

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 107/2025 OF 12TH NOVEMBER 2025

BETWEEN

JAMARI ENTERPRISES LIMITED APPLICANT

AND

THE ACCOUNTING OFFICER,

THE KENYA POWER & LIGHTING COMPANY PLC . 1ST RESPONDENT

THE KENYA POWER & LIGHTING COMPANY PLC . 1ST RESPONDENT

Review against the decision of the Accounting Officer, Kenya Power & Lighting Company PLC in relation to Tender No. KP1/9A.2/OT/003/NM/25-26 for Provision of Roads/Pavement Opening/Cutting, Ducting and Reinstatement Services

BOARD MEMBERS PRESENT

- | | |
|------------------------|---------------------|
| 1. Mr. Jackson Awele | - Panel Chairperson |
| 2. Mr. Robert Chelagat | - Member |
| 3. CPA Alexander Musau | - Member |

IN ATTENDANCE

- | | |
|------------------------|-----------------|
| 1. Mr. Philemon Kiprop | Board Secretary |
|------------------------|-----------------|

2. Mr. Abdalla Issa

Secretariat

PRESENT BY INVITATION

APPLICANT

JAMARI ENTERPRISES LIMITED

Mr. Duncan Kiprono - Advocate, Cheboi Kiprono Advocates

RESPONDENT

**THE ACCOUNTING OFFICER, THE KENYA
POWER & LIGHTING COMPANY PLC & THE
KENYA POWER & LIGHTING COMPANY PLC**

Ms. Kihara - Legal Counsel, Kenya Power & Lighting Company Plc

BACKGROUND OF THE DECISION

The Tendering Process

1. The Kenya Power & Lighting Company Plc (hereinafter referred to as "the Procuring Entity") invited bids from eligible tenderers in response to Tender No. KP1/9A.2/OT/003/NM/25-26 for Provision of Roads/Pavement Opening/Cutting, Ducting and Reinstatement Services (hereinafter referred to as the "subject tender") by an advertisement on 29th October 2025. Completed tenders were to be submitted in electronic format on the Procuring Entity's e-procurement portal on the initial tender submission deadline of 20th November 2025.

2. The Procuring entity issued Addendum No. 1 dated 10th November 2025, and Addendum No. 2 dated 12th November 2025 which made various clarifications and amendments on the Tender Document while extending the tender submission deadline to 28th November 2025.

Submission of Tenders and Tender Opening

3. The procurement proceedings of the subject tender were suspended pursuant to Section 168 of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act') when a Request for Review No. 107 of 2025 dated 11th November 2025 was filed on even date before the Public Procurement Administrative Review Board (hereinafter referred to as the 'Board').

REQUEST FOR REVIEW NO. 107 OF 2025

4. On 12th November 2025, Jamari Enterprises Limited, the Applicant herein filed a Request for Review dated 11th November 2025 together with an Applicant's Statement/Affidavit in Support of the Request for Review, its Director (hereinafter referred to as the 'instant Request for Review') through the firm of Cheboi Kiprono Advocates seeking the following orders from the Board in verbatim:

a) Order that the procurement process commenced by the Respondents in relation to Tender No. KP1/9A.2/OT/003/NM/25-26 is unlawful, irregular and in breach of Article 227 of the Constitution, the Public

Procurement and Asset Disposal Act 2015, and the attendant regulations.

b) Annul the impugned tender in its entirety and direct the Procuring Entity to re-advertise the tender in strict compliance with the law.

c) In the alternative, order the Procuring Entity to:

a. extend the tender submission deadline by at least 60 days to enable fair participation by all eligible bidders, and;

b. Issue an addendum deleting the impugned tender clauses

d) Direct the Respondents to pay the costs of and incidental to these proceedings.

e) Any other relief that the Honourable Board deems fit to grant, having regard to the circumstances of this case in order to give effect to the Board's orders.

5. In a Notification of Appeal and a letter dated 12th November 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 12th November 2025.

6. On 20th November 2025, the Respondents filed a 1st and 2nd Respondent's Notice of Appointment dated 19th November 2025, a Respondent's Memorandum of Response dated 19th November 2025 together with a confidential file pursuant to Section 67(3)(e) of the Act.
7. *Vide* a Hearing Notice dated 20th 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 25th November 2025 at 2.00 p.m. through the link availed in the said Hearing Notice.
8. On the morning of 25th November 2025, the Applicant filed Written Submissions dated 24th November 2025 together with a List and digest of Authorities dated 24th November 2025.
9. When the matter first came up for hearing on 25th November 2025 at 2.00 p.m., the Board read out pleadings filed by the Applicant and the Respondent. Counsel for the Respondent indicated that she had not been served with the Applicant's Statement/Affidavit in Support of the Request for Review and further sought leave to respond to the Applicant's written submissions served upon her earlier in the morning.
10. The Board having considered the Applicant's application proceeded to adjourn the matter and directed (i) the Board Secretary to serve upon the Respondents' counsel the Applicant's Statement/Affidavit in Support of the Request for Review, (ii) the Respondents to file their written submissions and list of authorities by 26th November 2025 at 9.00 a.m.,

(iii) the Applicant to file its rejoinder limited to points of law, if any, and
(iv) the instant Request for Review to proceed for hearing on 26th November 2025 at 2.00 p.m.

11. The Respondents filed on 26th November 2025 Written Submissions dated 25th November 2025.

12. At the hearing on 26th November 2025 at 2.00 p.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 Respondents 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

13. In his submissions, counsel for the Applicant, Mr. Kiprono relied on documents filed before the Board by the Applicant.

14. In opposition to the Respondents' Preliminary Objection, Mr. Kiprono submitted on the threshold that must be met by a party filing a request for review before the Board as set out under section 167(1) of the Act the first being that a party has to be a candidate or a tenderer in order to seek administrative review. In support of his argument, he referred to the holding in *Miscellaneous Application 637 of 2016 Republic v Independent Electoral and Boundaries Commission & Another Ex Parte Coalition for Reform and Democracy & 2 Others [2017] eKLR* and pointed out that the Applicant squarely falls within the category of persons clothed with the requisite *locus standi* to institute the instant Request for Review having duly obtained on 3rd November 2025 the blank tender document issued by the Respondents pursuant to invitation to tender notice.

15. Counsel further submitted that an applicant before the Board must have suffered or risk suffering loss which leads to the merits of the instant Request for Review where the Applicant had highlighted several grounds on its risk of being likely to suffer loss due to the breach by the Respondents. He pointed the Board to paragraph 39 of the Applicant's Supporting Affidavit where it had particularized the specific loss and damage that it was likely to suffer as a result of breach of duty imposed upon the 1st Respondent by the Act.

16. Counsel submitted that a party must seek administrative review within 14 days of the alleged breach of duty and pointed out that the Applicant, having obtained the blank tender document on 3rd November 2025 and

filed the instant Request for Review on 12th November 2025, was within the set out statutory timelines of 14 days.

17. While making reference to section 170 of the Act, counsel submitted that the procurement process in the subject tender had not reached its conclusion and no successful bidder had been identified or notified by the Procuring Entity and as such, there was no party falling under Section 170(c) of the Act capable of being joined to the proceedings. He further submitted that the Applicant properly invoked the provisions of section 170 by instituting the instant Request for Review against the accounting officer of the procuring entity thus complying fully with the requirements of the Act and ensuring that the Request for Review as filed is competent.

18. Counsel submitted that the Board is clothed with jurisdiction to entertain the instant Request for Review and urged it to dismiss the Respondents' Preliminary Objection.

19. As to whether the period allowed by the Respondents for the preparation and submission of tenders was reasonable, counsel referred the Board to Article 10, 47 and 227(1) of the Constitution and Section 58 and 70 of the Act and submitted that the procurement process commenced on 29th October 2025 and was scheduled to close on 20th November 2025 thereby allowing a preparation and submission period of approximately twenty (20) days only, a time frame which according to the Applicant, by all standards of reasonableness, is manifestly inadequate for a works contract of substantial value, scope, and complexity.

20. It is the Applicant's case that the short period allowed for the preparation and submission of tenders by the Respondents is inconsistent with Section 58 and 70(3) of the Act as read with Article 227(1) of the Constitution which collectively require that open tendering processes provide sufficient time and information to ensure fairness, transparency, competitiveness, and cost-effectiveness among bidders as it unfairly prejudices genuine and compliant bidders who are still in the process of obtaining the requisite statutory compliance documents thereby locking out fair competition.

21. The Applicant submitted that given the existing contract for similar works was extended until 2nd April 2026, there appears to be no justifiable urgency to warrant the limited tender period as the works will continue uninterrupted pending the appointment of a new contractor.

22. Counsel urged the Board to take judicial notice that the Council of Governors moved the High Court and were issued with conservatory orders halting the implementation of the mandatory EGP system hence procuring entities are at liberty to use the manual system in their procurement processes. He made reference to the Respondents' letter dated 14th October 2025 marked as annexure 2 and pointed out that the National Treasury allowed a waiver for the Procuring Entity to use the manual system in its procurement.

23. As to whether the procurement process commenced by the Respondents in regard to the subject tender was in accordance with the Constitution,

the Act, and Regulations 2020, counsel while referring to Section 3 and 80(2)&(3) of the Act argued that Clause 39 and 40 of the Instructions to Tenderers purport to grant the Procuring Entity the discretion to reject abnormally low or abnormally high tenders. He further argued that these provisions confer unfettered discretion upon the Procuring Entity contrary to Section 80 of the Act since they are susceptible to misuse, as they may be invoked to arbitrarily eliminate legitimate bids and favour pre-determined bidders, thus undermining the principles of fairness, transparency, and open competition enshrined in Article 227 of the Constitution.

24. Counsel submitted that the financial evaluation criteria set out under Part III of the tender document is irregular, arbitrary, and inconsistent with the Act and that sub-clauses (e) and (f) improperly rely on a 'published powerline construction services cost handbook' which has not been availed to bidders or incorporated into the tender documents.

25. He pointed out that reliance on undisclosed benchmarks offends Sections 70(3) and 80(2) of the Act which require that all evaluation criteria be objective, pre-disclosed, and uniformly applied hence without access to this cost handbook, bidders are deprived of the opportunity to understand or align their pricing with the Procuring Entity's expectations, thereby rendering the evaluation process opaque and unfair.

26. Counsel submitted that there is no statutory or regulatory basis for the Procuring Entity to impose or rely on a controlled pricing system such as

the said cost handbook. He indicated that the Applicant reasonable apprehends that Clause 39 and 40 were introduced mischievously to manipulate pricing outcomes and compromise genuine competition, contrary to Article 227 of the Constitution and Section 3 of the Act.

27. Counsel further submitted that Clause 41 on 'unbalanced and/or front loaded tenders is legally defective and inconsistent with the Constitution and the Act since it grants the Procuring Entity excessive discretion to determine when a tender is seriously unbalanced or front loaded without providing an objective or measurable criteria for that determination. He pointed out that the phrase 'in Kenya Power's opinion' introduces subjectivity and uncertainty as there is no defined parameters and the clause becomes vulnerable to arbitrary application and manipulation.

28. Counsel argued that this clause allows the Procuring Entity to require bidder to increase their performance security up to 30% of the contract price which imposes a financial burden on certain tenderers and may discourage competition, particularly from smaller or emerging firms, thus undermining the constitutional value of inclusivity in public procurement.

29. The Applicant contends that Clause 42 on qualifications of the tenderer is materially inconsistent with the Constitution, the Act and Regulations 2020 and that though it purports to govern the qualification and due diligence process, it suffers from ambiguity, internal inconsistency, and procedural unfairness making it susceptible to arbitrary application and abuse of discretion by the Procuring Entity. In support of its argument,

the Applicant referred the Board to the holding by the Court of Appeal in *Vickers Security Services Limited v Public Procurement Administrative Review Board & 3 others (Civil Appeal E143 & E150 of 2025 (Consolidated)) [2025] KECA 671 (KLR)*.

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

Respondent's submissions

31. In her submissions, counsel for the Respondents, Ms. Kihara relied on the Respondents documents filed before the Board including confidential documents concerning the subject tender submitted pursuant to Section 67(3)(e) of the Act.

32. Counsel submitted that it is in the public domain that all state entities are required to onboard on the eGP system as part of the Government's digital transformation agenda. She indicated that with respect to the works sought, the last procurement was done sometime in 2023 and the Procuring Entity resulted to seek for an exemption from National Treasury to procure various critical works and services including road cutting, pavement opening, excavations and reinstatement for underground cables services under its current procurement system pending the ongoing onboarding of its procurement services in the e-GP systems.

33. That having received the approval, the Procuring Entity floated the subject tender that was to initially close on 20th November 2025 but extended to 28th November 2025 vide Addendum No. 2.
34. As to whether the Board has jurisdiction to entertain the instant Request for Review, counsel referred the Board to provisions under Section 167(1) and 170 of the Act read with Regulation 203 and argued that these provisions have been consistently interpreted to mean that only a person who has actively participated in a procurement process, either as a candidate or a tenderer, and who alleges that they have suffered or stand to suffer loss or damage as a result of a breach of the law by the procuring entity may invoke the jurisdiction of the Board.
35. Counsel made reference to the holding by the Court of Appeal in *Mombasa James Oyondi t/a Betoyo Contractors & Another vs Elroba Enterprises Limited & Others (2019) eKLR Mombasa Civil Appeal No. 131 of 2018* and argued that the Applicant has not shown any direct loss as a result of the alleged breach of duty by the Respondents whether as a contractor or a bidder. Further, she pointed out that there is no indication of authorization for the Applicant's representative to file the instant matter from the pleadings filed noting that the matter was instituted by the Applicant's advocate on behalf of the Applicant and not the Applicant itself. She urged the Board to strike out the instant Request for Review with costs.

36. Without prejudice to the foregoing, counsel submitted that the procurement process in regard to the subject tender was done in accordance with the Constitution, the Act, and Regulations 2020. She pointed out that the Procuring Entity used the standardized tender document as prescribed by the Public Procurement Regulatory Authority (hereinafter referred to as "the Authority") in line with Section 70 of the Act and that the Applicant never sought for an extension of the tender submission deadline. She further indicated that the Tender Document provided for a pre bid meeting that allowed bidders to ventilate areas of concern leading to issuance of Addendum No. 1 and 2 in the subject tender.

37. Counsel submitted that the Act allows a procuring entity to amend a tender document to suit its needs so long as it makes no changes to Instructions to Tenderers (ITT) and general conditions for contract. She indicated that the impugned clauses 39 and 40 found under the ITT describe an abnormally low tender as one where the tender price in combination with other elements of the tender appears so low that it raises material concerns as to the capability of the tenderer to perform the contract for the offered tender price or that genuine competition between tenderers is compromised and an abnormally high tender as one where the tender price in combination with other constituent elements of the tender appear unreasonably too high to the extent that the procuring entity is concerned that it may not be getting value for money or paying too high a price of the contract compared with market prices or that genuine competition between tenderers is compromised.

38. She pointed out that the Respondents came across many price outliers in the previous procurement process which adversely affected the services which the Procuring Entity rendered to its consumers and customers leading it to come up with the formation of the handbook which served as a guide to bidders to ensure that all outsourced services conformed with the company's quality and operational benchmarks. She added that this handbook was prepared in consultation with the key stakeholders in the energy sector including the association which the Applicant is a member of namely Power Transmission Line Contractors Association and that at all times, the same is accessible to the general public on its website.

39. While relying on 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) e KLR*, and *Republic v Public Procurement Administrative Review Board & 2 others Ex-parte Coast Water Services Board & another [2016] e KLR* which cited with approval *JGH Marine A/S Western Marine Services Ltd CNPC Northeast Refining & Chemical Engineering Co. Ltd/Pride Enterprises vs. Public Procurement Administrative Review Board & 2 others [2015] eKLR* the Respondents contend that allowing the prayers sought by the Applicant will greatly prejudice bidders who have already complied with the terms of the Tender Document.

40. The Respondents urged the Board to dismiss the instant Request for Review with costs.

Applicant's Rejoinder

41. In a rejoinder, Mr. Kiprono submitted that the Supporting Affidavit accompanying the Request for Review deposed by John Muigai Kamau was in compliance with Regulation 203 (2)(b) of Regulations 2020.
42. He reiterated that the Applicant is a candidate in the instant procurement proceedings in line with Section 2 as read with 167(1) of the Act.
43. Counsel further reiterated that the cost handbook was not provided anywhere in the subject tender as a guide and that such a criteria is extraneous since evaluation of bids ought to be per the criteria provided in the Tender Document hence the procurement proceedings as commenced by the Procuring Entity are contrary to Article 227 (1) of the Constitution.
44. At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 12th November 2025 was due to expire on 3rd December 2025 and that the Board would communicate its decision on or before 3rd December 2025 to all parties to the Request for Review via email.

BOARD'S DECISION

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

In determining the first 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 as read with Regulation 203 of Regulations 2020.

Depending on the determination of Issue A;

B. Whether the time provided for submission of tender documents in the subject tender is reasonable and sufficient?

C. Whether the provisions of the Tender Document in the subject tender are in breach of the Constitution, the Act and Regulations 2020.

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

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

46. The Respondents in opposition of the instant Request for Review contend that the Applicant has neither pleaded nor demonstrated that it has suffered or is likely to suffer any loss or damage as a result of the alleged breach of duty occasioned by the Procuring Entity as prescribed under Section 167(1) of the Act. Further, the Respondents submitted that only a person who has actively participated in a procurement process either as a candidate or a tenderer can invoke the jurisdiction of the Board.

47. In response, the Applicant maintained that it was a candidate in the subject tender and had adequately pleaded on the loss or damage that it was likely to suffer as a result of breach of duty by the Respondents as prescribed under Section 2 as read with 167(1) of the Act and Regulation 203 of Regulations 2020.

48. Having considered parties submissions and pleadings filed in the instant Request for Review, we note that questions regarding the *locus standi* of the Applicant, if established, would divest the Board of jurisdiction to entertain the instant Request for Review given the preliminary and jurisdictional nature of this issue.

49. 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.

50. 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."

51. 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."

52. 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."

53. 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.

54. 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."

55. 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."***

56. 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.

57. 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 in conduct and determination of request for review proceedings.

i. 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;

58. We note that the Respondents 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.

59. 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 28 and 29 of the Applicant's Statement/Affidavit in Support of the Request for Review. 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.

60. Section 167 (1) 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)

61. 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.

62. 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.

63. 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]

64. 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.

65. 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."

66. 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."

67. 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.

68. In the instant 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.

69. 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.

70. The import of the above holding 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.

71. Having carefully perused the instant Request for Review, we note that the Applicant pleaded at paragraphs 28 and 29 of the Applicant's Statement/Affidavit in Support of the Request for Review as follows:

"28. The actions of the Respondents' have greatly prejudiced the Applicant's fair chance of participating and winning the bid.

29. As a result of the Respondent's irregular and unlawful actions, the Applicant stands to suffer grave loss and prejudice, including but not limited to the following;

a. Loss of a fair and equal opportunity to compete for the tender due to the unreasonably short preparation and

submission period, which effectively excluded genuine and compliant bidders who were still in the process of obtaining mandatory statutory documents.

b. Loss of potential profits and legitimate expectation of being considered for award based on merit and fair evaluation, the process having been clouded by vague and subjective provisions on "abnormally low" and "abnormally high" tenders that conferred unfettered discretion upon the Procuring Entity.

c. Loss of earnings and business prospects arising from the improper and discriminatory conduct of the tender process, which undermined competitiveness and transparency contrary to the principles enshrined in Article 227 of the Constitution and Sections 58, 70(3), and 80 of the Public Procurement and Asset Disposal Act, 2015.

d. Financial loss arising from the considerable expenditure already incurred in obtaining tender documents, preparing bid submissions, and mobilizing resources in readiness for participation in the procurement process, all of which have been rendered futile by the Respondent's arbitrary and unlawful conduct.

....."

72. From the above paragraphs, the Applicant contends that is has been prejudiced by the actions of the Respondents in the procurement process

and further lists the grave loss it stands to suffer by the alleged Respondents' irregular and unlawful actions.

73. 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 having sufficiently pleaded the loss it risks to suffer as a result of the alleged breach of duty imposed on the procuring entity by the Act. Accordingly, this ground of objection fails.

ii. As to whether or not the Applicant is a candidate in the subject tender so as to invoke the jurisdiction of the Board;

74. The Respondents contend that only a person who has actively participated in a procurement process either as a candidate or a tenderer can invoke the jurisdiction of the Board with regard to the subject tender.

75. On its part, the Applicant maintained that it was a candidate in the subject tender having obtained the Tender Document issued by the Respondents pursuant to the invitation to tender notice thereby acquiring the status of candidate as contemplated under the Act.

76. Section 2 of the Act defines a candidate in the following terms:

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

77. The High Court in **Petition No. 237 of 2018, Philip Nyandieka (Suing on his own behalf and on behalf of the general public) v. National Government CDF- Bomachoge Borabu constituency [2019] eKLR** while considering the meaning of a "candidate" (and tenderer) under Section 2 of the Act held that:

"Section 2 of the Act defines a "candidate" as "a person who has obtained the tender documents from a public entity pursuant to an invitation notice by a procuring entity". The said section defines a "tenderer" to mean "a person who submitted a tender pursuant to an invitation by a public entity".

This Court notes that the above provisions of the Act are restrictive on the persons who may approach the Board in the event of dissatisfaction with the tendering process and cannot overlook the disadvantage faced by the petitioner in as far as seeking a remedy before the said Board is concerned considering the fact that Section 167 (1) of the Act more or less closes the door to persons who do not fall within the meaning of a candidate and/or tenderer.

78. From the foregoing provision and case law, for one to be a candidate, such a person must have obtained a tender document from a public entity pursuant to an invitation by a procuring entity.

79. We note that the Invitation to Tender issued by the Procuring Entity provided that:

"Tender documents detailing the requirements of the above tenders may be obtained from the Kenya Power website (www.kplc.co.ke) from the date shown above."

80. The Applicant at paragraph 4 of the Applicant's Statement /Affidavit in Support of the Request for Review sworn by John Muigai Kamau on 11th November 2025 depones that:

"On or about 3rd November 2025, I downloaded the tender documents from the Procuring Entity's e-procurement portal (Annexed hereto as the exhibit marked "JMK-3" is a copy of the Tender Document that I downloaded) I am aware that a pre-bid meeting was scheduled for 4th November 2025."

81. From the above averments, the Applicant confirms having obtained a copy of the Tender Document from the Procuring Entity's website and annexed it as part of its exhibits in the instant Request for Review.

82. The Board, differently constituted, in **PPARB Application No. 30 of 2016, Achelis Material Handling Limited v. County Government of Kitui (hereinafter referred to as the County Government of Kitui's case)** explained the import of the term "candidate" under Section 2 of the Act as follows:

"The law is therefore clear that a party to a Request for Review must first demonstrate that it made an attempt to participate in the procurement process by first and foremost obtaining the tender document. This is necessary to avoid a situation where anyone may choose to interfere with a procurement process in jest or as an afterthought or to just settle scores. The threshold for candidature in this tender as set out by the law is that one must demonstrate they intended to participate in the tender by obtaining the tender document"

83. In essence, a candidate must therefore demonstrate its intention to participate in a procurement process by complying with the manner and procedure set out by a procuring entity for obtaining a tender document.

84. In our considered view, the Applicant having demonstrated its intention of participating in the subject tender by obtaining a copy of the tender document from the Procuring Entity's website and there being no rebuttal of this fact by the Respondents, renders the Applicant as a candidate within the meaning of Section 2 of the Act read with Section 167(1) of

the Act and it therefore has the *locus standi* to institute administrative review proceedings before the Board

85. In the circumstances, we find and hold that the Applicant is a candidate under the meaning of Section 2 of the Act read with Section 167(1) of the Act and has *locus standi* to institute the instant Request for Review before the Board. Accordingly, this ground of objection fails.

86. In summation, 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 time provided for submission of tender documents in the subject tender is reasonable and sufficient?

87. We understand the Applicant's case on this issue to be that according to the Invitation to Tender issued by the Procuring Entity on 29th October 2025, the subject tender was scheduled to close on 20th November 2025 thereby allowing bidders to prepare and submit their tender documents within a limited period of approximately twenty (20) days. The Applicant contends that by all standards of reasonableness, this period is manifestly inadequate for a works contract of substantial value, scope and complexity. Further, that this short period is inconsistent with provisions under Section 58 and 70(3) of the Act as read with Article 227 (1) of the Constitution which collectively require that open tendering

processes provide sufficient time and information to ensure fairness, equity, transparency, competitiveness, and cost-effectiveness among bidders.

88. We understand the Respondents' case on this issue to be that the subject tender was initially scheduled to close on 20th November 2025 but following a pre-bid meeting held on 4th November 2025, various concerns were raised which necessitated the Procuring Entity to make various clarifications and amendments leading to extension of the tender submission deadline to 28th November 2025 as communicated *vide* Addendum No. 2 dated 12th November 2025. The Respondents contend that the Applicant is deploying delay tactics in a bid to seek more time to obtain requisite compliance documents sought in the subject tender noting that it has not demonstrated any breach of duty by the Procuring Entity in regard to the procurement proceedings in the subject tender.

89. On the basis of the above representations, the Board is invited to interrogate whether the time provided for submission of tender documents in the subject tender is reasonable and sufficient.

90. We note that pursuant to ITT 3.6 of Section II – Tender Data Sheet (TDS) at page 28 of 146 of the Tender Document, the subject tender was restricted to only local limited companies. This provision reads:

<i>ITT Reference</i>	<i>PARTICULARS OF APPENDIX TO INSTRUCTIONS TO TENDERS</i>
---------------------------------	--

.....
ITT 3.6	Only local limited liability companies are eligible to apply

91. Section 102 (2) of the Act provides that an accounting officer may engage in procurement by means of restricted tendering in such manner as may be prescribed. Further, Regulation 89(7) of Regulation 2020 states that:

"The minimum time for preparation of tenders for the purposes of section 102 of the Act shall be a period of seven days."

92. In essence, the minimum time for preparation of tenders under restricted tendering shall be a period of seven (7) days. In this instance where the subject tender was limited to only local limited liability companies, the minimum period for preparation of tenders was therefore seven (7) days.

93. Turning to the present matter, we note that the subject tender was advertised on 29th October 2025 and was initially set to close on 20th November 2025 which gave bidders a total of 22 days to prepare and submit their bids. A pre-bid meeting was held on Tuesday, 4th November 2025 and from clarifications sought by bidders, the Procuring Entity issued (i) Addendum No. 1 dated 10th November 2025 where it made various clarifications and amendments, and (ii) Addendum No. 2 dated 12th November 2025 extending the tender submission deadline to 28th November 2025.

94. Following the extension of the subject tender's validity period, bidders had a total of 30 days from 29th October 2025 to 28th November 2025 to prepare and submit their tender documents in the subject tender. However, the Applicant filed the instant Request for Review on 12th November 2025 leading to suspension of the procurement proceedings in line with Section 168 of the Act hence time stopped running. As at 12th November 2025, a total of 13 days had been expended and bidders had 17 more days to prepare and submit their tenders before lapse of the tender submission deadline.

95. We note that ITT 8.2 of Section II – Tender Data Sheet (TDS) at page 28 of 146 of the Tender Document provides that an eligible bidder can seek questions in writing and the same are required to reach the Procuring Entity not later than seven (7) days prior to the tender closing date.

96. As such, the Applicant had an avenue of seeking for an extension of the tender submission deadline in the event that it was unable to conclude its preparation and submission of its tender document within the stipulated timelines. However, we have not had sight of any request for extension of the tender submission deadline by the Applicant nor clarification sought from the Procuring Entity on the sufficiency of the stipulated timelines within which bids were required to be submitted. It is therefore disingenuous for a candidate to complain about sufficiency of time before demonstrating that it has done everything in its power to comply with the provided time but has been unable to do so due to

certain justifiable reasons, such as insufficiency of information in the procurement process.

97. In view of the foregoing, the Board finds that the time provided for submission of tender documents in the subject tender is reasonable and sufficient.

Whether the provisions of the Tender Document in the subject tender are in breach of the Constitution, the Act and Regulations 2020

98. The Applicant contends that Clause 39, 40, 41, and 42 of Section I: Instructions to Tenderers at page 23 of 146 to 24 of 126 of the Tender Document are subjective and inconsistent with the Constitution and the Act. It submitted that the provisions therein fail to promote fair competition and ensure that bidders are treated equitably, there being no measurable parameters thus undermining the integrity of the procurement process and principles of fairness, transparency, and open competition enshrined in Article 227 of the Constitution.

99. According to the Applicant, Clause 39 and 40 of Section I: Instructions to Tenderers confer unfettered discretion upon the Procuring Entity contrary to Section 80 of the Act and are susceptible to misuse as they may be invoked to arbitrarily eliminate legitimate bids and favor pre-determined bidders.

100. The Applicant further took issue with the financial evaluation criteria set out under Section III – Evaluation and Qualification Criteria of the Tender Document and argued that the Procuring Entity reliance on an undisclosed power construction services cost handbook was contrary to Section 70(3) and 80(2) of the Act. It argued that there is no statutory or regulatory basis for the Procuring Entity to impose or rely on a controlled pricing system such as the said cost handbook.

101. The Applicant argued that Clause 41 of Section I: Instructions to Tenderers providing for unbalanced and/or front-loaded tenders is legally defective and inconsistent with the Act since it grants the Procuring Entity excessive discretion to determine when a tender is seriously unbalanced or front-loaded without providing an objective or measurable criteria in making such a determination.

102. Furthermore, the Applicant challenged the requirement for a bidder to increase its performance security up to 30% of the contract price on what it termed as a subjective assessment of imbalance, imposing a financial burden on certain tenderers and discouraging competition particularly from smaller or emerging firms thus undermining the constitutional value of inclusivity in public procurement.

103. The Applicant also faulted Clause 42 of Section I: Instructions to Tenderers and argued that the said provision suffers from ambiguity, restrictiveness, and is susceptible to arbitrary application by the Procuring Entity

104. In response, the Respondents contend that the impugned Clause 39, 40, 41, and 42 of Section I: Instructions to Tenderers at page 23 of 146 to 24 of 126 of the Tender Document are the general provision clauses contained in the standardized tender document prepared by the Public Procurement Regulatory Authority (the Authority) in accordance with Section 9, 58, and 70 of the Act for use by public entities. They submitted that the Procuring Entity is prohibited from making changes to the general provisions clauses under Section I: Instructions to Tenderers and that the same can only be done under the Tender Data Sheet (TDS).

105. With regard to the power construction services cost handbook provided under the financial evaluation criteria set out under Section III – Evaluation and Qualification Criteria of the Tender Document, the Respondents submitted that this handbook had been formulated and published after various and extensive engagements with key stakeholders in the energy sector and was accessible on its website. They further submitted that the handbook was to serve as a guide to bidders to ensure that all outsourced services conformed to the Procuring Entity's quality and operational benchmark.

106. Having considered parties rival submissions herein, the Board observes that the issue at hand pertains to what the Applicant deems as subjective, inconsistent, and ambiguous tender provisions as provided in the subject tender's Tender Document.

107. 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:

(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 ..."

108. 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...."

109.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.

110.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."

111. 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 is envisioned to adhere to the principles of procurement stipulated under Article 227 (1) of the Constitution.

112. 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."

113. 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.

114. 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), (4), (6)(e)(vi) 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.

(4) An accounting officer of a procuring entity shall be responsible for preparation of tender documents in consultation with the user and other relevant departments.

.....

(6) (e) instructions for the preparation and submission of tenders including

.....

(vi) the procurement function ensuring that where necessary, the preference and reservations of the tender are clearly spelt out in the bidding documents."

115. Regulation 68 of Regulations 2020 also provides for use of standard tender documents and formats. Regulation 68(4) of Regulations 2020 provides:

"(4) Pursuant to section 70(4) of the Act, the accounting officer of a procuring entity shall prepare the tender document clearly indicating the technical and financial evaluation criteria to be applied which shall be quantifiable, measurable and objective in line with the provisions of section 80(3) of the Act in consultation with the user department and other relevant departments."

116. From the foregoing, the Board observes that the obligation of preparing tender documents and laying out the specifications and applicable evaluation criterion rests with the accounting officer of a procuring entity, in consultation with the user department and other relevant departments, as provided under the Act and Regulations 2020. The accounting officer is further obligated to ensure that it provides sufficient information to allow fair competition among those who may wish to submit tenders.

117. Section 80 of the Act is instructive on how evaluation and comparison of tenders should be conducted by a procuring entity as follows:

"80. Evaluation of tender

(1) The evaluation committee appointed by the accounting officer pursuant to Section 46 of the

Act, shall evaluate and compare the responsive tenders other than tenders rejected.

(2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the provisions of this Act and statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered.

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

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

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

(4)"

118. 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.

119. Turning to the circumstances in the instant Request for Review, we note as follows:

120. On the issue of the published powerline construction services cost handbook referred to under Clause 3.4 of Part III – Financial Examination Criteria of Section III – Evaluation and Qualification Criteria at page 37 of 146 of the Tender Document, the criteria stipulated therein reads:

Evaluation of the following financial information against Tender Requirements and Specifications:

3.4.1 This will include the following: -

a) Confirmation of and considering that the Bill of Quantities is duly completed and signed and is in original KPLC format and not mutilated.

b) Confirming that the bidder has quoted in Kenya Shillings.

c) Confirming that the bidder has provided unit rates for ALL services

d) Confirming that the bidder has provided unit rates ONLY for listed items and in the appropriate columns

e) Confirming that the submitted rates are not abnormally low. Abnormally low rates shall be any itemized rate that is below 25% of the published powerline construction services cost handbook.

f) Confirming that the submitted rates are not abnormally high – Abnormally high rates shall be any itemized rate that is above 25% of the published powerline construction services cost handbook.

g) Conducting a financial comparison based on the analysis of the Bidder's total sum of units.

121. The Applicant took issue with reference by the Procuring Entity to the 'published powerline construction services cost handbook' and argued that the Procuring Entity was placing reliance on undisclosed and unpublished benchmarks and an inaccessible handbook. In response, the Respondents submitted that the powerline construction services cost handbook was published and available on its website hence accessible to all bidders in the subject tender.

122. As regards ITT 39 and 40 of Section I: Instructions to Tenderers at page 23 of 146 to 24 of 126 of the Tender Document which provides for abnormally low tenders and abnormally high tenders and read:

39 Abnormally Low Tenders

39.1 An Abnormally Low Tender is one where the Tender price, in combination with other elements of the Tender as specified in the TDS, appears so low that it raises material concerns as to the capability of the Tenderer in regard to the Tenderer's ability to perform the Contract for the offered Tender Price or that genuine competition between Tenderers is compromised.

39.2 In the event of identification of a potentially Abnormally Low Tender, Kenya Power shall seek written clarifications from the Tenderer, including detailed price analyses of its Tender price in relation to the subject matter of the contract, scope, proposed methodology, schedule, allocation of risks and responsibilities and any other requirements of the Tender document.

39.3 After evaluation of the price analyses, in the event that Kenya Power determines that the Tenderer has failed to demonstrate its capability to perform the Contract for the offered Tender Price, Kenya Power shall reject the Tender.

40. Abnormally High Tenders

40.1 An abnormally high price is one where the tender price, in combination with other constituent elements of the Tender as specified in the TDS, appears unreasonably too high to the extent that Kenya Power is concerned that it (Kenya Power) may not be getting value for money or it

may be paying too high a price for the contract compared with market prices or that genuine competition between Tenderers is compromised.

40.2 In case of an abnormally high tender price, Kenya Power shall make a survey of the market prices, check if the estimated cost of the contract is correct and review the Tender Documents to check if the specifications, scope of work and conditions of contract are contributory to the abnormally high tenders. Kenya Power may also seek written clarification from the tenderer on the reason for the high tender price. Kenya Power shall proceed as follows:

- i. If the tender price is abnormally high based on wrong estimated cost of the contract, Kenya Power may accept or not accept the tender depending on Kenya Power's budget considerations.***
- ii. If specifications, scope of work and/or conditions of contract are contributory to the abnormally high tender prices, Kenya Power shall reject all tenders and may retender for the contract based on revised estimates, specifications, scope of work and conditions of contract, as the case may be.***

40.3 If Kenya Power determines that the Tender Price is abnormally too high because genuine competition between tenderers is compromised (often due to

collusion, corruption or other manipulations), Kenya Power shall reject all Tenders and shall institute or cause competent Government Agencies to institute an investigation on the cause of the compromise, before retendering

123. From the above, the Board notes that where a bidder presents an abnormally low tender, the Procuring Entity shall seek written clarification from the said bidder including detailed price analyses of its tender price in relation to the subject matter of the contract, scope, proposed methodology, schedule, allocation of risks and responsibilities and any other requirements of the Tender Document and such a tender shall only be rejected in case the tenderer fails to demonstrate its capability to perform the contract for the offered tender price.

124. Further, where a bidder presents an abnormally high tender, the Procuring Entity shall conduct a survey of the market prices, checking if the estimated cost of the contract is correct and review the Tender Documents to check if the specifications, scope of work and conditions of contract are contributory to the abnormally high tenders. It may also seek clarification from the bidder on the reason for the high tender price.

125. Further, with regard to the tender evaluated as the lowest evaluated price, Clause 41 of Section I: Instructions to Tenderers at 24 of 126 of the Tender Document provides as follows:

41. Unbalanced and/or Front-Loaded Tenders

41.1 If in Kenya Power's opinion, the Tender that is evaluated as the lowest evaluated price is seriously unbalanced and/or front loaded, Kenya Power may require the Tenderer to provide written clarifications. Clarifications may include detailed price analyses to demonstrate the consistency of the tender prices with the scope of works, proposed methodology, schedule and any other requirements of the Tender document.

41.2 After the evaluation of the information and detailed price analyses presented by the Tenderer, Kenya Power may as appropriate;

a) accept the Tender; or

b) require that the total amount of the Performance Security be increased at the expense of the Tenderer to a level not exceeding a 30% of the Contract Price; or

c) agree on a payment mode that eliminates the inherent risk of Kenya Power paying too much for undelivered works; or

d) reject the Tender,

126.As regards the qualification of the eligible tenderer selected as having submitted the lowest evaluated and substantially responsive tender, Clause 42 provides as follows:

42. Qualification of the Tenderer

42.1 Kenya Power shall determine to its satisfaction whether the eligible Tenderer that is selected as having

submitted the lowest evaluated cost and substantially responsive Tender, meets the qualifying criteria specified in Section III, Evaluation and Qualification Criteria.

42.2 The determination shall be based upon an examination of the documentary evidence of the Tenderer's qualifications submitted by the Tenderer, pursuant to ITT 19. The determination shall not take into consideration the qualifications of other firms such as the Tenderer's subsidiaries, parent entities, affiliates, subcontractors (other than Specialized Subcontractors if permitted in the Tender document), or any other firm(s) different from the Tenderer.

42.3 An affirmative determination shall be a prerequisite for award of the Contract to the Tenderer. A negative determination shall result in disqualification of the Tender, in which event Kenya Power shall proceed to the Tenderer who offers a substantially responsive Tender with the next lowest evaluated price to make a similar determination of that Tenderer's qualifications to perform satisfactorily.

42.4 An Abnormally Low Tender is one where the Tender price, in combination with other elements of the Tender, appears so low that it raises material concerns as to the capability of the Tenderer in regards to the Tenderer's ability to perform the Contract for the offered Tender Price.

42.5 In the event of identification of a potentially Abnormally Low Tender, Kenya Power shall seek written clarifications from the Tenderer, including detailed price analyses of its Tender price in relation to the subject matter of the contract, scope, proposed methodology, schedule, allocation of risks and responsibilities and any other requirements of the Tender document.

42.6 After evaluation of the price analyses, if Kenya Power determines that the Tenderer has failed to demonstrate its capability to perform the Contract for the offered Tender Price, Kenya Power shall reject the Tender.

127. The Board has had the benefit of perusing the Standard Tender Document for Procurement of Works (Roads, Water Bridges etc.) issued by the Public Procurement Regulatory Authority on 22nd April 2021 and updated on 21st April 2022 and notes that the impugned Clause 39, 40, 41, and 42 of Section I: Instructions to Tenderers at page 23 of 146 to 24 of 126 of the Tender Document have been lifted verbatim in the subject tender's Tender Document save for (i) change of reference of the procuring entity to read Kenya Power, and (ii) increase of the total amount of the Performance Security to 30% of the Contract Price as compared to the 10% of the Contract Price set out in the Standard Tender Document.

128. Notably, Clause 7 of the Preface of the Standard Tender Document provides that:

"This document will be customized to suit the needs of the Procuring Entity. No changes should be made to Instructions to Tenderers (ITT) and to the General Conditions of Contract (GCC). These two sections will be modified to suit the Procuring Entity's requirement in the Tender Data Sheets (TDS) and in the Special Conditions of Contract (SCC), respectively. The Cover Page of this document, the Preface, Guidelines or notes to users and the Invitation to Tender should not be part of the tender Document to be issued to Tenderers. Refer to Appendix to the Preface for more details."

129. From the above, it is clear that while the Standard Tender Document is to be customized to suit the needs of the Procuring Entity, no changes ought to be made to the Instructions to Tenderers (ITT) and the General Conditions of Contract (GCC) as the two sections are modified under the Tender Data Sheet (TDS) to suit the requirements of the Procuring Entity.

130. In view of the above, the Board draws the attention of the Accounting Officer of the Procuring Entity to their responsibility to provide sufficient information in the subject tender, that is objective and quantifiable for the Evaluation Committee to be able to evaluate bids submitted in the subject tender as envisioned under the Constitution and the Act noting

that should a criterion emerge to be ambiguous in the course of evaluation, then the *doctrine of contra Proferentem* in Interpretation of Contracts will be applicable. This doctrine stipulates that in the event of an ambiguity, a clause shall be interpreted against the party who puts such clause forward and usually relies on such clause. The doctrine has been defined by Black's Law Dictionary, *9th Edition*, at page 377 as:

"The doctrine that, in interpreting documents, ambiguities are to be construed unfavorably to the drafter".

131. The prerequisite for the applicability of the *doctrine of Contra Proferentem* is the prevalence of ambiguity as was observed in the case of **Horne Coupar v Velletta & Company 2010 BCSC 483** where the Supreme Court of British Columbia held that "***ambiguity in a contract is the precondition to apply this doctrine though where the ambiguity is established, the rule is applied directly.***"

132. Similarly, in the **Civil Appeal No. 1942 of 2009 Bank of India & Another V K. Mohandas & Others, 2009 (5) SCC 313** where a question arose with respect to the interpretation of some provisions of the voluntary retirement scheme of 2000 of the Appellant, Justice R.M. Lodha opined that "***it was the Appellant who ultimately formulated the terms in the Contractual Scheme which stated, "the optees of voluntary retirement under that Scheme will be eligible to pension under the Pension Regulation, 1995," therefore they bear the risk of lack of clarity, if any.***"

133. As such, the Procuring Entity's Accounting Officer will shoulder the responsibility of addressing any contest that may be raised on applicability of an extraneous or ambiguous clause in the subject tender before the Board and it may be prudent to arrest such issues by way of clarifications before the subject tender submission deadline lapses. In the circumstances, and in view of the foregoing observations, it would be premature to determine whether the provisions of the Tender Document in the subject tender are in breach of the Constitution, the Act and Regulations 2020 noting that the tender submission deadline is yet to lapse and the Procuring Entity has adequate time to address any clarifications or issues that may be raised by prospective bidders with regard to the subject tender.

What orders should the Board grant in the circumstances?

134. The Board has established that it has jurisdiction to hear and determine the instant Request for Review having found that the Respondents' Preliminary Objection lacks merit.

135. The Board has found that the time provided for submission of tender documents in the subject tender is reasonable and sufficient noting that bidders have 17 more days to prepare and submit their tenders before lapse of the tender submission deadline.

136. The Board has further found that it would be premature to determine whether the provisions of the Tender Document in the subject tender are

in breach of the Constitution, the Act and Regulations 2020 noting that the tender submission deadline is yet to lapse and the Procuring Entity has adequate time to address any clarifications or issues that may be raised by prospective bidders with regard to the subject tender.

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

FINAL ORDERS

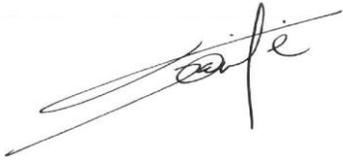
138.In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, No. 33 of 2015, the Board makes the following orders in the Request for Review dated 11th November 2025 and filed on 12th November 2025:

A. The Request for Review dated 11th November 2025 and filed on 12th November 2025 be and is hereby dismissed.

B. The Respondents are hereby directed to proceed with the procurement proceedings in Tender No. KP1/9A.2/OT/003/NM/25-26 for Provision of Roads/Pavement Opening/Cutting, Ducting and Reinstatement Services in accordance with the Constitution, the Act and Regulations 2020 noting the findings of the Board herein.

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

Dated at NAIROBI this 3rd Day of December 2025.



.....
PANEL CHAIRPERSON
PPARB



.....
SECRETARY
PPARB