to the effect that



thorough due diligence be undertaken on the Interested Party, noting that it had fallen behind schedule in previous projects awarded by the 2nd Respondent. The 1st Respondent further observed that enhanced due diligence would mitigate the risk of overloading a struggling contractor, which could occasion delays.

2nd Due Diligence Report

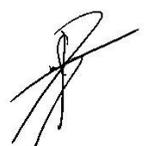
17. According to a Due Diligence Report dated 4th August 2025 (hereinafter “the 2nd Due Diligence Report”), the Evaluation Committee established that the Interested Party had the capacity to undertake multiple projects.

2nd Professional Opinion

18. In a Professional Opinion dated 7th August 2025 (hereinafter referred to as “the 2nd Professional Opinion”), the Head of Supply Chain Management Services of the Procuring Entity, Mr. Koome Eliud, reviewed the further due diligence report, and concurred with the Evaluation Committee’s recommendation to award the subject tender to the Interested Party.

Notification to Tenderers

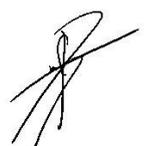
19. The tenderers were notified of the outcome of the evaluation of the subject tender through letters dated 8th August 2025.



REQUEST FOR REVIEW

20. On 27th August 2025, the Applicant, through the firm of James Oketch & Company Advocates, filed a Request for Review dated 26th August 2025. The application was accompanied by a Statement in Support of the Request for Review dated 26th August 2025 together with an Affidavit in Support of the Request for Review sworn by Rushab Kumar Doshi, the Director of the Applicant, on 26th August 2025. In the Request for Review, the Applicant sought the following orders:

- a) An order do issue terminating the present procurement process undertaken by the Procuring entity in respect of tender number MLPWHUD/SDHUD/AHP/178/2024-2025.**
- b) A declaration do issue that the Procuring Entity breached the provisions of the Public Procurement and Asset Disposal Act, 2015 and Article 47 and 227 of the Constitution.**
- c) An order do issue direction that the Notification of Intention of award in respect to tender number MLPWHUD/SDHUD/AHP/178/2024-2025 be cancelled and set aside.**
- d) An order do issue that the award and the entire procurement proceedings in tender number MLPWHUD/SDHUD/AHP/178/2024-2025 be nullified in its entirety.**



e) In the alternative to order (1), (2), (3) and (4) a declaration do issue that the Applicant was the winning bidder in in tender number MLPWHUD/SDHUD/AHP/178/2024-2025.

f) Costs of the Request for Review be awarded to the Applicant.

g) Granting any other relief that the Review Board deems fit to grant under the circumstances.

21. In a Notification of Appeal and a letter dated 27th August 2025, the Secretary of the Board notified the Respondents of the filing of the Request for Review and the suspension of the procurement proceedings of the subject tender, while forwarding to the said Procuring Entity a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 27th August 2025.

22. On 29th August 2025, the Interested Party, through the firm of Odhiambo Adhiambo Advocates LLP, filed a Memorandum of Appearance dated 28th August 2025.

23. On 3rd September 2025, the Respondents filed a letter dated 1st September 2025 referenced "Response on Appeal on Tender No.



MLPWHUD/SDHUD/AHP/178/2024-2025 for the Proposed Construction of Upper Kanyakwar Phase 2 AHP in Kisumu East Constituency, Kisumu County.” On the same date, the Respondents submitted the confidential documents to the Board in compliance with Section 67(3) of the Act.

24. On 3rd September 2025, the Interested Party filed a Replying Affidavit sworn on 1st September 2025 by Violet Akinyi Ager, a Director of the Interested Party.
25. On 5th September 2025, the Board Secretary issued a Hearing Notice of even date notifying the parties that the hearing of the Request for Review would be held virtually on 11th September 2025 at 11:00 a.m. via the provided link. On the same date, the Board further notified all bidders of the filing of the Request for Review.
26. On 8th September 2025, the Applicant filed a Notice of Preliminary Objection dated 4th September 2025, a Supplementary Affidavit sworn on 4th September 2025 by Rumab Kumar Doshi, written Submissions dated 4th September 2025, together with a List and Bundle of Authorities of even date.
27. On 10th September 2025, the Respondents filed a Response to the Applicant’s Notice of Preliminary Objection of even date.
28. On 10th September 2025, the Interested Party filed a Response to the Notice of Preliminary Objection dated 9th September 2025.



29. When the Board convened for the hearing on 11th September 2025 at 11:00 a.m., all parties 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. However, Counsel for the Interested Party indicated that he had not been served with the Applicant's Supplementary Affidavit. The Board directed the Applicant to effect service, which was duly done, whereupon Counsel for the Interested Party acknowledged receipt and confirmed readiness to proceed. The Board thereafter allocated time for the parties to highlight their respective submissions.

PARTIES SUBMISSIONS

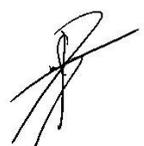
Applicant's Submissions on the Request for Review and the Preliminary Objection

30. The Applicant's Counsel submitted that the 1st Respondent's letter dated 1st September 2025 was fatally defective and incapable of constituting a proper response in law to the Application for Review. Counsel argued that the governing statute, the Act, together with its subsidiary legislation and the Review Board's circulars, prescribe in mandatory terms the form of responses to review applications, namely by way of a Memorandum of Response, Replying Affidavit, or Preliminary Objection.
31. It was submitted that the 1st Respondent had not filed any of the prescribed pleadings and that a letter could not satisfy the legal



threshold. As such, the Respondents had not properly joined issue with the Applicant, and the Application stood unopposed. Counsel further contended that the averments made on oath by the Applicant had not been controverted, and by virtue of established jurisprudence, unchallenged depositions are deemed admitted.

32. With regard to Article 159(2)(d) of the Constitution, Counsel submitted that the provision could not salvage a fatally defective pleading. In support of this position, reliance was placed on various decisions of the superior courts, including **Africa Inland Church Kenya Registered Trustees v Julius Mwanza & 2 others [2021] eKLR**, for the proposition that Article 159(2)(d) of the Constitution was never intended to cure substantive lapses that go to the root of pleadings.
33. The Applicant's Counsel submitted that the Interested Party's Replying Affidavit dated 1st September 2025 was fatally defective, as it was not accompanied by a Board resolution or authority to act evidencing that its director had power to represent the company. Reliance was placed on Order 2 Rule 16 and Order 9 Rule 2 of the Civil Procedure Rules which require that, in the case of a corporation, pleadings and acts must be authorized under the corporate seal. Counsel cited **Ueing & Another v Barclays Bank of Kenya Limited & Another [2023]** and **Siokwei Tarita Limited v Dr. Charles Walekwa [2012]**, among others, where courts held that absence of a Board resolution rendered proceedings instituted by a company void.
34. It was further submitted that the Interested Party had irregularly relied



on an attendance register authored by the 1st Respondent, contrary to section 35(1) and (4) of the Evidence Act which provides that a document must be produced by its maker unless statutory exceptions apply. To support this position, Counsel cited **Parkar & Another v Qureshi & 2 Others [2023] KECA 908 (KLR)** and **Mayfair Establishment Limited v Athman & Another [2025] KEELC 38 (KLR)**, among others, where courts emphasized strict compliance with section 35 of the Evidence Act before admitting documents under the hearsay rule.

35. Counsel submitted that the Applicant's bid of KES 854,690,409.21 was the lowest as shown at page 1256 of its annexures and, in accordance with section 86(1) of the Act, it ought to have been declared the successful tenderer. Counsel emphasized that the award was irregularly issued to the Interested Party whose bid was initially higher at KES 856,830,743.06 but was later altered to KES 826,830,743.06, thereby unfairly displacing the Applicant.
36. It was argued that Regulation 82(3) of the Regulations, 2020 requires that notifications to unsuccessful bidders disclose the successful bidder's name, tender price, and reasons for the award in accordance with section 86(1) of the Act. The Applicant contended that the 1st Respondent breached these provisions by manipulating the Interested Party's bid and failing to issue a lawful notification.
37. Counsel further submitted that on 13th August 2025 the 1st Respondent issued a notice of intention to award the tender but, by letter dated 15th

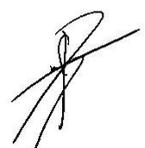


August 2025, irregularly extended the validity of the tender for a further thirty days. It was urged that section 88 of the Act permits an extension of tender validity only once and before the notification of award has been issued, hence the Respondent's actions were unlawful.

38. In addition, it was argued that the extension after notification contravened Articles 47 and 227 of the Constitution by denying the Applicant lawful, fair, transparent and cost-effective administrative action. Counsel submitted that the Respondent's conduct was unconstitutional, irregular and in violation of the principles of procurement under the Constitution and statute.

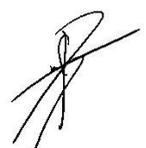
Respondents' Submissions to the Request for Review and the Preliminary Objection

39. The Respondents denied breaching either the Act or the Regulations, 2020 and maintained that the procurement was implemented in strict compliance with the law. They contended that the tender sum of KES 826,830,743.06, read out at the opening, was never altered and that the Applicant's assertion of manipulation was baseless. According to them, the Applicant's bid was not the lowest evaluated as envisaged under section 86 of the Act, and all bidders, including the Applicant, were duly notified under section 87(3) of the Act.
40. It was their case that the Applicant's disqualification stemmed from failure to stamp the confidential business questionnaire as required under MR8, a mandatory requirement applied uniformly to all bidders.



They argued that this omission rendered the Applicant non-responsive at the preliminary stage, and therefore its bid could not be subjected to further evaluation. The Respondents added that while the notification was indeed sent at 5:07 p.m., no prejudice was occasioned to the Applicant by the timing.

41. On the allegation of fraud and manipulation of the contract sum, the Respondents insisted that the award was made strictly at the tender sum read out and recorded in the opening register and minutes. They pointed out that the Applicant had not attended the tender opening nor requested the minutes under section 78 of the Act, and therefore its claims were unfounded. The Respondents further dismissed the allegation of fraud as unsubstantiated, noting that the Applicant's non-responsiveness at the preliminary stage alone justified its exclusion.
42. With respect to the extension of tender validity, the Respondents submitted that the Accounting Officer acted lawfully under section 88 of the Act by extending the period before its expiry, and for only thirty days as allowed. They rejected the Applicant's claim that the extension was unlawful or malicious.
43. The Respondents maintained that the successful bidder was the lowest evaluated tenderer, determined to be substantially responsive to the requirements of the tender documents through all stages of evaluation. They contended that the process complied fully with Article 227 of the Constitution, the Act, and the attendant Regulations, 2020. In their view, the Applicant could not claim loss or prejudice, as it was not the

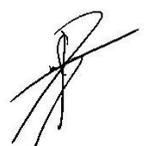


lowest evaluated bidder and had only itself to blame for failing to meet mandatory requirements.

44. In response to the Preliminary Objection, Counsel submitted that the contention that the Respondents' Response is incompetent is unfounded, as it is premised on a non-existent provision of law, there being no Section 205(3) of the Act. With respect to the issue raised under Order 9 Rule 7 of the Civil Procedure Rules, Counsel contended that the Advocate who signed the Respondents' Response to the Notice of Preliminary Objection is duly qualified under Article 156 of the Constitution.

Interested Party's Submissions to the Request for Review and the Preliminary Objection

45. Counsel for the Interested Party submitted that the Interested Party is a duly registered Kenyan company, compliant with all statutory requirements, and was therefore eligible to bid. It was urged that the Interested Party lawfully obtained the tender documents for the subject tender, submitted a responsive bid accompanied by a valid bid security, and attended the tender opening, unlike the Applicant who neither attended the opening nor requested the register, and had therefore relied on hearsay.
46. It was further submitted that during the tender opening held on 19th March 2025, the Interested Party's tender sum of KES 826,830,743.06 was read out publicly and recorded in the opening register and minutes.

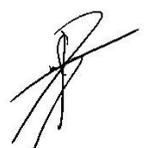


Counsel contended that this figure was consistently reflected in the Form of Tender, the evaluation report, and the notification of intention to award, thereby discrediting the Applicant's allegations of manipulation or unlawful variation of the contract sum.

47. The Interested Party contended that its bid was found substantially responsive at both the preliminary and technical evaluation stages and ultimately emerged as the lowest evaluated tenderer at financial evaluation. On that basis, and pursuant to Section 86(1)(a) of the Act, the Interested Party was lawfully recommended for award, which was subsequently approved by the Accounting Officer and communicated to it by the notification of 8th August 2025.
48. In response to the Applicant's contention that the Interested Party was the highest bidder, Counsel submitted that the allegation was false, reiterating that the Interested Party was in fact the lowest evaluated responsive bidder, a fact consistently confirmed by the official procurement records. It was further argued that the Applicant, having failed to request clarification or obtain the tender opening register, lacked any basis for the claims it had advanced.
49. Counsel relied on Section 82 of the Act to emphasize that tender sums read out at opening are absolute and final, and on Section 107 of the Evidence Act to submit that the burden of proof rested on the Applicant, which it had failed to discharge. On this basis, Counsel urged the Board to find that the procurement process was conducted lawfully, fairly, and transparently, and to dismiss the Request for Review with costs.



50. In response to the preliminary objection, Counsel submitted that a director of a company is by law authorized to act and depose on behalf of the company without the need for a board resolution, as provided under the Companies Act, 2015. Order 9 Rule 2 of the Civil Procedure Rules was said to be inapplicable to proceedings before this Board, which are governed by the Act and its Regulations, 2020. As per Counsel, the Replying Affidavit was therefore properly sworn, and the annexures, including the Notification of Award, Acceptance Letter, Certificate of Incorporation, and Business Permit, were admissible under Section 35 of the Evidence Act as official company records.
51. Counsel further argued that the Preliminary Objection itself was incompetent as it had not been signed and executed by the Advocate drawing it, contrary to Section 34(1) of the Advocates Act and Rule 13 of the Advocates (Practice) Rules. An unsigned pleading, it was submitted, is defective and cannot be relied upon. The Applicant's reliance on Section 205(3) of the Act was also termed a misapplication, since that provision deals with the scope of review proceedings and not admissibility of affidavits. The Interested Party's Replying Affidavit and annexures were said to be relevant and necessary for determination of the dispute, and striking them out would unjustly curtail the Interested Party's right to be heard under Article 50 of the Constitution.
52. In response to the issue of collusion, Counsel submitted that the Applicant had not attached any tender opening minutes and that the said allegations were therefore unsubstantiated.



53. It was lastly submitted that the Preliminary Objection failed to meet the threshold in **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696**, since it did not raise a pure point of law but instead called for factual inquiry into whether a resolution was necessary and whether annexures were authentic. The objection was therefore said to be bad in law and should be dismissed with costs.

Rejoinder

54. In rejoinder, Counsel for the Applicant submitted that they had pleaded collusion between the Respondents and the Interested Party at paragraphs 7 and 9 of the Request for Review.

55. Counsel for the Applicant submitted that reliance on Section 34 of the Advocates Act by Counsel for the Interested Party was erroneous as the provision deals with unqualified persons. Counsel further submitted that the Interested Party relied on Rule 13 of the Advocates Practice Rules, yet no such provision exists. Counsel also submitted that while Counsel for the Interested Party argued that the Civil Procedure Rules were inapplicable, their submissions were nonetheless hinged upon the said Rules.

56. Counsel submitted that the Notice of Preliminary Objection was in reference to Regulation 205 of the Regulations, 2020 and not Section 205 of the Act.



CLARIFICATIONS

57. The Board sought clarification from Counsel for the Applicant as to whether the Applicant had any representative present during the tender opening, and if so, who specifically that representative was. The Board further enquired on the source of the figure that the Applicant claimed to be the Interested Party's bid. In response, Counsel stated that the Applicant's representatives were indeed present during the tender opening and that it was those representatives who provided the said figures but did not disclose the identity of the said representatives either by name or Kenya National Identity Card Number.
58. The Board sought clarification from Counsel for the Applicant as to whether the Applicant was compliant with Mandatory Requirement No. 8. In response, Counsel confirmed that the Applicant was compliant.
59. The Board sought clarification from Counsel for the Applicant as to the legal effect of the unsigned Notice of Preliminary Objection. In response, Counsel stated that the same grounds of the Notice of Preliminary Objection had been raised orally and were also raised in the Supplementary Affidavit.
60. The Board sought clarification from Counsel for the Applicant as to whether the Act and the Regulations, 2020 provide a format of a memorandum of response. In response, Counsel submitted that he did not wish to litigate on behalf of the Respondents and further stated that Circular No. 2 of 2020 provided that a response may be by way of a



Notice of Preliminary Objection, Replying Affidavit, or a Statement of Grounds of Opposition.

61. The Board sought clarification from Counsel for the Applicant on the tender validity period as set out in the tender document. In response, Counsel submitted that the tender validity period was 150 days.

BOARD'S DECISION

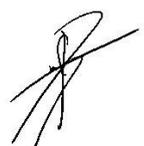
62. The Board has considered all documents, submissions, and pleadings, including the confidential documents submitted pursuant to Section 67(3)(e) of the Act. Accordingly, the following issues arise for determination:

A. Whether the Notice of Preliminary Objection is properly and competently before the Board for determination.

B. Whether the Respondents' letter dated 1st September 2025 filed in response to the Request for Review is defective.

C. Whether the Interested Party's Replying Affidavit is incompetent for want of an Authority to Act and/or a Board Resolution authorizing its deponent.

D. Whether the Procuring Entity evaluated the Applicant's tender in accordance with Section 80 of the Act and the



provisions of the Tender Document.

E. Whether the Procuring Entity altered the Interested Party's tender sum as read out during the Tender Opening.

F. Whether the 2nd Respondent unlawfully extended the tender validity period.

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

Whether the Notice of Preliminary Objection is properly and competently before the Board for determination.

63. In opposing the Request for Review, the Respondents filed a letter dated 1st September 2025 referenced "Response on Appeal on Tender No. MLPWHUD/SDHUD/AHP/178/2024-2025 for the Proposed Construction of Upper Kanyakwar Phase 2 AHP in Kisumu East Constituency, Kisumu County." On their part, the Interested Party filed a Replying Affidavit sworn on 1st September 2025 by Violet Akinyi Ager, a Director of the Interested Party. The filing of these documents elicited the Applicant's Notice of Preliminary Objection, wherein the Applicant contended that the said documents were incompetent and consequently rendered the Request for Review unopposed.
64. In responding to the Notice of Preliminary Objection, the Respondents' Counsel submitted that the contention that the Respondents' Response



was incompetent was unfounded, as it was premised on a non-existent provision of law, there being no Section 205(3) of the Act. With respect to the issue raised under Order 9 Rule 7 of the Civil Procedure Rules, Counsel contended that the Advocate who signed the Respondents' Response to the Notice of Preliminary Objection was duly qualified under Article 156 of the Constitution.

65. On the part of the Interested Party, Counsel argued that a director of a company is by law authorized to act and depose on behalf of the company without the need for a board resolution, as provided under the Companies Act, 2015. Order 9 Rule 2 of the Civil Procedure Rules was said to be inapplicable to proceedings before this Board, which are governed by the Act and the Regulations, 2020. Counsel submitted that the Replying Affidavit was therefore properly sworn, and that the annexures, including the Notification of Award, Acceptance Letter, Certificate of Incorporation, and Business Permit, were admissible under Section 35 of the Evidence Act as official company records. Counsel further argued that the Preliminary Objection itself was incompetent, as it had not been signed and executed by the Advocate drawing it, contrary to Section 34(1) of the Advocates Act and Rule 13 of the Advocates (Practice) Rules. It was submitted that an unsigned pleading is defective and cannot be relied upon.

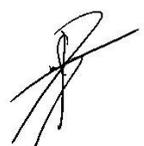
66. The effect of any of the grounds cited by the Applicant, if proved, would significantly impact how the Board determines the Request for Review, as they bear the potential of striking out all the responses filed by the Respondents and the Interested Party. Given their preliminary nature,



these grounds commend us to first make a determination on them before proceeding to consider the merits of the Request for Review.

67. However, we note that in responding to the Notice of Preliminary Objection, the Interested Party challenged its competency on the basis that it was unsigned and therefore incapable of being relied upon. Consequently, the issue of the competency of the Notice of Preliminary Objection commends itself for determination first, before consideration of the merits of the grounds raised therein.
68. In response to the issue of the Notice of Preliminary Objection being unsigned, Counsel for the Applicant did not dispute that the said Preliminary Objection is unsigned. Counsel, however, contended that the grounds raised therein had also been substantively advanced in the Supplementary Affidavit and were further reiterated through an oral Notice of Preliminary Objection made during the hearing.
69. Based on the foregoing, we note that it is not in dispute that the Notice of Preliminary Objection is unsigned. To satisfy ourselves fully on this issue, we examined the said Notice of Preliminary Objection and observed that while it is dated 4th September 2025, it bears no signature.
70. Order 2 Rule 16 of the Civil Procedure Rules provides as follows:

Every pleading shall be signed by an advocate, or recognized agent (as defined by Order 9, rule 2), or by the

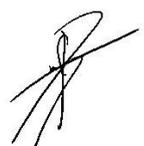


party if he sues or defends in person.

71. We understand the above section of the law to mean that every pleading presented before the court or a decision-making body must be signed either by a duly admitted advocate, a recognized agent as defined under Order 9 Rule 2 of the Civil Procedure Rules, or by the party themselves where they elect to sue or defend in person, the intent being to ensure that all pleadings bear the endorsement of a responsible person who assumes accountability for the document filed.
72. In the case of **Atulkumar Maganlal Shah v Investment & Mortgages Bank Limited & 2 Others, Civil Appeal No. 13 of 2001**, the Court of Appeal stated as follows:

“where a pleading is not signed, the same would be struck out rather than being dismissed. A pleading must be signed either by the advocate or the party himself where he sues or defends in person or by his recognized agent and this is meant to be a voucher that the case is not a mere fiction ”

73. We understand the above case law to mean that the requirement for pleadings to be signed is mandatory, and where a pleading is filed without a proper signature, it is liable to be struck out of the record rather than dismissed on merit. The case law emphasizes that a signature by an advocate, a party acting in person, or a recognized agent serves as an authentication and guarantee of the legitimacy of



the case.

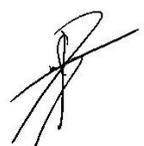
74. In **Regina Kavenya Mutuku & 3 Others vs United Insurance Co. Ltd [2002]1KLR 250**, Ringera J. (as he then was) held that:

“An unsigned pleading has no validity in law as it is the signature of the appropriate person on the pleading which authenticates the same and an unauthenticated document is not a pleading of anybody, it is a nullity.”

75. The above case law conveys that a pleading which lacks a proper signature has no legal effect whatsoever, since it is the signature of the advocate, party, or recognized agent that gives the document its authenticity. Without such authentication, the document cannot be attributed to any party before the court and is therefore treated as a nullity.

76. In **Asimba v Asimba (Civil Appeal No. E042 of 2022) [2022] KEHC 14022 (KLR) (Ruling, 12 October 2022)**, the High Court held as follows:

It is an established principle of law that failure to sign a pleading is fatal and renders that pleading incapable of being considered. The defect is not curable by an amendment. The cure is to strike the pleading and let the pleader file fresh pleadings as may be permitted by law. I say not curable and add that such pleading



cannot be saved by the application of the principles espoused in Article 159(2)(d) of the Constitution.

77. In our view, the cited case law underscores the principle that the failure to sign a pleading is a fatal defect which renders the pleading incapable of consideration by the court. The court in that decision was clear that such a defect is not curable by way of amendment, nor can it be salvaged through the application of Article 159(2)(d) of the Constitution. The proper course, as the court observed, is for the unsigned pleading to be struck out, leaving the pleader at liberty to file a fresh and duly signed pleading as permitted by law.
78. Guided by the foregoing binding precedents, we find that the Notice of Preliminary Objection is fatally defective for want of a signature. Accordingly, we strike it out from the record, as the omission goes to the root of the pleading.

Whether the Respondents' letter dated 1st September 2025 filed in response to the Request for Review is defective.

79. The Applicant, in its Supplementary Affidavit, contended that the Respondents' letter dated 1st September 2025 was fatally defective and incapable of constituting a proper response in law to the Application for Review. Counsel argued that the governing statute, together with its subsidiary legislation and the Board's circulars, prescribes in mandatory terms that responses to review applications may only be filed by way of a Memorandum of Response, Replying Affidavit, or Preliminary



Objection. It was submitted that the 1st Respondent had filed none of the prescribed pleadings, and that a letter could not meet the legal threshold.

80. In response, Counsel for the Respondents submitted that the contention that the Respondents' Response is incompetent is unfounded, as it is premised on a non-existent provision of law, there being no Section 205(3) of the Act.
81. In rejoinder, Counsel for the Applicant submitted that reference to Section 205(3) of the Act was a clerical error, and that the intended reference was to Regulation 205(3) of the Regulations, 2020.
82. Regulation 205(3) of the Regulations, 2020 provides as follows:

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

83. We understand the above section of the law to mean that once an accounting officer of a procuring entity is served with a notice of a request for review, they are under a legal obligation to file a written memorandum of response, accompanied by any documents specified, and must do so within five days unless the Secretary directs a shorter

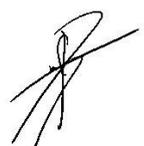


period in a given case, thereby ensuring that the review process proceeds expeditiously with all relevant information before the Board.

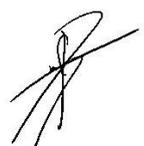
84. Upon the filing of the Request for Review, the Board issued a Notification of Appeal through a letter dated 27th August 2025, accompanied by Circular No. 02 of 2020 dated 24th March 2020, which set out administrative and contingency measures to mitigate the spread of COVID-19. The Circular provides in part as follows:

Upon being notified of and served with an electronic copy or hard copy of a Request for Review, an Accounting Officer of a Procuring Entity and/or any other Respondent to the Request for Review shall file and submit to PPARB Secretary his/her Memorandum of Response and/or Preliminary Objection to the Request for Review within 5 days of such service together with all documentation (including the confidential documentation referred to herein before) with respect to the procurement or asset disposal proceedings in issue.

85. We understand the crux of the matter to be whether the letter dated 1st September 2025, referenced "Response on Appeal on Tender No. MLPWHUD/SDHUD/AHP/178/2024-2025 for the Proposed Construction of Upper Kanyakwar Phase 2 AHP in Kisumu East Constituency, Kisumu County," constitutes a proper response to the Request for Review as contemplated under the law.



86. In determining this issue, we examined the letter dated 1st September 2025 and observed that it particularized the grounds raised in the Request for Review in tabular form and provided specific responses to each ground.
87. We note that while Regulation 205(3) of the Regulations, 2020 requires an accounting officer of a procuring entity, upon being served with a Request for Review, to submit to the Board a written memorandum of response, the Regulation does not prescribe any particular format for such a document. By way of comparison, Regulation 203 of the Regulations, 2020 expressly provides for the filing of a Request for Review and prescribes its form in the Schedules to the Regulations, a requirement that is absent in respect of a memorandum of response.
88. We observe that the term "memorandum" is not defined in the Act or the Regulations, and in its ordinary usage, a memorandum refers to a written communication or record, often concise, that sets out a party's position on a given matter. Viewed against this context, the Respondents' letter, which clearly articulated their response to the Request for Review and addressed the issues raised therein, meets the substance of what is contemplated as a memorandum of response. The law emphasizes the filing of a written response within the stipulated period, rather than the use of a rigid or technical format.
89. In view of the foregoing, we find that the letter dated 1st September 2025 constitutes a competent pleading within the meaning of Regulation 205(3) of the Regulations, 2020. We so hold because its



reference expressly indicates that it was filed in response to the Request for Review, and further, because the law does not prescribe a specific format for a memorandum of response. To penalize the Respondents on the basis of a non-existent format would not serve the interests of justice.

Whether the Interested Party's Replying Affidavit is incompetent for want of an Authority to Act and/or a Board Resolution authorizing its deponent.

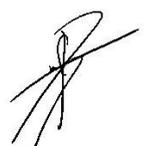
90. The Applicant's Counsel argued that the Interested Party's Replying Affidavit dated 1st September 2025 was fatally defective, as it was not accompanied by a Board resolution or authority to act evidencing that its director had power to represent the company. Reliance was placed on Order 2 Rule 16 and Order 9 Rule 2 of the Civil Procedure Rules which require that, in the case of a corporation, pleadings and acts must be authorized under the corporate seal.
91. In response, Counsel submitted that a director of a company is by law authorized to act and depose on behalf of the company without the need for a board resolution, as provided under the Companies Act, 2015. Order 9 Rule 2 of the Civil Procedure Rules was said to be inapplicable to proceedings before this Board, which are governed by the Act and its Regulations, 2020.
92. We understand the issue for determination to be two-pronged, in that the Applicant contended, firstly, that there was no Authority to Act



and/or Resolution authorizing the deponent to represent the Interested Party, and secondly, that there was no proof that the Interested Party's Advocates had the requisite authority to act on its behalf. We shall, however, address both limbs simultaneously.

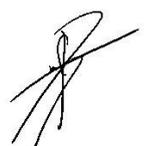
93. The Court of Appeal, in **Spire Bank Limited v. Land Registrar & 2 Others [2019] eKLR**, pronounced itself on the question of corporate entities not attaching their board resolutions before commencing a suit as follows:

"...It is essential to appreciate that the intention behind order 4 rule 1 (4) was to safeguard the corporate entity by ensuring that only an authorized officer could institute proceedings on its behalf. This was to address the mischief of unauthorized persons instituting proceedings on behalf of corporations, and obtaining fraudulent or unwarranted orders from the court. The company's seal that is affixed under the hand of the directors ensured that they were aware of, and had authorized such proceedings together with the persons enlisted to conduct them. And where evidence was produced to demonstrate that a person was unauthorized, the burden shifted to such officer to demonstrate that they were authorized under the company seal. With this in mind, we dare say that the provision was not intended to be utilized as a procedural technicality to strike out suits, particularly where no evidence was produced to demonstrate that the officer was

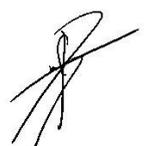


unauthorized.”

94. The above decision of the Superior Court highlights the importance of having resolutions in place to protect corporate entities. This ensures that only duly authorized officers, acting under the company’s seal, can initiate legal proceedings on the company’s behalf. The purpose is to prevent unauthorized individuals from misusing the court process to obtain fraudulent or improper orders. The affixing of the company seal by its directors serves as evidence of their awareness and approval of the legal action. In instances where it is proved that an officer was unauthorized, the burden of proof shifts to that officer to demonstrate proper authorization. However, this provision should not be applied rigidly to dismiss suits on technical grounds, particularly where there is no evidence to show that the officer lacked authority.
95. In addressing this issue, we also considered the authorities cited by the Applicant in support of the prayer to strike out the Interested Party’s Replying Affidavit and observed that they address a factual scenario different from the one presently before the Board. The cited cases deal with instances where a corporate entity seeks to institute proceedings, whereas the issue before us concerns a corporate entity defending itself in proceedings in which it has already been sued. In particular, the decisions in **Ueing & Another v. Barclays Bank of Kenya Limited & Another [2023]** and **Siokwei Tarita Limited v. Dr. Charles Walekwa [2012]** are distinguishable on that basis and are therefore inapplicable to the present circumstances.



96. In further considering this issue, we examined the Interested Party's Replying Affidavit and noted that it was accompanied by a CR-12 marked as "VAA-1". The said CR-12 lists the deponent, Violet Akinyi Ager, as one of the directors of the Interested Party.
97. Further, upon perusal of the documents filed by the Interested Party, we observed that on 29th August 2025, the Interested Party through its Advocates on record, lodged a Memorandum of Appearance dated 28th August 2025, wherein it expressly appointed the firm of Odhiambo Adhiambo Advocates LLP to act on its behalf in the present matter.
98. Based on the foregoing observations, and in the absence of any material placed before us to demonstrate that Violet Akinyi Ager lacked authority to represent the Interested Party, coupled with the fact that the firm of Odhiambo Adhiambo Advocates LLP was duly appointed to act on its behalf, we find no basis to strike out the Interested Party's Replying Affidavit. In arriving at this finding, we are guided by the Court of Appeal decision in **Spire Bank Limited v. Land Registrar & 2 Others [2019] eKLR**, which underscores that the evidentiary burden rests on the party alleging lack of authority before it can shift. In the present case, no evidence has been furnished to show that either Violet Akinyi Ager or the firm of Odhiambo Adhiambo Advocates LLP lacked authority to represent the Interested Party.
99. Therefore, based on the foregoing analysis, we find that the Interested Party's Replying Affidavit is properly on record and is competent for consideration in the determination of the instant Request for Review.

A handwritten signature in black ink, consisting of several overlapping, fluid strokes, located in the bottom right corner of the page.

Whether the Procuring Entity evaluated the Applicant's tender in accordance with Section 80 of the Act and the provisions of the Tender Document.

100. In commencing our determination of this issue, we are guided by the Board's pronouncement in **PPARB Application No. 52 of 2025, Jubilee Health Insurance vs The Accounting Officer, Kenya Wildlife Service and Others**, where the Board emphasized as follows:

"In a procurement environment where corruption and fraudulent schemes to secure tenders are not uncommon, the need for strict adherence to the evaluation criteria as set out in the tender documents and the law cannot be overstated. Proper and lawful evaluation is not merely a procedural formality, it is the primary safeguard against abuse, ensuring that public resources are expended transparently, competitively, and in a manner that upholds the principles of equity, fairness, and accountability."

101. The above pronouncement serves as the lens through which we shall proceed to analyze the issues arising in the present Request for Review regarding the evaluation of the Applicant's bid.

102. Counsel submitted that the Applicant's bid of KES 854,690,409.21 was



the lowest as shown at page 1256 of its annexures and, in accordance with section 86(1) of the Act, it ought to have been declared the successful tenderer.

103. In response, the Respondents argued that the Applicant's bid was not the lowest evaluated as envisaged under section 86 of the Act, and all bidders, including the Applicant, were duly notified under section 87(3) of the Act. It was their case that the Applicant's disqualification stemmed from failure to stamp the confidential business questionnaire as required under MR8, a mandatory requirement applied uniformly to all bidders. They argued that this omission rendered the Applicant non-responsive at the preliminary stage, and therefore its bid could not be subjected to further evaluation.

104. On the part of the Interested Party, it was argued that its bid was found to be substantially responsive at both the preliminary and technical evaluation stages and ultimately emerged as the lowest evaluated tenderer at the financial evaluation stage. On that basis, and pursuant to Section 86(1)(a) of the Act, the Interested Party was lawfully recommended for award, which recommendation was subsequently approved by the Accounting Officer and communicated to it through the notification dated 8th August 2025.

105. 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

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.

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 –

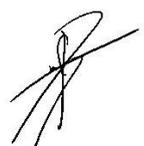
a...

b...

c...

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106. 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, based on objective criteria. 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.

107. 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:

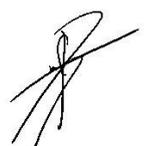
80. Evaluation of Tender

(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)

108. 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.

109. Section 79 of the Act provides as follows:

79. Responsiveness of tenders

(1) A tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents.

110. The Board understands the above section of the law to mean that, for a tender to be deemed responsive, it must strictly comply with all eligibility and mandatory requirements specified in the tender documents.

111. In the case of **Sinopec International Petroleum Service**



Corporation v Public Procurement Administrative Review Board & 3 others (Civil Appeal E012 of 2024) [2024] KECA 184 (KLR) (23 February 2024) (Judgment) the Court of Appeal stated as follows:

Bids are first evaluated for compliance with responsiveness criteria before being evaluated for compliance with other criteria. A bid only qualifies as a responsive bid if it meets all requirements as set out in the bid documents. Bids found to be non-responsive are excluded from the bid process regardless of the merits of their bids. Responsiveness is thus the first important hurdle for bidders to overcome.

112. We understand the above case law to mean that the evaluation of bids begins with an assessment of responsiveness, and only those bids that fully comply with the requirements set out in the bid documents can proceed to further evaluation. Any bid that fails to meet the stipulated criteria is deemed non-responsive and is automatically excluded from consideration, regardless of its merits. Responsiveness therefore serves as the primary and mandatory threshold that every bidder must satisfy.

113. We understand the Applicant's case to be that its bid was unfairly evaluated despite meeting all the criteria at every stage, whereas the Respondents contend that the Applicant failed to satisfy MR-8 and was therefore disqualified at the Preliminary Evaluation stage.



114. Upon perusal of the blank tender document, we note that MR-8 is framed in the following terms:

Duly filled, signed and stamped Confidential Business Questionnaire as per enclosed format. In case of a joint venture all parties must submit a valid confidential business questionnaire as per attached format; (Main Contractor Only).

115. We understand the above tender provision to mean that each bidder is required to complete, sign, and stamp the Confidential Business Questionnaire provided in the tender documents, strictly following the enclosed format. Where the bid is submitted as a joint venture, every party forming part of the joint venture must individually complete and submit a valid Confidential Business Questionnaire in the prescribed format. However, this requirement applies specifically to the main contractor and its joint venture partners, thereby ensuring full disclosure of relevant business information from all entities involved in the bid.

116. Having reproduced the provision of MR-8, which the Applicant is alleged to have failed to satisfy, the issue that now falls for determination is whether the Applicant indeed met the said criterion.

117. In determining this issue, we examined the confidential documents, and in particular the Applicant's bid, and observed that the Confidential Business Questionnaire submitted by the Applicant was not stamped as



required under the tender document. We further note that this was the reason expressly cited by the Respondents in the Notification of Intention to Award issued to the Applicant.

118. Considering that the Applicant failed to satisfy MR-8 of the tender document, the question of whether it had the lowest bid price is rendered moot, as its bid did not proceed beyond the Preliminary Evaluation stage.

119. Based on the foregoing findings, we are satisfied that the Applicant's bid was evaluated in accordance with Section 80 of the Act and the requirements set out in the tender document.

Whether the Procuring Entity altered the Interested Party's tender sum as read out during the Tender Opening.

120. Counsel for the Applicant argued that the award was irregularly issued to the Interested Party whose bid was initially higher at KES 856,830,743.06 but was later altered to KES 826,830,743.06, thereby unfairly displacing the Applicant.

121. In response, the Respondents argued that the award was made strictly at the tender sum read out and recorded in the opening register and minutes. They pointed out that the Applicant had not attended the tender opening nor requested the minutes under section 78 of the Act, and therefore its claims were unfounded.



122. On the part of the Interested Party, Counsel submitted that during the tender opening held on 19th March 2025, the Interested Party's tender sum of KES 826,830,743.06 was publicly read out and duly recorded in the tender opening register and minutes. It was further contended that this figure was consistently reflected in the Form of Tender, the evaluation report, and the notification of intention to award, thereby discrediting the Applicant's allegations of manipulation or unlawful variation of the contract sum.

123. Section 82 of the Act provides as follows:

(1) Subject to subsection (2) of this section, the tender sum as submitted and read out during the tender opening shall be absolute and final and shall not be the subject of correction, revision, adjustment or amendment in any way by any person entity.

(2) For avoidance of doubt, the provisions of subsection (1) shall not apply to sections 103, 131 and 141 of this Act.

124. We understand the above section of the law to mean that, as a general rule, the tender sum submitted by a bidder and read out during the tender opening is deemed to be conclusive and binding, and cannot thereafter be altered, corrected, revised, adjusted, or amended by any party. This provision secures the integrity of the procurement process by ensuring transparency, fairness, and equal treatment of bidders. However, the law expressly provides exceptions to this principle by



excluding from its operation matters governed under sections 103, 131, and 141 of the Act, thereby recognizing limited circumstances where the tender sum may lawfully be addressed outside the general prohibition.

125. We note that the determination of this issue turns on a factual inquiry, namely, a verification of the sum that was read out during the tender opening, the amount reflected in the Interested Party's bid documents, and the figure stated in the Notification of Intention to Award.

126. According to the Applicant, the Interested Party's bid price as read out during the tender opening was KES 856,830,743.06, which they contend was subsequently altered to KES 826,830,743.06. Conversely, the Respondents and the Interested Party maintained that the bid price was KES 826,830,743.06 throughout the tender proceedings.

127. In determining this issue, we examined the confidential documents and the Secretariat's notes, and observed that in the tender opening minutes dated 19th March 2025, the Interested Party's tender sum was recorded as KES 826,830,743.06. The same figure was reflected in the Tender Opening Register, and the Form of Tender.

128. We also examined the document relied upon by the Applicant in support of the figure of KES 856,830,743.06, which is annexed and marked as "GM-6" to the Affidavit in Support of the Request for Review. We observed that the said document contains figures attributed to various bidders, one of which reflects the sum claimed by the Applicant to have



been read out on behalf of the Interested Party. However, apart from this document, the Applicant did not furnish any further evidence to corroborate these allegations.

129. Consequently, the Board is faced with two competing sets of documents: on the one hand, the confidential documents submitted to the Board, comprising the Tender Opening Register, the Tender Opening Minutes, and the Interested Party's bid documents; and on the other hand, the document produced by the Applicant, which merely lists figures attributed to various bidders without any further evidentiary foundation.

130. Considering the evidence placed before us as analyzed above, we are unable to agree with the Applicant. This is because no particulars, such as the name and designation, of the person allegedly present on behalf of the Applicant during the tender opening were provided. Further, our perusal of the Tender Opening Register confirms that the Applicant was not represented at the tender opening. In addition, our review of the confidential documents demonstrates that the Interested Party's bid amount was consistently captured in the Tender Opening Register, the Tender Opening Minutes, and the Notification of Intention to Award, in exact conformity with the Interested Party's Form of Tender.

131. In view of the foregoing, we find that the Respondents did not alter the Interested Party's bid sum as read out during the tender opening, the said figure having been consistently recorded in the Tender Opening Register, the Tender Opening Minutes, and throughout the confidential



documents, including the Interested Party's bid document.

Whether the 2nd Respondent unlawfully extended the tender validity period.

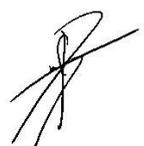
132. The Applicant argued that the Respondents irregularly extended the validity of the tender for a further thirty days. It was urged that section 88 of the Act permits an extension of tender validity only once and before the notification of award has been issued, hence the Respondent's actions were unlawful.

133. In response, the Respondents argued that the Accounting Officer acted lawfully under section 88 of the Act by extending the tender validity period before its expiry, and for only thirty days as allowed. They rejected the Applicant's claim that the extension was unlawful or malicious.

134. Section 88 of the Act provides as follows:

(1) Before the expiry of the period during which tenders shall remain valid the accounting officer of a procuring entity may extend that period.

(2) The accounting officer of a procuring entity shall give in writing notice of an extension under subsection (1) to each person who submitted a tender.



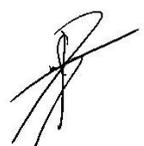
(3) An extension under subsection (1) shall be restricted to not more than thirty days and may only be done once.

(4) For greater certainty, tender security shall be forfeited if a tender is withdrawn after a bidder has accepted the extension of bidding period under subsection (1).

135. We understand the above section of the law to mean that the accounting officer of a procuring entity is permitted, before the lapse of the tender validity period, to extend the same, but such extension must be in writing, communicated to all tenderers, limited to a maximum of thirty days, and may only occur once. Further, where a bidder accepts such an extension and subsequently withdraws their tender, the law expressly provides that their tender security shall be forfeited, thereby underscoring the binding nature of the extension and protecting the integrity of the procurement process.

136. In determining this issue, we perused the blank tender document and noted that ITT 18.1 stipulated the tender validity period as 150 days. We further observed that the said period commenced on 19th March 2025 and was due to lapse on 16th August 2025. The Notification of Intention to Award, though dated 8th August 2025, was dispatched to bidders on 13th August 2025. Thereafter, by a letter dated 15th August 2025, the Respondents extended the tender validity period for a further 30 days.

137. In view of the foregoing analysis, we find that the Respondents



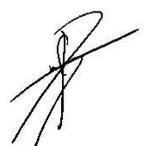
extended the tender validity period in compliance with Section 88 of the Act.

138. Before rendering our final decision, we find it necessary to address an issue that arose in the course of the hearing.

139. In its Notice of Preliminary Objection, the Applicant contended that the documents annexed to the Interested Party's Replying Affidavit ought to be expunged for failure to comply with Section 35 of the Evidence Act. However, in light of our earlier determination on the Notice of Preliminary Objection, we confined our consideration to the substantive grounds raised in the Applicant's pleadings.

140. Specifically, on the question of non-compliance with Section 35 of the Evidence Act in respect of the documents annexed to the Interested Party's Replying Affidavit, we observe that the Applicant, through paragraph 7 of its Supplementary Affidavit, narrowed its challenge to the Tender Opening Register.

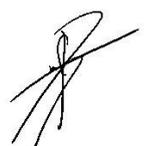
141. In arriving at our determination in this Request for Review, we refrained from delving into this issue because the Tender Opening Register forms part of the confidential documents submitted to the Board pursuant to Section 67(3)(e) of the Act. Consequently, the question of whether the Interested Party had the capacity to produce the said document, and whether we could rely on it, does not arise, as the document was already properly before the Board by operation of law. In any event, the interested party in its replying affidavit at paragraphs 7 and 8



discloses the source of the tender register and confirms it was a screenshot of the register taken on the day of tender opening by its representative and therefore, regardless of our findings on that question, we would still have been bound to rely on the document in reaching our determination.

What orders the Board should issue in the circumstance.

142. Having carefully considered the parties' submissions and evaluated all the evidence presented, the Board finds that the Notice of Preliminary Objection filed by the Applicant, being unsigned, is fatally defective and is accordingly struck out from the record. Nevertheless, since the issues raised therein were also canvassed in the Applicant's Supplementary Affidavit, we proceeded to determine those issues on their merits.
143. The Board further finds that the letter dated 1st September 2025, filed by the Respondents in response to the Request for Review, is competent and properly qualifies as a memorandum of response within the meaning of Regulation 205(3) of the Regulations, 2020.
144. The Board further finds that the Interested Party's Replying Affidavit is properly on record, there being no evidence placed before us to demonstrate that the deponent therein lacked authority to represent the Interested Party. Likewise, no evidence was tendered to show that the firm of Odhiambo Adhiambo Advocates LLP lacked the requisite authority to act for the Interested Party in these proceedings.



145. The Board further finds that the Respondents evaluated the Applicant's bid in accordance with the law and the requirements of the tender document. The Board equally finds that the Respondents did not alter the Interested Party's bid amount, as the figure recorded in the Tender Opening Register is consistently reflected throughout the confidential documents, including but not limited to the Tender Opening Minutes, the Evaluation Report, and the Interested Party's original bid document.

146. Lastly, the Board finds that the Respondents lawfully extended the tender validity period in accordance with Section 88 of the Act, and therefore the extension was proper and valid in law.

147. Consequently, the Request for Review dated 26th August 2025 with respect to Tender No. MLPWHUD/SDHUD/AHP/178/2024-2025 – Proposed Construction of Upper Kanyakwar Phase 2 AHP in Kisumu East Constituency, Kisumu County, is hereby dismissed in its entirety.

FINAL ORDERS

148. 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 26th August 2025:

- 1. The Notice of Preliminary Objection dated 4th September 2025 be and is hereby struck out;**
- 2. The Request for Review dated 26th August 2025 be and is**



hereby dismissed;

3. The 1st Respondent, the Accounting Officer of the State Department of Housing & Urban Development is hereby directed to oversee the tender proceedings for Tender No. MLPWHUD /SDHUD/AHP/178/2024-2025 – Proposed Construction of Upper Kanyakwar Phase 2 AHP in Kisumu East Constituency, Kisumu County to their lawful and logical conclusion; and
4. Each party shall bear its own costs of the proceedings.

Dated at NAIROBI, this 17th day of September 2025.



.....
CHAIRPERSON

PPARB



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SECRETARY

PPARB

