

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 3/2026 OF 5TH JANUARY 2026

BETWEEN

CHINA CIVIL ENGINEERING CONSTRUCTION CORPORATIONAPPLICANT

AND

**THE MANAGING DIRECTOR,
KENYA RAILWAYS CORPORATION 1ST RESPONDENT**

KENYA RAILWAYS CORPORATION 2ND RESPONDENT

CHINA ROAD AND BRIDGE CORPORATION (CRBC) 1ST INTERESTED PARTY

CRCEG-COVEC CONSORTIUM 2ND INTERESTED PARTY

Review against the decision of the Managing Director Kenya Railways Corporation in relation to Tender No. KR/SCM/001/2025-2026 for Procurement for Design and Construction Works (EPC) of Proposed Nairobi Railway City Central Station, Public Realm and Other Associated Infrastructure Works

BOARD MEMBERS PRESENT

- | | |
|-----------------------|---------------------|
| 1. Ms. Alice Oeri | - Panel Chairperson |
| 2. Eng. Lilian Ogombo | - Member |

- 3. CPA Alexander Musau - Member
- 4. Mr. Joshua Kiptoo - Member

IN ATTENDANCE

- 1. Ms. Sarah Ayoo Holding brief for Board Secretary
- 2. Ms. Evelyn Weru Secretariat

PRESENT BY INVITATION

APPLICANT CHINA CIVIL ENGINEERING CONSTRUCTION CORPORATION

- Mr. Maloba - Advocate, Conrad Law Advocates LLP
- Mr. Michael Amalemba - Advocate, Conrad Law Advocates LLP
- Mr. Sam Gitau - Advocate, Conrad Law Advocates LLP

RESPONDENT THE MANAGING DIRECTOR, KENYA RAILWAYS CORPORATION & KENYA RAILWAYS CORPORATION

- Mr. Muturi - Advocate, G. K. Muturi & Co. Advocates
- Ms. Juma - Advoate, G. K. Muturi & Co. Advocates

1ST INTERESTED PARTY CHINA ROAD AND BRIDGE CORPORATION (CRBC)

Mr. Kiragu Kimani SC - Hamilton Harrison & Mathews Advocates

Mr. Wilson Mwihuri - Hamilton Harrison & Mathews Advocates

Ms. Arriella Saina - Hamilton Harrison & Mathews Advocates

2ND INTERESTED PARTY CRCEG- COVEC CONSORTIUM

Mr. Oronga - Advocate, Odhiambo Oronga & Company

OTHERS

Mr. Jacob Odalo Impresa Costrazioni Maltauro (ICM) – SPA Limited

Youssef El-Dabe Orascom Construction

BACKGROUND OF THE DECISION

The Tendering Process

1. Kenya Railways, the Procuring Entity and 2nd Respondent herein on 24th August 2025 issued a Request for Proposals (RFP) to shortlisted bidders following evaluation of their Expression of Interest issued on 30th June 2025 and invited them to submit sealed tenders in response to Tender No. KR/SCM/001/2025-2026 for Procurement for Design and Construction Works of Proposed Nairobi Central Station, Public Realm, and other Associated Infrastructure Works (hereinafter referred to as the "subject tender"). The Procuring Entity issued two (2) Addenda in the subject tender while extending the initial subject tender's submission deadline from 3rd October 2025 at 1100 hrs to 10th November 2025 at 1100 hrs (East Africa Time).

Submission of Tenders and Tender Opening

2. According to the Tender Opening Minutes dated 10th November 2025 which were part of confidential documents furnished to the Public Procurement Administrative Review Board (hereinafter referred to as the 'Board') by the 1st Respondent pursuant to Section 67(3)(e) of the Act, a total of three (3) tenders were submitted in response to the subject tender. The three (3) tenders were opened in the presence of tenderers' representatives present at the tender opening session, and were recorded as follows:

S/No	Firm Name	Bid Bond	No of copies	Pagination
1	China Civil Engineering Construction Corporation (CCECC)	From Stanbic Bank Value of Kshs. 500,000,000.00 Valid Up To 30th August 2026	1 Original (Volume 1-7) 3 Copies (Volume 1-7) Flask Disk Enclosed Financial Proposal	Page 1-2264 Consistently
2	China Overseas Engineering Group Company Limited & China Railway Group Limited	From Stanbic Bank Value of Kshs. 500,000,000.00 Valid Up To 31st August 2026	1 Original (Volume 1-7) 3 Copies (Volume 1-7)	Page 1-2101 Consistently

	(CRCEG-COVEC Consortium)		Flask Disk	
			Enclosed Financial Proposal	
3	China Road Bridge Corporation	From Stanbic Bank Value of Kshs. 500,000,000.00 Valid Up To 3rd August 2026	1 Original (Volume 1-3) 3 Copies (Volume 1-3) 2 No. Flask Disks Enclosed Financial Proposal	Page 1-1413 Consistently

Evaluation of Tenders

3. A Tender Evaluation Committee (hereinafter referred to as the “Evaluation Committee”) appointed by the 1st Respondent undertook evaluation of the three (3) tenders as captured in the Evaluation Report for the subject tender signed by members of the Evaluation Committee on 10th December 2025 and in the following stages:

- i Preliminary Evaluation
- ii Technical Evaluation

Preliminary Evaluation

4. The Evaluation Committee was required to carry out a Preliminary Evaluation and examine tenders for responsiveness using the criteria provided under Preliminary and Mandatory Requirements of Section III – Evaluation and Qualification Criteria at page 27 to 30 of the Tender Document. Tenderers were required to meet all the mandatory requirements at this stage to proceed for Technical Evaluation.
5. At the end of evaluation at this stage, the Evaluation Committee found the three (3) tenders as responsive and recorded the Preliminary Evaluation Results as follows:

Preliminary Evaluation Results.

The preliminary results of the mandatory evaluation of the bidders were as follows:

S/ No	Bidder name	Comments
1	China Civil Engineering Construction Corporation (CCECC)	The bidder passed all the mandatory requirements and proceeded for the technical evaluation
2	China Overseas Engineering Group Company Limited & China Railway Group Limited (CRCEG-COVEC Consortium)	The bidder passed all the mandatory requirements and proceeded for the technical evaluation
3	China Road Bridge Corporation	The bidder passed all the mandatory requirements and proceeded for the technical evaluation

Observation:

It was noted by the Evaluation committee that during the Technical Opening of the Tender Bidder no. 3 (China Road Bridge Corporation) had submitted 2 No. Flash Disks one indicated as a technical and the other indicated as a Financial hence the committee only evaluated the technical part flash disk awaiting the outcome before proceeding to the Financials.

Technical Evaluation

6. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under Technical Evaluation of Section III – Evaluation and Qualification Criteria at page 31 to 35 of the Tender Document. Tenders were required to attain a minimum pass mark of 80 at this stage of evaluation to progress for financial evaluation.

7. At the end of evaluation at this stage, the Evaluation Committee found the three (3) tenders as responsive having attained the minimum pass mark and recorded the Technical Evaluation Results as follows:

2.4 TECHNICAL SCORES:

The bidders technical scores after the technical evaluation is as follows:

Table; Summary of Technical scores:

No.	Description	Score	CCECC	CRCEG-COVEC	CRBC
1.	Specific experience of the firm	30 Marks	23.3	24.3	26.1
2.	\Work Plan and Methodology	20 Marks	16	16	16

3.	Construction Methodology	15 Marks	12	12	13
4.	Financial Capacity to Deliver	5 marks	5	5	5
5.	Plant & Equipment	5 Marks	5	5	5
6.	Qualification and Experience of Key Personnel	5 Marks	5	3.4	5
7.	ESG and Climate Resilience Mainstreaming Strategy Implementation	10 Marks	6.5	8	8
8.	Reference Design Implementation	10 marks	8	8	9
	TOTAL		80.8	81.7	87.1

Table: technical results for the bidders is as follows:

No.	BIDDER NAME	TECHNICAL SCORE
1.	China Civil Engineering Construction Corporation (CCECC)	80.8
2.	JV - China Overseas Engineering Group Company Limited & China Railway Group Limited (CRCEG-COVEC Consortium)	81.7
3.	China Road Bridge Corporation	87.1

Opening of Financial Proposals

8. Vide letters dated 10th December 2025, the three bidders were notified of the Technical Evaluation Outcome and invited for opening of the financial proposals on 17th December 2025 at 10.00 a.m.

9. According to the Minutes of the Financial Tender Opening Meeting for the subject tender signed by members of the Evaluation Committee on 17th December 2025, financial proposals were opened, read out and recorded as follows:

No.	Firm Name	Bid Amount	No. of Copies	Pagination
1.	China Civil Engineering Construction Corporation (CCECC)	22,985,321,359.55 Kshs	1 Original 3 Copies Flash disk	2265-2329 Consistently
2.	JV – China Overseas Engineering Group Company Limited & China Railway Group Limited (CRCEG-COVEC Consortium)	32,468,098,687.83 Kshs	1 Original 3 Copies Flash Drive	1-33 Consistently
3.	China Road and Bridge Corporation	29,538,624,318.00 Kshs	1 Original 3 Copies Did not attach a soft copy	1-225 Consistently

Financial Evaluation

10. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under Financial Evaluation of

Section III – Evaluation and Qualification Criteria of the Tender Document. The Quality Cost Based Selection Method would be used to determine the winning bidder in the subject tender.

11. According to the Evaluation Report for the subject tender signed by members of the Evaluation Committee on 22nd December 2025, the Evaluation Committee found as follows as regards the Financial Opening:

S/No.	Firm Name	Bid Amount	No. of Copies	Pagination
1.	China Civil Engineering Construction Corporation (CCECC)	22,985,321,359.55 Kshs Kenya Shillings Twenty Two Billion, Nine Hundred and Eighty Five Million Three Hundred and Twenty One Thousand Three Hundred and Fifty Nine and Fifty Five Cents Only	1 Original and 3 Copies Attached a soft copy (Flash disk)	Consistently from page 2265-2329
2.	JV – China Overseas Engineering Group Company Limited & China Railway Group	32,468,098,687.83 Kshs Kenya Shillings Thirty Two Billion, Four Hundred and Sixty Eight Million,	1 Original and 3 Copies Attached a soft copy (Flash Drive)	Consistently from page 1-33

	Limited (CRCEG-COVEC Consortium)	Ninety Eight Thousand Six Hundred and Eighty Seven and Eighty Three Cents Only		
3.	China Road and Bridge Corporation	29,538,624,318.00 Kshs Kenya Shillings Twenty Nine Billion, Five Hundred and Thirty Eight Million, Six Hundred and Twenty Four Thousand Three Hundred and Eighteen Only	1 Original and 3 Copies Did not attach a soft copy (Flash disk)	Consistently from page 1- 225

Note:

The evaluation committee noted that during the Financial opening China Road Bridge Corporation had not submitted a Soft Copy of the financial proposal as it had already been issued at the technical opening as indicated on the opening minutes as both the Technical and Financial Flash disks therefore the committee proceeded to the Financial Evaluation basing this as a minor deviation pursuant to section 79, 2(a) of the PPAD Act 2025, " A responsive tender shall not be affected by (a) minor deviations that do not materially depart from the requirements set out in the tender documents.

....."

12. At the end of evaluation at this stage, bids were analyzed as follows:

Weighted Financial Criteria

The lowest evaluated Financial Proposal (FM) is given the maximum financial score (Sf) of 100. The formula for determining the financial scores (Sf) of all other Proposals is calculated as follows:

$Sf = 100 \times Fm/F$, in which "Sf" is the financial score, "Fm" is the lowest price, and "F" the price of the proposal under consideration.

The weights given to the Technical (T) and Financial (P) Proposals are:

$P=0.2$

Proposals are ranked according to their combined technical (St) and financial (Sf) scores using the weights (T= the weight given to the Technical Proposal; P= the weight given to the Financial Proposal; $T+P=1$) as following: $S=St \times T\% + Sf \times P\%$.

The bids were analyzed as follows from the responsive bidders: -

	FIRM	Total Amount (Kshs)	Technical Scores	SCORE = $\frac{\{\text{Lowest Bid Price}\}}{\text{Bid Price}} \times 100$	Technical scores weighted to T= 0.8	Financial Scores weighted to P= 0.2	Combined Technical (T) and Financial (P) scores
1	China Civil Engineering Construction Corporation (CCECC)	22,985,321,359.55 Kshs	80.8	100	64.64	20	84.64
2	JV – China Oversees	32,468,098,687.83 Kshs	81.7	70.79	65.36	14.16	79.52

	Engineering Group Company Limited & China Railway Group Limited (CRCEG-COVEC Consortium)						
3	China Road and Bridge Corporation	29,538,624,318.00 Kshs	87.1	77.81	69.68	15.56	85.24

Notes

The Quality Cost Based Method where: $\text{Score} = \frac{\{\text{Lowest Bid Price}\}}{\text{Bid price}} \times 100$ was used to determine the Financial score

2.3.2 Combined Technical and Financial Score

S/No	Firm	Financial Bid Amount	Total	Rank
1	China Civil Engineering Construction Corporation (CCECC)	Kshs 22,985,321,359.55	84.64	2
2	JV – China Overseas Engineering Group	Kshs 32,468,098,687.83	79.52	3

	Company Limited & China Railway Group Limited (CRCEG-COVEC Consortium)			
3	China Road and Bridge Corporation	Kshs 29,538,624,318.00	85.24	1

Evaluation Committee’s Recommendation

13. The Evaluation Committee recommended the award of the subject tender to M/s China Road and Bridge Corporation being the responsive bidder at a Contract price of Kenya Shillings Twenty-Nine Billion, Five Hundred and Thirty-Eight Million, Six Hundred and Twenty-Four Thousand Three Hundred and Eighteen Only (Kshs. 29,538,624,318.00)

Professional Opinion

14. In a Professional Opinion dated 22nd December 2025 (hereinafter referred to as “the Professional Opinion”), the General Manager – Supply Chain Management, Benedict Kiema, reviewed the manner in which the subject procurement process in the subject tender was undertaken including evaluation of tenders concurred with the recommendations of the Evaluation Committee with respect to award of the subject tender.

15. The Professional Opinion was subsequently approved by the 1st Respondent on 22nd December 2025.

Notification to tenderers

16. Tenderers were notified of the outcome of evaluation of the subject tender on 23rd December 2025.

REQUEST FOR REVIEW NO. 3 OF 2026

17. On 5th January 2026, China Civil Engineering Construction Corporation, the Applicant herein, filed through Gillian Koskei, its Legal Officer, a Request for Review dated 3rd January 2026 together with a Statement in Support of Request for Review made by Wang Xu, its Director (hereinafter referred to as the 'instant Request for Review') seeking the following orders, in verbatim, from the Board that:

1. This Request for Review is allowed and immediate statutory intervention for the Intent to Award.

2. The Public Procurement Administrative Review Board, in exercise of its powers under Section 173 of the Public Procurement and Disposals Act;-

2.1 Annuls the rejection letter (Ref: KR/SCM/001/2025-2026) dated 23rd December 2025 to the Applicant.

2.2 Annuls the Notification of Intention to Award to the successful bidder.

2.3 For sufficient cause demonstrated, substitute the tender award decision of the Procuring Entity with an award of Tender No. KR/SCM/001/2025-2026 to the Applicant, and the procurement process be completed within 15 days of the decision of the Review Board.

4. The Procuring Entity be condemned to pay all the Applicant's costs of and/or incidental to this Request for Review.

18. In a Notification of Appeal and a letter dated 5th January 2026, Mr. Philemon Kiprop, the Secretary of the Board notified the 1st and 2nd Respondents of the filing of the Request for Review and the suspension of the procurement proceedings, 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 matter within five (5) days from 5th January 2026.

19. On 8th January 2026, the Applicant filed through Conrad Law Advocates LLP a Notice of Appointment of Advocates of even date.

20. Vide a letter dated 13th January 2026, the Board Secretary sent a reminder to the Respondents referring to the Notification of Appeal for the instant Request for Review dated 5th January 2025 and notified the

Respondent of the provisions under Regulation 205(3) & (4) of the Public Procurement and Asset Disposal Regulations 2020 (hereinafter referred to as "Regulations 2020") with regard to the five days within which they were required to submit a response being on or about 10th January 2026 noting that the operations of the Board are time bound and require matters to be concluded within 21 days.

21. On 13th and 14th January 2026, the 1st and 2nd Respondents filed through G.K. Muturi & Co. Advocates a Notice of Appointment dated 7th January 2026, a 1st and 2nd Respondents' Memorandum of Response dated 12th January 2026 together with the confidential documents concerning the subject matter pursuant to Section 67(3)(e) of the Act.

22. Vide a Hearing Notice dated 12th January 2025 (meant to read 2026), the Board Secretary, notified parties and all tenderers in the subject tender of an online hearing of the Request for Review slated for 15th January 2026 at 11.00 a.m., through the link availed in the said Hearing Notice.

23. Vide email and letter dated 13th January 2026, 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, inter alia, 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.

24. Vide email of 14th January 2026, the Board Secretary notified parties that the hearing of the instant Request for Review had been rescheduled to 20th January 2026 at 2.00 p.m. and a Rescheduling Hearing Notice dated 16th January 2026 sent to parties on 16th January 2026.

25. On 16th January 2026, the Interested Party, China Road & Bridge Corporation filed through Hamilton Harrison & Mathews a Notice of Appointment of Advocates dated 15th January 2026.

26. On 16th January 2026, the Applicant filed a Further Statement in Support of Request for Review made by Wang Xu on 14th January 2026 together with Written Submissions dated 14th January 2026.

27. On 19th January 2026, the Interested Party filed a Replying Affidavit sworn by Wu Jun on even date, Written Submissions and a List and Bundle of Authorities of even date.

28. On 19th January 2026, the 2nd Interested Party filed via email through Odhiambo Oronga & Company Advocates a Notice of Appointment of Advocated dated 15th January 2026 and Arguments in Support of the instant Request for Review dated 15th January 2026.

29. On 20th January 2026, the Respondents filed Written Submissions dated 19th January 2026.

30. On the same day of 20th January 2026, the Applicant filed a List and Bundle of Authorities dated 19th January 2026.

31. When the matter came up for hearing on 20th January 2026 at 3.00 p.m., parties confirmed pleadings filed before the Board and were subsequently allocated time within which each party was required to proceed and highlight their respective cases. Thus, the matter proceeded for virtual hearing as scheduled.

PARTIES' SUBMISSIONS

Applicant's case

32. In his submissions, Mr. Maloba for the Applicant placed reliance on the Applicant's pleadings filed before the Board.

33. Counsel submitted that the Applicant submitted its bid to the Respondents having met all the conditions as stipulated in the Tender Document and its representatives attended both the Technical Proposal Opening on 10th November 2025 and the Financial Proposal Opening on 17th December 2025.

34. He submitted that at the Financial Proposal opening, it was observed that the 1st Interested Party assigned serial number 3 had failed to submit the electronic copy in form of USB Flash disk of its financial proposal as obliged in the Tender Document. Counsel further submitted that this omission was duly recorded at the opening and that the

Applicant on 18th December 2025 brought to the attention of the Procuring Entity the failure by the 1st Interested Party to submit the electronic copy of its Financial Proposal contrary to the mandatory requirements of the Tender Document.

35. Counsel referred the Board to page iv of the Letter of Invitation and pointed out that the proposals were required to be enclosed in plain envelopes marked with the tender number and name and be deposited in the tender box provided. He also pointed out that the proposals were to be submitted in two separate envelopes for technical and financial proposals and the consultant was required to submit the original and 3 copies and 1 USB flash disk of the Technical proposal which shall be placed in a sealed envelope clearly marked technical proposal and one original and 3 copies and a soft copy in a USB flash disk placed in another envelope clearly marked financial proposal and the warning across the envelope indicated as do not open with the technical proposal. Further, that both envelopes were to be placed in an outer envelope and sealed bearing the submission address and tender information and marked clearly not to be opened except in the presence of the opening committee of the Procuring Entity.

36. The Applicant submitted that the Procuring Entity is in breach of Section 74(1) of the Act and Regulations 74(b), (c), and (d) and 75 of Regulations 2020 on account of its intention to award a tenderer who submitted tender documents that contained material deviation from the mandatory submission requirements stipulated in the Tender

Document. As to whether there was material deviation in the bid submitted by the 1st Interested Party, the Applicant referred to Clause 22.1 of the Instructions to Tenderers in the Tender Document and pointed out that the requirement for submission of the electronic copy of the financial proposal by bidders was a mandatory requirement in the Tender Document. Further, that the requirement that the financial proposal ought not to be opened with the Technical Proposal as outlined under ITT 22.1 of the Appendix to Instructions to Tenderers on page 23 of the Tender Document was also a mandatory requirement in the Tender Document.

37. The Applicant submitted that the Interested Party failed to satisfy the mandatory requirement under ITT 22.1 of the Appendix to Instructions to Tenderers on page 23 of the Tender Document for failure to provide an electronic copy of the financial proposal as instructed.

38. It further submitted that the two-envelope system in public procurement that obligates tenderers to separate the technical proposal from the financial proposal is crucial to ensure that the price set by tenderers does not influence the technical evaluation. Counsel argued that the Respondents' concession at paragraph 12 of their response that at the time of technical opening, the Interested Party submitted two (2) USB flash disks, one clearly labelled as containing the Technical proposal and the other clearly labelled as containing the Financial Proposal is a position that contravenes the mandatory requirements contained in the Instructions to Tenderers that stipulate

that electronic copies of the proposals served in the USB flash disks were to be placed in separate envelopes each clearly marked 'Technical Proposal' and 'Financial Proposal' and the Tender Document expressly instructed that the Financial Proposal was not to be opened with the Technical Proposal.

39. Counsel submitted that it can be inferred that the proposals were opened simultaneously occasioning a significant procedural irregularity as it compromised the fairness and objectivity of the technical evaluation by potentially exposing evaluators to the financial information prematurely since the proper procedure ensures that the technical merit is assessed without price bias and promotes a level playing field for all bidders and increases confidence in the procurement process.

40. While making reference to paragraphs 11, 12, 13, and 17 of the Respondents' response, the Applicant pointed out that the Respondents do not dispute that the Interested Party failed to submit the electronic copy of the Financial Proposal at the financial opening but justifies the said omission as a minor deviation which ought not to have rendered its bid as non-responsive. It referred to the provisions under Section 79 of the Act and the holding in Miscellaneous Civil Application No. 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 and argued that a responsive bid is one that meets all the mandatory

requirements as set out in the bid document which in essence are the first hurdle that bidders must overcome for further consideration in an evaluation process. While making reference to Section 79(2) and (3) of the Act, the Applicant submitted that a mandatory requirement cannot be waived by a procuring entity or termed as a 'minor deviation' since mandatory requirements are instrumental in determining the responsiveness of a bid and it is important for bidders to compete on an equal footing.

41. In support of its argument, the Applicant also referred to the holding by the High Court in Miscellaneous Civil Application No. 140 of 2019 Republic v Public Procurement Administrative Review Board; Accounting Officer, Kenya Rural Roads Authority & 2 others (Interested Parties) Ex parte Roben Aberdare (K) Ltd (2019) eKLR and pointed out that the Applicant was the lowest bidder and it is in the public interest that goods and services be procured at the best price possible as stipulated under Article 227(1), 232(1)(b) and 201 (d) of the Constitution.

42. Mr. Maloba urged the Board to allow the instant Request for Review as prayed.

Respondents' case

43. In his submissions, Mr. Muturi counsel for the Respondents placed reliance on the pleadings and confidential documents submitted to the Board by the Respondents.

44. Mr. Muturi submitted that contrary to the Applicant's submissions, the Respondents at paragraph 3 and 9 of their response contend that two electronic flash disks were enclosed by the Interested Party.
45. As to whether the Interested Party's tender was responsive and compliant with Section 79 of the Act and the mandatory requirements set out in the Tender Document, counsel referred the Board to provisions under Section 227(1) of the Constitution, Section 79(1) and 80 of the Act and submitted that the Applicant's allegation in the instant Request for Review are factually incorrect and legally unsustainable for the reasons that the Interested Party submitted two (2) USB flash disks, one containing the Technical Proposal and the other containing the Financial Proposal as required under the Tender Document. He further submitted that both flash disks were clearly labelled, submitted together with the original and three copies of each proposal and remained accessible to the Evaluation Committee throughout the procurement process.
46. He argued that the Applicant's contention that the Interested Party's conduct amounted to a material deviation and non-conformity cannot stand when measured against the eligibility criteria provided under Section III – Evaluation and Qualification criteria of the Tender Document.

47. Counsel pointed the Board to Clause 1.3 under Section III – Evaluation and Qualification Criteria which provides that the Procuring Entity shall use the criteria and methodologies listed in this section to evaluate and identify the successful bidder. He argued that the mandatory requirements enumerated under Clause 2 of Section III – Evaluation and Qualification Criteria did not impose any obligation regarding the use of envelopes, nor did they prescribe any consequence for the manner in which the envelopes were sealed, packaged, or placed, and did not classify envelope placement or separation as a condition precedent to responsiveness.

48. Counsel submitted that while undertaking the evaluation, the Evaluation Committee confirmed that the Interested Party had complied with the requirement stipulated under Item 2 of Section III – Evaluation and Qualification Criteria of the Tender Document, providing the prescribed number of hard copies and the corresponding USB flash disks for both proposals which was also noted during the tender opening that all bidders submitted two (2) flash disks.

49. He further submitted that during the Preliminary Evaluation stage, the Procuring Entity evaluated all bids against the mandatory eligibility and responsiveness criteria stipulated in the Tender Document and found that each bid, including that of the Applicant and the Interested Party met all the mandatory requirements and qualified as responsive under Section 79(1) of the Act.

50. He reiterated that in light of Section 79(1) and 80(2) of the Act, the Interested Party complied with the tender requirements by submitting the requisite Technical and Financial Proposal in the prescribed format, number of hard copies and USB flash disks and there was therefore no breach capable of rendering its bid as non-responsive.

51. The Respondents contend that the Applicant's claim are premised on the instructions contained in the letter of Invitation to Tender at page v of the Tender Document which set out the manner of presentation of the bid including the use of envelopes and arrangements for presenting the bid and the same approach is reflected in the Tender Data Sheet (TDS) at ITT 22.1 which addressed the manner and timing of submission of tenders and the form in which the bids are to be lodged. Further, that the provisions of the letter of invitation and ITT 22.1 of the TDS differ from Item 2 of Section III – Evaluation and Qualification Criteria and ITT 23 on sealing and marking of tenders which prescribe a distinct mode of sealing, marking, and presentation of the tender that is not identical to the approach set out in ITT 22.1 and the letter of Invitation to Tenderers.

52. They further contend that the provisions relied upon by the Applicant do not form part of the evaluation and qualification criteria for determining the mandatory eligibility of a bid noting that Clause 6.2 of the Invitation to Tender (ITT) expressly provides that the invitation to tender issued by the Procuring Entity does not form part of the tendering document, underscoring its purely informational and non-

evaluative character. Additionally, that the letter of invitation does not fall within the eligibility component under the Evaluation and Qualification Criteria in Section III -Evaluation and Qualification Criteria of the Tender Document and that the same applies to the clauses contained in the Tender Data Sheet which support the tender process but do not themselves constitute the mandatory criteria applied in assessing responsiveness and eligibility.

53. Counsel argued that given that different sections of the Tender Document adopted different wording and modes of description, it was not expressly clear where the flash disk was to be placed or enclosed and any ambiguity on that point could not lawfully be construed against a bidder in the absence of a clear and express mandatory prescription. Hence, since these matters were not included in the stated evaluation criteria under Section III – Evaluation and Qualification Criteria of the Tender Document, they could not be used to declare a bidder’s tender non-responsive and remained administrative instructions on presentation and packaging, which did not go to the root of determining eligibility or compliance with the preliminary and mandatory requirements.

54. Counsel submitted that it is trite law that procuring entities cannot introduce additional disqualification criteria at the evaluation stage which are not expressly provided for in the Tender Document and referred to the holding by the Board in PPARB Application No. 23 of 2021 and the High Court in 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). He pointed out that in the instant matter, the Interested Party's bid conformed to all eligibility, technical, and financial requirements and satisfied the threshold for preliminary evaluation and that the Tender Document did not prescribe any sanction or consequence for envelope placement or separation, confirming that such instructions were not material to responsiveness.

55. Counsel reiterated that the Procuring Entity acted lawfully within Section 79 and 80(2) of the Act in finding that the Interested Party's tender was responsive and proceeding to evaluate it on its merits and any contrary interpretation would introduce extraneous conditions into the tender process and violate the principles of legality, fairness, and proportionality enshrined in Article 227(1) of the Constitution.

56. As to whether the Interested party's conduct constituted a material or minor deviation, counsel submitted that the Tender Document did not list the mode of packaging of the USB flash disk as a mandatory requirement under the Preliminary Evaluation Criteria and the Interested Party met all mandatory thresholds at this stage and there existed no legal basis for its disqualification on account of non-responsiveness. Further, that the Tender Document did not provide that non-conformity with the sealing of envelopes or the failure to place the USB flash disk in separate envelopes, would result in automatic disqualification and the Interested Party complied fully and

substantively with the requirement by submitting one Technical USB flash disk and one Financial USB flash disk. He argued that the mere fact that both flash disks were placed in the one external envelope does not negate compliance, as the requirement was existential and substantive rather than formalistic.

57. Counsel submitted that to elevate an alleged breach of an administrative instruction into a material deviation would amount to importing additional disqualification criteria not contemplated by the Tender Document, contrary to section 79(1) of the Act. He further submitted that Section 79(2)(a) of the Act expressly provides that a responsive tender shall not be affected by minor deviations that do not materially depart from the requirements set out in the tender documents hence a deviation is material only where it affects the substance of the tender, alters scope, quality or performance, confers an unfair competitive advantage, or undermines fairness, transparency, or competition. In support of his argument, counsel referred to the holding in Republic v Public Procurement Administrative Review Board; Kenya Medical Supplies Authority (KEMSA) (Interested Party) Ex parte Emcure Pharmaceuticals Limited [2019] KEHC 2976 (KLR), and pointed out that the High Court defined a minor informality or irregularity as one that is merely a matter of form and not of substance, whose effect on price, quantity, quality, or delivery is negligible and which can be corrected or waived without prejudice to other bidder and as such, the placement of envelopes in this instance of both duly labelled flash disks in one envelope falls squarely within this category. He further made

reference to the holding by the Court of Appeal in Sinopec International Petroleum Service Corporation v Public Procurement Administrative Review Board & 3 others (Civil Appeal E012 of 2024) [2024] KECA 184 (KLR) (23 February 2024) (Judgment) and the High Court in Republic v Public Procurement Administrative Review Board; Intertek Testing Services EA Limited & another (Interested Parties); Sgs Kenya Limited (Ex parte Applicant) (Application 496 of 2017) [2025] KEHC 10529 (KLR) (Judicial Review) (16 July 2025) (Ruling) and Republic v Public Procurement Administrative Review Board; Arid Contractors & General Supplies (Interested Party) Ex parte Meru University of Science & Technology [2019] KEHC 1935 (KLR).

58. Counsel submitted that Section 72 of the Interpretation and General Provisions Act reinforces this approach by providing that where a form is prescribed by written law, an instrument shall not be void by reason of a deviation that does not affect its substance or is not calculated to mislead hence the manner in which the USB flash disks were packaged neither affected the substance of the Interested Party's bid nor misled the Procuring Entity in any way. He pointed out that this position was adopted by the Board in PPARB Application No. 44 of 2020 and reiterated that the Interested Party's placement of both duly labelled flash disks in one external envelope met none of the thresholds of a material deviation. He pressed on that the Technical and Financial Proposals remained distinct and that the Financial Proposal USB was not opened during the Technical Evaluation stage, no confidential information was disclosed, and no bidder was advantaged or

prejudiced. As such, counsel argued that the deviation was a classic minor informality within the meaning of Section 79(2)(a) of the Act and the cited authorities, and that the Evaluation Committee was statutorily entitled to treat it as such rather than impose the disproportionate sanction of disqualification at the Financial Evaluation stage.

59. As to whether the Procuring Entity breached the provisions under Section 87 of the Act and the principle of transparency, Mr. Muturi submitted that the Applicant's arguments on this limb are based on a misinterpretation of Section 87 of the Act which impose a limited obligation on a procuring entity to notify bidders of the fact that their tender was unsuccessful, the identity of the successful bidder and the reasons for non-selection.

60. He argued that this provision does not require disclosure of evaluation scores, rankings or comparative results of other bidders and that courts have affirmed that a procuring entity satisfies Section 87 of the Act where it communicates the outcome, identifies the successful bidder, and provides clear reasons for non-selection, without disclosing the full scoring matrix of competing bidders. He further argued that Section 67(1)(c) of the Act protects the confidentiality of evaluation proceedings and prohibits disclosure of competing bidders' evaluation details except as permitted by the Act under section 68 (2)(d)(iii) hence disclosure of evaluation scores would be contrary to statute, as it would undermine the confidentiality safeguards embedded under Section 67 of the Act.

61. He reiterated that by notifying the Applicant of the tender outcome, identifying the successful bidder and stating that the Applicant did not attain the highest combined technical and financial score, the Procuring Entity complied with Section 87 of the Act while safeguarding confidentiality as required under Section 67(1)(c) of the Act.

62. He further reiterated that the evaluation criteria provided that the winning bidder was the one with the highest marks of the technical and financial evaluation and as such, this determination was not based on the lowest price.

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

1st Interested Party's Case

64. In his submissions, Mr. Kiragu counsel for the 1st Interested Party placed reliance on the Interested Party's pleadings filed before the Board.

65. Mr. Kiragu submitted that decisions ought to be based on evidence and not innuendo, suppositions, unsubstantiated allegations and twisting of facts. He indicated that it is critical to analyze the function of the procuring entities different teams being the tender opening committee and the evaluation committee and the different mandates that they exercise. He further indicated that it is important to avoid

treating the entire tender document as a manuscript for evaluation since this would be a miscarriage of justice.

66. Counsel submitted that the first step when it comes to evaluation is looking at the documents for compliance and that this is an event where all bidders, if they so choose, have a ringside seat and are invited to the tender opening where what is checked is what bidders have submitted. He pointed out that all bidders in the subject tender were present at the tender opening and signed against the minutes where it was clear that there were two flash disks.

67. He invited the Board to look at paragraph 12 and 13 of the Respondents' response which states that for the successful bidder, there were two USB flash disks, one clearly labelled as containing the Technical Proposal and the other labelled as containing the Financial Proposal which was set aside. He pointed out that there is no evidence that the Evaluation Committee looked at the USB flash disk containing the Financial Proposal and looking at the different figures submitted by the bidders, this would not have favored the 1st Interested Party.

68. Counsel urged the Board to query on the mischief that the Procuring Entity intended to address with the provisions found under Section III – Evaluation and Qualification Criteria of the Tender Document. He indicated that the purpose of the clause at page 28 of the Tender Document was to simply separate the financial proposal from the technical proposal with the requirement of submission of the USB flash

in mind. He pointed out that the Board was being asked to determine whether putting the USB flash disks in one envelope is so fundamental a matter that it should stop the project in its tracks and have the Procuring Entity commence the process all over again.

69. He invited the Board to look at page 23 of the Tender Documents specifically ITT 22.1 and submitted that this cannot be imported into the evaluation criteria. He argued that no evidence has been placed before the Board to suggest that placing the two flash disks in one envelope in any way skewed the evaluation in favour of the Interested party or indeed affected the process in any material way. He indicated that he was in agreement with Mr. Muturi that it is the question of where the flash disk was placed that is being interrogated and not whether or not two separate flash disks were submitted. He pointed out that this would be a recipe for chaos since errors will continue to occur and it is always a question of how material an error is.

70. As to whether the 1st Interested Party complied with Mandatory Requirement No. 2 under Section III – Evaluation and Qualification criteria of the Tender Document, counsel submitted that the Interested party submitted a complete bid by the deadline of 10th November 2025 and that the bid included 2 clearly marked USB flash disks; one for the technical proposal and one for the financial proposal in full compliance with Mandatory Requirement No. 2 of Section III – Evaluation and Qualification Criteria of the Tender Document. Counsel pointed out that this fact was corroborated by the Procuring Entity at paragraph 12 of

their response where it confirms that the Interested Party submitted two USB flash disks clearly marked "Technical" and "Financial".

71. The 1st Interested Party submitted that Section 80 of the Act requires the Evaluation Committee to evaluate and compare tenders fairly, using the procedures and criteria outlined in the Tender Document and this is exactly what the Procuring Entity did. It further submitted that paragraph 9 of the Respondent's response indicates that the Procuring entity recorded 'yes' against Mandatory Requirement No. 2 and having passed this threshold, its bid was properly deemed responsive. In support of its argument, it pointed to page 27 of the Tender Document and made reference to the holding by the Court of Appeal in *Sinopec International Petroleum Service Corporation v Public Procurement Administrative Review Board & 3 others* (Civil Appeal E012 of 2024) [2024] KECA 184 (KLR) (23 February 2024) (Judgment) and PPARB Application No. 115 of 2025.

72. As to whether submission of the flash disk was in the proper format, counsel submitted that the allegation that the 1st Interested Party did not submit the mandatory USB flash disk containing the financial proposal in a particular format is vague and fails the basic test of pleadings by not specifying what the required format was or how the Interested Party's submission deviated. Counsel argued that this lack of particularization makes it impossible for the Interested Party to defend against, or for the Board to adjudicate fairly.

73. The 1st Interested Party contends that the only 'format' specified in the mandatory requirement was '1' electronic copy in a USB Flash disk, a condition that the Interested Party undeniably met. Counsel pointed out that the Respondents at paragraph 19 of their response stated that the Financial USB was noted present during the initial opening in one envelope and this was correctly and lawfully characterized as a minor deviation in line with Section 79(2)(a) of the Act. He pressed on that while the Evaluation Committee noted the presence of the financial USB flash disk during the technical opening, it opened and evaluated only the Technical Proposal disk at that stage. Further, that the Financial disk was retained, unopened and placed aside to be considered exclusively during the financial opening which took place on 17th December 2025 and that this did not confer any unfair advantage, or prejudice the competitive process. That the Financial Proposal on the said disk was subsequently opened and evaluated at the appropriate time, forming the basis for the Interested Party's financial score.

74. In support of its case, the 1st Interested Party made reference to the holding in PPARB Application No. 116 of 2020 and PPARB Application No, 111 of 2025 and submitted that its bid could not be disqualified on account of a non-material issue, which did not affect the substance of the bid, the integrity of the evaluation process, or the equality of competition. It reiterated that the presence of the financial flash disk in the technical proposal envelope was clearly a minor deviation as it did not materially alter or depart from the characteristics, terms, conditions, and other requirements set out in the tender documents,

did not touch on the substance of the tender, and can be quantified to the extent possible, and appropriately taken account of in the evaluation of tenders.

75. The 1st Interested Party maintained that the procurement process fully satisfied the constitutional mandate of fairness, transparency, and cost effectiveness under Article 227 of the Constitution and urged the Board to dismiss the instant Request for Review with costs.

2nd Interested Party's Case

76. In his submissions, Mr. Oronga for the 2nd Interested Party placed reliance on the 2nd Interested Party's pleadings filed before the Board and indicated that the 2nd Interested Party was in support of the instant Request for Review having similarly lodged a review application against the decision of the Procuring Entity in the subject tender in PPARB Application No. 2 of 2026.

77. Counsel submitted that the 1st Interested Party was awarded the subject tender by the Respondents whereas it had failed to comply with the mandatory provisions of the tender specifically the provision of a USB Flash disk containing the financial proposal as per Section III (2) of the tender document. He further submitted that this constituted non-responsiveness to the subject tender and disqualified the 1st Interested Party from further consideration.

78. As to whether or not the Interested Party met the mandatory requirements of the subject tender and if the Interested Party's bid was unresponsive, Mr. Oronga submitted that there was a breach of the mandatory terms by the Interested Party in its bid and that the said bidder ought to have been declared unresponsive and not proceeded to the Technical Evaluation stage.

79. He indicated that the invitation to tender specifically required that the technical proposal be placed in an envelope clearly marked technical proposal and which envelope MUST include an original copy, 3 copies and 1 USB flash disk and which envelope must be SEALED and similarly, the Instructions to Tenderers required that the financial proposal be submitted in a separate, duly sealed envelope containing the Original, the copies and a USB flash disk sealed therein, and that it shall not be opened together with the technical proposal.

80. He submitted that as acknowledged by the Respondents at paragraph 12 of their response, during the technical proposals opening, two USB flash disks submitted by the Interested Party were found inside their Technical Proposal envelope, in breach of the sealing and marking requirements under ITT Clauses 23.1–23.4, including Clause 23.3 of the Tender Document. He reiterated that Clause 38.4 of the ITT underscores the materiality of strict compliance with these requirements.

81. He further submitted that as acknowledged by the Respondents at paragraph 19 of their response, the Financial Proposal submitted by the Interested Party did not contain any USB flash disk, contrary to the mandatory submission requirements under paragraph 2 of Section III – Evaluation Criteria of the Tender Document thus rendering the said Financial Proposal materially non-responsive. Mr. Oronga submitted that these mandatory terms were set out in the Tender Document with the purpose of Safeguarding the integrity of the tendering process and ought to be read conjunctively and not disjunctively.

82. Counsel pressed on that there is no doubt that there was no flash disk accompanying the financial proposal and that despite concession by the Respondents, they gave excuses as to why they opened the said proposals separately in total disregard of the requirements set out in the Tender Document instead of declaring the Interested Party's bid as non-responsive. He argued that the Respondents erred in treating the Interested Party's breach as a minor deviation contrary to Clause 31.2-31.4 of the Tender Document and in violation of Clause 23.3 of the Tender Document which prohibits acceptance of tenders that are not properly sealed or opened prematurely thus undermining the fairness and integrity of the evaluation process.

83. Counsel further submitted that the notification letter issued to it failed to divulge the various scores by both the Applicant and Interested Party thus failing to promote fairness, transparency, accountability, and good governance. He pointed out that whereas the Respondents allege that

they have no obligation to release individual scores, in their notification to the applicant they issued the scores of the 3rd tenderer and not the entity to which the letter was addressed nor the winner of the tender.

84. The Applicant contends that the pagination of the Interested Party's Technical Proposal is reflected as Volumes 1-3, paginated from pages 1-1413 which directly contradicts paragraph 9 of the Respondents' response stating that the Interested Party submitted the original as Volumes 1-7 paginated from pages 1-2264 and that these unexplained inconsistencies undermine transparency and the integrity of the bid process.

85. Mr. Oronga urged the Board to allow the instant Request for Review as prayed.

Applicant's Rejoinder

86. In a rejoinder, Mr. Maloba reiterated that the Applicant's case in the instant Request for Review was based on purely facts and not conjecture and pointed out that at the financial proposal opening, it was determined that the 1st Interested Party did not submit soft copies of its Financial Proposal in the form of a USB flash disk as instructed.

87. Counsel pointed out that Clause 1.3 of Section III – Evaluation and Qualification Criteria of the Tender Document goes ahead to present how bids move from one stage of evaluation to another until the tender is awarded. He further pointed out that according to Clause 2 of Section

III – Evaluation and Qualification Criteria of the Tender Document, the Procuring Entity will start by examining all tenders to ensure they meet all the eligibility requirements in the ITT. He made reference to ITT 38.3 at page 16 of the Tender Document requiring the Evaluation Committee to evaluate the Technical Proposals that have passed the eligibility and mandatory criteria on the basis of their responsiveness to the Tender Documents where the eligibility and mandatory criteria include the listed requirements and any other that may be included in the Data Sheet.

88. Counsel urged the Board to note that the listed requirements included, inter alia, for a bidder to submit the required number of copies of the Technical Proposal and to submit a sealed form of tender (financial proposal). He maintained that these provisions cannot be read separately or in seclusion and ought to be read together as a whole and while making reference to ITT 22.1 of Section II – Tender Data Sheet (TDS) of the Tender document, he pointed out that the preamble of Section II – Tender Data Sheet (TDS) provides that the specific data therein shall complement, supplement, or amend the provisions of the Instructions to Tenderers (ITT) and whenever there is a conflict, the provisions therein shall prevail over those in the ITT.

89. Counsel submitted that Mandatory Requirement No. 2 under Preliminary and Mandatory Requirements of Section III – Evaluation and Qualification Criteria at page 28 of the Tender Document made it mandatory for a bidder to submit a technical proposal – One (1)

Original and three (3) copies and 1 electronic copy in a flash disk and Financial Proposal – One (1) Original and three (3) copies and 1 electronic copy in a USB Flash disk documents which according to ITT 22.1 of Section II – Tender Data Sheet (TDS) of the Tender document were to be separated and the Financial Proposal not opened during the technical evaluation. He further pointed out that pursuant to Section 122 of the Act, a bid submitted under the QCBS method shall be submitted under two envelopes and urged the Board to allow the instant Request for Review as prayed.

90. At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 5th January 2026 was due to expire on 26th January 2026 and that the Board would communicate its decision on or before 26th January 2026 to all parties to the Request for Review via email.

BOARD'S DECISION

91. The Board has considered all documents, submissions, and pleadings together with confidential documents submitted to it pursuant to section 67 (3)(e) of the Act and finds the following issues call for determination:

A. Whether the Procuring Entity's Evaluation Committee committed an illegality in its evaluation and award of the subject tender contrary to the provisions of the Tender Document as read with the Act and Constitution.

B. Whether the Notification of Intention to Award the subject tender dated 23rd December 2025 issued to the Applicant in the subject tender met the threshold required in Section 87(3) of the Act read with Regulation 82 of Regulations 2020.

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

Whether the Procuring Entity's Evaluation Committee committed an illegality in its evaluation and award of the subject tender contrary to the provisions of the Tender Document as read with the Act and Constitution.

92. The Board has heard the Applicant's argument that the Respondents failed to evaluate and award the subject tender as per the requirements set out in the Tender Document as read with the Act and Constitution. It is the Applicant's case that it was a mandatory term of the Tender Document as provided in the Letter of Invitation, ITT 22.1 of Section II - Tender Data Sheet (TDS), and Mandatory Requirement No. 2 under Preliminary and Mandatory Requirements of Section III – Evaluation and Qualification Criteria that a USB flash disk containing a bidder's technical, and financial proposal were to be submitted in a particular format to the Procuring Entity.

93. The Applicant contends that the 1st Interested Party failed to submit the mandatory USB flash disk containing its Financial Proposal in the set-out format to the Procuring Entity thus rendering its tender as non-responsive. It further contends that in breach of the law and the provisions of the Tender Document, the Respondents proceeded to admit the 1st Interested Party's non-responsive tender for further evaluation and subsequently awarded it the subject tender.

94. The Applicant held the position that contrary to the Respondents' assertions, the non-adherence by the 1st Interested Party as regards the set out mandatory requirement and specifications of submission of its USB flash disk containing its Financial Proposal can neither be cured nor termed as a minor deviation within the meaning of Section 79(2)(a) of the Act, and that the admission of the 1st Interested Party's bid for further evaluation was unlawful and gave it an unfair competitive advantage in the procurement process.

95. On their part, the Respondents submitted that the allegation by the Applicant was factually incorrect and legally unsustainable for the reason that the 1st Interested Party submitted two (2) USB flash disks, one containing the Technical Proposal and the other containing the Financial Proposal as required under the Tender Document and that both flash disks were clearly labelled, submitted together with the original and three copies of each proposal, and remained accessible to the Evaluation Committee throughout the procurement process.

96. The Respondents further submitted that while undertaking evaluation, the Evaluation Committee confirmed that the 1st Interested Party had complied with Mandatory Requirement No. 2 under Preliminary and Mandatory Requirements of Section III – Evaluation and Qualification Criteria of the Tender Document having provided the prescribed number of hard copies of its Technical and Financial Proposal and the corresponding USB flash disks for both proposals as also noted at the tender opening that all bidders submitted two flash disks.

97. It is the Respondents case that pursuant to Section 79(1) and 80(2) of the Act, responsiveness of a tender ought to be assessed exclusively against the mandatory requirements expressly set out in the Tender Document and not on informal or administrative instructions. They pointed out that the Applicant's claims are premised on the instructions contained in the Letter of Invitation and the ITT 22.1 of Section II - Tender Data Sheet (TDS) of the Tender Document that set out the manner of presentation of a bid including use of envelopes and arrangements for the bid's presentation. They further pointed out that these aforementioned provisions do not form part of the evaluation and qualification criteria, are not identical and differ from Mandatory Requirement No. 2 under Preliminary and Mandatory Requirements of Section III – Evaluation and Qualification Criteria of the Tender Document which prescribes a distinct mode of sealing, marking, and presentation of the bid thus could not be used to declare a bidder's tender as non-responsive.

98. The Respondents held the position that the 1st Interested Party conformed to all eligibility, technical, and financial requirements and that the Procuring Entity acted lawfully within the provisions of Section 79 and 80(2) of the Act in finding the 1st Interested Party's tender responsive and proceeding to evaluate it on its merits.

99. On its part, the 1st Interested Party associated itself with the Respondents' submissions and submitted that its bid met the threshold on the requirements set out in the Tender Document to warrant it being awarded the subject tender having been evaluated in line with Section 79 and 80 of the Act. The 1st Interested Party submitted that the Applicant's claim was unsustainable in law, unsubstantiated, and unsupported by the tender record. It further submitted that it complied with Mandatory Requirement No. 2 under Preliminary and Mandatory Requirements of Section III – Evaluation and Qualification Criteria of the Tender Document, a fact corroborated by the Procuring Entity having submitted a complete bid as at the tender submission deadline which included two (2) clearly marked USB flash disks, one for Technical Proposal and one for the Financial Proposal.

100. The 1st Interested Party contends that the only format for submission of the electric copy of the Technical and Financial Proposal specified in the mandatory requirement was 1 electronic copy in USB flash disk, a condition that it met. It further contends that its USB flash disk containing its Financial Proposal was noted as present during the initial technical opening and was correctly and lawfully characterized as a minor deviation. It maintained that while the Evaluation Committee

noted the presence of the USB flash disk containing the Financial Proposal during the technical opening, it only opened and evaluated the technical flash disk and the financial flash disk was retained, unopened, and placed aside to be considered exclusively during the financial opening, where it was subsequently opened and evaluated at the appropriate time. It held the position that its bid could not be disqualified on account of a non-material issued which does not affect the substance of its bid, the integrity of the evaluation process, or the equality of the competition.

101. On the part of the 2nd Interested Party, it indicated that it was in support of the instant Request for Review and associated itself with the Applicant's submissions. It maintained the position that the admission of the 1st Interested Party's bid for further evaluation was unlawful and gave it an unfair competitive advantage in the procurement process since it failed to adhere to the set out mandatory requirement and specifications of submission of its USB flash disk containing its Financial Proposal.

102. Having considered parties rival submissions, we note that the issue in contest pertains to the mode of submission of the 1st Interested Party's USB flash disk containing its Financial Proposal in the subject tender and if the same was done in accordance with the requirements set out in the Tender Document.

103. 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 ...”**

104. 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 "

105. We note 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.

106. 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.”

107. 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.

108. 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.”

109. 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.

110. 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.”

111. 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...

112. 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

113. 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.”

114. 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.”

115. 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...”

116. 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.

117. The Applicant herein is aggrieved by the decision of the Procuring Entity to award the subject tender to the 1st Interested Party who it considers to have failed to meet the set out mandatory requirements in the Tender Document as regards the mode of submission of its USB flash disk containing its Financial Proposal.

118. We note that the Letter of Invitation at page v of the Tender Document provides that:

“Proposals Must be enclosed in plain sealed envelopes marked with the tender Number and Name and be deposited in the tender Box provided at Kenya Railways Offices Block C, Haile Selassie addressed to the address indicated in the tender document

The proposal will be submitted in two separates inner envelopes for Technical and Financial Proposals. The Consultant must submit: The original one (1), three copies (3) and One (1) USB flash disk of the technical proposal of the Technical Proposal shall be placed in a sealed envelope clearly marked "TECHNICAL PROPOSAL," and the original, all copies and soft of the Financial Proposal shall be placed in another sealed envelope clearly marked "FINANCIAL PROPOSAL" and warning:

"DO NOT OPEN WITH THE TECHNICAL PROPOSAL". Both envelopes shall be placed into an outer envelope and sealed. This outer envelope shall bear the submission address and other information indicated in the tender and be clearly marked, "DO NOT OPEN, EXCEPT IN PRESENCE OF THE OPENING COMMITTEE."

(a) Technical Proposal: one (1) original and 3 copies and 1 Flash disk

(b) Financial Proposal: one (1) original and 3 copies and 1 USB flash disk (written do not open with Technical Proposal)

The financial proposals will be opened within 7days after the outcome of the technical proposal for the responsive bidders proceeding to the financial evaluation criteria and those of the non-responsive bidders will be returned unopened after the stand still period of the tendering propose.

QCBS Method will be used to determine the responsive bidder as detailed in the tender document."

119. According to the above Letter of Invitation:

- i. A bidder was required to enclose its Proposal in response to the subject tender in a plain sealed envelope marked with the tender name and number and to submit the same in the tender box provided by the Procuring Entity;
- ii. The Proposal was to be submitted in two separate envelopes for Technical and Financial Proposals;
- iii. It was mandatory for a bidder to submit the original one (1), three (3) copies, and one (1) USB flash disk of the Technical Proposal and to place all the aforementioned in a sealed envelope clearly marked 'TECHNICAL PROPOSAL';
- iv. It was mandatory for a bidder to submit the original one (1), three (3) copies, and one (1) USB flash disk of the Financial Proposal and to place all the aforementioned in another sealed envelope clearly marked 'FINANCIAL PROPOSAL' and bearing the warning 'DO NOT OPEN WITH THE TECHNICAL PROPOSAL';
- v. Both envelopes were required to be placed into an outer envelope and sealed with the outer envelope bearing the submission address and other information indicated in the tender and clearly marked 'DO NOT OPEN EXCEPT IN PRESENCE OF THE OPENING COMMITTEE'.
- vi. Financial Proposals were to be opened within 7 days after the outcome of the Technical Proposal for the responsive bidders progressing to the Financial Evaluation and for the non-

responsive to be returned unopened after the standstill period of the tendering process.

- vii. The responsive bidder would be used to determine the responsive bidder.

120. ITT 23 of Section I – Instructions to Tenderers of the Tender Document provides for Sealing and Marking of Tenders as follows:

23 Sealing and Marking of tenders

23.1 The Tenderer shall deliver the Proposals (technical and Financial) in a single sealed envelope, or in a single sealed package, or in a single sealed container bearing the name and Reference number of the Tender addressed to the Procuring Entity and a warning “DO NOT OPEN BEFORE..... (the time and date for Tender opening date”. Within the single envelope, package or container, the Tenderer shall place the following separate, sealed envelopes:

23.2 In the single sealed envelope, or in a single sealed package, or in a single sealed container the following documents shall be closed and shall be addressed as follows:

- a. in an envelope or package or container marked “ORIGINAL”, all documents comprising the Technical Proposal, and**
- b. in an envelope or package or container marked “COPIES”, all required copies of the Technical Proposal; and**

- c. in an envelope marked "ORIGINAL" the Form of Tender; and the inner envelopes or packages or containers shall:**
- i. bear the name and address of the Procuring Entity.**
 - ii. bear the name and address of the Tender; and**
 - iii. bear the name and Reference number of the Contract**

23.3 If an envelope or package or container is not sealed and marked as required, the Procuring Entity will assume no responsibility for the misplacement or premature opening of the proposal. Tenders that are misplaced or opened prematurely will not be accepted.

23.4 The Proposal or its modifications must be sent to the address indicated in the Data Sheet and received by the Procuring Entity no later than the deadline indicated in the Data Sheet, or any extension to this deadline. Any Proposal or its modification received by the Procuring Entity after the deadline shall be declared late and rejected, and promptly returned unopened.

121. According to the above provision, if a bidder's envelope is not sealed and marked as required, the Procuring Entity will not assume responsibility for the misplacement or premature opening of the said proposal and tenders that are misplaced or opened prematurely will not be accepted.

122. Further, ITT 22.1 of Section II – Tender Data Sheet (TDS) provides as follows with regard to preparation of tenders:

ITT 22.1	The Consultant must submit: The original one (1), all copies three (3) One (1) electronic copy in form of USB flash disk of the Technical Proposal shall be placed in a sealed envelope clearly marked "TECHNICAL PROPOSAL," and the original, all copies and soft of the Financial Proposal shall be placed in another sealed envelope clearly marked "FINANCIAL PROPOSAL" and warning: "DO NOT OPEN WITH THE TECHNICAL PROPOSAL". Both envelopes shall be placed into an outer envelope and sealed. This outer envelope shall bear the submission address and other information indicated in the Appendix "ITC" and be clearly marked, "DO NOT OPEN, EXCEPT IN PRESENCE OF THE OPENING COMMITTEE." (a) Technical Proposal: one (1), all copies three (3) One (1) electronic copy in form of USB flash disk (b) Financial Proposal: one (1), all copies three (3) One (1) electronic copy in form of USB flash disk (written do not open with Technical) The financial proposals will be opened within 7days after the outcome of the technical proposal for the responsive bidders proceeding to the financial evaluation criteria and those of the non-responsive bidders will be returned
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unopened after the stand still period of the tendering propose. Tenderer will be required to provide firmly bound requalification documents (original and copy) in either spiral, perfect cover, hard copy or case bound.

The tender documents should be paginated/serialized (each page of the tender submission, exclusive of the cover page, must have a number and the numbers must be chronological in order) For pagination the numbering system to be used are numerical numbers i.e., 1,2,3, 4..., n (n being the last page of the tender document)

123. The Board notes that the above provisions mirror the requirements stipulated under the Letter of Invitation in that, inter alia,

- i. A bidder's Proposal was to be submitted in two separate envelopes for the Technical and Financial Proposals;
- ii. It was mandatory for a bidder to submit the original one (1), three (3) copies, and one (1) USB flash disk of the Technical Proposal and to place all the aforementioned in a sealed envelope clearly marked 'TECHNICAL PROPOSAL';
- iii. It was mandatory for a bidder to submit the original one (1), three (3) copies, and one (1) USB flash disk of the Financial Proposal and to place all the aforementioned in another sealed envelope clearly marked 'FINANCIAL PROPOSAL' and bearing the warning 'DO NOT OPEN WITH THE TECHNICAL PROPOSAL';

- iv. Both envelopes were required to be placed into an outer envelope and sealed with the outer envelope bearing the submission address and other information indicated in the tender and clearly marked 'DO NOT OPEN EXCEPT IN PRESENCE OF THE OPENING COMMITTEE'.
- v. Financial Proposals were to be opened within 7 days after the outcome of the Technical Proposal for the responsive bidders progressing to the Financial Evaluation and for the non-responsive to be returned unopened after the standstill period of the tendering process.

124. Moreover, both the Letter of Invitation and ITT 22.1 of Section II – Tender Data Sheet (TDS) use the word 'shall' to depict the requisite documents both in hard and soft copy that are to be placed in the sealed envelopes marked 'Technical Proposal' and 'Financial Proposal'. In **Miscellaneous Civil Application No. 52 of 2018 Republic v Public Procurement Administrative Review Board & 4 Others ex parte Britam Life Assurance Company Limited & Another (2018) eKLR** the High Court observed that:

"...The word shall in its ordinary meaning is a word of command which is normally given a compulsory meaning as it is intended to denote obligation. The Longman Dictionary of the English Language states that "shall" is used to express a command or exhortation or what is legally mandatory. Regard must be had to the long-established principles of statutory interpretation. At

common law, there is a vast body of case law which deals with the distinction between statutory requirements that are peremptory or directory and, if peremptory, the consequences of non-compliance.

.....

125. Going by the High Court’s view, the use of the word ‘shall’ in the Letter of Invitation and ITT 22.1 of Section II – Tender Data Sheet (TDS) to depict the requisite documents both in hard and soft copy that are to be placed in the sealed envelopes marked ‘Technical Proposal’ and ‘Financial Proposal’ is to be construed as denoting compulsory or a mandatory obligation and in this regard, it was a mandatory obligation for a bidder to place:

- i. the original one (1), three (3) copies, and one (1) USB flash disk of the Technical Proposal in a sealed envelope clearly marked ‘TECHNICAL PROPOSAL’;
- ii. the original one (1), three (3) copies, and one (1) USB flash disk of the Financial Proposal of the Financial Proposal in a sealed envelope clearly marked ‘FINANCIAL PROPOSAL’.

126. Notably, the preamble under Section II – Tender Data Sheet (TDS) reads:

The following specific data shall complement, supplement, or amend the provisions in the Instructions to Tenderers (ITT). Whenever there is a conflict, the provisions herein shall prevail over those in ITT.

127. The import of the above provision is that the provisions under the Data Sheet at Section II – Tender Data Sheet (TDS) shall supplement the provisions under the Instructions to Tenderers and where there is a conflict between the provisions under the Instructions to Tenderers and the provisions under the Data Sheet, the provisions under the Data Sheet prevail. In **PPARB Application No. 125 of 2024 Nyonjoro East Africa Limited v The Accounting Officer, North Rift Valley Water Works Development Agency & Another**, the Board, differently constituted, held at paragraph 102 of its decision that:

.....

102. In essence, Clause 1.1 of the General Provisions at Section III- Evaluation and Qualification Criteria of the Tender Document as read with ITT 35.2(e) of Section II- Tender Data Sheet (TDS) of the Tender Document categorically provides the procedures and criteria that the Evaluation Committee is required to adhere to in evaluating bids submitted in the subject tender. Notably Section II –Tender Data Sheet (TDS) of the Tender Document provides that the specific data therein shall complement, supplement, or amend the provisions in the Instructions to Tenderer (ITT) and whenever there is a conflict, the provisions therein shall prevail over those in the ITT.

.....

128. The Board observes that the criteria for evaluation and qualification of bidders was provided under Section III- Evaluation and Qualification Criteria of the Tender Document. Clause 1 under Section III- Evaluation and Qualification Criteria of the Tender Document set out the General Provisions as follows:

1. General Provisions

1.1 This section contains the criteria that the Procuring Entity shall use to evaluate tender and qualify tenderers. No other factors, methods or criteria shall be used other than specified in this tender document. The Tenderer shall provide all the information requested in the forms included in Section IV, Tendering Forms. The Procuring Entity shall use the Standard Tender Evaluation Document for Goods and Works for evaluating Tenders.

.....

1.3 Evaluation and contract award criteria

The Procuring Entity shall use the criteria and methodologies listed in this Section to evaluate tenders and arrive at the Lowest Evaluated Tender. The tender that (i) meets the qualification criteria, (ii) has been determined to be substantially responsive to the Tender Documents, and (iii) is determined to have the Lowest Evaluated Tender price shall be selected for award of contract."

129. According to the above provisions, the Procuring Entity was required to evaluate tenders and qualify tenderers using the criteria set out under Section III – Evaluation and Qualification Criteria and no other factors, methods, or criteria would be used other than what has been specified in the Tender Document. For a tender to be selected for award of contract, it ought to inter alia, meet the qualification criteria and be determined to be substantially responsive to the Tender Documents.

130. We understand the above provision to mean that in addition to satisfying the evaluation criteria set out under Section III – Evaluation and Qualification Criteria of the Tender Document, a tender was required to be substantially responsive to the requirements specified in the Tender Document. Put differently, the Tender Document ought to be read holistically and interpreted conjunctively for a bid to not only be considered as substantially responsive but as having also met the qualification criteria.

131. The above is consistent with clause 6 of the tender document at page 4 thereof which provides;

Sections of Tender Document

6.1 The tender document consists of Parts 1, 2, and 3, which includes all the sections specified below, and which should be read in conjunction with any Addenda issued in accordance with ITT 10.

PART 1 Tendering Procedures

- i) Section I- Instructions to Tenderers (ITT)**
- ii) Section II- Tender Data Sheet (TDS)**
- iii) Section III- Evaluation and Qualification Criteria**
- iv) Section IV-Tendering Forms**

PART 2 Works Requirements

- i) Section V- Specifications**
- ii) Section VI- Drawings**

PART 3 Conditions of Contract and Contract Forms

- i) Section VII- General Conditions of Contract (GCC)**
- ii) Section VIII– Special Conditions of Contract (SCC)**
- iii) Section IX- Contract Forms**

6.2 The Invitation to Tender Document Notice issued by the Procuring Entity is not part of the Tender document.

6.3 Unless obtained directly from the Procuring Entity, the Procuring Entity is not responsible for the completeness of the Tender document, responses to requests for clarification, the minutes of the pre-Tender meeting (if any), or Addenda to the Tender document in accordance with ITT 10.

In case of any contradiction, documents obtained directly from the Procuring Entity shall prevail.

6.4 The Tenderer is expected to examine all instructions, forms, terms, and specifications in the Tender Document and to furnish with its Tender all information and documentation as is required by the Tender document.

132. We note that the parties made reference to Mandatory Requirement No. 2 under Preliminary and Mandatory Requirements of Section III – Evaluation and Qualification Criteria of the Tender Document with regard to submission of the Technical and Financial Proposals in the subject tender which provides:

2	Bidders Must Submit Technical Proposal – One (1) original and three (3) copies and 1 electronic copy in a USB Flash disk and Financial Proposal– One	RFP DOCUMENT	Each Bidder/ Consortium	Mandatory
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	(1) original and three (3) copies and 1 electronic copy in a USB Flash disk Documents			
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133. For a bidder to be considered as having complied with the above set out mandatory requirement, it was required to provide:

- i. Technical Proposal – One (1) original and three (3) copies and 1 electronic copy in a USB Flash disk; and
- ii. Financial Proposal – One (1) original and three (3) copies and 1 electronic copy in a USB Flash disk Documents.

134. According to the Minutes of the subject tender’s Tender Opening signed by Members of the Tender Opening Committee on 10th November 2025, Technical Proposals submitted in response to the subject tender were opened and recorded as follows:

S/No	Firm Name	Bid Bond	No of copies	Pagination

1	China Civil Engineering Construction Corporation (CCECC)	From Stanbic Bank Value of Kshs. 500,000,000.00 Valid Up To 30 th August 2026	1 Original (Volume 1-7) 3 Copies (Volume 1-7) Flask Disk Enclosed Financial Proposal	Page 1-2264 Consistently
2	China Overseas Engineering Group Company Limited & China Railway Group Limited (CRCEG-COVEC Consortium)	From Stanbic Bank Value of Kshs. 500,000,000.00 Valid Up To 31 st August 2026	1 Original (Volume 1-7) 3 Copies (Volume 1-7) Flask Disk Enclosed Financial Proposal	Page 1-2101 Consistently
3	China Road Bridge Corporation	From Stanbic Bank Value of Kshs. 500,000,000.00 Valid Up To 3 rd August 2026	1 Original (Volume 1-3) 3 Copies (Volume 1-3) 2 No. Flask Disks Enclosed Financial Proposal	Page 1-1413 Consistently

135. According to the Evaluation Report for the subject tender signed by members of the Evaluation Committee on 10th December 2025 following opening and evaluation of the Technical Proposals, the Preliminary Evaluation Results were recorded as follows:

Preliminary Evaluation Results.

The preliminary results of the mandatory evaluation of the bidders were as follows:

<i>S/ No</i>	<i>Bidder name</i>	<i>Comments</i>
<i>1</i>	<i>China Civil Engineering Construction Corporation (CCECC)</i>	<i>The bidder passed all the mandatory requirements and proceeded for the technical evaluation</i>
<i>2</i>	<i>China Overseas Engineering Group Company Limited & China Railway Group Limited (CRCEG-COVEC Consortium)</i>	<i>The bidder passed all the mandatory requirements and proceeded for the technical evaluation</i>
<i>3</i>	<i>China Road Bridge Corporation</i>	<i>The bidder passed all the mandatory requirements and proceeded for the technical evaluation</i>

Observation:

It was noted by the Evaluation committee that during the Technical Opening of the Tender Bidder no. 3 (China Road Bridge Corporation) had submitted 2 No. Flash Disks one indicated as a technical and the other indicated as a Financial hence the committee only evaluated the technical part flash disk awaiting the outcome before proceeding to the Financials.

136. According to the Minutes of the Financial Tender Opening Meeting for the subject tender signed by members of the Tender Opening Committee on 17th December 2025, financial proposals were opened, read out and recorded as follows:

No.	Firm Name	Bid Amount	No. of Copies	Pagination
1.	China Civil Engineering Construction Corporation (CCECC)	22,985,321,359.55 Kshs	1 Original 3 Copies Flash disk	2265-2329 Consistently
2.	JV – China Overseas Engineering Group Company Limited & China Railway Group Limited (CRCEG-COVEC Consortium)	32,468,098,687.83 Kshs	1 Original 3 Copies Flash Drive	1-33 Consistently
3.	China Road and Bridge Corporation	29,538,624,318.00 Kshs	1 Original 3 Copies Did not attach a soft copy	1-225 Consistently

137. According to the Evaluation Report for the subject tender signed by members of the Evaluation Committee on 22nd December 2025

following evaluation of the Financial Proposals, the Evaluation Committee found as follows as regards the Financial Opening:

S/No.	Firm Name	Bid Amount	No. of Copies	Pagination
1.	China Civil Engineering Construction Corporation (CCECC)	22,985,321,359.55 Kshs Kenya Shillings Twenty-Two Billion, Nine Hundred and Eighty-Five Million Three Hundred and Twenty-One Thousand Three Hundred and Fifty-Nine and Fifty-Five Cents Only	1 Original and 3 Copies Attached a soft copy (Flash disk)	Consistently from page 2265-2329
2.	JV – China Overseas Engineering Group Company Limited & China Railway Group Limited (CRCEG-COVEC Consortium)	32,468,098,687.83 Kshs Kenya Shillings Thirty-Two Billion, Four Hundred and Sixty-Eight Million, Ninety-Eight Thousand Six Hundred and Eighty-Seven and Eighty-Three Cents Only	1 Original and 3 Copies Attached a soft copy (Flash Drive)	Consistently from page 1-33

3.	China Road and Bridge Corporation	29,538,624,318.00 Kshs Kenya Shillings Twenty-Nine Billion, Five Hundred and Thirty-Eight Million, Six Hundred and Twenty-Four Thousand Three Hundred and Eighteen Only	1 Original and 3 Copies Did not attach a soft copy (Flash disk)	Consistently from page 1-225
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Note:

The evaluation committee noted that during the Financial opening China Road Bridge Corporation had not submitted a Soft Copy of the financial proposal as it had already been issued at the technical opening as indicated on the opening minutes as both the Technical and Financial Flash disks therefore the committee proceeded to the Financial Evaluation basing this as a minor deviation pursuant to section 79, 2(a) of the PPAD Act 2025, " A responsive tender shall not be affected by (a) minor deviations that do not materially depart from the requirements set out in the tender documents.

....."

138. From the above Tender Opening Minutes and Evaluation Reports, we note as follows with regard to submission of the Interested Party's USB flash disk with respect to its Financial Proposal:

- i. The Tender Opening Committee at the initial opening of the Technical Proposals submitted in the subject tender on 10th

- November 2025 noted that the 1st Interested party submitted two (2) No. of flash disks;
- ii. The Evaluation Committee during evaluation of the Technical Proposals noted that the 1st Interested party had submitted two (2) No. of flash disks one indicated as technical and the other indicated as Financial hence evaluated only the technical part flash disk;
 - iii. The Tender Opening Committee at the opening of the Financial Proposals on 17th December 2025 noted that the 1st Interested Party did not attach a soft copy of the Financial Proposal;
 - iv. The Evaluation Committee during the evaluation of the Financial Proposals noted that the 1st Interested Party had not submitted a soft Copy of the financial proposal as it had already been issued at the technical opening as indicated on the opening minutes as both the Technical and Financial Flash disks and progressed the Interested party to Financial Evaluation having based this deviation as a minor deviation pursuant to section 79 (2) (a) of the Act.

139. At this juncture, the question that the Board is now called upon to answer is whether the Respondents were justified to base the deviation committed by the 1st Interested Party in submission of its soft copy 1 USB flash disk containing its Financial Proposal in its Technical Proposal Envelope instead of placing it in the Financial Proposal Envelope together with all attendant documents related to the Financial Proposal i.e., 1 original and 3 copies as a minor deviation that did not materially

depart from the requirements set out in the Tender Document. This is in view of having hereinabove established that the requirements provided in both the Letter of Invitation and ITT 22.1 of Section II – Tender Data Sheet (TDS) with regard to submission of the Technical and Financial Proposal were set in mandatory terms.

140. We note that ITT 30.1 of Section I – Instructions to Tenderers of the Tender Document defines a deviation as:

“Deviation” is a departure from the requirements specified in the tender document;

141. ITT 31 of Section I – Instructions to Tenderers of the Tender Document further provides for determination of Responsiveness as follows:

31.2 A substantially responsive Tender is one that meets the requirements of the Tender document without material deviation, reservation, or omission. A material deviation, reservation, or omission is one that, if accepted, would:

- a. Affect in any substantial way the scope, quality, or performance of the Works specified in the Contract; or**
- b. limit in any substantial way, inconsistent with the tender document, the Procuring Entity's rights or the tenderer's obligations under the proposed contract; or**
- c. if rectified, would unfairly affect the competitive position of other tenderers presenting substantially responsive tenders.**

.....

31.4 If a tender is not substantially responsive to the requirements of the tender document, it shall be rejected by the Procuring Entity and may not subsequently be made responsive by correction of the material deviation, reservation, or omission

142. In essence, a deviation as provided for in the Tender Document is a departure from the requirements specified in the Tender Document and for a tender to be deemed as substantially responsive, it ought to meet the requirements of the Tender Document without material deviation. For a deviation to be considered as material, if accepted and rectified, it would unfairly affect the competitive position of other tenderers presenting substantially responsive tenders. Further, if a tender is not substantially responsive to the requirements of the tender document, it shall be rejected by the Procuring Entity and may not subsequently be made responsive by correction of the material deviation.

143. By submitting two (2) USB flash disks each containing the Technical and Financial Proposals, the 1st Interested Party by no doubt deviated from the Tender Documents requirements on submission of bids in the subject tender as laid out in the Letter of Invitation and ITT 22.1 of Section II – Tender Data Sheet (TDS) which were in mandatory terms. We have hereinabove established that in addition to satisfying the evaluation criteria set out under Section III – Evaluation and Qualification Criteria of the Tender Document, a tender was required

to be substantially responsive to the requirements specified in the Tender Document including mandatory requirement No.2 reproduced hereinabove.

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 a procuring entity cannot 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 Guard force 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. In the recent holding by the High Court in **Republic v Public Procurement Administrative Review Board Ex parte Fresquare Investments Limited & 2 Others (Interested Parties) [2025]** eKLR Justice R.E.Aburili held that:

.....

133. In view of this Court, treating the Applicant’s omission as a ‘minor error’ would directly undermine Article 227 of the Constitution and the statutory architecture of the PPADA in several interconnected ways as stated below.

134. Article 227 of the Constitution provides:

.....

135. Article 227(1) requires procurement systems to be fair and equitable, transparent, competitive and cost-effective. Therefore, treating a substantive omission as minor would inter alia, confer an undue advantage on the Applicant; penalise bidders who strictly complied with the tender requirements; and introduce unequal treatment. Fairness in procurement is not subjective or outcome-based. It is achieved by uniform application of the rules to all bidders.

136. Secondly, Article 227 also demands transparency. It follows that if a mandatory requirement can later be re-classified as “minor,” bidders cannot predict which rules will be enforced and as a result, tender requirements lose

normative force thereby making the procurement process opaque and discretionary, contrary to the constitutional design. Transparency requires that bidders know in advance what will disqualify them and that those rules will be enforced as written.

137. Thirdly, public procurement competitiveness and cost effectiveness depends on a level playing field. Therefore, permitting post-submission curing of substantive omissions allows bidders to submit incomplete tenders, knowing they may later rectify them, it disincentivises diligence and compliance and distorts genuine competition, ultimately undermining cost-effectiveness. 138. Fourthly, Section 79 draws a bright line between responsive and non-responsive tenders. The Section provides:

.....

139. Section 79(1) requires compliance with all mandatory requirements and Section 79(2) allows only non-material deviations. Treating the omission as minor would in my view collapse this statutory distinction, convert mandatory requirements into optional ones and undermine section 79 of the Act thereby rendering the section nugatory.

140. In the view of this Court, once a requirement in the tender documents is mandatory, materiality is already legislatively determined and therefore the procuring entity or the Review Board cannot make it discretionary to favour one bidder against the other bidders who have complied with the

requirement. 141. Fifth, Section 80 of the Act mandates that evaluation be conducted strictly in accordance with the tender documents. The section provides:

.....

142. in view of the above provision, re-characterizing a mandatory requirement as minor at evaluation stage would Amount to re-writing the tender documents by introducing undisclosed evaluation criteria and as a result, violate the principle that bidders must be evaluated on pre-disclosed rules only.

143. Sixth, Section 82 of the Act and Regulation 74 of the 2020 Regulations permit correction and clarification only where such clarification does not introduce new information or change the substance of the tender.

144. Section 82 provides:

82. Correction, revision, adjustment or amendment of tender (1) Subject to subsection (2) of this section, the tender sum as submitted and read out during the tender opening shall be absolute and final and shall not be the subject of correction, revision, adjustment or amendment in any way by any person entity. (2) For avoidance of doubt, the provisions of subsection (1) shall not apply to sections 103, 131 and 141 of this Act.

145. Although the section refers to the tender sum, where the error is not a typo or clerical error, allowing disclosure of the auditor's name post-submission would introduce new

material information, cure a substantive omission and convert clarification into post-tender compliance. This would directly defeat the statutory limits placed on clarification.

146. On the other hand, Regulation 74 provides:

74. Preliminary evaluation of open tender

(1) Pursuant to section 80 of the Act and upon opening of tenders, the evaluation committee shall first conduct a preliminary evaluation to determine whether —

(a) a tenderer complies with all the eligibility requirements provided for under section 55 of the Act;

(b) the tender has been submitted in the required format and serialized in accordance with section 74(1)(i) of the Act;

(c) any tender security submitted is in the required form, amount and validity period, where applicable;

(d) the tender has been duly signed by the person lawfully authorised to do so through the power of attorney;

(e) the required number of copies of the tender have been submitted; (f) the tender is valid for the period required;

(g) any required samples have been submitted; and

(h) all required documents and information have been submitted.

(2) Subject to section 79(2)(b) of the Act, any errors in the submitted tender arising from a miscalculation of unit price, quantity, subtotal and total bid price shall be considered as a major deviation that affect.

.....

149. Eighth is that the Review Board being a creature of statute, if it were permitted to re-classify substantive omissions as minor or waive mandatory requirements, this would act ultra vires its mandate and usurp the legislative role reserved to Parliament under Article 227(2) of the Constitution.

150. Lastly, at a systemic level, treating substantive omissions as minor deviations would encourage strategic non-compliance by bidders, increase procurement disputes and litigation, introduce subjectivity into evaluation, and thereby eroding public confidence in procurement processes.

151. Public procurement law exists precisely to restrain discretion, not to expand it. It follows that a procurement process is rendered unfair not by strict enforcement of tender requirements, but by selective relaxation of those requirements in favour of one or another of the bidders.

152. Thus, the constitutional and statutory framework requires, rather than prohibits, strict rejection of tenders that fail to meet mandatory requirements.

150. From the above, the Learned Judge pointed out that treating a substantive omission as a minor deviation confers an unfair advantage on the Applicant therein and penalizes bidders who strictly complied with the tender requirements. She further pointed out that fairness in public procurement is achieved by uniform application of the rules to all bidders and that if a mandatory requirement can later be re-

classified as a minor, bidders cannot predict which rules will be enforced making the procurement process opaque and discretionary contrary to the constitutional design. Importantly, public procurement competitiveness and cost-effectiveness depends on a level playing field and permitting post-submission curing of substantive omissions allows bidders to submit incomplete tenders knowing that they may later rectify them thereby distorting genuine competition and undermining cost-effectiveness. The High Court was adamant in stating that once a requirement in the tender document is mandatory, neither the procuring entity or this Board can make it discretionary to favour one bidder against the other bidders who have complied with the requirement.

151. Considering the above, we are left with the inevitable conclusion that the Procuring Entity's Evaluation Committee erred in treating the deviation committed by the 1st Interested Party in submission of its soft copy 1 USB flash disk containing its Financial Proposal in its Technical Proposal Envelope instead of placing it in the Financial Proposal Envelope together with all attendant documents related to the Financial Proposal i.e., 1 original and 3 copies as a minor deviation that did not materially depart from the requirements set out in the Tender Document.

152. This is in view of the fact that the requirements provided in both the Letter of Invitation and ITT 22.1 of Section II – Tender Data Sheet (TDS) with regard to submission of the Technical and Financial Proposal

were set in mandatory terms and non-compliance rendered the 1st Interested Party's bid as non-responsive and it ought not have been progressed for further evaluation at the Financial Evaluation stage.

153. From the contents of the Evaluation Report signed by members of the Evaluation Committee on 22nd December 2025 following evaluation of the Financial Proposals, the Evaluation Committee found as follows as regards the Technical Scores and Financial scores:

2.4 TECHNICAL SCORES:

The bidders technical scores after the technical evaluation is as follows:

Table; Summary of Technical scores:

No.	Description	Score	CCECC	CRCEG-COVEC	CRBC
9.	Specific experience of the firm	30 Marks	23.3	24.3	26.1
10.	Work Plan and Methodology	20 Marks	16	16	16
11.	Construction Methodology	15 Marks	12	12	13
12.	Financial Capacity to Deliver	5 marks	5	5	5
13.	Plant & Equipment	5 Marks	5	5	5
14.	Qualification and Experience of Key Personnel	5 Marks	5	3.4	5
15.	ESG and Climate Resilience	10 Marks	6.5	8	8

	Mainstreaming Strategy Implementation				
16.	Reference Design Implementation	10 marks	8	8	9
	TOTAL		80.8	81.7	87.1

Table: technical results for the bidders is as follows:

No.	BIDDER NAME	TECHNICAL SCORE
4.	China Civil Engineering Construction Corporation (CCECC)	80.8
5.	JV - China Overseas Engineering Group Company Limited & China Railway Group Limited (CRCEG-COVEC Consortium)	81.7
6.	China Road Bridge Corporation	87.1

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Weighted Financial Criteria

The lowest evaluated Financial Proposal (FM) is given the maximum financial score (Sf) of 100. The formula for determining the financial scores (Sf) of all other Proposals is calculated as follows:

$Sf = 100 \times Fm / F$, in which "Sf" is the financial score, "Fm" is the lowest price, and "F" the price of the proposal under consideration.

The weights given to the Technical (T) and Financial (P) Proposals are:

P=0.2

Proposals are ranked according to their combined technical (St) and financial (Sf) scores using the weights (T= the weight given to the Technical Proposal; P= the weight given to the Financial Proposal; T+P=1) as following: $S = St \times T\% + Sf \times P\%$.

The bids were analyzed as follows from the responsive bidders: -

	FIRM	Total Amount (Kshs)	Technical Scores	SCORE = {<u>Lowest Bid Price</u>} x 100 Bid Price	Technical scores weighted to T= 0.8	Financial Scores weighted to P= 0.2	Combined Technical (T) and Financial (P) scores
1	China Civil Engineering Construction Corporation (CCECC)	22,985,321,359.55 Kshs	80.8	100	64.64	20	84.64
2	JV – China Overseas Engineering Group Company Limited & China Railway Group Limited (CRCEG- COVEC Consortium)	32,468,098,687.83 Kshs	81.7	70.79	65.36	14.16	79.52

3	China Road and Bridge Corporation	29,538,624,318.00 Kshs	87.1	77.81	69.68	15.56	85.24
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Notes

The Quality Cost Based Method where: $\text{Score} = \frac{\{\text{Lowest Bid Price}\}}{\text{Bid price}} \times 100$ was used to determine the financial score

2.3.2 Combined Technical and Financial Score

S/No	Firm	Financial Bid Amount	Total	Rank
1	China Civil Engineering Construction Corporation (CCECC)	22,985,321,359.55 Kshs	84.64	2
2	JV – China Overseas Engineering Group Company Limited & China Railway Group Limited (CRCEG-COVEC Consortium)	32,468,098,687.83 Kshs	79.52	3
3	China Road and Bridge Corporation	29,538,624,318.00 Kshs	85.24	1

154. As to the successful bidder in the subject tender, ITT 38.4 of Section II – Tender Data Sheet (TDS) of the Tender Document provides:

“Only Technical proposals of tenderers that pass the preliminary examination as outlined in Section III (Preliminary examination for Determination of Responsiveness) will be evaluated. The preliminary examination is a pass/fail assessment, and a Proposal shall be rejected at this stage if it does not respond to important aspects of the tender. A Proposal shall be rejected if it fails to achieve the minimum technical score of 80 out of 100. The technical score weight shall be $T = 0.8$ and Financial $P = 0.2$ ”

155. Further, ITT 43.1 of Section II – Tender Data Sheet (TDS) of the Tender Document provides:

“The Lowest bidder shall be determined using the QCBS method that is the bidder the bidder with the highest combined technical and financial score as follows: The lowest evaluated Financial Proposal (F_m) is given the maximum financial score (S_f) of 100. The formula for determining the financial scores (S_f) of all other Proposals is calculated as follows: $S_f = 100 \times F_m / F$, in which “ S_f ” is the financial score, “ F_m ” is the lowest price, and “ F ” the price of the proposal under consideration.

The weights given to the Technical (T) and Financial (P) Proposals are: T = 0.8 and P = 0.2 Proposals are ranked according to their combined technical (St) and financial (Sf) scores using the weights (T = the weight given to the Technical Proposal; P = the weight given to the Financial Proposal; T + P = 1) as following: $S = St \times T\% + Sf \times P\%$. The minimum technical score required to pass is 80%.”

156. Additionally, ITT 45.1 of Section II – Tender Data Sheet (TDS) of the Tender Document provides:

“The Lowest Evaluated Bidder shall be the bidder with the highest combined technical and financial scores. The tenderer must have met all the tender requirements, including the scope of work, terms of reference, and technical specs.”

157. The Board takes note of Section 86 of the Act that provides for the successful tender as follows:

“(1) The successful tender shall be the one who meets any one of the following as specified in the tender document—

(a) the tender with the lowest evaluated price;

(b) the responsive proposal with the highest score determined by the procuring entity by combining, for each proposal, in accordance with the procedures and

criteria set out in the request for proposals, the scores assigned to the technical and financial proposals where Request for Proposals method is used;

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

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

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

(2) For the avoidance of doubt, citizen contractors, or those entities in which Kenyan citizens own at least fifty-one per cent shares, shall be entitled to twenty percent of their total score in the evaluation, provided the entities or contractors have attained the minimum technical score.”

158. Further, Regulation 77 of Regulations 2020 provides for Financial Evaluation and determination of the evaluated tender price as follows:

“77. Financial evaluation

(1) Upon completion of the technical evaluation under regulation 76 of these Regulations, the evaluation committee shall conduct a financial evaluation and comparison to determine the evaluated price of each tender.

(2) The evaluated price for each bid shall be determined by—

(a) taking the bid price in the tender form;

(b) taking into account any minor deviation from the requirements accepted by a procuring entity under section 79(2)(a) of the Act;

(c) where applicable, converting all tenders to the same currency, using the Central Bank of Kenya exchange rate prevailing at the tender opening date;

(d) applying any margin of preference indicated in the tender document.

(3) Tenders shall be ranked according to their evaluated price and the successful tender shall be in accordance with the provisions of section 86 of the Act.”

159. In essence, an evaluation committee while evaluating tenders at the financial evaluation stage is required take the bid price in the Form of Tender and rank tenders according to their evaluated price whereby the successful bidder shall be the one who meets the criteria specified under Section 86 of the Act and the Tender Document. In the instant procurement proceedings, the bidder with the highest combined score technical and financial score would be declared the winner.

160. Having established that the 1st Interested Party’s bid ought not to have progressed for further evaluation at the Financial Evaluation

stage, we find that the scoring of the Financial Proposals by the Procuring Entity's Evaluation Committee as indicated in the Evaluation Report signed by members of the Evaluation Committee on 22nd December 2025 to have been erroneous and misguided for having considered the 1st Interested Party's non-responsive bid.

161. In the circumstances, we find that the Procuring Entity's Evaluation Committee committed an illegality in its evaluation and award of the subject tender contrary to the provisions of the Tender Document as read with the Act and Constitution. Accordingly, this ground of review succeeds and is allowed.

Whether the Notification of Intention to Award the subject tender dated 23rd December 2025 issued to the Applicant in the subject tender met the threshold required in Section 87(3) of the Act read with Regulation 82 of Regulations 2020.

162. The Applicant contends that the Notification of Intention to Award the subject tender dated 23rd December 2025 was issued contrary to Section 87(3) of the Act having failed to divulge both its scores and those of the Interested Party. In response, the Respondents submitted that Section 87 of the Act imposes a limited obligation on a procuring entity to notify bidders of the fact that their tender was unsuccessful, the identity of the successful bidder and the reasons for non-selection. It further submitted that this provision does not require disclosure of evaluation scores, rankings or comparative results of other bidders and

that disclosure of confidential information pertaining to evaluation would be contrary to Section 67(1) of the Act unless in instances permitted under Section 68(2)(d)(iii) of the Act.

163. We note that Section 87 of the Act is instructive on how notification of the outcome of evaluation of the successful and unsuccessful tenderers should be conducted by a procuring entity and provides as follows:

“87. Notification of intention to enter into a contract

(1) Before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity shall notify in writing the person submitting the successful tender that his tender has been accepted.

(2) The successful bidder shall signify in writing the acceptance of the award within the time frame specified in the notification of award.

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

(4) For greater certainty, a notification under subsection (1) does not form a contract nor reduce the validity period for a tender or tender security.”

164. Section 87 of the Act recognizes that notification of the outcome of evaluation of a tender is made in writing by an accounting officer of a procuring entity. Further, the notification of the outcome of evaluation ought to be done simultaneously to the successful tenderer(s) and the unsuccessful tenderer(s). A disclosure of who is evaluated as the successful tenderer is made to the unsuccessful tenderer with reasons thereof in the same notification of the outcome of evaluation.

165. The procedure for notification under Section 87(3) of the Act is explained by Regulation 82 of Regulations 2020 which provides as follows:

“82. Notification of intention to enter into a contract

- (1) The notification to the unsuccessful bidder under Section 87(3) of the Act, shall be in writing and shall be made at the same time the successful bidder is notified.**
- (2) For greater certainty, the reason to be disclosed to the unsuccessful bidder shall only relate to their respective bids.**

(3) The notification in this regulation shall include the name of the successful bidder, the tender price and the reason why the bid was successful in accordance with Section 86(1) of the Act.”

166. In view of the provisions of Section 87 of the Act read with Regulation 82 of Regulations 2020, the Board observes an accounting officer of a procuring entity must notify, in writing, the tenderer who submitted the successful tender, that its tender was successful before the expiry of the tender validity period. Simultaneously, while notifying the successful tenderer, an accounting officer of a procuring entity notifies other unsuccessful tenderers of their unsuccessfulness, giving reasons why such tenderers are unsuccessful, disclosing who the successful tenderer is, why such a tenderer is successful in line with Section 86(1) of the Act and at what price is the successful tenderer awarded the tender. These reasons and disclosures are central to the principles of public procurement and public finance of transparency and accountability enshrined in Article 227 and 232 of the Constitution. This means all processes within a public procurement system, including notification to unsuccessful tenderers must be conducted in a transparent manner.

167. In **Judicial Review No. 589 of 2017, Lordship Africa Limited v Public Procurement Administrative Review Board & 2 others (2018) eKLR** (hereinafter referred to as “the Lordship Case”) and

Judicial Review Miscellaneous Application No. 531 of 2015, Republic v Public Procurement Administrative Review Board & 2 others ExParte Akamai Creative Limited (hereinafter referred to as “the Akamai Case”) the High Court dealt with the importance of providing reasons for disqualifying a bidder.

168. In the Lordship Case, the High Court held that:

“It must be emphasized that contracts that are pedigree of a flawed process must be rendered null and void ab initio. The right to file a Request against the decision of the Procuring Entity accrues after an unsuccessful bidder is notified that its bid was not successful, and with reasons.

...The letter simply states that the tenderer was not successful for incompleteness and for being nonresponsive. It does not state what was incomplete and or what aspect of the bid was non responsive leading to the rejection.

Notification of regret to the unsuccessful tenderer and the giving reasons for the regret is not optional for the procuring entity.”

169. In the Akamai Case, the High Court held that:

“In my view, Article 47 of the Constitution requires that parties to an administrative proceeding be furnished

with the decision and the reasons thereof within a reasonable time in order to enable them decide on the next course of action. It is not merely sufficient to render a decision but to also furnish the reasons for the same. Accordingly, where an administrative body unreasonably delays in furnishing the parties with the decision and the reasons therefor when requested to do so, that action or inaction may well be contrary to the spirit of Article 47 aforesaid”

170. From the above authorities, the Board observes that the High Court was basically expounding on one of the rules of natural justice as provided for in Article 47 (2) of the Constitution which provides:

“If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.”

171. In essence, the rules of natural justice as provided for in Article 47 of the Constitution require that a procuring entity promptly notifies tenderers of the outcome of evaluation to afford an unsuccessful tenderer the opportunity to challenge such reasons if need be. Further, the Act does not require that an unsuccessful tenderer to seek clarification in order for the accounting officer to provide it with the

outcome of evaluation or reasons leading to its disqualification in a tendering process.

172. Turning to the present matter, we note from the Notification of Intention to Award the subject tender dated 23rd December 2025 issued to the Applicant that the reason for its disqualification in the subject tender was indicated as follows:

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We wish to notify you that your tender was unsuccessful because of the following reason;

i. You did not earn the highest combined score.

The successful tenderers is M/s China Road and Bridge Corporation at a contract sum if Kshs. 29,538,624,318.00 (Kenya Shillings Twenty-Nine Billion, Five Hundred and Thirty-Eight Million, Six Hundred and Twenty-Four Thousand, Three Hundred and Eighteen) only inclusive if all taxes.

Other tenderers who submitted tenders were as follows:

	Firm	Total Amount (Kshs)	Combined Technical (T) and Financial (P) scores	REMARKS
1	JV – China Overseas Engineering Group Company Limited & China Railway Group		79.52	The bidder did not attain the highest

	Limited (CRCEG – COVEC Consortium)			combined Technical and Financial Score
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173. From the above, the Board notes that the Respondents only informed the Applicant that its bid was unsuccessful since it did not earn the highest combined score yet failed to disclose its score following the evaluation of the subject tender. The Respondents instead informed it of the scores of JV – China Overseas Engineering Group Company Limited & China Railway Group Limited (CRCEG-COVEC Consortium) which was equally unsuccessful but failed to inform it of the reasons why the Interested party was rendered successful as envisioned under Section 87 of the Act as read with Regulation 80 and 61 of Regulations 2020. These requirement in our considered view goes a long way in promoting the principles of transparency, accountability and fair administrative action in public procurement which cannot be wished away by any public or state officer discharging their duties.

174. In the circumstances, we find that the Respondents Letter of Notification of Intention to Award the subject tender dated 23rd December 2025 issued to the Applicant in the subject tender did not

meet the threshold required in Section 87(3) of the Act read with Regulation 82(3) of Regulations 2020.

What orders should the Board grant in the circumstances?

175. Having considered the parties' submissions and examined all the evidence on record, the Board has established that the Procuring Entity's Evaluation Committee committed an illegality in its evaluation and award of the subject tender contrary to the provisions of the Tender Document as read with the Act and Constitution for having treated the deviation committed by the 1st Interested Party in submission of its soft copy 1 USB flash disk containing its Financial Proposal in its Technical Proposal Envelope instead of placing it in the Financial Proposal Envelope together with all attendant documents related to the Financial Proposal i.e., 1 original and 3 copies as a minor deviation that did not materially depart from the requirements set out in the Tender Document.

176. The Board has also found that the Respondents' Letter of Notification of Intention to Award the subject tender dated 23rd December 2025 issued to the Applicant failed to meet the threshold required in Section 87(3) of the Act read with Regulation 82(3) of Regulations 2020.

177. The upshot of the findings is that the instant Request for Review succeeds and is allowed in the following specific terms, subject to the

right of any person aggrieved with this decision to seek judicial review by the High Court within fourteen days:

FINAL ORDERS

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

A. The Applicant's Request for Review dated 3rd January 2026 and filed on 5th January 2026 in respect of Tender No. KR/SCM/001/2025-2026 for Procurement for Design and Construction Works (EPC) of Proposed Nairobi Railway City Central Station, Public Realm and Other Associated Infrastructure Works be and is hereby allowed.

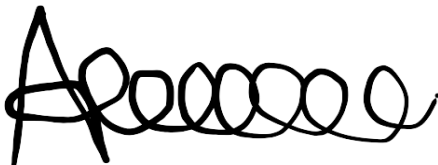
B. The letters of Notification of Intent to Award Tender No. KR/SCM/001/2025-2026 for Procurement for Design and Construction Works (EPC) of Proposed Nairobi Railway City Central Station, Public Realm and Other Associated Infrastructure Works issued by the 1st Respondent to the successful bidder, the Applicant and all other unsuccessful bidders in regard to the subject tender be and are hereby nullified and set aside.

C. The 1st Respondent is hereby ordered to re-convene the Tender Evaluation Committee in the subject tender and direct it to re-evaluate qualifying tenders at the Financial Evaluation stage in line with the provisions of the Tender Document, the Constitution, the Act and Regulations 2020 while taking into consideration our findings in this decision.

D. The 1st Respondent is directed to complete the procurement process, including the making of an award, in the subject tender within 21 days of this decision taking into consideration the findings of the Board herein.

E. Considering that the procurement process is not complete each party shall bear its own costs in this Request for Review.

Dated at NAIROBI this 26th Day of January 2026.



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**PANEL CHAIRPERSON
PPARB**



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**SECRETARY
PPARB**