

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 100/2025 OF 28TH OCTOBER 2025

BETWEEN

FRESQUARE INVESTMENTS COMPANY LIMITED APPLICANT

AND

THE MANAGING DIRECTOR,

KENYA AIRPORTS AUTHORITY 1ST RESPONDENT

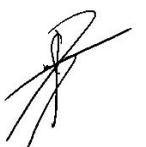
KENYA AIRPORTS AUTHORITY 2ND RESPONDENT

SAJUCY COMPANY LIMITED INTERESTED PARTY

Review against the decision of the Managing Director, Kenya Airports Authority in relation to Tender No. KAA/OT/Kabunde/0183/2024-2025 for Proposed Construction of Kabunde Passenger Terminal Building and Associated Works at Kabunde Airstrip

BOARD MEMBERS PRESENT

1. Mr. George Murugu, FCI Arb, I.P - Chairperson
2. Ms. Alice Oeri - Vice Chairperson & Member
3. CPA Alexander Musau - Member



BACKGROUND OF THE DECISION

The Tendering Process

1. The Kenya Airports Authority invited sealed tenders in response to Tender No. KAA/OT/Kabunde/0183/2024-2025 for Proposed Construction of Kabunde Passenger Terminal Building and Associated Works at Kabunde Airstrip (hereinafter referred to as the "subject tender"). Tendering was conducted under open competitive method (National) and the invitation was by way of an advertisement on 6th May 2025 on My Gov Newspaper, the Procuring Entity's website www.kaa.go.ke and on the Public Procurement Information Portal (PIIP) website www.tenders.go.ke where the blank tender document for the subject tender issued to tenderers (hereinafter referred to as the 'Tender Document') was available for download. Tenders were to be submitted online and the tender's submission deadline was initially scheduled for 22nd May 2025 at 11.00 a.m. The Procuring Entity issued five (5) Addenda clarifying various provisions of the Tender Document while extending the tender submission deadline to 26th June 2025 at 11.00 a.m.

Submission of Tenders and Tender Opening

2. According to a Tender/Quotation Register dated 26th June 2024 furnished as part of the Confidential Documents with respect to the subject tender to the Public Procurement Administrative Review Board (hereinafter referred to as the 'Board') by the Respondent pursuant to



Section 67(3)(e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act') and signed by members of the Tender Opening Committee, a total of twelve (12) tenders were submitted in response to the subject tender and were recorded as follows:

Bidder No.	Name
1.	Sajucy Company Limited
2.	I & C Infrastructures and Construction and Villaz Solutions Limited Joint Venture
3.	Sangira Lalji Kenya Limited
4.	Cilneod Kenya Limited
5.	Shiv Construction Company Limited
6.	Dapalk Consortium Company Ltd
7.	Zonals Company Limited
8.	Arcon Works Limited
9.	Fresquare Investment Company Limited
10.	Hizen Company Limited
11.	Miatonite Company Limited
12.	Superserv Limited

Evaluation of Tenders

3. A Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") appointed by the 1st Respondent undertook evaluation of the twelve (12) tenders as captured in the Evaluation

Report for the subject tender dated 31st July 2025 and signed by members of the Evaluation Committee (hereinafter referred to as the "Evaluation Report") in the following stages:

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

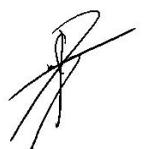
Preliminary Evaluation

4. The Evaluation Committee was required to examine tenders for responsiveness using the criteria provided under the Mandatory & Technical Requirements as per the Qualification Form at page 24 & 25 of Section III- Evaluation and Qualification Criteria of the Tender Document. Tenderers were required to meet all the mandatory requirements at this stage to proceed to the technical evaluation stage.

5. At the end of evaluation at this stage, four (4) tenders were determined non-responsive, while eight (8) tenders, including the Applicant's tender, were determined responsive and proceeded for Technical Evaluation.

Technical Evaluation

6. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under Clause B Technical Evaluation of the Qualification Form at page 24 & 25 of Section III- Evaluation and Qualification Criteria of the Tender Document.



7. At the end of evaluation at this stage, seven (7) tenders, including the Applicant's tender, were determined as non-responsive while one (1) tender was determined responsive and proceeded for evaluation at the Financial Evaluation stage.

Financial Evaluation

8. At this stage of evaluation, the Evaluation Committee was required to examine tender prices and the lowest evaluated bidder would be awarded the subject tender. Following the conclusion of evaluation at this stage, the Evaluation Committee founds as follows:

	BIDDER NAME	AMOUNT QUOTED (KSHS)
1.	<i>Sajucy Company Limited</i>	194,876,660.62

6.1 LOWEST EVALUATED BID SUMMARY

The summary to the lowest responsive evaluated bidder's financial proposal and form of tender price is provided below: -

Project	TITLE: PROPOSED CONSTRUCTION OF THE KABUNDE PASSENGER TERMINAL BUILDING AND ASSOCIATED INFRASTRUCTURE	
Contract No.	KAA/OT/KABUNDE/0183/2024-2025	
Bill of Quantities Summary		
Item No.	Description	Amount (KShs cts)
BILL No.1	PRELIMINARIES AND GENERAL CONDITIONS PAGE 82	12,656,000.00
BILL No. 2	BUILDING & MECH WORKS PAGE 103	98,916,670.00
BILL No. 3	ELECTRICAL SERVICES FROM PAGE 114	21,174,690.00
BILL No. 4	MECHANICAL SERVICES FROM PAGE 125	8,248,260.00
BILL No. 5	FIRE FIGHTING from page 128	2,485,660.00
BILL No. 6	AIR-CONDITIONING from page 129	3,453,000.00
BILL No. 7	ICT NETWORKING FROM PAGE 130	4,522,332.00
BILL No. 8	DAYWORKS FROM PAGE 134	1,222,240.00
	Sub Total	152,678,852.00
	Add 10% Contigencies	15,267,885.20

	<i>Sub Total</i>	167,946,737.20
	<i>Add 16% VAT</i>	26,871,477.95
	<i>Grand Total costs inclusive of all applicable taxes and Public Procurement Capacity Building Levy of 0.03% Carried to page on the form of Tender</i>	194,876,660.62

Note

- *The computed price as submitted in the financial proposal table is Kshs. 194,876,660.62*
- *The project will be financed from the budget of FY24/25 with a provision of Kshs.197 Million.*

Due Diligence

9. According to the Due Diligence Report signed by member of the Evaluation Committee, due diligence was carried out on 1st September 2025 and the Evaluation Committee being satisfied recommended award of the subject tender to the Interested Party at its quoted sum of Kenya Shillings One Hundred and Ninety-Four Million, Eight Hundred and Seventy-Six Thousand, Six Hundred and Sixty and Six two cents only (Kshs. 194,876,660.62).

Evaluation Committee's Recommendation

10. The Evaluation Committee recommended award of the subject tender to the Interested Party, Sajucy Company Limited, being the lowest evaluated bidder at its quoted sum of Kenya Shillings One Hundred and Ninety-Four Million, Eight Hundred and Seventy-Six Thousand, Six Hundred and Sixty and Six two cents only (Kshs. 194,876,660.62).

Professional Opinion

11. In a Professional Opinion dated 14th October 2025 (hereinafter referred to as the "Professional Opinion"), the Ag. Managing



Director/CEO Mr. Vincent Korir reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders and concurred with the recommendations of the Evaluation Committee with respect to award of the subject tender to the Interested Party.

12. Thereafter, the Professional Opinion was approved by Dr. Mohamud M. Gedi, the 1st Respondent herein.

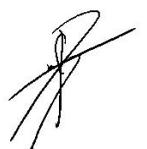
Notification to Tenderers

13. Tenderers were notified of the outcome of evaluation of the subject tender vide letters dated 14th October 2025.

REQUEST FOR REVIEW NO. 100 OF 2025

14. On 28th October 2025, Fresquare Investments Company Limited, the Applicant herein filed a Request for Review dated 27th October 2025 together with a Supporting Affidavit sworn on 27th October 2025 by Mary Mwiu Kivata, its Director (hereinafter referred to as the 'instant Request for Review') through the firm of Omire Law Advocates seeking the following orders from the Board in verbatim:

a) The Honourable Board do allow the Request for Review.



b) The Procuring Entity's letter dated 14th October, 2025 purporting to declare the Applicant's bid for TENDER NO KAA/OT/KABUNDE/0183/2024- 2025 unsuccessful be annulled in its entirety.

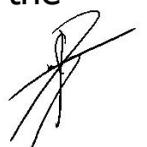
c) The Honourable Board do direct the 2nd Respondent's Evaluation Committee to admit the Applicants' Tender for re-evaluation and proceed with the subject procurement process to its logical conclusion.

d) That in the alternative the Honourable Board do direct the 2nd Respondent's to award the contract to the lowest bidder being the Applicant having met all the requirements.

e) Costs of and/or incidental to this Review be borne by the Procuring Entity.

f) Any other orders that the Board may deem just and fit in the circumstances.

15. In a Notification of Appeal and a letter dated 28th October 2025, Mr. Philemon Kiprop, the Secretary of the Board notified the Respondents of the filing of the Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said Respondents a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020. Further, the



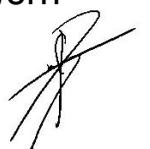
Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 28th October 2025.

16. On 3rd November 2025, the Respondents filed a Reply by the Procuring Entity/ Respondents dated 3rd November 2025 together with confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act.

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

18. *Vide* a Hearing Notice dated 3rd November 2025, the Board Secretary, notified parties and all tenderers in the subject tender of an online hearing of the instant Request for Review slated for 11th November 2025 at 11.00 a.m. through the link availed in the said Hearing Notice.

19. On 6th November 2025, the Interested Party electronically filed through Mogaka Omwenga & Mabeya Advocates a Notice of Appointment of Advocates dated 6th November 2025, Interested Party's Memorandum of Response dated 6th November 2025, and Replying Affidavit sworn



on 6th November 2025 by Julius Asuma Kibagendi. The said pleadings were physically filed on 7th November 2025 together with Interested Party's Notice of Preliminary Objection dated 6th November 2025.

20. On 10th November 2025, the Applicant filed Written Submissions together with a List of Authorities both dated 7th November 2025.

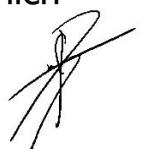
21. The Respondents also filed on 10th November 2025 Written Submissions and a List of Authorities both dated 7th November 2025.

22. *Vide* email dated 11th November 2025, parties were notified of postponement of the hearing to 12th November 2025 at 11.00 a.m. Upon request by the Applicant's counsel, the hearing was further postponed to 14th November 2025 at 11.00 a.m.

23. On 11th November 2025, the Interested Party filed Written Submissions dated 10th November 2025.

24. On 13th November 2025 the Applicant electronically filed Written Submissions in opposition of the Interested Party's Preliminary Objection together with a List of Authorities both dated 13th November 2025. The same were physically filed on the morning of 14th November 2025.

25. At the hearing on 14th November 2025 at 11.00 a.m., the Board read out pleadings filed parties and proceeded to allocate time within which



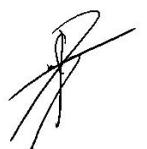
each party was required to proceed and highlight their respective cases. The Board also directed that the hearing of the preliminary objection by the Interested Party would be heard as part of the substantive Request for Review. This was in accordance with Regulation 209(4) of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as 'Regulations 2020') which grants the Board the discretion to hear preliminary objections as part of a substantive request for review and deliver one decision. Thus, the matter proceeded for virtual hearing as scheduled.

PARTIES' SUBMISSIONS

Applicant's submissions

26. In her submissions, counsel for the Applicant, Ms. Omire relied on documents filed before the Board by the Applicant.

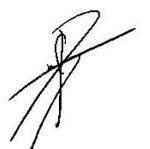
27. In opposition to the Interested Party's Preliminary Objection, counsel submitted that the said preliminary objection as filed was fatally defective and ought to be struck out *in limine* for being filed out of time. In support of her argument, she made reference to Regulation 206 as read with Regulation 209(1) of Regulations 2020 and pointed out that the preliminary objection having been filed on 7th November 2025 was one day late, time barred *ab initio* and not regularized by the Interested Party. She emphasized that the time limits under Regulations 2020 are strict as to ensure expeditious resolution of procurement disputes and promote finality and referred the Board to



the holdings in *Geothermal Development Company Ltd v. Attune Construction Ltd [2021] eKLR* and *Toddy Civil Engineering Company Ltd v. Lake Victoria North Water Works Development Agency Application No. 08 of 2023*, where procedural rigour was upheld.

28. Counsel submitted that entertaining the late objection would prejudice the Applicant which prepared its case within the statutory timelines and offend Article 50(1) of the Constitution on fair hearing and the overriding objective of expeditious disposal under Regulation 207 and urged the Board to strike out the Preliminary Objection with costs.

29. Without prejudice to the foregoing, counsel submitted on the merits of the Preliminary Objection and argued that the instant Request for Review when construed purposively and holistically unequivocally discloses such breached and resultant quantifiable loss and damage to the Applicant including wrongful disenfranchisement from the subject tender (valued at approximately KShs. 173 million), opportunity costs, and prejudice to public interest through inflated procurement expenditure exceeding KShs. 20 million. She pointed the Board to paragraphs 16, 22, 23, 25, and 26 of the Request for Review where loss and damage had been pleaded together with the Supporting Affidavit where it was reiterated that the rejection of the Applicant's tender was in total breach of Article 47(2) and against the principles of fairness, transparency and prejudiced the right of the Applicant. Counsel urged the Board to strike out the preliminary objection with costs.



30.As regards the grounds raised in the Request for Review, Ms. Omire submitted that disqualification of the Applicant’s tender was legally untenable, factually false and procedurally fatal resting on the misconception that (a) the audited financial statements prepared under IFRS for SMEs do not comply with the tender’s requirement for International Financial Reporting Standards (IFRS), and (b) the auditor’s practicing certificate number P/2067, clearly printed beneath the signature on each audit opinion, does not constitute the “name of the auditor” as required by ICPAK By-Law No. 38.

31.Ms. Omire submitted that the Applicant’s submission of five consecutive years of audited accounts (2020–2024), each explicitly certified as compliant with IFRS for SMEs, far exceeded the mandatory threshold stipulated at Section III, item 11 (p. 34) of the Tender Document and demonstrated substantial, if not exemplary, responsiveness. She pointed out that the Tender Document did not prescribe ‘full IFRS’, did not prohibit the use of IFRS for SMEs, and imposed no additional qualification on the IFRS framework and as such, the requirement that financial statements be ‘prepared in accordance with International Financial Reporting Standards (IFRS)’ is to be interpreted in the context of Kenyan law, ICPAK practice, and international accounting norms, all of which treat IFRS for SMEs as fully compliant IFRS for non-publicly accountable entities.

32. Counsel while relying on the holding in *Republic v Public Procurement Administrative Review Board ex parte Olive Telecommunication PVT*



Limited [2014] eKLR ; OJSC Power Machines Limited, TransCentury Limited, and Civicon Limited v Public Procurement Administrative Review Board & 2 others [2017] eKLR; and Republic v Public Procurement Administrative Review Board; Director General Energy and Petroleum Regulatory Authority (Ex parte Applicant); Datasec Limited (Interested Party) [2022] eKLR pressed on that procuring entities cannot impose requirements not stated in the Tender Document.

33. She pointed out that the Applicant's financial statements submitted at pages 85, 98, 111, 124 and 137 of its bid explicitly declare compliance with IFRC for SMEs and include balance sheets, profit and loss accounts, and cash flow statements for 2020, 2021, 2022, 2023, and 2024 all audited, signed, and dated. She urged the Board to declare that disqualification of the Applicant's bid on the ground that its IFRS for SMEs is non-complaint was illegal, irrational and ultra-vires.

34. Counsel submitted that the disqualification of the Applicant's bid on the basis that the name of the auditor does not appear on the independent auditor opinion was factually incorrect, legally misconceived and procedurally abusive.

35. She pointed out that each of the five audit opinions for the years 2020, 2021, 2022, 2023, and 2024 were personally signed by the responsible auditor with the practicing certificate number P/2067 clearly and prominently printed immediately beneath the signature line at pages



80, 93, 106, 119 and 132 of the Applicant's bid. She argued that this format fully satisfies the requirements of ICPAK By-Law No. 38, the ICPAK Council Guideline on Signing Assurance Engagements (December 2013), and the tender's evaluation criteria. She further argued that the Procuring Entity's insistence on a standalone full personal name absent any such mandate in the tender or ICPAK Regulations represents an impermissible elevation of form over substance, a post tender variation of criteria and a breach of duty to evaluate strictly per the published terms.

36. She made reference to ICPAK By-Law No. 38 and stated that the said provision does not mandate a full personal name and requires that only the identity of the signing member be indicated prominently below the signature which was a requirement precisely met by the P/2067 designation and reinforced by the ICPAK Council Guideline on Signing Assurance Engagements (December 2013).

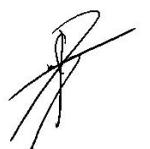
37. Counsel submitted that the intention of By-Law 38 is to ensure that an identifiable licensed auditor takes responsibility for the audit opinions and it is not a hyper-technical mandate about the form of signature block noting that the subject tender's reference to audit opinions 'issued in accordance with ICPAK By-Law 38' simply meant the financials needed to be audited by a duly registered CPA (K) practitioner which the Applicant satisfied noting that each of its submitted audit reports was signed by a CPA (K) holding a valid

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practicing certificate no. P/2067 of the firm of AMG Kenya – Certified Public Accountants.

38.It is the Applicant's case that the audit reports bore the firm's letterhead and were personally signed by the responsible CPA with his practicing number P/2067 shown below the signature. It contends that though the signing partner's personal name may not have been separately typed out in the block, the unique practicing number identifies him rendering the audit opinions compliant in substance with By-Law 38 and the tender requirement. It further contends that at worst, if the Procuring Entity expected the literal printing of the individual's name next to the signature, this was a minor formality that did not affect the authenticity or validity of the audit reports. It pointed out that the auditor who signed is traceable by his membership/practice number and there is no doubt that the financial statements were audited by an authorized person, as required.

39.Without prejudice to the foregoing, Ms. Omire while making reference to Section 79(2)(b) of the Act submitted that omitting the typed name, while providing the membership name, could be viewed as a deviation and is a textbook example of a minor deviation under the Act as it does not materially depart from any tender requirement noting that the omission was a harmless oversight or difference in format that can be corrected without affecting the substance of the tender.

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40. She further submitted that the alleged missing name of the auditor neither changes the Applicant's financial capacity nor gives it any unfair advantage as it is purely an administrative technicality which the Board is empowered by law to overlook in the interest of substantive compliance. In support of her argument, she referred the Board to the holding in *Republic v. PPARB ex parte Roben Aberdare Ltd (2019)* and *Republic v Public Procurement Administrative Review Board & Others ex parte Sinopec International Petroleum Service Corporation [2024]*.

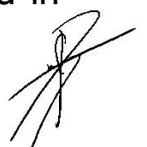
41. The Applicant urged the Board to allow the instant Request for Review as prayed.

Respondent's submissions

42. In his submissions, counsel for the Respondents, Mr. Njagi relied on its documents filed before the Board including confidential documents concerning the subject tender submitted pursuant to Section 67(3)(e) of the Act.

43. Mr. Njagi indicated that the Respondents were in support of the Interested Party's Preliminary Objection and associated themselves with submissions made by the Interested Party in regard of the same.

44. With regard to the substance of the instant Request for Review, counsel submitted that the Procuring Entity can only consider bids which are substantively responsive to the requirements stipulated in

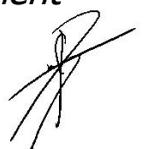


the Tender Document. He pointed the Board to Part B – Technical Evaluation of the Tender Document and indicated that all bidders were obligated to meet the said requirement and that the same was in compliance with the provisions of the Act i.e., Section 58, 79(1), 80(2) of the Act and Article 227 of the Constitution.

45.He further pointed the Board to Regulation 8 of the Accountants (Standards of Professional Practice and Ethical Conduct) and ICPAK Guidelines on Signing Assurance Engagements – Independent Audit Opinions: By Law No. 38 and submitted that a member in practice must sign their own name on assurance engagements and other engagements on behalf of the firm and where a member uses the firm’s name, the name of the individual signing must be placed prominently below it.

46.The Respondents contend that whereas the Applicant submitted financial statements audited by the firm of AMG-Kenya Limited, with a stamp and signature affixed thereto, the name of auditor who conducted the audit was not indicated as provided under ICPAK-By Law 38. They further contend that the Applicant’s non-compliance rendered it ineligible and it was validly excluded from subsequent stages of evaluation.

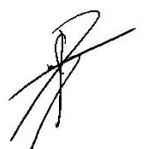
47. Mr. Njagi submitted that a responsive tender is one that conforms to all the eligibility and mandatory requirements in the Tender Document and referred to the holding in *Republic v Public Procurement*



Administrative Review Board & another; Premier Verification Quality Services (PVQS) Limited (Interested Party) Ex Parte Tuv Austria Turk [2020] eKLR; Republic v Public Procurement Administrative Review Board ex parte Guardforce Group Limited; Pwani University & 2 Others (Interested Parties) [2021] eKLR; and Republic v Public Procurement Administrative Review Board Ex parte Meru University of Science & Technology; M/S Aaki Consultants Architects and Urban Designers (Interested Party) [2019] KEHC 9313 (KLR).

48. Counsel pointed out that technical specifications are not merely procedural since they define the Procuring Entity's precise requirements, safeguard quality and performance, and ensure fairness and transparency in the evaluation process hence form the foundation upon which responsiveness of a tender is assessed, and non-compliance with such specifications renders a bid non-responsive.

49. While making reference to the holding by the Board in *PPARB Application No. 81 of 2020* and *PPARB Application No. 132 of 2020*, counsel submitted that the Applicant's Annual Report and Financial Statements for the years ended 2021–2024 did not constitute certified Audited Annual Financial Accounts since the said financial accounts were not properly attested, as the name of the certifying auditor was not provided contrary to the requirements of ICPAK By-Law No. 38 and Guideline 8 of the Accountants (Standards of Professional Practice and Ethical Conduct) Regulations.



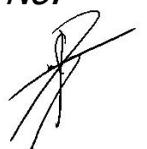
50.He urged the Board to dismiss the instant Request for Review with costs.

Interested Party's submissions

51.In his submissions, counsel for the Interested Party, Mr. Mogaka submitted that the Interested Party relied on its documents filed before the Board.

52.Mr. Mogaka urged the Board to admit and allow the Preliminary Objection since no prejudice was being suffered by its admission noting that the Applicant had argued all issues raised therein. He argued that the objection raised goes to jurisdiction which is the root in which the Board exercises its powers and where there is no jurisdiction, the Board has to down its tools.

53.Counsel referred the Board to Section 167(1) of the Act and submitted that for a tenderer to invoke the jurisdiction of the Board, it ought to amongst others, demonstrate that it has suffered or is likely to suffer loss and damage. He pointed out that the instant Request for Review shows that the Applicant did not plead that it has suffered or risks suffering loss or damage due to breach of a duty imposed on the procuring entity by the Act. He further pointed out that failure to plead loss or damage is fatal rendering the review application incompetent. In support of his argument, he referred the Board to the holding in *James Oyondi t/a Betoyo Contractors & another v Elroba Enterprises Limited & 8 others (2019) KECA 916 (KLR)* and *PPARB Application No.*



8 of 2023 and sought for the review to be struck out with costs to the Interested Party.

54.As to the substantive grounds of the review, counsel referred the Board to Section III – Evaluation and Qualification Criteria Item 11 of the Tender Document and submitted that the Applicant by its own pleadings had admitted that its submitted audited financial statements did not bear the individual auditors name as required by ICPAK By Law No. 38 which only contained the firms name, stamp and certificate number which proves that the Applicant’s bid was non-compliant with the mandatory requirement and rightly deemed to be non-responsive pursuant to Section 79(1) of the Act.

55.While making reference to the holding in *Republic v Public Procurement Administrative Review Board; Accounting Officer, Kenya Rural Roads Authority & 2 others (Interested Parties) Ex Parte Roben Aberdare (K) Ltd [2019] KEHC 5570 (KLR)* counsel submitted that all bidders including the Applicant were required to satisfy all mandatory requirements in order to qualify and proceed for further evaluation.

56.It is the Interested Party’s case that evaluation of the subject tender was done strictly in accordance with the evaluation criteria set out in the Tender Document pursuant to Section 80(2) of the Act.

57.Counsel urged the Board to dismiss the instant Request for Review with costs



Applicant's Rejoinder

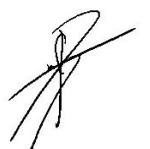
58. In a rejoinder, Ms. Omire reiterated that the Interested Party's preliminary objection as filed is out of time as per Regulations 2020 and must be struck out. She also reiterated that the jurisdiction of the Board was properly invoked pursuant to Section 167(1) of the Act.

59. Counsel submitted that By Law No. 38 was complied with to the extent that the identification of the auditor was clearly spelt out in the Applicant's financial statements and urged the Board to allow the instant Request for Review as prayed.

60. At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 28th October 2025 was due to expire on 18th November 2025 and that the Board would communicate its decision on or before 18th November 2025 to all parties to the Request for Review via email.

BOARD'S DECISION

61. The Board has considered each of the parties' cases, documents, pleadings, written submissions, list and bundle of authorities together with confidential documents submitted to the Board by the Respondents pursuant to Section 67(3)(e) of the Act and finds the following issues call for determination.



A. Whether the Interested Party's Notice of Preliminary Objection as filed is properly before the Board.

Depending on the determination of Issue A;

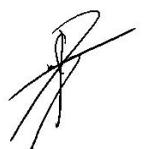
B. Whether the Board has jurisdiction to hear and determine the instant Request for Review;

In determining the second issue, the Board will make a determination on whether the Applicant has the requisite *locus standi* to approach the Board by dint of Section 167(1) of the Act on the question of pleading loss and damage.

Depending on the determination of Issue B;

C. Whether the Procuring Entity's Evaluation Committee in disqualifying the Applicant's tender at the Technical Evaluation stage acted in breach of the provisions of Section 80(2) of the Act.

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



Whether the Interested Party's Notice of Preliminary Objection as filed is properly before the Board.

62. The Applicant in opposition to the Interested Party's Notice of Preliminary Objection dated 6th November 2025 submitted that the said preliminary objection was fatally defective and ought to be struck out *in limine* for being filed out of time and contrary to Regulation 209(1) of Regulations 2020. Ms. Omire for the Applicant pointed out that the deadline for filing a preliminary objection in the matter lapsed on 6th November 2025 and indicated that the Board lacks discretion to condone the delay in filing the same. She further indicated that entertaining the late objection would prejudice the Applicant who had prepared its case within the statutory window and offend Article 50(1) of the Constitution and the overriding objective of expeditious disposal under Regulation 207 of Regulations 2020.

63. In response, Mr. Mogaka for the Interested Party urged the Board to admit the Interested Party's Notice of Preliminary Objection and submitted that no prejudice had been occasioned on the Applicant as it had argued on all issues raised and noting that the objection raised goes to the jurisdiction of the Board.

64. Regulation 209(1) of Regulations 2020 provides as follows:

"Preliminary Objection

(1) A party notified under regulation 206 may file a preliminary objection to the hearing of the request for review



to the Secretary of the Review Board within three days from the date of notification.”

65. Regulation 206 of Regulations 2020 referred to above provides as follows:

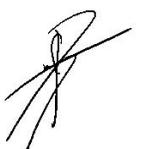
"206. Notice of Hearing

(1) The Review Board Secretary shall give reasonable notice of the date fixed for hearing to all parties to the review.

(2) The notice referred to in paragraph (1) shall be in the format set out in the Sixteenth Schedule of these Regulations.”

66. In essence, Regulation 206 as read with 209(1) of Regulations 2020 provide that any party notified by the Board Secretary of a date fixed for hearing of a request for review may file a preliminary objection to the hearing of the request for review within three (3) days from the date of being notified by the Board Secretary of the date fixed to hear the request for review.

67. The Board observes that it is not in dispute that the Interested Party's Notice of Preliminary Objection was filed outside the timelines stipulated under Regulation 209(1) of Regulations 2020 having been filed one (1) day late after the lapse of the stipulated three (3) days. This Board, differently constituted, in **PPARB Application No. 81 of 2020 Tunasco Insaat Anonim Sirketi v The Accounting Officer, Kenya Medical Supplies Authority & Another** while cautioning parties before it on the importance of observing timelines stated as follows:

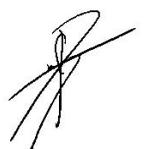


"This Board would like to remind procuring entities and aggrieved candidates/tenderers to be mindful of the timelines provided in Circular No. 2/2020 of 24th March 2020 read together with section 167 (1) and 171 (1) of the Act and conduct themselves in a manner that promotes the right to a fair hearing under Article 50 of the Constitution. It is unacceptable for parties to a request for review to ignore the timelines and procedure specified in the aforementioned provisions undermining the authority vested upon the Board pursuant to the Act."

68. Turning to the circumstances in the instant Request for Review, the Interested Party contends that its Preliminary Objection goes to the jurisdiction of the Board and is hence based on a point of law. Notably, the Applicant substantively addressed the Interested Party's Preliminary Objection in its Written Submissions in Opposition to the Interested Party's Preliminary Objection dated 13th November 2025 and at the hearing of the instant Request for Review.

69. We note that the definition of a preliminary objection was well set out in the case of **Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd [1969] EA 696** as follows:

"So far as I'm aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit."



70. Further Sir Charles Newbold held that:

"The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop"

71. Superior courts have on various occasions addressed the question of the appropriate time to raise a preliminary objection. In **Beatrice Cherotich Koskei and Another –vs- Olenguruone Land Dispute Tribunal and 2 Others Misc Civil Appl 861 of 2007**, the High Court observed as follows:

"If, as respondents' counsel contends, the present application is defective and incompetent, any proceedings based on it would be a nullity and a waste of everybody's time. It is trite law that a preliminary objection can be raised at any time and that if such an objection exists, it is preferable for it to be raised at the earliest possible opportunity. I, therefore, hold that respondents' counsel is entitled to raise his preliminary



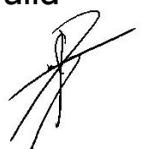
objection to the application as it stands, for the applicants to respond thereto for the court to make a determination thereon."

72. The above sentiments echoed the view of the High Court in the case of **Ali Oshan and Others –vs- Mrs. Catherine Kaswii Nyiha and Others Misc Civil Application 525 of 2002** where it stated as follows:

"It is obvious that the Kenya National Football Federation Constitution does not allow parties whose disputes fall within the definition of Article XIX (1) to commence proceedings in a court of law but to refer them to Arbitration. ... It is trite law that a preliminary objection can be raised at any time when the action is still active. Hence Mr. Gikandi is perfectly right to raise the preliminary point at this stage... "

73. From the foregoing, it is preferable for a preliminary objection to be raised at the earliest possible opportunity. This may have informed the provisions under Regulation 209(1) of Regulations 2020 capping the filing a preliminary objection to the hearing of a request for review within three (3) days of notification of the date fixed for hearing noting the perishability of procurement proceedings and the limited timeline of 21 days within which the Board is required to complete a review as stipulated under Section 171 of the Act.

74. Given the foregoing, the Board agrees with the views expressed in the above case law and is of the considered opinion that if there is a valid



objection on a point of law to a matter proceeding before it, either for want of jurisdiction or for some other sufficient reason, then such an objection ought to be raised at the earliest opportune time and the Board is obliged to decide the issue straight away on the material before it, thus affording all parties an opportunity to be heard.

75. Notably, the Court of Appeal observed in **Suleiman Said Shabhal –vs- Independent Electoral and Boundaries Commission and 3 Others, Civil Appeal No 42 of 2013** as follows as regards jurisdictional questions;

"This Court, in The Owners of the Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd (supra) stated that a question as to the jurisdiction of the court, which may be raised by way of a preliminary objection, ought to be raised at the earliest opportunity and the court seized of the matter is obliged to decide the issue straight away on the material before it."

76. In the persuasive authority from the Supreme Court of Nigeria in the case of **State v Onagoruwa [1992] 2 NWLR 221 – 33 at 57 – 59** the Court held that:

"Jurisdiction is the determinant of the vires of a court to come into a matter before it. Conversely, where a court has no jurisdiction over a matter, it cannot validly exercise any judicial power thereon. It is now common place, indeed a well beaten legal track, that jurisdiction



is the legal right by which courts exercise their authority. It is the power and authority to hear and determine judicial proceedings. A court with jurisdiction builds on a solid foundation because jurisdiction is the bedrock on which court proceedings are based."

77. In the circumstances, the Interested Party's Notice of Preliminary Objection dated 6th November 2025 and filed on 7th November 2025 which raises a question as to the jurisdiction of the Board to entertain the instant Request for Review be and is hereby admitted as being properly filed before the Board.

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

78. This Board is mindful of the established legal principle that courts and decision-making bodies can only preside over cases where they have jurisdiction and when a question on jurisdiction arises, a Court or tribunal seized of a matter must as a matter of prudence enquire into it before doing anything concerning such a matter in respect of which it is raised.

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

"... the power of the court to decide a matter in controversy and presupposes the existence of a duly constituted court with control over the subject matter and the parties ... the power of courts to inquire into facts, apply the law, make

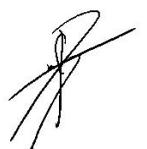


decisions and declare judgment; The legal rights by which judges exercise their authority.”

80. The celebrated Court of Appeal decision in **The Owners of Motor Vessel “Lilian S” v Caltex Oil Kenya Limited [1989] eKLR; Mombasa Court of Appeal Civil Appeal No. 50 of 1989** underscores the centrality of the principle of jurisdiction. In particular, Nyarangi JA, decreed:

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

81. The Supreme Court added its voice on the source of jurisdiction of a court or other decision-making body in the case **Samuel Kamau Macharia and another v Kenya Commercial Bank Ltd and 2 others [2012] eKLR; Supreme Court Application No. 2 of 2011** when it decreed that;



"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with Counsel for the first and second Respondent in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter for without jurisdiction the Court cannot entertain any proceedings."

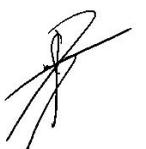
82. The jurisdiction of a court, tribunal, quasi-judicial body or an adjudicating body can only flow from either the Constitution or a Statute (Act of Parliament) or both.

83. This Board is a creature of statute owing to the provisions of 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."

84. Further, Section 28 of the Act provides for the functions and powers of the Board as follows:

"(1) The functions of the Review Board shall be—



(a) reviewing, hearing and determining tendering and asset disposal disputes; and
(b) to perform any other function conferred to the Review Board by this Act, Regulations or any other written law.”

85. The above provisions demonstrate that the Board is a specialized, central independent procurement appeals review board with its main function being reviewing, hearing and determining tendering and asset disposal disputes.

86. The jurisdiction of this Board is provided for under Part XV – Administrative Review of Procurement and Disposal Proceedings and specifically in Section 167 of the Act which provides for what can and cannot be subject to proceedings before the Board and Section 172 and 173 of the Act which provides for Powers of the Board.

87. Turning to the instant Request for Review, the Interested Party challenged the jurisdiction of the Board to hear and determine the instant Request for Review as follows:

As to whether the Applicant has the requisite locus standi to approach the Board by dint of Section 167(1) of the Act on the question of pleading loss and damage.



88. The Interested Party raised a preliminary objection to the hearing of the instant Request for Review on the ground that the Applicant lacks *locus standi* to institute the request for review pursuant to Section 167(1) of the Act since it has neither claimed or pleaded that it has suffered and/or risk suffering any loss or damage as a result of the alleged breach of duty imposed on the procuring entity by the Act.

89. The Respondents associated themselves with submissions made on this issue by the Interested Party.

90. In response, the Applicant submitted that it duly pleaded that it risks suffering loss or damage as a result of the alleged breach of duty imposed on the Procuring Entity and pointed the Board to paragraphs 19, 22, 23, 25, and 26 of the Request for Review and averments made in the accompanying Supporting Affidavit. It reiterated that it had complied with the requirements under Section 167(1) of the Act and has the requisite *locus standi* to seek administrative review under the Act.

91. We note that Section 167 of the Act 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.

(2)

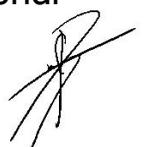
(3)

(4)

92. In essence, for one to invoke the jurisdiction of the Board, they need to approach the Board as provided under Section 167(1) of the Act and must (a) either a candidate or a tenderer (within the meaning of Section 2 of the Act), (b) claim to have suffered or to risk suffering, loss or damage due to breach of a duty imposed on a procuring entity by the Act or Regulations 2020, and (c) seek administrative review by the Board within fourteen (14) days of notification of award or date of occurrence of alleged breach of duty imposed on a procuring entity by the Act and Regulations 2020 at any stage of the procurement process in a manner prescribed under Regulation 203 of Regulations 2020.

93. Having considered parties rival submissions, we note that superior courts have pronounced themselves on the aforementioned requirement for a candidate or tenderer to plead suffering or risk suffering loss or damage due to the breach of a duty imposed on a procuring entity by the Act or Regulations 2020 as provided under Section 167 of the Act.

94. In **Mombasa Civil Appeal No. 131 of 2018 James Ayodi t/a Betoyo Contractors & Another vs Elroba Enterprises Ltd & Another (2019) eKLR** (hereinafter referred to as "the James Oyondi



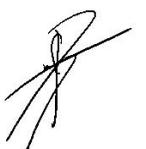
case”), the Court of Appeal was called upon to render itself in an appeal challenging the decision of the High Court which held that the Board ought to have ruled that the Appellants had no *locus standi* before it as they had not demonstrated that they had suffered loss or were likely to suffer loss. The Court of Appeal held as follows:

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

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

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

95. In essence, the court of appeal held that in seeking an administrative review before the Board, a candidate or tenderer must at the very least



claim in its pleadings to have suffered or to be at the risk of suffering loss or damage due to the breach of a duty imposed on a procuring entity by the Act or Regulations 2020.

96. This Board in **PPARB Application No. 8 of 2023 Toddy Civil Engineering Company Limited v Chief Executive Officer, Lake Victoria North Water Works Development Agency & Another** (hereinafter referred to as "the Toddy case") was faced with a similar issue as the one herein and being guided by the holding in the James Oyondi case, held at pages 60 to 65 of its Decision as follows:

"In the James Oyondi case, the applicant never pleaded nor attempted to show themselves as having suffered loss or damage or that they were likely to suffer any loss or damage as a result of any breach of duty by Kenya Ports Authority which the Court of Appeal held is a threshold requirement for any who would file a review before the Board in terms of Section 167(1) of the Act. The Court of Appeal held that it seemed plain that in order to file a review application, a candidate or tenderer must at the very least claim to have suffered or to be at risk of suffering loss or damage for it is not every candidate or tenderer who has a right to file for administrative review. The Court of Appeal further held that the Board ought to have ruled that the Applicant in the request for review had no locus, and that the learned Judge at the High was right to reverse the Board's decision for failing



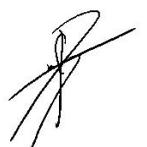
to do so. The Court of Appeal concluded on by holding that they had no difficulty upholding the learned high court judge.

We understand this to mean that for a tenderer to file a request for review application before the Board, it must at the very least claim in its pleadings that it has suffered or is at the risk of suffering loss or damage due to breach of duty imposed on a procuring entity by the Act or Regulations 2020 pursuant to section 167 (1) of the Act.

In essence, administrative review by the Board is sought by a candidate or a tenderer who claims to have suffered or is at risk of suffering loss or damage and such loss or damage emanates from the breach of a duty imposed on a procuring entity by the Act or Regulations 2020.

.....

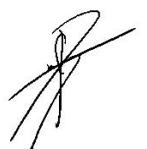
Guided by the holding in the above cases, and in view of the Court of Appeal's holding in the James Oyondi case, the Applicant would have at the very least sought leave to amend its Request for Review (in good time) to incorporate its pleadings and claim/plead having suffered or likely to have suffered loss or damage due to breach of duty imposed on the 2nd Respondent by the Act and Regulations 2020 in line with the provisions of section 167(1) of the Act.



In view of the foregoing, our hands are tied as we are bound by the Court of Appeal's holding in the James Oyondi case and we have no option but to hold that the Applicant lacks the standing to seek an administrative review by the Board for failure to claim/plead that it has suffered or risks suffering loss or damage due to breach of duty imposed on the 2nd Respondent by the Act and Regulations 2020. Accordingly, the Applicant lacks the locus standi to seek administrative review before the Board for failure to claim that it has suffered or risks suffering, loss or damage due to breach of a duty imposed on the 2nd Respondent by the Act or the Regulations.

Consequently, this ground of objection by the Respondents succeeds."

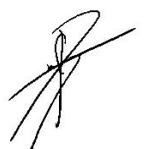
97. From the Toddy case (which was upheld by the Court of Appeal in its judgment delivered on 19th June 2023 in *Civil Appeal No. E295 of 2023 consolidated with Civil Appeal No. E296 of 2023 Lake Victoria North Water Works Development Agency v Toddy Civil Engineering Company Limited & others*), the Board found that it was bound by the Court of Appeal holding in the James Oyondi case and held that the Applicant lacked *locus standi* to seek administrative review before it for failure to claim or plead in its Request for Review that it has suffered or risks suffering loss or damage due to breach of a duty imposed on the procuring entity by the Act or Regulations 2020.



98. Similarly, in **PPARB Application No. 52 of 2023 Space Contractors & Suppliers Investment Limited v Accounting Officer, Kenya Ports Authority & Others**, (hereinafter referred to as “the Space Contractors case”) the Board found at paragraph 170 of its Decision dated 21st August 2023 as follows:

"170. In the circumstances, we find no reason to depart from this Board's holding in the Toddy case and the holding by the Court of Appeal in the James Oyondi case and hereby find and hold that the Applicant lacks the standing to seek an administrative review by the Board for failure to claim or plead that it has suffered or risks suffering loss or damage due to breach of duty imposed on the 2nd Respondent by the Act and Regulations 2020. Consequently, the Applicant lacks the locus standi to seek administrative review before the Board for its failure to plead that it has suffered or risks suffering, loss or damage due to breach of a duty imposed on the 2nd Respondent by the Act or the Regulations."

99. On appeal, the Board's decision in the Space Contractor's case was upheld by the Court of Appeal in its judgement delivered at Mombasa on 27th November 2023 in **Civil Appeal No. E169 of 2023 Space Contractors & Suppliers Investment Limited v Public Procurement Administrative Review Board & Others** which held at paragraph 61 as follows:



".....In our view, the answer to Mr Gikandi's submission is to be found in section 167(1), which requires that the person seeking administrative review by way of a Request for Review be a candidate or a tenderer who ought to claim that it has suffered, or was at the risk of suffering, loss or damage due to the breach of a duty imposed on a procuring entity by the Act or the Regulations. Therefore, it does not suffice to alleged breach. One must go ahead and plead that it has suffered or risk suffering loss or damage as a result of the breach. In our considered view, it is not enough to simply contend that some of those awarded the tender were not qualified as the appellant contended here. The appellant ought to have pleaded what loss, if any, it suffered or risked suffering as a result thereof. It failed to do so."

100. The Court of Appeal held that it does not suffice for one to allege breach. What is required is for one to go ahead and plead that it has suffered or risks suffering loss or damage as a result of the alleged breach.

101. In the present Request for Review, the central issue for determination by this Board is whether the Applicant, through its pleadings, has at least asserted that it has suffered, or is at risk of suffering, loss or damage due to a breach of duty imposed on the Procuring Entity by the Act or the Public Procurement and Asset Disposal Regulations, 2020. This



determination is pivotal in ascertaining whether the Applicant possesses the requisite *locus standi* to bring the matter before the Board.

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

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

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

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

104. The import of the above holdings is that *locus standi* refers to the right to appear and be heard in a court or other proceedings, literally meaning "a place of standing." Consequently, if a party is found to lack *locus standi*, it cannot be heard, regardless of whether its case has merit. This issue alone may lead to the preliminary dismissal of the Request for Review without delving into its substantive aspects.

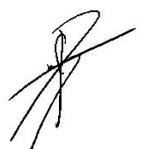


105. Having carefully perused the Request for Review dated 27th October 2025, we note that the Applicant pleaded at paragraphs 19, 22, 23, 25, and 26 of the Request for Review as follows:

"19. THAT the Applicant is aggrieved by the aforesaid decisions of the Procuring Entity and avers that the purported decisions to reject the Applicant's bid despite complying with all the requirements of the Tender document lacks merit, is illegal, null and void. The impugned action by the Procuring Entity is illegal, ultra vires its powers and is contra statute.

22. THAT the Procuring Entity's impugned decision disregarded the factors set out in law and in the Tender Document and took into account irrelevant and immaterial factors not contemplated in the Tender Document effectively deviating from the purpose and objective of the above provisions and disenfranchised the Applicant.

28. THAT further the manner in which the Respondents conducted themselves was not transparent contrary to the objectives and spirit of promoting fairness and competition and ensuring that all the competitors are treated fairly. The Applicant having submitted all requirements as per the Act and the Tender Document had a legitimate expectation that its bid would be fairly



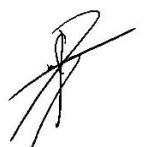
evaluated and awarded which is not the case and thus prejudices the right of the Applicant.

29. THAT the actions of the Procuring Entity offend the provision of Article 227 of the Constitution of Kenya, 2010, which is to the effect that a state organ must contract for goods and services in a manner that is fair, equitable, transparent and cost-effective. The Procuring Entity has flouted this provision by blatantly discriminating against the Applicant.

.....”

106. We note from the above paragraphs that the Applicant contends that it has been ‘aggrieved’, ‘disenfranchised’, ‘prejudiced’, and ‘discriminated’ as a result of the manner in which the Respondents carried out the procurement process leading to disqualification of its bid in the subject tender. The Board understands the reference to being aggrieved, disenfranchised, prejudiced and discriminated to mean that the Applicant suffered or stood to suffer loss and damage as a result of the actions of the Procuring Entity.

107. In arriving at this conclusion, the Board is guided by the holding in **PPARB Application No. 96 of 2024 Eastr Solutions Ltd v The Director General/Accounting Officer, Parliamentary Joint Services & Others**, where the Board differently constituted considered a similar issue on the question of *locus standi* and held at

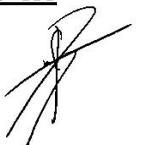


paragraphs 130 to 133 of its Decision dated 11th December 2023 as follows

"130. The question that the Board is now called to answer is whether the Applicant has at the very least claimed that it has suffered or risks suffering loss or damage due to the breach of duty imposed on the Procuring Entity by the Act or Regulations 2020 from its pleadings in the instant Request for Review to enable it establish whether the Applicant has locus standi.

131. We note that Black Laws Dictionary, 9th Edition defines the word 'aggrieved' as "(Of a person or entity) having legal rights that are adversely affected; having been harmed by an infringement of legal rights." Collins Dictionary defines 'aggrieved' as "having a grievance, wronged; injured in one's legal rights."

132. In view of the above definitions, it is our considered opinion that the word 'aggrieved' as pleaded at paragraphs 6 and 11 of the instant Request for Review denotes a claim by the Applicant of a grievance in the procurement proceedings of the subject tender emanating from a breach of duty imposed upon the Respondent by the Act and that its legal rights have been adversely affected as a result of the decision of the Procuring Entity in awarding the subject tender. This in



itself is an express attempt by the Applicant to at least claim in its pleadings that it has suffered or risks suffering loss or damage as a result of breach of duty by the Procuring Entity and therefore meets the threshold requirement for a tenderer intending to file a review before the Board in terms of Section 167(1) of the Act.

133. In the circumstances, we find and hold that the Applicant has the locus standi to seek an administrative review by the Board in the subject tender. Accordingly, this ground of opposition of the 1st Interested Party's Notice of Preliminary Objection dated 30th November 2023 and filed on 1st December 2023 fails."

108. Further, the High Court in **Kamau Murango v Attorney General & another; Cabinet Secretary Ministry of Water, Sanitation and Irrigation (Interested Party) [2022]**, in **Katiba Institute v Judicial Service Commission & 2 others; Kenya Magistrates and Judges Association & 2 others (Interested Parties) (Constitutional Petition E128 of 2022) [2022] KEHC 438 (KLR) (Constitutional and Human Rights) (3 June 2022) (Ruling)** and in **Okello & another v Assembly & 2 others; Shop & Deliver Limited t/a Betika & 7 others (Interested Party) (Constitutional Petition E010 of 2021) [2021] KEHC 94 (KLR) (20 September 2021) (Ruling)** defined **prejudice** as provided for



by the "The Black's Law Dictionary 10th Edition" as "*Damage or detriment to one's legal rights or claims*"

109. In the same vein and in view of the foregoing, we find that the Applicant's claim that it is aggrieved, prejudiced, disenfranchised, and discriminated by the decision and actions of the Respondents in disqualifying its bid in the subject tender denotes a claim by the Applicant of a grievance in the procurement proceedings of the subject tender emanating from a breach of duty imposed upon the Respondents by the Act and that its legal rights have been adversely affected as a result of the decision of the Procuring Entity in awarding the subject tender. This in itself is an express attempt by the Applicant to at least claim in its pleadings that it has suffered or risks suffering loss or damage as a result of breach of duty by the Procuring Entity and therefore meets the threshold requirement for a tenderer intending to file a review before the Board in terms of Section 167(1) of the Act.

110. In the circumstances, we find and hold that the Applicant has the *locus standi* to seek an administrative review by the Board in the subject tender. Accordingly, this ground of opposition fails.

111. In summation, the interested party's preliminary objection lacks merit, the Board has jurisdiction to hear and determine the instant



Request for Review and now proceeds to address the substantive issues framed for determination in the instant Request for Review.

Whether the Procuring Entity's Evaluation Committee in disqualifying the Applicant's tender at the Technical Evaluation stage acted in breach of the provisions of Section 80(2) of the Act

112. It is the Applicant's case that disqualification of its bid in the subject tender on account of non-compliance with Item 11 of Part B – Technical Evaluation of Section III – Evaluation and Qualification Criteria of the Tender Document was illegal, wrongful and unfair since the reason issued by the Respondents for its disqualification constitute an immaterial technicality and factual misrepresentation that does not affect the substantial responsiveness of its bid. The Applicant contends that the Respondents in disqualifying its bid introduced a new mandatory requirement post tender thus varying the tender requirements after tender opening to its detriment and contrary to Section 80(2) of the Act.

113. In response, the Respondents contend that the Applicant's bid was properly disqualified for non-compliance with the mandatory requirement under Item 11 of Part B – Technical Evaluation of Section III – Evaluation and Qualification Criteria of the Tender Document which rendered it non-responsive and ineligible for further evaluation in the subject tender. They maintained that the procurement process and award of the subject tender complied with the law and the requirements set out in the Tender Document.



114. On its part, the Interested Party aligned itself with the submissions by the Respondents and submitted that the Evaluation Committee adhered to the set-out evaluation criteria in the Tender Document in disqualifying the Applicant's bid in the subject tender. It further submitted that the Applicant failed to meet the threshold on the requirements set out in the Tender Document to warrant it being issued the orders sought in the instant Request for Review

115. Having considered parties rival submissions herein, the Board observes that the objective of public procurement is to provide quality goods and services in a system that implements the principles specified in Article 227 of the Constitution, which provides as follows:

Article 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 ..."

116. Justice Mativo (as he then was) in **Nairobi High Court Misc. Application No. 60 of 2020; Republic v The Public Procurement**



Administrative Review Board & another; Premier Verification Quality Services (PVQS) Limited (Interested Party) Ex Parte Tuv Austria Turk [2020] eKLR (hereinafter referred to as "Misc. Application No. 60 of 2020") spoke to the principles under Article 227 of the Constitution as follows:

"45. Article 227 of the Constitution provides that when procuring entities contract for goods or services they must comply with the principles of fairness, equity, transparency, competitiveness and cost-effectiveness. For there to be fairness in the public procurement process, all bids should be considered on the basis of their compliance with the terms of the solicitation documents, and a bid should not be rejected for reasons other than those specifically stipulated in the solicitation document.

46. However, there is a need to appreciate the difference between formal shortcomings, which go to the heart of the process, and the elevation of matters of subsidiary importance to a level, which determines the fate of the tender. The Evaluation Committee has a duty to act fairly. However, fairness must be decided on the circumstances of each case...."

117. The Board observes that the legislation contemplated in Article 227(2) of the Constitution is the Act. Section 3 of the Act underpin



good governance, integrity, transparency and accountability as key pillars in public procurement and asset disposal proceedings.

118. Section 58 of the Act requires a procuring entity to use a standard tender document which contains sufficient information and provides as follows:

"(1) An accounting officer of a procuring entity shall use a standard procurement and asset disposal documents issued by the Authority in all procurement and asset disposal proceedings.

(2) The tender documents used by a procuring entity under subsection (1) shall contain sufficient information to allow fairness, equitability, transparency, cost-effectiveness and competition among those who may wish to submit their applications."

119. In essence, the procuring entity is mandated to use the standard tender document issued by the Public Procurement Regulatory Authority in all its procurement and disposal proceedings and its tender document ought to contain sufficient information to allow fairness, equitability, transparency, cost-effectiveness and competition amongst bidders submitting their bids. This then adheres to the principles of procurement stipulated under Article 227 (1) of the Constitution.



120. Additionally, Section 60(1) of the Act provides that:

"(1) An accounting officer of a procuring entity shall prepare specific requirements relating to the goods, works or services being procured that are clear, that give a correct and complete description of what is to be procured and that allow for fair and open competition among those who may wish to participate in the procurement proceedings."

121. The import of the above provision is that the specific requirements prepared in a tender document relating to goods, works, or services being procured ought to be clear, and give a correct and complete description of what is to be procured so as to allow for fair and open competition among bidders.

122. In the same vein, section 70 of the Act requires a procuring entity to use a standard tender document which contains sufficient information to allow for fair competition among tenderers. Section 70(3) reads as follows:

"(3) The tender documents used by a procuring entity pursuant to subsection (2) shall contain sufficient information to allow fair competition among those who may wish to submit tenders."



123. Section 80(1) and (2) of the Act is instructive on how evaluation and comparison of tenders should be conducted by a procuring entity, as follows:

Section 80 - Evaluation of tender:

(1) The evaluation committee appointed by the accounting officer pursuant to Section 46 of the Act, shall evaluate and compare the responsive tenders other than tenders rejected under Section 82(3).

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

124. Section 80(2) of the Act is clear on the requirement for the Evaluation Committee to evaluate and compare tenders in a system that is fair using the procedures and criteria set out in the Tender Document. A system that is fair is one that considers equal treatment of all tenders against a criterion of evaluation known by all tenderers having been well laid out in the tender document. Section 80(3) of the Act requires for such evaluation criteria to be as objective and quantifiable to the extent possible and to be applied in accordance with the procedures provided in the tender document

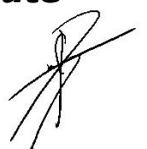


125.Responsiveness of tenders is provided for under Section 79(1) of the Act as follows:

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

126.Responsiveness serves as an important first hurdle for tenderers to overcome. From the above provision, a tender only qualifies as a responsive tender if it meets all eligibility and mandatory requirements set out in the tender documents. In the case of **Republic v Public Procurement Administrative Review Board & another; Premier Verification Quality Services (PVQS) Limited (Interested Party) Ex-parte Tuv Austria Turk [2020] eKLR** the High Court stated that:

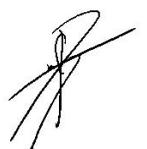
"In public procurement regulation it is a general rule that procuring entities should consider only conforming, compliant or responsive tenders. Tenders should comply with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents. Bidders should, in other words, comply with tender conditions; a failure to do so would defeat the underlying purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some bidders were allowed to circumvent tender conditions. It is important for bidders to compete on an equal footing. Moreover, they have a legitimate



expectation that the procuring entity will comply with its own tender conditions. Requiring bidders to submit responsive, conforming or compliant tenders also promotes objectivity and encourages wide competition in that all bidders are required to tender on the same work and to the same terms and conditions.”

127. Further, the High Court in **Miscellaneous Civil Application 85 of 2018 Republic v Public Procurement Administrative Review Board Ex parte Meru University of Science & Technology; M/S Aaki Consultants Architects and Urban Designers (Interested Party) [2019] eKLR** (hereinafter referred to as Miscellaneous Civil Application No. 85 of 2018) held:

“Briefly, the requirement of responsiveness operates in the following manner: - a bid only qualifies as a responsive bid if it meets all requirements as set out in the bid document. Bid requirements usually relate to compliance with regulatory prescripts, bid formalities, or functionality/technical, pricing and empowerment requirements. Indeed, public procurement practically bristles with formalities which bidders often overlook at their peril. Such formalities are usually listed in bid documents as mandatory requirements – in other words they are a sine qua non for further consideration in the evaluation process. The standard practice in the public



sector is that bids are first evaluated for compliance with responsiveness criteria before being evaluated for compliance with other criteria, such as functionality, pricing, empowerment or post qualification. Bidders found to be non-responsive are excluded from the bid process regardless of the merits of their bids. Responsiveness thus serves as an important first hurdle for bidders to overcome...

...Mandatory criteria establish the basic requirement of the invitation. Any bidder that is unable to satisfy any of these requirements is deemed to be incapable of performing the contract and is rejected. It is on the basis of the mandatory criteria that "competent" tenders are established..."

128. It is settled law that mandatory requirements are the first hurdle that tenderers must overcome for further consideration in an evaluation process. A bidder found to be non-responsive is excluded from the bid process regardless of the merits of its tender. The Evaluation Committee is mandated to evaluate the Applicant's tender using the procedures and criteria set out in the Tender Document having regard to provisions of the Act and the Constitution. A laid out evaluation criteria must, to the extent possible, be objective and quantifiable.



129.The Applicant herein is aggrieved by the notification letter dated 14th October 2025 which informed it that:

".....

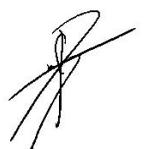
From your bid, we noted that your audited financial statements incorporating balance sheets (statements of financial position), profit and loss statements (statements of comprehensive income) and cash flow statements for any of the last 3 years (2021-2023) or (2022-2024) were not prepared in accordance with International Financial Reporting Standards and incorporating audit opinions issued in accordance with ICPAK By-Law No. 38. The name of the auditor does not appear on the independent auditor opinion.

The bidder who was determined to be the lowest evaluated and therefore the successful tenderer is M/s Sajucy Company Limited at their quoted bid price of Kshs. 194,876,660.62 inclusive of all applicable taxes.

....."

130.There is no doubt that the Applicant's bid in the subject tender was disqualified at the Technical Evaluation stage.

131.The evaluation criteria of the bids submitted in the subject tender was laid out under Section III – Evaluation and Qualification Criteria of the Tender Document. Technical Requirement 11 of Part B –



Technical Evaluation of Section III – Evaluation and Qualification
Criteria of the Tender Document provides:

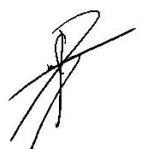
11	Financial Capabilities	The audited balance sheets or, if not required by the laws of the Tenderer’s country, other financial statements acceptable to the Procuring Entity, for the last [5] five years shall be submitted and must demonstrate the current soundness of the Tenderer’s financial position and indicate its prospective long-term profitability.	Audited financial statements incorporating balance sheets (statements of financial position), profit and loss statements (statements of comprehensive income) and cash flow statements for any of the last 3 years (2021-2023) or (2022- 2024) prepared in accordance with International Financial Reporting Standards and incorporating audit opinions issued in accordance with ICPAK	Must Meet
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			<i>By-Law No. 38. Form 3.1 and 3.2 must be filled)</i>	
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132. From the above requirement, a bidder was mandatorily required to provide:

- i. Audited financial statements incorporating balance sheets (statements of financial position), profit and loss statements (statements of comprehensive income) and cash flow statements for any of the last 3 years (2021-2023) or (2022-2024);
- ii. Audited financial statements prepared in accordance with International Financial Reporting Standards;
- iii. Audited financial statements incorporating audit opinions issued in accordance with ICPAK By-Law No. 38; and
- iv. Filled Form 3.1 and 3.2.

133. According to the Evaluation Report, the Applicant's bid was among the seven (7) bids disqualified at the Technical Evaluation stage for the reason that the name of the auditor did not appear on the independent auditor opinion. Other bidders disqualified for the same reason (some amongst other reasons) include Cilneod Kenya Ltd, Arcon Works, Hizen Co. Ltd, Miatonite Co. Ltd, and Superserv Ltd.



134. Having perused the Applicant's original tender submitted to the Board as part of the confidential documents pursuant to Section 67(3)(e) of the Act, we note that the Applicant submitted:

- i. at pages 70 to 72 Filled Form 3.1;
- ii. at page 74 Annual Practicing License – 2025 for CPA George Munga Amolo under Practicing Number P/2067;
- iii. at page 75 Firm Annual Practicing License – 2025 for AMG Kenya under Practicing Firm Number PF/635;
- iv. Audited Financial Statements for the Year 2020, 2021, 2022, 2023, and 2024 at page 76 to 138 of its bid document. These incorporated the Report of the Independent Auditor issued at pages 79-80 for year 2020, 92-93 for year 2021, 105-106 for year 2022, 118-119 for year 2023, and 131-132 for year 2024.

135. We note that all the submitted audit opinions for the aforementioned years were signed as indicated below, being a sample of the report of the Independent Auditor of the state of financial affairs of the Applicant as at 31st December 2024:

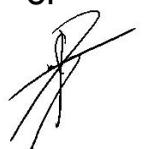


136. From the above, it is clear that the submitted audit opinions were signed by a Certified Public Accountant with a practicing number appended alongside which reads P/2067 and under the firm of AMG which stamped, signed and dated the said audit opinions. However, the name appearing below the signature and practicing number is that of AMG-Kenya, being the audit firm and not of the auditor in person which led to disqualification of the Applicant's bid by the Evaluation Committee since the name of the auditor does not appear on the independent auditor opinion.

137. In their submissions, the Respondents referred the Board to ICPAK Guidelines on Signing Assurance Engagements-Independent Audit Opinions: By Law No. 38 stipulated under Technical Requirement 11 of Part B – Technical Evaluation of Section III – Evaluation and Qualification Criteria of the Tender Document which reads:

"Members in practice shall sign on their assurance engagements in their own names on behalf of their firm whether they are sole proprietorships or partnerships. They may however sign using the name of the firm provided the name of the person signing is indicated in a prominent place below the signature."

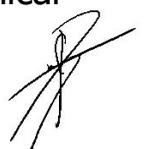
138. The above guideline dictates that an independent auditor when signing an assurance engagement ought to sign in their own name on behalf of their firm whether they are sole proprietorships or



partnerships. Alternatively, they may sign using the name of the firm provided that the name of the person signing is indicated in a prominent place below the signature. In both instances, it is quite clear that the name of the person signing must be indicated in the independent audit opinions so as to be deemed as being in compliant with ICPAK By Law No. 38.

139. In view of the above, the Board is of the considered view that whereas the Applicant submitted audited financial statements audited by the firm of AMG-Kenya Limited for the years 2020, 2021, 2022, 2023, and 2024 and prepared in accordance with the International Financial Reporting Standards, its incorporated Audit Opinions for the said years were not issued in accordance with ICPAK By-Law No. 38 in as far as the name of the auditor signing the independent audit opinions was not indicated and did not appear on the said opinions and the said auditor was only identifiable by the indicated practicing number.

140. It is not enough for the Applicant to have annexed at page 74 of its bid the Annual Practicing License of the auditor signing the Independent Audit Opinions since the criteria categorically required bidders to incorporate audit opinions issued in accordance with ICPAK By-Law No. 38 that mandates the auditor to sign in their own name on behalf of their firm or when using the name of the firm to indicate their name in a prominent place below the signature. It would have been different had Technical Requirement 11 of Part B – Technical

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Evaluation of Section III – Evaluation and Qualification Criteria of the Tender Document omitted the requirement for the incorporated audit opinions to be issued in accordance with ICPAK By-Law No. 38.

141. The Board has had the benefit of perusing the Interested Party's tender and notes that the Interested Party provided its Audited Financial Statements at page 676 to 748 of its bid for the years 2024, 2023, and 2022, which incorporated audit opinions issued in accordance with ICPAK By-Law No. 38 and the said opinions clearly indicated that the engagement partner responsible for the independent audit opinions was CPA Kabuya Julius Kingori P/1435 whose Annual Practicing License 2025 was also submitted at page 677 of the Interested Party's bid document.

142. Compliance by the Interested Party with Technical Requirement 11 of Part B – Technical Evaluation of Section III – Evaluation and Qualification Criteria of the Tender Document promotes the constitutional principle of competitiveness stipulated under Article 227(1) of the Constitution giving it an edge over other non-compliant bidders in the subject tender. This Board, in carrying out its mandate and in balancing the competing principles stipulated under Article 227(1) of the Act, is obligated to be conscious of the need to promote competition amongst bidders and ensure that competitors are treated fairly.

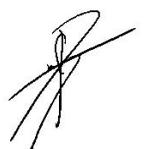
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143. We note that the Applicant while making reference to Section 79(2)(b) of the Act submitted that the effect of omission of the auditor's typed name in the submitted independent audit opinions while providing the auditor's membership number therein could be viewed as a minor deviation that does not materially depart from the tender requirement and is a harmless oversight that can be overlooked in the interest of substantive compliance.

144. The Board has on various occasions considered the import of Section 79(2) and (3) of the Act with respect to minor deviations. Section 79(2) and (3) of the Act provides that:

"(2) A responsive tender shall not be affected by-
(a) minor deviations that do not materially depart from the requirements set out in the tender document; or
(b) errors or oversights that can be corrected without affecting the substance of the tender.
(3) A deviation described in subsection (2)(a) shall-
(a) be quantified to the extent possible; and
(b) be taken into account in the evaluation and comparison of tenders."

145. Essentially, responsiveness of a tender shall not be affected by any minor deviations that do not materially depart from the requirements set out in the Tender Document and that do not affect the substance of a tender. This provision details a minor deviation as one that can

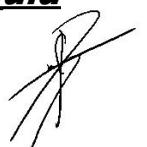


be quantified to the extent possible and shall be taken into account in the evaluation and comparison of tenders.

146. In **Miscellaneous Civil Application No. 85 of 2018** the High Court considered what amounts to a minor deviation and determined as follows:

The term "acceptable tender" means any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document. A tender may be regarded as acceptable, even if it contains minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set out in the tender documents or if it contains errors or oversights that can be corrected without touching on the substance of the tender. Any such deviation shall be quantified, to the extent possible, and appropriately taken account of in the evaluation of tenders. A tender shall be rejected if it is not acceptable....

In public procurement regulation it is a general rule that procuring entities should consider only conforming, compliant or responsive tenders. Tenders should comply with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents. Bidders should, in other words, comply with tender conditions; a failure to do so would



defeat the underlying purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some bidders were allowed to circumvent tender conditions. It is important for bidders to compete on an equal footing. Moreover, they have a legitimate expectation that the procuring entity will comply with its own tender conditions. Requiring bidders to submit responsive, conforming or compliant tenders also promotes objectivity and encourages wide competition in that all bidders are required to tender on the same work and to the same terms and conditions.

147. It is evident that neither the Board nor a procuring entity can waive a mandatory requirement or term it as a "minor deviation" since a mandatory requirement is instrumental in determining the responsiveness of a tender and is a first hurdle that a tender must overcome in order to be considered for further evaluation.

148. In **Republic v Public Procurement Administrative Review Board ex parte Guardforce Group Limited; Pwani University & 2 Others (Interested Parties) [2021] eKLR** Justice E.K. Ogola, held that;

"...it becomes apparent to this court that the aspect of compliance with the mandatory requirement of the tender document aims to promote fairness, equal treatment, good governance, transparency,



accountability and to do away with unfairness. Failure to conform to this mandatory requirement, and/or exempt or give an opportunity to those who had not earlier on conformed to this mandatory requirement translates to unequal and unfair treatment of other tenderers and, if allowed, may encourage abuse of power and disregard of the law by not only bidders, but also procuring entities."

149. Considering the above, we are left with the inevitable conclusion that the Applicant failed to comply with Technical Requirement 11 of Part B – Technical Evaluation of Section III – Evaluation and Qualification Criteria of the Tender Document being a mandatory requirement by failing to indicate the name of the auditor in its submitted audit opinions contrary to ICPAK – By Law 38.

150. In the circumstances, the Board finds that the Procuring Entity's Evaluation Committee correctly evaluated the Applicant's tender at the Technical Evaluation stage in compliance with the provisions of Section 80(2) of the Act, the Constitution and the Tender Document and rightfully disqualified the Applicant at the Technical Evaluation stage.

What orders should the Board grant in the circumstances?

151. The Board has established that the Interested party's preliminary objection lacks merit and the Board has jurisdiction to hear and determine the instant Request for Review.



152. The Board has found that the Procuring Entity's Evaluation Committee evaluated the Applicant's tender in the subject tender at the Technical Evaluation stage in accordance with Technical Requirement 11 of Part B – Technical Evaluation of Section III – Evaluation and Qualification Criteria of the Tender Document, and thus in keeping with the Act and the Constitution, and rightfully disqualified the Applicant's tender for failing to indicate the name of the auditor in its submitted audit opinions contrary to ICPAK – By Law 38, which was a mandatory requirement.

153. The upshot of our findings is that the instant Request for Review fails.

FINAL ORDERS

154. 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 Request for Review dated 27th October 2025 and filed on 28th October 2025:

A. The Request for Review dated 27th October 2025 and filed on 28th October 2025 be and is hereby dismissed.

B. The Respondents are hereby directed to proceed with the procurement proceedings of Tender No.



KAA/OT/Kabunde/0183/2024-2025 for Proposed Construction of Kabunde Passenger Terminal Building and Associated Works at Kabunde Airstrip to conclusion in accordance with the Tender Document, the Act, and the Constitution.

C. Each party shall bear its own costs in the Request for Review.

Dated at NAIROBI this 18th Day of November 2025.


.....
CHAIRPERSON
PPARB


.....
SECRETARY
PPARB

