

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 19/2026 OF 09TH FEBRUARY 2026

BETWEEN

ALMIRALL EAST AFRICA LIMITED APPLICANT

AND

THE ACCOUNTING OFFICER,

THE KENYA POWER & LIGHTING COMPANY PLC . 1ST RESPONDENT

THE KENYA POWER & LIGHTING COMPANY PLC . 1ST RESPONDENT

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

BOARD MEMBERS PRESENT

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

IN ATTENDANCE

- | | |
|-------------------|-----------------------------------|
| 1. Ms. Sarah Ayoo | Holding Brief for Board Secretary |
|-------------------|-----------------------------------|

2. Ms. Evelyn Weru

Secretariat

PRESENT BY INVITATION

APPLICANT

ALMIRALL EAST AFRICA LIMITED

Mr. Duncan Kiprono - Advocate, Cheboi Kiprono Advocates

RESPONDENTS

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

Mr. Dennis Maanzo - Legal Counsel, Kenya Power & Lighting Company Plc

BACKGROUND OF THE DECISION

The Tendering Process

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

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

Submission of Tenders and Tender Opening

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

REQUEST FOR REVIEW NO. 107 OF 2025

4. On 12th November 2025, Jamari Enterprises Limited, filed a Request for Review dated 11th November 2025 together with an Applicant's Statement/Affidavit in Support of the Request for Review (hereinafter referred to as 'Request for Review No. 107 of 2025') through the firm of Cheboi Kiprono Advocates seeking the following orders from the Board in verbatim:

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

in breach of Article 227 of the Constitution, the Public Procurement and Asset Disposal Act 2015, and the attendant regulations.

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

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

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

b. Issue an addendum deleting the impugned tender clauses

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

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

5. On 3rd December 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. 107 of 2025:

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

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

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

NAIROBI HIGH COURT JUDICIAL REVIEW APPLICATION NO. E406 OF 2025

6. Dissatisfied with the Decision of the Board dated 3rd December 2025, Jamari Enterprises Limited sought judicial review by the High Court against the said decision in Nairobi High Court Judicial Review Application No. E406 of 2025 (hereinafter referred to as “the Judicial Review”). On 27th January 2026, the High Court having considered the Judicial Review issued the following orders:

122. This Court has considered all the above arguments by the respective parties and it finds that the orders sought are not merited. This is because, from the material placed on record, the Respondent acted within its statutory mandate and the Applicant’s grievances were addressed with reasons and procedural safeguards.

Quashing the Review Board’s decision or restraining the Interested Parties at this stage would be disproportionate and unnecessary, as the process has in-built mechanisms including clarifications and extension of time to address any issues arising.

123. Accordingly, the Notice of Motion dated 16th December 2025 found to be devoid of merit and is hereby dismissed.

124. On costs, I order that each party shall bear its own costs of these proceedings.

125. This file is closed.

126. It is so ordered.

NAIROBI CIVIL APPEAL NO. E076 OF 2026

7. Dissatisfied with the Judgment of the High Court in the Judicial Review, Jamari Enterprises Limited lodged an appeal at the Court of Appeal at Nairobi against the said judgement in Nairobi Civil Appeal No. E076 of 2026 (hereinafter referred to as “the Civil Appeal”) which is pending before the Court of Appeal.

Addenda

8. The Procuring Entity issued Addendum No. 3 dated 24th November 2025, Addendum No. 4 dated 9th December 2025, Addendum No. 5 dated 17th December 2025, and Addendum No. 6 dated 28th January 2026 making various clarifications regarding the subject tender while extending the tender submission deadline to 5th February 2026.

Submission of Tenders and Tender Opening

9. According to the Tender Opening Minutes dated 5th February 2026 which were part of confidential documents furnished to the Public Procurement Administrative Review Board (hereinafter referred to as 'the Board') by the 1st Respondent pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act (hereinafter referred to as 'the Act'), a total of thirty-five (35) tenders were submitted in response to the subject tender and were recorded as follows:

No.	Bidder
1	Gatibu Engineering Enterprises
2	Murtgen Builders Co. Ltd
3	SG & M Engineering Co. Ltd
4	Kenwin Contractors
5	Gladmart Company Limited
6	Geonet Technologies Ltd
7	M & D Interface Co. Ltd
8	Teriksson Limited
9	Credible Technical Works Limited
10	Kenserve Online Services Limited
11	Central Engineering Services Limited
12	Sydainamsi General Supplies
13	Cumart Company Limited
14	Tides Construction Limited

15	Saben Holdings Limited
16	Xerode Civil & Buildind Contractors Ltd
17	Dynapax Investment Limited
18	Fortran Holdings Limited
19	Valf Company Ltd
20	Damuka engineering Co. Limited
21	Kenwise Ihub Solutions Ltd
22	Benskam Investment Limited
23	Arcadic Engineering Co Ltd
24	Lekker Consult Limited
25	Hanib Contractors Limited
26	Ufundi Construction Ltd
27	Shamato Logistics Ltd
28	Ayax Investment Limited
29	Rojax Group Ltd
30	EddyCom Contractors Limited
31	Drawn Konstrukt Limited
32	Njewap Tech Limited
33	Harriscom Company Ltd
34	Frabe Contractors Company Limited
35	Kelsen Investment Ltd

REQUEST FOR REVIEW NO. 19 OF 2026

10. On 9th February 2026, Almirall East Africa Limited, the Applicant herein, filed a Request for Review dated 9th February 2026 together with an

Applicant's Statement/Affidavit in Support of the Request for Review (hereinafter referred to as 'the instant Request for Review') through the firm of Cheboi Kiprono Advocates seeking the following orders from the Board in verbatim:

- a) Order that the tender closing and or opening proceedings undertaken by the 2nd Respondent in relation to Tender No. KP1/9A.2/OT/003/NM/25-26 is unlawful, irregular and in breach of Article 10, 47, 227 of the Constitution, the Public Procurement and Asset Disposal Act 2015, and the attendant regulations.***
- b) Annul the tender closing and opening proceedings undertaken by the 2nd Respondent and direct the Procuring Entity to strictly comply with the law.***
- c) Nullify any evaluation, recommendation, and/or award arising from the impugned procurement process.***
- d) Direct the Respondent to conduct a fresh tender closing and public opening, followed by evaluation, strictly in compliance with the Constitution, the PPADA, and the Regulations.***
- e) Award the Applicant the costs of and incidental to this Request for Review.***
- f) Any other relief that the Honourable Board deems fit to grant, having regard to the circumstances of this case in order to give effect to the Board's orders.***

11. In a Notification of Appeal and a letter dated 9th February 2026, Mr. Philemon Kiprop, the Secretary of the Board notified the Respondents of the filing of the Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said Respondents a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020. Further, the Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 9th February 2026.

12. On 16th February 2026, the Respondents filed through Maanzo Advocate a Respondent's Memorandum of Response dated 13th February 2026 together with a confidential file pursuant to Section 67(3)(e) of the Act.

13. The Board Secretary, notified parties and all tenderers in the subject tender of an online hearing of the instant Request for Review slated for 19th February 2026 at 2.00 p.m. through the link availed in the said Hearing Notice.

14. When the matter came up for hearing on 19th February 2026 at 2.00 p.m., the Board read out pleadings filed by parties. Counsel for the Applicant and Respondent indicated that they were not ready to proceed with the hearing and sought for more time to file their written submissions. Having considered the request for adjournment, the Board directed:

- i. The Applicant to file and serve its written submissions by Friday, 20th February 2026 at 9.00 a.m.
- ii. The Respondents to file and serve their written submissions by Monday, 23rd February 2026 at 9.00 a.m.
- iii. The hearing be rescheduled to Monday, 23rd February 2026 at 2.30 p.m.

15. On 20th February 2026, the Applicant filed Written Submissions dated 19th February 2026 together with a List and Digest of Authorities dated 19th February 2026.

16. On 23rd February 2026, the Respondents filed Written Submissions together with a List of Authorities of even date.

17. At the hearing on 23rd February 2026 at 2.30 p.m., the Board read out pleadings filed by the Applicant and the Respondent and proceeded to allocate time within which each party was required to proceed and highlight their respective cases. The Board also directed that the hearing of the preliminary objection by the Respondents would be heard as part of the substantive Request for Review. This was in accordance with Regulation 209(4) of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as 'Regulations 2020') which grants the Board the discretion to hear preliminary objections as part of a substantive request for review and deliver one decision. Thus, the matter proceeded for virtual hearing as scheduled.

PARTIES' SUBMISSIONS

Applicant's submissions

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

19. As to whether the tender opening conducted on 5th February 2026 complied with provisions under Section 78 of the Act as well as Regulation 65, 66, and 67 of Regulations 2020, Mr. Kiprono submitted that the tender opening conducted by the Respondents on 5th February 2026 failed to comply with the aforementioned provisions having conducted the said opening in a non-public, opaque, restricted, and partisan manner; and failing to announce mandatory particulars including tender prices, and status of bid security. He further submitted that the 2nd Respondent failed to prepare, complete, maintain, and avail a proper tender opening register thus defeating transparency, preventing auditability, undermining accountability, and constituting procedural impropriety. He reiterated that by departing from mandatory statutory provisions governing the closing and opening of tenders, the 2nd Respondent adopted a procurement system that was neither fair, transparent, nor competitively neutral. In support of his argument, he made reference to the holding in *Communications Commission of Kenya & 5 others v Royal Media Services Ltd & 5 others (Petition 14, 14A, 14B & 14C of 2014 (Consolidated)) [2014] KESC 53 (KLR) (29 September 2014) (Judgment)*; *Republic v Public Procurement Administrative Review Board; County Government of Laikipia & another (Interested*

Parties); Pelt Security Services Ltd (Ex parte) (Judicial Review Application 74 of 2018) [2018] KEHC 2068 (KLR) (Judicial Review) (3 December 2018) (Judgment); and Republic V Kenya Revenue Authority Exparte Shake Distributors Ltd [2012] Kehc 525 (KLR).

20. As to whether the Respondents' decision to proceed with further procurement steps, notwithstanding the requirements under Section 175(4) and (5) of the Act and the pendency of appellate proceedings was lawful, counsel submitted that an appeal to the Court of Appeal had been filed arising from the High Court's judgment in Judicial Review Application No. E406 of 2025 and that the statutory framework under Section 175 of the Act establishes a strict and time-bound appellate process. He further submitted that the spirit and letter of that provision require parties to respect the appellate window and refrain from taking steps that undermine or overreach pending judicial proceedings.

21. Counsel argued that by issuing Addendum No. 6 and operationalizing the subject tender while appellate proceedings touching the said tender were pending, the Respondents altered the status quo and pre-empted the appellate court's jurisdiction. He further argued that this conduct offends the doctrine of *lis pendens*, which prohibits parties from taking steps that render pending litigation nugatory or academic and pointed to the holding by the Court of Appeal in *Uhuru Highway Development Ltd v Central Bank of Kenya & 2 Others* and the Supreme Court in *Board of Governors, Moi High School Kabarak & Another v Malcolm Bell*.

22. He pointed out that the Court of Appeal in *Aprim Consultants v Parliamentary Service Commission & another [2021] KECA 1090 (KLR)* expressed itself on Section 175 of the Act and held that the provisions therein are couched in mandatory terms with respect to the stipulated timelines. He indicated that appeals under Section 175 of the Act are *sui generis* and as such, Addendum No. 6 issued by the Respondents is null and void for reasons that it was issued within the seven (7) days which a party aggrieved by a decision of the High Court may lodge an appeal at the Court of Appeal. Counsel submitted that based on Section 175(5) of the Act, the decision of the Board in Request for Review No. 107 of 2025 is held in abeyance pending the determination by the Court of Appeal and pointed to the holding in *Republic v Public Procurement Administrative Review Board Ex-Parte Syner- Chemie Limited & 3 others [2016] KEHC 1107 (KLR)*.

23. In opposition to the Respondents' Preliminary Objection, Mr. Kiprono submitted on the threshold that must be met by a party filing a request for review before the Board as set out under section 167(1) of the Act the first being that a party has to be a candidate or a tenderer in order to seek administrative review. In support of his argument, he referred to the holding in *Miscellaneous Application 637 of 2016 Republic v Independent Electoral and Boundaries Commission & Another Ex Parte Coalition for Reform and Democracy & 2 Others [2017] eKLR*; and *Petition No. 237 of 2018, Philip Nyandieka (Suing on his own behalf and on behalf of the general public) v. National Government CDF-Bomachoge Borabu constituency [2019] eKLR*, and pointed out that the

Applicant squarely falls within the category of persons clothed with the requisite *locus standi* to institute the instant Request for Review having duly downloaded the blank tender document from the Respondent's e-procurement portal and participated in the procurement process.

24. Counsel further submitted that the Applicant has demonstrated that it has suffered and continues to risk suffering loss and damage as a direct consequence of the Respondent's unlawful conduct, particularly the issuance of the impugned Addendum dated 28th January 2026 which irregularly revived and progressed the procurement process in a manner that was illegal and procedurally defective thus locking out the Applicant of a fair and lawful procurement framework. He pointed the Board to paragraph 39 of the Applicant's Supporting Affidavit where it had particularized the specific loss and damage that it was likely to suffer as a result of breach of duty imposed upon the 1st Respondent by the Act.

25. Counsel submitted that a party must seek administrative review within 14 days of the alleged breach of duty and pointed out that the Applicant filed the instant Request for Review within 14 days of the issuance of impugned Addendum which constitutes the date of occurrence of the alleged breach.

26. While making reference to section 170 of the Act, counsel submitted that the procurement process in the subject tender had not reached its conclusion and no successful bidder had been identified or notified by

the Procuring Entity and as such, there was no party falling under Section 170(c) of the Act capable of being joined to the proceedings. He further submitted that the Applicant properly invoked the provisions of section 170 by instituting the instant Request for Review against the accounting officer of the procuring entity thus complying fully with the requirements of the Act and ensuring that the Request for Review as filed is competent.

27. Counsel submitted that the Board is clothed with jurisdiction to entertain the instant Request for Review and urged it to allow the instant Request for Review as prayed.

Respondent's submissions

28. In his submissions, counsel for the Respondents, Mr. Maanzo relied on the Respondents documents filed before the Board including confidential documents concerning the subject tender submitted pursuant to Section 67(3)(e) of the Act.

29. Counsel submitted that the Applicant lacks *locus standi* to institute the instant Request for Review since it was neither a candidate nor a tenderer in the subject tender as stipulated under Section 2 and 167(1) of the Act. He pointed out that the Applicant neither submitted its bid as alleged and asked the Board to confirm the same from the Tender Opening Minutes and Tender Register submitted as part of the confidential documents. He further submitted that the Applicant had not demonstrated its claim to having downloaded the Tender Document

from the Procuring Entity's website there being no portal login details nor website access details provided in its pleadings. *In support of his argument, he made reference to the holding in Republic v Independent Electoral and Boundaries Commission & another Ex Parte Coalition for Reform and Democracy & 2 others [2017] KEHC 8439 (KLR)* and submitted that judicial precedent demonstrates awareness that parties that are not candidates or tenderers are locked out from seeking review from the Board although they can access other remedies without invoking the provisions of the Act.

30. As to the legality of Addendum No. 6, Mr. Maanzo submitted that following the delivery of Judgment in Milimani HCJR No. E406 of 2025 on 27th January 2026, the Respondents lawfully and legally issued Addendum No. 6 on 28th January 2026 and proceeded with procurement proceedings as there was no pending statutory provision or court order barring the Respondents from proceeding with the subject tender. While making reference to Section 175(4) and (5) of the Act, counsel argued that the said provisions do not, either expressly or impliedly, impose a duty upon a procuring entity to suspend procurement proceedings in wait for a party to file an Appeal. He cautioned that even after a party has filed an appeal, it is the responsibility of the aggrieved party to seek stay orders in its appeal and protect its interest.

31. He submitted that Section 168 of the Act provides only for suspension of procurement proceedings in terms prescribed by the notice issued

by the Board Secretary once a review application is filed and that these terms of suspension of procurement proceedings by the Board Secretary do not precede the determination of the review application.

32. He maintained that there was no pending litigation when Addendum No. 6 was issued and that the doctrine of *lis pendens* relied upon by the Applicant is applicable in property law and is not a universal doctrine across all areas of law. In support of his argument, he cited the holding by the Court of Appeal in *Naftali Ruthi Kinyua v Patrick Thuita Gachure & another [2015] KECA 911 (KLR)* where the said doctrine was defined.

33. Counsel submitted that the Applicant has not demonstrated proof of when an appeal was filed against the determination by the High Court in the Judicial Review and if orders staying the procurement proceedings were issued in the said appeal.

34. He further submitted that the Applicant has approached the Board with unclean hands in a move to approbate and reprobate as it is challenging the legality of Addendum No. 6 which it alleges to have relied on to submit its bid and referred the Board to the holding by the High Court in *Royal Ngao Holdings Limited v N.K. Brothers Limited [2020] KEHC 2550 (KLR)*.

35. On the issue raised concerning the subject tender's opening, counsel submitted that the Respondents complied with Section 78 of the Act as read with Regulation 65, 66, 67, 68, and 73 in that (a) a tender opening

committee was appointed by the 1st Respondent in line with Section 78(1) of the Act, (b) the tender opening was scheduled at 10.30 a.m. on 5th February 2026 which is immediately after the tender closing at 10.00 a.m. on 5th February 2026 where only submitted bids were opened, (c) the tender opening was done at auditorium stima plaza as designated by Addendum No. 6 in the presence of bidders and representatives who attended the tender opening, (d) the tender opening register was recorded in terms of the information read pursuant to Section 78(6) of the Act and Regulation 73 of Regulations 2020, and (e) Regulation 73 provides that despite the provisions of Section 78(6)(b) of the Act, the total price of the tender may not be read out where a tender consists of numerous items that are quoted for separately.

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

Applicant's Rejoinder

37. In a rejoinder, Mr. Kiprono reiterated that the Applicant is a candidate in the instant procurement proceedings in line with Section 2 as read with 167(1) of the Act. He submitted that the Applicant downloaded the Tender Document from the Procuring Entity's website and that the pre-bid meeting as provided for in the Tender Document was not mandatory.

38. Counsel further submitted that all parties are aware of the ongoing appeal having been served with a Notice of Appeal on 29th January 2026, which was a day after the Respondents issued the impugned Addendum No. 6.

39. At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 9th February 2026 was due to expire on 2nd March 2026 and that the Board would communicate its decision on or before 2nd March 2026 to all parties to the instant Request for Review via email.

BOARD'S DECISION

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

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

In determining the first issue, the Board will make a determination on whether the Applicant has the requisite *locus standi* to approach the Board by dint of Section 167(1) of the Act read with Section 2 of the Act.

Depending on the determination of Issue A;

B. Whether Addendum No. 6 as issued by the Respondents is legal.

C. Whether the Respondents acted contrary to the provisions of Section 78 of the Act with regard to tender opening of the subject tender.

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

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

41. The Board is mindful of the established legal principle that courts and decision-making bodies can only preside over cases where they have jurisdiction and when a question on jurisdiction arises, a Court or tribunal seized of a matter must as a matter of prudence enquire into it before doing anything concerning such a matter in respect of which it is raised.

42. Black's Law Dictionary, *8th Edition*, defines jurisdiction as:

"... the power of the court to decide a matter in controversy and presupposes the existence of a duly constituted court with control over the subject matter and the parties ... the

power of courts to inquire into facts, apply the law, make decisions and declare judgment; The legal rights by which judges exercise their authority.”

43. The celebrated Court of Appeal decision in **The Owners of Motor Vessel “Lilian S” v Caltex Oil Kenya Limited [1989] eKLR; Mombasa Court of Appeal Civil Appeal No. 50 of 1989** underscores the centrality of the principle of jurisdiction. In particular, Nyarangi JA, decreed:

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything, without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for continuation of proceedings pending evidence. A court of law downs tools in respect of the matter before it the moment it holds that it is without jurisdiction.”

44. The Supreme Court added its voice on the source of jurisdiction of a court or other decision-making body in the case **Samuel Kamau Macharia and another v Kenya Commercial Bank Ltd and 2 others [2012] eKLR; Supreme Court Application No. 2 of 2011** when it decreed that;

"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with Counsel for the first and second Respondent in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter for without jurisdiction the Court cannot entertain any proceedings."

45. The jurisdiction of a court, tribunal, quasi-judicial body or an adjudicating body can only flow from either the Constitution or a Statute (Act of Parliament) or both.

46. This Board is a creature of statute owing to the provisions of Section 27 (1) of the Act which provides:

"(1) There shall be a central independent procurement appeals review board to be known as the Public Procurement Administrative Review Board as an unincorporated Board."

47. Further, Section 28 of the Act provides for the functions and powers of the Board as follows:

"(1) The functions of the Review Board shall be—

(a) reviewing, hearing and determining tendering and asset disposal disputes; and

(b) to perform any other function conferred to the Review Board by this Act, Regulations or any other written law.”

48. The above provisions demonstrate that the Board is a specialized, central independent procurement appeals review board with its main function being reviewing, hearing and determining tendering and asset disposal disputes.

49. The jurisdiction of this Board is provided for under Part XV – Administrative Review of Procurement and Disposal Proceedings and specifically in Section 167 of the Act which provides for what can and cannot be subject to proceedings before the Board and Section 172 and 173 of the Act which provides for Powers of the Board in conduct and determination of request for review proceedings.

50. Turning to the instant Request for Review, the Respondents challenged the jurisdiction of the Board to hear and determine the instant Request for Review as follows:

As to whether the Applicant has the requisite locus standi to approach the Board by dint of Section 167(1) of the Act read with Section 2 of the Act;

51. It is the Respondents' case that the Applicant is not a candidate nor a tenderer in the subject tender thus lacks *locus standi* to initiate and prosecute the instant Request for Review having not demonstrated that it is a candidate or tenderer which has suffered or is likely to suffer any loss or damage as a result of the alleged breach of duty by the Respondents. Mr. Maanzo submitted that the Applicant has not adduced any evidence to prove that it downloaded, prepared, and/or submitted its bid in reliance of the revised tender submission deadline communicated vide Addendum No. 6 and that it was not among the bidders who submitted bids and bid securities as at the time of tender closing.

52. In response, the Applicant submitted that it is squarely met the statutory threshold set out under Section 167(1) and Section 2 of the Act and that it is within the meaning of a candidate having downloaded the Tender Document from the Procuring Entity's e-procurement portal and participated in the procurement process. Mr. Kiprono submitted that the Applicant has demonstrated that it has suffered and continues to risk suffering loss and damage as a direct consequence of the Respondents' unlawful conduct in the subject tender and particularly having issued Addendum No. 6 which irregularly revived and progressed the procurement process in an illegal and unprocedural manner thereby effectively locking out the Applicant of a fair and lawful procurement process.

53. Having considered parties' submission, the Board notes that the question of whether or not the Applicant has the requisite *locus standi* to approach the Board as a candidate is a jurisdictional issue since it is not just any and every person that may move the Board or invoke the jurisdiction of the Board by way of a Request for Review under Section 167 (1) of the Act which states:

167. Request for a review

(1) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.

(2)

(3)

(4)

54. In essence, for one to invoke the jurisdiction of the Board, they need to approach the Board as provided under Section 167(1) of the Act and must either be a candidate or a tenderer within the meaning of Section 2 of the Act.

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

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

56. The question of whether or not the Applicant was a candidate in the subject tender's procurement proceedings, rests solely on the interpretation of the term "candidate" under Section 2 of the Act. According to this provision, for one to be a candidate, such a person must have obtained a tender document from a public entity pursuant to an invitation notice by a procuring entity.

57. According to Black's Law Dictionary, 7th Edition, the word 'pursuant to' means '*a term meaning to conform to something or something that is done in consequence of*'. The Collins English Dictionary, 8th Edition defines the term "pursuant to" to mean '*In accordance with*'. This therefore means that a candidate is a person who has obtained a tender document from a public entity in accordance with an invitation notice by a procuring entity.

58. It is the Board's considered view that Section 2 of the Act cures the mischief whereby a person obtains a tender document from somewhere else or from someone else, other than the procuring entity that issued the said tender document or such person obtains the tender document from a procuring entity without following the procedure provided for obtaining the tender document.

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

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

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

60. In **PPARB Application No. 1 of 2020, Energy Sector Contractors Association v. Kenya Power & Lighting Company Limited & Another**, the Board held that:

"From the above decisions, the Board notes that the Courts were alive to the fact that it is only candidates (persons who have obtained a procuring entity's tender document) and tenderers (persons who participate in the tendering process) that may approach this Board. From the definition provided in section 2 of the Act, for one to be a candidate in a procurement proceeding or asset being disposed, what that person has to do is to obtain the tender documents from a public entity pursuant to an invitation notice by a procuring entity.

The Procuring Entity in this instance provided two methods that any person could have used to obtain the tender document, and the Applicant chose to exercise one of the two, that is, to download a copy of the Bidding Document applicable to the subject tender from the Procuring Entity's Official Website.

In all the scenarios cited by the Procuring Entity, the Board observes that none of them affect the jurisdiction of the Board to hear and determine an application before it where the Applicant has demonstrated it was a candidate in procurement proceedings initiated under the Act. The Applicant herein filed a copy of the Bidding Document and upon perusal, the same is a copy of the Bidding Document issued by the Procuring Entity in so far as the subject procurement process is concerned.

Accordingly, the Board finds that the Applicant has the locus standi as a candidate to file a Request for Review before this Board as required under section 167 (1) of the Act read together with section 2 of the Act.”

61. Further, in **PPARB Application No. 30 of 2016, Achelis Material Handling Limited v. County Government of Kitui (hereinafter referred to as the County Government of Kitui’s case)** the Board explained the import of the term “candidate” under Section 2 of the Act as follows:

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

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

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

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

64. The Applicant at paragraph 4 of the Applicant's Statement /Affidavit in Support of the Request for Review sworn by Edwin Mwanda on 9th February 2026 depones that:

"On or about 3rd November 2025, I downloaded the tender documents from the Procuring Entity's e-procurement portal (Annexed hereto as the exhibit marked "EM-3" is a copy of the Tender Document that I downloaded) ."

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

66. In our considered view, the Applicant having demonstrated its intention of participating in the subject tender by obtaining a copy of the tender document from the Procuring Entity's website where it was published without any reservations or restrictions renders the Applicant as a candidate within the meaning of Section 2 of the Act read with Section 167(1) of the Act and it therefore has the *locus standi* to institute administrative review proceedings before the Board

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

Whether Addendum No. 6 as issued by the Respondents is legal.

68. The Applicant contends that at the time of issuance of Addendum No. 6 by the Respondents which revised the tender closing date to 5th February 2026 at 10.00 a.m. and expressly stated that all other terms and conditions of the subject tender remained unchanged, there existed pending court proceedings directly relating to the subject tender before the Court of Appeal being an appeal of the judgment issued by the High Court in Milimani HCJR No. E406 of 2025 on 27th January 2026. Counsel submitted that parties in the instant matter are aware of the existing appeal having been served with a Notice of Appeal on 29th January 2026, which was a day after the Respondents issued the impugned Addendum No. 6.

69. He further submitted that the act of proceeding with the procurement process in the subject tender by the Respondents is contrary to Section 175(4) and (5) of the Act which establishes a strict and time-bound appellate process and requires parties to refrain from taking steps that undermine or overreach pending judicial proceedings. Counsel indicated that by issuing Addendum No. 6 and proceeding with the

procurement process in the subject tender while the appellate proceedings touching on the subject tender were pending, the Respondents altered the *status quo* and pre-empted the appellate court's jurisdiction and that its actions are *void ab initio*.

70. In response, the Respondents contend that following the delivery of Judgment by the High Court in Milimani HCJR No. E406 of 2025 on 27th January 2026, they lawfully and legally issued Addendum No. 6 and proceeded with the procurement proceedings in the subject tender as there was no pending statutory provision or court order barring them from proceeding with the subject tender. Counsel submitted that Section 175(4) and (5) of the Act neither expressly nor impliedly imposes a duty upon a procuring entity to suspend procurement proceedings in wait for a party to lodge an appeal and that even after such appeal is filed, it is the appellant's responsibility to seek stay orders so as to protect their interests.

71. Counsel further submitted that the Applicant has not demonstrated proof of when the alleged appeal was filed against the determination of the High Court in Milimani HCJR No. E406 of 2025 on 27th January 2026 and if any orders staying the procurement proceedings in the subject tender were issued in the said Appeal.

72. Section 175 of the Act provides as follows:

175. Right to judicial review to procurement

(1) A person aggrieved by a decision made by the Review Board may seek judicial review by the High Court within fourteen days from the date of the Review Board's decision, failure to which the decision of the Review Board shall be final and binding to both parties

(2) The application for a judicial review shall be accepted only after the aggrieved party pays a percentage of the contract value as security fee as shall be prescribed in Regulations.

(3) The High Court shall determine the judicial review application within forty- five days after such application.

(4) A person aggrieved by the decision of the High Court may appeal to the Court of Appeal within seven days of such decision and the Court of Appeal shall make a decision within forty-five days which decision shall be final.

(5) If either the High Court or the Court of Appeal fails to make a decision within the prescribed timeline under subsection (3) or (4), the decision of the Review Board shall be final and binding to all parties. (6) A party to the review which disobeys the decision of the Review Board or the High Court or the Court of Appeal shall be in breach of this Act and any action by such party contrary to the decision of the Review Board or the High Court or the Court of Appeal shall be null and void. (7) Where a

decision of the Review Board has been quashed, the High Court shall not impose costs on either party.

73. In essence, a person aggrieved by the decision of the Board may seek judicial review by the High Court within 14 days failure to which the Board's Decision becomes final and binding. Where a judicial review is lodged, the High Court is mandated to hear and determine the same within 45 days and a person aggrieved by the High Court's determination may lodge an appeal to the Court of Appeal within 7 days of such determination. The Court of Appeal is mandated to hear and determine the appeal within 45 days and its decision shall be final.

74. We have heard the Applicant submit that it lodged an appeal against the judgment delivered by the High Court on 27th January 2026 in Milimani HCJR No. E406 of 2025 being judicial review of the Board's Decision in Request for Review No. 107 of 2025. Though counsel for the Applicant submitted that parties were served with a Notice of Appeal on 29th January 2026, the same was annexed as part of the Applicant's pleadings. Additionally, no Stay Order has been produced before the Board either by the Applicant or Respondents in the course of the instant Request for Review indicating that the procurement proceedings in the subject tender were suspending pending the hearing and determination of the Applicant's appeal. Moreover, neither party has produced before the Board any application for stay of the High Court's judgement and the procurement proceedings in the subject tender pending the hearing and determination of the Applicant's appeal.

75. Importantly, we note that the impugned Addendum No. 6 was issued by the Respondents on 28th January 2026 which was a day after the High Court rendered itself in Milimani HCJR No. E406 of 2025 where it upheld the Decision of the Board in Request for Review No. 107 of 2025.

76. The question that therefore arises is whether the issuance of Addendum No. 6 by the Respondents following delivery of the High Court's judgment in Milimani HCJR No. E406 of 2025 was legal in light of provisions under Section 175 of the Act, and if the Respondents' act of proceeding with the procurement process in the subject tender during the pendency of the Applicant's appeal in the absence of any stay orders was legal.

77. It is trite law that the institution of an appeal does not operate as a bar to execution of a sentence in criminal matters or execution of decree in civil matters unless otherwise expressly provided. Order 42 Rule 6(1) of the Civil Procedure Rules restates this principle and provides in part that:

"No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused, by the court appealed from, the court to which, such an appeal is preferred shall

be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just , and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.”

78. Notably, Rule 5(2)(b) of the Court of Appeal Rules dictates that:

"Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may –

(a)

(b) in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.”

79. In **RWW v EKW [2019] KEHC 6523 (KLR)**, the High Court held as follows where an application for stay pending appeal is filed:

8. The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right

against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

80. While the Board, the High Court and Court of Appeal are ordinarily mandated to follow the rules and procedures as contained in the Act and Regulations 2020, they also can and are guided by other legal propositions such as those derived from common law and other Acts of Parliament while reviewing, hearing and determining tendering and asset disposal disputes which are civil in nature and there is nothing in the Act and Regulations 2020 that restricts application of the said legal principles and doctrines of law while rendering themselves. This concurrently applies to all parties who seek the Board's, High Court's and Court of Appeal's intervention in procurement proceedings.

81. In view of the foregoing, it follows therefore that filing of an appeal by the Applicant in regard to the subject tender as provided for under Section 175 of the Act does not expressly or impliedly operate as a stay of procurement proceedings in the said tender unless an application for stay was made and subsequently, an order of stay was granted either by the High Court or the Court of Appeal with regard to the subject tender. Nothing therefore prevented the Procuring Entity from issuing Addendum No. 6 on 28th January 2026 or from proceeding with the procurement process in the subject tender having not been served with

any stay orders by the Applicant herein or the Applicant in Request for Review No. 107 of 2026, being the Appellant in the Civil Appeal.

82. In the circumstances, the Board finds and holds that Addendum No. 6 as issued by the Respondents is legal. Accordingly, this ground of review fails.

83. Before concluding on this issue, the Board deems it necessary to address whether the instant Request for Review as filed offends the doctrine of *sub judice* in view of Civil Appeal No. E076 of 2026 lodged by Jamari Enterprises Limited at the Court of Appeal at Nairobi against the judgement by the High Court in Milimani HCJR No. E406 of 2025 concerning the subject tender.

84. The doctrine of *sub judice* which is provided in our legal system under Section 6 of the Civil Procedure Act, 2010 as follows:

6. Stay of suit

No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

Explanation.—The pendency of a suit in a foreign court shall not preclude a court from trying a suit in which the same matters or any of them are in issue in such suit in such foreign court.

85. Section 6 of the Civil Procedure Act expressly provides that no court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed. In essence, the doctrine of *sub judice* precludes courts and tribunals from proceeding with the trial of any suit where the matter in issue is also the subject of trial in previously commenced proceedings between the same parties or parties under whom any of them claim.

86. For the doctrine of *sub judice* to apply the following principles ought to be present:

(a) There must exist two or more suits filed consecutively;

(b) The matter in issue in the suits or proceedings must be directly and substantially the same, the parties in the suits or proceedings must be the same or must be parties under whom they or any of them claim and they must be litigating under the same title, the suits must be

pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

87. In view of the above, noting that the Applicant in the instant Request for Review is Almirall East Africa Limited and the Applicant in Request for Review being the Appellant in the Civil Appeal is Jamari Enterprises Limited, we find and hold that the instant Request for Review as filed does not offend the legal doctrine of sub judice since the matter in issue in the instant Request for Review and in the Civil Appeal has been instituted by different parties and the issues under litigation concerning the subject tender are substantially different.

88. Even assuming, *arguendo*, that the parties in the respective proceedings were identical, the doctrine of sub judice would still be inapplicable in the present circumstances. The doctrine of *sub judice*, codified under Section 6 of the Civil Procedure Act, is intended to prevent multiplicity of suits and avoid conflicting decisions in parallel proceedings of a similar nature. However, its application is not mechanical; it must be considered in light of the statutory framework governing the proceedings in question.

89. Procurement proceedings under the Public Procurement and Asset Disposal Act are *sui generis*. They are governed by strict and peremptory statutory timelines designed to ensure expeditious resolution of disputes so as not to stall public procurement processes.

Unlike ordinary civil proceedings, which are not constrained by comparable statutory timelines, procurement disputes are time-bound and must be concluded within the framework expressly prescribed by statute.

90. To apply the doctrine of *sub judice* rigidly in procurement disputes would undermine the very objective of the procurement regime. Given the inherently litigious nature of procurement processes, it would create a dangerous precedent if a tenderer or candidate could simply institute parallel proceedings in a superior court and thereby paralyse time-sensitive procurement proceedings pending before a statutory review body or lower court. Such an approach would invite abuse of process and frustrate the efficient functioning of public procurement. Public procurement is a matter of public interest. The statutory timelines are not merely procedural conveniences; they are substantive safeguards intended to balance fairness, accountability, and the need for continuity in public service delivery. As a matter of public policy, courts must be slow to invoke the *sub judice* rule where doing so would defeat statutory timelines and stall procurement processes without an express order of stay or other lawful limitation. In the absence of a stay or a clear statutory prohibition, the mere existence of parallel proceedings cannot, without more, justify invocation of the *sub judice* rule in procurement matters. To hold otherwise would be contrary to the object and spirit of the procurement statute and would impede the timely disposal of disputes as mandated by law.

91. Accordingly, albeit obiter, we find that the doctrine of *sub judice* would not properly arise in procurement proceedings governed by strict statutory timelines and underpinned by compelling public interest considerations.

Whether the Respondents acted contrary to the provisions of Section 78 of the Act with regard to tender opening of the subject tender.

92. The Board has heard the Applicant submit on this issue that the tender closing and opening conducted by the Respondents in the subject tender on 5th February 2026 was unlawful and non-compliant with Section 78 of the Act read with Regulation 65, 66, and 67 of Regulations 2020. The Applicant contends that the tender opening conducted by the Respondents on 5th February 2026 was conducted in a non-public, opaque, restricted, and partisan manner; and that the Respondents failed to announce mandatory particulars including tender prices, and status of bid security. Further, that the 2nd Respondent failed to prepare, complete, maintain, and avail a proper tender opening register thus defeating transparency, preventing auditability, undermining accountability, and constituting procedural impropriety.

93. The Board has heard counter submissions by the Respondents to be that they complied with Section 78 of the Act with regard to tender opening in the subject tender in that (a) a tender opening committee was appointed by the 1st Respondent in line with Section 78(1) of the

Act, (b) the tender opening was scheduled at 10.30 a.m. on 5th February 2026 which is immediately after the tender closing at 10.00 a.m. on 5th February 2026 where only submitted bids were opened, (c) the tender opening was done at auditorium Stima Plaza as designated by Addendum No. 6 in the presence of bidders and representatives who attended the tender opening, (d) the tender opening register was recorded in terms of the information read pursuant to Section 78(6) of the Act and Regulation 73 of Regulations 2020, and (e) Regulation 73 provides that despite the provisions of Section 78(6)(b) of the Act, the total price of the tender may not be read out where a tender consists of numerous items that are quoted for separately.

94. The Board, having considered parties' submissions herein, observes that the objective of public procurement is to provide quality goods and services in a system that implements the principles specified in Article 227 of the Constitution, which provides as follows:

Article 227 - Procurement of public goods and services

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.

95. The Board takes cognizance of Section 78 of the Act which provides for Opening of tenders as follows:

Section 78 - Opening of tenders:

(1) An accounting officer of a procuring entity shall appoint a tender opening committee specifically for the procurement in accordance with the following requirements and such other requirements as may be prescribed—

(a)

(b)

(2) Any bid withdrawn in writing shall not be eligible for evaluation or consideration in the tender process.

(3) Immediately after the deadline for submitting tenders, the tender opening committee shall open all tenders received before that deadline.

(4) Those submitting tenders or their representatives may attend the opening of tenders.

(5) The tender opening committee shall assign an identification number to each tender and record the number of pages received.

(6) As each tender is opened, the following shall be read out loud and recorded in a document to be called the tender opening register—

(a) the name of the person submitting the tender;

(b) the total price, where applicable including any modifications or discounts received before the deadline for submitting tenders except as may be prescribed; and

(c) if applicable, what has been given as tender security.

(7) No tenderer shall be disqualified by the procuring entity during opening of tenders.

(8) The accounting officer of a procuring entity shall, on request, provide a copy of the tender opening register to a person submitting a tender.

(9) Each member of the tender opening committee shall—

(a) sign each tender on one or more pages as determined by the tender opening committee; and

(b) initial, in each tender, against the quotation of the price and any modifications or discounts, where applicable.

(10) The tender opening committee shall prepare tender opening minutes which shall set out—

(a) a record of the procedure followed in opening the tenders; and

(b) the particulars of those persons submitting tenders, or their representatives, who attended the opening of the tenders.

(11) To acknowledge that the minutes are true reflection of the proceedings held, each member of the tender opening committee shall—

(a) initial each page of the minutes;

(b) append his or her signature as well as initial to the final page of the minutes indicating their full name and designation.

(12) A person who causes the physical loss of tender documents provided for under this section commits an offence.”

96. Interpretation of the above provisions of Section 78 of the Act is that

- (a) immediately after the tender submission deadline, the tender opening committee shall open all tenders received before that deadline,
- (b) tenderers or their representatives may attend the opening of tenders,
- (c) as each tender is opened, the name of the person submitting the tender shall be read out and including the total price and where applicable any modifications or discounts received before the deadline for submitting tenders except as may be prescribed,
- (d) no tenderer shall be disqualified by the procuring entity during opening of tenders,
- (e) each member of the tender opening committee shall sign each tender on one or more pages as determined by the tender opening committee and initial, in each tender, against the quotation of the price and any modifications or discounts where applicable, and
- (f) the tender opening committee shall prepare tender opening minutes that set out a record of the procedure followed at tender opening.

97. The Board notes that ITT 24.1, ITT 27.1, and ITT 27.6 of Section II – Tender Data Sheet (TDS) of the Tender Document provided that tenders in the subject tender were to be submitted electronically through the Procuring Entity’s SAP online tendering portal in PDF format on www.kplc.co.ke RFX no. 1000002925 and that public opening would be done through the KPLC tendering portal at 10.30 a.m. in Stima Club Off Thika Road, Ruaraka, Nairobi as specified in the KPLC Tendering Portal for submitted tenders only.

98.Regulation 57 of Regulations 2020 provides for opening of e-tender as follows:

Regulation 57 - Opening of e-tenders

(1) Where submission of tenders are done online, such submissions shall be received into an electronic tender box and maintained to high standards of security and the e-tender box shall remain closed until the time of tender opening.

(2) The electronic tender box referred to under paragraph (1) shall have three passwords that are simultaneously time-activated and each password shall be issued to different officers who are members of the tender opening committee.

(3) Without limiting the generality of the foregoing, the tenderer submitting a bid or proposal may encrypt their bid as long as their respective passwords are availed at the tender opening.

(4) A tenderer who submits an encrypted tender and fails to provide their respective password or other means of access to the document at the tender opening shall be deemed not to have submitted their bid.

(5) A record of the bid opening shall be kept in print copy and signed by the tender opening committee appointed in accordance with section 78(1) of the Act.

(6) A procuring entity shall ensure that the date and time of an automated closure of an electronic bid deadline is

indicated in the invitation notice or tender document in accordance with the local time zones.

(7) All tenders shall be opened in the presence of all invited bidders who choose to attend and sign a record of attendance.

(8) Despite paragraph (7), a procuring entity may allow for online viewing of tender opening proceedings by tenderers.

(9) All e-tenders shall be readable through open standard interfaces and formats as specified in the tender documents.

(10) Information read at the bid opening shall include where applicable and practicable, the name of the tenderer, the absolute and final price, offered discount, tender security and any other pertinent information that may be deemed necessary.

(11) The procuring entity shall on request provide a copy of the tender opening register to a tenderer.

(12) Bids or proposals in electronic format shall be protected against access by unauthorized persons until the publication of the contract award.

(13) A procuring entity shall open bids or proposals in electronic format. (14) A procuring entity shall ensure that financial proposals in electronic format shall only be accessed and opened after the technical evaluation of the proposals where so required in the e-tender documents.

(15) Until the price bids are opened, the bid-offers shall be kept confidential.

(16) Financial bids for unsuccessful bidders at the technical stage shall not be opened.

99. It is clear that the provisions on opening of e-tenders under Regulation 57 of Regulations 2020 do not materially depart from what is provided under Section 78 of the Act on opening of tenders by the Tender Opening Committee. According to Regulation 57, a record of the bid opening shall be kept in print copy and signed by the tender opening committee appointed under Section 78(1) of the Act. All tenders are required to be opened in the presence of all invited bidders who chose to attend and a procuring entity may allow for online viewing of tender opening proceedings by tenderers. Additionally, the information read at the bid opening shall include where applicable and practicable, the name of the tenderer, the absolute and final price, offered discount, tender security and any other pertinent information that may be deemed necessary.

100. The Applicant at paragraph 8 of the Applicant's Statement /Affidavit in Support of the Request for Review sworn by Edwin Mwanda on 9th February 2026 annexed the Tender Opening Register marked as "EM-5" which it claims under paragraph 9 to contain material statutory violations being:

a) Failure to disclose tender prices, contrary to Section 78(2) of the Act and Regulation 66(2), as numerous entries under

"Total Tender Amount in Kshs." do not contain actual monetary figures but instead bear vague and impermissible notations such as "As per attached price summary sheet," "As per attached price schedule," or other unintelligible remarks;

- b) Inconsistency and incompleteness of mandatory particulars, as some bidders have figures reflected while others do not, thereby defeating uniformity, transparency, and competitive neutrality;***
- c) Use of ambiguous, incoherent, and illegible descriptions in place of mandatory disclosures, rendering the register incapable of serving its statutory purpose as a contemporaneous, verifiable, and auditable record of the tender opening;***
- d) Failure to create a self-contained tender opening register, as required by law, by purporting to incorporate undisclosed external documents by reference, contrary to the requirement that all mandatory particulars be announced and recorded at the time of opening; and***
- e) Internal contradictions between bidder names, response comparison numbers, and tender amounts, which demonstrate that the register was not prepared in a clear, accurate, or reliable manner as required under Regulations 65 and 67.***

101. The Board notes that the annexure marked as EM-5 is incomplete as it only lists the entry of the bidders No. 1 to 22 in the Tender Opening Register. Having compared the same with the Tender Opening Register forming part of the confidential documents submitted to the Board by the 1st Respondent, the Board notes that three (3) bidders confirmed having witnessed the tender opening process as captured in the Tender Opening Register. Additionally, the 1st Respondent also submitted the Tender Opening Minutes, the Bid Security Register and an Attendance Register which lists tenderer's representatives who attended the tender opening. Section 78 (10) and (11) of the Act require the tender opening committee to prepare tender opening minutes which set out a record of the procedure followed at the opening of tenders, including particulars of bidders and their representative who attended the tender opening. Further, each member of the tender opening committee is required to acknowledge the minutes as a true reflection of the proceedings held by initialing each page of the minutes and appending his/her signature as well as initial on the last page of the minutes while indicating their full name and designation.

102. A perusal of the Tender Opening Minutes of the subject tender reveals that the Applicant was not present at the tender opening. Further, we note that:

- i. The 5 bidders' representatives present were requested to volunteer and witness the retrieval of the bid securities from the tender box and the retrieved bid securities were all sealed and clearly labelled with the tender number and tender name;

- ii. There were 42 bid securities retrieved from the bid security box;
- iii. The tender closed on 5th February 2026 at 10.00 a.m. and was opened on the same day at 10.30 a.m.
- iv. Thirty-Five (35) bidders successfully submitted their bids in response to the subject tender and they were read out publicly in the presence of bidders present as well as their total tender amounts as indicated in their form of tenders which details were subsequently noted as seen in the Tender Opening Register.

103. It is the Board's considered view that the Tender Opening Committee complied with the provisions set out under Section 78 of the Act with regard to opening of the bids submitted in the subject tender. In the circumstances, we find that the Respondents adhered to the provisions of Section 78 of the Act with regard to tender opening of the subject tender.

104. That said, the Applicant having not submitted a tender and further having elected not to attend the tender opening it cannot, without credible and cogent evidentiary foundation, invite this Board to invalidate the process on the basis of alleged irregularities said to have occurred therein. Participation in the tender opening is not a cosmetic procedural step; it is a transparency safeguard designed to afford bidders firsthand visibility into the process. A party who voluntarily absents itself from that safeguard cannot subsequently speculate as to impropriety without placing before the Court concrete proof of wrongdoing. Accordingly, this ground of review fails.

What orders should the Board grant in the circumstances?

105.The Board has established that it has jurisdiction to hear and determine the instant Request for Review having found that the Applicant was a candidate in the subject tender.

106.The Board has found that Addendum No. 6 as issued by the Respondents is legal and that the instant Request for Review as filed is not *sub judice*.

107.The Board has further found that the Respondents adhered to the provisions of Section 78 of the Act with regard to tender opening of the subject tender.

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

FINAL ORDERS

109.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 dated 9th February 2026 and filed on even date be and is hereby dismissed.

B. The Respondents are hereby directed to proceed with the procurement proceedings in Tender No.

KP1/9A.2/OT/003/NM/25-26 for Provision of Roads/Pavement Opening/Cutting, Ducting and Reinstatement Services in accordance with the Constitution, the Act and Regulations 2020 noting the findings of the Board herein.

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

Dated at NAIROBI this 2nd Day of March 2026.



.....
PANEL CHAIRPERSON
PPARB



.....
SECRETARY
PPARB