

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 47/2026 OF 27TH MARCH 2026

BETWEEN

MEDIAMAX NETWORK LIMITED APPLICANT

AND

THE ACCOUNTING OFFICER,

STATE DEPARTMENT FOR BROADCASTING AND

TELECOMMUNICATIONS RESPONDENT

THE STAR PUBLICATIONS LIMITED INTERESTED PARTY

Review against the decision of the Accounting Officer, State Department for Broadcasting and Telecommunications in relation to Tender No. MICDE/SDBT/01/2025-2026 for Provision of Publishing/Printing and Distribution Services for MyGov Publication/Other Public Sector Publications.

BOARD MEMBERS PRESENT

- | | |
|------------------------------------|---------------|
| 1. Mr. George Murugu, FCI Arb, I.P | - Chairperson |
| 2. Mr. Daniel Langat | - Member |
| 3. Mr. Stanslaus Kimani | - Member |
| 4. CPA Alexander Musau | - Member |



IN ATTENDANCE

- | | |
|------------------------|-------------------|
| 1. Mr. Philemon Kiprop | - Board Secretary |
| 2. Ms. Godana Dokatu | - Secretariat |
| 3. Ms. Evelyn Weru | - Secretariat |

PRESENT BY INVITATION

APPLICANT

MEDIAMAX NETWORK LIMITED

- | | |
|------------------------|--|
| 1. Ms. Rose Muchori | MediaMax Network Limited |
| 2. Mr. Chrispine Magak | MediaMax Network Limited |
| 3. Ms. Aldrene Kimtai | Accounts Manager, MediaMax Network Limited |

RESPONDENT

THE ACCOUNTING OFFICER, STATE DEPARTMENT FOR BROADCASTING AND TELECOMMUNICATIONS

Ms. Annette Nyakora	Principal State Counsel
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INTERESTED PARTY

THE STAR PUBLICATIONS LIMITED

- | | |
|------------------------|-------------------------------------|
| 1. Mr. Nura Abdulkadir | Advocate, Garane & Somane Advocates |
| 2. Mr. Ali Ahmed | Advocate, Garane & Somane Advocates |
| 3. Mr. Derrick Asala | Advocate, Garane & Somane Advocates |
| 4. Ms. Faith Kiende | Advocate, Garane & Somane Advocates |



BACKGROUND OF THE DECISION

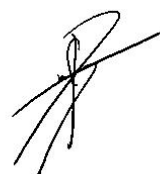
The Tendering Process

1. The State Department for Broadcasting and Telecommunications (hereinafter referred to as "the Procuring Entity ") invited sealed tenders in response to Tender No. MICDE/SDBT/01/2025-2026 for Provision of Publishing/Printing and Distribution Services for MyGov Publication/Other Public Sector Publications (hereinafter referred to as the "subject tender"). The subject tender's submission deadline was scheduled on 10th February 2026 at 11.00 a.m.

Submission of Tenders and Tender Opening

2. According to the Tender Opening Minutes which were part of confidential documents furnished to the Public Procurement Administrative Review Board (hereinafter referred to as the 'Board') by the 1st Respondent pursuant to Section 67(3)(e) of the Act, a total of five (5) tenders were submitted in response to the subject tender. The five (5) tenders were opened in the presence of tenderers' representatives present at the tender opening session, and were recorded as follows:

Bidder No.	Name
1	Magic Touch Media Group Ltd
2	Media Max Network Ltd
3	Standard Group Plc



4	Nation Media Group Plc
5	The Star Publications Limited

Evaluation of Tenders

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

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

Preliminary Evaluation

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

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



Technical Evaluation

6. The Evaluation Committee was required to carry out a Technical Evaluation using the criteria provided under Stage 2: Technical Evaluation of the Tender Document. Tenderers were required to meet the pass mark score of 70% at this stage so as to proceed for Financial Evaluation.
7. At the end of evaluation at this stage, the Interested Party's tender was determined to have met the pass mark score and progressed for further evaluation.

Financial Evaluation

8. At this stage of evaluation, the Evaluation Committee was required to examine and evaluate tenders according to the criteria provided under Clause B: Financial Evaluation of the Tender Document. The lowest evaluated bidder who met the qualification criteria would be engaged in negotiation on process quoted according to the established market rates so as to ensure that there is value for money for the services rendered.
9. At the end of evaluation at this stage, the Evaluation Committee considered award of the subject tender to the Interested Party. However, it found that the Interested Party's financially evaluated bundled quoted price of Kshs. 15,000,000/- was higher than the Procuring Entity's allocated budget of Kshs. 13,000,000/-.

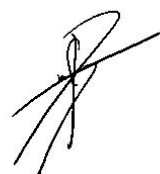


Evaluation Committee's Recommendation

10. The Evaluation Committee recommended that the Accounting Officer of the Procuring Entity to conduct competitive negotiations with the Interested Party in line with Section 131 and 132 of the Act so as to align the quoted price with the Procuring Entity's allocated budget.

Negotiations

11. Vide letter dated 3rd March 2026, the Accounting Officer of the Procuring Entity wrote to the Interested Party and requested it to revise and submit its best and final offer taking into account that the terms and conditions of the subject tender remain the same and that the revised prices would not compromise the quality specifications of the said tender. In response, the Interested Party provided a best and final offer of Kshs. 13,000,000/-.
12. Upon review, the Evaluation Committee recommended award of the subject tender to the Interested Party at the price of Kshs. 13,000,000/- and a site visit be undertaken for due diligence.
13. On 9th March 2026, the Evaluation Committee conducted a site visit of the physical location of the Interested Party's printing press facility off Mombasa Road at Steel Makers Go Down so as to verify the bidder's technical capacity, equipment availability, operational capability, staffing, quality control systems, and overall ability to deliver the requirements outlined in the tender document. The Evaluation



Committee confirmed that the Interested Party met the required technical capacity in terms of evidence of its ability (printing, equipment, and staff capacity) to print and distribute 100,000 copies of My Gov Publication across the 47 counties, with proof of similar printing and distribution works undertaken.

Professional Opinion

14. In a Professional Opinion dated 12th March 2026 (hereinafter referred to as "the Professional Opinion"), the Head of Supply Chain Management Services, F. N. Mwangi (Mrs.) reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders, concurred with the recommendations of the Evaluation Committee and recommended award of the subject tender to the Interested Party as detailed therein.

15. Thereafter, the Professional Opinion was approved by the Respondent.

Notification to Tenderers

16. Tenderers were subsequently notified of the outcome of evaluation of the subject tender vide letters of Notification of Intention to Award.

REQUEST FOR REVIEW NO. 47 OF 2026

17. On 27th March 2026, MediaMax Network Limited, the Applicant herein, filed a Request for Review dated 26th March 2026 together with a



Supporting Statement of even day made by Aldrene Kintai, its Account Manager in the Commercial Department (hereinafter referred to as the 'instant Request for Review') seeking the following orders from the Board that:

- a. THAT the decision of the Respondent in respect to Tender Number MICDE/SDBT/01/2025-2026: - Provision of Publishing/Printing and Distribution Services for MyGov publication communicated vide an undated Notification of Intention to Award on 17th March, 2026 be set aside in its entirety.***
- b. THAT the decision of the Respondent to award Tender Number MICDE/SDBT/01/2025-2026: - Provision of Publishing/Printing and Distribution Services for MyGov publication to the Interested Party be set aside in its entirety.***
- c. THAT upon granting prayer (a) and (b) above, the Honorable Board be pleased to order the Respondent's evaluation committee to readmit the Applicant's bid into the tendering process and evaluate the same from the technical proposal stage onwards or re-advertise the tender.***
- d. THAT the Honorable Review Board be pleased to make such other or further orders at it may deem just, expedient, and appropriate in ensuring that the ends of justice are fully met in the circumstances of this Request for Review.***



e. THAT the costs of and incidental to this Request for Review be borne by the Respondent.

18. In a Notification of Appeal and a letter dated 27th March 2026, Mr. Philemon Kiprop, the Secretary of the Board notified the Respondent and Procuring Entity of the filing of the instant Request for Review and the suspension of the procurement proceedings, while forwarding to the said Respondents a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020. Further, the Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the matter within five (5) days from 27th March 2026.
19. *Vide* a Hearing Notice dated 4th April 2026, the Board Secretary, notified parties and all tenderers in the subject tender of an online hearing of the Request for Review slated for 9th April 2026 at 11.00 a.m., through the link availed in the said Hearing Notice.
20. On 7th April 2026, the 1st and 2nd Respondents filed through Annette Nyakora, Principal State Counsel, soft copies of a Notice of Appointment dated 7th April 2026, the 1st and 2nd Respondents' Memorandum of Response dated 7th April 2026 together with the confidential documents concerning the subject matter pursuant to Section 67(3)(e) of the Act. Hard copies were filed on 8th April 2026.



21. *Vide* letter and email dated 8th April 2026, the Board Secretary notified all tenderers in the subject tender via email, of the existence of the instant Request for Review while forwarding to all tenderers a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020. All tenderers in the subject tender were invited to submit to the Board any information and arguments concerning the tender within three (3) days.
22. On 9th April 2026, the Interested Party filed through the firm of Garane & Somane Advocates a Notice of Appointment dated 8th April 2026, an Interested Party's Memorandum of Response dated 8th April 2026, a Replying Affidavit sworn on 8th April 2026 by James Wachira Mundia, its Chief Finance Officer, Written Submissions dated 9th April 2026 and a List of Authorities and Case Digest dated 9th April 2026.
23. On the same day of 9th April 2026, counsel for the Interested party sought for an adjournment via email and indicated that he was unable to proceed with the hearing scheduled at 2.00 p.m. since he was concurrently engaged in a hearing before a three-judge bench of the Environment and Land Court in ELC Petition No. E052 of 2025. Subsequently, hearing of the instant Request for Review was rescheduled to Friday, 10th April 2026 at 11.30 a.m.
24. At the hearing on 10th April 2026 at 11.30 a.m., the Board read out pleadings filed by parties in the matter and confirmed that parties had exchanged their respective pleadings. Each party was allocated time to



highlight its case and the matter proceeded for virtual hearing as scheduled.

25. Nation Media Group, one of the bidders in the subject tender filed on 10th April 2026, Nation Media Group Plc filed its response concerning the subject tender. On the morning of 11th April 2026, the Respondents filed via email its response to the response filed by Nation Media Group. This transpired after the Board had heard parties' submissions in the instant Request for Review and as such, the Board will restrict itself with issues canvassed during the hearing.

PARTIES' SUBMISSIONS

Applicant's case

26. In its submissions, the Applicant placed reliance on its pleadings filed before the Board.
27. The Applicant submitted that the Respondent's decision to disqualify the Applicant's bid was irrational, unreasonable, and in breach of the principles of fairness and transparency as enshrined in Section 73 of the Act which mandates equal treatment of all tenderers.
28. The Applicant further submitted that the Procuring Entity adopted an unduly restrictive interpretation of publishing/printing and distribution services by limiting it to physical print yet the Tender Document did not expressly exclude digital publishing. It pointed out that the reason cited for its disqualification is that it did not provide a certified 6 months



statement of daily print runs and returns by the Company's CEO/Authorized company official but instead provided a 6 months certified statement for print runs/impressions for the e-newspaper given the subject tender relates to the provision of publishing/printing, and distribution services for MyGov publication.

29. It contends that given that its e-newspaper is distributed free of charge, there are no returns generated in the conventional sense applicable to paid print publications and as such, the requirement for returns is not applicable in this context and that the Procuring Entity failed to reasonably consider the operational model of digital publications.

30. As to whether the Applicant failed to fill the tender price in the Form of Tender, the Applicant submitted that this is not a mandatory requirement as per the Tender Document nor is it in breach of Section 79(1) of the Act. It argued that the disqualification on this basis is unjustified, disproportionate, and contrary to the principles of fairness and transparency and introduces as a requirement that was not expressly classified as mandatory.

31. It pointed out that its tender price was clearly and correctly indicated in the Price Schedule as seen at page 75 of the Tender Document which is the primary document for pricing and that the alleged omission in the Form of Tender is a minor non-material clerical error that does not affect the substance, completeness, or competitiveness of the bid.

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32. The Applicant submitted that the Respondent's application of a requirement not stated as mandatory constitutes an unfair and illegal deviation from the evaluation criteria set out in the Tender Document contrary to Section 80(1) of the Act. Further, that pursuant to Section 79(1) of the Act, responsiveness is determined based on conformity to the eligibility and other mandatory requirements in the tender documents and by disqualifying its bid on a ground not stipulated as mandatory, the Respondent introduced an extraneous evaluation criterion thereby violating the principle that evaluation must be strictly in accordance with the criteria disclosed to all tenderers.

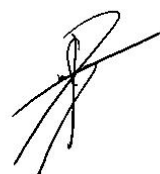
33. Ms. Muchori pointed out that the Interested Party was invited for negotiations which resulted in a reduction of its tender price from Kshs. 15 Million to 13 Million yet the Applicant was not afforded a similar opportunity to clarify the minor discrepancy in its Form of Tender or to enter into negotiations despite submitting a valid price schedule. That this differential treatment is a violation of the Applicant's right to equal treatment under Section 73 of the Act and constitutes an irregularity in the procurement process. Further, that its disqualification is ultra vires the provisions of the Act as it is based on a criteria that was not explicitly stated as a mandatory requirement nor applied with due consideration of the nature of the bidder's business model.

34. The Applicant urged the Board to allow the instant Request for Review as prayed.

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Respondents' case

35. In their submissions, the Respondents placed reliance on the pleadings and confidential documents submitted to the Board.
36. As to whether disqualification of the Applicant's tender in the subject tender is justified, counsel submitted that Section III – Evaluation and Qualification Criteria No. 2 of the Tender Document dictates that the procuring entity will start by examining all tenders to ensure they meet in all respects of the eligibility criteria and other mandatory requirements in the ITT, and that the tender is complete in all aspects in meeting the requirements provided for in the preliminary evaluation criteria. She pointed out that the Evaluation Committee applied these criteria while evaluating bids submitted in the subject tender at the Preliminary Evaluation stage.
37. She further submitted that Section I – Instructions to Tenderers ITT 19.1 – Documents establishing the Eligibility and Qualifications of the tenderer provides that to establish tenderer's eligibility in accordance with ITT 4, tenderers shall complete the Form of Tender included in Section IV – Tendering Forms. Additionally, that Section III – Tender Data Sheet (TDS) – ITT 14.1 provides that the Form of Tender and Priced Activity Schedule shall be prepared using the relevant forms furnished in Section IV – Tendering Forms and that the forms must be completed without any alterations to the text.



38. It is the Respondents' case that the Applicant's bid was not responsive as stipulated under Section 79(1) of the Act since (i) it filled, signed, and stamped the Form of Tender but omitted the tender price contrary to ITT 19.1 of the Tender Document, and (ii) it did not provide a certified 6-month statement of daily print runs and returns by the Company's CEO / Authorized company official, but instead provided a 6-month certified statement for print runs / impressions for e-newspaper, which was a mandatory requirement, and as such, the procurement process and evaluation of bids in the subject tender was above board.

39. Counsel submitted that omission of the price in a tender is considered a material deviation not a clerical error, making the tender non-responsive. She argued that the Form of Tender constitutes the formal and binding offer, and the tender sum contained therein represents the bidder's final and unequivocal price.

40. Counsel submitted that there being no tender sum indicated by the Applicant, once a bid has been submitted, no alteration, amendment or rectification is allowed pursuant to Section 82 of the Act. She further submitted that the tender sum is absolute, cannot be change, and, relied upon the holdings in *PPARB Application No. 42 of 2017*, *PPARB Application No. 123 of 2020* and *Sinopec International Petroleum Service Corporation v Public Procurement Administrative Review Board & 3 others (Civil Appeal E012 of 2024) [2024] KECA 184 (KLR) (23 February 2024) (Judgment)* in support of her argument.



41. While addressing the Applicant's claim that there are no returns generated since its e-newspaper is distributed free of charge rendering this requirement as not applicable to it, counsel argued that if the Applicant does not have daily print runs and returns, then it was ineligible *ab initio* and should not have applied for the subject tender noting that Mandatory Requirement No. 4 provided that the eligible tenderer must have a Certified 6-month statement of daily print runs and returns by the Company's CEO/Authorized company official.

42. In support of her argument, she relied on the holding in *Republic vs Public Procurement Administrative Review Board Ex parte Kenya Ports Authority Limited & 2 others* [2017] eKLR, *Ernie Campbell & Co. Ltd vs The Accounting Officer, National Housing 60 Corporation & others*, PPRAB Application No. 109 of 2021, *Republic vs Public Procurement Administrative Review Board & another; Premier Verification Quality Services (PVQS) Limited (Interested Party) Ex Parte Tuv Austria Turk* [2020] eKLR, and *Republic vs Public Procurement Administrative Review Board; Kenya Medical Supplies Authority (KEMSA) (Interested Party) Ex parte Emcure Pharmaceuticals Limited* [2019] eKLR and reiterated that mandatory requirements are non-negotiable and failure to comply cannot be cured as a minor deviation.

43. The Respondents argued that by the time the Procuring Entity was conducting competitive negotiations as provided under Section 131 (c), 132 (b), (2), (3), (4), and (5) and 133 of the Act, the Interested Party



had passed the preliminary and technical evaluation and that the competitive negotiations engaged in were not for purposes of rectifying any discrepancies. Further, that the only circumstances that allow competitive negotiations are set out under Section 131 of the Act and the Applicant did not meet the threshold in order for the procuring entity to conduct competitive negotiations with it.

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

Interested Party's case

45. The Interested Party placed reliance on its pleadings filed before the Board.

46. As to whether the failure to fill the price in the form of tender makes the Applicant's bid non-responsive, counsel submitted that the form of tender is a mandatory, foundational, and non-waivable requirement in the procurement process and the Tender Document expressly required bidders to complete the Form of Tender without alteration as part of establishing responsiveness. He argued that the Form of Tender constitutes the formal and binding offer and the tender sum contained therein represents the bidder's final and unequivocal price. Further, that the tender document provides that the tender sum, as submitted and read out during tender opening, is absolute and final and not subject to correction, adjustment, or amendment.

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47. Counsel submitted that where no tender sum is provided in the Form of Tender, there is no valid offer capable of evaluation and such omission is incurable. He argued that failure to indicate the tender sum constitutes a material omission, being the failure to submit a fundamental component of the bid noting that the tender document expressly provides that a tender containing a material omission is non-responsive and cannot subsequently be made responsive. Further, that the evaluation of responsiveness is based strictly on the contents of the tender as submitted, and the Procuring Entity cannot rely on post-submission explanations or corrections.

48. Counsel maintained that clarifications, as provided for under the Tender Document are limited in scope and cannot be used to alter the substance of a bid or introduce missing information, including the price. Further, that the Form of Tender is the bidder's binding/definitive offer, and it cannot be replaced by (or the offer derived from) the price schedule or other attachments. He reiterated that the Applicant's failure to include the tender sum in the Form of Tender rendered its bid non-responsive *ab initio* and incapable of proceeding to further evaluation and relied on the holding in *PPARB Application No. 123 of 2020* in support of his argument.

49. As to whether the Procuring Entity discriminated against the Applicant and showed favoritism towards the Interested Party, counsel submitted that this allegation by the Applicant was without factual or legal basis and that the Interested Party did not receive any clarification from the

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Procuring Entity. He further submitted that the evaluation process was sequential and that only bids that satisfied the mandatory requirements proceeded to subsequent stages of evaluation. He pointed out that the record demonstrates that multiple bidders including the Applicant were disqualified for failure to comply with mandatory requirements demonstrating uniform application of the evaluation criteria.

50. As to whether the Procuring Entity adopted an unduly restrictive interpretation of publishing/printing and distribution services, counsel submitted that the subject tender as advertised was for the provision of printing distribution services for the government, which necessarily has a public interest impetus to reach the widest possible audience. He indicated that this meant that printing and distribution of government publications necessarily includes physical and digital circulation and the term 'printing and distribution services' could not possibly be interpreted to limit it solely to 'digital printing and distribution.'

51. He pointed out that the provisions of the Tender Document which included as a mandatory requirement the provision of certified 6 month statement of daily print runs and returns by the company's CEO/Authorized company official in the tender and as such, the term daily print runs could only mean both physical and online print runs.

52. Counsel further pointed out that this position is reinforced by the fact that the pricing schedule and other requirements section in the Tender Document has requirements for the provision of daily circulation figures

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for physical print outs/publications and daily coverage and opportunity to see (OTS) for online copies/publications; each incapable of being substituted by the other.

53. He argued that the Procuring Entity intended to evaluate two distinct but complementary dissemination channels and that in any event, the invitation to tender and the Tender Document expressly provided an avenue for bidders to seek clarification or further information prior to submission, and even edit or review their documents before the bid was closed. While relying on the holding in *Republic v Public Procurement Administrative Review Board & another Ex Parte* (2024) eKLR and *Republic v Public Procurement Administrative Review Board; Kenya Power & Lighting Company PLC* (2026) eKLR, counsel submitted that bidders bear the responsibility of engaging diligently within the procurement framework, including seeking clarification where necessary.

54. The Interested Party urged the Board to dismiss the instant Request for Review with costs.

Applicant's Rejoinder

55. In rejoinder, Ms. Muchori reiterated that pursuant to Section 79 of the Act, a responsive tender shall not be affected by minor deviations that do not materially depart from the requirements set out in the Tender Document or errors and oversights that can be corrected without affecting the substance of the tender.



BOARD'S DECISION

56. The Board has considered all documents, submissions, and pleadings together with confidential documents submitted to it pursuant to section 67 (3)(e) of the Act and finds the following issues call for determination:

A. Whether the Procuring Entity lawfully disqualified the Applicant's tender 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 Procuring Entity lawfully disqualified the Applicant's tender in accordance with the provisions of the Tender Document, the Act, and the Constitution.

57. It is the Applicant's case that the Respondents failed to correctly apply the evaluation criteria and procedures set out in the Tender Document and unlawfully disqualified its tender on account of failure to fill the tender price in its Form of Tender despite meeting all the mandatory and technical requirements in the subject tender contrary to Article 227 of the Constitution and Section 80(2) of the Act.



58. On their part, the Respondents contend that the Evaluation Committee complied with provisions of the Constitution, the Act, and the Tender Document in evaluation of the Applicant's bid submitted in the subject tender and that the Applicant was rightfully disqualified having failed to fill the tender price in its Form of Tender which was a mandatory requirement stipulated in the Tender Document.

59. The Interested Party associated itself with the Respondents submissions and submitted that the Applicant failed to meet the mandatory requirements stipulated in the Tender Document and was rightfully disqualified in the subject tender.

60. We note 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:

"227. Procurement of public goods and services

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

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



a) d)”

61. 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”

62. The Act was established, *inter alia*, to give effect to Article 227 of the Constitution. 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."

63. 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.

64. 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."

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65. Section 80 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, ...***
- (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)"***



66. 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. The Board's interpretation of a system that is fair is one that considers equal treatment of all tenders against criteria of evaluation known by all tenderers having been well laid out in the tender document issued by the procuring entity. 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.

67. 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."

68. 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."

69. Further, the High Court 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** (hereinafter referred to as Miscellaneous Civil Application No. 85 of 2018) held:

"Briefly, the requirement of responsiveness operates in the following manner: - a bid only qualifies as a



responsive bid if it meets all requirements as set out in the bid document. Bid requirements usually relate to compliance with regulatory prescripts, bid formalities, or functionality/technical, pricing and empowerment requirements. Indeed, public procurement practically bristles with formalities which bidders often overlook at their peril. Such formalities are usually listed in bid documents as mandatory requirements – in other words they are a sine qua non for further consideration in the evaluation process. The standard practice in the public sector is that bids are first evaluated for compliance with responsiveness criteria before being evaluated for compliance with other criteria, such as functionality, pricing, empowerment or post qualification. Bidders found to be non-responsive are excluded from the bid process regardless of the merits of their bids. Responsiveness thus serves as an important first hurdle for bidders to overcome...

...Mandatory criteria establish the basic requirement of the invitation. Any bidder that is unable to satisfy any of these requirements is deemed to be incapable of performing the contract and is rejected. It is on the basis of the mandatory criteria that "competent" tenders are established..."



70. In **Sinopec International Petroleum Service Corporation v Public Procurement Administrative Review Board & 3 others (Civil Appeal E012 of 2024) [2024] KECA 184 (KLR) (23 February 2024) (Judgment)** the Court of Appeal stated as follows:

"Bids are first evaluated for compliance with responsiveness criteria before being evaluated for compliance with other criteria. A bid only qualifies as a responsive bid if it meets all requirements as set out in the bid documents. Bids found to be non-responsive are excluded from the bid process regardless of the merits of their bids. Responsiveness is thus the first important hurdle for bidders to overcome."

71. 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.



72. Having considered parties pleadings and submissions, the Board is required to determine whether the Applicant's tender was properly evaluated and disqualified in the subject tender.

73. According to the letter of Notification of Intention to Award issued to the Applicant by the Procuring Entity, we note that the reasons for disqualification of the Applicant's bid is laid out as follows:

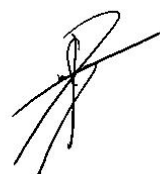
" -The bidder did not provide a certified 6-month statement of daily print runs and returns by the Company's CEO/Authorized company official but instead provided a 6-month certified statement for print runs/impressions for e-newspaper.

-The tenderer failed to fill the tender price in the form of tender."

74. A perusal of the Evaluation Report submitted to the Board by the 1st Respondent pursuant to Section 67(3)(e) of the Act reveals that the Applicant's tender was disqualified at the preliminary evaluation stage and reads as follows:

'(i) The tenderer failed to fill the tender price in the form of tender.

(ii) The tenderer did not comply to the procedure set out in the tender document and Section 79(1) of the Public Procurement and Asset Disposal Act 2015 which states – 'A tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents.'



75. From the contents of the Evaluation Report, it is evident that the Applicant's tender was disqualified at the Preliminary Evaluation stage for failure to fill the tender price in the form of tender.

76. A look at the Tender Document shows that ITT 13 of Section I – Instructions to Tenderers of the Tender Document provides for Documents Comprising the Tender as follows:

13.1 The Tender shall comprise the following:

(a) Form of Tender prepared in accordance with ITT 14

.....

77. ITT 14 of Section I – Instructions to Tenderers of the Tender Document provides for the Form of Tender and Activity Schedule as follows:

14.1 The Form of Tender and Priced Activity Schedule shall be prepared using the relevant forms furnished in Section IV- Tendering Forms. The forms must be completed without any alterations to the text, and no substitutes shall be accepted except as provided under ITT 22.3. All blank spaces shall be filled in with the information requested.

.....

78. According to the above provisions, a bid submitted in the subject tender ought to comprise of a Form of Tender which has been prepared using the relevant forms furnished in Section IV, Tendering Forms and this form



must be completed without any alteration to the text with all blank spaces filled in with the requested information.

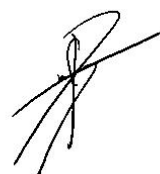
79. Notably, ITT 14.1 of Section II – Tender Data Sheet (TDS) of the Tender Document provides:

<i>ITT 14.1</i>	<i>Form of Tender and Activity Schedule and other forms in the bid document</i> <i>The Form of Tender and priced Activity Schedule shall be prepared using the relevant forms furnished in Section IV, Tendering Forms. The forms must be completed without any alterations to the text</i>
------------------------	--

80. Moreover, ITT 19 of Section I – Instructions to Tenderers of the Tender Document provides for Documents Establishing the Eligibility and Qualifications of the Tenderer as follows:

19.1 To establish Tenderer's eligibility in accordance with ITT4, tenderers shall complete the Form of Tender included in Section IV- Tendering Forms.

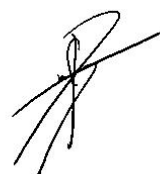
81. Hence, a tenderer's eligibility and qualification in the subject tender would be established from its completed Form of Tender included in Section IV, Tendering Forms.



82. It is important to note that both 14 and 19 of Section I – Instructions to Tenderers of the Tender Document use the word 'shall' to depict the compulsory or mandatory obligation placed on a bidder to complete the Form of Tender submitted in the subject tender (a) using the relevant forms furnished in Section IV, Tendering Forms, (b) without alterations to the text, (c) without substitutions unless allowed under ITT 22.3, and (d) by filling all blank spaces with the information requested. In so saying, we observe that the High Court in **Miscellaneous Civil Application No. 52 of 2018 Republic v Public Procurement Administrative Review Board & 4 Others ex parte Britam Life Assurance Company Limited & Another (2018) eKLR** held as follows:

"...The word shall in its ordinary meaning is a word of command which is normally given a compulsory meaning as it is intended to denote obligation. The Longman Dictionary of the English Language states that "shall" is used to express a command or exhortation or what is legally mandatory. Regard must be had to the long established principles of statutory interpretation. At common law, there is a vast body of case law which deals with the distinction between statutory requirements that are peremptory or directory and, if peremptory, the consequences of non-compliance.

.....



83. The Board notes that the criteria for evaluation of the subject tender was set out in Section III-Evaluation and Qualification Criteria of the Tender Document which lays out the General Provision as follows:

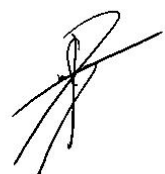
"

1.2 This section contains the criteria that the Employer shall use to evaluate tender and qualify tenderers. No other factors, methods or criteria shall be used other than specified in this tender document. The Tenderer shall provide all the information requested in the forms included in Section IV, Tendering Forms. The Procuring Entity should use the Standard Tender Evaluation Report for Goods and Works for evaluating Tenders.

1.3 Evaluation and contract award criteria

The Procuring Entity shall use the criteria and methodologies listed in this Section to evaluate tenders and arrive at the Lowest Evaluated Tender. The tender that (i) meets the qualification criteria, (ii) has been determined to be substantially responsive to the Tender Documents, and (iii) is determined to have the Lowest Evaluated Tender price shall be selected for award of contract."

84. According to the above provisions, the Procuring Entity was required to evaluate tenders and qualify tenderers using the criteria set out under Section III – Evaluation and Qualification Criteria and no other factors,



methods, or criteria would be used other than what has been specified in the Tender Document. For a tender to be selected for award of contract, it ought to *inter alia*, meet the qualification criteria and be determined to be substantially responsive to the Tender Documents.

85. It therefore means that in addition to satisfying the evaluation criteria set out under Section III – Evaluation and Qualification Criteria of the Tender Document, a tender was required to be substantially responsive to the requirements specified in the Tender Document. Put differently, the Tender Document ought to be read holistically and interpreted conjunctively for a bid to not only be considered as substantially responsive but as having also met the qualification criteria.

86. Examination of the Applicant's bid document submitted to the Board by the 1st Respondent pursuant to Section 67(3)(e) of the Act shows the following with regard to the reasons for disqualification of the bid submitted by the Applicant in response to the subject tender:

(i) Failure to fill the Form of Tender

87. A bidder was required to submit a duly filled, signed, and stamped Form of Tender. The instructions to tenderers on the Form of Tender at Section IV – Tendering Forms were as follows:

"1. FORM OF TENDER INSTRUCTIONS TO TENDERERS

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i) The Tenderer must prepare this Form of Tender on stationery with its letterhead clearly showing the Tenderer's complete name and business address.

ii) All italicized text is to help Tenderer in preparing this form.

iii) Tenderer must complete and sign CERTIFICATE OF INDEPENDENT TENDER DETERMINATION and the SELF DECLARATION OF THE TENDERER and TENDERER'S ELIGIBILITY – CONFIDENTIAL BUSINESS QUESTIONNAIRE all attached to this Form of Tender.

iv) The Form of Tender shall include the following Forms duly completed and signed by the Tenderer.

a) Tenderer's Eligibility-Confidential Business Questionnaire

b) Certificate of Independent Tender Determination

c) Self-Declaration of the Tenderer

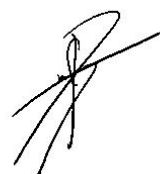
Date of this Tender Submission: _____ [insert date (as day, month, and year) of Tender submission]

.....

e) Tender Price: The total price of our Tender, excluding any discounts offered in item (f) below is:

[insert one of the options below as appropriate]

In case of multiple Service Lines or Service Packages (a) Total price of each Service Line or Package [insert the total price of each in words and figures, indicating the various amounts and the respective currencies]; and (b) Total price of all Service Lines and Packages [insert the total price in words and figures, indicating the various amounts and the respective currencies];



Discounts: The discounts offered and the methodology for their application are:

i) The discounts offered are: [Specify in detail each discount offered]

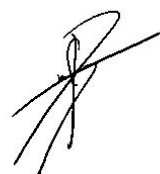
ii) The exact method of calculations to determine the net price after application of discounts is shown below: [Specify in detail the method that shall be used to apply the discounts];

..... "

88. For the Form of Tender to be considered as completed and prepared in accordance with ITT 14 of Section I – Instructions to Tenderers of the Tender Document, a bidder was required to, *inter alia*, prepare its Form of Tender on stationery with its letterhead clearly showing its complete name and business address complete and be guided by the italicized text in preparing the said form. With regard to the tender price, the bidder was required to insert any one of the available options by indicating the total price in words and figures.

89. We note that the Applicant submitted its Form of Tender at page 28 to 30 of its bid document and observe as follows:

- i. The Applicant failed to duly complete its Form of Tender having failed to indicate its tender price as instructed in both words and figures.
- ii. The Applicant also failed to submit its Form of Tender on stationery with its letterhead clearly showing its complete name and business address as instructed.



90. With regard to the omissions on the Applicant's Form of Tender, the Board has severally stated the prime position which the Form of Tender occupies in the tendering process. In **PPARB Application No. 118 of 2024 Kanyareh Investment Company Limited v The Accounting Officer, Kapsabet Girls High School & Others**, the Board held as follows with regard to the Form of Tender:

"It is the document through which a tenderer communicates its intentions to a procuring entity. It often communicates the tender amount and other important information about the tender. The tender stated in the Form of Tender cannot be altered in any way save as provided for within the tender document. In other words, the Form of Tender is sacrosanct. The information contained therein cannot be taken lightly."

91. In this instant, it is evident that the Applicant's Form of Tender was not submitted in the manner prescribed in the Tender Document having failed to indicate its tender price. While making reference to Section 79 of the Act with regard to responsiveness of its tender, the Applicant urged the Board to consider the non-compliance issues identified by the Procuring Entity as a minor deviation and having no effect on the substance of its tender.

92. In addressing whether the errors committed by the Applicant in its Form of Tender can be deemed as minor deviation, we note that ITT 30.1 of



Section I – Instructions to Tenderers of the Tender Document defines a deviation as:

"Deviation" is a departure from the requirements specified in the tender document;

93. ITT 31 of Section I – Instructions to Tenderers of the Tender Document further provides for determination of Responsiveness as follows:

.....

31.2 A substantially responsive Tender is one that meets the requirements of the Tender document without material deviation, reservation, or omission. A material deviation, reservation, or omission is one that:

a) if accepted, would:

i. affect in any substantial way the scope, quality, or performance of the Works specified in the Contract; or

ii. limit in any substantial way, inconsistent with the tender document, the Procuring Entity's rights or the tenderer's obligations under the proposed contract; or

b) if rectified, would unfairly affect the competitive position of other tenderers presenting substantially responsive tenders.

.....

31.4 If a tender is not substantially responsive to the requirements of the tender document, it shall be rejected by the Procuring Entity and may not subsequently be made



***responsive by correction of the material deviation,
reservation, or omission***

94. In essence, a deviation as provided for in the Tender Document is a departure from the requirements specified in the Tender Document and for a tender to be deemed as substantially responsive, it ought to meet the requirements of the Tender Document without material deviation. For a deviation to be considered as material, if accepted and rectified, it would unfairly affect the competitive position of other tenderers presenting substantially responsive tenders. Further, if a tender is not substantially responsive to the requirements of the tender document, it shall be rejected by the Procuring Entity and may not subsequently be made responsive by correction of the material deviation.

95. Having failed to complete the Form of Tender as instructed in the Tender Document, the Applicant by no doubt deviated from the provided requirements laid out under ITT 14 and 19 of Section I – Instructions to Tenderers of the Tender Document which are in mandatory terms. This is in view of having established hereinabove that in addition to satisfying the evaluation criteria set out under Section III – Evaluation and Qualification Criteria of the Tender Document, a tender was required to be substantially responsive to the requirements specified in the Tender Document.

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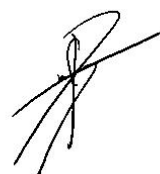
96. The Board has on various occasions considered the import of Section 79(2) and (3) of the Act with respect to minor deviations. Section 79 (2) and (3) of the Act provides that:

"(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.*"**

97. 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.

98. In **Miscellaneous Civil Application No. 85 of 2018** 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."

99. 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.

100. 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."



101. 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.

102. 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.

103. 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.

104. 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.

105. The Board is therefore not persuaded by the Applicant's arguments to consider that its tender was substantially responsive and that any minor deviations in its tender in view of its non-compliance with preparing its Form of Tender were immaterial noting that public procurement espouses the principle of competition which requires that participating tenderers should compete on equal footing such that any non-compliance on any tender requirement calls for the automatic disqualification of the non-compliant tender.

(ii) Failure to provide a certified 6-month statement of daily print runs and returns by the Applicant's CEO/Authorized Company Official

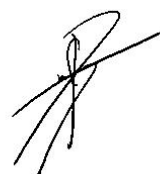
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106. Mandatory Requirement No. 4 under Clause A. Mandatory Requirements (Preliminary Evaluation) of the Tender Document required a bidder to submit Certified 6 – month statement of daily print runs and returns by the Company’s CEO/Authorized company official. We note that the Applicant instead submitted in its bid Print Runs/Impressions for the Last Six Months for People Daily E-Newspaper and indicated that People Daily E-Newspaper doesn’t have print returns since it is accessed for free.

107. It is the Board’s considered view that the Applicant ought to have sought clarification from the Procuring Entity in view of Mandatory Requirement No. 4 of the Tender Document prior to submission of its bid document so as to ascertain the requirement for print returns and if any exemption would be issued for bidders that did not have print returns.

108. In any event, the Applicant having obtained the Tender Document and determined that it was eligible, qualified, and interested to bid in the subject tender advertised on 20th January 2026, ought to have challenged Mandatory Requirement No. 4 under Clause A. Mandatory Requirements (Preliminary Evaluation) of the Tender Document within 14 days from 20th January 2026 in line with Section 167(1) of the Act which dictates that:

(1) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of



occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.

109. The Board notes that it has in a plethora of cases held that procurement proceedings are time bound and a candidate or a tenderer who wishes to challenge a decision of a procuring entity with respect to a tender must come before the Board at the earliest, by using the earliest option available so as not to be accused of laches. In **Republic v Public Procurement Administrative Review Board & 2 others Ex-Parte Kemotrade Investment Limited [2018] eKLR** the High Court at paragraphs 65, 66 and 67 noted that to determine when time starts to run, such determination can only be made upon an examination of the alleged breach and when the aggrieved tenderer had knowledge of the said breach and held:

66. The answer then to the question when time started to run in the present application can only be reached upon an examination of the breach that was alleged by the 2nd Interested Party in its Request for Review, and when the 2nd Interested Party had knowledge of the said breach. The said Request for Review was annexed as "Annexure CO4" to the 2nd Interested Party's replying affidavit. Paragraphs 2 to 4 of the said Request address the first breach that the 2nd



Interested Party 's representative, one Charles Obon'go noted and notified the Chairman of the tender opening committee about at the tender opening, namely that the Applicant had not supplied the sample of 3m of the sleeve and mill certificate and had not been issue with a delivery note, and that the said Applicant sought to introduce the sample after the commencement of the tender opening.

67. It is not in dispute that the tender opening was on 10th November 2017 at 10.00am, which all the parties attest to in their various affidavits. It is therefore evident that for this particular breach the 2nd Interested Party had knowledge of the same and admits to notifying the 1st Interested Party's tender opening committee of the same on 10th November 2017. Therefore, time for filing a review against this particular alleged breach started to run on 10th November 2017, and the Respondent had no jurisdiction to consider the alleged breach when it was included in the Request for Review filed on 21st February 2017, as the statutory period of filing for review of 14 days had long lapsed. Any decisions by the Respondent on the alleged breach were therefore ultra vires



and null and void.

110. The Applicant's challenge regarding Mandatory Requirements (Preliminary Evaluation) of the Tender Document is therefore time barred having been raised outside the prescribed statutory period stipulated under Section 167(1) of the Act

111. In the circumstances, the Board finds that the Procuring Entity 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.

What orders should the Board grant in the circumstances?

112. The Board has found that the Procuring Entity 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.

113. The upshot of our finding is that the instant Request for Review fails.

FINAL ORDERS

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



A. The Request for Review dated 26th March 2026 and filed on 27th March 2026 be and is hereby dismissed.

B. The Respondent is hereby directed to proceed with the procurement process of Tender No. MICDE/SDBT/01/2025-2026 for Provision of Publishing/Printing and Distribution Services for MyGov Publication/Other Public Sector Publications to conclusion in accordance with the provisions of the Tender Document, the Act, and the Constitution.

C. In view of our findings above, each party shall bear its own costs in the Request for Review.

Dated at NAIROBI this 15th Day of April 2026.


.....
CHAIRPERSON
PPARB


.....
SECRETARY
PPARB