

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 9/2026 FILED ON 22ND JANUARY 2026

BETWEEN

BOURICE CONSTRUCTION LIMITED..... APPLICANT

AND

ACCOUNTING OFFICER,

MOLO ACADEMY PRIMARY SCHOOL.....1ST RESPONDENT

MOLO ACADEMY PRIMARY SCHOOL.....2ND RESPONDENT

PRELIAM ENTERPRISES.....INTERESTED PARTY

Review against the decision of the Accounting Officer, Molo Academy Primary School in relation to Tender No. MAPS/B-DORM/001/2025-2027 - Supply of Labour for the Proposed Construction to Completion of 3 No. Storey Dormitory at Molo Academy Primary School in Molo Constituency.

BOARD MEMBERS PRESENT

QS Hussein Were	-	Panel Chairperson
Ms. Jessica M'mbetsa	-	Member
Mr. Robert Chelagat	-	Member

IN ATTENDANCE

Mr. Abdalla Issa - Holding Brief for Board Secretary

PRESENT BY INVITATION

APPLICANT

BOURICE CONSTRUCTION LIMITED

Mr. David Githaiga

Advocate, Owaga & Associates

RESPONDENTS

THE ACCOUNTING OFFICER, MOLO ACADEMY PRIMARY SCHOOL

MOLO ACADEMY PRIMARY SCHOOL

Mrs. Edna Kapsowe

Principal, Molo Academy Primary School

INTERESTED PARTY

PRELIM ENTERPRISES

Mr. Mwenesi Agesa

Sheth & Wathigo Advocates

BACKGROUND OF THE DECISION

The Tendering Process

1. The Molo Academy Primary School (hereinafter, "the Procuring Entity") invited eligible tenderers to submit bids for Tender No. MAPS/B-DORM/001/2025-2027 Supply of Labour for the Proposed Construction to Completion of 3 No. Storey Dormitory at Molo Academy Primary School in Molo Constituency (hereinafter, "the subject tender"). The tender was initially scheduled to close and be opened on 29th December 2025.

Addenda/Clarifications

2. According to the confidential documents submitted to the Board pursuant to section 67(3)(e) of the Public Procurement and Asset Disposal Act (hereinafter "the Act"), the Procuring Entity issued an Addendum dated 28th December 2025, that revoked the initial Tender Document and introduced a revised Tender Document. The revised Tender Document introduced a tender security requirement and extended the tender closing date to 6th January 2026.

Submission of Bids and Tender Opening

3. From the Tender Opening Report dated 6th January, 2026, a total of six (6) tenders were received and recorded, as follows:

Bid No.	Name of Bidder
1.	M/s Omex (EA) Controls Ltd
2.	M/s Cranberry Designers Ltd
3.	M/s Bourice Construction Services Company
4.	M/s Regence Enterprises Co. Limited
5.	M/s Pascoh Afrique Décor K Ltd
6.	M/s Preliam Enterprises

Evaluation of Tenders

4. The evaluation process was undertaken in three stages, as set out below:
 - i. Preliminary Evaluation
 - ii. Technical Evaluation
 - iii. Financial Evaluation

Preliminary Evaluation

5. At the Preliminary Evaluation stage, the Evaluation Committee was required to examine each tender against the mandatory requirements set out under the Preliminary/Mandatory Evaluation criteria of the Tender Document. Any tender that failed to satisfy these requirements was to be declared non-responsive.
6. Upon conclusion of preliminary evaluation, four bids, including the Applicant's tender, were found to be non-responsive and were consequently disqualified from further consideration. The remaining two tenders, which included the Interested Party's bid, were found to be responsive and were accordingly advanced to the Technical Evaluation stage.

Technical Evaluation

7. At the Technical Evaluation stage, the Evaluation Committee assessed the tenders for compliance with the technical requirements set out in the Technical Evaluation criteria of the Tender Document. To qualify for progression to the financial evaluation stage, a tender was required to attain a minimum technical score of seventy-five percent (75%).
8. At the end of technical evaluation, all tenders attained scores exceeding the minimum required technical score of seventy-five percent (75%). Accordingly, all the tenders were advanced to the Financial Evaluation stage.

Financial Evaluation

9. At the Financial Evaluation stage, the evaluation committee was required to evaluate the tenders in accordance with the Financial Evaluation criteria set out in the Tender Document.
10. Upon conclusion of financial evaluation, the bidders were ranked and it was determined that the lowest responsive evaluated bidder was M/s Preliam Enterprises, the Interested Party herein

Evaluation Committee's Recommendation

11. The Evaluation Committee recommended award of the tender to Preliam Enterprises, having been determined to be the lowest responsive evaluated bidder.

Professional Opinion

12. In a Professional Opinion dated 9th January 2026, Ms. Irene Cheptoo, a Procurement Officer, reviewed the procurement process, including the evaluation of the tenders, and concurred with the Evaluation Committee's recommendation to award the tender to the lowest evaluated bidder. The Professional Opinion was subsequently approved by the 1st Respondent on the same date.

Notification of Award

13. The tenderers were notified of the outcome of the evaluation for the subject tender through letters of Notification of Intention to Award dated 9th January 2026.

REQUEST FOR REVIEW NO. 9 OF 2026

14. On 22nd January 2026, the Applicant, through the firm of Owaga & Associates, filed a Request for Review dated 19th January 2026, accompanied by a Supporting Statement sworn on 19th January 2026 by Patrice Omollo, the Applicant's Director, seeking the following reliefs:

- a. The decision of the Procuring Entity awarding Tender No. MAPS/B-DORM/001/2025- 2027 be annulled and set aside, together with all consequential actions arising therefrom;*
- b. The Procuring Entity be directed to re-evaluate all bids submitted in respect of Tender No. MAPS/B-DORM/001/2025-2027 strictly in accordance with the Public Procurement and asset Disposal Act, 2015, and the tender documents, with due regard to mandatory requirements MR5 and MR6.*
- c. The Procuring Entity be prohibited from implementing or proceeding with the award of Tender No. MAPS/B-DORM/001/2025-2027 until full compliance with the law and the Board's directions has been achieved.*
- d. A declaration be issued that the Procuring Entity acted unlawfully and in breach of its statutory duty by issuing an addendum after the submission deadline and by considering bids that failed to meet mandatory requirements.*

15. In a Notification of Appeal and a letter dated 22nd January 2026, Mr. Philemon Kiprop, the Board Secretary notified the Respondents of the filing of the instant Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the Respondents a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020. Further, the Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the tender within five days from 22nd January 2026.
16. On 27th January 2026, the Respondents filed a Memorandum of Response dated 26th January 2026 together with an Affidavit sworn on 27th January 2026 by the 1st Respondent and submitted to the Board the confidential documents relating to the subject tender.
17. On 27th January 2026, the Interested Party filed a Notice of Appointment of Advocates, appointing the firm of Sheth & Wathigo Advocates to represent it in the matter. On the same day, it also filed a Response to the Applicant's Request for Review, accompanied by a Verifying Affidavit sworn by Sharon Omukunda Nasiali, a Director of the Interested Party, as well as Written Submissions dated 26th January 2026.
18. On 30th January 2026, the Board Secretary issued a Hearing Notice notifying parties that the hearing of the Request for Review would be held virtually on 5th February 2026 at 11:00 a.m. via the provided link.

19. When the Board convened for hearing on 5th January 2026, Counsel for the Applicant stated that they had not received the Respondents' Memorandum of Response. The Board directed the 1st Respondent to serve the Memorandum of Response afresh on the Applicant's Counsel, which was immediately complied with. The hearing was adjourned for thirty minutes to allow Counsel for the Applicant to peruse the Memorandum of Response.
20. After the thirty-minute adjournment, the Board allocated time for each party to present and highlight their respective submissions.

PARTIES' SUBMISSIONS

Applicant's Submissions

21. The Applicant's Counsel, Mr. David Githaiga, submitted that the 2nd Respondent initiated procurement proceedings for the construction of a boys' dormitory, but from inception the process was marred by illegality, bias, and external interference. Counsel contended that the tender was irregularly advertised, having been backdated to 2nd December 2024 but only posted on 9th December 2024, thereby casting doubt on the integrity and transparency of the procurement process.
22. It was further submitted that the tender opening process was fundamentally flawed. Counsel argued that the initial opening scheduled for 16th December 2024 was improperly postponed through a phone call

on the ground that certain officers, who were not staff of the Procuring Entity, were absent. The subsequent opening on 18th December 2024 was allegedly chaired by the Molo Sub-County Director of Education, who was neither the Accounting Officer nor a member of staff of the Procuring Entity, in contravention of the Act and established procurement procedures.

23. Counsel submitted that the Applicant's bid was unlawfully disqualified at the preliminary evaluation stage on the basis of alleged non-submission of KRA documents, which had in fact been provided. This exclusion prompted the first Request for Review in PPARB Application No. 7 of 2025, culminating in a ruling delivered on 28th January 2025 in which the Board set aside the procurement process and directed a fresh evaluation of all bids.
24. Mr. Githaiga argued that the Procuring Entity deliberately disregarded the Board's orders. He submitted that the Applicant's bid was once again not evaluated, and a regret letter was issued which omitted the Applicant's firm altogether, necessitating a second review in PPARB Application No. 29 of 2025. Despite a further ruling by the Board on 4th April 2025, the Accounting Officer allegedly persisted in non-compliance and issued another regret letter dated 31st October 2025, founded on what Mr. Githaiga termed a flawed and misleading debriefing.

25. Counsel further submitted that upon re-advertisement of the tender, the submission and opening process was again manipulated. It was contended that a bid from Miles Engineering Limited was received at 10:06 a.m., well after the stipulated deadline of 9:00 a.m., and was nonetheless personally accepted by the Accounting Officer, demonstrating preferential treatment and bias.
26. He argued that both the Tender Opening Committee and the Evaluation Committee were improperly constituted, as they were dominated by persons who were not staff of the Procuring Entity. This, Counsel submitted, violated Sections 44, 45 and 46 of the Act and demonstrated a pre-determined intent to influence the outcome of the tender.
27. It was further submitted that during evaluation, the Evaluation Committee unlawfully introduced an additional mandatory requirement that all pages of the bids be signed, a criterion that was not contained in the tender documents. Counsel argued that this arbitrary requirement was selectively applied with the sole purpose of disqualifying certain bidders, including the Applicant.
28. Counsel also challenged the evaluation of mandatory requirements, submitting that Mandatory Requirement MR6 relating to the National Construction Authority (NCA) Certificate was breached, as a competing bidder was evaluated as compliant despite holding an expired and invalid

NCA certificate. Similarly, it was submitted that Mandatory Requirement MR5 on bid security was applied inconsistently across bidders, resulting in unequal treatment. The Applicant's Counsel further submitted that the Applicant was wrongly accused of failing to complete Form CON 2 on pending litigation, despite having no pending litigation or history of non-performance and that this allegation was used as an unjustified ground for disqualification.

29. Counsel placed emphasis on the issuance of an Addendum dated 28th December 2025 at 11:53 a.m., after the bid submission deadline of 9:00 a.m. on the same day. It was submitted that the Accounting Officer falsely claimed that the addendum had been posted on the PPIP portal, in blatant violation of Section 75 of the Act.

30. Counsel submitted that the cumulative effect of the irregular committee formations, arbitrary evaluation criteria, acceptance of non-compliant and late bids, disregard of the Board's orders and issuance of a post-deadline addendum demonstrated a complete lack of transparency, fairness and equity, contrary to Article 227 of the Constitution and Section 3 of the Act. Counsel contended that the Applicant's competitively priced bid was systematically and unlawfully excluded through a pattern of biased and fraudulent conduct intended to favour a predetermined bidder, and that the notification of award issued on 9th January 2026 formed the basis of the present Request for Review.

Respondents' Submissions

31. Mrs. Edna Kapsowe, on behalf of the Respondents, submitted that the allegation that the Tender Evaluation Committee was improperly constituted was unfounded. She contended that, in accordance with Section 46 (3) of the Act and Regulation 29 of the Public Procurement and Asset Disposal Regulations (hereinafter "the Regulations, 2020"), four of the five members of the Evaluation Committee were lawfully co-opted from other procuring entities, which is expressly permitted in law. She further submitted that the Evaluation Committee was therefore properly constituted.

32. Mrs Kapsowe averred that, in an earlier Request for Review involving the same procurement, the Applicant had recommended that the Procuring Entity re-advertise the tender and involve relevant technical experts. The Respondents complied fully by re-advertising the tender and co-opting qualified technical experts as permitted by law. She contended that it was contradictory and an abuse of the review process for the Applicant to challenge the very measures they had previously proposed and which were implemented in good faith and in strict compliance with the Act.

33. On the issue of disqualification at the Mandatory Evaluation stage, the Respondents submitted that the Applicant was properly disqualified for failure to comply with mandatory requirements. It was submitted that Mandatory Requirement MR14 required bidders to submit a duly filled, signed and stamped/sealed Litigation History and History of Non-Performing Contracts using Form CON-2, as provided in the tender

document. The Applicant failed to duly complete Form CON-2, rendering its bid non-responsive at the Mandatory Evaluation stage.

34. It was further submitted that the Applicant failed to meet other mandatory requirements, namely MR7 and MR12. Under MR7, the Applicant failed to complete material items in the Form of Tender and under MR12, the Applicant failed to submit certified audited financial statements for the 2022 financial year. It was contended that the Applicant selectively addressed MR14 while deliberately omitting these other independent grounds of non-responsiveness, each of which was sufficient to warrant disqualification.
35. With respect to the alleged unlawful issuance of an Addendum, the Respondents stated that the Addendum was lawfully issued prior to the tender closing date to clarify requirements and to ensure compliance with section 61(2)(b) of the Act on tender security. The Respondents further stated that the Addendum was issued to all bidders, displayed on the School Notice Board and duly acknowledged by all six bidders, including the Applicant.
36. On the allegation regarding breach of Mandatory Requirement MR6, it was submitted that all NCA certificates submitted by bidders, including that of M/s Omex (EA) Controls Ltd, were verified through the NCA portal and confirmed to be valid at the time of evaluation. There was therefore no breach of MR6 as alleged.

37. Regarding Mandatory Requirement MR5 on tender security, the Respondents submitted that the Tender document clearly required a tender security of KES 250,000.00, valid for 120 days from the date of tender opening. The Evaluation Committee assessed both the amount and validity period, and all bids, including the Applicant's, complied with this requirement. The Respondents contended that no inconsistency, impropriety, or prejudice was demonstrated.
38. On the alleged violation of Article 227 of the Constitution, the Respondents submitted that the procurement process complied fully with Article 227(1), section 3 and section 80 of the Act. Evaluation was conducted strictly in accordance with the criteria set out in the tender document and the award was made to the lowest evaluated responsive bidder. It was submitted that the Applicant failed to demonstrate any illegality, unfairness or prejudice.

Interested Party's Submissions

39. Mr. Mwenesi Agesa, for the Interested Party, submitted that the Request for Review is unmerited and ought to be dismissed with costs, arguing that the Applicant seeks only to frustrate the ongoing tender despite failing to meet the technical requirements of the bid.
40. Regarding the constitution of the Tender Evaluation Committee, Counsel submitted that the Applicant's allegation that four members were not staff of the 1st Respondent is misconceived. Section 46(3) of the Act permits the inclusion of external technical expertise in an Evaluation

Committee, provided such expertise is obtained in writing and appointed by the accounting officer. The Interested Party's Counsel argued that the Evaluation Committee's constitution fully complied with the Act and that the Applicant's repeated challenges, including prior Applications for Review, demonstrate a pattern of forum shopping intended to derail the procurement process to the detriment of the 1st Respondent's learners.

41. On the issue of the Applicant's failure to complete Form CON-2 of the bidding documents, Counsel submitted that compliance with mandatory bid requirements is essential, and non-compliance warrants disqualification. Reference was made to ***Request for Review No. 72 of 2019 Chemilite International vs. Kenya Ports Authority***, where the Board upheld a bid rejection for failure to submit a mandatory document. The Interested Party argued that the Applicant did not provide evidence that the decision to award the tender to the Interested Party was illegal, irrational or made in bad faith.
42. Counsel further submitted that the burden of proof lies squarely on the Applicant under the Act and the Regulations, and that the Applicant failed to provide credible evidence to support claims of irregularities, illegality or lack of transparency in the procurement process. In particular, the allegation that an addendum was issued unlawfully is unfounded, as the addendum was issued within the submission timeline and aimed to clarify aspects of the tender. The Interested Party concluded that the Applicant's claims are speculative, lacking evidential support and intended merely to frustrate the procurement process.

Applicant's Rejoinder

43. In rejoinder, Counsel for the Applicant submitted that the Applicant marked Form CON-2 as "not applicable," as it did not have any litigation history.

BOARD'S DECISION

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

- i) Whether the Procuring Entity issued an addendum to the tender after the date of tender submission contrary to the provisions of Section 75 (1) of the Act.*

- ii) Whether the Procuring Entity improperly constituted the Evaluation Committee with members who are not qualified in breach of Section 46 of the Act.*

- iii) Whether the Procuring Entity failed to evaluate the Applicant's tender in accordance with the Tender Document contrary to the provisions of Section 80 (2) of the Act.*

iv) What appropriate orders should be issued in the circumstances.

As to whether the Procuring Entity issued an addendum to the tender after the date of tender submission contrary to the provisions of Section 75 (1) of the Act

45. It is not in contest that the Procuring Entity invited eligible tenderers to submit bids for Tender No. MAPS/B-DORM/001/2025-2027 for Supply of Labour for the Proposed Construction to Completion of 3 No. Storey Dormitory at Molo Academy Primary School in Molo Constituency which tender was initially scheduled to close and be opened on 29th December 2025.
46. It is further not in contest that the Procuring Entity issued an Addendum dated 28th December 2025 that introduced a tender security requirement and extended the tender closing date to 6th January 2026.
47. The Board has heard the Applicant's argument that the issuance of an Addendum dated 28th December 2025 at 11:53 a.m., after the bid submission deadline of 29th December 2025 at 9:00 a.m. violated the provisions of Section 75 of the Act.
48. The Board has heard the Procuring Entity's response that the addendum was lawfully issued prior to the tender closing date to clarify requirements and to ensure compliance with Section 61(2)(b) of the Act

on tender security. The Procuring Entity stated that the addendum was issued to all bidders, displayed on the School Notice Board and duly acknowledged by all six bidders, including the Applicant. The Interested Party aligned itself with the Procuring Entity's response.

49. The question that has arisen is whether the Addendum to the tender document was issued by the Procuring Entity after the date of tender submission. To effectively answer this question the Board takes cognisance of Section 75 of the Act on modifications to tender documents.
50. Section 75 of the Act provides as follows:

"(1) A procuring entity may amend the tender documents at any time before the deadline for submitting tenders by issuing an addendum without materially altering the substance of the original tender.

(2) An amendment may be made on the procuring entity's own initiative or in response to an inquiry by a candidate or tenderer.

(3) A procuring entity shall promptly provide a copy of the addendum to each person to whom the procuring entity provided copies of the tender documents.

(4) The addendum shall be deemed to be part of the tender documents.

(5) If the tender documents are amended when the time remaining before the deadline for submitting tenders is less than one third of the time allowed for the preparation of tenders, or the time remaining is less than the period indicated in instructions to tenderers, the accounting officer of a procuring entity shall extend the deadline as necessary to allow the amendment of the tender documents to be taken into account in the preparation or amendment of tenders.”

51. The Board understands the above section of the law to mean that a procuring entity is legally empowered to amend tender documents at any time before the deadline for submission of tenders, provided that such amendments do not materially alter the substance of the original tender. Such amendments must be communicated promptly to all bidders who received the original tender documents. Once issued, any Addendum

forms an integral part of the tender documents and is binding on all bidders.

52. The Board further understands that where amendments are issued close to the submission deadline, the procuring entity has an obligation to extend the deadline where necessary, so as to afford bidders adequate time to take the amendments into account in the preparation or revision of their tenders.
53. In essence, amendments issued before the tender submission deadline are lawful and procedurally sound, as long as bidders are duly notified and sufficient time is allowed to accommodate the changes.
54. In the instant Request for Review the Board notes that an Addendum dated 28th December 2025 was issued to the bidders. The Addendum imposed a tender security requirement and extended the tender closing date to 6th January 2026.
55. It is the contention of the Applicant that the Addendum was issued on 29th December 2025 at 11:53 a.m., which was passed the initial tender submission deadline of 29th December 2025 at 9.00 a.m. Conversely, the Respondents and the Interested Party contend that the Addendum was issued before the tender submission deadline.

56. To conclusively address this issue the Board looks at the events subsequent to the issuance of the addendum. It has been submitted, which submissions have not been refuted, that:

- i) The Procuring Entity issued an addendum dated 28th December, 2025 to the tender document.
- ii) The Addendum was issued to all the six bidders, including the Applicant, who duly acknowledged receipt.
- iii) Tenders were opened on 6th January 2026.
- iv) The Applicant, alongside other bidders, submitted tenders that were subsequently opened on 6th January 2026.
- v) The Applicant's tender opened on 6th January 2026, together with other tenders, complied with requirements of Addendum dated 28th December, 2025.
- vi) There was no tender opening on 29th December 2025 at 9.00 a.m.

57. From the foregoing sequence of events the Board observes that there has arisen an issue of jurisdiction which it must address first.

58. Assuming for a moment that the Addendum was issued after the tender submission deadline of 29th December 2025, it is curious that the Applicant did not challenge it by way of a request for review under Section 167 of the Act. The Applicant instead chose to comply with the modifications that came with the Addendum including the new tender

security requirement and revised tender submission deadline of 6th January 2026.

59. The Applicant's actions are suggestive of a bidder who participated in the tender process and adhered to the modifications stipulated in the Addendum only to come back after its tender was unsuccessful to challenge the process it participated in. Unfortunately for the Applicant, it mounted the challenge more than 14 days after it became aware of the Addendum.
60. The Board's reading of Section 167 of the Act is that the Applicant ought to have filed a Request for Review based on any objection to the Addendum within 14 days from 29th December 2025, when it became aware of its existence. The Board notes that the instant Request for Review was filed on 22nd January 2026, 24 days after the Applicant became aware of the Addendum.
61. Further, the Board can only interpret the Applicant's initial satisfaction with the Addendum, followed by compliance and subsequent dissatisfaction after being unsuccessful, as seeking to benefit from the Addendum while simultaneously challenging it. It amounts to approbation and reprobation.

See ***PPARB Application No. 121 of 2025 The Gardens and Weddings Centre Ltd vs County Government of Nakuru, Department of Health Services and Another.***

62. In ***Civil Suit No. 343 of 2009, Terry Wanjiru Kariuki v Equity Bank Limited & Another [2018] eKLR***, when faced with a similar situation of approbation and reprobation by a party, the Court held as follows:

"A party cannot be allowed to blow hot, blow cold; fast and loose or approbate and reprobate. The same principle was discussed in the case of; Republic vs Institute of Certified Public Secretaries of Kenya (Exparte Mundia Njeru Geteru) (2010) eKLR where the Court stated that:

"It is obvious that Mundia is approbating and reprobating which is an unacceptable conduct. Such conduct was considered in Evans vs Bartlam (1973) 2 ALL ER 649 at page 652, where Lord Russel of Killowen said; The doctrine of approbation and reprobation requires for its foundation inconsistency of conduct. This is an attitude of which I cannot approve, nor do I think in law the defendants are entitled to adopt it. They are, as the Scottish lawyers (frame it) approbating

and reprobating or, in the more homely English phrase blowing hot and cold.”

63. In the Board’s considered view, any challenge to a provision of a Tender Document, including one arising from an Addendum, must be made before the tender closes or within 14 days of becoming aware of it. Submitting a bid and subsequently challenging the provision after the evaluation has been completed amounts to attempting to change the rules of the process retrospectively. The proper course is to file a Request for Review before the tender closes and prior to submitting a bid, so as to avoid the impermissible conduct of approbation and reprobation.
64. In view of the foregoing, the Board finds that the allegation that the addendum was unlawfully issued is time barred for being raised outside the stipulated timeline of 14 days after its alleged occurrence prescribed under section 167 of the Act and as such the Board lacks jurisdiction to entertain the issue.
65. Accordingly, this ground of the Request for Review fails and is disallowed.

As to whether the Procuring Entity improperly constituted the Evaluation Committee with members who are not qualified in breach of Section 46 of the Act.

66. The Board heard the Applicant's argument that the Evaluation Committee was dominated by persons who were not staff of the Procuring Entity in contravention of the provisions of Sections 44, 45 and 46 of the Act and that this demonstrated a pre-determined intent to influence the outcome of the procurement.
67. The Respondents disputed the argument stating that the committee was properly constituted and went on to submit that four out of the five members of the Evaluation Committee were lawfully co-opted from other procuring entities in accordance with Section 46 (3) of the Act and Regulation 29 of the Regulations 2020.
68. The Interested Party submitted that Section 46 (3) of the Act permits the inclusion of external technical expertise in an Evaluation Committee, provided such expertise is obtained in writing and appointed by the Accounting Officer and that the Evaluation Committee's constitution fully complied with the Act.
69. The Board takes cognisance of Section 46 of the Act that states:

Section 46 - Evaluation Committee

"(1) An Accounting officer shall ensure that an ad hoc evaluation committee is established in accordance with this

Act and Regulations made thereunder and from within the members of staff, with the relevant expertise.

(2) In establishing the ad hoc evaluation committee referred to in subsection (1) above, the procuring entity that is a State Department or a County Department, shall do so in consultation with the Cabinet Secretary or the County Executive Committee member responsible for that entity, as the case may be.

(3) Despite subsection (1), where technical expertise is required from outside the organisation, such expertise may be obtained from other procuring entities or procured to join the committee, on recommendation, in writing, by the head of the procurement function, and the committee shall be appointed by the accounting officer, in writing.

(4)...”

70. The Board understands the above section of the law to mean that the Accounting Officer of a procuring entity is mandated to establish an *ad hoc* evaluation committee composed of staff with relevant expertise, in accordance with the Act and Regulations. Where necessary, technical expertise from outside the Procuring Entity may be incorporated into the

Evaluation Committee, provided such experts are recommended in writing by the head of the procurement function and formally appointed by the Accounting Officer.

71. It is clear therefore that the law permits Procuring Entities to outsource technical expertise in the constitution of the Evaluation Committee, provided that the process complies with the law. The Board further recognizes that many institutions, particularly schools, often lack sufficient in-house capacity or staff competent to conduct evaluations and manage tendering processes.
72. The Board notes that in PPARB Application No. 29 of 2025, the Procuring Entity was ordered to redo the tendering process from the Professional Opinion stage after it was held that the 1st Respondent erred in preparing and executing the Professional Opinion. The Board observes that such situations often arise due to lean staffing and the absence of procurement professionals in primary and secondary schools.
73. The key question in outsourcing technical experts in evaluation committees is whether it is conducted in accordance with the prescribed legal process, which requires a written recommendation by the head of the procurement function, followed by the appointment of the Evaluation Committee by the Accounting Officer, also in writing.

74. The Board heard the Applicant argue that the appointment of the Evaluation Committee did not follow the appropriate procedure. However, the Applicant failed to provide any evidence to discharge its burden of proof regarding this alleged procedural failure. In the circumstances, the Board has no option but to make the finding, which it hereby does, that this ground of the Request for Review has neither been substantiated nor proven and therefore fails.

As to whether the Procuring Entity failed to evaluate the Applicant's tender in accordance with the Tender Document contrary to the provisions of Section 80 (2) of the Act

75. It was the Applicant's submission that, during evaluation, the Evaluation Committee unlawfully introduced an additional mandatory requirement that all pages of the bids be signed and that the requirement was selectively applied with the sole purpose of disqualifying certain bidders, including the Applicant.

76. It was also the Applicant's submission that a competing bidder was evaluated as compliant despite holding an expired and invalid NCA certificate. Similarly, it was submitted that Mandatory Requirement MR5 on bid security was applied inconsistently across bidders. The Applicant further submitted that the Applicant was wrongly accused of failing to complete Form CON 2 on pending litigation, despite having no pending litigation or history of non-performance.

77. The Respondents countered that the Applicant was properly disqualified for failure to comply with mandatory requirements. It was submitted that Mandatory Requirement MR14 required bidders to submit a duly filled, signed and stamped/sealed Litigation History and History of Non-Performing Contracts using Form CON-2, as provided in the tender document. The Applicant failed to duly complete Form CON-2, rendering its bid non-responsive at the Mandatory Evaluation stage.
78. It was further submitted that the Applicant failed to meet other mandatory requirements, namely MR7 and MR12. Under MR7, the Applicant failed to complete material items in the Form of Tender, and under MR12, the Applicant failed to submit certified audited financial statements for the 2022 financial year.
79. The Interested Party's Counsel submitted that compliance with mandatory bid requirements is essential, and non-compliance warrants disqualification. Reference was made to ***Request for Review No. 72 of 2019 Chemilite International vs. Kenya Ports Authority***, where the Board upheld a bid rejection for failure to submit a mandatory document. The Interested Party argued that the Applicant did not provide evidence that the decision to award the tender to the Interested Party was illegal, irrational or made in bad faith.

80. The Board is alive to the provisions of Article 227 of the Constitution, which outlines the objective of public procurement, ensuring the provision of quality goods and services within a framework that upholds the principles enshrined therein. Article 227 states as follows:

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 and may provide for all or any of the following –

a...d...

81. The above section of the law provides that, inter alia, when a State organ or public entity procures goods or services, the process must adhere to specific standards, one of which is competitive fairness. In this context, competitive fairness means that the procurement process must offer all qualified suppliers an equal opportunity to compete for the contract. It ensures that no bidder is unfairly advantaged or

disadvantaged and that selection is based on objective criteria. This fosters integrity, value for money and public trust in the procurement system.

82. The Board observes that the legislation referred to in Article 227(2) of the Constitution is the Act. Section 80 of the Act provides guidance on the evaluation and comparison of tenders by a Procuring Entity as follows:

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.

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

(3)

83. Section 80(2) of the Act mandates the Evaluation Committee to evaluate and compare tenders fairly, using the procedures and criteria outlined in the Tender Document. The Board interprets a fair evaluation system as one that ensures equal treatment of all tenders based on transparently

defined criteria in the Tender Document.

84. In the case of ***Sinopec International Petroleum Service Corporation v Public Procurement Administrative Review Board & 3 others (Civil Appeal E012 of 2024) [2024] KECA 184 (KLR) (23 February 2024) (Judgment)*** the Court of Appeal stated as follows:

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

85. The Board understands the above case law to underscore the centrality of responsiveness in the evaluation of bids, by affirming that bids must first be subjected to an assessment of compliance with the mandatory responsiveness criteria before any consideration is given to other technical or financial requirements.

86. The above case law emphasizes that a bid can only be regarded as responsive if it strictly meets all the mandatory requirements as stipulated in the bid documents, and that failure to comply with even a

single mandatory requirement renders a bid non-responsive. Such non-responsive bids are, by operation of law, excluded from further evaluation irrespective of their competitiveness or apparent merits. The principle distilled from the case law is that responsiveness constitutes the first and most critical threshold in the tender evaluation process, which bidders must surmount before progressing to subsequent stages of evaluation.

87. In addressing this issue, the Board notes that it is undisputed that the Applicant was disqualified at the Preliminary Evaluation stage. The Board further notes that the Applicant’s Notification of Intention to Award cited the following reasons for disqualification:

<p>3. M/s Bourice Construction Services Company P.O. Box 908 Molo</p>	<p>Failed at the Mandatory evaluation stage i.e.</p> <p>I) The form of tender was not dully filled i.e. the bidder did not fully fill item (iv) Conformity – did not indicate the brief description of the works tendered for and item (xiv) The bidder did not declare whether the firm was a state-owned enterprise or not.</p> <p>II) The bidder did not provide the certified audited accounts for 2022 Financial year</p>
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		<p><i>III) The bidder did not dully fill the FORM CON 2 which included the Litigation History and the History of Non-Performing Contracts.</i></p>
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88. The Board perused the Evaluation Report, specifically the section on Preliminary Evaluation, and noted that the Mandatory Requirements in contention are MR 7, MR 12, and MR 15, which are provided as follows:

MR- 7 Dully filled signed and stamped/sealed Form of Tender

MR- 12 - Certified copies of Audited Financial reports for the last three (3) years 2024, 2023, and 2022 Provide the certified auditor/accountant’s practicing number.

MR- 15 Dully filled, signed and stamped/sealed Litigation History Form provided in the tender document (FORM CON-2)

89. The Board notes that in the Request for Review, the Applicant limited its challenge to MR 15, contending that it had duly completed Form CON-2. The Applicant was silent regarding whether it complied with the other Mandatory Requirements cited in its Notification of Intention to Award.

The only other issue raised by the Applicant concerns the alleged failure to apply uniform criteria across all bidders.

90. To determine whether the Applicant was evaluated fairly and in accordance with the law, the Board notes that established jurisprudence provides that a bidder who fails to satisfy any mandatory requirement is deemed non-responsive and is not entitled to proceed to subsequent stages of evaluation.
91. The Board perused the Applicant's bid and notes that the bid document at pages 485 and 486 contains Form CON-2, was not duly completed as required under MR 15. In contrast, the Interested Party's bid document at pages 47 and 48 contains the same form, duly completed in accordance with the mandatory requirements. The Board also reviewed the bids of the other participants and notes that the same criteria were applied uniformly, with bidders disqualified where they failed to meet the relevant requirements.
92. Perusal of the bid document submitted by the Applicant confirms that the Applicant did not meet the requirements of MR7, MR12 and MR15. It then follows that the evaluation committee could not declare it to be responsive to the criteria set out in preliminary evaluation stage of the tender document and as such the Applicant was lawfully disqualified at preliminary evaluation stage.

93. In view of the foregoing, the Board finds that the evaluation of the Applicant's bid was conducted in accordance with the evaluation criteria provide in the tender document and therefore in keeping with the law.
94. For all of the foregoing, this ground of review fails and is disallowed.

As to what orders should the Board grant in the circumstances

95. Having considered the parties' submissions and examined the evidence on record, the Board finds that it lacks jurisdiction to determine the issue regarding the issuance of the Addendum dated 28th December 2025. Further, the Board finds that the Applicant has not provided any evidence to demonstrate that the appointment of the Evaluation Committee was inconsistent with the law.
96. The Board further finds that the evaluation of the Applicant's bid was conducted in accordance with the law and the Tender Document, as the Applicant was correctly found not to have met certain Mandatory Requirements, resulting in its disqualification at the Preliminary Evaluation stage.
97. Consequently, the instant Request for Review fails, subject to the right of any person aggrieved with this decision to seek judicial review by the High Court within fourteen days pursuant to Section 175 of the Act.

FINAL ORDERS

98. 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 this Request for Review:

- 1. The Request for Review dated 19th January 2026 in respect of Tender No. MAPS/B-DORM/001/2025-2027 for Supply of Labour for the Proposed Construction to Completion of 3-storey Dormitory at Molo Academy Primary School in Molo Constituency be and is hereby dismissed;**
- 2. The Accounting Officer of Molo Academy Primary School is hereby directed to oversee the tender process of the subject tender to its logical and lawful conclusion within 21 days;**
- 3. Considering that the procurement process of the subject tender is not complete, each party shall bear its own costs in this Request for Review.**

Dated at NAIROBI, this 12th day of February 2026



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PANEL CHAIRPERSON
PPARB

PPARB No. 09.2026:
12th February, 2026:



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SECRETARY
PPARB