

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 26/2026 OF 23RD FEBRUARY 2026

BETWEEN

KENMA HOMECARE SERVICES LIMITED APPLICANT

AND

THE ACCOUNTING OFFICER,

COUNTY GOVERNMENT OF NAKURU, DEPARTMENT OF

HEALTH SERVICES 1ST RESPONDENT

COUNTY GOVERNMENT OF NAKURU, DEPARTMENT OF

HEALTH SERVICES 2ND RESPONDENT

DELKI SUPPLIES AND GENERAL SERVICES INTERESTED PARTY

Review against the decision of the Accounting Officer, County Government of Nakuru, Department of Health Service in relation to Tender No. CGN/MOH/ONT/021/2025-2026 for Provision of Comprehensive Cleaning and Gardening Services.

BOARD MEMBERS PRESENT

- | | |
|-------------------------|---------------------|
| 1. Ms. Jessica M'mbetsa | - Panel Chairperson |
| 2. Mr. Robert Chelagat | - Member |
| 3. Mr. Joshua Kiptoo | - Member |

4. Eng. Lilian Ogombo

- Member

IN ATTENDANCE

1. Mr. Abdalla Issa

Holding Brief for Board Secretary

2. Ms. Evelyn Weru

Secretariat

PRESENT BY INVITATION

APPLICANT

KENMA HOMECARE SERVICES LIMITED

Mr. Murigi Kamande

h/brief for Mr. Mbiyu Kamau - Advocate, Mbiyu Kamau & Co. Advocates

RESPONDENTS

**THE ACCOUNTING OFFICER,
COUNTY GOVERNMENT OF NAKURU,
DEPARTMENT OF HEALTH SERVICES &
COUNTY GOVERNMENT OF NAKURU,
DEPARTMENT OF HEALTH SERVICES**

Mr. Jacob Ngwele

- Advocate, JN & P Law Advocates LLP

BACKGROUND OF THE DECISION

The Tendering Process

1. The County Government of Nakuru (hereinafter referred to as "the Procuring Entity") invited eligible tenderers to submit bids in response to Tender No. CGN/MOH/ONT/021/2025-2026 Provision of

Comprehensive Cleaning and Gardening Services (hereinafter referred to as “the subject tender”). The tender was initially scheduled to close and be opened on 22nd December 2025.

Addenda/Clarifications

2. According to the confidential documents submitted 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’), an addendum dated 19th December 2025 was issued to extend the tender submission deadline to 29th December 2025.

Submission of Tenders and Tender Opening

3. According to the Tender Opening Minutes dated 29th December 2025 which were part of confidential documents furnished to the Board, a total of eight (8) tenders were received in response to the subject tender and were recorded as follows:

| No. | Bidder |
|------------|-------------------------------------|
| 1 | Garbage Hero Ltd |
| 2 | Kleansley Hygiene Plus Ltd |
| 3 | Linstar Ventures Ltd |
| 4 | Delki Supplies and General Services |
| 5 | Mob Industries Limited |

| | |
|---|---------------------------------------|
| 6 | The Gardens & Wedding Centre Ltd |
| 7 | Harvest Facility Management Group Ltd |
| 8 | Kenma Homecare Services Ltd |

Suspension of Procurement Proceedings

4. The procurement proceedings of the subject tender were suspended pursuant to Section 168 of the Act when PPARB Application No. 121 of 2025 dated 29th December 2025 was filed by The Gardens and Weddings Centre Ltd through the firm of Karugu Mbugua & Company Advocates seeking the following reliefs:

- a. The Honourable Board be pleased to find that Clause MR 17 (Mandatory Evaluation Criteria) is unfair, unlawful, unreasonable and discriminatory as against the applicant and the same be expunged as part of the Mandatory Evaluation Criteria;***

- b. The Applicant's bid be subjected to further evaluation on the basis of the same and/or identical criteria similar to all other bids;***

- c. Costs of this application be borne by the Respondents; and***

- d. Any other orders that the Honorable Board may deem just and fit.***

5. On 19th January 2026, the Board in exercise of powers conferred upon it by Section 173 of the Act issued the following orders in PPARB Application No. 121 of 2025:

a) The Request for Review dated 29th December 2025 be and is hereby dismissed;

b) The Accounting Officer of the County Government of Nakuru – Department of Health Services is hereby directed to oversee the tender proceedings for Tender No. CGN/MOH/ONT/021/2025-2026 Provision of Comprehensive Cleaning and Gardening Services to their logical and lawful conclusion; and

c) Each party shall bear its own costs of the proceedings

Evaluation of Tenders

6. A Tender Evaluation Committee appointed by the 1st Respondent undertook evaluation of the eight (8) tenders as captured in the Evaluation Report for the subject tender in the following stages:

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

Preliminary Evaluation

7. The Evaluation Committee was required to examine tenders for responsiveness using the criteria provided under Stage One: Mandatory Requirements of the Tender Document. Tenderers were required to meet all the mandatory requirements at this stage to proceed to the technical evaluation stage.
8. At the end of evaluation at this stage, seven (7) tenders were determined non-responsive including the Applicant's tender, while one (1) tender, being the Interested Party's tender, was determined responsive and proceeded for Technical Evaluation.

Technical Evaluation

9. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under Stage Two: Technical Requirements of the Tender Document. Bidders were required to score 80% and above to be considered for financial evaluation.
10. At the end of evaluation at this stage, the one (1) tender that progressed at this stage was determined responsive and proceeded for evaluation at the financial evaluation stage.

Financial Evaluation

11. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria set out under the Financial Evaluation Criteria of the Tender Document. Following the conclusion of evaluation at this stage, the Evaluation Committee found as follows:

| <i>S/No.</i> | <i>Bidders Name</i> | <i>AMOUNT PER ANNUM</i> | <i>RANK</i> |
|---------------------|---|--------------------------------|--------------------|
| <i>1.</i> | <i>M/S Delki Supplies and General Services P.O. Box 311-20117 Naivasha</i> | <i>43,103,288.52</i> | <i>1</i> |

Evaluation Committee's Recommendation

12. The Evaluation Committee recommended award of the subject tender to M/S Delki Supplies and General Services at a total sum of Kenya Shillings Forty-Three Million, One Hundred Three Thousand, Two Hundred and Eighty-Eight and Fifty-Two Cents (Kshs. 43,103,288.52) only inclusive of all government taxes.

Professional Opinion

13. In a Professional Opinion dated 26th January 2026 (hereinafter referred to as "the Professional Opinion"), the Director Supply Chain Management, AnnMarie Kuria, reviewed the manner in which the subject procurement process in the subject tender was undertaken including evaluation of tenders and concurred with the recommendations of the Evaluation Committee with respect to award of the subject tender.

Notification to tenderers

14. Tenderers were notified of the outcome of evaluation of the subject tender vide letter dated 10th February 2026.

REQUEST FOR REVIEW NO. 26 OF 2026

15. On 23rd February 2026, Kenma Homecare Services Limited, the Applicant herein, filed through the firm of Mbiyu Kamau & Co. Advocates a Request for Review dated 20th February 2026 together with a Supporting Affidavit sworn on even date by Kennedy Makhama, its Director (hereinafter referred to as 'the instant Request for Review') seeking the following orders from the Board in verbatim:

a) A declaration that the Procurement Entity breached the requirements of the Tender Evaluation under the Tender Document.

b) A declaration that the Procurement Entity breached the provisions of the Public Procurement and Asset Disposal Act, 2015:

c) A declaration that the Procurement Entity breached Article 227(1) of the Constitution, 2010.

d) The decision of the Procuring entity dated 10th February, 2026 to award the tender to the Interested Party be annulled and set aside forthwith.

e) The Applicant be directed to evaluate the applicant's bid taking into account that the applicant's had fully complied with all the mandatory and technical evaluation criteria of the subject tender; and

f) Any other orders that the Honorable Board may deem just and fit in the circumstances.

16. In a Notification of Appeal and a letter dated 23rd 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 23rd February 2026.

17. *Vide* a letter dated 4th March 2026, the Board Secretary sent a reminder to the Respondents referring to the Notification of Appeal for the instant Request for Review and notified them of the timelines within which they were required to submit their response being on or about 10th March 2026 noting that the operations of the Board are time bound and require matters to be concluded within 21 days.

18. The Board Secretary, notified parties and all tenderers in the subject tender of an online hearing of the instant Request for Review slated for 10th March 2026 at 2.00 p.m. through the link availed. Parties however agreed to have the matter heard on 11th March 2026 at 2.00 p.m. during the proceedings in PPARB Application No. 25 of 2026.
19. On 10th March 2026, the Respondents filed through JN & P Law Advocates LLP a Notice of Appointment dated 9th March 2026, a Procuring Entity's Memorandum of Response dated 9th March 2026 and written Submissions dated 9th March 2026 together with the confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act.
20. When the matter came up for hearing on 11th March 2026 at 2.00 p.m., the Board read out pleadings filed by the Applicant and the Respondents and proceeded to allocate time within which each party was required to proceed and highlight their respective cases. Thus, the matter proceeded for virtual hearing as scheduled.

PARTIES' SUBMISSIONS

Applicant's submissions

21. In his submissions, counsel for the Applicant, Mr. Murigi relied on pleadings filed before the Board by the Applicant and associated himself with his pleadings made in PPARB Application No. 25 of 2026.

22. Mr. Murigi submitted that the reason for disqualification of the Applicant's tender as communicated vide the notification letter dated 10th February 2026 was that (a) the supporting documents were not duly stamped by the commissioner of oaths as required; (b) the Applicant did not submit a soft copy through the IFMIS Portal as required; and (c) the Applicant did not submit a recommendation letter from the Accounting Officer Health Services as required.

23. He made reference to the doctrine of *De minimis non curat lex* and submitted that the law does not concern itself with trifles. He further made reference to Section 79 of the Act and invited the Board to scrutinize the confidential documents presented by the Respondents, determine the documents that had not been commissioned and establish if failure to commission any of the said documents prejudiced the bid process or the integrity of the tendering process. He urged the Board to find that the Applicant substantially complied with the requirements set out in the Tender Document.

24. As to the issue concerning failure by the Applicant to upload a soft copy through the IFMIS portal as required, counsel submitted that it is the original bid that was submitted that is evaluated and that the failure to upload the soft copy of the Applicant's bid does not in any way affect the tendering process.

25. With regard to the Applicant's compliance with Mandatory Requirement No. 17 of the Tender Document, counsel submitted that the Respondents acted in contravention of the provisions of the Constitution and the Act by disqualifying the Applicant's bid from the tendering process on account of having not submitted a recommendation letter from the Procuring Entity's accounting officer stipulated under Mandatory Requirement No. 17 of the Tender Document yet the Applicant had not previously provided similar services to the Respondents.

26. He further submitted that the plain meaning of Mandatory Requirement No. 17 of the Tender Document is that all suppliers and contractors that have previously worked with the health department must provide a recommendation letter from the health services signed by the accounting officer.

27. Counsel pressed on that though Mandatory Requirement No. 17 of the Tender Document is couched as a mandatory requirement, it did not apply to all contractors and suppliers since it is the only mandatory requirement that has the qualification 'if' hence the said requirement did not apply to the Applicant. Counsel pointed out that the Applicant has never worked with the health department and as such, Mandatory Requirement No. 17 of the Tender Document did not apply to it. He urged the Board to note the contents under paragraph 10 (e) of the Respondents' Memorandum of Response and reiterated that it was only

those who had previously worked with the health department that were required to provide the recommendation letter.

28. While making reference to the Board's Decision in PPARB Application No. 121 of 2025, Mr. Murigi pointed out that the Board correctly appreciated the import of Mandatory Requirement No 17 of the Tender Document at paragraph 36 by finding that this requirement is only applicable to contractors who have previously worked with the Procuring Entity mandating them to provide a recommendation letter from the Health Services signed by the Accounting Officer.

29. Counsel queried if a recommendation letter is synonymous with a clearance letter and submitted that the two were different and if the Procuring Entity required a clearance letter from the accounting officer, Mandatory Requirement No. 17 of the Tender Document would have stated as much. He argued that it was wrong for the Respondents to shift the burden of proof to the bidder to show that it had tried to procure a recommendation letter since such burden of proof is on the Respondents to show that Mandatory Requirement No. 17 of the Tender Document applied to the Applicant.

30. He submitted that the Applicant complied with all other mandatory requirements save for Mandatory Requirement No. 17 of the Tender Document which was not applicable to it and argued that the Respondents failed to promote integrity and fairness of its procedures

under the subject tender by discriminating against the Applicant and failing to fairly evaluate its bid.

31. Mr. Murigi urged the Board to allow the instant Request for Review as prayed.

Respondent's submissions

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

33. Counsel submitted that the Applicant did not meet Mandatory Requirements No. 7, 16 and 17 of the Tender Document as stipulated under Section 79 of the Act. In support of his argument on the place of mandatory requirements, counsel referred to the holding by the High Court in *Republic v Public Procurement Administrative Review Board Ex parte Meru University of Science & Technology (2019) eKLR* and *Republic v Public Procurement Administrative Review Board; Kenya Airports Authority & another (Interested Parties); Fresquare Investments Limited (Ex parte Applicant) [2026] KEHC 25 (KLR)*. He urged the Board to find that mandatory requirements must be satisfied and that deviation from mandatory requirements should not be permissible.

34. As to the Applicant's non-compliance with Mandatory Requirement No. 7 of the Tender Document, counsel submitted that the Applicant has admitted to having failed to submit properly commissioned documents stamped by a commissioner of oaths and this non-compliance cannot be waived or considered to be immaterial.

35. As to the Applicant's non-compliance with Mandatory Requirement No. 16 of the Tender Document, counsel submitted that the subject tender was conducted through IFMIS and submission of a soft copy of a bidder's bid through IFMIS was a mandatory requirement. He further submitted that bidders were required to submit both a hard and soft copy of their bid and that the Respondents' record show that the Applicant did not upload its bid document on IFMIS and such non-compliance cannot be treated as a minor deviation.

36. As to the Applicant's non-compliance with Mandatory Requirement No. 17 of the Tender Document, counsel associated himself with his submissions in PPARB Application No. 25 of 2026 and submitted that Mandatory Requirement No. 17 of the Tender Document constitutes an objective, clear and quantifiable evaluation criterion. He further submitted that it is trite law that a procuring entity is at liberty to craft tender documents to meet its specific needs and that the standard for evaluating such criteria is not whether a bidder finds them convenient, but whether they are objective, clear and quantifiable. He pointed out that Mandatory Requirement No. 17 of the Tender Document is objective as it seeks a specific document from a specific authority; is

clear since the wording is unambiguous and mandates a recommendation letter; and quantifiable since either the recommendation letter is provided or not and as such, there is no grey area.

37. It is the Respondents' case that the argument by the Applicant that Mandatory Requirement No. 17 of the Tender Document was inapplicable to it since it was not a previous service provider is a misinterpretation of the Tender Document since the Applicant bore the burden of seeking clarification from the Accounting Officer who would have issued a letter confirming that the Applicant was not a previous service provider which would have sufficed and that the failure to provide any letter from the Accounting Officer left the evaluation committee with no discretion but to deem its bid non-responsive.

38. Counsel submitted that the issue in contest relating to the subject tender is *res judicata* having already been determined by the Board in PPARB Application No. 121 of 2025 filed on 29th December 2025 where the Board rendered its Decision 19th January 2026 and urged the Board to adopt its finding in the instant Request for Review. He indicated that the issue in contest has already been settled in that a party that already submitted itself to the subject tender, such as the Applicant, does not have a window to challenge the provisions in the subject tender since it bound itself to the rules of the procurement process and agreed to the provisions therein. He further indicated that the Respondents associated themselves with the holding of the Board in PPARB

Application No. 121 of 2025 as regards the interpretation of Mandatory Requirement No. 17 of the Tender Document and urged the Board to uphold its finding as indicated at paragraph 46 of its Decision in PPARB Application No. 121 of 2025 in view of the fact that the Applicant bound itself to the Tender Document by submitting its bid.

39. As to whether the Procuring Entity acted in breach of Sections 79 and 80(2) of the Act as read with Article 227 of the Constitution by disqualifying the Applicant's bid for non-compliance with Mandatory Requirements No. 7, 16 and 17 of the Tender Document, counsel submitted that the Evaluation Committee applied the evaluation criteria in the Tender Document and in compliance with Sections 79 and 80(2) of the Act. He further submitted that the Evaluation Committee cannot waive essential evaluation criteria that apply uniformly to all bidders as to do so would undermine the integrity of the procurement process and constitute an unfair advantage to non-compliant bidders. He reiterated that evaluation criteria applying to all bidders without exception cannot be discriminatory and pointed out that seven (7) other bidders were found to be non-responsive at this stage on account of non-compliance with Mandatory Requirement No. 17 of the Tender Document demonstrating that the criterion was applied uniformly and without bias.

40. Counsel maintained the position that the Respondents have demonstrably adhered to the principles under Article 227 of the Constitution and that a bidder cannot use a review process to cure its

own non-compliance. He pointed out that the Applicant's failure to meet a clear, objective and mandatory requirement cannot be blamed on the Procuring Entity.

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

Applicant's Rejoinder

42. In rejoinder, Mr. Murigi submitted that the Applicant has not admitted to having not complied with Mandatory Requirements No. 7, 16 and 17 of the Tender Document. He further submitted that the Applicant had not challenged the legality of Mandatory Requirement No. 17 of the Tender Document and that the issue in contest is whether the Applicant's bid complied with the relevant mandatory requirements stipulated in the Tender Document.

43. He reiterated that the Applicant's tender was substantially responsive in view of Section 79(2) of the Act which stipulates that minor deviations, errors and oversights cannot affect the responsiveness of a tender.

44. At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 23rd February 2026 was due to expire on 16th March 2026 and that the Board would

communicate its decision on or before 16th March 2026 to all parties to the instant Request for Review via email.

BOARD'S DECISION

45. 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 Respondents lawfully disqualified the Applicant's tender at the Preliminary Evaluation stage in accordance with the provisions of the Tender Document, the Act and the Constitution.

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

Whether the Respondents lawfully disqualified the Applicant's tender at the Preliminary Evaluation stage in accordance with the provisions of the Tender Document, the Act and the Constitution

46. It is the Applicant's case that its bid was unlawfully evaluated and disqualified from the procurement process in the subject tender on account of non-compliance with Mandatory Requirements Nos. 7, 16

and 17 of the Tender Document yet its bid met all the mandatory requirements stipulated in the Tender Document and was substantially responsive in view of Section 79 of the Act. The Applicant contends that the Respondents failed to use the evaluation criteria set out in the Tender Document in evaluation of its bid contrary to Section 80(2) of the Act and that they failed to promote integrity and fairness in the tendering process contrary to Article 227(1) of the Constitution.

47. On their part, the Respondents submitted that the Applicant's bid failed to comply with the evaluation criteria set out under Mandatory Requirements Nos. 7, 16 and 17 of the Tender Document. They further submitted that the Evaluation Committee acted in strict compliance with the law as mandated under Section 80(2) of the Act as read with Article 227(1) of the Constitution and the provisions of the Tender Document by declaring the Applicant's bid non-responsive for failure to meet the stipulated mandatory requirements which applied uniformly to all bidders and cannot be waived.

48. The Board 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:

(1) When a State organ or any other public entity contracts for goods or services, it shall do so in

accordance with a system that is fair, equitable, transparent, competitive and cost-effective.

(2) An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented ...”

49. The High Court in **Nairobi High Court Misc. Application No. 60 of 2020; Republic v The Public Procurement Administrative Review Board & Ors v Ex-parte Tuv Austria Turk** spoke to the principles under Article 227 of the Constitution and held as follows:

"45. Article 227 of the Constitution provides that when procuring entities contract for goods or services they must comply with the principles of fairness, equity, transparency, competitiveness and cost-effectiveness. For there to be fairness in the public procurement process, all bids should be considered on the basis of their compliance with the terms of the solicitation documents, and a bid should not be rejected for reasons other than those specifically stipulated in the solicitation document.

46. However, there is a need to appreciate the difference between formal shortcomings, which go to the heart of the process, and the elevation of matters of subsidiary importance to a level, which determines the fate of the tender. The Evaluation Committee has a duty to act

fairly. However, fairness must be decided on the circumstances of each case...."

50. We note that the legislation contemplated in Article 227(2) of the Constitution is the Act. Section 3 of the Act underpin good governance, integrity, transparency and accountability as key pillars in public procurement and asset disposal proceedings.

51. Section 58 of the Act requires a procuring entity to use a standard tender document which contains sufficient information and provides as follows:

"(1) An accounting officer of a procuring entity shall use a standard procurement and asset disposal documents issued by the Authority in all procurement and asset disposal proceedings.

(2) The tender documents used by a procuring entity under subsection (1) shall contain sufficient information to allow fairness, equitability, transparency, cost-effectiveness and competition among those who may wish to submit their applications."

52. In essence, the procuring entity is mandated to use the standard tender document issued by the Public Procurement Regulatory Authority in all its procurement and disposal proceedings and its tender document ought to contain sufficient information to allow fairness,

equitability, transparency, cost-effectiveness and competition amongst bidders submitting their bids. This then adheres to the principles of procurement stipulated under Article 227 (1) of the Constitution.

53. In the same vein, section 70 of the Act requires a procuring entity to use a standard tender document which contains sufficient information to allow for fair competition among tenderers. Section 70(3) reads as follows:

"(3) The tender documents used by a procuring entity pursuant to subsection (2) shall contain sufficient information to allow fair competition among those who may wish to submit tenders."

54. Section 80(1) and (2) of the Act is instructive on how evaluation and comparison of tenders should be conducted by a procuring entity, as follows:

"80. Evaluation of tender

(1) The evaluation committee appointed by the accounting officer pursuant to Section 46 of the Act, shall evaluate and compare the responsive tenders other than tenders rejected.

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

documents and, in the tender for professional services, shall have regard to the provisions of this Act and statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered.

(3) The following requirements shall apply with respect to the procedures and criteria referred to in subsection (2)-

(a) the criteria shall, to the extent possible, be objective and quantifiable;

(b) each criterion shall be expressed so that it is applied, in accordance with the procedures, taking into consideration price, quality, time and service for the purpose of evaluation; and

(4)

55. Section 80(2) of the Act is clear on the requirement for the Evaluation Committee to evaluate and compare tenders in a system that is fair using the procedures and criteria set out in the Tender Document. A system that is fair is one that considers equal treatment of all tenders against a criterion of evaluation known by all tenderers having been well laid out in the tender document. Section 80(3) of the Act requires for such evaluation criteria to be as objective and quantifiable to the

extent possible and to be applied in accordance with the procedures provided in the tender document

56. Responsiveness of tenders is provided for under Section 79(1) of the Act as follows:

"(1) A tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents."

57. Responsiveness serves as an important first hurdle for tenderers to overcome. From the above provision, a tender only qualifies as a responsive tender if it meets all eligibility and mandatory requirements set out in the tender documents. In the case of **Republic v Public Procurement Administrative Review Board & another; Premier Verification Quality Services (PVQS) Limited (Interested Party) Ex-parte Tuv Austria Turk [2020] eKLR** the High Court stated that:

"In public procurement regulation it is a general rule that procuring entities should consider only conforming, compliant or responsive tenders. Tenders should comply with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents. Bidders should, in other words, comply with tender conditions; a failure to do so would defeat the underlying purpose of supplying information

to bidders for the preparation of tenders and amount to unfairness if some bidders were allowed to circumvent tender conditions. It is important for bidders to compete on an equal footing. Moreover, they have a legitimate expectation that the procuring entity will comply with its own tender conditions. Requiring bidders to submit responsive, conforming or compliant tenders also promotes objectivity and encourages wide competition in that all bidders are required to tender on the same work and to the same terms and conditions.”

58. It is settled law that mandatory requirements are the first hurdle that tenderers must overcome for further consideration in an evaluation process. A bidder found to be non-responsive is excluded from the bid process regardless of the merits of its tender. The Evaluation Committee is mandated to evaluate the Applicant’s tender using the procedures and criteria set out in the Tender Document having regard to provisions of the Act and the Constitution. A laid-out evaluation criteria must, to the extent possible, be objective and quantifiable.

59. The Applicant in the instant Request for Review is aggrieved by the reasons given by the Respondents for disqualification of its tender as communicated in the notification letter dated 10th February 2026 which reads in part:

"....."

Reference is made to your participation in the above referenced tender. You are hereby notified that after mandatory evaluation your bid was not successful because of the following:

- The supporting documents were not duly stamped by the commissioner of oaths as required.**
- You did not submit soft copy through the IFMIS Portal as required.**
- You did not submit recommendation letter from the Accounting Officer, Health Services as required.**

.....

60. The Board has carefully studied the Tender Document and notes that the criteria for evaluation of the subject tender was set out in Section III-Evaluation and Qualification Criteria of the Tender Document. Mandatory Requirements touching on the reasons for disqualification of the Applicant's tender were provided as follows:

Mandatory Requirement No. 7:

All supporting documents must be stamped by the commissioner of oaths.

Mandatory Requirement No. 16:

Tender documents must be submitted in both soft (Through IFMIS supplier portal) and hard copies in the manner described in the Invitation Notice

Mandatory Requirement No. 17:

"Must provide recommendation letter from the Health services by the Accounting Officer signed if the contractor/supplier has previously worked with the Department. Contractors whose projects were terminated due to non-performance or were in breach of the contract terms shall not be considered. Debarred contractors shall also not be considered."

61. In essence a bidder was required to ensure that all its supporting documents were stamped by a commissioner of oaths, submit its bid in both soft copy through IFMIS portal and hard copy in the manner provided in the invitation to tender and any contractor or supplier who had previously worked with the Procuring Entity was mandated to provide a recommendation letter from the Health Services signed by the Accounting Officer

62. A perusal of the Evaluation Report submitted to the Board by the 1st Respondent pursuant to Section 67(3)(e) of the Act reveals as follows with respect to evaluation of the Applicant's tender:

M/S Kenma Homecare Services Limited P.O Box 9721-00200 Nairobi - did not submit all duly stamped supporting documents by the commissioner of oaths, soft copy through

the IFMIS Portal and provide recommendation letter from the Accounting Officer, Health Services as required.

63. The Board has perused the Applicant's original tender and found as follows with regard to the above non-conforming responses on the mandatory requirements as identified by the Respondents:

i. Mandatory Requirement No. 7 of the Tender Document

64. Mandatory Requirement No. 7 of the Tender Document required a bidder to have all supporting documents in its bid stamped by the [sic] commissioner of oaths. We note that the Evaluation Committee disqualified the Applicant for non-compliance with this requirement on the basis that it did not submit all supporting documents duly stamped by a commissioner of oaths. The Board having perused the Applicant's bid notes that that Applicant attached documents at pages 250 to 308 of its bid that are stamped by a commissioner of oaths.

65. In our considered view, the Applicant's bid complied with provisions under Mandatory Requirement No. 7 of the Tender Document having submitted supporting documents that were duly stamped by a commissioner of oaths as stipulated.

ii. Mandatory Requirement No. 16 of the Tender Document

66. Mandatory Requirement No. 16 of the Tender Document required a bidder to submit its bid in the subject tender in both soft copy through the IFMIS portal and hard copy in the manner provided in the invitation to tender. We note that the Evaluation Committee disqualified the Applicant for non-compliance with this requirement on the basis that it did not submit a soft copy of its bid document through the IFMIS Portal.

67. In **PPARB Application No. 108 of 2025 AI – Ahdi Insurance Brokers Limited v Accounting Officer, Machakos County Government and Others**, the Board found as follows with regard to the IFMIS portal:

88. According to the National Treasury website <https://www.treasury.go.ke/ifmis/>, IFMIS Department, we note that IFMIS (Integrated Financial Management Information System) is an initiative of the National Treasury and is an Oracle based Enterprise Resource Planning (ERP) being used at both the National and County levels of government with an aim of enhancing accountability and transparency in public procurement. It is a Public Finance Management (PFM) reform initiative to automate and streamline Government financial management processes and procedures. The portal provides a secure, Internet-based access point that enables direct and real-time access for responding to bid invitations and communicating directly with the GOK Procuring Units.

89. The foregoing aligns with the provisions of Section 7 (1) and (2)(c) of the Act which provides the role of the National Treasury in public procurement and asset disposal as follows:

(1) The National Treasury established under section 11 of the Public Finance Management Act, 2012, shall be responsible for public procurement and asset disposal policy formulation.

(2) In performance of its role under subsection (1), the National Treasury shall –

.....

(c) design and prescribe an efficient procurement management system for the national and county governments to ensure transparent procurement and asset disposal as contemplated by Article 227 of the Constitution:

Provided that the National Treasury shall prescribe through Regulations a system under this paragraph which operates, respects and promotes the distinctiveness of the national and county levels of government;

90. Connected to the IFMIS portal is an IFMIS P2P Kenya Supplier Portal Training Manual developed by the National Treasury (hereinafter referred to as "the Training Manual") which outlines how users will (a) access the Kenya Supplier

portal and home page, (b) use the Orders tab and related functions, (c) use the Finance tab and related functions, and (d) use the Sourcing responsibility to respond to bid requests and communicate directly with the GOK procuring unit. Approved supplier users are registered at IFMIS for access to the portal and receive a User ID and Password login credentials via email from the designated IFMIS administrators and the email notification includes the appropriate link to the portal's login page for access.

91. According to pages 27 and 28 of the Training Manual, all portal supplier users can utilize the messaging capabilities to communicate directly with IFMIS Procuring Unit with questions or requests for more information during negotiations. Users receive updates when message responses are received from the IFMIS personnel and all active quote responses are listed in the 'Your Active and Draft Responses' section of the Home Page.

68. Turning to the circumstances in the instant Request for Review, the Applicant has not adduced any evidence to show that it managed to access, upload and submit its bid document on the IFMIS Portal as required under Mandatory Requirement No. 16 of the Tender Document before the tender submission deadline. It is trite law that he who alleges

must prove. Sections 107, 108, 109 and 112 of the Evidence Act provide as follows:

"107. Burden of proof

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

111.....

112. Proof of special knowledge in civil proceedings

In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."

69. Our understanding of the aforementioned provisions of the Evidence Act is that (a) he who alleges must prove, (b) the burden of proof lies with the person who would fail if no evidence is given on either side, (c) the burden of proof may shift from the person who wishes a court to believe its existence to another person if provided by law, and (d) the burden of proving or disproving a fact is upon a person who has any fact especially within their knowledge in civil proceedings.

70. The Supreme Court of Kenya in **Petition No. 12 of 2019 Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others [2020] eKLR** (hereinafter referred to as Samson Gwer's case) held as follows with respect to the principle of burden of proof in civil claims:

"[47] It is a timeless rule of the common law tradition ^{3/4} Kenya's juristic heritage ^{3/4} and one of fair and pragmatic conception, that the party making an averment in validation of a claim, is always the one to establish the plain veracity of the claim. In civil claims, the standard of proof is the "balance of probability". Balance of probability is a concept deeply linked to the perceptible fact-scenario: so there has to be evidence, on the basis of

which the Court can determine that it was more probable than not, that the respondent bore responsibility, in whole or in part.

[48]

[49] Section 108 of the Evidence Act provides that, "the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;" and Section 109 of the Act declares that, "the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

[50] This Court in Raila Odinga & Others v. Independent Electoral & Boundaries Commission & Others, Petition No. 5 of 2013, restated the basic rule on the shifting of the evidential burden, in these terms:

"...a Petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden...."

[51] In the foregoing context, it is clear to us that the petitioners, in the instant case, bore the overriding obligation to lay substantial material before the Court, in discharge of the evidential burden establishing their treatment at the hands of 1st respondent as unconstitutional. Only with this threshold transcended, would the burden fall to 1st respondent to prove the

contrary. In the light of the turn of events at both of the Superior Courts below, it is clear to us that, by no means, did the burden of proof shift to 1st respondent.

[52]

[53] In spite of the commonplace that proof of "indirect discrimination" is difficult, the petitioners ought to have provided sufficient evidence before the Court, to enable it to make a determination. The 1st respondent, by a more positive scheme, went ahead to counter the bare allegations. The petitioners failed, in this regard, to discharge their initial burden of proof.

.....

[64] The petitioners having failed to discharge their evidential burden, the plea of unfair process stood unproven, and there was no material before the Court to show unfair determination."

71. The Supreme Court in the Samson Gwer's case recognized that a party making an averment in validation of a claim is always the one to establish the veracity of such claim and that in civil claims, the standard of proof is on a balance of probability which requires evidence, on the basis of which a court can determine that it was more probable than not that a respondent bore responsibility, in whole or in part. The Supreme Court went further to hold that a claimant is under obligation to first discharge its burden of proof (initial burden of proof) before a respondent is invited to bear the evidential burden. Simply put, a

claimant/applicant has to prove its case by laying substantial material before a court, and it is only after such proof has been made, that a respondent is called upon to disprove the claimant's/applicant's case and/or to prove the respondent's case. For clarity, the burden of proof is always static and rests on the claimant/applicant throughout a trial and it is only the evidential burden of proof which may shift to the respondent depending on the nature and effect of evidence adduced by the claimant/applicant.

72. We are also guided by the holding of the Supreme Court in the case of **Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 others [2014] eKLR** which stated:

"The person who makes such an allegation must lead evidence to prove the fact. She or he bears the initial legal burden of proof which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of the law. On the other hand, the evidential burden is a shifting one, and is a requisite response to an already-discharged initial burden. The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue" [Cross and Tapper on Evidence, (Oxford University Press, 12th ed, 2010, page 124)]."

73. Turning to the matter at hand, it is the Board's considered view that the Applicant could at the very least have adduced a screenshot of its IFMIS log in home page and related tabs showing that it submitted a soft copy of its bid as required under Mandatory Requirement No. 16 of the Tender Document.

74. We note that the Respondents provided, as part of the confidential documents, a print out of the IFMIS Portal indicating Quote History of bidders who submitted soft copies of their bid documents in response to the subject tender and the Applicant's bid was not among the listed bidders.

75. In the circumstances, the Board finds that the Applicant failed to comply with provisions under Mandatory Requirement No. 16 of the Tender Document since it did not submit a soft copy of its bid document through the IFMIS Portal

iii. Mandatory Requirement No. 17 of the Tender Document

76. The Board notes that it was previously called upon to make a determination as to the framing of Mandatory Requirement No. 17 of the Tender Document in **PPARB Application No. 121 of 2025 The Gardens and Weddings Centre Ltd v County Government of Nakuru, Department of Health Services & Another**. Having

considered the said provision, the Board held as follows at paragraph 36 of its Decision:

36. The Board understands the above mandatory requirement as ensuring that only reliable and qualified contractors or suppliers are considered for procurement. Specifically, it mandates that any contractor who has previously worked with the Procuring Entity must provide a recommendation letter from the Health Services, signed by the Accounting Officer, to verify satisfactory past performance. Contractors whose projects were terminated due to non-performance or breach of contract, as well as those who have been officially debarred, are automatically excluded from consideration.

77. In essence, the Board established that Mandatory Requirement No. 17 of the Tender Document ensures that only reliable and qualified contractors or suppliers are considered for procurement in the subject tender. Any contractor or supplier who has previously worked with the Procuring Entity is mandated to provide a recommendation letter from the Health Services signed by the Accounting Officer. Further, contractors whose projects were terminated due to non-performance or breach of contract, as well as those who have been officially debarred, are automatically excluded from consideration.

78. The foregoing interpretation is in view of the use of the word 'if' under Mandatory Requirement No. 17 of the Tender Document which according to Oxford Learner's Dictionaries:

"is a conjunction used to introduce a condition or supposition, indicating that one thing depends on another happening or being true."

79. As such, a condition was placed only on bidders who had previously worked with the Procuring Entity to provide a recommendation letter from the Health Services signed by the Accounting Officer.

80. The Board has heard submissions by the Respondents that if a bidder was not previously involved with the Procuring Entity, then it was obvious that the Accounting Officer would issue a letter to that effect and that the Evaluation Committee would recognize that there was a letter from the Accounting Officer.

81. However, the Board considers this line of argument to be misleading and erroneous in view of the fact that this information was not expressly contained in the Tender Document as required under Section 58(2) of the Act and bidders who had not previously worked with the Procuring Entity were not informed of such a requirement in the Tender Document to nonetheless get a recommendation from the Accounting Officer even if they had not previously worked with the Procuring Entity before.

82. Consequently, the Board finds that the Evaluation Committee used extraneous evaluation criteria in evaluating the Applicant's bid in the subject tender with regard to Mandatory Requirement No. 17 of the Tender Document. In saying so, the Board is guided by the holding in **Zachariah Wagunza & Another vs. Office of the Registrar Academic Kenyatta University & 2 Others [2013] eKLR** where the High Court held that:

"Concerning irrelevant considerations, where a body takes account of irrelevant considerations, any decision arrived at becomes unlawful. Unlawful behavior might be constituted by

(i) an outright refusal to consider the relevant matter; (ii) a misdirection on a point of law; (iii) taking into account some wholly irrelevant or extraneous consideration; and (iv) wholly omitting to take into account a relevant consideration."

83. The Evaluation Committee is under a duty to confine itself to the procedures and criteria set out in the Tender Document when evaluating bids as read with provisions of the Act and the Constitution. The integrity of public procurement demands strict adherence to published criteria and this Board is tasked with affirming the primacy of the Tender Document and upholding procurement fairness and legality. This was the holding of Justice Aburili in **Judicial Review E092 of 2025 Minet Kenya Insurance Brokers Limited v The Public**

Procurement Administrative Review Board & Others where the High Court cautioned the Board against introduction of unstated evaluation criterion in the Tender Document and held as follows:

"139. In light of the foregoing analysis, this Court finds that the 1st Respondent's interpretation of the term "valid registration" to include a current practicing license was not only inconsistent with the plain and ordinary meaning of the term "valid registration" as used in the tender documents, but also amounted to the unlawful introduction of an unstated evaluation criterion.

140. Further, the duty to draft clear, unambiguous and comprehensive tender documents lies with the Procuring Entity, and where the procuring entity fails to expressly stipulate specific requirements, bidders are entitled to rely on the document as framed. To hold otherwise would be to sanction retrospective and subjective interpretations that undermine the principles of fairness, transparency and accountability in public procurement processes.

141. Accordingly, I find and hold that the decision to fail to award to the Applicant the required marks during technical evaluation on the basis of an unstated requirement namely, a current practicing license was unlawful, irrational and ultra

vires. It offended the principles of legality, procedural fairness and legitimate expectation and violated the Applicant's right to fair administrative action under Article 47 of the Constitution under Article 47 of the Constitution and the statutory safeguards under the Public Procurement and Asset Disposal Act.

142. I hasten to add that the integrity of public procurement demands strict adherence to published criteria. The Review Board's expansion of the term "valid registration" undermines this principle and should be corrected, the interpretation having been a post facto interpretation by the tender procuring entity. This case demonstrates the absolute need for the Review Board to always affirm the primacy of the tender document and uphold procurement fairness and legality..."

84. At this juncture, the question that the Board is now called upon to answer is whether the Applicant's non-compliance with Mandatory Requirement No. 16 of the Tender Document can be deemed to be a minor deviation that did not materially depart from the requirements set out in the Tender Document in view of Section 79(2) and (3) of the Act.

85. The Board has on various occasions considered the import of Section 79(2) and (3) of the Act with respect to minor deviations. Section 79 (2) and (3) of the Act provides that:

"(2) A responsive tender shall not be affected by-
(a) minor deviations that do not materially depart from the requirements set out in the tender document; or
(b) errors or oversights that can be corrected without affecting the substance of the tender.
(3) A deviation described in subsection (2)(a) shall-
(a) be quantified to the extent possible; and
***(b) be taken into account in the evaluation and comparison of tenders.*"**

86. Essentially, responsiveness of a tender shall not be affected by any minor deviations that do not materially depart from the requirements set out in the Tender Document and that do not affect the substance of a tender. This provision details a minor deviation as one that can be quantified to the extent possible and shall be taken into account in the evaluation and comparison of tenders.

87. In **Miscellaneous Civil Application 85 of 2018 Republic v Public Procurement Administrative Review Board Ex parte Meru University of Science & Technology; M/S Aaki Consultants Architects and Urban Designers (Interested Party) [2019] eKLR**, the High Court considered what amounts to a minor deviation and determined as follows:

The term "acceptable tender" means any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document. A tender may be regarded as acceptable, even if it contains minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set out in the tender documents or if it contains errors or oversights that can be corrected without touching on the substance of the tender. Any such deviation shall be quantified, to the extent possible, and appropriately taken account of in the evaluation of tenders. A tender shall be rejected if it is not acceptable....

In public procurement regulation it is a general rule that procuring entities should consider only conforming, compliant or responsive tenders. Tenders should comply with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents. Bidders should, in other words, comply with tender conditions; a failure to do so would defeat the underlying purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some bidders were allowed to circumvent tender conditions. It is important for bidders to compete on an equal footing. Moreover, they have a legitimate expectation that the procuring entity will comply with its

own tender conditions. Requiring bidders to submit responsive, conforming or compliant tenders also promotes objectivity and encourages wide competition in that all bidders are required to tender on the same work and to the same terms and conditions.”

88. It is evident that a procuring entity cannot waive a mandatory requirement or term it as a “minor deviation” since a mandatory requirement is instrumental in determining the responsiveness of a tender and is a first hurdle that a tender must overcome in order to be considered for further evaluation.

89. In **Republic v Public Procurement Administrative Review Board ex parte Guardforce Group Limited; Pwani University & 2 Others (Interested Parties) [2021] eKLR** Justice E.K. Ogola, held that;

“...it becomes apparent to this court that the aspect of compliance with the mandatory requirement of the tender document aims to promote fairness, equal treatment, good governance, transparency, accountability and to do away with unfairness. Failure to conform to this mandatory requirement, and/or exempt or give an opportunity to those who had not earlier on conformed to this mandatory requirement translates to unequal and unfair treatment of other tenderers and, if

allowed, may encourage abuse of power and disregard of the law by not only bidders, but also procuring entities."

90. In the recent holding by the High Court in **Republic v Public Procurement Administrative Review Board Ex parte Fresquare Investments Limited & 2 Others (Interested Parties) [2025]** eKLR Justice R.E.Aburili held that:

.....

133. In view of this Court, treating the Applicant's omission as a 'minor error' would directly undermine Article 227 of the Constitution and the statutory architecture of the PPADA in several interconnected ways as stated below.

134. Article 227 of the Constitution provides:

.....

135. Article 227(1) requires procurement systems to be fair and equitable, transparent, competitive and cost-effective. Therefore, treating a substantive omission as minor would inter alia, confer an undue advantage on the Applicant; penalise bidders who strictly complied with the tender requirements; and introduce unequal treatment. Fairness in procurement is not subjective or outcome-based. It is achieved by uniform application of the rules to all bidders.

136. Secondly, Article 227 also demands transparency. It follows that if a mandatory requirement can later be re-classified as "minor," bidders cannot predict which rules will

be enforced and as a result, tender requirements lose normative force thereby making the procurement process opaque and discretionary, contrary to the constitutional design. Transparency requires that bidders know in advance what will disqualify them and that those rules will be enforced as written.

137. Thirdly, public procurement competitiveness and cost effectiveness depends on a level playing field. Therefore, permitting post-submission curing of substantive omissions allows bidders to submit incomplete tenders, knowing they may later rectify them, it disincentivises diligence and compliance and distorts genuine competition, ultimately undermining cost-effectiveness. 138. Fourthly, Section 79 draws a bright line between responsive and non-responsive tenders. The Section provides:

.....

139. Section 79(1) requires compliance with all mandatory requirements and Section 79(2) allows only non-material deviations. Treating the omission as minor would in my view collapse this statutory distinction, convert mandatory requirements into optional ones and undermine section 79 of the Act thereby rendering the section nugatory.

140. In the view of this Court, once a requirement in the tender documents is mandatory, materiality is already legislatively determined and therefore the procuring entity or the Review Board cannot make it discretionary to favour one

bidder against the other bidders who have complied with the requirement. 141. Fifth, Section 80 of the Act mandates that evaluation be conducted strictly in accordance with the tender documents. The section provides:

.....

142. in view of the above provision, re-characterising a mandatory requirement as minor at evaluation stage would Amount to re-writing the tender documents by introducing undisclosed evaluation criteria and as a result, violate the principle that bidders must be evaluated on pre-disclosed rules only.

143. Sixth, Section 82 of the Act and Regulation 74 of the 2020 Regulations permit correction and clarification only where such clarification does not introduce new information or change the substance of the tender.

144. Section 82 provides:

82. Correction, revision, adjustment or amendment of tender (1) Subject to subsection (2) of this section, the tender sum as submitted and read out during the tender opening shall be absolute and final and shall not be the subject of correction, revision, adjustment or amendment in any way by any person entity. (2) For avoidance of doubt, the provisions of subsection (1) shall not apply to sections 103, 131 and 141 of this Act.

145. Although the section refers to the tender sum, where the error is not a typo or clerical error, allowing disclosure of the

auditor's name post-submission would introduce new material information, cure a substantive omission and convert clarification into post-tender compliance. This would directly defeat the statutory limits placed on clarification.

146. On the other hand, Regulation 74 provides:

74. Preliminary evaluation of open tender

(1) Pursuant to section 80 of the Act and upon opening of tenders, the evaluation committee shall first conduct a preliminary evaluation to determine whether —

(a) a tenderer complies with all the eligibility requirements provided for under section 55 of the Act;

(b) the tender has been submitted in the required format and serialized in accordance with section 74(1)(i) of the Act;

(c) any tender security submitted is in the required form, amount and validity period, where applicable;

(d) the tender has been duly signed by the person lawfully authorised to do so through the power of attorney;

(e) the required number of copies of the tender have been submitted; (f) the tender is valid for the period required;

(g) any required samples have been submitted; and

(h) all required documents and information have been submitted.

(2) Subject to section 79(2)(b) of the Act, any errors in the submitted tender arising from a miscalculation of unit price, quantity, subtotal and total bid price shall be considered as a major deviation that affect.

.....

149. Eighth is that the Review Board being a creature of statute, if it were permitted to re-classify substantive omissions as minor or waive mandatory requirements, this would act ultra vires its mandate and usurp the legislative role reserved to Parliament under Article 227(2) of the Constitution.

150. Lastly, at a systemic level, treating substantive omissions as minor deviations would encourage strategic non-compliance by bidders, increase procurement disputes and litigation, introduce subjectivity into evaluation, and thereby eroding public confidence in procurement processes.

151. Public procurement law exists precisely to restrain discretion, not to expand it. It follows that a procurement process is rendered unfair not by strict enforcement of tender requirements, but by selective relaxation of those requirements in favour of one or another of the bidders.

152. Thus, the constitutional and statutory framework requires, rather than prohibits, strict rejection of tenders that fail to meet mandatory requirements.

91. From the above, the Learned Judge pointed out that treating a substantive omission as a minor deviation confers an unfair advantage on the Applicant and penalizes bidders who strictly complied with the tender requirements. She further pointed out that fairness in public

procurement is achieved by uniform application of the rules to all bidders and that if a mandatory requirement can later be re-classified as a minor, bidders cannot predict which rules will be enforced making the procurement process opaque and discretionary contrary to the constitutional design.

92. Importantly, public procurement competitiveness and cost-effectiveness depends on a level playing field and permitting post-submission curing of substantive omissions allows bidders to submit incomplete tenders knowing that they may later rectify them thereby distorting genuine competition and undermining cost-effectiveness. The High Court was adamant in stating that once a requirement in the tender document is mandatory, neither the procuring entity or this Board can make it discretionary to favour one bidder against the other bidders who have complied with the requirement.

93. Considering the above, we are left with the inevitable conclusion that the Procuring Entity's Evaluation Committee lawfully disqualified the Applicant's tender at the Preliminary Evaluation stage on account of non-compliance with Mandatory Requirement No. 16 of the Tender Document.

What orders should the Board grant in the circumstances?

94. The Board has established that the Applicant's bid complied with provisions under Mandatory Requirement No. 7 of the Tender

Document having submitted supporting documents that were duly stamped by a commissioner of oaths as stipulated.

95. The Board has also established that the Evaluation Committee used extraneous evaluation criteria in evaluating the Applicant's bid in the subject tender with regard to Mandatory Requirement No. 17 of the Tender Document.

96. The Board has found that the Respondents lawfully disqualified the Applicant's tender at the Preliminary Evaluation stage on account of non-compliance with Mandatory Requirement No. 16 of the Tender Document. The Respondents are hereby directed to issue the Applicant with the correct reasons for disqualification of its bid in view of the Board's findings herein.

97. The upshot of our decision is that the instant Request for Review fails in terms of the following specific orders, subject to the right of any person aggrieved with this decision to seek judicial review by the High Court within fourteen days as stipulated under Section 175 of the Act:

FINAL ORDERS

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

A. The Applicant's Request for Review dated 20th February 2026 and filed on 23rd February 2026 in respect of Tender No. CGN/MOH/ONT/021/2025-2026 for Provision of Comprehensive Cleaning and Gardening Services be and is hereby dismissed.

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

Dated at NAIROBI this 16th Day of March 2026.

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**PANEL CHAIRPERSON
PPARB**

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**SECRETARY
PPARB**