

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 18/2026 OF 28TH JANUARY 2026

BETWEEN

**SINTECNICA ENGINEERING S.R.L IN JOINT VENTURE WITH STEAM
S.R.L APPLICANT**

AND

THE ACCOUNTING OFFICER,

KENYA ELECTRICITY GENERATING COMPANY

PLC (KENGEN) 1ST RESPONDENT

KENYA ELECTRICITY GENERATING COMPANY

PLC (KENGEN) 2ND RESPONDENT

ELC ELECTROCONSULT S.P.A 1ST INTERESTED PARTY

EUROPEAN INVESTMENT BANK 2ND INTERESTED PARTY

Review against the decision of the Accounting Officer Kenya Electricity
Generating Company in relation to Tender No. KGN-BDD-016-2024 for
Consulting Services for Olkaria VII Geothermal Power Project.

BOARD MEMBERS PRESENT

- | | |
|-----------------------|---------------------|
| 1. Mr. Jackson Awele | - Panel Chairperson |
| 2. Eng. Lilian Ogombo | - Member |
| 3. Mr. Daniel Langat | - Member |

IN ATTENDANCE

- | | |
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| 1. Philemon Kiprop | - Board Secretary |
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2. Ms. Evelyn Weru

- Secretariat

PRESENT AS PER INTRODUCTIONS

APPLICANT SINTECNICA ENGINEERING S.R.L IN JOINT VENTURE WITH STEAM S.R.L

1. Mr. Herman Omiti - Advocate, Ngeri, Omiti & Bush Advocates LLP
2. Mr. Tom Ngeri - Advocate, Ngeri, Omiti & Bush Advocates LLP
3. Ms. Moureen Langat - Advocate, Ngeri, Omiti & Bush Advocates LLP
4. Ms. Mary Karumi - Advocate, Ngeri, Omiti & Bush Advocates LLP

RESPONDENTS THE ACCOUNTING OFFICER, KENYA ELECTRICITY GENERATING COMPANY PLC (KENGEN) & KENYA ELECTRICITY GENERATING COMPANY PLC (KENGEN)

Mr. Mogaka - Advocate, Mogaka Omwenga and Mabeya Advocates

Mr. Abiud Ambehi – Advocate, Mogaka Omwenga and Mabeya Advocates

INTERESTED PARTY ELC ELECTROCONSULT S.P.A

N/A

BACKGROUND OF THE DECISION

The Tendering Process

1. Kenya Electricity Generating Company Plc, the Procuring Entity and 2nd Respondent herein, being in the process of receiving financing from European Investment Bank (EIB), invited sealed tenders in response to

Tender No. KGN-BDD-016-2024 for Consulting Services for Olkaria VII Geothermal Power Project (hereinafter, "the subject tender") which was carried out in a single stage, three envelopes (Prequalification, Technical and Financial) International Competitive Bidding. The invitation was by way of an advertisement dated 24th September 2024 on *My Gov* Publication, the Procuring Entity's website www.kengen.co.ke and on the Public Procurement Information Portal www.tenders.go.ke where the blank tender document for the subject tender (hereinafter referred to as the Tender Document') was available for download.

2. The Tender Document was classified in two parts being (a) Part 1 containing the prequalification bidding documents, and (b) Part 2 containing the Request for Proposal bidding documents.

3. Bidders were required to duly complete and submit, on the same day, the application for part 1 in a sealed envelope marked *"PREQUALIFICATION FOR OLKARIA VII CONSULTANCY SERVICES"* and the application for part 2 marked *"TECHNICAL PROPOSAL FOR OLKARIA VII CONSULTANCY SERVICES- DO NOT OPEN WITH THE PREQUALIFICATION DOCUMENTS"* and *"FINANCIAL PROPOSAL FOR OLKARIA VII CONSULTANCY SERVICES-DO NOT OPEN WITH THE TECHNICAL PROPOSAL"*. Bidders who downloaded the Tender Document were required to immediately notify the Procuring Entity vide email to the availed contacts. The initial tender submission deadline was scheduled on 27th November 2024.

Addenda

4. The Procuring Entity subsequently issued, on various dates, four (4) Addenda which sought to vary, to some extent, certain information provided in the blank Tender Document while extending the submission deadline to 11th December 2024.

Submission of Tenders and Tender Opening

5. According to the Tender Opening Minutes for the subject tender dated 11th December 2024 and which Tender Opening Minutes were part of confidential documents furnished to the Public Procurement Administrative Review Board (hereinafter referred to as the 'Board' pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act'), the outer envelopes of the bids were opened in the presence of bidders present confirming existence of three separate envelopes in line with provisions of ITC 19.2 of the Tender Document.
6. According to the Tender Opening details for prequalification three (3) bidders submitted bids in the subject tender as follows:

Bid No.	Name Of The Firm/JV
	JV of Exergy International Srl & Pozitif Enerji
	JV of Sintecnica Engineering S.R.L & Steam S.R.L
	ELC Electroconsult S.p.A

Evaluation of Tenders

7. A Tender Evaluation Committee undertook evaluation of the submitted bids as captured in an Evaluation Report dated 6th January 2025 in two parts namely:

- i Part I: Prequalification for Consultancy Services for Olkaria VII Geothermal Power Project
- ii Part II: RFP (Technical Proposal) for Consultancy Services for Olkaria VII Geothermal Power Project

Part I: Prequalification for Consultancy Services for Olkaria VII Geothermal Power Project

8. The Evaluation Committee was required to evaluate tenders using the criteria provided under Part I Prequalification for Consultancy Services for Olkaria VII Geothermal Power Project of the Tender Document which entailed checking for eligibility and responsiveness. At the end of evaluation at this stage, one (1) bidder was found to be non-responsive while two (2) bidders, being the Applicant and Interested Party herein, were found to be responsive and progressed to the RFP – Technical Proposal Evaluation stage.

Part II: RFP (Technical Proposal) for Consultancy Services for Olkaria VII Geothermal Power Project

Opening of Technical Proposals

9. According to the Tender Opening Minutes dated 20th December 2024, the Technical Proposals for the two prequalified bidders (i.e. the

Applicant and Interested Party herein) were opened on 20th December 2024 at 11.00 a.m. and recorded as follows:

NO.	NAMES OF THE FIRM/JOINT VENTURE
1	JV of Sintecnica Engineering S.R.L & Steam S.R.L
2	ELC Electroconsult S.p.A

Evaluation of the Technical Proposals

10. The Evaluation Committee was required to subject the two tenders to the evaluation criteria provided in the Tender Document as read with the Addenda. At the end of evaluation at this stage, both tenders were found to have met the minimum technical score of 70 % and qualified to proceed for further evaluation at the Financial Evaluation stage. The summary of the technical score was recorded by the Evaluation Committee as follows:

Table 9: summary of Technical Scores

<i>No.</i>	<i>Firm</i>	<i>Technical Score</i>
<i>1</i>	<i>JV of Sintecnica Engineering S.R.L & Steam S.R.L</i>	<i>73.04</i>
<i>2</i>	<i>ELC Electroconsult S.p.A</i>	<i>92.06</i>

11. Subsequently, the Evaluation Committee recommended approval for the two (2) bidders to proceed to the tender opening of their financial proposals. The 1st Respondent was requested to:

- i Approve the evaluation results for Prequalification and the Technical Proposals for the subject tender.

- ii Authorize seeking of Financier's No Objection of the evaluation results for Prequalification and the Technical Proposals bids.
- iii Authorize the opening of the Applicant's and Interested Party's bids.

First Professional Opinion

12. In a Professional Opinion Ref No: PPADA2015-275/01/2025 dated 8th January 2025, (hereinafter referred to as "the First Professional Opinion"), the Supply Chain Manager – Procurement, Mr. Vincent Mamboleo reviewed the manner in which the procurement process was undertaken including evaluation of tenders and recommendation by the Evaluation Committee and concurred with the Evaluation Committee's recommendations for approval of the opening of the Applicant's and Interested Party's financial proposals subject to No Objection from the Financier.

13. Thereafter the First Professional Opinion was approved by the 1st Respondent on 8th January 2025.

Invitation for Financial Proposal Opening

14. *Vide* letters dated 17th February 2025, the Applicant and Interested Party were invited for financial opening of their bids scheduled to take place on 20th February 2025 at 1030 hrs E.A.T at the Procuring Entity's premises.

Financial Proposal Opening

15. The Applicant's and Interested Party's Financial Proposals were opened by the Tender Opening Committee on 20th February 2025 and recorded as follows:

<i>NO.</i>	<i>NAME OF THE FIRM</i>	<i>AMOUNT OF QUOTED PRICE ON THE FINANCIAL PROPOSAL SUBMISSION FORM</i>
<i>1</i>	<i>JV of Sintecnica Engineering S.R.L & Steam S.R.L</i>	<i>EUR: 16,792,425.00 Estimated amount of applicable taxes: 2,693,985.00</i>
<i>2</i>	<i>ELC Electroconsult S.p.A</i>	<i>EUR: 18,162,835.78 Estimated amount of applicable taxes: 4,113,148.63</i>

Evaluation of the Financial Proposals

16. The Evaluation Committee was required to examine the financial proposals of the Applicant and the Interested Party in accordance with the evaluation criteria contained in the Tender Document as read with the Addenda.

17. The Evaluation Committee after reviewing the financial proposals identified a number of clarification items that were compiled and sent to the respective parties for appropriate responses.

18. According to the Financial Evaluation Report dated 3rd March 2025, the Evaluation Committee at the end of evaluation at this stage found as follows:

3.4 Results of the Financial Evaluation

3.4.1 Evaluated Financial Price

The Evaluation criteria was subjected to the read-out prices exclusive of taxes in line with ITC 24 of the RFP document.

Based on the foregoing, and as demonstrated in table 4 above after application of financial evaluation criteria, the firms' evaluated financial price is as follows:

- i. JV of Sintecnica Engineering S.R.L & Steam S.R.L: EUR 14,098,440.00***
- ii. ELC Electroconsult S.p.A: EUR 16,068,187.15***

3.4.2 Technical Evaluation Score

From the Technical Evaluation report, the technical scores for the two firms are as follows:

- i. JV of Sintecnica Engineering S.R.L & Steam S.R.L: 73.04***
- ii. ELC Electroconsult S.p.A: 92.06***

3.4.3 Financial Evaluation Score

From table 4 above, the Financial Scores for the two firms are as follows:

- i. JV of Sintecnica Engineering S.R.L & Steam S.R.L: 20.00***
- ii. ELC Electroconsult S.p.A: 17.55***

3.4.4 Combined Technical and Financial Evaluation

The combined Technical Scores and Financial Scores for each bidder as per table 5 above are as follows:

- i. JV of Sintecnica Engineering S.R.L & Steam S.R.L: 78.43***
- ii. ELC Electroconsult S.p.A: 91.20***

3.4.5 Overall Ranking of the bidders after combined Technical and Financial Score

Rank 1: ELC Electroconsult S.p.A with a combined Technical and Financial Score of 91.20

Rank 2: JV of Sintecnica Engineering S.R.L & Steam S.R.L with a combined Technical and Financial Score of 78.43

Evaluation Committee's Recommendation

19. The Evaluation Committee recommended award of the tender to the Interested Party as follows:

Subject to successful negotiation, the Evaluation Committee recommends that the tender for Procurement of Consultancy Services for Olkaria VII Geothermal Power Project be awarded to ELC Electroconsult S.p.A at their quoted total price of EUR 18,162,835.78 equivalent to KES 2,494,009,816.01 (Kenya Shillings Two Billion, Four Hundred and Ninety Four Million, Nine Thousand, Eight Hundred and Sixteen and One Cent Only) inclusive

of all applicable taxes. The estimated tax amount is EUR 4,113,148.63.

Note: The date of the exchange rate (base date) as per ITC 25.1 in the RFP document is 28 days prior to the date of submission of proposals. The submission deadline for the proposals was 11th December 2024. Therefore, the base date is 13th November 2024. The exchange rate based on Central Bank of Kenya.as at 13th November 2024 was 1 EUR = KES 137.3139

Second Professional Opinion

20. In a Professional Opinion Ref No: PPADA2015-362/03/2025 dated 10th March 2025, (hereinafter referred to as “the Second Professional Opinion”), the Supply Chain Manager – Procurement, Mr. Vincent Mamboleo reviewed the manner in which the procurement process was undertaken including evaluation of financial proposals and recommendation by the Evaluation Committee to award the subject tender to the Interested Party and concurred with the Evaluation Committee’s recommendations for award of the subject tender to the Interested Party.

21. Thereafter the Second Professional Opinion was approved by the 1st Respondent on 10th March 2025.

Notification to Tenderers

22. *Vide* letters dated 21st March 2025 bidders were notified of the outcome of evaluation of the tender.

REQUEST FOR REVIEW NO. 38 OF 2025

23. On 3rd April 2025, Sintecnica Engineering S.R.L in Joint Venture with Steam S.R.L, the Applicant herein, filed Request for Review No. 38 of 2025 dated 3rd April 2025 together with a Supporting Affidavit sworn by Matteo Quaia on 3rd April 2025 (hereinafter, "Request for Review No. 38 of 2025") through the firm of Ngeri, Omiti & Bush seeking the following orders from the Board:

a) A Declaration be and is hereby issued that the Accounting Officer and the Procuring Entity have breached the provisions of Articles 10, 27, 201, 227 and 232 of the Constitution of Kenya and Sections 3, 80 and 86 of the Public Procurement and Asset Disposal Act as read with Regulation 76 and 77 of the Public Procurement and Asset Disposal Regulations, 2020.

b) This Board do issue an Order that the Interested Party failed to satisfy all the mandatory requirements and qualification criteria and did not conform to the Technical Evaluation Criteria outlined in the Tender Documents and, therefore, the Accounting Officer and the Procuring Entity erred in their decision to award the Tender Reference No. KGN-BDD-016-2024 for procurement of consultancy services for Olkaria VII

Geothermal Power Project wrongly, irregularly and illegally to the Interested Party.

c) This Board do issue an Order annulling and/or cancelling the Notification of Award issued to the Interested Party in the Tender Reference No. KGN-BDD-016-2024 for procurement of consultancy services for Olkaria VII Geothermal Power Project.

d) This Board do issue an Order directing the Accounting Officer and the Procuring Entity to award the Tender Reference Number KGN-BDD-016-2024 for procurement of consultancy services for Olkaria VII Geothermal Power Project to the Applicants, being the lowest evaluated responsive bidders.

e) In the alternative and without prejudice to Prayer Number (d) above, this Board do issue an Order directing the procuring entity to re-do the technical evaluation of the bids submitted under Tender Reference No. KGN-BDD-016-2024.

f) This Board do grant the Applicants damages for loss of business amounting to a sum of Euros Sixteen Million Seven Hundred and Ninety-Two Thousand Four Hundred and Twenty-Five (EUR 16,792,425.00).

g) The Respondents be ordered to pay costs of and incidental to these proceedings.

h) Any other or further reliefs and/or orders as this Board may deem just, equitable and fit to grant in the circumstances.

24. On 24th April 2025, the Board in exercise of the powers conferred upon it under the Act issued the following orders with respect to Request for Review No. 38 of 2025:

A. The Applicant's Request for Review dated 3rd April, 2025 and filed on even date in respect of Tender No. KGN-BDD-016-2024 for Consulting Services for Olkaria VII Geothermal Power Project be and is hereby allowed.

B. The letters of Notification of Intent to Award Tender No. KGN-BDD-016-2024 for Consulting Services for Olkaria VII Geothermal Power Project dated 21st March 2025 issued by the 1st Respondent to the Interested Parties, the Applicant and all other unsuccessful bidders in regard to the subject tender be and are hereby nullified and set aside.

C. The 1st Respondent is hereby ordered to re-convene the Tender Evaluation Committee in the subject tender and

direct it to re-evaluate tenders that progressed to the Technical Evaluation stage in line with the evaluation criteria contained in the Tender Document as read with the Act and Regulations 2020.

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

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

RE-EVALUATION

25. According to a Re-Evaluation Report dated 2nd May 2025, the Evaluation Committee reconvened and proceeded to re-evaluate both the Applicant's and Interested Party's tenders at the Technical Evaluation stage.

26. Following the technical evaluation, both the Applicant and the Interested Party were found to have met the minimum technical score and qualified to proceed to the Financial Evaluation stage. The summary of the Technical Scores was recorded as follows:

Table 3: Summary of Technical Scores

No.	Firm	Technical Score
1	JV of Sintecnica Engineering S.r.l & Steam S.r.l	77.95
2	ELC Electroconsult S.p.A	92.06

27. At the Financial Evaluation stage, the Evaluation Committee identified a clarification item on applicable taxes from the Applicant and proceeded to record the combined financial re-evaluation as follows:

Table 4: Compiled Financial Re-Evaluation Sheet

COMBINED FINANCIAL RE-EVALUATION			
		NAME OF FIRM (BIDDER)	
	EVALUATION CRITERIA ITEMS	JV of Sintecnica Engineering S.r.l & Steam S.r.l (IN EUR)	ELC Electroconsult S.p.A (IN EUR)
1	PART 1 - PROPOSAL PRICE AMOUNT		
1.1	Financial Proposal Price (as Read out at Tender)	16,792,425.00	18,162,835.78
1.2	Total Amount, inclusive of Taxes (ITC 16.3 b of Section II-Data sheet)	16,792,425.00	18,162,835.78
1.3	Taxes	2,693,985.00	4,113,148.63
2	PART 2 - FINANCIAL BREAKDOWN		
2.1	Time Based portion Amount of Proposal Price - F₁	13,469,925.00	13,825,380.66
2.2	lumpsum portion Amount of Proposal Price - F₁	4,153,125.00	4,337,455.12
3	PART 3 - SPECIFIC CONSIDERATIONS (ITC 14 OF DATA SHEET)		
	Part A. Time based amount		

3.1	RFP Time Input (Person Months) - T_0	450.00	450.00
3.2	Proposal Time Input (if different) - T_1	450.00	358.25
3.4	Highest Remuneration Rate for a Key Expert in Financial Proposal - R_{max}	20,240.00	22,000.00
3.5	Time based portion Amount (Adjusted) - $F_2 = F_1 + (T_0 - T_1) * R_{max}$	13,469,925.00	15,843,880.66
	Part B. Lump Sum amount		
3.6	RFP Arbitrary length of large bore pipes (KMS) - L_0	30.00	30.00
3.7	Proposal length of Large bore pipes (if different) - L_1	30.00	30.00
3.8	Lumpsum portion Amount (Adjusted) - $F_2 = F_1 * L_0 / L_1$	4,153,125.00	4,337,455.12
	Part C. Total Evaluated Price (A + B)	17,623,050.00	20,181,335.78

4	COMBINED EVALUATION (ITC 26.1)		
4.1	Technical Score- T	77.95	92.06
4.2	Weighted Technical Score, $P_T = W_T \times T$ ($W_T = 80\%$)	62.36	73.65
4.3	Weighted Financial Score, $P_F = W_F \times C_0 / C$ ($W_F = 20$)	20.00	17.46
4.4	Overall Combined Score, $P = P_T + P_F$	82.36	91.11
	Overall Rank (Position/Remark) ***	2	1

28. The Evaluation Committee proceeded to recommend award the subject tender to the Interested Party as follows:

Subject to successful negotiation, the Evaluation Committee recommends that the tender for Procurement of Consultancy Services for Olkaria VII Geothermal Power Project be awarded to ELC Electroconsult S.p.A at their quoted total price of EUR 18,162,835.78 equivalent to KES 2,494,009,816.01 (Kenya Shillings Two Billion, Four Hundred and Ninety-Four Million, Nine Thousand, Eight Hundred and Sixteen and One Cent Only)

inclusive of all applicable taxes. The estimated tax amount is EUR 4,113,148.63.

29. In a Professional Opinion Ref No: PPADA2015-485/05/2025 dated 2nd May 2025, (hereinafter referred to as "the Third Professional Opinion"), the Ag. Supply Chain Manager – Procurement, Mr. Vincent Mamboleo reviewed the manner in which the procurement process was undertaken including re-evaluation of bids and recommendation by the Evaluation Committee to award the subject tender to the Interested Party and concurred with the Evaluation Committee's recommendations for award of the subject tender to the Interested Party.

30. Thereafter the Third Professional Opinion was approved by the 1st Respondent on 2nd May 2025.

31. *Vide* letters dated 7th May 2025 bidders were notified of the outcome of evaluation of the subject tender.

REQUEST FOR REVIEW NO. 62 OF 2025

32. On 21st May 2025, Sintecnica Engineering S.R.L in Joint Venture with Steam S.R.L, the Applicant herein, filed Request for Review No. 62 of 2025 dated 20th May 2025 together with a Supporting Affidavit sworn by Matteo Quaia on 16th May 2025 (hereinafter referred to as "Request for Review No. 62 of 2025") through the firm of Ngeri, Omiti & Bush seeking the following orders from the Board:

a) A Declaration be and is hereby issued that the Accounting Officer and the Procuring Entity have breached the provisions of Articles 10, 27, 201, 227 and 232 of the Constitution of Kenya and Sections 3, 55, 80, 83 and 86 of the Public Procurement and Asset Disposal Act as read with Regulation 30 (a), (b) and (e), 76, 77 and 80 of the Public Procurement and Asset Disposal Regulations, 2020 as well as Sections 18, 22, 23 and 32 of the Engineers Act and the Regulations made thereunder.

b) A Declaration be and is hereby issued that the Accounting Officer and the Procuring Entity did not comply with the Decision of this Honorable Board in PPARB Application No. 38 of 2025 Sintecnica Engineering S.R.L in Joint Venture with Steam S.r.l vs The Accounting Officer, Kenya Electricity Generating Company PLC (KenGen) & 2 Others on 24th April, 2025.

c) A Declaration be and is hereby issued that the Interested Party's bid did not conform to the Technical and Financial Evaluation Criteria outlined in the Tender Documents and, therefore, the Accounting Officer and the Procuring Entity erred in their decision to award and wrongly, irregularly and illegally awarded the Tender Reference No. KGN-BDD-016-2024 for procurement of consultancy

services for Olkaria VII Geothermal Power Project to the Interested Party.

d) This Board do issue an Order annulling and/or cancelling the Notification of Award issued to the Interested Party after the re-evaluation exercise in the Tender Reference No. KGN-BDD-016-2024 for procurement of consultancy services for Olkaria VII Geothermal Power Project.

e) This Board do issue an Order directing the Accounting Officer and the Procuring Entity to award the Tender Reference Number KGN-BDD-016-2024 for procurement of consultancy services for Olkaria VII Geothermal Power Project to the Applicants, being the lowest responsive evaluated bidders.

f) In the alternative and without prejudice to Prayer Number (v) above, this Board do award the Tender Reference Number KGN-BDD-016-2024 for procurement of consultancy services for Olkaria VII Geothermal Power Project to the Applicants, being the lowest responsive evaluated bidders.

g) This Board do grant the Applicants damages for loss of business amounting to a sum of Euros Sixteen Million

Seven Hundred and Ninety-Two Thousand Four Hundred and Twenty-Five (EUR 16,792,425.00).

h) The Respondents be ordered to pay costs of and incidental to these proceedings.

i) Any other or further reliefs and/or orders as this Board may deem just, equitable and fit to grant in the circumstances.

33. On 11th June 2025, the Board in exercise of the powers conferred upon it under the Act issued the following orders with respect to Request for Review No. 62 of 2025:

229. The Applicant's Request for Review dated 20th May, 2025 and filed on 21st May 2025 in respect of Tender No. KGN-BDD-016-2024 for Consulting Services for Olkaria VII Geothermal Power Project be and is hereby allowed in the following specific terms:-

a) The letters of Notification of Intent to Award Tender No. KGN-BDD-016-2024 for Consulting Services for Olkaria VII Geothermal Power Project dated 7th May 2025 issued by the 1st Respondent to the Interested Parties, the Applicant and all other unsuccessful

bidder in regard to the subject tender be and are hereby nullified and set aside.

b) The 1st Respondent is hereby ordered to re-convene the Tender Evaluation Committee in the subject tender and direct it to re-evaluate the Applicant's and Interested Party's tenders at the financial evaluation stage, taking into account the conclusive findings of the Board on the technical evaluation and the total evaluated prices in accordance with the financial evaluation criteria set out in Section II – Data Sheet, Clause 26.1 of the Tender Document, as read with the Public Procurement and Asset Disposal Act, 2015 and the Public Procurement and Asset Disposal Regulations, 2020.

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

d) Given that the tender validity period is due to expire on 27th June 2025, the Accounting Officer is hereby directed, pursuant to Section 88 of the Public Procurement and Asset Disposal Act, 2015, to extend

the tender validity period once, by a further thirty (30) days from the said date noted hereinabove.

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

NAIROBI HIGH COURT JUDICIAL REVIEW APPLICATION NO. E170 OF 2025 AS CONSOLIDATED WITH JUDICIAL REVIEW MISC. NO. E071 OF 2025

34. Dissatisfied with the Decision of the Board dated 11th June 2025, the Applicant, Respondents, and 1st Interested Party herein sought judicial review by the High Court against the said decision in Nairobi High Court Judicial Review Application No. E170 of 2025 as consolidated with Judicial Review Misc. No. E071 of 2025 (hereinafter referred to as "First the Judicial Review"). On 1st August 2025, the High Court having considered the Judicial Review issued the following orders:

- i An order of certiorari to remove and bring to the High Court for purposes of quashing the 1st Respondent's decision dated and delivered on 11th June, 2025 in Application Number 62 of 2025 is hereby issued.***
- ii The 1st Respondent's decision dated and delivered on 11th June, 2025 in Application Number 62 of 2025 quashed.***
- iii Application Number 62 of 2025 shall be reheard within 7 days.***

NAIROBI CIVIL APPEAL NO. E630 OF 2025

35. Dissatisfied with the Judgment of the High Court in the Judicial Review, parties lodged an appeal at the Court of Appeal at Nairobi against the said judgement in Nairobi Civil Appeal No. E630 of 2025 (hereinafter referred to as "the First Civil Appeal"). On 5th September 2025, the Court of Appeal at Nairobi issued the following orders:

- i That the judgment of the High Court in HCJR No. E170 of 2025 as consolidated with JR Misc. App. E071 of 2025 is hereby affirmed to the extent that there was an infringement of the 1st respondent's right to fair administrative action. Consequently, orders No. 1 and 2 in the impugned judgment are hereby affirmed;***
- ii That the learned Judge's finding at paragraph 180 of the impugned judgment is hereby set aside;***
- iii That PPARB Application No. 62 of 2025 is hereby remitted to the Review Board for determination by a panel excluding Ms. A. Oeri, Ms. J. M'mbetsa, and Mr. J. Kiptoo.***
- iv That the matter be heard and determined within 21 days of the date of this judgment.***
- v That each party will meet its own costs of the appeal.***

REHEARING OF REQUEST FOR REVIEW NO. 62 OF 2025 – de novo
PURSUANT TO ORDERS OF THE COURT OF APPEAL IN CIVIL
APPEAL NO. E630 OF 2025

36. On 12th September 2025, the Board issued parties with directions on re-hearing of Request for Review No. 62 of 2025 as follows:

- i. The Applicant, Sintecnica Engineering S.R.L in joint Venture with Steam S.R.L Limited, is directed to serve upon the Interested Party, ELC Electroconsult S.P.A, all its pleadings, affidavits and submissions filed in PPARB Application No. 62 of 2025 by 5:00pm on 15th of september,2025 and thereafter file an Affidavit of Service with the Board.***
- ii. The 1st and 2nd Respondents, The Accounting Officer, Kenya Electricity Generating Company PLC (Kengen) & Kenya Electricity Generating Company PLC (Kengen) is directed to serve upon the Interested Party, ELC Electroconsult S.P.A, all its pleadings, affidavits and submissions filed in PPARB Application No. 62 of 2025 by 5:00pm on 15th September, 2025 and thereafter file an Affidavit of Service with the Board.***
- iii. The Interested Party, ELC Electroconsult S.P. A, is hereby directed to file and serve upon the Applicant and the 1st & 2nd Respondents its response and submissions in regard to PPARB Application No. 62 of 2025 by 5:00pm***

on 18th September,2025 and thereafter file an Affidavit of Service with the Board.

iv. The Applicant and Respondents are hereby directed to file and serve upon all parties its rejoinders and submissions, if any, to the Interested Party's pleadings by 5:00pm on 19th September,2025 and thereafter file an Affidavit of Service with the Board.

v. In addition to direction No. 2 above, the 1st Respondent is directed to separately submit to the Review Board all the confidential documents with respect to Tender No. KGN-BDD-016-2024 for Consulting Services for Olkaria VII Geothermal Power Project pursuant to provisions of section 67 of the Act by 5:00pm on 15th of September,2025.

vi. The re-hearing of Request for Review No. 62 of 2025 is slated on 22nd of September,2025 at 2:00pm and a Hearing Notice and link is hereby attached.

37. On 26th September 2025, the Board in exercise of the powers conferred upon it under the Act issued the following orders with respect to Rehearing of Request for Review No. 62 of 2025:

- A. The letters of Notification of Intent to Award Tender No. KGN-BDD-016-2024 for Consulting Services for Olkaria VII Geothermal Power Project dated 7th May 2025 issued by the 1st Respondent to the Interested Parties, the Applicant and all other unsuccessful bidders in regard to the subject tender be and are hereby nullified and set aside.***
- B. The 1st Respondent is hereby ordered to re-convene the Tender Evaluation Committee in the subject tender and direct it to carry out technical and financial re-evaluation of only responsive tenders while taking into account the findings of the Board herein as regards the evaluation criteria contained in the Tender Document as read with the Act and Regulations 2020.***
- C. The 1st Respondent is directed to complete the procurement process, including the making of an award, in the subject tender within 30 days of this decision taking into consideration the findings of the Board herein.***
- D. The 1st Respondent is hereby directed to extend the tender validity period by 30 days pursuant to Section 88 of the Act.***
- E. Considering that the procurement process is not complete each party shall bear its own costs in this Request for Review.***

**NAIROBI HIGH COURT JUDICIAL REVIEW APPLICATION NO. E323
OF 2025**

38. Dissatisfied with the Decision of the Board dated 26th September 2025, ELC Electroconsult S.P.A, the 1st Interested Party herein sought judicial review by the High Court against the said decision in Nairobi High Court Judicial Review Application No. E323 of 2025 (hereinafter referred to as “the Second Judicial Review”). On 20th November 2025, the High Court having considered the Second Judicial Review issued the following orders:

186. In the premises, having considered the record, the submissions of the parties, and the applicable legal principles, it is clear that the ex parte applicant has not demonstrated that the Review Board acted illegally, irrationally, or in breach of procedural fairness. The Review Board afforded all parties a full and fair opportunity to be heard, properly considered the evidence before it and acted within the scope of its statutory mandate.

187. I find no basis to interfere with the Review Board’s decision under the principles of judicial review, as the applicant has not established any of the grounds for judicial review under the Fair Administrative Action Act, 2015 or under any other law. I therefore find that the ex parte applicant is not entitled to the orders sought.

188. Consequently, the Judicial review application dated 13th October 2025 is hereby dismissed.

189. I however order that each party shall bear their own costs of these proceedings which have lingered in this Court for a while.

190. This file is closed.

NAIROBI CIVIL APPEAL NO. E1012 OF 2025

39. Dissatisfied with the Judgment of the High Court in the Second Judicial Review, ELC Electroconsult S.P.A, the 1st Interested Party lodged an appeal at the Court of Appeal at Nairobi against the said judgement in Nairobi Civil Appeal No. E1012 of 2025 (hereinafter referred to as “the Second Civil Appeal”). On 19th December 2025, the Court of Appeal at Nairobi issued the following orders:

18. Based on the foregoing, we uphold the contention by the 2nd respondent that this appeal was filed out of time and is, therefore, incompetent. Being of that view, we have no basis for considering the merits or otherwise of the appeal. Accordingly, the application dated 4th December 2025 succeeds and the appeal is hereby struck out with costs to the 2nd respondent.

19. Orders accordingly.

TERMINATION OF THE SUBJECT TENDER

40. *Vide* letter dated 15th January 2026, the Applicant was notified of termination of the subject tender by the Respondents.

REQUEST FOR REVIEW NO. 18 OF 2026

41. On 28th January 2026, Sintecnica Engineering S.R.L in Joint Venture with Steam S.R.L, the Applicant herein, filed Request for Review No. 18 of 2026 dated 27th January 2026 together with a Supporting Affidavit sworn by Matteo Quaia on 27th January 2026 (hereinafter, “the instant Request for Review”) through the firm of Ngeri, Omiti & Bush seeking the following orders from the Board:

a. A Declaration be and is hereby issued that the Accounting Officer and the Procuring Entity bear the ultimate responsibility in all matters pertaining to the Tender and not the 2nd Interested Party because that would be the only way to avoid arbitrariness and ensure compliance with Constitutional and principles set out in the Constitution and the Laws of Kenya.

b. A Declaration be and is hereby issued that the Accounting Officer and the Procuring Entity have breached the provisions of Articles 10, 27, 201, 227 and 232 of the Constitution of Kenya and Sections 3, 63 80, 83 and 87 of the Public Procurement and Asset Disposal Act as read with Regulation 80 and 82 of the Public Procurement and Asset Disposal Regulations, 2020.

- c. A Declaration be and is hereby issued that the purported termination of Tender Reference No. KGN-BDD-016-2024 for procurement of consultancy services for Olkaria VII Geothermal Power Project was irregular and is, therefore, illegal, null and void.***
- d. This Board do issue an Order annulling and/or setting aside the Letter of Cancellation of the Tender Reference No. KGN-BDD-016-2024 for procurement of consultancy services for Olkaria VII Geothermal Power Project issued to the Applicants.***
- e. This Board do issue an Order directing the Accounting Officer and the Procuring Entity to complete the procurement process of the Tender Reference Number KGN-BDD-016-2024 for procurement of consultancy services for Olkaria VII Geothermal Power Project.***
- f. The Board do issue an Order directing the Accounting Officer and the Procuring Entity to complete the award process as directed above within fourteen (14) days and award the tender to the Applicants, being the lowest responsive evaluated bidders.***
- g. In the alternative and without prejudice to Prayers Number (v) and (vi) above, this Board do award the Tender Reference Number KGN-BDD-016-2024 for procurement of consultancy services for Olkaria VII Geothermal Power Project to the Applicants, being the lowest responsive evaluated bidders.***

- h. In the event that the purported cancellation of the Tender is to stand (for whatever reason), this Board do grant the Applicants damages for loss of business amounting to a sum of Euros Sixteen Million Seven Hundred and Ninety-Two Thousand Four Hundred and Twenty-Five (EUR 16,792,425.00) since the cancellation of the Tender, if at all, is purely due to the actions and omissions of the Accounting Officer and the Procuring Entity.***
- i. The Respondents be ordered to pay costs of and incidental to these proceedings.***
- j. Any other or further reliefs and/or orders as this Board may deem just, equitable and fit to grant in the circumstances.***

42. In a Notification of Appeal and a letter dated 28th January 2026, Mr. Philemon Kiprop, the Secretary of the Board notified the 1st and 2nd Respondents of the filing of the instant 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 instant Request for Review together with confidential documents concerning the matter within five (5) days from 28th January 2026.

43. On 1st February 2026, the Respondents filed through Mogaka Omwega & Mabeya Advocates soft copies of the Notice of Appointment of Advocates dated 1st February 2026, 1st and 2nd Respondents' Memorandum of Response dated 1st February 2026, Respondents Notice of Preliminary Objection dated 1st February 2026 and a Replying Affidavit sworn on 1st February 2026 by Vincent Nyamweya Mamboleo. Hard copies of the aforementioned documents were subsequently filed on 2nd February 2026.

44. *Vide* email of 2nd February 2026, the Applicant through its advocates sent a link to the Respondents and Interested Parties containing the instant Request for Review.

45. The Board Secretary on 10th February vide email notified parties in the subject tender of an online hearing of the Request for Review slated for 12th February 2026 at 2.00 p.m., through the link availed in the attached Hearing Notice. He later on advised parties that the hearing would proceed at 12.00 noon on the said 12th February 2026.

46. The Respondents vide email of 10th February 2026 and 12th February 2026 sought for the Board's indulgence to adjourn the slated hearing indicating that their counsel in the matter was engaged in several court sessions with the last session concluding at 3.30 p.m. and proposed to have the matter heard on Friday, 13th 2026 at 9.00 a.m. On their Applicants vide email of 12th February 2026 indicated that thought they were amenable to rescheduling of the hearing to 3.30 p.m. on 12th

February 2026, they had made adjustments to enable them proceed at 12.00 noon. Following several consultations, the Board Secretary notified parties that the hearing would proceed on Thursday, 12th February 2026 at 12.00 noon.

47. On 12th February 2026, the Applicant filed a Further Affidavit sworn on 11th February 2026 by Matteo Quaia, a Supplementary Affidavit Sworn on 12th February 2026, Written Submissions dated 11th February 2026 and List and Bundle of Documents dated 11th February 2026.

48. On the same day of 12th February 2026, the Respondents filed Written Submissions of even date together with a List & Bundle of Authorities of even date.

49. At the hearing on 12th February 2026, the Board confirmed from parties the pleadings filed and 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.

50. At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 28th January

2026 was due to expire on 18th February 2026 and that the Board would communicate its decision on or before 18th February 2026 to all parties to the Request for Review via email.

PARTIES' SUBMISSIONS

Applicant's Submissions

51. The Applicant relied on its pleadings filed before the Board.

52. As to whether the Board has jurisdiction to entertain the instant Request for Review, Mr. Omiti submitted that the preliminary objection raised by the Respondents relies on Clause 1.8.3 of the EIB Guidelines which according to the Respondents specify that any complaint that a tenderer has ought to be filed with EIB. He submitted that the EIB guidelines are not a source of law in Kenya and to the extent that a party seeks to rely on them, they become documents that must be produced as evidence which goes against the rules of a preliminary objection that dictates it must raise pure points of law and not factual issues that are contentious. He reiterated that the Respondent's preliminary objection as raised is unmerited, bad in law and defective and as such, ought to be struck out.

53. He pointed to Clause 1.8.2 of the EIB Guidelines and submitted that the provisions therein do not oust the jurisdiction of the Board but instead refer to what is termed as complaints against the Bank's actions and not those of the procuring entity. He further submitted that the instant Request for Review concerns the actions of the Procuring Entity

and not EIB making Clause 1.8.2 of the EIB Guidelines inapplicable in the instant case. He indicated that the bank had been named as an interested party in the instant proceedings and not a respondent since the complaint made is not against. He further indicated that the Bank had been named as an interested party due to the contradictory positions raised by the Respondents who seemingly blame it for the cancellation of the subject tender.

54. Counsel submitted that upon receiving communication regarding the termination of the subject tender, they sought clarification and were informed that the reason for the cancellation was because the Respondents did not receive a no objection from the bank which meant that they did not have financing yet when the Applicant sought a similar clarification from the Bank, it indicated that the reason it did not give a no objection was because the Respondents confirmed that the subject tender had been cancelled and there was no reason to give an objection to that extent.

55. Counsel referred the Board to Clause 31.2 of Part A: Tendering Procedures under Section II: Instructions to Consultants of the Tender Document and submitted that the Respondents had informed bidders that in the event of a complaint, the same ought to be filed as an administrative review before the Board which is a recognition that any issues arising from the procurement process in the subject tender ought to be referred to the Board and not elsewhere.

56. As to whether the termination of the subject tender was proper and complaint with Section 63 of the Act as well as Article 10 and 227 of the Constitution, counsel submitted that the Respondents failed to comply with the law and while citing the holding in *Republic v Public Procurement Administrative Review Board & 2 Others [2019] KEHC 9688 (KLR)* and *Republic v Public Procurement Administrative Review Board Exparte Nairobi City & Sewerage Company; Webtribe Limited t/a Jambopay Limited (Interested Party) [2019] KEHC 4757 (KLR)*, argued that the decision by the Respondents to cancel the subject tender and subsequent reasons issued to the Applicant were not sufficient; and that the attempt by the Respondents to cite budgetary provisions issues is neither real nor substantial.

57. He further argued that the High Court has specifically held that procurement processes including any cancellation of a tender must strictly conform to the constitutional dictates of transparency, openness, accountability, fairness, and the rule of law as envisioned under Article 10 and 227 of the Constitution. He pressed on that a procuring entity cannot merely cite statutory language to justify a cancellation of a tender and reasons given for such cancellation must be sufficient and within the law.

58. He submitted that the cancellation of the subject tender was done in secrecy noting the contradictory positions of the Respondents and the Bank when clarification was sought by the Applicant. Counsel made reference to the Procuring Entity's letter dated 15th January 2026 where

it indicated that the reason for cancellation of the subject tender is that the project financier declined to grant a no objection to the critical steps of the tender hence without financing, they cannot proceed with the tendering process. He further made reference to the Applicant's letter dated 16th January 2026 seeking clarification from the Procuring Entity and pointing out that the same financier had previously issued no-objections on two occasions when the 1st Interested Party was deemed responsive.

59. He indicated that the Procuring Entity responded vide letter dated 19th January 2026 confirming that upon completion of the judicial process, it undertook re-evaluation of the subject tender and made recommendation for award in line with the Board's Orders in Re-hearing PPARB Application No. 62 of 2026 but the bank declined to issue a no objection citing various areas of non-compliance with the EIB Procurement Guidelines. Further, that the Procuring Entity independently considered the Financier's position as anticipated in the guidelines and determined that the issues raised were material to the procurement process and informed the Applicant to seek any further clarification on its decision not to issue the No Objection as provided under Section (b) of annex 7 of the Guide to Procurement.

60. Counsel referred the Board to letters dated 15th January 2026 and 20th January 2026 addressed to the 2nd Interested Party where it sought clarification on the issue of not granting the No Objection and the response from the 2nd Interested Party dated 22nd January 2026 where

it acknowledged receipt of the Applicant's letters and indicated that it had received communication from the Procuring Entity that the subject tender had been cancelled and that in accordance with the bank's procedures, the cancellation of a procurement process brings all related requests for clarification or challenges to a close and it would not be taking any further action on the matter.

61. He argued that from the chronology of events and communication between parties, the Procuring Entity decided to cancel the subject tender and from their letter dated 7th January 2026 addressed to the bank, the No Objection had been lifted on 4th April 2025 and was never reinstated as further seen from the letter dated 7th May 2025. Counsel reiterated that the financier had given a No Objection and it is incorrect to say that a No Objection was not given or was lifted and pointed to an email marked as annexure No. 9 at page 96 of the Respondents' reply showing that there were certain reports that were given to the 2nd Respondent that indicated that the Board did not comply with the procurement process or the law. He pointed out that the Respondents accused the Board of going overboard and allocating marks or points to parties following the rehearing of PPARB Application No. 62 of 2025 which is misleading and incorrect.

62. Counsel urged the Board to allow the instant Request for Review as prayed.

Respondents' Submissions

63. The Respondents relied on their documents filed before the Board.

64. Mr. Mogaka submitted that the EIB Guidelines provide that the bank has to approve every stage of the procurement process and it is not in dispute that the Procuring Entity had to obtain the No Objection from the bank. He referred the Board to the Respondent's annexures marked VN 8 and VN 9 being letters to the bank and submitted that these sought the No Objection to award the subject tender to the Applicant.

65. Counsel submitted that EIB declined to issue the requisite letter of No Objection and that the legal and practical implication of that decision is unequivocal since without the Bank's concurrence, the financing contemplated under the subject tender could not be released. He pointed out that in donor-funded procurement, the availability of funds is inseparably tied to the donor's approval and that the absence of a "no objection" therefore extinguishes the financial substratum upon which the tender rests. In support of his argument, he made reference to the holding in *Republic v. PPARB & 3 others ex parte Astral Industrial Alliance (Astronea) Ltd (High Court Misc. Appl. E143 of 2023) [2024] eKLR (J.M. Chigiti, J.) – Bomet County Aggregation Park Tender*.

66. It is the Respondents' case that the procurement in the subject tender was expressly premised upon external financing from EIB, as disclosed in the Tender Documents and the applicable donor-funded procurement framework. Further, that in the absence of such financing,

the Procuring Entity would have been legally and practically incapable of meeting the financial obligations arising under any resultant contract and as such, the availability of EIB funding constituted a fundamental and indispensable pre-condition to any lawful award or contract execution.

67. They argued that in such circumstances, pursuant to Section 63 of the Act, the Procuring Entity was legally and contractually bound to halt and terminate the procurement process since to proceed with notification of award, or to purport to create contractual obligations in the absence of donor approval and funding, would have constituted a direct violation of the Tender Documents and the governing EIB Procurement Guidelines. In support of their argument, they relied on the holding in *Republic v. Public Procurement Administrative Review Board & 2 others ex parte Coast Water Services Board & China Henan Corp. (High Court JR Appl. No. 16 of 2016) [2016] eKLR (G.V. Odunga, J.)*

68. Counsel submitted that the Respondents are unable to mandate the issuance of a Letter of No Objection or the release of funds by the Financier and that given the absence of these essential funds, the Respondents acted with due diligence and prudence in terminating the tendering process.

69. He reiterated that the termination of the procurement process in the subject tender under Section 63 of the Act was grounded upon a lawful,

rational and objectively verifiable reason being the Donor/Financier's refusal to issue the requisite letter of No Objection and that this refusal signified the unavailability of the contemplated financing for the subject tender which was subject to donor concurrence. That once the financing failed to materialize, continuation of the process would have been illusory, imprudent, and contrary to sound public financial management hence by dint of Section 167(4) of the Act, the Board's jurisdiction to entertain the matter is divested.

70. The Respondents argued that the Applicant and the 1st Interested Party did not invoke or exhaust the complaint mechanism provided under Clause 1.8.2 of the EIB Guidelines which requires a structured avenue for lodging complaints against actions or decisions attributable to the Bank and that no valid complaint has been lodged challenging EIB's refusal to issue a letter of No objection. They further argued that it is untenable to attribute arbitrariness or illegality to the Respondents when the Financiers decision remains unchallenged through the prescribed donor procedures.

71. Mr. Mogaka submitted that granting the orders sought would serve no practical or legal purpose and would amount to an exercise in futility, as the same would be incapable of implementation in the prevailing circumstances and cautioned that it is a settled principle of law that courts and statutory tribunals do not act in vain nor issue orders incapable of enforcement.

72. He further submitted that the Applicant has neither demonstrated nor proved the existence of any legally cognizable loss arising from the subject procurement process. He pointed out that the alleged damages are speculative, remote, and incapable of crystallizing into an enforceable claim in law since the procurement process in question was expressly subject to donor concurrence and financing approval. He further pointed out that upon the intended Donor's refusal to issue a mandatory Letter of No Objection, the process could not lawfully proceed to award or contract execution and in those circumstances, no bidder could acquire a vested or enforceable right to the tender, and consequently no compensable loss could arise from the lawful termination of the process.

73. While referring to Section 173 of the Act, counsel submitted that the Board lacks jurisdiction to entertain and determine claims for damages or financial compensation as the Act conspicuously limits the Board's monetary jurisdiction to costs as between parties to the review and contains no provision empowering it to award general damages, special damages, compensation, or loss of profits.

74. As to the submission of a written report to the Public Procurement Regulatory Authority pursuant to Section 63(2) and (3) of the Act, counsel submitted that this was provided for in the Authority's website and that the Board has access to the communication posted on the said website detailing cancellation of the subject tender.

75. Mr. Mogaka urged the Board to dismiss the instant Request for Review with costs.

Applicant's Rejoinder

76. In a rejoinder, Mr. Omiti submitted that the Respondents orchestrated a Letter of No Objection not being issued as seen from documentation presented in the matter. He made reference to the Board's orders issued in Rehearing PPARB Application No. 62 of 2025 and pointed out that the Board directed the Evaluation Committee to reconvene and carry out technical and financial evaluation of only the responsive tenders while taking into account the findings of the Board and at no point did the Board award any marks.

77. While making reference to Section 63 (2) and (3) of the Act, he submitted that no evidence had been placed before the Board that a written report was submitted to the Public Procurement Regulatory Authority within 14 days of cancellation of the subject tender.

BOARD'S DECISION

78. 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

79. 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 Letter dated 15th January 2026 which reads:

"....."

**TENDER CANCELLATION FOR TENDER FOR
PROCUREMENT OF CONSULTANCY SERVICES FOR
OLKARIA VII GEOTHERMAL POWER PROJECT**

We refer to the above tender, referenced KGN-BDD-016-2024, opened on 11th December, 2024.

We wish to advise you that the Tender for Procurement of Consultancy Services for Olkaria VII Geothermal Power Project has been cancelled due to the reason that the Project Financier declined to grant a Non-Objection to the critical step on the Tender. Consequently, without the Financier's Non-Objection, there will be no finances to honour the payment obligations for the resultant Contract.

We would however, like to thank you for your interest to do business with us.

....."

80. From the contents of the above letter, the Respondents attribute termination of the subject tender due to the Project Financier declining to grant a Non-Objection to the critical step on the Tender and that consequently, without the said Financier's Non-Objection, there will be

no finances to honour the payment obligation for the resultant Contract.

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

82. 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)"***

83. 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].

84. 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.

85. 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]

86. 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 of the Act thereby divesting the Board its jurisdiction in the matter.

87. 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.

88. 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.

89. 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.

90. 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.

91. 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”

92. The above judicial pronouncements mirror the position of this Board in its previous decisions. See: **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. 33 of 2025 Bilashaka Investment Limited v The Accounting Officer St. George’s Primary and Junior School & Another.**

93. 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.

94. 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."**

95. 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."

96. From the foregoing, for an accounting officer of a procuring entity to validly terminate a procurement or asset disposal proceedings:

- i. The termination must be based on one of the grounds outlined under Section 63(1)(a) to (f) of the Act.

- ii. The Accounting Officer must submit a written report to the Public Procurement Regulatory Authority (PPRA) within 14 days of the termination, detailing the reasons for the decision.
- iii. The Accounting Officer must also issue a written notice to all tenderers within the same 14-day period, clearly communicating the reasons for the termination.

97. Effectively, an accounting officer has a duty to provide sufficient reasons and supporting evidence to justify the termination of a procurement process under challenge. Additionally, the accounting officer must demonstrate compliance with both the substantive and procedural requirements set out under Section 63 of the Act.

98. On the one hand, these substantive requirements require a procuring entity to specify the particular ground under Section 63(1) of the Act for terminating a tender and to present the supporting facts justifying such termination.

99. On the other hand, Section 63 (2), (3), and (4) outlines the procedure to be followed by a procuring entity when terminating a tender. These include: (i) submitting a Written Report to the PPRA within 14 days of the termination and (ii) issuing termination notices to all participating tenderers within the same period, clearly stating the reasons for termination.

100. 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.

101. 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"

102. The Board shall now examine whether the Respondents in the instant Request for Review adhered to both the substantive and procedural requirements outlined in Section 63 of the Act when terminating the procurement proceedings for the subject tender

On the substantive requirements for termination of procurement proceedings in the subject tender

103. We have reviewed the letter dated 15th January 2026 addressed to the Applicant with reference to the subject tender's cancellation. This letter notified the Applicant that:

We wish to advise you that the Tender for Procurement of Consultancy Services for Olkaria VII Geothermal Power Project has been cancelled due to the reason that the Project Financier declined to grant a Non-Objection to the critical step on the Tender. Consequently, without the Financier's Non-Objection, there will be no finances to honour the payment obligations for the resultant Contract.

104. From the contents of the above letter, we note that the Respondents did not make reference to the provisions under Section 63 of the Act but instead indicated that cancellation of the subject tender was due to the decline by the Project Financier to grant a letter of No Objection without which the Respondents contend that there will be no finances to honour payment obligations for a contract resulting from the subject tender.

105. Upon receipt of the above cancellation letter, we note that the Applicant sought clarification from the Respondents vide letter dated 16th January 2026 as follows:

".....
We note that the reason given in your letter for the cancellation of the tender is that the Project Financier declined to issue a no-objection to a critical step on the Tender. However, this position raises material concerns, as the same Financier previously issued no-objections on two occasions when one of the bidders, ELC ElectroConsult S.P.A., was deemed the responsive bidder. Following a litigation history, facts of which are within your knowledge, the PPARB held that the award of the tender to ELC ElectroConsult S.P.A. was irregular and unprocedural, nullified the award issued to ELC ElectroConsult S.P.A. and directed you to conduct a re-evaluation of only the responsive bidders taking into account its findings and the criteria in the Tender Document.

The purpose of this letter is to, therefore, request that you furnish us with the specific reasons provided by the Project Financier for declining to issue the no-objection and any evidence of public notification of the cancellation of the Tender.

....."

106. Subsequently, the Respondents vide letter dated 19th January 2026 responded as follows:

".....

Upon completion of the judicial process on the tender, the Procuring Entity undertook re-evaluation of the tender and made recommendation for award in line with the PPRA ruling No. 62 of 2025 Re-hearing.

We refer you to the Financier's (European Investment Bank - EIB) Guide to Procurement which were annexed to the tender. Annex 2 of the EIB procurement Guidelines (The Bank's review of procurement decisions in Public Sector operations located outside the European Union) provides a number of important steps that the promoter/Procuring Entity is required to follow through the procurement process.

For specific case of contracts for consulting services, the guide provides as follows:

"...The Bank reviews the scope of the services and the terms of reference proposed (including the procedure selected), the shortlisting report explaining how the recommended shortlist of consultants has been prepared, the request for proposals, the evaluation report justifying the proposed selection, and the draft consultant's contract, to ensure that it can finance the corresponding services."

Item 4 of annex 2 provides as follows:

"...In the case of a pre-qualification, the promoter must send to the Bank, for its non-objection, the pre-qualification report and proposed list of pre-qualified candidates..."

Item 6 of annex 2 also provides as follows:

"...After analysis of the tenders, the promoter must send to the Bank its evaluation report(s), making a clear recommendation for the next tendering stage (if any) or the contract award. The Bank will provide its non-objection or appropriate comments."

Pursuant to the Guide to Procurement as excerpted above, the Procuring Entity after completing the Re-Evaluation in accordance with PPARB ruling No. 62 of 2025 Re-hearing, submitted the evaluation report to EIB for the necessary Non-Objection, which they declined to issue citing various areas of non-compliance with their procurement guidelines.

Upon review of the submitted documentation, the EIB declined to issue the Non-Objection, citing non-compliance of the evaluation and proposed award with the applicable EIB Procurement Guidelines. The Procuring Entity independently considered the Financier's position as anticipated in the guidelines and determined that the issues raised were material to the procurement process.

In the absence of the Financier's Non-Objection, and given that the subject procurement was donor-funded, the Procuring Entity was legally and contractually precluded from proceeding with the award and entering into a binding contract, as there would be no financing available to meet the resultant contractual obligations.

Please note that the Financier acts independently from the Procuring Entity and therefore it is advisable for you to seek any further clarification on their decision not to issue the Non-Objection directly from the Financier (EIB) as provided for in section (b) of annex 7 of the Guide to Procurement.

On the issue of public notification of the cancellation of the tender, the Procuring Entity is required to publish the notice on the Public Procurement Information Portal (PPIP) within 14 days. The Procuring Entity shall ensure full compliance with the statutory publication requirements within the prescribed timelines.

.....

107. In the same vein, we note that the Applicant similarly wrote to the 2nd Interested Party, EIB, vide letters dated 15th January 2026 and 20th January 2026 with regard to the subject tender and communication received from the Respondents pertaining to the decline by the Bank to issue the letter of No Objection resulting to cancellation of the subject tender. In the letter of 20th January 2026, the Applicant wrote:

".....

We have now received a letter dated January 19th, 2026 from KenGen which we enclose herewith for your information and further action. The upshot of the letter is that although they (as the Procuring Entity) undertook re-evaluation of the tender and made recommendation for award (to us) in line with the PPARB's Ruling in Application No. 62 of 2025 (Re-

Hearing) ("the Ruling"), EIB declined to issue them with a Non-Objection "citing non-compliance of the evaluation and proposed award with the applicable EIB Procurement Guidelines" hence they could not proceed to award the tender to use.

Suffice it to say that we have not only not seen the Non-Objection decline but that we harbor extreme fears and suspicions on these reasons due to the history of this tender which has resulted into a lengthy litigation in the past

Be that as it may, and to help us put this matter to rest, we kindly request you to share with us reasons for declining on the non-Objection on the specific areas of non-compliance of the evaluation and proposed award with the applicable EIB Procurement Guidelines.....

....."

108. *Vide* letter dated 22nd January 2026, the 2nd Interested Party, EIB, responded to the Applicant as follows:

.....

The Bank has received communication from the Promoter, KenGen, that the referenced tender has been cancelled. In accordance with Bank procedures, the cancellation of a procurement process brings all related requests for

clarification or challenges to a close. The Bank will therefore not be taking any further action on this matter.

For further clarification regarding the cancellation and the reasons the Bank could not issue a non-objection, we encourage you to contact KenGen, who is responsible for communication with all bidders. In addition, our procurement guidelines prohibit the bank from sharing procurement related information with bidders at any stage.

.....

109. From the foregoing correspondences, it is clear that while the Procuring Entity attribute cancellation of the subject tender to the non-issuance of a letter of No Objection in the subject tender by the EIB, the said Bank indicates that it received communication pertaining to cancellation of the subject tender from the Procuring Entity and as such in accordance to its procedures, such cancellation closed all related requests for clarification or challenges and that the Procuring Entity was responsible to address any further clarification regarding the cancellation and reasons why it could not issue the letter of No Objection.

110. The Board has heard the Procuring Entity admit that in compliance with the Orders issued by the Board on 26th September 2025 in Rehearing PPARB Application No. 62 of 2025 and as upheld by the High

Court and the Court of Appeal in the second Judicial Review and the Second Civil Appeal, they re-evaluated the subject tender and proceeded to recommend award to the Applicant herein based on the outcome of the Re-Evaluation Report. This has been highlighted at page 25 of 31 of the Matters Arising – Tender Cancellation Report submitted to the Board as part of the confidential documents which reads:

The Evaluation Committee proceeded to re-evaluate the financial proposal of JV of Sintecnica S.r.l and Steam S.r.l based on the ruling of PPARB ruling No 62 of 2025 (Re-hearing) since the ruling by the second panel disqualified ELC – Electroconsult SPA on the basis of financial statements (2nd Re-Evaluation Report attached as Annex III)

Based on the outcome of the Financial Re-Evaluation, the Evaluation Committee then recommended that the Tender for Procurement of Consultancy Services for Olkaria VII Geothermal Power Project be awarded to the JV of Sintecnica s.r.l and Steam s.r.l in line with the ruling of PPARB No 62 of 2025 (Re-hearing) at total evaluated amount of Euro 17,623,050.00 (say Euro Seventeen Million, Six Hundred and Twenty-Three Thousand and Fifty only).

Professional Opinion Ref No: PPADA2015-784/01/2026 dated 7th January 2026 which recommended the tender to be awarded to JV of Sintecnica s.r.l and Steam s.r.l in line with the ruling of PPARB No 62 of 2025 (Re-hearing) at total evaluated amount of Euro 17,623,050.00 (say Euro Seventeen Million Six Hundred and Twenty-Three Thousand and Fifty only) subject to confirmation of financing approval and the obtaining of a Non Objection from the

Financier.

111. The Respondents annexed at paragraph 19 of the Replying Affidavit sworn by Vincent Mamboleo on 1st February 2026 their request marked as VNM 8 seeking the No Objection from EIB vide letter dated 7th January 2026 which makes reference to the completed re-evaluation as guided by the Board in Rehearing PPARB Application No. 62 of 2025 and stated as follows:

".....

We now submit the Re-Evaluation Report to enable you lift the suspension on the concurrence/NO Objection to allow us to proceed with notification of Intent to award and also undertake Contract Negotiations with JV of Sintecnica Srl and Steam Srl as guided by Public Procurement Administrative review Board, PPARB.

112. In response, as seen from the Respondents' annexure marked VNM9, the EIB vide email of 8th January 2026 responded as follows:

" Dear Reuben and the KenGen Team,

We have observed that the nature of the complaint has evolved throughout the entirety of the redress, ultimately leading to the disqualification of the initial winner based on their financial statement. Given the sequence of events from the initial objection and appeal by the JV of Sintecnica Srl and Steam Srl, it is evident

that the PPARB's decisions have not adhered to the procurement procedures outlined in the tender dossier. Moreover, the PPARB acted as a separate evaluation Committee, assigning scores and conducting evaluation based on local regulations. This approach has compromised the reliability and compliance of the overall process with the Bank's general principles of procurement.

Given the reasons outline, we regret to inform you that we are unable to provide a non-objection to the evaluation as completed by the PPARB.

Best regards,

David.

113. In a nutshell, the EIB attributes the decision not to issue the letter of

No Objection to:

- i. Non-adherence of the decisions rendered by the Board to the procurement procedures outlined in the tender dossier;
- ii. The Board's functioning as a separate Evaluation Committee, assigning scores and conducting evaluation based on local regulations;
- iii. The Board's approach compromised the reliability and compliance of the overall process with the Bank's general principles of procurement.

114. The Board takes great issue with the aforementioned averments by EIB being the reason for non-issuance of the letter of No Objection in view of the fact that:

- i. The Board's Decision issued on 26th September 2025 in Rehearing PPARB Application No. 62 of 2025 was upheld by both the High Court in the second Judicial Review and the Court of Appeal in the second Civil Appeal and is final and binding to all parties as far as the subject tender is concerned.
- ii. The Board as established under Section 27 of the Act is mandated under Section 28 of the Act to review, hear, and determine tendering and asset disposal and upon completion of a review, Section 173 of the Act stipulates that it has the power to:

(a) annul anything the accounting officer of a procuring entity has done in the procurement proceedings, including annulling the procurement or disposal proceedings in their entirety;

(b) give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings;

(c) substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings;

(d) order the payment of costs as between parties to the review in accordance with the scale as prescribed; and

(e) order termination of the procurement process and commencement of a new procurement process.

- iii. EIB Guidelines dictate, under Clause 1.3, 1.8, and Annex 7, that procurement related complaints against the Procuring Entity ought to be addressed under the available national remedy mechanisms. Notably, the Board in its Decision in Rehearing PPARB Application No. 62 of 2025 at paragraphs 143 to 173 went at great lengths to determine whether the subject tender's procurement is one under a bilateral or multilateral agreement between the Government of Kenya and any other foreign government, agency, entity, or multilateral agency so as to oust the application of the Act by dint of Section 4(2)(f) of the Act and effectively divest the Board of jurisdiction and conclusively found:

172that whereas the subject tender herein was undertaken under a bilateral agreement entered into by the Government of Kenya and EIB and EIB Procurement Guidelines were meant to be used in the said procurement, the said guidelines provide that procurement related complaints against the Procuring Entity, being the promoter ought to be

addressed under the available national remedy mechanisms.

173. Thus, in view of provisions under Section 4(2)(f) of the Act read with Regulation 5(1) of Regulations 2020 the Act is applicable in the procurement proceedings in the subject tender. As such, under section 28 of the Act, the Board has jurisdiction to entertain the matter and this limb of objection fails. We so hold.

115. While the Board recognizes the vital role that EIB plays in delivering the Government of Kenya's ambitious transformational programmes, we deem it prudent to point out that where national and local laws have been embraced by development partners in resolving conflict, then the same ought to be complied with. Donor agencies should at the very least respect constitutional, statutory, and regulatory standards in the countries where they operate. It then follows that to the extent EIB Guidelines designated Kenyan law as the applicable law in the procurement process in the subject tender, the threshold for termination of the subject tender on account of lack of funding must still be met.

116. In the circumstances, it is imperative that the multilateral partners in this case EIB exercises due deference to Kenya's municipal legal

framework, which it expressly acknowledged as the applicable regime for the resolution of procurement disputes under the subject tender. Having acceded to the use of national review mechanisms, the Bank cannot approbate and reprobate by disregarding determinations rendered by duly constituted statutory bodies and affirmed by the superior courts. Respect for constitutional order, statutory mandates, and final judicial pronouncements is not merely procedural formality but a foundational requirement of lawful administrative cooperation. A generalized aspersion of the nature cast on this board's decision and of the higher courts that affirmed it is in bad taste and risks being perceived as undue pressure rather than partnership which must be avoided in favour of comity, legality, and institutional restraint.

117. The foregoing notwithstanding, the Board in its Decision issued on 26th September 2025 in Rehearing PPARB Application No. 62 of 2025 noted the aspect of financing of the subject tender at paragraphs 162 and 163 as follows:

162. The Board observes that the Respondents deposed at paragraph 2 of the Replying Affidavit sworn by Vincent Nyamweya Mamboleo that the subject tender is the Government of Kenya's commitment to advancing renewable energy initiative to meet the Country's electricity demand and annexed copies of correspondence being:

- i. Kengen's letter dated 4th July 2024 marked as VNM-2A*
- ii. C.S Treasury's letter dated 26th September 2024 marked as VNM-2B; and*
- iii. European Investment Bank's letter dated 7th March 2025 marked as VNM-2C*

163. A review of the abovementioned annexures reveals that the Procuring Entity sought financing from the European Investment Bank through the National Treasury to support implementation of the project in the subject tender and this financing was aimed at funding a gap estimate of USD 147.5 million. From the contents of the European Investment Bank's letter dated 7th March 2025, it indicated that the concessional financing would be provided to the National Treasury and then on-lend to Kengen. As such, financing was to the Government of Kenya through the National Treasury which would then on-lent the funds to Kengen for implementation of the project in the subject tender which places the subject tender under a bilateral agreement between the Republic of Kenya and the European Investment Bank.

118. Further to the above, we note that the Respondents annexed copies of the aforementioned correspondence at paragraph 2 of the Replying Affidavit sworn by Vincent Nyamweya Mamboleo being:

- i. Kengen’s letter dated 4th July 2024 addressed to the CS Ministry of Energy & Petroleum marked as VNM-3; and
- ii. C.S National Treasury’s letter dated 26th September 2024 addressed to the Head of Regional Hub for East Africa European Investment Bank marked as VNM-2

119. Kengen’s letter dated 4th July 2024 addressed to the CS Ministry of Energy & Petroleum marked as VNM-3 reads in part:

***" The estimated total project cost for Olkaria VII project is USD 441 Million as shown in the table below....
JICA has already committed to finance 25% of the project by allocating 15.7 Billion JPY (Equivalent USD 109 Million) being balance of funds from Olkaria V Geothermal Power project on-lent loan KE-P31. KenGen shall finance the drilling and project administration costs amounting to USD 132 Million which is 30% of the project cost. This leaves a 45% funding gap amounting to USD 200M.***

....."

120. The C.S National Treasury’s letter dated 26th September 2024 addressed to the Head of Regional Hub for East Africa European Investment Bank marked as VNM-2 reads in part:

"....."

As you are aware, the Government of Kenya remains committed to advancing renewable energy initiatives to meet the country's electricity demand while expanding green energy capacity. This aligns with the national goal of achieving 100% renewable energy generation by 2030.

In this regard, the Government of Kenya, through Kenya Electricity Generating Company (KenGen) plans to develop the Olkaria VII 80.3MW Geothermal Power Plant. The total estimated project cost is USD 441.69 million and will be co-financed by the Government of Kenya and the Japan International Cooperation Agency (JICA). The funding gap is estimated at USD 147.5 million.

The purpose of this letter is to confirm that the proposed Olkaria VII Geothermal Power Plant is a priority project. Consequently we are seeking funding of USD 147.5 Million from the European Investment Bank to support the implementation of the project....."

121. Evidently, funding for development of the Olkaria VII 80.3MW Geothermal Power Plant would be obtained from various stakeholders.

122. The Board has on numerous occasions held that 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 procuring entity's approved budget.

123. 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.”

124. 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.

125. 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 procuring entity's approved procurement plan, the Board finds that there is a strong rebuttable presumption that the subject tender herein was within the Procuring Entity's approved budget and procurement plan.

126. It is our considered view 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 of the Act having failed to provide sufficient evidence justifying termination of the subject tender noting that funding for development of the Olkaria VII 80.3MW Geothermal Power Plant was to be co-financed not only by EIB but other various stakeholders.

127. 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"

128. 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.

129. 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

130. 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 of the Act and the aforementioned cases.

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

131. 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 letter issued by the Respondents to the Applicant contravened Section 63 of the Act as it failed to point out the specific pre-condition listed under Section 63 sub-section (a) to (i) which led to cancellation of the subject tender. Further, the mere recital of the reason for termination as *'... due to the reason that the Project Financier declined to grant a Non-Objection to the critical step on the Tender. Consequently, without Financier's Non-Objection, there will be no finances to honour the payment obligations for the resultant Contract'* without providing any explanation on why the letter of No Objection was not issued is insufficient and did not afford the Applicant 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.

132. 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, from the confidential documents submitted by the 1st Respondent, 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. We note that Counsel

for the Respondents in his submissions indicated that the said report could be accessed by the Board from the Public Procurement Information Portal (PPIP). However, if such a report was indeed filed, the Respondents ought to at least have produced a screenshot or print-out evidencing the same.

133. 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.

134. 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.

135. 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.

136. 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 for

termination of the procurement proceedings as communicated to vide letter dated 15th January 2026. 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.

137. Consequently, the Board finds that the Respondent did not comply with the provisions of Section 63 of the Act in terminating the subject tender. 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; It is the primary responsibility of an accounting officer to ensure that a procuring entity complies with the provisions of the Act.

138. 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

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

140. 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.

141. 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

142. 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:

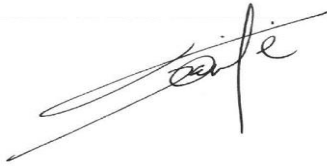
A. The Request for Review filed on 28th January 2026 with respect to Tender No. KGN-BDD-016-2024 for Consulting Services for Olkaria VII Geothermal Power Project be and is hereby allowed.

B. The Letters communicating Termination of Procurement Proceedings with respect to Tender No. KGN-BDD-016-2024 for Consulting Services for Olkaria VII Geothermal Power Project, issued to the Applicant and all the other bidders in the subject tender, be and are hereby canceled and set aside.

C. The 1st Respondent is hereby directed to proceed with the procurement process with respect to Tender No. KGN-BDD-016-2024 for Consulting Services for Olkaria VII Geothermal Power Project to its lawful conclusion.

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

Dated at NAIROBI this 18th Day of February 2026.



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PANEL CHAIRPERSON

PPARB



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SECRETARY

PPARB