

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 97/2025 OF 6TH OCTOBER 2025

BETWEEN

SINTMOND GROUP LIMITED..... APPLICANT

AND

THE ACCOUNTING OFFICER,

KENYA ELECTRICITY GENERATING

COMPANY PLC..... 1ST RESPONDENT

KENYA ELECTRICITY GENERATING

COMPANY PLC..... 2ND RESPONDENT

JV OF MUNJA TRADING LIMITED

AND MARWIL ENERGY HOLDING AS..... INTERESTED PARTY

Review against the decision of the Accounting Officer, Kenya Electricity Generating Company PLC in relation to Tender No. KGN-SALE-005-2025 for Sale of Certified Emissions Reductions (Re-Tender).

BOARD MEMBERS PRESENT

- | | |
|-------------------------|--------------------|
| 1. Ms. Jessica M'mbetsa | -Panel Chairperson |
| 2. Mr. Daniel Langat | -Member |
| 3. Mr. Stanslaus Kimani | -Member |

IN ATTENDANCE

- 1. Mr. Robert Mwangi - Holding Brief for Board Secretary
- 2. Christabel Kaunda - Secretariat

PRESENT BY INVITATION

APPLICANT

SINTMOND GROUP LIMITED

Mr. George Kamau Advocate, Gerivia Advocates LLP
Ms. Susan Munene Advocate, Gerivia Advocates LLP
Mr. David Namai Advocate, Gerivia Advocates LLP
Mr. Francis Kabucho Advocate, Gerivia Advocates LLP

RESPONDENTS

**THE ACCOUNTING OFFICER,
KENYA ELECTRICTY GENERATING
COMPANY PLC,
KENYA ELECTRICTY GENERATING
COMPANY PLC,**

Mrs. Marysheila Oduor Advocate, Triple OK Law LLP Advocates

INTERESTED PARTY

**JV OF MUNJA TRADING LIMITED
AND MARWIL ENERGY HOLDING AS**

Mr. Denis Seko Advocate, Seko Minayo & Co. Advocates LLP
Mr. Sisule Advocate, Seko Minayo & Co. Advocates LLP

BACKGROUND OF THE DECISION

The Tendering Process

1. Kenya Electricity Generating Company PLC (hereinafter referred to as "the Procuring Entity") invited eligible tenderers to submit tenders in response to Tender No. KGN-SALE-005-2025 for Sale of Certified Emissions Reductions (Re-Tender) (hereinafter referred to as the "subject tender"). The same was by way of open international method of tendering and by way of an advertisement on the MyGov issue of 27th May 2025 with a pre-bid date of 4th June 2025 at 10.30 a.m. and an initial submission deadline of 17th June 2025, which was further extended to 27th June 2025 on or before 2.00 p.m.

Addenda/Clarifications

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 thereafter issued three (3) Addenda on 29th May, 5th June and 12th June 2025 respectively together with two (2) Clarifications of 5th and 12th June 2025 with respect to the subject tender. A summary of the said Addenda and Clarifications is set out hereunder:

- i. Addendum No. 1, issued on 29th May 2025, notified bidders that Mandatory Requirement No. 16, which required bidders to demonstrate previous successful participation in Emission Reduction trading or transactions of Certified Emission Reductions (CERs) or Voluntary Emission Reductions (VERs), would form part of the evaluation criteria. Compliance with this requirement was to be established through the submission of client references and/or evidence of CER transfers or voluntary cancellation certificates arising from the successful purchase of CERs. The Addendum further clarified that all other terms and conditions of the tender would remain as originally stipulated in the tender document.

- ii. Addendum No. 2, issued on 5th June 2025, notified bidders that submission of bids would be conducted online through the Procuring Entity's bid portal, while the initial bid closing date remained unchanged. The Addendum further clarified that in the case of Joint Venture arrangements, Mandatory Requirements Nos. 1, 2, 3, 4, 11, 12 and 13 would be applicable to all members of the Joint Venture. In addition, bidders were advised of amendments to the price schedule, with the revised schedule annexed to the Addendum expressly superseding the price schedule contained in the tender document. The Addendum further informed bidders that they were at liberty to submit a bid in respect of CERs from a single line item or to submit bids for all CERs available, provided that the highest bidder for each line item would be considered for award subject to

- compliance with the Mandatory Requirements. All other terms and conditions of the tender were to remain as originally stipulated in the tender document.
- iii. Addendum No. 3, issued on 12th June 2025, notified bidders that the tender closing date and time had been extended to 24th June 2025 at 2.00 p.m., with the corresponding tender opening scheduled for 24th June 2025 at 2.30 p.m.
 - iv. Clarification No. 1, issued on 5th June 2025, provided that prior participation in Emission Reduction trading or transactions was critical to the Procuring Entity in order to ensure effective delivery of the assignment. The Clarification further notified bidders that they were permitted to enter into Joint Venture Agreements for the purpose of pooling resources and industry experience. In addition, bidders were informed of an amendment to the price schedule requiring indication of the issuance period for each batch of CERs. They were also given the option of submitting bids for CERs relating to a specific vintage, line item, or individual project, or alternatively, for all the CERs available.
 - v. Clarification No. 2, issued on 12th June 2025, notified bidders that the Pre-Bid Meeting held on 4th June 2025 was not mandatory and would not constitute an evaluation criterion. It further reiterated that the Mandatory Requirements forming part of the evaluation

were set out in the tender document as well as in Addenda No. 1 and 2, dated 29th May and 5th June 2025 respectively.

Submission of Bids and Tender Opening

3. According to the Tender Opening Register dated 24th June 2025, submitted as part of the confidential documents, a total of three (3) tenders were received in response to the subject tender. The tenders were recorded as follows:

Bid No.	Name of Bidder
1.	Munja Trading Limited in a JV with Marwil Energy Holding AS
2.	Kyoto Network Limited
3.	Sintmond Group Limited

4. **Evaluation of Tenders:** According to the Evaluation Report, the Tender Evaluation Committee (hereinafter referred to as "the Evaluation Committee") convened to evaluate the tenders submitted. The evaluation process was undertaken in two stages, as set out below:

- i. Preliminary/Mandatory Evaluation;
- ii. Financial Evaluation.

1st Preliminary Evaluation

5. At this stage of evaluation, the Evaluation Committee was required to assess tenders against the criteria set out under the table titled Mandatory Preliminary Requirements at page 12 of the Tender Document, together with the additional criteria introduced through the Addenda. Bidders were required to meet all sixteen (16) mandatory requirements in order to qualify for progression to the Financial Evaluation Stage. Failure to satisfy any of the mandatory requirements rendered a tender non-responsive at this stage.

6. Upon conclusion of this stage of evaluation, only one tender, that of the Interested Party, was found responsive and therefore proceeded to the Financial Evaluation Stage.

1st Financial Evaluation

7. At this stage, the Evaluation Committee was required to assess tenders in accordance with the criteria set out at page 13 of the Tender Document, with the highest evaluated bidder per line item being eligible for award in line with the provisions of the Act.

8. The Evaluation Committee determined that the Interested Party had submitted the highest evaluated tender price, cumulatively amounting to United States Dollars Nineteen Million Six Hundred Thirty-Seven

Thousand Seven Hundred Fifty-Eight (USD 19,637,758), and was therefore ranked as the best evaluated bidder for purposes of award of the subject tender.

1st Evaluation Committee's Recommendation

9. The Evaluation Committee recommended the award of the purchase of 6,384,398 CERs under the subject tender to Munja Trading Limited, in joint venture with Marwil Energy Holding AS, at a contract price of United States Dollars Nineteen Million Six Hundred Thirty-Seven Thousand Seven Hundred Fifty-Eight (USD 19,637,758).

1st Professional Opinion

10. In a Professional Opinion dated 25th July 2025 (hereinafter referred to as "the 1st Professional Opinion"), the Procuring Entity's Ag. Supply Chain Manager – Procurement and the Ag. General Manager – Supply Chain, reviewed the procurement process, including the evaluation of the tenders, and agreed with the Evaluation Committee's recommendations to award the subject tender to the Interested Party. The Professional Opinion was subsequently approved by the 1st Respondent on the 25th July 2025.

1st Notification of Award

11. The tenderers were notified of the outcome of the evaluation for the subject tender through letters dated 1st August 2025.

REQUEST FOR REVIEW NO. 90 OF 2025

12. On 7th August 2025, the Applicant, through the firm of Gerivia Advocates LLP, filed a Request for Review dated 6th August 2025 accompanied by a Statement/Affidavit in Support of the Request for Review sworn on 6th August 2025 by Richmond Gatu Muriithi its Director and Group Chief Executive Officer (hereinafter referred to as "PPARB Application No. 90 of 2025") seeking the following orders:

a) The Respondents' decision awarding Tender Number: KGN-SALE-005-2025 Tender for Sale of Certified Emissions Reductions (CERs) (Re-Tender) to the Interested Party be annulled and set aside;

b) The Respondents Letter of Regret dated 1st August 2025 notifying the Applicant that it had not been successful in Tender Number: KGN-SALE-005-2025 Tender for Sale of Certified Emissions Reductions (CERs) (Re-Tender) and notifying the successful bidder as the Interested Party be annulled and set aside;

- c) A declaration that the Procuring Entity failed to evaluate the Applicant's bid at the mandatory preliminary evaluation stage in accordance with the criteria and procedures under the Tender Document and the provisions of the Act at Sections 79(1), 80(2) and 86(1) and the provisions of Regulation 74(1) of the Regulations;***
- d) The Procuring Entity be directed to re-admit the Applicant's bid as having met all mandatory requirements and proceed to undertake the second stage of evaluation, namely, financial evaluation, in line with pages 12 and 13 of the Tender Document;***
- e) The Respondents be directed to proceed with the procurement to its logical conclusion by making an award to the responsive highest priced bidder in line with its findings of the re-evaluation of the Applicant's bid at the preliminary evaluation stage where the Applicant's bid was unfairly disqualified;***
- f) The Respondents be compelled to pay the Applicant the costs arising from/and incidental to this Application; and***

g) The Board to make such further orders as it may deem fit and appropriate in ensuring that the ends of justice are fully met in the circumstances of this Request for Review.

13. On 28th August 2025, the Board in exercise of the powers conferred upon it under the Act, issued the following orders in respect of Request for Review No. 90 of 2025:

i. The Letter of Notification of Intention to Award dated 1st August 2025 addressed to the Interested Party as the successful bidder and the Letters of Regret issued to the Applicant and the other unsuccessful bidder with respect to Tender No. KGN-SALE-005-2025 for Sale of Certified Emissions Reductions (Re-Tender) be and are hereby nullified and set aside;

ii. The 1st Respondent be and is hereby directed to re-convene the Evaluation Committee and re-evaluate all tenders at the preliminary evaluation stage afresh in accordance with the provisions of the Tender document, the Act, Regulations 2020, the Constitution and taking into consideration the findings of the Board herein;

iii. The Respondents are hereby directed to proceed with and conclude the tender proceedings concerning Tender No.

KGN-SALE-005-2025 for Sale of Certified Emissions Reductions (Re-Tender) including the issuance of an award within 21 days from the date hereof; and.

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

Re-Evaluation

14. According to the Re-Evaluation Report dated 24th September 2025 (hereinafter referred to as "the Re-Evaluation Report"), the Evaluation Committee reconvened pursuant to the Board's directions issued in PPARB Application No. 90 of 2025, for purposes of re-evaluating the tenders submitted. The Committee conducted the re-evaluation in two stages, as outlined below.

- i. Preliminary/Mandatory Evaluation;
- ii. Financial Evaluation.

2nd Preliminary/Mandatory Evaluation

15. At this stage of evaluation, the Evaluation Committee was required to assess tenders against the criteria set out under the table titled Mandatory Preliminary Requirements at page 12 of the Tender

Document, together with the additional criteria introduced through the Addenda. Bidders were required to meet all sixteen (16) mandatory requirements in order to qualify for progression to the Financial Evaluation Stage. Failure to satisfy any of the mandatory requirements rendered a tender non-responsive at this stage.

16. Upon conclusion of this stage of evaluation, the tenders submitted by the Applicant and the Interested Party were found to be responsive and consequently proceeded to the Financial Evaluation Stage. One tender was found to be non-responsive and was therefore excluded from further consideration.

2nd Financial Evaluation

17. At this stage, the Evaluation Committee was required to assess tenders in accordance with the criteria set out at page 13 of the Tender Document, with the highest evaluated bidder per line item being eligible for award in line with the provisions of the Act.
18. The Applicant and the Interested Party submitted bids with similar prices across various schedules and sub-schedules. Consequently, and in accordance with Sections 131, 132, and 133 of the Act, read together with Regulation 100 of the Regulations, 2020, the Procuring Entity invited the two bidders to submit their best and final offers under competitive negotiations. The invitations were issued on 8th September 2025 with a

closing date of Thursday, 11th September 2025 at 10:00 a.m. The Interested Party responded by indicating that they would not be submitting a final offer, while the Applicant submitted its final offer as requested.

19. Upon conclusion of the evaluation at this stage, the Evaluation Committee determined that the Applicant had submitted the highest evaluated tender, with a cumulative price of United States Dollars Twenty-Three Million, Two Hundred and Seven Thousand, Three Hundred and Fifty-Nine and Sixty Cents (USD 23,207,359.60). The Applicant was accordingly ranked as the best evaluated bidder for purposes of award of the subject tender.

1st Due Diligence

20. According to the Due Diligence Report dated 19th September 2025 (hereinafter referred to as "the Due Diligence Report"), the Evaluation Committee conducted due diligence on the highest evaluated bidder in accordance with Clause 14 of the Bid Data Sheet contained in the Tender Document.
21. Upon conclusion of the due diligence exercise, the Evaluation Committee observed that the Applicant had previously been awarded a tender by the Kenya Electricity Generating Company (KenGen) for the sale of

4,578,148 Certified Emission Reductions (CERs) under Tender No. KGNSALE-001-2024 dated 7th May 2024, at a contract price of United States Dollars Thirty-Two Million, Forty-Seven Thousand and Thirty-Six (USD 32,047,036.00). However, the Applicant failed to honour its contractual obligations under the said contract. The Committee further noted that the Applicant had provided evidence of purchase of Carbon Credits from the Carbon Trade Exchange (CTX) and documentation of retirement of CERs and Verified Emission Reductions (VERs) from the Clean Development Mechanism (CDM) and the Verified Carbon Standard (VERRA), valued as follows:

- i. 100 units of VERRA VERs at a price of USD 78.50 inclusive of fees, (Unit price USD 0.75 per VER),
- ii. 100 units of CDM CERs at a price of USD 102 inclusive of fees (Unit price 1 USD per CER)

22. The Evaluation Committee established that the total amount paid by the Applicant for the purchase of Carbon Credits was United States Dollars One Hundred and Eighty and Fifty Cents (USD 180.50), equivalent to Kenya Shillings Twenty-Three Thousand, Two Hundred and Eighty-Four and Fifty Cents (KES 23,284.50), based on an exchange rate of Kenya Shillings One Hundred and Twenty-Nine (KES 129) to the Dollar. The Committee observed that the submitted evidence of purchase, valued at KES 23,284.50 (USD 180.50), was manifestly low and inadequate to demonstrate the Applicant's capacity to procure 6,384,398 Certified

Emission Reductions (CERs) at the final bid price of United States Dollars Twenty-Three Million, Two Hundred and Seven Thousand, Three Hundred and Fifty-Nine and Sixty Cents (USD 23,207,359.60), equivalent to Kenya Shillings Two Billion, Nine Hundred and Ninety-Three Million, Seven Hundred and Forty-Nine Thousand, Three Hundred and Eighty-Eight and Forty Cents (KES 2,993,749,388.40), based on the same exchange rate.

23. The Evaluation Committee concluded that the Applicant did not meet the due diligence requirements relating to technical and financial capability and was therefore not qualified for award of the contract. Consequently, the Committee proceeded to consider the next responsive evaluated bidder in accordance with Regulation 80 of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as “the Regulations, 2020”)

2nd Due Diligence

24. According to the Due Diligence Report dated 24th September 2025 (hereinafter referred to as “the Due Diligence Report”), the Evaluation Committee conducted due diligence on the highest evaluated bidder in accordance with Clause 14 of the Bid Data Sheet contained in the Tender Document.

25. Upon conclusion of the due diligence exercise, the Evaluation Committee observed that the results in respect of the Interested Party were satisfactory. The Interested Party demonstrated the requisite experience, technical competence, and financial capacity to perform the contract. Accordingly, the Evaluation Committee recommended that the award of the subject tender be made to the Interested Party.

2nd Evaluation Committee's Recommendation

26. The Evaluation Committee recommended the award of the purchase of 6,384,398 CERs under the subject tender to Munja Trading Limited, in joint venture with Marwil Energy Holding AS, at a contract price of United States Dollars Nineteen Million Six Hundred Thirty-Seven Thousand Seven Hundred Fifty-Eight (USD 19,637,758).

2nd Professional Opinion

27. In a Professional Opinion dated 29th September 2025 (hereinafter referred to as "the 2nd Professional Opinion"), the Procuring Entity's Ag. Supply Chain Manager – Procurement and the Ag. General Manager – Supply Chain, reviewed the procurement process, including the evaluation of the tenders, and agreed with the Evaluation Committee's recommendations to award the subject tender to the Interested Party. The Professional Opinion was subsequently approved by the 1st Respondent on the 29th September 2025.

2nd Notification of Award

28. The tenderers were notified of the outcome of the re-evaluation for the subject tender through letters dated 29th September 2025.

PPARB NOTICE OF MOTION APPLICATION NO. 90 OF 2025

29. On 19th September 2025, the Respondents, through the firm of TripleOKLaw LLP Advocates, filed a Notice of Motion dated 18th September 2025 (hereinafter referred to as “the Notice of Motion”), supported by a Supporting Affidavit sworn on the same date by Vincent Mamboleo, the 2nd Respondent’s Acting Supply Chain Manager. The Notice of Motion sought the following orders:

a) That this Application be certified urgent and be heard on an urgent basis and orders issued without staying the tender process;

b) That the Board be pleased to extend the time by Fourteen Days for the Respondents to proceed with and conclude the tender proceedings conceding Tender No KGN-SALE-005-2025 for the Sale of Certified Emissions Reductions (Re-Tender) including the issuance of the Award Letter as directed by this Board in its decision herein dated 28th August 2025;

c) That the Board to grant leave for due diligence to be conducted during such extended period;

d) That the costs of this application be in the cause.

30. On 26th September 2025, the Board in exercise of the powers conferred upon it under the Act, issued the following orders in respect of Notice of Motion Application No. 90 of 2025:

i. The Consent dated 22nd September 2025 and filed on 23rd September 2025 with respect to the Respondents' Notice of Motion Application dated 18th September 2025 be and hereby withdrawn;

ii. The time as was set out by this Board in Order (C) in its Decision in Request for Review Application No. 90 of 2025 dated 28th August 2025 be and is hereby extended by 14 days from 18th September 2025 for the Respondents to proceed with and conclude the tender proceedings concerning Tender No. KGN-SALE-005-2025 for Sale of Certified Emissions Reductions (Re-Tender) including issuance of the Letter of Award; and

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

REQUEST FOR REVIEW NO. 97 OF 2025

31. On 6th October 2025, the Applicant, through the firm of Gerivia Advocates LLP, filed a Request for Review dated 2nd October 2025 accompanied by a Statement/Affidavit in Support of the Request for Review sworn on 2nd October 2025 by Richmond Gatu Muriithi, its Director and Group Chief Executive Officer (hereinafter referred to as “the instant Request for Review”) seeking the following orders:

- i. The Respondents decision awarding Tender Number: KGN-SALE-005-2025 - Tender For Sale of Certified Emission Reductions (CERs) (RE-TENDER) to the Interested Party be annulled and set aside;***

- ii. The Respondents’ Letter of Regret dated 29th September 2025 notifying the Applicant that it had not been successful in Tender Number: KGN-SALE-005-2025 - Tender For Sale of Certified Emission Reductions (CERs) (RE-TENDER) and notifying the successful bidder as the Interested Party be annulled and set aside;***

- iii. A declaration that the Procuring Entity failed to adhere to the Ruling and directions of this Honourable Board issued on 28th August 2025 in its re-evaluation of the Tenders;***
- iv. A declaration that the Procuring Entity failed to evaluate the Applicant's bid at the due diligence stage in accordance with the provisions of Sections 80 (2) and (3), 83 of the Act and Regulation 80 of the Regulations as read together with the provisions of the Tender Document;***
- v. An order setting aside the due diligence conducted by the Procuring Entity upon the Applicant and the resulting report (if any);***
- vi. An order directing the 1st Respondent to award the Tender to the Applicant noting that the Procuring Entity declared it the highest evaluated bidder by virtue of it progressing to the due diligence stage and that it had passed due diligence based on the evaluation criteria in the Tender Document;***
- vii. An order awarding costs of this Request for Review to the Applicant owing to the disobedience to the Orders of this Board by the Respondents; and***

viii. The Board to make such further orders as it may deem fit and appropriate in ensuring that the ends of justice are fully met in the circumstances of this Request for Review.

32. In a Notification of Appeal and a letter dated 6th October 2025, Mr. Philemon Kiprop, the Board Secretary notified the Respondents of the filing of the instant Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the Respondents a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020. Further, the Respondents were requested to submit a response to the instant Request for Review together with confidential documents concerning the subject tender within five days from 6th October 2025.
33. On 15th October 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 22nd October 2025 at 11:00 a.m. via the provided link.
34. On 15th October 2025, the Respondents filed a Notice of Appointment of Advocates dated 12th October 2025, appointing the firm of Triple OK Law LLP to act on their behalf. They also filed a Replying Affidavit sworn on 14th October 2025 by Vincent Mamboleo, the Supply Chain Manager of the Procuring Entity, on behalf of the 1st and 2nd Respondents. On the

same date, the Respondents submitted to the Board the confidential documents in compliance with Section 67(3)(e) of the Act.

35. On 21st October 2025, the Applicant filed a Further Affidavit sworn on the same date by Richmond Gatu Muriithi, its Director and Group Chief Executive Officer.
36. On 22nd October 2025, the Interested Party filed a Notice of Appointment of Advocates dated 21st October 2025, appointing the firm of Seko Minayo & Company Advocates to act on its behalf together with a Replying Affidavit sworn on 21st October 2025 by Andreas Svoor, its Director.
37. When the Board convened for the hearing on 22nd October 2025, learned counsel for the respective parties appeared as duly instructed. The Board confirmed that all filed documents had been read out and that service thereof had been effected upon all parties. Counsel for the Applicant, however, indicated that he wished to respond to the Replying Affidavit filed by the Interested Party, which had been filed and served on the day of the hearing. He sought for an adjournment to enable him to file a response. Counsel for the Respondents did not oppose the request for adjournment and further indicated that additional time was required to file the Respondents' written submissions. Counsel for the Interested Party equally expressed no objection to the adjournment.

38. In view of the unopposed application for adjournment, the Board issued directions to the effect that the Respondents and the Interested Party were to file their written submissions by 5:00 p.m. on 22nd October 2025. The Applicant was granted leave to file a Further Affidavit, if necessary, together with its written submissions by 11:00 a.m. on 23rd October 2025. The hearing was consequently rescheduled to 2:30 p.m. on 23rd October 2025.
39. On 22nd October 2025, the Respondents filed their Written Submissions dated the same day.
40. On 23rd October 2025, the Interested Party filed its Written Submissions dated 22nd October 2025.
41. On 23rd October 2025, the Applicant filed a Further Affidavit sworn on 22nd October 2025 by Richmond Gatu Muriithi, together with its written submissions and list of authorities, all dated 22nd October 2025.
42. When the Board convened for the hearing on 23rd October 2025, the respective Advocates appeared for the parties. The Board read out the filed documents, and the Advocates confirmed service thereof upon each other. Thereafter, the Board allocated time for the Advocates to highlight their respective submissions.

PARTIES' SUBMISSIONS

Applicant's Submissions

43. The Applicant's Counsel submitted that the Board is properly seized of jurisdiction to determine the Request for Review, which was filed on 6th October 2025, being the seventh day after receipt of the Notification of Intention to Award dated 29th September 2025. Counsel contended that the Respondents' assertion that the alleged breaches arose from correspondences dated 15th, 17th, and 19th September 2025 is misconceived, as the impugned decisions emanate from the Notification of Intention to Award itself.
44. It was submitted that the Applicant could not have been aware of the alleged breaches prior to receipt of the said Letter of Regret, since the due diligence evaluation process is by law a confidential stage under Section 67(1)(c) of the Act. Consequently, any complaint regarding the due diligence process could only be raised after notification of the results of that evaluation. Counsel emphasized that under Section 167(1) of the Act, a bidder may seek review either upon occurrence of a breach or upon receipt of a notification letter, and that knowledge of the breach is a necessary precondition to approaching the Board.
45. The Applicant's Counsel further argued that the issues raised in items 1(i)–(iii) of the Notification of Intention to Award, were introduced for

the first time in that letter and were not the subject of any prior correspondence or decision made between 15th and 19th September 2025. The Applicant therefore had no earlier opportunity to challenge them. Regarding item 1(iv), Counsel maintained that although the request for additional client references was communicated in earlier correspondence, the Board retains jurisdiction to determine that issue because the Respondents only communicated the effect and purpose of those documents in the Notification of Intention to Award.

46. It was further submitted that the Applicant's request for clarification on the documents sought during due diligence was never substantively addressed by the Respondents, and that the Notification of Intention to Award was the first formal communication revealing the Respondents' position. The Applicant therefore remains within time to challenge the use of extraneous evaluation criteria and the disqualification based on grounds not reflected in the tender requirements.
47. The Applicant's Counsel submitted that the due diligence exercise undertaken by the Procuring Entity was conducted contrary to the orders, directions and findings of the Board, and in violation of the provisions of the law. Counsel argued that under section 83 of the Act, due diligence is limited to confirming and verifying the qualifications of the tenderer who submitted the lowest evaluated responsive tender, based on documents already submitted at the evaluation stage.

48. It was the Applicant's contention that the Procuring Entity misconstrued the purpose of due diligence by re-evaluating its bid instead of confining itself to verification of the information contained in the tender documents. Counsel relied on the decision in ***Republic v Public Procurement Administrative Review Board; Finken Holding Limited & another (Interested Parties) ex parte Desbro Engineering Limited [2018] eKLR***, where the Court held that due diligence cannot be used as a pretext for re-evaluating technical qualifications. Reliance was also placed on ***Consortium of H. Young & Co (E.A) Limited & Yantai Jereh Petroleum Equipment and Technologies Company Limited v PPARB & 2 others [2017] KEHC 2140 (KLR)*** for the proposition that due diligence must be confined within the parameters of section 83 of the Act.
49. Counsel further submitted that the reasons cited in the Notification of Intention to Award, namely, alleged failure to meet specific experience under Mandatory Requirement No. 16 (MR 16), prior non-performance in an earlier tender, insufficient experience and lack of additional client references, were all premised on matters that had already been determined in the Board's earlier Ruling. The Applicant argued that the Board had expressly found that the Applicant satisfied MR 16 and directed the Procuring Entity to re-evaluate tenders strictly in accordance with the Tender Document, the Act, the Regulations, and the Board's findings. By revisiting MR 16 during due diligence, the Procuring Entity was said to

have acted in contempt of the Board's Ruling and beyond the scope of section 83 of the Act.

50. It was the Applicant's further submission that under section 83(2) of the Act, due diligence could only involve obtaining confidential references from the third parties named in the Applicant's bid and could not extend to a fresh assessment of compliance. Counsel emphasized that the Respondents were bound by the doctrine of finality and the principle of the rule of law, citing ***Republic v Ahmad Abolfathi Mohammed & Another [2018] eKLR*** and ***PPARB Application No. 77 of 2025 Henry Kibet Barno T/A Berur Driving School v The Chief Officer, Youth Affairs and Sports, County Government of Uasin Gishu & Others***, where the importance of compliance with court and Board orders was reaffirmed.

51. The Applicant's Counsel submitted that the Procuring Entity improperly relied on extraneous and undisclosed due diligence criteria to disqualify the Applicant on the basis of alleged prior non-performance in Tender No. KGN-SALE-001-2024, contrary to Sections 79, 80 and 83 of the Act, the Regulations, 2020 and Article 227 of the Constitution. Counsel argued that the alleged non-performance did not form part of the mandatory requirements or the tender criteria and could not therefore lawfully form the basis for disqualification at the due diligence stage.

52. It was the Applicant's contention that under Sections 79(1) and 80(2) of the Act, evaluation of tenders must be confined strictly to the procedures and criteria set out in the tender documents. In the Applicant's view, the Procuring Entity breached these provisions by employing new and undisclosed parameters, in contravention of the principle of transparency under Article 227 of the Constitution. Reliance was placed on ***Republic v PPARB & Others ex parte Tuv Austria Turk, Judicial Review Misc. Application No. 85 of 2018, and PPARB Application No. 39 of 2020 Simba Corporation Limited v Ministry of Interior & Others***, where it was held that due diligence must be anchored on the tender document and limited to verification of information already submitted by the bidder.
53. Counsel further submitted that the Tender Document in the present case contained no requirement regarding historical contract performance, pending litigation, or submission of Form CON-2, and therefore the Procuring Entity acted outside its statutory powers in introducing these considerations during due diligence. It was argued that the Applicant was condemned unheard on matters that were never part of the tender process, in breach of the Fair Administrative Action Act. The Applicant maintained that it ought to have been accorded an opportunity to explain that any non-performance in the earlier tender arose from the Procuring Entity's own termination of the contract, which was the subject of conservatory orders of the High Court.

54. The Applicant also faulted the Procuring Entity for invoking ongoing arbitration proceedings, arguing that arbitral proceedings are confidential under Sections 35 and 36 of the Arbitration Act and the UNCITRAL Arbitration Rules, unless disclosure is consented to by the parties or ordered by a competent authority. The Applicant asserted that no such consent had been given, and that the Respondents were precluded from relying on the same.
55. The Applicant's Counsel submitted that the Respondents erred in disqualifying the Applicant on the basis that its previous transaction involved a negligible volume of CERs. Counsel contended that this finding demonstrated a blatant disregard of the Board's prior Ruling in PPARB Application No. 90 of 2025, in which the Board had interpreted MR 16 to only require proof of previous participation in CER or VER projects, without prescribing any threshold as to the volume or value of the past transactions. It was the Applicant's position that the Procuring Entity therefore acted beyond its mandate under Section 83 of the Act by introducing a fresh evaluation criterion on capacity at the due diligence stage.
56. It was further submitted that having subjected the Applicant to due diligence, the Procuring Entity was bound by Section 83 of the Act to merely verify and confirm information already submitted by the lowest evaluated responsive tenderer. Counsel relied on ***PPARB Application No. 9 of 2021, Daniels Outlets Limited v Numerical Machining***

Complex Limited and PPARB Application No. 70 of 2020, Prudential Sourcing Limited v Kenya Medical Supplies Authority, where the Board underscored that due diligence is a post-qualification process distinct from evaluation and cannot be used to introduce new or subjective parameters such as the scale of past transactions. The Applicant therefore contended that the Respondents' conduct amounted to an unlawful re-evaluation contrary to Sections 79, 80, and 83 of the Act and Article 227 of the Constitution.

57. On the issue of lack of additional or independent client references, Counsel argued that Section 83(2) of the Act limits the Procuring Entity to obtaining confidential references from third parties with whom the bidder has previously engaged and does not permit bidders to furnish new documents after the tender submission deadline. The Procuring Entity's demand for additional client reference letters at the due diligence stage was thus contrary to Section 76(2) of the Act and outside the scope of Section 83. Reliance was placed on ***PPARB Application No. 161 of 2021 Pinnie Agency Limited v County Assembly of Kisumu***, where the Board held that introducing new documentation or parameters at due diligence amounts to an unlawful expansion of evaluation criteria.
58. The Applicant maintained that its earlier client reference letters already demonstrated adequate professional experience, and that the Procuring Entity's subsequent request for "new or independent references", despite earlier seeking only "past experiences through testimonials" was vague

and shifting, thereby depriving the Applicant of a fair evaluation. Counsel submitted that such conduct violated Articles 47 and 227 of the Constitution as well as Sections 60 and 80(3) of the Act, which require clarity, fairness, and consistency in evaluation criteria. The Applicant also cited ***PPARB Application No. 158 of 2020 On the Mark Security Limited v Kenya Revenue Authority***, where the Board faulted a procuring entity for relying on its own user department reports instead of external references during due diligence.

Respondents' Submissions

59. The Respondents' Counsel submitted that, pursuant to the Board's Decision of 28th August 2025 in PPARB Application No. 90 of 2025, the 2nd Respondent duly reconvened its Evaluation Committee and conducted a fresh preliminary evaluation of all tenders in strict compliance with the Tender Document, the Act, and the attendant Regulations, 2020. Counsel stated that upon re-evaluation, only two bidders, the Applicant and the Interested Party, met all the mandatory requirements and therefore proceeded to the financial evaluation stage.

60. It was further submitted that both the Applicant and the Interested Party were thereafter invited to submit their best and final offers under the competitive negotiation process contemplated under Sections 131, 132 and 133 of the Act, read together with Regulation 100 of the Regulations, 2020. While the Interested Party declined to submit a final offer, the

Applicant submitted a bid of USD 23,207,359.60, which emerged as the highest evaluated responsive tender.

61. Counsel pointed out that Clause 14 of the Bid Data Sheet expressly empowered the Procuring Entity, at its discretion, to undertake due diligence on eligible bidders prior to award. It was submitted that this step was reinforced by paragraph 127 of the Board's Decision in PPARB Application No. 90 of 2025, which directed that the successful bidder undergo due diligence pursuant to Section 83 of the Act, as a prudent measure to ensure transparency, cost-effectiveness, and public interest in the procurement process.
62. In compliance with the foregoing directive and the provisions of Clause 14 of the Bid Data Sheet, the 2nd Respondent's Evaluation Committee, through a letter dated 15th September 2025, notified the Applicant of its intention to conduct due diligence on 17th September 2025. The committee subsequently carried out a site visit to the Applicant's premises and prepared a due diligence report in line with Section 83 of the Act.
63. The Respondents' Counsel maintained that the due diligence exercise was properly undertaken to verify the Applicant's capacity and accuracy of the information supplied, consistent with Section 83 of the Act and Regulation 80 of the Regulations, 2020. The process involved background

checks using publicly available information, a physical inspection of the Applicant's facilities, and verification of documentation provided during the bid process.

64. The Respondents' Counsel submitted that the due diligence exercise conducted on the Applicant was in full compliance with the law. It was submitted that the Applicant was duly notified by a letter dated 15th September 2025 that the Evaluation Committee would visit its premises on 17th September 2025 for purposes of due diligence. Following the visit, the 2nd Respondent requested the Applicant, through an email sent the same day, to avail certain documents by 18th September 2025 at 9.30 a.m., including audited financial statements, evidence of access to credit, ESG strategy documentation, and proof of past professional experience.

65. Counsel submitted that the Applicant responded to the said communication through various emails and a letter dated 17th September 2025, providing some of the requested documents, including a payment plan, past project references, ESG information, and audited accounts which were verified on 18th September 2025. The Respondent maintained that by furnishing these documents, the Applicant voluntarily participated in the due diligence process and could not subsequently challenge the same. Any grievances arising therefrom ought to have been raised within fourteen days under Section 167 of the Act, failing which the present Request for Review was time-barred and beyond the jurisdiction of the Board.

66. It was further contended that the due diligence exercise was properly conducted pursuant to Section 83 of the Act and Regulation 80 of the Regulations, 2020. Counsel noted that the exercise sought to verify the Applicant's technical, financial, and operational capacity, and that the findings revealed material deficiencies. Specifically, the Evaluation Committee found that the Applicant had previously failed to perform Tender No. KGN-SALE-001-2024 for the sale of 4,578,148 CERs, which had to be terminated despite extensions. The current tender, covering 6,384,398 CERs, included the same CERs previously terminated, thereby establishing a direct nexus between the earlier non-performance and the present procurement.
67. The Respondents further argued that the Applicant's past transaction involving only 200 CERs valued at USD 180 was insignificant compared to the scale of the current tender and did not constitute credible evidence of capacity. The Applicant also failed to provide satisfactory client references demonstrating successful execution of comparable projects. The Evaluation Committee thus concluded that the Applicant lacked the requisite financial, technical, and operational capacity and failed to meet the due diligence requirements under MR16.
68. Counsel submitted that the due diligence process covered all relevant mandatory requirements, including MR1 (Legal Status), MR2 (Tax

Compliance), MR3 (Business Permit), MR12 (Commitment to Code of Ethics), MR15 (Financial Capacity), and MR16 (Past Experience), and was undertaken transparently and in good faith. It was emphasized that the decision of the Evaluation Committee was merit-based, evidence-driven, and consistent with Sections 79, 80, and 83 of the Act as well as Article 227 of the Constitution.

69. It was the Respondents position that the 2nd Respondent acted strictly within the confines of the law and the Board's directives, and that no extraneous or unconstitutional considerations influenced its decision. On the contrary, failure to conduct due diligence would have amounted to a breach of Article 227 of the Constitution. Counsel further submitted that upon obtaining a negative due diligence outcome for the Applicant, the 2nd Respondent proceeded to conduct due diligence on the next lowest evaluated responsive tenderer, the Interested Party, in line with Regulation 80(2) of the Regulations, 2020.

Interested Party's Submissions

70. Counsel for the Interested Party associated himself with the Respondents' submissions that the instant Request for Review was filed outside the statutory fourteen-day period prescribed under Section 167(1) of the Act. He accordingly submitted that the Board lacks jurisdiction to entertain the present Request for Review.

71. Counsel for the Interested Party submitted that following the Board's earlier decision ordering a fresh evaluation of the tenders, the Procuring Entity undertook a re-evaluation in three stages, evaluation of mandatory requirements, due diligence, and financial evaluation. Both the Applicant and the Interested Party passed the mandatory requirements and proceeded to due diligence; however, only the Interested Party advanced to the financial stage as the Applicant failed due diligence. Upon conclusion of the process, the evaluation committee recommended award of the tender to the Interested Party.

72. It was contended that the evaluation process strictly adhered to the tender document and the law. Counsel referred the Board to pages 14 and 15 of the Tender document which expressly required bidders to be reputable firms with experience in carbon credits trading and to demonstrate previous successful participation in emission reduction transactions by providing client references or evidence of completed carbon credit transfers. In this regard, the Interested Party maintained that due diligence was properly conducted in accordance with section 83 of the Act and Regulation 80 of the Regulations, 2020, and that the Applicant's contrary argument was based on an erroneous interpretation of the tender requirements.

73. Counsel emphasized that during due diligence on 17th September 2025, the Applicant was requested to provide evidence of past professional experience in carbon credits trading but failed to do so, instead asserting

that the documents sought were not part of the tender requirements. The Interested Party further accused the Applicant of failing to perform a similar contract previously awarded by the Respondents in 2024, arguing that this demonstrated incompetence and should even warrant debarment under section 41 of the Act.

74. In contrast, the Interested Party submitted that it fully complied with all due diligence requirements by providing proof of prior experience in carbon trading, including two official European Union Registry Transaction Confirmations, a commercial invoice, and a sale and purchase agreement dated 10th July 2023. Counsel contended that the re-evaluation exercise was conducted in strict adherence to Clauses 17 and 18 of the Tender document which required substantial responsiveness and experience, and provided for award to the highest evaluated bidder subject to the reserve price.

75. Counsel for the Interested Party further submitted that the Procuring Entity conducted due diligence strictly in accordance with the law. Relying on ***Republic v Public Procurement Administrative Review Board; Kenya Pipeline Company Ltd & Another (Interested Parties) ex parte Krohne (Pty) Ltd [2018] eKLR***, Counsel reiterated that due diligence entails the attention and care expected of a person seeking to satisfy a legal requirement or discharge an obligation. In this case, the Respondents physically verified the authenticity of the information submitted by bidders and their experience in carbon credits trading, as

permitted under Section 83 of the Act and Regulation 80 of the Regulations, 2020.

76. It was argued that the due diligence process was fully compliant with Section 83 of the Act, which allows an evaluation committee to confirm the qualifications of a tenderer prior to award. Counsel cited ***PPARB Application No. 134 of 2019 Trident Insurance Company Ltd v Accounting Officer, County Assembly of Nyamira & Another***, to emphasize that due diligence involves verifying a bidder's past performance through references from prior engagements. The Applicant, it was submitted, failed to demonstrate both experience and capacity to perform, having previously been awarded a similar contract in 2024 for the sale of CERs valued at over USD 32 million, but failed to deliver, resulting in the re-advertisement of the tender now under review.

77. Counsel also relied on ***Republic v Public Procurement Administrative Review Board & Another ex parte University of Eldoret [2017] eKLR***, where the court held that due diligence is an implied and mandatory criterion in every procurement process to ensure that only capable bidders are awarded tenders. It was therefore contended that the Applicant's failure to demonstrate capability and experience justified its disqualification at the due diligence stage, and that the Respondents properly satisfied themselves that only the Interested Party was qualified to perform the contract.

78. With respect to the financial evaluation, it was submitted that, upon the Applicant's disqualification at the due diligence stage, only the Interested Party proceeded to financial evaluation, where it emerged as the highest evaluated bidder in accordance with the tender document. The Respondents, therefore, lawfully awarded the tender to the Interested Party, and no public loss, such as the alleged KES 400 million, could arise since only the Interested Party's bid was considered at that stage.

Applicant's Rejoinder

79. In rejoinder, Counsel for the Applicant submitted that the impetus for filing the Request for Review arose from the issuance of the Notice of Intention to Award, which, according to the Applicant, constituted the Respondents' formal communication of the outcome of the due diligence process.

80. Counsel further submitted that the due diligence exercise was not undertaken in accordance with the law, as the Respondents failed to confine the process within the parameters set out in the Tender Document. He contended that it is impermissible in law to conduct a fresh preliminary or technical evaluation under the guise of a due diligence exercise.

81. Counsel further submitted that the issue of alleged non-performance did not emanate from the Tender Document and was therefore extraneous

to the evaluation criteria. He added that the allegation was subjective, having originated from the Procuring Entity itself rather than from the references contacted during the due diligence process.

BOARD'S DECISION

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

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

In determining the first issue, the Board will make a determination on the following sub-issue:

i. Whether the Request for Review was filed outside the timeline under section 167 (1) of the Act.

Depending on the finding of the above issue:

B. Whether the Respondents complied with the Board's findings and directives issued in PPARB Application No. 90 of 2025;

C. Whether the due diligence exercise was conducted in accordance with the law, the requirements of the Tender Document, and the Board's directions in PPARB Application No. 90 of 2025; and

D. What appropriate orders should issue in the circumstances.

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

83. In response to the Request for Review, the Respondents contend that the same was time-barred, having been filed outside the statutory fourteen-day period prescribed under Section 167(1) of the Act. This position was supported by the Interested Party. The Applicant, on the other hand, maintained that the Request for Review was filed within time, asserting that it was lodged on the seventh day following service of the Notice of Intention to Award.
84. We note that the issue of the Request for Review being time barred, if established, would deprive the Board of jurisdiction to entertain the

present Request for Review. Consequently, given the preliminary and jurisdictional nature of the issue, it must be addressed as a matter of priority.

85. We are 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.
86. 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.
87. 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."

88. The 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.

89. 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.

90. The jurisdiction of this Board is anchored under Part XV of the Act, which governs administrative review of procurement and disposal proceedings. In particular, Section 167 of the Act delineates the matters that may be brought before the Board, those that are excluded from its purview, and the timelines within which such matters must be filed. Sections 172 and 173 of the Act, on the other hand, prescribe the powers exercisable by the Board in the conduct and determination of such proceedings.

91. Therefore, in light of the foregoing, the Board has no alternative but to examine its jurisdiction by determining whether the Applicant has locus standi and whether the Request for Review was filed outside the mandatory statutory timeline.

Whether the Request for Review was filed outside the timeline under section 167 (1) of the Act.

92. In responding to the Request for Review, the Respondents argued that the Applicant was duly notified by a letter dated 15th September 2025 that the Evaluation Committee would visit its premises on 17th September 2025 for purposes of due diligence. Following the visit, the 2nd Respondent requested the Applicant, through an email sent the same day, to avail certain documents by 18th September 2025 at 9.30 a.m., including audited financial statements, evidence of access to credit, ESG strategy documentation, and proof of past professional experience.
93. The Respondents' Counsel argued that the Applicant responded to the said communication through various emails and a letter dated 17th September 2025, providing some of the requested documents, including a payment plan, past project references, ESG information, and audited accounts. Counsel submitted that any grievances arising therefrom ought to have been raised within fourteen days under Section 167 of the Act, failing which the present Request for Review was time-barred and beyond the jurisdiction of the Board.
94. In response to the issue on the Request for Review being time barred, Counsel for the Applicant submitted that the Board is properly seized of jurisdiction to determine the Request for Review, which was filed on the seventh day after receipt of the Notification of Intention to Award dated

29th September 2025. Counsel contended that the Respondents' assertion that the alleged breaches arose from correspondences dated 15th, 17th, and 19th September 2025 is misconceived, as the impugned decisions emanate from the Notification of Intention to Award itself.

95. The Applicant's Counsel argued that the Applicant could not have been aware of the alleged breaches prior to receipt of the said Letter of Notification of Intention to Award, since the due diligence evaluation process is by law a confidential stage under Section 67(1)(c) of the Act. Consequently, any complaint regarding the due diligence process could only be raised after notification of the results of that evaluation. Counsel emphasized that under Section 167(1) of the Act, a bidder may seek review either upon occurrence of a breach or upon receipt of a notification letter, and that knowledge of the breach is a necessary precondition to approaching the Board. It was further submitted that the Applicant's request for clarification on the documents sought during due diligence was never substantively addressed by the Respondents, and that the Notification of Intention to Award was the first formal communication revealing the Respondents' position.

96. Counsel for the Interested Party associated himself with the Respondents' position that the Request for Review was filed outside the statutory fourteen-day period prescribed under Section 167(1) of the Act. He consequently submitted that the Board lacks jurisdiction to entertain the present Request for Review.

97. We note 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.

98. Regulation 203(2)(c)(ii) 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*****

99. We interpret the above provision to mean that an applicant seeking intervention of the Board 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 establish 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.

100. In the instant Request for Review, we observe that the dispute revolves around determining the benchmark event from which the statutory limitation period ought to commence. The Respondents and the Interested Party contended that time began to run on 17th September 2025, being the date on which the Applicant received the Respondents' request to furnish documents for purposes of the due diligence exercise. The Applicant, on the other hand, maintained that time began to run upon receipt of the Letter of Notification of Intention to Award dated 29th September 2025.

101. In view of the diametrically opposed positions taken by the parties, we find that the determination of this issue hinges upon an examination of the events that transpired between 15th and 19th September 2025, and on 29th September 2025.

102. We note that on 15th September 2025, the Respondents notified the Applicant of a due diligence exercise scheduled to take place at the Applicant's premises on 17th September 2025. The due diligence was duly conducted on that date, during which the Respondents requested the Applicant to furnish additional documents for review as part of the

process. The Applicant complied with this request on the same day. Subsequently, by a letter dated 19th September 2025, the Applicant sought clarification from the Respondents regarding the conduct of the due diligence exercise, particularly the requirement to provide further documentation at that stage. On the same date, via email, the Respondents acknowledged receipt of both the requested documents and the Applicant's letter, and indicated that the issues raised therein would be formally addressed. Thereafter, by a Letter of Notification of Intention to Award dated 29th September 2025, the Respondents informed the Applicant that its bid had been unsuccessful.

103. We note the Applicant's contention that its letter dated 19th September 2025 was never responded to, notwithstanding the Respondents' earlier indication, via email, that an official response would be provided. We further observe that this assertion was not controverted by the Respondents. Upon perusal of the confidential documents submitted to the Board, we did not find any evidence of a response to the Applicant's said letter.

104. In view of the foregoing factual background, the issue for determination is when time ought to be deemed to have begun to run. Upon careful consideration, we find merit in the Applicant's position that the statutory timeline commenced upon receipt of the Letter of Notification of Intention to Award. We so find because the outcome of the events that transpired between 15th and 19th September 2025 only became apparent to the

Applicant upon receipt of the said notification. The Respondents did not respond to the Applicant's letter dated 19th September 2025, and therefore the Applicant had no concrete basis to allege a breach prior to the notification. As long as there existed a legitimate expectation of an official response from the Respondents, time could not be said to have begun to run, as the Applicant was awaiting a formal communication that would crystallize the cause of action. Accordingly, we find that time began to run upon issuance of the Letter of Notification of Intention to Award to the Applicant.

105. Having established that the benchmark event for purposes of computing time is the date on which the Applicant received the Letter of Notification of Intention to Award, the next issue for consideration is whether the statutory fourteen-day period had lapsed by the time the Request for Review was filed. We note that it is not in dispute that the Applicant received the Letter of Notification of Intention to Award on 29th September 2025, and that the Request for Review was filed on 6th October 2025.

106. In computing time, the Board is guided by Section 57 of the Interpretation and General Provisions Act, which provides as follows:

57. Computation of time

In computing time for the purposes of a written law, unless the contrary intention appears—

- (a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;***
- (b) if the last day of the period is Sunday or a public holiday or all official non-working days (which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day;***
- (c) where an act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;***
- (d) where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time.***

107. We understand the above section of the law to mean that, in computing time under a written law, unless a different intention is clearly indicated,

the day on which an event occurs or an act is done is not counted in the calculation of time; if the final day of the period falls on a Sunday, public holiday, or any officially recognized non-working day (collectively referred to as excluded days), the period is extended to the next working day; where an act is required to be done on a specific day that turns out to be an excluded day, performing the act on the next working day is deemed timely; and where the time allowed for performing an act is six days or fewer, excluded days are entirely omitted from the count.

108. In computing the time within which the Applicant ought to have sought administrative review before the Board in relation to the evaluation of its tender, the fourteen-day period commenced on 30th September 2025 and lapsed on 13th October 2025. In accordance with Section 57(a) of the Interpretation and General Provisions Act, 29th September 2025, being the date on which the notification letter was sent, is excluded from the computation. Accordingly, the Applicant had the period between 30th September 2025 and 13th October 2025 to file its Request for Review before the Board.

109. We observe that the Request for Review was filed on 6th October 2025, which falls within the fourteen-day statutory timeline. Accordingly, we find that the Request for Review was filed in compliance with Section 167(1) of the Act and this Board is therefore clothed with the requisite jurisdiction to hear and determine this dispute on merit

Whether the Respondents complied with the Board’s findings and directives issued in PPARB Application No. 90 of 2025

110. The Applicant alleged that the Respondents failed to comply with the Board’s findings and directives issued in PPARB Application No. 90 of 2025. In support of this contention, Counsel for the Applicant relied on the decision in ***PPARB Application No. 77 of 2025 Henry Kibet Barno t/a Berur Driving School v The Chief Officer, Youth Affairs and Sports, County Government of Uasin Gishu & Others***, wherein the Board underscored the importance of strict compliance with orders issued by both the courts and the Board.
111. In response, the Respondents’ Counsel submitted that, pursuant to the Board’s Decision of 28th August 2025 in PPARB Application No. 90 of 2025, the 2nd Respondent duly reconvened its Evaluation Committee and conducted a fresh preliminary evaluation of all tenders in strict compliance with the Tender Document, the Act, and the attendant Regulations, 2020. Counsel stated that upon re-evaluation, only two bidders, the Applicant and the Interested Party, met all the mandatory requirements and therefore proceeded to the financial evaluation stage and the Applicant emerged as the highest evaluated responsive tender.
112. The Respondents’ Counsel pointed out that Clause 14 of the Bid Data Sheet expressly empowered the Procuring Entity, at its discretion, to undertake due diligence on eligible bidders prior to award. It was

submitted that this step was reinforced by paragraph 127 of the Board's Decision in PPARB Application No. 90 of 2025, which directed that the successful bidder undergo due diligence pursuant to Section 83 of the Act, as a prudent measure to ensure transparency, cost-effectiveness, and public interest in the procurement process.

113. The Interested Party associated itself with the Respondents' position, submitting that the Procuring Entity duly complied with the Board's directions and findings, and that the Applicant's allegations to the contrary were unfounded.

114. The resolution of this issue hinges on an evaluation of the Respondents' actions vis-à-vis the specific orders issued by the Board in PPARB Application No. 90 of 2025. Accordingly, we deem it necessary to reproduce the said orders for clarity and context.

i. The Letter of Notification of Intention to Award dated 1st August 2025 addressed to the Interested Party as the successful bidder and the Letters of Regret issued to the Applicant and the other unsuccessful bidder with respect to Tender No. KGN-SALE-005-2025 for Sale of Certified Emissions Reductions (Re-Tender) be and are hereby nullified and set aside;

- ii. The 1st Respondent be and is hereby directed to reconvene the Evaluation Committee and re-evaluate all tenders at the preliminary evaluation stage afresh in accordance with the provisions of the Tender document, the Act, Regulations 2020, the Constitution and taking into consideration the findings of the Board herein;*
- iii. The Respondents are hereby directed to proceed with and conclude the tender proceedings concerning Tender No. KGN-SALE-005-2025 for Sale of Certified Emissions Reductions (Re-Tender) including the issuance of an award within 21 days from the date hereof; and.*
- iv. In view of the fact that the procurement process is not complete, each party shall bear its own costs in this Request for Review.*

115. We observe that only orders number 2 and 3 imposed affirmative obligations upon the Respondents. Order number 1 merely nullified the Letters of Notification of Intention to Award previously issued to the bidders and thus required no further action. Similarly, order number 4 related to costs, with each party bearing its own, and therefore did not necessitate any action by the Respondents. Consequently, our analysis shall be confined to orders number 2 and 3.

116. Order number 2 directed the 1st Respondent to reconvene the Evaluation Committee and undertake a re-evaluation of all tenders at the preliminary evaluation stage. The key issue for determination in respect of this order is whether the Respondents indeed complied with that directive.
117. Upon perusal of the confidential documents, we noted a Re-Evaluation Report indicating that the Evaluation Committee was duly reconvened and that it conducted a re-evaluation of all tenders from the preliminary evaluation stage. Accordingly, we are satisfied that the Respondents complied with order number 2 of the Board's decision in PPARB Application No. 90 of 2025.
118. Order number 3 obligated the Respondents to conclude the tender proceedings and issue an award within twenty-one (21) days from the date of the Board's decision. The key question, therefore, is whether the Respondents adhered to this directive within the stipulated timeframe.
119. In determining this issue, we perused the confidential documents and observed that the Respondents proceeded with the tender process up to the stage of issuing the Letters of Notification of Intention to Award. We, however, note that this was not concluded within the twenty-one (21) days stipulated by the Board. Nonetheless, upon realizing that the period was about to lapse, the Respondents filed a Notice of Motion dated 18th September 2025 before the Board for an extension of time pursuant to

Section 88 of the Act, which was duly granted on 26th September 2025. Accordingly, we are satisfied that the Respondents complied with Order No. 3 as directed.

120. Further, paragraph 127 of the Board's decision in PPARB Application No. 90 of 2025 provided as follows:

127. Given that the present tender did not provide for a Technical Evaluation Stage, the Board finds it prudent for the Respondents to ensure that the successful bidder undergoes the due diligence process provided under Section 83 of the Act. While Section 83 of the Act is not framed in mandatory terms, the Tender document at Clause 14 of the Bid Data Sheet on page 9 of 36 contemplates due diligence but anticipates a situation whereby due diligence is carried out at the discretion of the Procuring Entity. The Board finds that conducting this process is a prudent measure to guarantee the quality of services, particularly where public interest is concerned. This will also serve to ensure that the procurement proceedings are carried out in accordance with the principles of transparency and cost effectiveness as enshrined in Article 227 of the Constitution.

121. We understand the paragraph above to mean that the Board recommended to the Respondents to undertake a due diligence exercise on the successful bidder since the tender document did not include a technical evaluation stage. The Board reasoned that, while Section 83 of the Act does not make due diligence mandatory, it remains a prudent step whenever the tender document contemplates it and where public interest is at stake. By recommending the exercise, the Board emphasized that due diligence would help verify the bidder's capacity to deliver quality services and promote the constitutional principles of transparency and cost-effectiveness under Article 227 of the Constitution.

122. We note that in undertaking the re-evaluation exercise, the Respondents duly took cognizance of the above directive and proceeded to conduct a due diligence exercise. In view of the foregoing, and based on our findings on compliance with Orders No. 2 and 3, we are satisfied and find that the Respondents complied with the Board's decision in PPARB Application No. 90 of 2025.

Whether the due diligence was conducted in accordance with the law, the Tender document and the Board's decision in PPARB Application No. 90 of 2025

123. The Applicant's Counsel submitted that the due diligence exercise undertaken by the Procuring Entity was conducted contrary to the orders, directions and findings of the Board, and in violation of the provisions of

the law. Counsel argued that under section 83 of the Act, due diligence is limited to confirming and verifying the qualifications of the tenderer who submitted the lowest evaluated responsive tender, based on documents already submitted at the evaluation stage. Counsel relied on the decision in ***Republic v Public Procurement Administrative Review Board; Finken Holding Limited & another (Interested Parties) ex parte Desbro Engineering Limited [2018] eKLR***, where the Court held that due diligence cannot be used as a pretext for re-evaluating technical qualifications. Reliance was also placed on ***Consortium of H. Young & Co (E.A) Limited & Yantai Jereh Petroleum Equipment and Technologies Company Limited v PPARB & 2 others [2017] KEHC 2140 (KLR)*** for the proposition that due diligence must be confined within the parameters of section 83 of the Act.

124. Counsel further submitted that the reasons cited in the Notification of Intention to Award, namely, alleged failure to meet specific experience under Mandatory Requirement No. 16 (MR 16), prior non-performance in an earlier tender, insufficient experience and lack of additional client references, were all premised on matters that had already been determined in the Board's earlier Ruling. The Applicant argued that the Board had expressly found that the Applicant satisfied MR 16 and directed the Procuring Entity to re-evaluate tenders strictly in accordance with the Tender Document, the Act, the Regulations, and the Board's findings.

125. It was the Applicant's further submission that under section 83(2) of the Act, due diligence could only involve obtaining confidential references from the third parties named in the Applicant's bid and could not extend to a fresh assessment of compliance. The Applicant's Counsel submitted that the Procuring Entity improperly relied on extraneous and undisclosed due diligence criteria to disqualify the Applicant on the basis of alleged prior non-performance in Tender No. KGN-SALE-001-2024, contrary to the law. Counsel argued that the alleged non-performance did not form part of the mandatory requirements or the tender criteria and could not therefore lawfully form the basis for disqualification at the due diligence stage. Reliance was placed on ***Republic v PPARB & Others ex parte Tuv Austria Turk, Judicial Review Misc. Application No. 85 of 2018, and PPARB Application No. 39 of 2020 Simba Corporation Limited v Ministry of Interior & Others***, where it was held that due diligence must be anchored on the tender document and limited to verification of information already submitted by the bidder.

126. It was argued that the Applicant was condemned unheard on matters that were never part of the tender process, in breach of the Fair Administrative Action Act. The Applicant maintained that it ought to have been accorded an opportunity to explain that any non-performance in the earlier tender arose from the Procuring Entity's own termination of the contract, which was the subject of conservatory orders of the High Court. The Applicant also faulted the Procuring Entity for invoking ongoing arbitration proceedings, arguing that arbitral proceedings are

confidential under Sections 35 and 36 of the Arbitration Act and the UNCITRAL Arbitration Rules, unless disclosure is consented to by the parties or ordered by a competent authority. The Applicant asserted that no such consent had been given, and that the Respondents were precluded from relying on the same. The Applicant's Counsel submitted that the Respondents erred in disqualifying the Applicant on the basis that its previous transaction involved a negligible volume of CERs. It was the Applicant's position that this was tantamount to introducing a fresh evaluation criterion on capacity at the due diligence stage.

127. Counsel relied on ***PPARB Application No. 9 of 2021, Daniels Outlets Limited v Numerical Machining Complex Limited and PPARB Application No. 70 of 2020, Prudential Sourcing Limited v Kenya Medical Supplies Authority***, where the Board underscored that due diligence is a post-qualification process distinct from evaluation and cannot be used to introduce new or subjective parameters such as the scale of past transactions. The Procuring Entity's demand for additional client reference letters at the due diligence stage was thus contrary to Section 76(2) of the Act and outside the scope of Section 83. Reliance was placed on ***PPARB Application No. 161 of 2021 Pinnie Agency Limited v County Assembly of Kisumu***, where the Board held that introducing new documentation or parameters at due diligence amounts to an unlawful expansion of evaluation criteria. The Applicant also cited ***PPARB Application No. 158 of 2020 On the Mark Security Limited v Kenya Revenue Authority***, where the Board faulted a procuring

entity for relying on its own user department reports instead of external references during due diligence.

128. In response, Counsel for the Respondents argued that in compliance with the Board's decision in PPARB Application No. 90 of 2025 and the provisions of Clause 14 of the Bid Data Sheet, the 2nd Respondent's Evaluation Committee, through a letter dated 15th September 2025, notified the Applicant of its intention to conduct due diligence on 17th September 2025. The committee subsequently carried out a site visit to the Applicant's premises and prepared a due diligence report in line with Section 83 of the Act.

129. The Respondent's Counsel maintained that the due diligence exercise was properly undertaken to verify the Applicant's capacity and accuracy of the information supplied, consistent with Section 83 of the Act and Regulation 80 of the Regulations, 2020. The process involved background checks using publicly available information, a physical inspection of the Applicant's facilities, and verification of documentation provided during the bid process. The Respondent's Counsel submitted that the due diligence exercise conducted on the Applicant was in full compliance with the law. It was submitted that the Applicant was duly notified by a letter dated 15th September 2025 that the Evaluation Committee would visit its premises on 17th September 2025 for purposes of due diligence. Following the visit, the 2nd Respondent requested the Applicant, through an email sent the same day, to avail certain documents by 18th

September 2025 at 9.30 a.m., including audited financial statements, evidence of access to credit, ESG strategy documentation, and proof of past professional experience.

130. Counsel submitted that the Applicant responded to the said communication through various emails and a letter dated 17th September 2025, providing some of the requested documents, including a payment plan, past project references, ESG information, and audited accounts which were verified on 18th September 2025. The Respondent maintained that by furnishing these documents, the Applicant voluntarily participated in the due diligence process and could not subsequently challenge the same. Counsel noted that the exercise sought to verify the Applicant's technical, financial, and operational capacity, and that the findings revealed material deficiencies. Specifically, the Evaluation Committee found that the Applicant had previously failed to perform Tender No. KGN-SALE-001-2024 for the sale of 4,578,148 CERs, which had to be terminated. The current tender, covering 6,384,398 CERs, included the same CERs previously terminated, thereby establishing a direct nexus between the earlier non-performance and the present procurement.

131. The Respondent further argued that the Applicant's past transaction involving only 200 CERs valued at USD 180 was insignificant compared to the scale of the current tender and did not constitute credible evidence of capacity. The Applicant also failed to provide satisfactory client references demonstrating successful execution of comparable projects.

The Evaluation Committee thus concluded that the Applicant lacked the requisite financial, technical, and operational capacity and failed to meet the due diligence requirements under MR16. Counsel submitted that the due diligence process covered all relevant mandatory requirements, including MR1 (Legal Status), MR2 (Tax Compliance), MR3 (Business Permit), MR12 (Commitment to Code of Ethics), MR15 (Financial Capacity), and MR16 (Past Experience), and was undertaken transparently and in good faith. Counsel further submitted that upon obtaining a negative due diligence outcome for the Applicant, the 2nd Respondent proceeded to conduct due diligence on the next lowest evaluated responsive tenderer, the Interested Party, in line with Regulation 80(2) of the Regulations, 2020.

132. On the part of the Interested Party, Counsel contended that the evaluation process strictly adhered to the Tender Document and the law. Counsel referred the Board to pages 14 and 15 of the Tender Document which expressly required bidders to be reputable firms with experience in carbon credits trading and to demonstrate previous successful participation in emission reduction transactions by providing client references or evidence of completed carbon credit transfers. In this regard, the Interested Party maintained that due diligence was properly conducted in accordance with section 83 of the Act and Regulation 80 of the Regulations, 2020, and that the Applicant's contrary argument was based on an erroneous interpretation of the tender requirements.

133. The Interested Party's Counsel emphasized that during due diligence on 17th September 2025, the Applicant was requested to provide evidence of past professional experience in carbon credits trading but failed to do so, instead asserting that the documents sought were not part of the tender requirements. The Interested Party further accused the Applicant of failing to perform a similar contract previously awarded by the Respondents in 2024, arguing that this demonstrated incompetence and should even warrant debarment under section 41 of the Act

134. Relying on ***Republic v Public Procurement Administrative Review Board; Kenya Pipeline Company Ltd & Another (Interested Parties) ex parte Krohne (Pty) Ltd [2018] eKLR***, Counsel reiterated that due diligence entails the attention and care expected of a person seeking to satisfy a legal requirement or discharge an obligation. Counsel cited ***PPARB Application No. 134 of 2019 Trident Insurance Company Ltd v Accounting Officer, County Assembly of Nyamira & Another***, to emphasize that due diligence involves verifying a bidder's past performance through references from prior engagements.

135. The Applicant, it was submitted, failed to demonstrate both experience and capacity to perform, having previously been awarded a similar contract in 2024 for the sale of CERs valued at over USD 32 million, but failed to deliver, resulting in the re-advertisement of the tender now under review. Counsel also relied on ***Republic v Public Procurement Administrative Review Board & Another ex parte University of***

Eldoret [2017] eKLR, where the court held that due diligence is an implied and mandatory criterion in every procurement process to ensure that only capable bidders are awarded tenders.

136. Having considered the parties' submissions and the documents placed before us, we observe that the central issue in the instant Request for Review pertains to the manner in which the due diligence exercise was conducted on the Applicant after it had emerged as the highest evaluated responsive bidder.

137. We note that the dispute is about disposal and not procurement. However, we understand that the genesis of procurement and disposal of goods and services has its origin in 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...

138. The above provision of the law establishes that, among other requirements, when a State organ or public entity procures goods or services, the process must adhere to specific standards, including competitive fairness. Competitive fairness entails providing all qualified suppliers with an equal opportunity to compete, ensuring that no bidder is unduly advantaged or disadvantaged, and that selection is grounded on objective criteria. This principle promotes integrity, value for money, and public confidence in the procurement system. The Board further observes that these standards equally apply to the disposal of goods.

139. The Board observes that the legislation referred to in Article 227(2) of the Constitution is the Act. Section 83 of the Act provides on post-qualification as follows:

83. Post-qualification

(1) An evaluation committee may, after tender evaluation, but prior to the award of the tender, conduct due diligence and present the report in writing to confirm and verify the qualifications of the tenderer who submitted the lowest evaluated responsive tender to be awarded the contract in accordance with this Act.

(2) An evaluation committee may, after tender evaluation, but prior to the award of the tender, conduct due diligence and present the report in writing to confirm and verify the qualifications of the tenderer who submitted the lowest evaluated responsive tender to be awarded the contract in accordance with this Act.

(3) To acknowledge that the report is a true reflection of the proceedings held, each member who was part of the due diligence by the evaluation committee shall—

(a) initial each page of the report; and

(b) append his or her signature as well as their full name and designation.

140. We understand the above provision of the law to mean that after completing the evaluation of tenders but before awarding a contract, the evaluation committee is permitted to conduct a due diligence exercise to confirm and verify the qualifications of the tenderer who submitted the lowest evaluated responsive bid. This process ensures that the tenderer indeed meets all the necessary legal, technical, and financial requirements before an award is made. The law further requires that the due diligence report be documented in writing, with each participating committee member initialling every page and signing the final report to authenticate its accuracy and confirm collective responsibility for the findings.

141. Regulation 80 of the Regulations, 2020 provides more information on the post-qualification process as follows:

80. Post-qualification

(1) Pursuant to section 83 of the Act, a procuring entity may, prior to the award of the tender, confirm the

qualifications of the tenderer who submitted the bid recommended by the evaluation committee, in order to determine whether the tenderer is qualified to be awarded the contract in accordance with sections 55 and 86 of the Act.

(2) If the bidder determined under paragraph (1) is not qualified after due diligence in accordance with the Act, the tender shall be rejected and a similar confirmation of qualifications conducted on the tenderer—

(a) who submitted the next responsive bid for goods, works or services as recommended by the evaluation committee; or

(b) who emerges as the lowest evaluated bidder after re-computing financial and combined score for consultancy services under the Quality Cost Based Selection method.

142. We understand the above provision of the law to mean that before awarding a tender, the procuring entity is required to verify whether the bidder recommended by the evaluation committee is indeed qualified to be awarded the contract, as guided by sections 55 and 86 of the Act.

This verification process, commonly known as due diligence, serves to confirm the bidder’s technical, legal, and financial capacity. If the recommended bidder fails to meet the qualification requirements upon such verification, their tender must be rejected, and the procuring entity should then conduct a similar confirmation exercise on the next responsive bidder, or, in the case of consultancy services under the Quality Cost Based Selection method, on the bidder who becomes the lowest evaluated after re-computation of the financial and combined scores.

143. Having explained the law on due diligence as per the Act and the Regulations, 2020, we find it wise to reproduce Clause 14 of the Bid Data Sheet contained in the Tender Document as it is the section of the Tender document that talks about due diligence. Clause 14 of the Bid Data Sheet provides as follows:

14.	<i>Due Diligence</i>	<i>KenGen may at its own discretion conduct due diligence on the eligible bidders to establish their ability to perform the contract before the award of the contract.</i>
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144. We understand this provision to mean that KenGen reserves the discretion to conduct a due diligence exercise on eligible bidders before awarding the contract, with the primary objective of assessing and verifying whether such bidders possess the necessary technical, financial,

and organizational capacity to effectively perform and deliver the contractual obligations to the required standards.

145. Turning to the matter at hand, we note that it is not in dispute that the Applicant was disqualified following the due diligence exercise conducted on its bid at the Preliminary Evaluation Stage. The reason for the disqualification is captured in the Applicant's Letter of Notification of Intention to Award, which is partly reproduced below:

Sintmond Group Ltd,

P.O. Box 11804-00100

IMARA DAIMA

Tel. XXXXXXXXXXXXXXXXXX

Email: XXXXXXXXXXXXXXXXXXXX

LETTER OF REGRET

***TENDER FOR SALE OF CERTIFIED EMISSION REDUCTIONS
(CERS)(RETENDER)***

We refer to the above tender, reference KGN-SALE-005-2025 opened on 24th June, 2025 and we wish to advise that your firm was not successful due to the following reason(s):

1. Based on the due diligence outcome, you failed to meet requirements on the specific/relevant experience, under MR 16 as you did not demonstrate previous successful participation in Emission Reduction trading/transactions of CER's or VER's, as listed below;

i. While reviewing the previous experience and your performance history of it was noted that the you were awarded Tender No.KGN-SALE-001-2024 for the Sale of 4,578,148 Certified Emission Reductions (CERs)by KenGen, valued at USD 32,047,036.00, on 7th May 2024. Despite being granted two extensions under the contract, and a stay order by the High court you failed to honour its contractual obligations.

ii. The current tender for 6,384,398 CERs incorporates the 4,578,148 CERs previously terminated for non-performance by your firm. This creates a direct and material nexus between your past failure and the subject matter of the present procurement.

iii. In your submission you referred to a past transaction involving the procurement of 200 CERs at a total USD 180 (KES 23,220) for internal business use.it was

established that while this demonstrated limited participation in the carbon market, the volume and scale of the transaction are negligible compared to the magnitude of the current tender involving 6.38 million CERs. This was therefore determined that such a transaction did not provide credible evidence of capacity to undertake a contract of this scale.

- iv. In addition, you did not furnish any new or independent client references demonstrating successful performance of comparable contracts.***

The bidder awarded the contract is JV of Munja Trading Limited and Marwil Energy Holding AS at the total price of USD19,637,758.00 (Say United States Dollars Nineteen Million, Six Hundred and Thirty-Seven Thousand, Seven Hundred and Fifty-Eight) for 6,384,398 CER's.

Please note that this letter supersedes the notification letter dated 1st August 2025. This is following the ruling by the Public Procurement Administrative Review Board as per the Application No. 90/2025.

We would however, like to thank you for your interest to do business with us.

Yours faithfully,

VINCENT MAMBOLEO

GENERAL MANAGER - SUPPLY CHAIN

For:KENYA ELECTRICITY GENERATING COMPANY PLC

146. We understand the reasons for the Applicant's disqualification to be that the Procuring Entity found that although the Applicant had previously been awarded Tender No. KGN-SALE-001-2024 for the sale of 4,578,148 Certified Emission Reductions (CERs) valued at USD 32,047,036.00, it failed to honour its contractual obligations despite two granted extensions and a stay order issued by the High Court. The Procuring Entity further observed that the current tender for 6,384,398 CERs included the same CERs that were previously terminated for non-performance by the Applicant, thereby creating a direct nexus between the earlier default and the current procurement. Additionally, the Applicant's cited a past transaction involving 200 CERs valued at USD 180 (KES 23,220) was deemed negligible in scale and insufficient to demonstrate capacity for a contract of this magnitude. Lastly, the Applicant did not provide any new or independent client references evidencing successful completion of comparable contracts.

147. We note that at the core of all the reasons advanced for the Applicant's disqualification lies the question of past performance. Before analysing those reasons, we find it necessary to address whether past performance formed part of the evaluation criteria in the Tender Document. Upon perusal, we observe that Clause 14 of the Bid Data Sheet made reference to the Procuring Entity's obligation "**...to establish the tenderer's ability to perform the contract before the award of the contract.**" We interpret this clause as encompassing an assessment of past performance, since one of the most practical means of determining a tenderer's ability to perform a future contract is by examining their previous performance in similar assignments.

148. The first reason cited for the Applicant's disqualification was that, having previously been awarded Tender No. KGN-SALE-001-2024 for the sale of 4,578,148 CERs valued at USD 32,047,036.00, the Applicant allegedly failed to honour its contractual obligations. The Applicant, however, contended that it ought to have been afforded an opportunity to clarify that any perceived non-performance in the earlier tender was not due to its own fault, but rather resulted from the Procuring Entity's unilateral termination of the contract, which subsequently became the subject of conservatory orders issued by the High Court.

149. In assessing the weight of the foregoing ground, we reiterate that Clause 14 of the Bid Data Sheet expressly provided for past performance as a

criterion during due diligence, as earlier noted. While the Respondents could not disregard the fact that they had previously engaged the Applicant in a similar tender involving the same subject matter, which was subsequently terminated due to alleged non-performance, we cannot also ignore that the alleged non-performance is sub judice and forms the subject of confidential arbitral proceedings and ought not to have been considered by the Respondents.

150. The second reason for disqualification is intrinsically linked to the first, as it merely elaborates on it by noting that the current tender for 6,384,398 CERs included the 4,578,148 CERs previously terminated for non-performance by the Applicant. Consequently, we find no need for a separate analysis of this ground and instead adopt and incorporate our reasoning under the first ground in addressing this point.

151. Regarding the third reason for disqualification, we observe that the issue concerning the 200 CERs transaction as proof of past experience had previously formed the subject of determination in PPARB Application No. 90 of 2025. In that case, the Board held that MR16 only required proof of previous transactions, which the Applicant had duly provided, and therefore found the Applicant's disqualification at the Preliminary Evaluation Stage to be unlawful. Consequently, the Board ordered a re-evaluation. However, we note that compliance with MR16 did not preclude the application of Clause 14 of the Bid Data Sheet, which

independently required demonstration of the Applicant's ability to perform the present tender.

152. Given the magnitude of the subject tender and the substantial financial value involved, the Applicant bore the obligation to demonstrate its capacity to undertake a contract of such scale. Pursuant to Clause 14 of the Bid Data Sheet, one of the means of establishing such capacity was by evidencing successful performance in previous contracts of comparable value and complexity. However, the Applicant's cited transaction involving 200 CERs was, by all standards, negligible and insufficient to establish capability to perform the current tender. We also note that the Applicant did not provide independent evidence of successful performance in previous contracts of comparable value and complexity despite being given an opportunity to do so via the email of 17th September, 2025. Accordingly, we find that under this ground, the Respondents were justified in concluding that the Applicant lacked the requisite experience and capacity to handle the present tender.

153. Turning to the final reason for disqualification, we note that the Applicant failed to provide any new or independent client references evidencing successful performance of comparable contracts despite being given an opportunity to do so through the email of 17th September 2025. This omission contravened the requirements of Clause 14 of the Bid Data Sheet, which obligated tenderers to demonstrate capacity and reliability through verifiable past performance. The absence of such references

reasonably led the Respondents to conclude that the Applicant lacked the demonstrated capability to execute a contract of the magnitude contemplated under the present tender.

154. From the foregoing analysis, it is evident that the reasons advanced for disqualification revolve around the Applicant's past performance, which was found to be unsatisfactory. The Applicant did not demonstrate any prior experience or capacity to manage a contract of similar magnitude to the present tender. When considered against the backdrop of the earlier terminated tender, the Applicant's performance history did not inspire confidence in its ability to deliver under the current procurement. Accordingly, we are persuaded that a reasonable and prudent procuring entity, faced with the same set of facts, would have reached a similar conclusion, that the Applicant failed to demonstrate sufficient ability/capability to perform the tender.

155. In arriving at the foregoing conclusion, we have also taken into account the submissions made by Counsel for the Interested Party, who recalled that during the hearing of ***PPARB Application No. 90 of 2025***, the Applicant had admitted that, had it known recommendation letters were required under MR16, it would have provided them. In the present case, Clause 14 of the Bid Data Sheet expressly required the Procuring Entity to undertake due diligence, including requesting references and evidence of past experience. Despite being aware of the importance of demonstrating past experience, the Applicant still failed to furnish any

such evidence. The only reasonable inference to draw from this omission is that the Applicant did not possess credible proof of past performance to support its capability to execute the tender.

156. We note that the Applicant relied on the decision in **PPARB Application No. 158 of 2020 On the Mark Security Limited v Kenya Revenue Authority** where the Board faulted the procuring entity for relying solely on its own user department reports rather than obtaining external references during due diligence. The Applicant adopted a similar argument in the present matter, contending that the due diligence exercise undertaken by the Respondents was flawed for the same reason, namely, that it relied on reports generated by the Procuring Entity's own user department instead of independent third-party references.

157. We find the above decision distinguishable from the present matter for the following reasons: Firstly, in **PPARB Application No. 158 of 2020**, the due diligence exercise was conducted across three entities, one of which was the procuring entity's user department. The findings from the two external entities were positive, while only the report from the user department was negative. Conversely, in the present case, the Applicant did not furnish any references from a client.

158. Secondly, in **PPARB Application No. 158 of 2020**, the procuring entity did not take any step to demonstrate that the successful tenderer's

performance was unsatisfactory, as the contract was completed without cancellation and there was no indication of substandard performance. We find this distinguishable from the present Request for Review, where the previous tender involving the Applicant was terminated due to alleged non-performance.

159. In totality, we observe that in **PPARB Application No. 158 of 2020**, the Evaluation Committee acted without objectivity during the due diligence process by relying solely on the user department's negative reference to disqualify the bidder, notwithstanding two other positive reports. In contrast, we are persuaded that the Evaluation Committee in **PPARB Application No. 97 of 2025** acted objectively, and that any reasonable evaluation committee, faced with the same set of circumstances, would have reached a similar conclusion.

160. We therefore find and hold that the due diligence exercise conducted by the Respondents was carried out in accordance with the law, the provisions of the Tender Document, and the Board's directives in **PPARB Application No. 90 of 2025**.

What orders should the Board grant in the circumstances?

161. Having considered the parties' submissions and examined all the evidence on record, we find that the instant Request for Review was filed within the fourteen (14) day period prescribed under Section 167 of the

Act. Accordingly, we hold that the instant Request for Review is not time-barred, and the Board has jurisdiction to determine the matter.

162. We further note that the Respondents complied with the Board's decision in **PPARB Application No. 90 of 2025**, having executed all orders as directed. Additionally, the due diligence conducted on the Applicant was carried out in accordance with the law, the provisions of the Tender Document, and the Board's directives in the said application.

163. We further note that the tender validity period had been extended from 18th September 2025 for a period of fourteen (14) days. Pursuant to the powers conferred upon us under Section 173 of the Act, we deem it necessary to extend the tender validity period by a further twenty-one (21) days from the date of this decision, within which the Respondents shall be required to conclude the tender proceedings.

164. Consequently, the instant Request for Review filed on 6th October 2025, relating to Tender No. KGN-SALE-005-2025 for Sale of Certified Emissions Reductions (Re-Tender), is hereby disallowed as specified in the Final Orders section below.

FINAL ORDERS

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

A. The Request for Review dated 2nd October 2025 and filed on 6th October 2025 be and is hereby dismissed;

B. The tender validity period in respect of Tender No. KGN-SALE-005-2025 – Sale of Certified Emissions Reductions (Re-Tender) be and is hereby extended by twenty-one (21) days from the date of this decision.

C. The Accounting Officer of Kenya Electricity Generating Company PLC be and is hereby directed to oversee the tender proceedings for Tender No. KGN-SALE-005-2025 for Sale of Certified Emissions Reductions (Re-Tender) to their lawful and logical conclusion; and

D. Each party shall bear its own costs of the proceedings.

DATED at NAIROBI, this 27th day of October 2025

.....
PANEL CHAIRPERSON
PPARB

.....
SECRETARY
PPARB

