

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 13/2026 OF 26TH JANUARY 2026

BETWEEN

TAXAN INVESTMENTS LIMITED APPLICANT

AND

ACCOUNTING OFFICER,

KISII COUNTY GOVERNEMENT 1ST RESPONDENT

KISII COUNTY GOVERNEMENT 2ND RESPONDENT

Review against the decision of the Accounting Officer, Kisii County Government in relation to Tender No. 2050856-2025/2026 for Cabro Works Within Kitutu Central Ward.

BOARD MEMBERS PRESENT

- | | |
|------------------------|--|
| 1. Ms. Alice Oeri | - Vice Chairperson & Panel Chairperson |
| 2. Eng. Lilian Ogombo | - Member |
| 3. Mr. Robert Chelagat | - Member |

IN ATTENDANCE

- | | |
|---------------------|-----------------------------------|
| 1. Mr. Abdalla Issa | Holding brief for Board Secretary |
| 2. Ms. Evelyn Weru | Secretariat |

PRESENT BY INVITATION

APPLICANT

TAXAN INVESTMENTS LIMITED

Mr. Omar Siraji

- Advocate, Omar Siraji & Co. Advocates

RESPONDENT

ACCOUNTING OFFICER, KISII COUNTY

GOVERNEMENT & KISII COUNTY

GOVERNEMENT

Mr. Mokaya

- Advocate, Office of the County Attorney

BACKGROUND OF THE DECISION

The Tendering Process

1. The Kisii Municipality invited sealed tenders from qualified and interested tenderers in response to Tender No. 2050856-2025/2026 for Cabro Works Within Kitutu Central Ward (hereinafter referred to as the "subject tender"). Tendering was conducted under open competitive method (National) and was open to all including Small and Medium Enterprises, Youth, Women and PWDs. The blank tender document for the subject tender issued to tenderers (hereinafter referred to as the 'Tender Document') was published on 26th November 2025 on the Daily Nation Newspaper, on the Procuring Entity's website www.kisii.go.ke and the Public Procurement Information Portal (PPIP) website www.tenders.go.ke . The budget estimate was provided in the Tender

Document as Kenya Shillings Sixty-Four Million Five Hundred and Seventy Thousand (64,570,000.00) only and the subject tender was in two lots being: Lot 1 – Cabro paving for Imperial primary-Dans hotel road-Kenya Power Maosa building- Getembe Hardware- Valaria Road and Lot 2 - Cabro paving for Soko Njinga – Nubia Mosque – Nubia Hall road. Tenders would only be submitted electronically through the IFMIS Supplier Portal and the submission deadline was scheduled on 10th December 2025 at 10.00 a.m.

Submission of Tenders and Tender Opening

2. According to the Tender Opening Minutes dated 10th December 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 Public Procurement and Asset Disposal Act (hereinafter referred to as 'the Act'), a total of five (5) tenders were submitted in response to the subject tender and were recorded as follows:

No.	Bidder
1	Cavram Holdings Limited
2	Denvin Solutions and Investments Ltd
3	Sacle Enterprises Limited
4	Saumo Enterprises
5	Taxan Investment Limited

Evaluation of Tenders

3. A Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") appointed by the 1st Respondent undertook evaluation of the five (5) tenders as captured in the Evaluation Report for the subject tender submitted to the Board as part of the confidential documents in the following stages:

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

Preliminary Evaluation

4. The Evaluation Committee was required to examine tenders for responsiveness using the criteria provided under the Mandatory Requirement/ Preliminary Evaluation of the Tender Document. Tenderers were required to meet all the mandatory requirements at this stage to proceed to the technical evaluation stage.

5. At the end of evaluation at this stage, four (4) tenders were determined non-responsive, while one (1) tender, being the Applicant's tender was determined responsive and proceeded for Technical Evaluation.

Technical Evaluation

6. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under the Technical Evaluation Criteria of the Tender Document. Bidders were required to score 70% and above to be considered for financial evaluation.
7. At the end of evaluation at this stage, the Applicant's tender having scored 85.3% was determined responsive and progressed for evaluation at the financial evaluation stage.

Financial Evaluation

8. During this phase of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under the Financial Evaluation Award Criteria of the Tender Document. Following the conclusion of evaluation at this stage, the Evaluation Committee found the Applicant's to have attained the highest combined technical score and was recommended for award of the subject tender.

Evaluation Committee's Recommendation

9. The Evaluation Committee recommended award of the subject tender to Taxan Investments Ltd at its quoted price of Kenya Shillings Fifty-Seven Million Nine Hundred and Eighty-Four Thousand Eight Hundred and Six (Kshs. 57,984,806.00) only.

Professional Opinion

10. In a Professional Opinion dated 8th January 2026 (hereinafter referred to as “the Professional Opinion”), the Deputy Director Supply Chain Management, Samsone Mayaka, reviewed the manner in which the subject procurement process in the subject tender was undertaken including evaluation of tenders and indicated as follows:

.....in consideration of the budget estimates for the FY 2025-2026, I recommend for the procurement proceedings to be terminated pursuant to Section 63 (1) (b) of the Public Procurement and Asset Disposal Act,2015.

This will allow for re-advertisement of the Cabro works in two phases as envisaged in the supplementary budget estimates of the FY 2025/2026. i.e Phase I Ksh. 105,993,018 and Phase II Ksh. 24,000,000. The requisitions, bill of quantities & scope of works of the two phases will also be revised appropriately based on these findings.

As guided by section 84 (3) of the Public Procurement and Asset Disposal Act, 2015, you may consider approving recommendation to RE-ADVERTISE the tender in two phases i.e. Cabro works in Kisii Town Phase I of Ksh. 105,993,018 and Cabro works in Kisii town phase II of Ksh. 24,000,000.

11. The Professional Opinion was subsequently approved by the 1st Respondent on the same day of 8th January 2026.

Notification to tenderers

12. *Vide* letters dated 9th January 2026, tenderers were notified of the termination of the subject tender.

Re - advertisement

13. On 23rd January 2026, the Procuring Entity invited sealed tenders in response to Tender No. 2095460-2025/2026 for Cabro Works within Kitutu Central Ward (hereinafter referred to as "the Re-advertised Tender") which was in two lots namely; Lot 1 - Cabro Paving for Soko Mjinga- Nubia Mosque-Nubia Hall road, and Lot 2 - Cabro Paving for Imperial Pri -Dans Hotel Road-kenya power. Tendering under the Re-advertised Tender would be electronic through IFMIS and was conducted under open competitive method (National) and was reserved for Youth, Women, and PWDs. The tender submission deadline was scheduled on 3rd February 2026.

REQUEST FOR REVIEW NO. 13 OF 2026

14. On 26th January 2026, Taxan Investments Limited, the Applicant herein, filed through Omar Siraji & Co. Advocates, a Request for Review accompanied by a Supporting Affidavit sworn on 22nd January 2026 by Abdifatah Ali Adan, its Director (hereinafter referred to as the 'instant Request for Review') seeking the following orders, in verbatim, from the Board that:

- a) An order annulling and setting aside the Respondent's decision contained in the Regret Letter dated 9th January 2026 terminating Tender No. 2050856-2025/2026 for Cabro Works Within Kitutu Central Ward.***
- b) A declaration that the purported termination of the said tender under Section 63(1)(b) of the Public Procurement***

and Asset Disposal Act, 2015 was unlawful, irregular, and null and void ab initio.

c) An order compelling the Respondents to reinstate the tender process to the stage immediately prior to the unlawful termination.

d) An order compelling the Respondents to adopt and implement the Evaluation Committee's recommendation and to proceed to award Tender No. 2050856-2025/2026 to the Applicant.

e) In the alternative an award of damages to the Applicant for loss of business and expectation in the sum of Kenya Shillings Eleven Million, Two Hundred Thousand (KES 11,200,000/=).

f) An order that the Respondents bear the costs of this Request for Review and all incidental expenses incurred by the Applicant.

g) Any other or further relief that this Honorable Board may deem just, equitable, and expedient to grant in the circumstances.

15. In a Notification of Appeal and a letter dated 26th 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 26th January 2026.

16. *Vide* emails of 4th February 2026 and 10th February 2026, the Board Secretary sent reminders to the Respondents referring to the Notification of the instant Request for Review and notified the Respondents 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 (5) days within which they were required to submit a response and confidential documents concerning the procurement proceedings in the subject tender noting that the operations of the Board are time bound and require matters to be concluded within 21 days.

17. *Vide* email of 10th February 2026, the Respondents through the office of the County Attorney filed scanned copies of the Procuring Entity's Memorandum of Response dated 9th February 2026, an Affidavit in Support of the Respondent's Memorandum of Response sworn on 9th February 2026 by Afuna Ondara, its Municipal Manager, and a Notice of Intention to Raise a Preliminary Objection dated 9th February 2026.

18. The Board Secretary, notified parties in the subject tender of an online hearing of the Request for Review slated for 11th February 2026 at 11.00 a.m., through the link availed in the said Hearing Notice.

19. When the matter first came up for hearing on 11th February 2026, the Board read out pleadings filed by the respective parties in the matter. Mr. Omar indicated that he had been served with the Respondents response the previous night and sought for time to file a response to the same. On his part, Mr. Mokaya indicated that he had not paid for the Respondents' Preliminary Objection and with respect to failure to submit to the Board the original confidential documents concerning the subject tender, he was not aware of what was required to be submitted in terms of the confidential documents. He however endeavored to have the said documents posted immediately to ensure they were received by 8.00 a.m. on 12th February 2026.

20. Having heard parties' submissions, the Board directed:

- i. Mr. Mokaya to pay for the Respondents' Preliminary Objection and serve the same upon the Mr. Omar for the Applicant together with his Written Submissions;
- ii. Mr. Omar to file and serve his response and submissions by 8.00 a.m. on 12th February 2026;
- iii. Mr. Mokaya to ensure that the confidential documents concerning the subject tender were submitted to the Board in line with Section 67 (3)(e) of the Act by close of business.

iv. That the hearing of the matter be rescheduled to 12th February 2026 at 11.00 a.m.

21. On the same day of 11th February 2026, Mr. Mokaya paid the filing fees for the Respondents' Preliminary Objection.

22. On 12th February 2026, the Applicant filed a Supplementary Affidavit sworn on 11th February 2026 by Abdifatah Ali Adan, Written Submissions of even date and a Bundle of Authorities.

23. On 12th February 2026, the Respondents filed Written Submissions of even date and soft copies of the confidential documents pertaining to the subject tender.

24. At the hearing on 12th February 2026, the Board confirmed pleadings filed and noted the non-compliance by the Respondents to submit to it the original confidential documents concerning the subject tender. Having taken note of the limited time within which it was required to review the matter, the Board directed that the hearing of the objection raised by the Respondents would be heard as part of the substantive Request for Review. This was in accordance with Regulation 209(4) of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as 'Regulations 2020') which grants the Board the discretion to hear preliminary objections as part of a substantive

request for review and deliver one decision. Thus, the matter proceeded for virtual hearing as scheduled.

25. At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 26th January 2026 was due to expire on 16th February 2026 and that the Board would communicate its decision on or before 16th February 2026 to all parties to the Request for Review via email.

26. The Respondents on 13th February 2026 filed via email soft copies of the blank Tender Document, a document titled 'Proposed Budget FY 2025-26', and a document titled 'Copy of Proposed Supplementary Budget FY 2025-26.

PARTIES' SUBMISSIONS

Applicant's case

27. In his submissions, Mr. Omar on behalf of the Applicant placed reliance on the Applicant's pleadings filed before the Board.

28. With regard to the preliminary issues raised by the Respondents, the Applicant submitted that Section 167(4)(b) of the Act only bars review by the Board if and when a termination has been validly effected under Section 63 of the Act. While relying on the holding in *Republic v PPARB; Leeds Equipments & Systems Ltd (Ex parte Kenya Veterinary Vaccines Production Institute) [2018] eKLR* and *Adopt-A-Light Ltd v Kenya*

National Highways Authority [2018] KLR it further submitted that until the statutory conditions under Section 63 of the Act are satisfied, the Board retains jurisdiction to scrutinize the termination.

29. Counsel submitted that the law requires factual finding to establish that Section 63 of the Act applied which is inherently a mixed question of fact and law and that the Board and Superior Courts have consistently held that an objection to jurisdiction cannot be resolved without examining the evidence and process of termination. He relied on the holding in *Republic v PPARB & Another ex parte Selex Sistemi Integrati (2008) eKLR* and *Republic v The Parliamentary Service Commission (Aprim Consultants, Nairobi HCC No.117 of 2020)* and submitted that the High Court held that even a Section 63 of the Act termination requires scrutiny and that Section 167(4)(b) is a statutory pre-condition that needs to be satisfied before the jurisdiction of the Court can be ousted.

30. Counsel pointed out that it is settled law that a preliminary objection must raise a pure point of law on the assumption that the facts are as pleaded, and must not involve disputed facts. He indicated that the Court of Appeal in *Mukisa Biscuit Mfg. Co. Ltd v West End Distributors [1969] EA 696* warned against the increasing practice of raising points which should be argued in the normal manner by way of preliminary objection given that a preliminary objection raises a pure point of law and it cannot be raised if any fact has to be ascertained.

31. He argued that the Respondents' objection is predicated on factual assertion that the termination met the criteria under Section 63 of the Act and determining this requires an examination of the Procuring Entity's factual record such as budget allocations, technical evaluation among others rendering it a merit issue and not a pure question of the law. Counsel urged the Board to strike out the Preliminary Objection for being premature and misplaced.

32. With regard to the substantive issues raised in the instant Request for Review, Counsel submitted that the reason issued for termination of the subject tender is untenable both in fact and in law for the reason that (i) it is a cardinal obligation imposed by the Act that a procuring entity must not commence or advertise a procurement process unless it has secured budgetary provision and aligned the procurement with an approved procurement plan since the statutory framework does not contemplate speculative tendering subject to later confirmation of funds, and (ii) the factual record exposes the implausibility of the alleged budgetary constraints since the Applicant was duly evaluated and declared by the Evaluation Committee as the successful bidder but the Procuring Entity purported to terminate the subject tender on account of insufficient budgetary provision but barely a month of terminating the subject tender, the Procuring Entity re-advertised the same tender for the same scope of works within the same financial year and within the same budgetary range as the subject tender and at a budget estimate that was higher than the Applicant's successful bid price.

33. Counsel questioned how funds that were allegedly unavailable during a concluded tendering process suddenly reappeared almost immediately within the same financial cycle and argued that this unexplained re-emergence of funds irresistibly points to a termination that was neither genuine nor lawful but rather a calculated device to defeat the outcome of a competitive process. He pressed on that this sequence of events is inconsistent with a genuine lack of funds and a procuring entity that genuinely lacked budgetary provision could not lawfully re-advertise the same procurement almost immediately at an equivalent or higher financial threshold. He argued that such conduct directly contradicts the statutory ground relied upon and negates the credibility of the asserted reason for termination.

34. He submitted that it is the statutory mandate of the Board pursuant to Section 173 of the Act to review procurement proceedings and annul any decision of a procuring entity that is inconsistent with the Act, Regulations 2020 and the Tender Document and that in the premise the Board must first determine whether the impugned termination satisfied the substantive and procedural requirements of Section 63 of the Act.

35. Counsel submitted that Section 63 of the Act governs termination of procurement proceedings and the circumstances under which an accounting officer may lawfully terminate a tender. He further submitted that Section 63(1)(b) of the Act permits termination only

where there is inadequate budgetary provision and that this is the reason given in the impugned decision of the Respondents in terminating the subject tender.

36. He indicated that the facts in the instant Request for Review point out that the issue of inadequate budget is far from the truth noting that the Respondents readvertised the same tender with a budget estimate set as slightly higher than the successful bid in the terminated tender.

37. Further, that Section 63 (2), (3), and (4) of the Act further imposes procedural obligations including prompt notification to bidders, recording of reasons, and reporting to the Public Procurement Regulatory Authority and the Procuring Entity has not demonstrated compliance or adherence with these procedural safeguards.

38. The Applicant urged the Board to allow the instant Request for Review as prayed and to dismiss the preliminary objection raised by the Respondents.

Respondents' case

39. In his submissions, Mr. Mokaya on behalf of the Respondents placed reliance on the pleadings filed before the Board.

40. With regard to the Preliminary Objection raised, Mr. Mokaya submitted that the instant Request for Review is improperly before the Board based on provisions under Section 167(4) of the Act which dictate that

a termination of a procurement or asset disposal proceedings in accordance with Section 63 of the Act shall not be subject to review by the Board. He further submitted that the instant Request for Review was terminated in line with Section 63(1)(b) of the Act on account of inadequate budgetary provision and that in the circumstances, the only available remedy is for the Applicant to seek judicial review by the High Court.

41. On the substantive issues raised, Mr. Mokaya submitted that the impugned termination of the subject tender was above board, transparent, and legal and that it was informed by the facts espoused in the Professional Opinion dated 8th January 2026. He further submitted that the Respondents entirely associate with Part B of the said Professional Opinion which demonstrates the fact that there was an error in requisitioning for the intended works in Phase 1 and Phase 2 leading to provision of inadequate funds to finance the works for both Phase 1 and Phase 2 leading to the provision of inadequate funds to finance the works for both phases concurrently. He indicated that the Procuring Entity had no choice but to terminate the procurement process so as to allow for the re-advertisement of the said works to be done in phases and not concurrently.

42. According to the Respondents, the tender advertisement indicated that the said Cabro works were planned to be implemented in two distinct phases being Phase I at a cost of Kshs. 105 Million and Phase II at a cost of Kshs. 24 Million each under a separate vote head whereas the

two phases ought to have been procured independently so as to clearly distinguish the scope and funding of each phase. That to the contrary, the Procuring Entity amalgamated the works totaling to Kshs. 129 Million and invited bids under two projects namely Cabro Works in Kitutu Central Ward with an Engineer's Estimate of Kshs. 64.1 Million (Open Tender) and Cabro Works in Bobaracho ward with an engineer's estimate of Kshs. 64.5 million (Reserved Tender).

43. The Respondents contend that during evaluation and as captured under the Legal and Practical Aspects in the Professional Opinion, an anomaly was identified wherein one tender was open to all eligible bidders while the other was reserved for marginalized groups despite both procurements arising from a combined scope of works.

44. It is the Respondents' case that the termination was informed by the fact that the said works which were similar in nature were advertised as two separate tenders whereas the Act under Section 54(1) read with Regulation 43 of regulations 2020 prohibits tender splitting making the termination necessary so as to avoid committing an offence under the Act.

45. The Respondents argued that the Applicant is bound by Clause 4 of the Form of Tender which it signed which provides that 'We further understand that you are not bound to accept the lowest or any tender you may receive' and by executing the said Form of Tender, the Applicant explicitly acknowledged and accepted the discretionary

authority of the Procuring entity in determining whether or not a tender process should proceed to award since discretion extends not only to acceptance or rejection of individual tenders but also to termination of the entire procurement process where the circumstances so warrant.

46. Counsel pointed the Board to the Procuring Entity's Procurement Plan and the Development Plan indicating available amounts and the deficit to be covered under the Supplementary Budget and argued that these clearly show that there were no funds.

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

Applicant's Rejoinder

48. In a rejoinder, Mr. Omar submitted that the Procuring Entity first advertised the subject tender as Tender No. 2050856-2025/2026 for Cabro Works Within Kitutu Central Ward with a closing date on 10th December 2025 while the second advert was done on 23rd January 2026 under Tender No. 2095460-2025/2026 for Cabro Works within Kitutu Central Ward.

49. He pointed out that the Applicant's bid was successful at the quoted price of Kshs. 57,984,806.00 while the new budget estimate is provided as Kshs. 58,300,000.00 which is higher than the amount initially accepted. While referring to Section 167(4)(b) and Section 63 of the Act, counsel submitted that the procurement laws provide for a fair

playing field between bidders and that the actions of the Respondents in the procurement process in the subject tender was arbitrary and illegal. He further submitted that the burden of proof in light of Section 63 of the Act shifts to the Respondents and they are under an obligation of providing evidence in support of the inadequate budgetary provision as alleged.

BOARD'S DECISION

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

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

In determining the first issue, the Board shall make a determination whether the procurement proceedings in the subject tender were terminated in accordance with Section 63 of the Act thereby ousting the jurisdiction of the Board pursuant to Section 167(4)(b) of the Act?

Depending on the determination of the first issue;

B. Whether the Respondents in terminating the subject tender complied with Section 63 of the Act.

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

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

51. By way of background, the Applicant was among five (5) tenderers who submitted bids in Tender No. 2050856-2025/2026 for Cabro Works Within Kitutu Central Ward. Upon evaluation, the Evaluation Committee found its tender to be the lowest evaluated tender and recommended award of the subject tender to the Applicant at its quoted price of Kshs. 57,984,806.00. However, in a Professional Opinion prepared and signed by the Deputy Director Supply Chain Management, Samsone Mayaka, and addressed to the 1st Respondent, Mr. Mayaka recommended termination of the procurement proceedings in the subject tender pursuant to Section 63(1)(b) of the Act.

52. The Applicant in the instant Request for Review is aggrieved by the decision of the 1st Respondent to terminate the procurement proceedings in the subject tender as communicated in the Regret Letter dated 9th January 2026 which reads:

"....."

**RE: NEGOTIATION NO. 2050856-2025/2026 – CABRO
WORKS WITHIN KITUTU CENTRAL WARD**

REGRET LETTER

Pursuant to public procurement and Disposal Act 2020, section 87(3) notification to the unsuccessful bidders shall be in writing and shall be made at the same time the successful bidder is notified.

I hereby wish to notify you that you successfully qualified for the award of contract of the above subject tender. However, due to budgetary constraints and change in the scope of work the procurement proceedings has been terminated pursuant to Sect 63 (1)(b) of the Public Procurement and Asset Disposal Act, 2015.

The revised Bill of quantities and scope of works will be re-advertised based on the revised supplementary budget estimates for the FY 2025-2026 in due course.

In case of any queries kindly seek clarification from the supply chain office at the Treasury buildings Block A.

.....”

53. From the contents of the above letter, the Respondents attribute termination of the subject tender due to budgetary constraints and change on the scope of work and in doing so, relied on Section 63(1)(b) of the Act.

54. The question that the Board is called to answer is whether the termination of the procurement proceedings in the subject tender was valid.

55. The Board is cognizant of the objective of public procurement which is to provide quality goods and services in a system that implements the principles specified in Article 227 of the Constitution which reads:

"227. Procurement of public goods and services

(1) When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.

(2) An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for all or any of the following –

- a)***
- b)***
- c) and***

d).....”

56. 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.”

57. Further to the provisions of Article 227 of the Constitution, the national values and principles of governance under Article 10 of the Constitution apply to State organs and public entities contracting for goods and services. Article 10 of the Constitution reads:

“(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—

(a) applies or interprets this Constitution;

(b) enacts, applies or interprets any law; or

(c) makes or implements public policy decisions.

(2) The national values and principles of governance include—

(a);

(b);

(c) good governance, integrity, transparency and accountability” [Emphasis ours].

58. Efficient good governance in public procurement proceedings provides tenderers with an assurance that public procurement and asset disposal processes are operating effectively and efficiently. Such processes are also underpinned by broader principles such as the rule of law, integrity, transparency and accountability amongst others.

59. Termination of procurement proceedings is governed by Section 63 of the Act and we note that where the procurement proceedings have been terminated in accordance with Section 63 of the Act, the Board is divested of its jurisdiction by dint of Section 167(4)(b) of the Act. The provisions of Section 167(4)(b) of the Act are conditional on such termination being in accordance with Section 63 of the Act and reads:

“(4) The following matters shall not be subject to the review of procurement proceedings under subsection (1)—

(a) the choice of a procurement method;

(b) a termination of a procurement or asset disposal proceedings in accordance with section 63 of this Act; and
(c) where a contract is signed in accordance with section 135 of this Act. [Emphasis by the Board]

60. In response to the instant Request for Review, the Respondents submitted that the Board lacks jurisdiction to hear and determine the instant Request for Review by dint of Section 167(4) of the Act. The Respondents submitted that termination of the procurement proceedings in the subject tender was conducted in accordance with Section 63 (1)(b) of the Act thereby divesting the Board its jurisdiction in the matter.

61. On its part, the Applicant submitted that the Board has jurisdiction to hear and determine the instant Request for Review since the termination of the procurement proceedings in the subject tender was not carried out in accordance with Section 63 of the Act. The Applicant further submitted that whilst Section 167(4)(b) of the Act bars the Board from reviewing a termination decision made under Section 63 of the Act, the Board retains the authority to assess if indeed the termination complied with the requirements under Section 63 and should it find that the termination is inconsistent with the said requirements, it has jurisdiction to invalidate the said decision.

62. It is trite law that courts and decision-making bodies should only act in cases where they have jurisdiction and when a question of jurisdiction arises, a Court or tribunal seized of a matter must as a matter of prudence enquire into it before doing anything concerning such a matter.

63. Superior Courts of this country have on numerous occasions offered guidance on the interpretation of Section 167(4) of the Act and the ousting of the Board's jurisdiction on account of the subject matter relating to termination of tenders. The High Court in **Miscellaneous Civil Application No. 1260 of 2007, Republic v. Public Procurement Administrative Review Board & Another Ex parte Selex Sistemi Integrati (2008) eKLR**, while determining the legality of sections 36 (6) and 100 (4) of the repealed Public Procurement and Disposal Act, 2005 that dealt with termination of procurement proceedings held as follows:

"I now wish to examine the issues for determination. The first issue is whether the Public Procurement and Disposal Act, 2005, s 100 (4) ousts the jurisdiction of the court in judicial review and to what extent the same ousts the jurisdiction of the Review Board. That question can be answered by a close scrutiny of section 36 (6) of the said Act which provides:

"A termination under this section shall not be reviewed by the Review Board or a court."

In the literal sense, section 36 (6) quoted above purports to oust the jurisdiction of the court and the Review Board. The Court has to look into the ouster clause as well as the challenged decision to ensure that justice is not defeated. In our jurisdiction, the principle of proportionality is now part of our jurisprudence. In the case of *Smith v. East Elloe Rural District Council* [1965] AC 736 Lord Viscount Simonds stated as follows:

"Anyone bred in the tradition of the law is likely to regard with little sympathy legislative provisions for ousting the jurisdiction of the court, whether in order that the subject may be deprived altogether of remedy or in order that his grievance may be remitted to some other tribunal."

It is a well settled principle of law that statutory provisions tending to oust the jurisdiction of the Court should be construed strictly and narrowly... The court must look at the intention of Parliament in section 2 of the said Act which is inter alia, to promote the integrity and fairness as well as to increase transparency and accountability in Public Procurement Procedures.

To illustrate the point, the failure by the 2nd Respondent to render reasons for the decision to terminate the Applicant's tender makes the decision amenable to review by the Court since the giving of reasons is one of the fundamental tenets of the principle of natural justice. Secondly, the Review Board ought to have addressed its mind to the question whether the termination met the threshold under the Act, before finding that it lacks jurisdiction to entertain the case before it, on the basis of a mere letter of termination furnished before it.

64. The High Court in the *Selex Sistemi Integrati* case cited above, held that the Board has the duty to question whether a decision by a procuring entity terminating a tender meets the threshold of Section 63 of the Act, and that this Board's jurisdiction is not ousted by the mere fact of the existence of a letter of notification terminating procurement proceedings.

65. Further, in **Judicial Review Miscellaneous Application No. 142 of 2018, Republic v. Public Procurement and Administrative Review Board & Another ex parte Kenya Veterinary Vaccines Production Institute (2018) eKLR** (hereinafter referred to as "JR No. 142 of 2018") the High Court held as follows:

"The main question to be answered is whether the Respondent [Review Board] erred in finding it had

jurisdiction to entertain the Interested Party's Request for Review of the Applicant's decision to terminate the subject procurement...

A plain reading of section 167 (4) (b) is to the effect that a termination that is in accordance with section 63 of the Act is not subject to review. Therefore, there is a statutory pre-condition that first needs to be satisfied in the said sub-section namely that the termination proceedings are conducted in accordance with the provisions of section 63 of the Act, and that the circumstances set out in section 63 were satisfied, before the jurisdiction of the Respondent can be ousted.

As has previously been held by this Court in Republic v Kenya National Highways Authority Ex Parte Adopt –A-Light Ltd [2018] eKLR and Republic v. Secretary of the Firearms Licensing Board & 2 others Ex parte Senator Johnson Muthama [2018] eKLR, it is for the public body which is the primary decision maker, [in this instance the Applicant as the procuring entity] to determine if the statutory pre-conditions and circumstances in section 63 exists before a procurement is to be terminated...

However, the Respondent [Review Board] and this Court as review courts have jurisdiction where there is a

challenge as to whether or not the statutory precondition was satisfied, and/or that there was a wrong finding made by the Applicant in this regard...

The Respondent [Review Board] was therefore within its jurisdiction and review powers, and was not in error, to interrogate the Applicant's Accounting Officer's conclusion as to the existence or otherwise of the conditions set out in section 63 of the Act, and particularly the reason given that there was no budgetary allocation for the procurement. This was also the holding by this Court (Mativo J.) in R v Public Procurement Administrative Review Board & 2 Others Ex-parte Selex Sistemi Integrati which detailed the evidence that the Respondent would be required to consider while determining the propriety of a termination of a procurement process under the provisions of section 63 of the Act"

66. The above judicial pronouncements mirror the position of this Board in its previous decisions in **PPARB Application No. 5 of 2021; Daniel Outlet Limited v Accounting Officer Numeric Machines Complex Limited; PPARB Application No. 29 of 2023 Craft Silicon Limited v Accounting Officer Kilifi County Government & another; PPARB Application No. 5 of 2024 Seluk**

**Investments Limited v The Accounting Officer/Chief Officer
Department of Urban Development County Government of
Machakos & Another, and PPARB Application No. 19 of 2024
Enwealth Financial Services Limited v Board of Trustees,
Kenya National Examination Council, Staff Retirement
Benefits Scheme, 2011 & Others.**

67. Drawing from the above judicial pronouncements, this Board will first interrogate the termination of the subject tender to establish whether the termination of the subject tender was in accordance with the requirements under Section 63 of the Act. It is only upon satisfying itself that the said requirements have been met that the Board can down its tools in the matter. However, where any requirement has not been met, the Board will exercise its jurisdiction to hear and determine the Request for Review.

68. Section 63 of the Act is instructive in the manner in which a procuring entity may terminate procurement or asset disposal proceedings and provides as follows:

"(1) An accounting officer of a procuring entity, may, at any time, prior to notification of tender award, terminate or cancel procurement or asset disposal proceedings without entering into a contract where any of the following applies—

(a) the subject procurement has been overtaken by—

(i) operation of law; or

(ii) substantial technological change;

(b) inadequate budgetary provision;

(c) no tender was received;

(d) there is evidence that prices of the bids are above market prices;

(e) material governance issues have been detected;

(f) all evaluated tenders are non-responsive;

(g) force majeure;

(h) civil commotion, hostilities or an act of war; or

(i) upon receiving subsequent evidence of engagement in fraudulent or corrupt practices by the tenderer.

(2) An accounting officer who terminates procurement or asset disposal proceedings shall give the Authority a written report on the termination within fourteen days.

(3) A report under subsection (2) shall include the reasons for the termination.

(4) An accounting officer shall notify all persons who submitted tenders of the termination within fourteen days of termination and such notice shall contain the reason for termination."

69. Further, Regulation 48 of Regulations 2020 provides:

"(1) Prior to the cancellation or termination of a procurement and asset disposal proceedings under section 63 of the Act, an accounting officer may take into account the recommendations of the head of procurement function.

(2) The report required under section 63(2) and (3) of the Act shall be made in accordance with the guidelines issued by the Authority."

70. In essence, Section 63 (1) of the Act stipulates that termination of procurement proceedings is only done prior to award of a tender and when any of the pre-conditions listed in sub-section (a) to (i) exist. Additionally, Section 63 (2), (3), and (4) outlines the procedure to be followed by a procuring entity when terminating a tender. It is trite law that for the termination of procurement proceedings to pass the legal muster, a procuring entity must demonstrate compliance with both the substantive and procedural requirements under Section 63 of the Act.

71. Section 63 of the Act is instructive on termination of procurement proceedings being undertaken by an Accounting Officer of a procuring

entity at any time before notification of award is made and such termination must only be effected if any of the pre-conditions enumerated in Section 63(1) (a) to (i) of the Act are present. This is the substantive statutory pre-condition that must be satisfied before a termination of procurement proceedings is deemed lawful. Further, following such termination, an accounting officer is required to give the Authority a written report on the termination with reasons and notify all tenderers, in writing, of the termination with reasons within fourteen (14) days of termination. These are the procedural statutory pre-conditions that must be satisfied before a termination of procurement proceedings is deemed lawful.

72. In **Republic v Public Procurement Administrative Review Board; Leeds Equipment & Systems Limited (Interested Party); Ex parte Kenya Veterinary Vaccines Production Institute [2018] eKLR**, the High Court held that:

"In a nutshell therefore and based on the above-cited cases where the decision of a procuring entity to terminate procurement process is challenged before the Board the procuring entity is to place sufficient reasons and evidence before the Board to justify and support the ground of termination of the procurement process under challenge. The procuring entity must in addition to providing sufficient evidence also demonstrate that it has complied with the substantive and procedural

requirements set out under the provisions of Section 63 of the Act”

73. It is therefore important for the Board to determine the legality, or lack thereof, of the Respondents’ decision to terminate the procurement proceedings of the subject tender which then will inform the legality or lack thereof of the Respondent’s decision to float the Re-advertised Tender on 23rd January 2026.

With regard to substantive requirements for termination of procurement proceedings in the subject tender

74. We understand the Applicant’s contention to be that the termination of the subject tender was illegal since the Respondents have not provided sufficient evidence of real and tangible evidence of the alleged grounds of termination of the subject tender’s procurement proceedings on account of inadequate budgetary provision. It further contends that the time lapse between the initial advertisement of the subject tender and the Readvertised Tender is minimal and falls within the same financial year and that its quoted tender sum in the subject tender is near identical to, and lower than the Engineer’s Estimate in the Readvertised Tender.

75. On the other hand, the Respondents contend that the subject tender was terminated due to budgetary constraints arising from failure to align the requisitioned works with the approved budget lines. They

further contend that according to the tender advertisement, the said Cabro works were planned to be implemented in two distinct phases being Phase I at a cost of Kshs. 105 Million and Phase II at a cost of Kshs. 24 Million, each under a separate vote head and procured independently to clearly distinguish the scope and funding of each phase. They argued that contrary to this, the Procuring Entity amalgamated the works totaling to Kshs. 129 Million and proceeded to invite bids under two projects namely; Cabro Works in Kitutu Central Ward with an Engineer's Estimate of Kshs. 64.1 million (Open Tender) and cabro works in Bobaracho Ward with an Engineer's estimate of Kshs. 64.5 million (Reserved Tender).

76. They submitted that during evaluation and as captured in the Legal and Practical Aspects of the Tender in the Professional Opinion, an anomaly was identified wherein one tender was open to all eligible bidders while the other was reserved for marginalized groups, despite both procurements arising from a combined scope of works.

77. Having considered parties' pleadings and submissions in the instant Request for Review, the question that comes up for this Board's determination is whether the Respondents decision to terminate the subject tender on the basis of inadequate budgetary provision was in line with Section 63(1)(b) of the Act.

78. Section 63(1)(b) of the Act as cited hereinbefore stipulates that one of the grounds that a procuring entity may rely on to justify its termination of a tender is inadequate budgetary provision.

79. Cambridge Dictionary defines the word 'inadequate' to mean '*too low in quality or too small in amount; not enough*' and 'budget' to mean '*the amount of money you have available to spend*'. We can therefore deduce that the meaning of inadequate budgetary provision in public procurement to be that the amount of money a procuring entity has to spend is too low or not enough to meet the needs of its user department.

80. Budgetary provision is a key factor in public procurement. Section 44(1) of the Act provides that an accounting officer of a public entity is primarily responsible for ensuring that the public entity complies with the Act. Further section 44 (2)(a) of the Act requires the accounting officer in performance of his/her responsibilities to ensure that procurement of goods, works and services of the public entity are within the approved budget of that entity.

81. Section 53 of the Act further provides as follows:

"(1) All procurement by State organs and public entities are subject to the rules and principles of this Act.

(2) An accounting officer shall prepare an annual procurement plan which is realistic in a format set out in the Regulations within the approved budget prior to

commencement of each financial year as part of the annual budget preparation process.

(3) Any public officer who knowingly recommends to the accounting officer excessive procurement of items beyond a reasonable consumption of the procuring entity commits an offence under this Act. (4) All asset disposals shall be planned by the accounting officer concerned through annual asset disposal plan in a format set out in the Regulations.

(5) A procurement and asset disposal planning shall be based on indicative or approved budgets which shall be integrated with applicable budget processes and in the case of a State Department or County Department, such plans shall be approved by the Cabinet Secretary or the County Executive Committee member responsible for that entity.

(6) All procurement and asset disposal planning shall reserve a minimum of thirty per cent of the budgetary allocations for enterprises owned by women, youth, persons with disabilities and other disadvantaged groups.

(7) Multi-year procurement plans may be prepared in a format set out in the Regulations and shall be consistent with the medium term budgetary expenditure framework for projects or contracts that go beyond one year.

(8) Accounting officer shall not commence any procurement proceeding until satisfied that sufficient funds to meet the obligations of the resulting contract are reflected in its approved budget estimates.

(9) An accounting officer who knowingly commences any procurement process without ascertaining whether the good, work or service is budgeted for, commits an offence under this Act.

(10) For greater certainty, the procurement and disposal plans approved under subsection (5) shall include choice of procurement and disposal methods and certain percentages referred to under subsection (6).

(11) Any state or public officer who fails to prepare procurement and disposal plans shall be subject to internal disciplinary action.

(12) Upon submission of the procurement plans to the National Treasury pursuant to section 44(2)(c) of this Act, the accounting officer of a procuring entity shall publish and publicize its approved procurement plan as invitation to treat on its website.

(13) On receipt of the procurement plans submitted by the procuring entities, the National Treasury shall publish and publicize the procurement plans as invitation to treat on the state tender portal.”

82. The import of the above provisions is that it is the primary responsibility of an accounting officer to ensure that a procuring entity complies with the provisions of the Act. **The accounting officer is also responsible for preparation of an annual procurement plan which ought to be within the approved budget and should not commence any procurement proceedings until satisfied that sufficient funds to meet the obligations of the resulting contract are reflected in the approved budget estimates.** An accounting officer who knowingly commences any procurement process without ascertaining whether the good, work or service is budgeted for commits an offence under the Act.

83. Turning to the circumstances in the instant Request for Review, it is our considered view, the best evidence that a procuring entity ought to provide to demonstrate availability or lack of an adequate budgetary allocation for the procurement process would be the Procuring Entity's Approved Procurement Plan and Approved Budget Estimates that were in place at the time of commencement of the procurement process in the subject tender as contemplated under Section 44(2)(b) and 53(d) of the Act.

84. However, the Board has neither had sight of the original copies of the Procuring Entity's Approved Procurement Plan nor the Approved Budget Estimates that were in place at the time of commencement of the procurement process in the subject tender noting that despite efforts by the Board's Secretariat to have the Respondents submit the original

confidential documents concerning the subject tender, the Respondents failed to avail the same even when their counsel on record assured the Board that they were being delivered prior to commencement of the hearing.

85. Instead, the Respondents availed via email soft copies of the proposed budget and supplementary budget and scanned photocopies of the documents pertaining to the procurement process in the subject tender and amongst these was a scanned photocopy of the Professional Opinion by the Deputy Director Supply Chain Management, Samsone Mayaka, which reads in part:

PART B - LEGAL & PRACTICAL ASPECTS OF THE TENDER

Requisition
The works were requested by the user department, through the Municipal Engineer, approved by the Accounting Officer and funds availability confirmed by the County Head of Accounting unit. Requisitioning of the works was in compliance with section 73 of the Act and regulation 52. However critically looking at the requisitions based on the budget estimates and procurement plan, there ought to be two requests done for the budget line items i,e Cabro works in Kisii Town Phase I of Ksh. 105,993,018 and Cabro works in Kisii town phase II of Ksh. 24,000,000. In the contrary requisitions were made separately for the Cabro works in Kisii town i.e Ksh 64,083,000 for Cabro works in Bobaracho ward and Ksh. 64,570,000 for Cabro works in Kitutu Central ward which is against the revised budget estimates of the FY 2025/2026.

.....

Availability of budget/funds:
The department planned for this procurement in the approved Procurement Plan for 2025-2026 as below;

- Plan Number: 49169*
- Financial Year: 2025-2026*
- Department: Kisii Municipality*
- Item/Service code: W000001262*
- Item/Service Description: Cabro Works at Kisii CBD*

□ **Account: 1-5223-5223000101-00001001-0709015210-3110599-52100001-000**

Further, the department confirmed that funds were budgeted for in the approved budget 2025-2026 in two phases i.e. Cabro works in Kisii Town Phase I of Ksh. 105,993,018 and Cabro works in Kisii town phase II of Ksh. 24,000,000.

PART C - RECOMMENDATION TO ACCOUNTING OFFICER FOR APPROVAL / REJECTION

In view of the above information and in consideration of the budget estimates for the FY 2025-2026, I recommend for the procurement proceedings to be terminated pursuant to Section 63 (1) (b) of the Public Procurement and Asset Disposal Act, 2015.

This will allow for re-advertisement of the Cabro works in two phases as envisaged in the supplementary budget estimates of the FY 2025/2026. i.e Phase I Ksh. 105,993,018 and Phase II Ksh. 24,000,000. The requisitions, bill of quantities & scope of works of the two phases will also be revised appropriately based on these findings.

As guided by section 84 (3) of the Public Procurement and Asset Disposal Act, 2015, you may consider approving recommendation to RE-ADVERTISE the tender in two phases i.e. Cabro works in Kisii Town Phase I of Ksh. 105,993,018 and Cabro works in Kisii town phase II of Ksh. 24,000,000.

86. According to the above Professional Opinion:

- i. The works in the subject tender were requested by the user department through the Municipal Engineer, approved by the 1st Respondent and funds availability confirmed by the County Head of Accounting Unit.
- ii. Requisition was in accordance with Section 73 of the Act as read with Regulation 52 of Regulations 2020.
- iii. Based on the Budget Estimates and Procurement Plan, there ought to be two requests done for the budget line items being

Cabro works in Kisii Town Phase I at Ksh. 105,993,018 and Cabro works in Kisii town phase II at Ksh. 24,000,000.

- iv. However, requisitions were separately made for the Cabro works in Kisii town at Ksh 64,083,000 for Cabro works in Bobaracho ward and at Ksh. 64,570,000 for Cabro works in Kitutu Central ward which is claimed to be against the revised budget estimates of the FY 2025/2026.
- v. A recommendation of termination of the subject tender was made in consideration of the budget estimates for the FY 2025-2026 so as to allow for re- advertisement of the Cabro Works in two phases as envisaged in the Supplementary Budget estimates of the FY 2025/2026 being Cabro works in Kisii Town Phase I at Ksh. 105,993,018 and Cabro works in Kisii town phase II at Ksh. 24,000,000.

87. We also note that the Respondents availed via email a scanned photocopy of the Tender Document regarding the subject tender that was issued on 26th November 2025 and scheduled to close on 10th December 2025. Page v of the Invitation to Tender of the Tender Document indicated as follows with regard to the advertised Tender and the Budget Estimate:

"INVITATION TO TENDER

PROCURING ENTITY: KISII MUNICIPALITY CONTRACT

***NAME AND DESCRIPTION: CABRO WORKS WITHIN
KITUTU CENTRAL WARD***

BUDGET ESTIMATE: 64,570,000 (Sixty-Four Million Five Hundred and Seventy Thousand Shillings)

1. The Kisii Municipality invites sealed tenders for the construction of Cabro works within Kitutu Central Ward.

2. Tendering will be conducted under open competitive method (National) using a standardized tender document. Tendering is open to all qualified and interested Tenderers.

Tendering is open to all including Small and Medium Enterprises, Youth, Women and PWDs.

.....

88. Further, ITT 1.1 under Section II – Tender Data Sheet (TDS) of the Tender Document identifies the number and identification of lots (contracts) comprising the subject tender as follows:

Lot 1- Cabro paving for Imperial primary-Dans hotel road-Kenya Power Maosa building- Getembe Hardware-Valaria Road

Lot 2- Cabro paving for Soko Njinga – Nubia Mosque – Nubia Hall Road

89. Moreover, the Bill of Quantities for both Lot 1 and Lot 2 of the subject Tender Document were provided for under Section V – Bill of Quantities of the Tender Document.

90. In essence, the Procuring Entity in floating the subject tender indicated that tendering was open to all bidders including Small and Medium Enterprises, Youth, Women, and PWDS and that the subject tender was in two lots whose Bill of Quantities was categorically provided for. Additionally, the budget estimate was clearly stipulated at Kshs. 64,570,000.00.

91. With the above in mind, the Board observes that 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."

92. 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.

93. 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."

94. 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.

95. 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.”

96. 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:

(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...

97. 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.

98. During the hearing of the instant Request for Review, we heard counsel for the Respondent allude to an approved revised budget estimate (Supplementary) where the budget extract is said to have provided the amount required to carry out works in Phase I for Cabro Works in Kisii Town at Ksh. 105,993,018 and Phase II Cabro Works in Kisii Town at Ksh. 24,000,000. The Board notes that these amounts total to a sum of Kshs. 129,993,018.00. Additionally, we have heard the Respondents submit that according to the Procuring Entity's Procurement Plan, the vote head within which the subject procurement was charged had a budget of Kshs. 264,555,894.

99. Turning to the instant matter, it is not in dispute that the Procuring Entity not only laid out, in the Tender Document, clear, correct, and complete description of what was being procured concerning the subject tender under Lot 1 and Lot 2 but also indicated the budget estimates at Kshs. 64,570,000.00 which guided bidders in quoting their tender sum. The Applicant was recommended for award at their tender sum of Ksh. 57,984,806.09 which was not only lower than the total amount of Kshs. 64,570,000.00 stipulated in the Tender Document but also lower than the vote head within which the subject procurement is said to have been charged at Ksh. 264,555,894 in the Procurement Plan.

100. Interestingly, the Readvertised Tender which is also categorized in two lots but now reserved for Youth, Women, and PWDs sets out a budget estimate at Kshs. 58,300,000.00. This amount is higher than

the Applicant's recommended award tender sum of Ksh. 57,984,806.09.

101. Noting the express restriction against commencement of a procurement process without ascertaining whether the good, work, or service is budgeted for and the requirement under Regulation 71 of Regulations 2020 requiring the head of the user department to initiate the procurement process through a requisition in line with the approved procurement plan, the Board finds that there is a strong rebuttable presumption that the subject tender herein was within the Respondent's approved budget and procurement plan hence the decision to re-advertise the same within the same financial year.

102. Regrettably, the Board notes that the documents availed by the Respondents as scanned photocopies concerning the subject tender cannot be authenticated in law in view of Section 67(3) (e) of the Act which mandates a Procuring Entity to avail original documents concerning a procurement process that is under review by the Board.

103. Further, Section 53 of the Act dictates that a procurement plan shall be prepared by an accounting officer who is required pursuant to Regulation 40(4) of Regulations 2020 to prepare the procurement plan as a consolidated annual procurement plan comprising of the procurement plans of user departments and the same shall be approved, in the case of the county government, by the executive committee member of finance. Under Regulation 41 and 42 of

Regulations 2020, the consolidated procurement plan ought to contain, inter alia, the estimated cost for procurement of items and shall be prepared in the format prescribed in the third schedule of the Act. A cursory look at the format of a procurement plan makes provision for execution by both the Accounting Officer and the CEC Finance, in the case of a county government.

104. With regard to budgets, Section 129(1)(a) of the Public Finance Management Act designates the county executive committee with the responsibility of approving budget estimates submitted to it by the County Executive Committee Member for finance. Under Section 129(2)(a) of the Public Finance Management Act as read with Section 8(1) of the County Governments Act, county budget estimates shall be approved by the County Assembly and it is on the basis of the approved budgets that an appropriation bill would be passed. It follows therefore that a procurement plan and an approved budget are prescribed documents that have the force of law.

105. Taking into account the foregoing, the budget estimates alluded to in undertaking the project under procurement in the subject tender, and absent the original documents concerning the procurement process in the subject tender, the Board finds and holds that the Respondents have failed to fulfill the substantive requirements for the termination of the procurement proceedings in the subject tender as required by Section 63(1)(b) of the Act having failed to provide sufficient evidence

of inadequate budgetary allocation justifying termination of the subject tender.

106. The Board notes that Superior courts in this country have previously warned against the growing trend of procuring entity's reproducing the grounds of termination under Section 63 of the Act without any further information to bidders. In **Republic v Public Procurement Administrative Review Board Exparte Nairobi City & Sewerage Company; Webtribe Limited t/a Jambopay Limited (Interested Party) [2019] eKLR; Nairobi High Court Judicial Review Application 437 of 2018** the High Court considered a judicial review application challenging the decision of this Board that had found that the Procuring Entity irregularly terminated the tender under consideration. In dismissing the judicial review application, the High Court sounded a warning to Procuring Entities that mere recitation of grounds of termination of a tender under Section 63 of the Act without information establishing the alleged ground of termination is insufficient to justify such termination:

"45. The mere recitation of the statutory language, as has happened in this case is not sufficient to establish the grounds or sufficient reasons. The reasons for the termination must provide sufficient information to bring the grounds within the provisions of the law. This is because the tender process and in particular, the

termination, must be done in a transparent and accountable and legal manner as the law demands. This is because the question whether the information put forward is sufficient to place the termination within the ambit of the law will be determined by the nature of the reasons given. The question is not whether the best reasons to justify termination has been provided, but whether the reasons provided are sufficient for a reasonable tribunal or body to conclude, on the probabilities, that the grounds relied upon fall within any of the grounds under section 63 of the Act. If it does, then the party so claiming has discharged its burden under section 63"

107. From the above holding which is binding on this Board, public procurement processes, including termination or cancellation of a public tender, should be done in an open and transparent manner and mere recitation of the statutory language under Section 63 of the Act does not suffice. It is our considered opinion that fairness and transparency during termination of procurement proceedings require as of necessity that an accounting officer of a Procuring Entity should not only recite the statutory language as reasons for termination but also provide real and tangible reasons backed with sufficient evidence for such termination to all tenderers in the letter of notification of termination of procurement proceedings. With this information and evidence, aggrieved tenderers will critically weigh their options on whether or not to challenge such a

termination in light of being in possession of sufficient evidence of the reasons for such termination

108. Guided by the above holdings, the Board finds and holds that the Respondents have failed to fulfill the substantive requirements for the termination of procurement proceedings in the subject tender as required by Section 63(1)(b) of the Act and the aforementioned cases. This is due to the fact that they did not provide sufficient evidence of the alleged inadequate budgetary provision in the procurement proceedings as communicated to tenderers in the Regret Letter dated 9th January 2026 justifying termination of procurement proceedings in the subject tender.

With regard to procedural requirements for termination of procurement proceedings in the subject tender;

109. Turning to the procedural requirements under Section 63 of the Act, and guided by the case law cited above, the Board notes that the termination letters issued by the Respondents to the Applicant and other unsuccessful bidders in the subject tender contravened section 63(4) of the Act, as they merely recited the phrase “there was a budgetary constraint with the scope of works advertised therefore the procurement proceedings have been terminated” without providing any explanation for the termination. The Board finds this to be inadequate, as it does not afford a tenderer sufficient information to understand the reasons for the termination or to determine whether to challenge it. This constitutes unfair administrative action and, accordingly, fails to

satisfy the procedural requirement of giving reasons to tenderers as envisaged by law.

110. Another procedural requirement is set out in Section 63(2) of the Act, read together with PPRA Circular 4/2022 dated 1st July 2022, regarding the obligation to furnish the Public Procurement Regulatory Authority with a written report on the termination within fourteen (14) days. However, the Board has not had sight of any written report addressed or submitted to the Public Procurement Regulatory Authority notifying it of termination of the subject tender and reasons thereof in accordance with Section 63(2) & (3) of the Act.

111. In the circumstances, we find that the procedural statutory pre-conditions that must be satisfied before a termination is deemed lawful as required by Section 63(2), (3) & (4) of the Act have all not been met by the Respondents.

112. Having established that the Respondents failed to satisfy both the substantive and procedural statutory pre-conditions of termination of procurement proceedings in line with Section 63 of the Act, the Board finds and holds that the purported termination of the subject tender's procurement proceedings was unlawful and illegal.

113. As such, the Board's jurisdiction to hear and determine the instant Request for Review has not been ousted by dint of Section 167(4)(b) of the Act.

As to whether the Respondents in terminating the subject tender complied with the provisions of Section 63 of the Act.

114. The Board has already determined in the preceding issue that the Respondents failed to satisfy the substantive requirement under Section 63 of the Act as they did not provide sufficient evidence of inadequate budgetary provision in the procurement proceedings as communicated to tenderers in the Regret letter dated 9th January 2026 justifying termination of procurement proceedings in the subject tender. Further, we have established that the procedural statutory pre-conditions that must be satisfied before a termination is deemed lawful as required by Section 63(2), (3) & (4) of the Act have all not been met by the Respondents since sufficient reasons pertaining to the reason of termination on account of inadequate budgetary provision pursuant to Section 63(1)(b) of the Act were not issued to all tenderers.

115. Consequently, the Board finds that the Respondent did not comply with the provisions of Section 63 of the Act in terminating the subject tender and that the Readvertised Tender floated on 23rd January 2026 by the Respondents was unlawful and illegal.

116. The Board deems it necessary to caution the Respondents to take cognizance of the fact that pursuant to Section 44 and 53 of the Act:

- i It is the primary responsibility of an accounting officer to ensure that a Procuring Entity complies with the provisions of the Act.

- ii The Accounting Officer is also responsible for preparation of an annual procurement plan which ought to be within the approved budget.
- iii The Accounting Officer should not commence any procurement proceedings until satisfied that sufficient funds to meet the obligations of the resulting contract are reflected in the approved budget estimates.
- iv An Accounting Officer who knowingly commences any procurement process without ascertaining whether the good, work or service is budgeted for commits an offence under the Act.

117. In the view of the foregoing, it is the finding of the Board that the Respondents in terminating the procurement proceedings with respect to the subject tender did not comply with Section 63 of the Act.

As to what orders should the Board grant in the circumstances

118. The Board has found that it has jurisdiction to hear and determine the instant Request for Review.

119. The Board has established that the Respondents failed to satisfy both the substantive and procedural statutory pre-conditions of termination of procurement proceedings in line with Section 63 of the Act and as

such, termination of the procurement proceedings of the subject tender was not done in accordance with Section 63 of the Act.

120. The Board has also established that the readvertised Tender floated on 23rd January 2026 was unlawful and illegal.

121. The upshot of our findings is that the instant Request for Review succeeds 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 pursuant to Section 175 of the Act.

FINAL ORDERS

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

A. The Request for Review filed on 26th January 2026 with respect to Tender No. 2050856-2025/2026 for Cabro Works Within Kitutu Central Ward be and is hereby allowed.

B. The Regret Letters communicating Termination of Procurement Proceedings with respect to Tender No. 2050856-2025/2026 for Cabro Works Within Kitutu Central Ward dated 9th January 2026, issued to the Applicant and

all the other bidders in the subject tender, be and are hereby canceled and set aside.

C. The Professional Opinion with respect to Tender No. 2050856-2025/2026 for Cabro Works Within Kitutu Central Ward dated 8th January 2026 and approved by the 1st Respondent on even date be and is hereby cancelled and set aside.

D. The decision by the Respondents to advertise and publish Tender No. 2095460-2025/2026 for Cabro Works within Kitutu Central Ward including any subsequent procurement processes undertaken with respect to the said tender be and is hereby annulled and set aside.

E. The 1st Respondent is hereby directed to proceed with the procurement process with respect to Tender No. 2050856-2025/2026 for Cabro Works Within Kitutu Central Ward to its lawful conclusion, within 21 days from the date of this decision.

F. The Board Secretary is hereby directed to furnish the Director General of the Public Procurement Regulatory Authority with this decision for purposes of following up on the Respondents' compliance with the Orders of the Board as contained herein.

G. Given that the procurement process is not complete, each party shall bear its own costs in the Request for Review

Dated at NAIROBI this 16th Day of February 2026.



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PANEL CHAIRPERSON

SECRETARY

PPARB

PPARB