

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 20/2026 FILED ON 5TH FEBRUARY 2026

BETWEEN

CANON SECURITY SERVICES KENYA LIMITED..... APPLICANT

VERSUS

THE ACCOUNTING OFFICER,

KAKAMEGA COUNTY

WATER AND SANITATION COMPANY.....1ST RESPONDENT

KAKAMEGA COUNTY S

WATER AND SANITATION COMPANY.....2ND RESPONDENT

Review against the decision of the Accounting Officer, Kakamega County Water and Sanitation Company in relation to Tender No. KACWASCO/SEC/00187/2025-2026 Provision of Security Services for Kakamega County Water and Sanitation Company.

BOARD MEMBERS PRESENT

| | | |
|---------------------------------|---|-------------------|
| Mrs. Njeri Onyango, FCI Arb, SC | - | Panel Chairperson |
| QS Hussein Were | - | Member |
| Ms. Jessica M'mbetsa | - | Member |

IN ATTENDANCE

Ms. Dokatu Godana - Holding Brief for Board Secretary

PRESENT BY INVITATION

APPLICANT **CANON SECURITY SERVICES KENYA LIMITED**

Mr. Kabuthia Kamau Advocate, Kabuthia Kamau & Associates
Advocates

RESPONDENTS **THE ACCOUNTING OFFICER,
KAKAMEGA COUNTY WATER AND
SANITATION COMPANY
KAKAMEGA COUNTY WATER AND
SANITATION COMPANY**

Mr. Wabuko Advocate, Kakamega County Water and
Sanitation Company

Ms. Achiono Advocate, Kakamega County Water and
Sanitation Company

Mr. Muganda Advocate, Kakamega County Water and
Sanitation Company

OTHER BIDDERS

DALIK SECURITY SERVICES LIMITED

Mr. Songa

Advocate, Derrick & Smith Law LLP

PAPATON SECURITY SERVICES LIMITED

Mr. Timothy Mbaka

Advocate, Omwando Mbaka & Company
Advocates

BACKGROUND OF THE DECISION

The Tendering Process

1. The Kakamega County Water and Sanitation Company (hereinafter referred to as "the Procuring Entity") invited eligible tenderers to submit bids for Tender No. KACWASCO/SEC/00187/2025-2026 Provision of Security Services for Kakamega County Water and Sanitation Company (hereinafter referred to as "the subject tender"). The subject tender was duly advertised in the *Standard* newspaper of 24th September 2025, wherein prospective bidders were directed to access and download the tender documents from the Procuring Entity's official website. The tender was initially scheduled to close and be opened on 7th October 2025; however, the closing and opening dates were subsequently extended to 13th October 2025.

Submission of Bids and Tender Opening

2. According to the Tender Opening Minutes dated 13th October 2025, submitted to the Public Procurement Administrative Review Board (hereinafter referred to as "the Board") as part of the confidential documents pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act"), a total of five (5) tenders were received in response to the subject tender. The tenders received were recorded as follows:

| Bid No. | Name of Bidder |
|----------------|-----------------------------|
| 1. | Canon Security Services Ltd |
| 2. | Dalik Security Services Ltd |
| 3. | Lindum Systems Ltd |
| 4. | Papaton Security Ltd |
| 5. | Chakra Security |

Evaluation of Tender

3. According to the Evaluation Report dated 17th November 2025 (hereinafter referred to as "the 1st Evaluation Report"), the Tender Evaluation Committee (hereinafter referred to as "the Evaluation Committee") convened to evaluate the tenders submitted. The evaluation process was undertaken in three stages, as set out below:

- i. Preliminary Evaluation;

- ii. Technical Evaluation
- iii. Financial Evaluation.

1st Preliminary Evaluation

- 4. At the Preliminary Evaluation stage, the Evaluation Committee was required to assess the tenders against the criteria set out at page 33 of the blank Tender Document. Any tender that failed to satisfy any of the mandatory requirements at this stage was to be declared non-responsive.
- 5. Upon completion of the Preliminary Evaluation, three tenders, among them the 1st Interested Party's tender, were found to be non-responsive and were consequently disqualified from further consideration. Two tenders, including those of the Applicant and Dalik Security Services Limited, were found to be responsive and accordingly advanced to the Technical Evaluation stage.

1st Technical Evaluation

- 6. At the Technical Evaluation stage, the Evaluation Committee assessed the tenders for compliance with the technical requirements outlined at pages 33 to 35 of the blank Tender Document. To qualify for progression to the Financial Evaluation stage, a tender was required to attain a minimum technical score of seventy percent (70%).

7. Upon conclusion of the Technical Evaluation stage, all tenders attained scores exceeding the minimum required technical score of seventy percent (70%). Accordingly, all the tenders were advanced to the Financial Evaluation stage.

1st Financial Evaluation

8. At the Financial Evaluation stage, the Evaluation Committee was required to assess the tenders in accordance with the criteria set out at page 35 of the Tender Document, which included determining the lowest evaluated bidder whose quotation fell within the approved budget.
9. Upon conclusion of the Financial Evaluation, the Evaluation Committee ranked the bidders and determined that the lowest responsive evaluated bidder was Dalik Security Services Limited with a tender sum of KES 11,712,002.16.

1st Evaluation Committee's Recommendation

10. The Evaluation Committee recommended award of the subject tender to Dalik Security Services Limited, having been determined to be the lowest responsive evaluated bidder, at a total sum of KES 11,712,002.16 subject to due diligence.

1st Due diligence

11. According to a Due Diligence Report dated 17th November 2025 (hereinafter referred to as 'the Due Diligence Report'), the Evaluation Committee conducted due diligence on Dalik Security Services Limited. The outcome confirmed that Dalik Security Services Limited possessed the requisite technical capacity to provide the service.

1st Professional Opinion

12. In a Professional Opinion dated 18th November 2025 (hereinafter referred to as "the 1st Professional Opinion"), the Procuring Entity's Procurement Manager, Mr. Edwin Kweyu, reviewed the procurement process, including the evaluation of the tenders, and agreed with the Evaluation Committee's recommendations to award the subject tender to Dalik Security Services Limited. The Professional Opinion was subsequently approved by the 1st Respondent, on the 19th November 2025.

1st Notification of Award

13. The tenderers were notified of the outcome of the evaluation for the subject tender through letters dated 1st December 2025.

REQUEST FOR REVIEW NO. 115 OF 2025

14. On 15th December 2025, the Applicant, through the firm of Kabuthia Kamau & Associates Advocates, filed a Request for Review, accompanied by a Supporting Affidavit Review sworn on 11th December 2025 by Joseph Gichungu Macharia, the Applicant's Director (hereinafter collectively referred to as "the Request for Review No. 115 of 2025"), seeking the following reliefs:

a. That the decision of the Accounting Officer of the procuring entity in the procurement proceedings with respect to Tender Number KACWASCO/SEC/000187/2025-2026 – Provision of Security Services for Kakamega County Water and Sanitation Company, particularly the decision to issue a Notification of Intention to Award the Tender to the 1st Interested Party, is hereby declared unlawful and thereby set aside.

b. That Tender Number KACWASCO/SEC/000187/2025-2026 – Provision of Security Services for Kakamega County Water and Sanitation Company be awarded to the Applicant being now the most responsive bidder in conformity with the Provisions of the Law and in conformity with the evaluation criteria set out in the Tender documents.

c. In the alternative and without prejudice to prayer No. 2 above, the procuring entity do property and correctly evaluate the bids submitted in respect of Tender Number KACWASCO/SEC/000187/2025-2026 – Provision of Security Services for Kakamega County Water and Sanitation Company in conformity with the law and the Tender Documents and using objective, transparent evaluation criteria.

d. The Applicant be awarded costs of the present review proceedings.

e. This Honorable Board be pleased to issue such further or other orders as it may deem fit.

15. On 5th January 2026, the Board in exercise of the powers conferred upon it under the Act, issued the following orders in respect of Request for Review No. 115 of 2025:

i. The Notice of Preliminary Objection dated 29th December 2025 be and is hereby dismissed;

ii. The Letters of Notification of Intention to Award dated 1st December 2025, addressed to the bidders, including the Applicant and the 1st and 2nd Interested Parties, in respect

of Tender No. KACWASCO/SEC/00187/2024-2025 Provision of Security Services for Kakamega County Water and Sanitation Company, are hereby nullified and set aside.

iii. The Accounting Officer of the Kakamega County Water and Sanitation Company is hereby directed to reconvene the Evaluation Committee and conduct a fresh evaluation of the bids, strictly on the basis of the status of the bids as at 13th October 2025. The fresh evaluation shall be completed within twenty-one (21) days from the date of this decision and shall be undertaken in strict compliance with the provisions of the Constitution, the Public Procurement and Asset Disposal Act, the Regulations, and the tender documents, while taking into account the findings and directions contained in this decision as well as the findings made by the Board in Request for Review No. 113 of 2025, Papaton Security Services Limited vs. the 1st and 2nd Respondents and Dalik Security Services Limited, dated 24th December 2025; and

iv. Each party shall bear its own costs of the proceedings.

RE-EVALUATION

16. According to the Evaluation Report dated 22nd January 2026 (hereinafter referred to as “the 2nd Evaluation Report”), the Tender Evaluation Committee reconvened for purposes of re-evaluating the tenders that had been submitted in respect of the subject procurement.

2nd Preliminary Evaluation

17. At the Preliminary Evaluation stage, the Evaluation Committee was required to assess the tenders against the criteria set out at page 33 of the blank Tender Document. Any tender that failed to satisfy any of the mandatory requirements at this stage was to be declared non-responsive.
18. Upon completion of the Preliminary Evaluation, the Board notes that four (4) tenders were determined to be non-responsive and were, therefore, disqualified from further consideration. Only one tender, the Applicant’s tender, was found to be responsive and was accordingly advanced to the Technical Evaluation stage.

2nd Technical Evaluation

19. At the Technical Evaluation stage, the Evaluation Committee assessed the tenders for compliance with the technical requirements outlined at pages 33 to 35 of the blank Tender Document. To qualify for progression to the Financial Evaluation stage, a tender was required to attain a minimum technical score of seventy percent (70%).

20. Upon conclusion of the Technical Evaluation stage, the Applicant's tender attained a score exceeding the minimum required technical score of seventy percent (70%). Accordingly, it was advanced to the Financial Evaluation stage.

2nd Financial Evaluation

21. At the Financial Evaluation stage, the Evaluation Committee was required to assess the tenders in accordance with the criteria set out at page 35 of the Tender Document, which included determining the lowest evaluated bidder whose quotation fell within the approved budget.
22. Upon conclusion of the Financial Evaluation, the Evaluation Committee determined that the lowest responsive evaluated bidder was the Applicant with a tender sum of KES 12,740,094.

2nd Evaluation Committee's Recommendation

23. The Evaluation Committee recommended award of the subject tender to Canon Security Services Limited, having been determined to be the lowest responsive evaluated bidder, at a total sum of KES 12,740,094 subject to due diligence.

2nd Professional Opinion

24. In a Professional Opinion dated 26th January 2026 (hereinafter referred to as “the 2nd Professional Opinion”), the Procuring Entity’s Procurement Manager, Mr. Edwin Kweyu, reviewed the procurement process, including the evaluation of the tenders. He noted that the budget for the subject tender was KES 12,000,000.00, while the recommended bidder quoted a price of KES 12,740,094, which exceeded the budget. The Procurement Manager did not make any specific recommendation but submitted the 2nd Professional Opinion to the Accounting Officer for a decision on the award.
25. On 26th January 2026, the 1st Respondent rejected the 2nd Professional Opinion, cancelled the subject tender, and directed that a fresh procurement process be initiated pursuant to Section 63(1)(b) of the Act. The Respondent noted that the cancellation was necessitated by the fact that the lowest responsive bidder’s price exceeded the approved budget.

2nd Notification of Award

26. The tenderers were notified of the outcome of the evaluation for the subject tender through letters dated 26th January 2026.

REQUEST FOR REVIEW NO. 20 OF 2026

27. On 5th February 2026, the Applicant, through the firm of Kabuthia Kamau & Associates Advocates, filed an undated Request for Review, accompanied by a Supporting Affidavit Review sworn on 5th February 2026 by Joseph Gichungu Macharia, the Applicant's Director (hereinafter collectively referred to as "the Request for Review"), seeking the following reliefs:

- i. That the decision of the Accounting Officer of the procuring entity in the procurement proceedings with respect to Tender Number KACWASCO/SEC/000187/2025-2026 – Provision of Security Services for Kakamega County Water and Sanitation Company, particularly the decision to issue a Notification of Cancellation of the Tender to the Applicant, is hereby declared unlawful and thereby set aside.*
- ii. That Tender Number KACWASCO/SEC/000187/2025-2026 – Provision of Security Services for Kakamega County Water and Sanitation Company be awarded to the Applicant being now the most responsive bidder in conformity with the Provisions of the Law and in conformity with the evaluation criteria set out in the Tender documents, subject to Competitive Negotiations.*
- iii. In the alternative and without prejudice to prayer No. B above, the procuring entity do engage the Applicant on a*

competitive negotiation process in respect of Tender Number KACWASCO/SEC/000187/2025-2026 – Provision of Security Services for Kakamega County Water and Sanitation Company in conformity with the Section 131 of the Act, findings of the Decision on Review Application No 115 of 2025, and all other provisions of the law and the Tender Documents.

- iv. The Applicant be awarded costs of the present review proceedings.***
- v. This Honourable Board be pleased to issue such further or other orders as it may deem fit.***

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

29. On 10th February 2026, the Respondents filed their Memorandum of Response, together with a Statement by Mr. Edwin Kweyu Livweje and a Notice of Preliminary Objection, all dated 9th February 2026. On the same date, the Respondents also submitted the confidential documents to the Board in compliance with Section 67(3)(e) of the Act.
30. On 16th February 2026, the Applicant filed a Reply to Memorandum of Response dated 13th February 2026.
31. On 16th February 2026, Dalik Security Services Limited, one of the bidders, hereinafter referred to as the 1st Interested Party, through the firm of Derrick & Smith Law LLP, filed a Notice of Appointment of Advocates dated the same day.
32. On 16th February 2026, the Board Secretary issued a Hearing Notice dated the same day to the parties, notifying them that the hearing of the Request for Review would be held virtually on 17th February 2026 at 2:00 p.m. via the provided link.
33. When the Board convened for hearing on 17th February 2026, the respective Advocates appeared for the parties. Two bidders, Dalik Security Services Limited (1st Interested Party) and Papaton Security Services Limited (hereinafter referred to as the 2nd Interested Party), though not joined as parties in the Request for Review, attended the hearing through

their respective Advocates. Counsel for the two Interested Parties applied for an adjournment to enable them to respond to the Request for Review. Counsel for the Applicant and the Respondents did not object to the application, while Counsel for the Respondents sought corresponding leave to respond to any pleadings that would be filed by the Interested Parties.

34. Upon considering the application for adjournment, the Board directed that the Interested Parties be granted leave to respond to the Request for Review. Leave was equally extended to the Applicant and the Respondents to respond to any pleadings that would be filed by the two Interested Parties. The hearing was accordingly rescheduled to 20th February 2026 at 9:30 a.m.
35. On 18th February 2026, the 1st Interested Party filed a Memorandum of Response, together with a Statement by Mr. Abdi Yussuf Noor, its Director, both dated the same day.
36. On 19th February 2026, the 2nd Interested Party, through the firm of Omwando Mbaka & Company Advocates, filed a Notice of Appointment of Advocates dated 18th February 2026, together with a Memorandum of Response, a Statement by Ms. Nancy Khasoha Kamusienyi, and a Notice of Preliminary Objection, all dated 18th February 2026.

37. On 19th February 2026, the Respondents filed a Further Memorandum of Response dated the same day.
38. When the Board convened for hearing on 20th February 2026, the respective Advocates appeared for the parties. The Board perused the filed documents and inquired whether service of the same had been effected on all other parties. The Advocates confirmed that service had been duly carried out. The Board then allocated time for the Advocates to present and highlight their respective submissions.

PARTIES' SUBMISSIONS

Applicant's Submissions

39. The Applicant's Counsel submitted that the Notices of Preliminary Objection raised by the Respondents and the 2nd Interested Party are devoid of merit. Counsel argued that the present Request for Review is not *res judicata* as the parties in this matter are different from those in PPARB Application No. 115 of 2025 and, further, that the issues raised herein are distinct. It was contended that whereas PPARB Application No. 115 of 2025 revolved around compliance with a NITA registration certificate, the instant Request concerns compliance with Sections 63, 131 and 132 of the Act, which issues did not arise in the previous proceedings.

40. On the question of jurisdiction under Section 167(4)(b) of the Act, Counsel submitted that this Board is properly seized of the matter as the Applicant seeks enforcement and compliance with the Board's decision rendered in PPARB Application No. 115 of 2025.
41. Counsel submitted that following the Notification of Intention to Award dated 1st December 2025, in which the Applicant was indicated as the second most responsive evaluated bidder, the Applicant lodged PPARB Application No. 115 of 2025. In its decision dated 5th January 2026, the Board set aside the said notification and directed the 1st Respondent to reconvene the Evaluation Committee and conduct a fresh evaluation strictly on the basis of the status of the bids as at 13th October 2025, in compliance with the law and the tender document, and taking into account the findings in that decision.
42. The Applicant's Counsel further submitted that in paragraph 100 of the decision in PPARB Application No. 115 of 2025, this Board expressly addressed the issue of budgetary allocation and competitive negotiations under Sections 131 and 132 of the Act, holding that those provisions could only be invoked after completion of a proper evaluation and that the Respondents would be at liberty to invoke them, if necessary, following the fresh evaluation.

43. Counsel submitted that upon completion of the fresh evaluation, the Respondents issued a Notification of Cancellation of Tender dated 26th January 2026 on the ground of inadequate budgetary provision, stating that the lowest evaluated bidder had quoted above the approved budget for the 2025/2026 financial year, but without disclosing the identity of that bidder. It was argued that the issue of budget had already been canvassed and pronounced upon in PPARB Application No. 115 of 2025 and that the Respondents, having discovered that the lowest evaluated bidder was above budget, were obligated to invoke competitive negotiations pursuant to Sections 131 and 132 of the Act rather than cancel the tender.
44. The Applicant's Counsel submitted that although the Applicant's financial bid of KES 12,740,094/= exceeded the approved budget of KES 12,000,000/=, the excess was only 6.17%, well within the statutory threshold of twenty-five percent (25%) contemplated under Section 131(c) as read together with Section 132(1)(b), (2), (3), (4) and (5) of the Act. It was therefore contended that the Procuring Entity was required to consider and undertake competitive negotiations before resorting to cancellation. The failure to do so was termed a violation of Sections 131 and 132 of the Act and a direct disregard of the Board's express directions in its decision of 5th January 2026.
45. Counsel further argued that the cancellation of the tender without exhausting the option of competitive negotiations amounts to an unlawful and premature termination contrary to established jurisprudence of this

Board. Reliance was placed on ***PPARB Review Number 135 of 2020 The Copy Cat Limited vs Accounting Officer Kenya Post Office Savings Bank and Kenya Post Office Savings Bank***, where the Board emphasized that termination of procurement proceedings should be a measure of last resort after all options under the Act have been exhausted. Similar reliance was placed on ***PPARB Review Number 119 of 2020 Rhombus Construction Company Limited vs Accounting Officer Kenya Ports Authority and Kenya Port Authority***, in which the Board underscored the utility of competitive negotiations in saving time and public resources.

46. Counsel further submitted that the foregoing position was upheld by the High Court in ***Accounting Officer, Kenyatta International Convention Centre & another vs Public Procurement Administrative Review Board; Paramax Cleaning Services Limited & another (Interested Parties) [2025] KEHC 6031 (KLR)***, where the Court affirmed the legality of engaging in competitive negotiations within budgetary allocation and rejected attempts to challenge such directions after partial compliance.
47. The Applicant's Counsel also contended that the failure to disclose the name of the lowest evaluated bidder in the Notification of Cancellation offended the principles of transparency, fairness, equity and competition under Article 227 of the Constitution.

48. On the powers of the Board, Counsel submitted that under Section 173(a), (b) and (c) of the Act, this Board enjoys wide discretionary and residual powers, including the power to direct the doing, redoing or undoing of acts by the Accounting Officer. It was argued that the Board's powers are not merely managerial but are intended to achieve substantive justice in procurement processes. Counsel further submitted that the Board, acting as an appellate and specialized statutory tribunal, possesses inherent jurisdiction to extend the validity period of the tender and to direct the Procuring Entity to engage in competitive negotiations with the Applicant.
49. Counsel submitted that the decision to cancel the tender was erroneous, unlawful and prejudicial to the Applicant, who, according to Counsel, was the most responsive evaluated bidder, and that the cancellation contravened the Act, the Constitution, and the express findings and directions of this Board in PPARB Application No. 115 of 2025.

Respondents' Submissions

50. The Respondents' Counsel submitted that the present Request for Review is *res judicata*, the core issue regarding the invocation and applicability of Sections 131 and 132 of the Act having been conclusively determined by this Board in PPARB Request for Review No. 115 of 2025. Counsel argued that in its decision in PPARB Application No. 115 of 2025, the Board expressly held that the Respondents were at liberty to invoke Sections 131

and 132 of the Act, if necessary, after conducting a fresh evaluation of the bids. It was therefore submitted that the Applicant is seeking to re-litigate matters already finally determined between the same parties, contrary to Section 7 of the Civil Procedure Act and the doctrine of finality. In that regard, Counsel contended that this Board lacks jurisdiction to reopen or sit on appeal over its own concluded findings.

51. The Respondents' Counsel further submitted that, pursuant to the Board's directions and Section 46 of the Act, the Tender Evaluation Committee reconvened and conducted a fresh evaluation strictly in accordance with Section 79(1) and (2) of the Act. Upon re-evaluation, it was established that the lowest evaluated bidder had quoted a price above the Procuring Entity's approved budget for the Financial Year 2025-2026. Consequently, prior to any award, the Accounting Officer terminated the procurement proceedings pursuant to Section 63(1)(b) of the Act on account of inadequate budgetary provision. Counsel maintained that the cancellation was lawful, justified, and expressly sanctioned by statute.

52. On the issue of negotiations, the Respondents' Counsel submitted that the relevant provisions of the Act employ permissive language and confer discretion upon the Accounting Officer. It was argued that there is no mandatory duty to negotiate and that the Accounting Officer cannot be compelled to invoke Sections 131 and 132 of the Act absent an express statutory obligation. Counsel relied on ***Municipal Council of Mombasa vs Republic & Umoja Consultants Ltd [2002] eKLR*** for the

proposition that where a statute grants discretion, a court or tribunal cannot dictate how that discretion should be exercised unless illegality, irrationality, or procedural impropriety is demonstrated.

53. Further reliance was placed on ***Republic vs Public Procurement Administrative Review Board & 2 Others ex parte Numerical Machining Complex Ltd [2017] eKLR***, where the High Court affirmed that procuring entities are entitled to exercise discretion in procurement matters and that such discretion should not be interfered with unless exercised unlawfully or in bad faith. Counsel submitted that the Accounting Officer exercised his discretion lawfully, reasonably, and within the confines of the Act.
54. The Respondents' Counsel also distinguished between award and cancellation, submitting that the disclosure obligations under Sections 86 and 87 of the Act arise only after evaluation and award. In contrast, termination under Section 63 of the Act occurs prior to award and therefore no bidder attains the status of a successful or lowest evaluated bidder capable of triggering disclosure rights.
55. Counsel further submitted that, in any event, the procurement process is legally spent due to lapse of the tender validity period. The bids were opened on 13th October 2025 and were valid for 120 days, expiring on 10th February 2026. Upon expiry, the tender ceased to exist in law and could

not confer enforceable rights or sustain review proceedings. In support of that position, reliance was placed on ***Republic vs Chairperson, Public Procurement Administrative Review Board & 2 Others; Authority & 2 Others ex parte Rhombus Construction Co. Ltd (Interested Party) [2022] KEHC 1 (KLR)***, where the Court held that once tender validity lapses, the procurement dies a natural death and cannot be revived.

56. Counsel further cited ***Republic vs Public Procurement Administrative Review Board; Consortium of GBM Projects Ltd & ERG Insaat Ticaret Ve Sanayi AS (Interested Party) ex parte National Irrigation Board [2020] KEHC 9232 (KLR)*** for the holding that the Review Board falls into jurisdictional error where it entertains or extends a tender validity period that has already lapsed. It was thus submitted that any order of reinstatement or award after expiry of validity would be unlawful and contrary to Section 87 of the Act.

57. As a threshold issue, the Respondents' Counsel raised a Preliminary Objection challenging the jurisdiction of the Board under Section 167(4)(b) of the Act. Counsel submitted that the impugned decision concerns termination pursuant to Section 63(1)(b) of the Act and that Section 167(4)(b) expressly excludes from review any termination undertaken in accordance with Section 63 of the Act. In that regard, reliance was placed on ***Parliamentary Service Commission vs Public Procurement Administrative Review Board; Arprim Consultants (Interested***

Party) [2021] KEHC 9385 (KLR), where the High Court held that once it is demonstrated that termination was conducted in accordance with Section 63 of the Act and the statutory circumstances were satisfied, the jurisdiction of the Review Board is ousted.

58. The Respondents' Counsel further submitted that the termination herein strictly complied with Section 63(1)(b) of the Act, as the lowest evaluated bid exceeded the approved budget and there was no lawful allocation to sustain the award. It was contended that the Procuring Entity could not lawfully proceed to award a contract in excess of the approved budget without violating the constitutional principles on prudent use of public resources and the statutory obligation to ensure value for money. Reliance was placed on ***Republic vs Public Procurement Administrative Review Board; Peesam Limited & another (Exparte Applicants); Accounting Officer Kenya Revenue Authority & another (Interested Parties) [2025] KEHC 1866 (KLR)***, where the High Court held that procurement cannot logically proceed in the face of a budgetary deficit and that a decision compelling continuation in such circumstances would be incapable of implementation.

1st Interested Party's Submissions

59. Counsel submitted that the Board lacks jurisdiction to entertain this Request for Review, relying on Section 167(4)(b) of the Act. They argued

that the procurement subject of the Request for Review was lawfully terminated pursuant to Section 63 of the Act, which has the legal effect of bringing the procurement proceedings to an end. Upon termination, all bids lapse, and no bidder retains an enforceable legal expectation capable of protection under Section 167 of the Act.

60. Regarding the Board's powers under Section 173 of the Act, Counsel submitted that the reliefs sought by the Applicant exceed the lawful powers of the Board. While Section 173 of the Act empowers the Board to annul procurement proceedings, give directions, or substitute the decision of an accounting officer, such powers must be exercised within the framework of the procurement method adopted. Counsel emphasized that the Board cannot conduct a fresh evaluation or convert an open tender into a negotiated procurement mechanism in circumstances not permitted under Sections 131 and 132 of the Act. The statutory mandate to evaluate bids and determine the successful bidder rests solely with the procuring entity, acting strictly in accordance with the tender document and the Act.
61. On the issue of selective negotiation, Counsel submitted that the procurement was conducted through the open tender method, and that competitive negotiations under Section 131 are permitted only in narrowly circumscribed circumstances. They argued that these provisions do not create an entitlement for any bidder to demand negotiations following an open tender, and that the discretion to invoke competitive negotiation

rests exclusively with the Accounting Officer within the strict confines of the Act.

62. Counsel emphasized that public procurement must comply with Article 227(1) of the Constitution, requiring a system that is fair, equitable, transparent, competitive, and cost-effective. Fairness is owed to all bidders collectively, not to one bidder in isolation. Counsel submitted that granting reliefs that would secure a commercial advantage for the Applicant would be manifestly unfair, and that no legitimate expectation can arise in the absence of a concluded procurement process or notification of award.

2nd Interested Party's Submissions

63. Counsel submitted that the application offends the mandatory provisions of Section 167(4)(b) of the Act, which oust the jurisdiction of this Honourable Board. He further submitted that the application violates the principle of finality in litigation, and therefore the Applicant should not be allowed to re-litigate the matter in pursuit of a more favourable outcome. In addition, Counsel noted that Sections 131 and 132 of the Act do not obligate a Procuring Entity to engage in competitive negotiations, as the language used is permissive, employing the word "may" rather than "shall".

Applicant's Rejoinder

64. In rejoinder, Counsel for the Applicant submitted that the orders issued in PPARB Application No. 115 of 2025 remain binding and must be complied with.

BOARD'S DECISION

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

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 the following sub-issues:

i. Whether the present Request for Review is barred by the doctrine of *res judicata*.

ii. Whether the Board has jurisdiction over the present Request for Review pursuant to section

167(4)(b) of the Act on account of the termination of the subject tender.

B. Whether the Respondents complied with the findings and directives of the Board issued in PPARB Application No. 115 of 2025.

C. Whether the procurement process relating to the subject tender has lapsed and is therefore legally spent by virtue of the expiry of the tender validity period.

D. What appropriate orders should issue in the circumstances.

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

66. In response to the Request for Review, the Respondents and the Interested Parties contended that the matter is *res judicata* and that the termination of the tender was lawful. They further submitted that, for these reasons, the Board lacks jurisdiction to entertain the Request for Review pursuant to Section 167(4)(b) of the Act.
67. On the part of the Applicant, Counsel contended that the Request for Review is not *res judicata* and that the termination of the subject tender

was improper; consequently, the Board is properly seized of jurisdiction to entertain the dispute.

68. The effect of the foregoing issues, if established, would be to deprive the Board of jurisdiction to entertain the present Request for Review. Accordingly, given their preliminary and jurisdictional nature, the issues must be addressed as a matter of priority. The Board is guided by the well-established principle that adjudicative bodies may only determine matters within their jurisdiction. Where a question of jurisdiction arises, it must be resolved as a threshold issue before any further proceedings. Jurisdiction is the cornerstone of adjudication, and in its absence, a court or a tribunal lacks the legal authority to proceed.

69. In ***Kenya Hotel Properties Limited v Attorney General & 5 others (Petition 16 of 2020) [2022] KESC 62 (KLR) (Civ) (7 October 2022)***, the Supreme Court reaffirmed that jurisdiction is the cornerstone of any judicial or quasi-judicial process. Where a question of jurisdiction is raised, it must be addressed and resolved at the earliest stage of the proceedings.

On our part, and this is trite law, jurisdiction is everything as it denotes the authority or power to hear and determine judicial disputes. It was this court's finding in In [R v Karisa Chengo \[2017\] eKLR](#), that jurisdiction is that which grants a court authority to decide matters by holding;

"By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics...where a court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given."

70. This Board is a creature of statute, established under 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.

71. Section 28 of the Act outlines the functions of the Board as follows:

The functions of the Review Board shall be – reviewing, hearing and determining tendering and asset disposal disputes; and to perform any other function conferred to the Review Board by this Act, Regulations or any other written law.

72. The jurisdiction of this Board is established under Part XV – Administrative Review of Procurement and Disposal Proceedings. Specifically, Section 167 of the Act defines the matters that can and cannot be brought before the Board, while Sections 172 and 173 outline the Board's powers in handling such proceedings.
73. In light of the foregoing, the Board is compelled to examine its jurisdiction with reference to the preliminary issues raised by the Respondents and the Interested Parties.

Whether the present Request for Review is barred by the doctrine of res judicata.

74. The Respondents' Counsel submitted that the present Request for Review is *res judicata*, the core issue regarding the invocation and applicability of Sections 131 and 132 of the Act having been conclusively determined by this Board in PPARB Request for Review No. 115 of 2025. Counsel argued

that in its decision in PPARB Application No. 115 of 2025, the Board expressly held that the Respondents were at liberty to invoke Sections 131 and 132 of the Act, if necessary, after conducting a fresh evaluation of the bids. It was therefore submitted that the Applicant is seeking to re-litigate matters already finally determined between the same parties, contrary to Section 7 of the Civil Procedure Act and the doctrine of finality. In that regard, Counsel contended that this Board lacks jurisdiction to reopen or sit on appeal over its own concluded findings.

75. The 1st Interested Party's Counsel submitted that the Request for Review violates the principle of finality in litigation, and therefore the Applicant should not be allowed to re-litigate the matter in pursuit of a more favourable outcome.
76. In response to the foregoing, the Applicant's Counsel submitted that the present Request for Review is not *res judicata* as the parties in this matter are different from those in PPARB Application No. 115 of 2025 and, further, that the issues raised herein are distinct. It was contended that whereas PPARB Application No. 115 of 2025 revolved around compliance with a NITA registration certificate, the instant Request concerns compliance with Sections 63, 131 and 132 of the Act, which issues did not arise in the previous proceedings.
77. Section 7 of the Civil Procedure Act provides as follows:

"No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."

78. The above provision stipulates that a court, tribunal, or any board adjudicating a dispute is precluded from hearing a case or issue that has already been conclusively determined in a prior case involving the same parties, or their representatives, and relating to the same subject matter, provided the earlier case was heard by a court or body with the legal authority to make such a determination.
79. In the case of ***Attorney General & Another v. ET (2012) eKLR***, it was held that:

"The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in form of a new cause of action which has been resolved by a court of competent"

jurisdiction. In the case of Omondi s NBK & Others (2001) EA 177 the court held that "parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit".In that case the court quoted Kuloba J, (as he then was) in the case of Njanju vs Wambugu and another Nairobi HCC No. 2340 of 1991 (unreported) where he stated: If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift in every occasion he comes to court, then I do not see the use of doctrine of res judicata.....".

80. The above decision underscores the importance of courts being vigilant against attempts by litigants to circumvent the doctrine of *res judicata* by presenting previously decided issues as new claims or by introducing additional parties or slightly modified causes of action. It emphasizes that the true test is whether the plaintiff is, in essence, seeking the same remedy for a matter that has already been adjudicated by a competent court.
81. Turning to the present Request for Review, the main question for determination is whether the Applicant is merely seeking to apply a cosmetic modification to the current application, in light of the fact that the Board had already determined the matter in PPARB Application No. 115 of 2025.

82. The Board notes that in PPARB Application No. 115 of 2025, the Applicant challenged the evaluation process, particularly the manner in which the 1st Interested Party was declared the lowest responsive bidder. The Board further notes that, as a consequence thereof, it ordered that the Letters of Notification of Intention to Award dated 1st December 2025, issued to the bidders in respect of the subject tender, be nullified and set aside. The main issue in the said proceedings was in deed whether or not the Third Party therein had been properly evaluated in terms of the criteria for evaluation contained in the Tender document. The issue of termination and competitive Negotiations were not litigated by the parties
83. The Board further ordered the 1st Respondent to reconvene the Evaluation Committee and conduct a fresh evaluation of the bids strictly on the basis of the status of the bids as at 13th October 2025. The fresh evaluation was to be completed within twenty-one (21) days from 5th January 2026, being the date when the decision in PPARB Application 115 of 2025 was delivered, and undertaken in strict compliance with the law and the provisions of the tender document, while taking into account the findings and directions contained in that decision as well as the findings made by the Board in PPARB Application No. 113 of 2025.
84. The Board notes that, following the foregoing orders, the Respondents conducted a fresh evaluation of the bids, which culminated in the

termination of the procurement proceedings in respect of the subject tender.

85. In determining whether the instant Request for Review is *res judicata*, the Board perused the same and notes that it challenges decision taken after the re-evaluation process. The Board finds that the re-evaluation of the bids, as so ordered, has not previously been the subject of litigation, at least before the Board. Further the very decision to terminate the proceedings is a fresh issue that arises that was not canvassed or determined in Application No 115 of 2026.
86. In view of the foregoing, the Board finds that the instant Request for Review is not *res judicata* and, to that extent, the Board is properly seized of jurisdiction to entertain the same. The Board shall accordingly proceed to determine the other preliminary jurisdictional issues.

Whether the Board has jurisdiction over the present Request for Review pursuant to section 167(4)(b) of the Act on account of the termination of the subject tender

87. The Respondents' Counsel submitted that Section 167(4)(b) expressly excludes from review any termination undertaken in accordance with Section 63 of the Act. In that regard, reliance was placed on ***Parliamentary Service Commission vs Public Procurement***

Administrative Review Board; Arprim Consultants (Interested Party) [2021] KEHC 9385 (KLR), where the High Court held that once it is demonstrated that termination was conducted in accordance with Section 63 of the Act and the statutory circumstances were satisfied, the jurisdiction of the Review Board is ousted.

88. The Respondents' Counsel further submitted that the termination herein strictly complied with Section 63(1)(b) of the Act, as the lowest evaluated bid exceeded the approved budget and there was no lawful allocation to sustain the award. It was contended that the Procuring Entity could not lawfully proceed to award a contract in excess of the approved budget without violating the constitutional principles on prudent use of public resources and the statutory obligation to ensure value for money. Reliance was placed on ***Republic vs Public Procurement Administrative Review Board; Peesam Limited & another (Exparte Applicants); Accounting Officer Kenya Revenue Authority & another (Interested Parties) [2025] KEHC 1866 (KLR)***, where the High Court held that procurement cannot logically proceed in the face of a budgetary deficit and that a decision compelling continuation in such circumstances would be incapable of implementation.
89. On the part of the 1st Interested Party, Counsel submitted that the Board lacks jurisdiction to entertain this Request for Review, relying on Section 167(4)(b) of the Act. Counsel argued that the procurement subject of the Request for Review was lawfully terminated pursuant to Section 63 of the

Act, which has the legal effect of bringing the procurement proceedings to an end. Upon termination, all bids lapse, and no bidder retains an enforceable legal expectation capable of protection under Section 167 of the Act.

90. On the part of the 2nd Interested Party, Counsel submitted that the Request for Review offends the mandatory provisions of Section 167(4)(b) of the Act, which oust the jurisdiction of this Honourable Board.
91. In responding to the above, the Applicant's Counsel submitted that the Board is properly seized of the matter as the Applicant seeks enforcement and compliance with the Board's decision rendered in PPARB Application No. 115 of 2025.
92. The Applicant's Counsel submitted that following the Notification of Intention to Award dated 1st December 2025, in which the Applicant was indicated as the second most responsive evaluated bidder, the Applicant lodged PPARB Application No. 115 of 2025. In its decision dated 5th January 2026, the Board set aside the said notification and directed the 1st Respondent to reconvene the Evaluation Committee and conduct a fresh evaluation strictly on the basis of the status of the bids as at 13th October 2025, in compliance with the law and the tender document, and taking into account the findings in that decision.

93. The Applicant's Counsel submitted that upon completion of the fresh evaluation, the Respondents issued a Notification of Cancellation of Tender dated 26th January 2026 on the ground of inadequate budgetary provision, stating that the lowest evaluated bidder had quoted above the approved budget for the 2025/2026 financial year, but without disclosing the identity of that bidder. It was argued that the issue of budget had already been canvassed and pronounced upon in PPARB Application No. 115 of 2025 and that the Respondents, having discovered that the lowest evaluated bidder was above budget, were obligated to invoke competitive negotiations pursuant to Sections 131 and 132 of the Act rather than cancel the tender.
94. The Applicant's Counsel submitted that although the Applicant's financial bid of KES 12,740,094/= exceeded the approved budget of KES 12,000,000/=, the excess was only 6.17%, well within the statutory threshold of twenty-five percent (25%) contemplated under Section 131(c) as read together with Section 132(1)(b), (2), (3), (4) and (5) of the Act. It was therefore contended that the Procuring Entity was required to consider and undertake competitive negotiations before resorting to cancellation. The failure to do so was termed a violation of Sections 131 and 132 of the Act and a direct disregard of the Board's express directions in its decision of 5th January 2026.
95. Counsel further argued that the cancellation of the tender without exhausting the option of competitive negotiations amounts to an unlawful

and premature termination contrary to established jurisprudence of this Board. Reliance was placed on ***PPARB Review Number 135 of 2020 The Copy Cat Limited vs Accounting Officer Kenya Post Office Savings Bank and Kenya Post Office Savings Bank***, where the Board emphasized that termination of procurement proceedings should be a measure of last resort after all options under the Act have been exhausted. Similar reliance was placed on ***PPARB Review Number 119 of 2020 Rhombus Construction Company Limited vs Accounting Officer Kenya Ports Authority and Kenya Port Authority***, in which the Board underscored the utility of competitive negotiations in saving time and public resources.

96. Counsel further submitted that the foregoing position was upheld by the High Court in ***Accounting Officer, Kenyatta International Convention Centre & another vs Public Procurement Administrative Review Board; Paramax Cleaning Services Limited & another (Interested Parties) [2025] KEHC 6031 (KLR)***, where the Court affirmed the legality of engaging in competitive negotiations within budgetary allocation and rejected attempts to challenge such directions after partial compliance.
97. We note that central to this issue is the question of termination and its effect on the Board's jurisdiction as provided under Section 167(4)(b) of the Act, which is reproduced below:

167. Request for a review

(1)....

(2)....

(3)....

(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.

98. We understand the above provision of the law to mean that certain matters in the procurement process are excluded from review. In particular, paragraph (b) focuses on the termination of a procurement or asset disposal in accordance with section 63 of the Act, meaning that once a procuring entity terminates a procurement or disposal process following the procedures set out in section 63, that decision cannot be challenged or subjected to review before the Board. The provision also clarifies that the choice of a procurement method (paragraph a) and situations where a contract is signed under section 135 (paragraph c) are similarly excluded from review.

99. Superior Courts in Kenya have consistently provided guidance on the interpretation of Section 167(4)(b) of the Act, particularly regarding the limitation of the Board's jurisdiction in matters involving the termination of tenders. Judicial precedents have clarified the extent to which the Board's authority is ousted when a procurement process is terminated under Section 63 of the Act.
100. In ***Nairobi High Court Judicial Review Misc. Application No. 390 of 2018; R v Public Procurement Administrative Review Board & Others Ex parte Kenya Revenue Authority***, the High Court affirmed that the Board has jurisdiction to first determine whether the preconditions for termination under Section 63 of the Act have been met before declining to hear the matter.

"33. A plain reading of Section 167(4) (b) of the Act 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..."

101. See also ***Nairobi High Court Judicial Review Misc. Application No. 117 of 2020; Parliamentary Service Commission v Public Procurement Administrative Review Board & Ors vs Aprim Consultants***

102. Drawing from the above judicial pronouncements, the Board has jurisdiction to first interrogate whether the preconditions for termination of a tender under Section 63 of the Act were met. Only upon satisfying ourselves that the termination was undertaken in strict compliance with the said preconditions can we decline jurisdiction. Where any of the preconditions are not met, we retain jurisdiction to hear and determine the Request for Review.
103. Section 63 of the Act provides for the termination of public procurement and asset disposal proceedings in the following terms:

63. Termination or cancellation of procurement and asset disposal Proceedings

(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)....

(b) inadequate budgetary provision;

(c) ...

(d) ...

(e) ...

(f) ...

(g) ...

(h) ...

(i) ...

(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.

104. We understand the above provision of the law to mean that the accounting officer of a procuring entity is legally empowered to terminate or cancel procurement or asset disposal proceedings at any stage before notification of award, provided that one or more of the specified grounds exist, including where there is inadequate budgetary provision. However, this power is not unfettered, as the accounting officer is required to comply with clear procedural obligations, namely: submitting a written report to the Public Procurement Regulatory Authority within fourteen days explaining the reasons for the termination, and notifying all tenderers within the same period, with such notice expressly stating the reason for termination.

105. From the foregoing, for an accounting officer of a procuring entity to validly terminate a procurement or asset disposal proceeding:
- 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 (hereinafter referred to as ‘the Authority’) 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.
106. On the one hand, the substantive requirements under section 63(1) of the Act oblige a procuring entity to specify the particular ground for terminating a tender and to provide the supporting facts justifying such termination. On the other hand, the procedural requirements, as set out under sections 63(2), (3), and (4) of the Act, include: (i) submitting a written report to the Authority within fourteen (14) days of the termination; and (ii) issuing termination notices to all participating tenderers within the same period, clearly stating the reasons for termination.

107. We shall now examine whether the Respondents complied with both the substantive and procedural requirements prescribed under Section 63 of the Act when terminating the procurement proceedings for the subject tender. We shall first consider the substantive requirements before proceeding to the procedural aspects.
108. The Board perused the termination letters dated 26th January 2026, which formed part of the confidential documents submitted pursuant to section 67(3)(e) of the Act. In particular, the Applicant's termination letter provided, in part, as follows:

...

Dear Sir/Madam

***RE: NOTIFICATION OF CANCELLATION FOR TENDER NO.
KACWASCO/SEC/000187/2025-2026 – PROVISION OF
SECURITY SERVICES FOR KAKAMEGA COUNTY WATER
AND SANITATION COMPANY***

The above subject matter refers.

As you are aware, the above Tender was advertised in the Standard newspaper on 24th September, 2025 and subsequently posted on our website. An addendum was issued on 29th September, 2025 where the Tender closing date was extended to 13th October, 2025.

The Evaluation exercise was successfully completed by 22nd January 2026 as was ordered by Public Procurement and Administrative Review Board (PPARB). The lowest evaluated bidder was however, established to have quoted above our approved budget for 2025/2026.

In view of the above and pursuant to Public Procurement and Asset Disposal Act 2015 section 63(1)(b), the Procurement entity has resolved to cancel the Tender reference above due to inadequate budgetary provision.

Yours faithfully,

SIGNED

Michael Ogol,

MANAGING DIRECTOR

109. A perusal of the above letter indicates that the subject tender was terminated on account of inadequate budgetary provision. The Board further notes that the stated reason falls within one of the grounds specified under section 63(1)(b) of the Act. Consequently, the question that arises is what the budget for the subject tender was, and whether, in the totality of the circumstances, the termination was justified.
110. In determining the budget set for the procurement proceedings of the subject tender, the Board perused the confidential documents as well as the pleadings and notes that the budget was KES 12,000,000.
111. The Board further notes that, in compliance with the orders in PPARB Application No. 115 of 2025, a fresh evaluation of the bids was conducted, resulting in the Applicant being found the lowest evaluated bidder with a quoted price of KES 12,740,094. Consequently, a 2nd Professional Opinion was prepared, and the 1st Respondent ordered the cancellation of the subject tender on account of inadequate budgetary provision.
112. The Board observes that, in PPARB Application No. 115 of 2025, it had noted that the Respondents should consider the option of conducting competitive negotiation in accordance with section 131 of the Act, which provides as follows:

131 Competitive Negotiations

An accounting officer of a procuring entity may conduct competitive negotiations as prescribed where—

(a) there is a tie in the lowest evaluated price by two or more tenderers;

(b) there is a tie in highest combined score points;

(c) the lowest evaluated price is in excess of available budget; or

(d) there is an urgent need that can be met by several known suppliers.

113. The Board understands the above section of the law as granting the accounting officer of a procuring entity limited and clearly defined circumstances under which competitive negotiations may be undertaken after evaluation of tenders. Specifically, the provision permits recourse to competitive negotiations where there is a tie in the lowest evaluated price, a tie in the highest combined technical and financial score, where the lowest evaluated price exceeds the available budget, or where there exists an urgent need capable of being met by several known suppliers.

114. In particular, with regard to subsection (c), the Board understands that competitive negotiations are justified where the lowest evaluated tender price surpasses the procuring entity's approved budget, thereby necessitating engagement with the lowest evaluated tenderer(s) to seek a reduction or adjustment of the price within the confines of the available budget, while safeguarding the principles of fairness, transparency, equity, and value for money. This provision therefore does not authorize arbitrary renegotiation, but rather provides a controlled mechanism to reconcile evaluated prices with budgetary constraints without automatically terminating the procurement process.
115. Turning to the instant Request for Review, the Board notes that the Respondents did not conduct any competitive negotiations. The Board further notes that the Respondents submitted that section 131 of the Act is not couched in mandatory terms, as it uses the word "may." Accordingly, the Respondents exercised their discretion and opted to terminate the tender rather than conduct competitive negotiations.
116. The Board notes that where the law vests discretion, such discretion must not be exercised capriciously. Discretion must be exercised judiciously guided by financial prudence and in public interest as well as the best interest of the public Institution. The tendering process involves public funds, and any discretion exercised by an Accounting Officer must promote the values in Article 227 of the Constitution, including cost effectiveness and also taking note of the guiding principles of Public procurement set

out in the Act. The Board observes that re-tendering incurs additional costs at the expense of public funds. Competitive negotiation, on the other hand, offers a potential means of saving public funds and is therefore an option that ought to be considered. Any exercise of discretion should take into account the possibility of avoiding the expenses associated with re-tendering.

117. The Board further notes that the Applicant quoted a price of KES 12,740,094, which is KES 740,094 above the budget of KES 12,000,000. This represents a variance of 6.167%, which falls within the 25% limit provided for under section 132 of the Act.

118. The Board did engage the Respondent's officer who was in attendance to get to know what was the situation on the ground noting that the previous Security contract had lapsed. The officer informed the Board that, at the moment, and having obtained approval from the PPRB, the Respondent had obtained temporary security services from a sister organization for a period of three months covering up to February, 2026. This in the mind of the Board brings into play some urgency and thus the need to act in a manner that would provide the Respondent with the needed security service at the earliest. This in our view would have been better achieved by a negotiation as provided for, other than a cancellation that would inevitably lead to a re-tender and further delay.

119. In view of the foregoing, the Board finds that the 1st Respondent did not exercise his discretion judiciously given the circumstances. The Board further finds that terminating the tender, when there was a viable alternative of concluding the tender proceedings, was not the most prudent course of action. Accordingly, the substantive requirements for termination under section 63 of the Act have not been satisfied.
120. Counsel for the 2nd Interested Party submitted that Competitive Negotiations can only come into play when there is a tie between several bidders. That position is erroneous. Any one of the circumstances set out under section 131 (a) to (d) on a stand- alone basis can sustain a determination to enter into negotiations.
121. Turning to the procedural aspect of the termination, the Board notes that the law requires, as noted above, that the Accounting Officer submit a written report to the Authority within fourteen (14) days of the termination, detailing the reasons for the decision. The Accounting Officer must also issue a written notice to all tenderers within the same fourteen (14)-day period, clearly communicating the reasons for the termination.
122. The Board first addresses the issue of the written report to the Authority. The Board notes that the Respondents submitted that the report was not furnished because the instant Request for Review was filed within the fourteen (14) days allotted for submission of the report. The Respondents further submitted that the filing of the Request for Review halted the

tendering process pursuant to section 168 of the Act, and, as a result, they were unable to submit the said report.

123. Section 168 of the Act provides as follows:

168. Notification of review and suspension of proceedings

Upon receiving a request for a review under **section 167**, the Secretary to the Review Board shall notify the accounting officer of a procuring entity of the pending review from the Review Board and the suspension of the procurement proceedings in such manner as may be prescribed.

124. The Board understands the above section of the law as imposing a mandatory procedural obligation upon the Secretary to the Review Board, upon receipt of a Request for Review under section 167 of the Act, to formally notify the accounting officer of the concerned procuring entity both of the existence of the pending review and of the automatic suspension of the procurement proceedings. The effect of this provision is to trigger an immediate statutory standstill of the procurement process, thereby preserving the subject matter of the dispute and preventing the procuring entity from taking further steps, such as contract signing or award implementation, until the Review Board renders its determination. The Board therefore understands section 168 as safeguarding the integrity

of the review process by ensuring that the proceedings before it are not rendered nugatory through continued procurement actions during the pendency of the review.

125. The Board notes that the obligation to provide a report is articulated in the following terms under section 63(2) of the Act:

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

126. The Board's understanding of Sections 63(2) and 168 of the Act is that the obligation to prepare and issue a written report under Section 63(2) is not extinguished merely because an order has been made suspending procurement proceedings under Section 168. We so hold because Section 168 operates to suspend ongoing procurement proceedings. However, where a procurement process has already been terminated, there are no subsisting proceedings capable of being suspended.

127. Further, Section 63(2) of the Act is triggered upon termination of a procurement process. Once termination has occurred, the duty to prepare a written report arises as a consequential statutory requirement. In such circumstances, there is no live procurement process capable of suspension under Section 168 of the Act, the proceedings having already come to an end by virtue of the termination.

128. Accordingly, the Board finds that the reason given by the Respondents for not issuing a written report to the Authority does not constitute a valid justification in the circumstances. The Board therefore finds that the Respondents failed to comply with the procedural requirements under section 63(2) of the Act.
129. Turning to the second procedural requirement of issuing a written notice to all tenderers within the fourteen (14)-day period, clearly communicating the reasons for the termination, the Board perused the confidential documents and notes that all tenderers were notified by letters dated 26th January 2026.
130. However, the Board notes that the Termination Letters ought to have contained greater specificity, particularly by identifying the responsive bidder or bidders whose quoted prices exceeded the approved budget. In the absence of such disclosure, it becomes unclear at what point the affected bidder would become aware that its quoted price was above the budgetary allocation. This information is especially critical in circumstances such as the present one, where the Procuring Entity elected not to undertake competitive negotiations.
131. By specifying the names of the responsive bidder or bidders whose quoted prices exceeded the approved budget, a Procuring Entity promotes transparency and ensures that the affected parties are placed in a position

to make informed decisions on whether to challenge the termination before the Board. The Board notes that Article 227 of the Constitution underscores transparency as one of the foundational principles governing public procurement in Kenya. In furtherance of that constitutional imperative, the Board finds it prudent that Procuring Entities ought to indicate, in the Termination Letters, the names of the responsive bidder or bidders whose quoted prices were above the approved tender budget.

132. In view of the foregoing, the Board finds that, notwithstanding the fact that the bidders were notified of the termination within the prescribed fourteen (14) days, the contents of the said Termination Letters fell short of the statutory threshold, particularly in so far as the promotion of transparency is concerned, as required under Article 227 of the Constitution.

133. In view of the foregoing, the Board concludes that the termination of the subject tender was not carried out in accordance with the law. Consequently, the Board is properly seized of jurisdiction to determine the merits of the instant Request for Review. The Board's jurisdiction has therefore not been ousted under section 167(4)(b) of the Act.

Whether the Respondents complied with the findings and directives of the Board issued in PPARB Application No. 115 of 2025

134. The Applicant's Counsel submitted that the Respondents failed to comply with the orders issued in PPARB Application No. 115 of 2025, as they terminated the subject tender instead of conducting competitive negotiations, as directed in the said decision of the Board.
135. On the part of the Respondents and the Interested Parties, they submitted that the orders issued in PPARB Application No. 115 of 2025 were complied with, and that compliance led to the decision to terminate the subject tender.
136. In determining this issue, the Board perused the decision in PPARB Application No. 115 of 2025 and notes that the following orders were issued therein:

- 1. The Notice of Preliminary Objection dated 29th December 2025 be and is hereby dismissed.***

- 2. The Letters of Notification of Intention to Award dated 1st December 2025, addressed to the bidders, including the Applicant and the 1st and 2nd Interested Parties, in respect of Tender No. KACWASCO/SEC/00187/2024-2025 Provision of Security Services for Kakamega County Water and Sanitation Company, are hereby nullified and set aside.***

3. The Accounting Officer of the Kakamega County Water and Sanitation Company is hereby directed to reconvene the Evaluation Committee and conduct a fresh evaluation of the bids, strictly on the basis of the status of the bids as at 13th October 2025. The fresh evaluation shall be completed within twenty-one (21) days from the date of this decision and shall be undertaken in strict compliance with the provisions of the Constitution, the Public Procurement and Asset Disposal Act, the Regulations, and the tender documents, while taking into account the findings and directions contained in this decision as well as the findings made by the Board in Request for Review No. 113 of 2025, Papaton Security Services Limited vs. the 1st and 2nd Respondents and Dalik Security Services Limited, dated 24th December 2025.

4. Each party shall bear its own costs of the proceedings.

137. Given the nature of the orders issued, the Board notes that the only order requiring action on the part of the Respondents was Order No. 3, as reproduced above. The remaining orders did not impose any specific obligations on the Respondents. Accordingly, the analysis shall be limited to the said Order No. 3.

138. In determining whether this issue was complied with, the Board perused the confidential documents and notes that, indeed, a fresh evaluation of the bids was conducted, resulting in the Applicant being found the lowest evaluated bidder. However, the Board further notes that the subject tender was terminated on account of inadequate budgetary provision.
139. In view of the findings on competitive negotiations analyzed in the preceding issues, the Board finds that there was only partial compliance with its decision. The 1st Respondent ought to have exercised discretion to conduct the competitive negotiations rather than terminate the tender. While there was no express order regarding competitive negotiations, the fact that the Respondents ultimately terminated the subject tender demonstrates that the proceedings did not reach their logical conclusion, having opted not to conduct the said negotiations.
140. Accordingly, the Board finds that the Respondents did not fully comply with its orders, as the fresh evaluation should have been conducted in strict compliance with the law, which would have included undertaking the competitive negotiations.

Whether the procurement process relating to the subject tender has lapsed and is therefore legally spent by virtue of the expiry of the tender validity period.

141. The Applicant's Counsel submitted that the Board possesses inherent jurisdiction to extend the validity period of the tender and that the same should be extended to ensure that there is substantive justice.
142. In response, the Respondents' Counsel submitted that the procurement process is legally spent due to lapse of the tender validity period. The bids were opened on 13th October 2025 and were valid for 120 days, expiring on 10th February 2026. Upon expiry, the tender ceased to exist in law and could not confer enforceable rights or sustain review proceedings. In support of that position, reliance was placed on ***Republic vs Chairperson, Public Procurement Administrative Review Board & 2 Others; Authority & 2 Others ex parte Rhombus Construction Co. Ltd (Interested Party) [2022] KEHC 1 (KLR)***, where the Court held that once tender validity lapses, the procurement dies a natural death and cannot be revived.
143. Counsel for the Respondents further cited ***Republic vs Public Procurement Administrative Review Board; Consortium of GBM Projects Ltd & ERG Insaat Ticaret Ve Sanayi AS (Interested Party) ex parte National Irrigation Board [2020] KEHC 9232 (KLR)*** for the holding that the Review Board falls into an error where it entertains or extends a tender validity period that has already lapsed. It was thus submitted that any order of reinstatement or award after expiry of validity would be unlawful and contrary to Section 87 of the Act.

144. Section 88 of the Act provides on the extension of tender validity period as follows:

88. Extension of tender validity period

(1) Before the expiry of the period during which tenders shall remain valid the accounting officer of a procuring entity may extend that period.

(2) The accounting officer of a procuring entity shall give in writing notice of an extension under subsection (1) to each person who submitted a tender.

(3) An extension under subsection (1) shall be restricted to not more than thirty days and may only be done once.

(4) For greater certainty, tender security shall be forfeited if a tender is withdrawn after a bidder has accepted the extension of bidding period under subsection (1).

145. The Board interprets the above section to mean that the law permits the accounting officer of a procuring entity, before the expiry of the initial tender validity period, to extend the said period of validity. Such an extension, however, is limited in scope as it can only be exercised once,

for a maximum of thirty (30) days, and must be communicated in writing to all tenderers. Further, once a bidder accepts the extension, the tender security furnished remains binding, and withdrawal of the tender thereafter would result in forfeiture of the tender security.

146. The Court of Appeal, in ***Chief Executive Officer, the Public Service Superannuation Fund Board of Trustees v CPF Financial Services Limited & 2 Others*** (Civil Appeal No. E510 of 2022) [2022] KECA 982 (KLR), pronounced itself on the powers of the Board to extend the tender validity period as follows:

42. The 2nd respondent (the Board) is an independent quasi judicial creature of statute, and its broad powers are set out in sections 28 and 173 of the PPAD Act. It has power to give directions to accounting officers of procuring entities with respect to anything to be done or redone in procurement or disposal proceedings. In our view, its power may even include power to extend validity of a tender in situations where an accounting officer for no good reason fails to adhere to statutory timelines or disobeys the Board's directions so as to frustrate tenderers or bidders, even if the stated tender validity period has expired. This is akin to the power exercised by the High Court or this Court to extend time to appeal in appropriate circumstances, notwithstanding

that the stipulated time for instituting such appeal may have already expired.

147. The Board interprets the above case law to mean that it possesses the power, pursuant to Sections 28 and 173 of the Act, to extend the validity of a tender where circumstances so demand. This authority arises particularly in instances where an accounting officer fails to comply with statutory timelines or disregards the Board's directions in a manner that would otherwise frustrate tenderers. The decision affirms that the Board's mandate, being quasi-judicial, is sufficiently broad to permit such extension even after the lapse of the tender validity period, in the same way superior courts may extend time for filing appeals notwithstanding the expiry of prescribed timelines.
148. See also ***PPARB Application No. 95 of 2024 Tinsta Enterprises JV Peesam Limited v The Accounting Officer Kenya Airports Authority & another and PPARB Application No. 113 of 2024; EASA Enterprises Limited v The Chief Executive Officer, National Water Harvesting & Storage Authority & another.***
149. In view of the Court of Appeal's decision in ***Civil Appeal No. E510 of 2022 (supra)***, the question of the Board's power to extend tender validity even after its expiration is settled.

150. The Board notes that the subject tender had a validity period of 120 days, set to expire on 10th February 2026. The instant Request for Review was filed on 5th February 2026, which, pursuant to section 168 of the Act, automatically suspended the running of the tender validity period. In the ordinary course, and absent the suspension, the tender would have expired on 3rd March 2026. It follows, therefore, that the tender validity has not yet expired.
151. The Board finds that the tender validity has not yet expired and that the subject tender is not legally spent. Further, the Board observes that it has the power to extend the tender validity in appropriate circumstances.

What orders should the Board grant in the circumstances?

152. Having considered the parties' submissions and examined all the evidence on record, the Board finds that it has jurisdiction, as the Request for Review is not *res judicata* and the termination of the subject tender was not carried out in accordance with the provisions of section 63 of the Act. Accordingly, the Board's jurisdiction has not been ousted under section 167(4)(b) of the Act.
153. Further, the Board finds that the Respondents ought to have exercised their discretion to conduct competitive negotiations in accordance with sections 131 and 132 of the Act, rather than terminating the subject tender.

154. Lastly, the Board finds that it has jurisdiction to extend the tender validity period and, in any event, notes that the tender validity has not yet expired.
155. Consequently, the instant Request for Review, filed on 5th February 2026, relating to Tender No. KACWASCO/SEC/00187/2025-2026 Provision of Security Services for Kakamega County Water and Sanitation Company, is hereby allowed to the extent specified in the Final Orders section below.

FINAL ORDERS

156. 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:

- 1. The Notices of Preliminary Objection dated 9th February 2026 and 18th February 2026, filed by the Respondents and Papaton Security Services Limited, respectively, are hereby dismissed.**
- 2. The Termination Letters dated 26th January 2026, addressed to the bidders in respect of Tender No. KACWASCO/SEC/00187/2025-2026 Provision of Security Services for Kakamega County Water and Sanitation Company, are hereby nullified and set aside.**

3. The Accounting Officer of Kakamega County Water and Sanitation Company is hereby directed to conduct competitive negotiations in accordance with sections 131 and 132 of the Act, with the lowest evaluated bidder, being the Applicant.
4. To enable the Procuring Entity to comply with these orders, the tender validity period is hereby extended by forty-five
5. (45) days from the date of this decision.
6. Each party shall bear its own costs of the proceedings.

Dated at NAIROBI, this 26th day of February 2026.



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PANEL CHAIRPERSON
PPARB



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SECRETARY
PPARB