REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 89/2026 OF 18TH JUNE 2026

BETWEEN

PLATINATE SOLUTIONS LTD ..... APPLICANT

AND

THE DIRECTOR GENERAL
COMMUNICATIONS AUTHORITY OF KENYA .....1st RESPONDENT
COMMUNICATIONS AUTHORITY OF KENYA ..... 2nd RESPONDENT

Review against the decision of the Director General, Communications Authority of Kenya in relation to Tender No. CA/SCM/OT/03/2025-2026 for the Provision of ID-TO-SIM Card Checker Services

BOARD MEMBERS PRESENT

1. Mrs. Njeri Onyango, FCIArb, S.C - Panel Chairperson
2. QS Hussein Were - Member
3. Mr. Jackson Awele - Member
4. Mr. Stanslaus Kimani - Member

IN ATTENDANCE

1. Ms. Godana Dokatu - Holding brief for Board Secretary
2. Ms. Evelyn Weru - Secretariat

PRESENT BY INVITATION

APPLICANT **PLATINATE SOLUTIONS LTD**

Ms. Kerubo - Advocate, A.E. Kiprono & Associates

RESPONDENT **THE DIRECTOR GENERAL**
COMMUNICATIONS AUTHORITY OF KENYA

Mr. Wachira Patrick - Advocate, Kipkenda & Company Advocates

BACKGROUND OF THE DECISION

The Tendering Process

1. The Communications Authority of Kenya, Procuring Entity herein invited sealed tenders in response to Tender No. CA/SCM/OT/03/2025-2026 for the Provision of ID-TO-SIM Card Checker Services (hereinafter referred to as the "subject tender"). The invitation was on 17th February 2026 on the Procuring Entity's website https://tenders.go.ke/OpenTenders and on the Public Procurement Information Portal www.tenders.go.ke where the blank tender document for the subject tender issued to tenderers by the Procuring Entity (hereinafter referred to as the Tender Document') was available for download. The subject tender's submission deadline was scheduled on 11th March 2026 at 10.30 a.m. E.A.T.

Submission of Tenders and Tender Opening

2. According to the Minutes of the subject tender's opening held on 11th March 2026 signed by members of the Tender Opening Committee (hereinafter referred to as the 'Tender Opening Minutes') and which Tender Opening Minutes were part of confidential documents furnished to the Public Procurement Administrative Review Board (hereinafter referred to as the 'Board') by the Respondent pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act'), five (5) tenders were successfully submitted in the subject tender being:

No	**Bidder**
1.	Better SMS Limited
2.	BSK Global
3.	Mashiriki Limited
4.	Masterclass Solution Limited
5.	Platinate Solutions

Evaluation of Tenders

3. A Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") appointed by the Respondent undertook evaluation of the tenders submitted in the subject tender as captured in the Evaluation Report for the subject tender (hereinafter referred to as the "Evaluation Report") in the following stages:
    a. Preliminary Evaluation
    b. Technical Evaluation

c. 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 Clause A Mandatory/Preliminary Evaluation Stage of Section III- Evaluation and Qualification Criteria of the Tender Document. Tenderers were required to meet all the mandatory requirements at this stage to proceed for Technical Evaluation.

5. At the end of evaluation at this stage, two (2) tenders were determined to be non-responsive and while three (3) tenders were 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 Clause B Technical Compliance Evaluation Stage and Clause C Technical Capacity Evaluation Stage of Section III- Evaluation and Qualification Criteria of the Tender Document.

7. At the end of evaluation at the Technical Compliance Evaluation stage, all the three (3) tenders met the requirements of the Technical Compliance Evaluation and were rendered responsive and progressed for evaluation at the Technical Capacity Evaluation stage.

Upon conclusion of evaluation at the Technical Capacity Evaluation stage, two (2) tenders were found to be non-responsive while one (1) tender was determined to be responsive and progressed to Financial Evaluation.

Financial Evaluation

8. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria provided under Clause D Financial Evaluation of Section III – Evaluation and Qualification Criteria of the Tender Document. Upon evaluation of the one (1) tender that had progressed at this stage, the Evaluation Committee found as follows:

Table 9: Financial Proposal

No.	***Item description***	***Qty.***	***B1***	
			Unit Cost (Exclusive of Taxes)	***Total Cost (Exclusive of Taxes***
1.	***One time system set up fees for Provision of ID-to-SIM card Checker Services***	***1***	***1,980,000.00***	***1,980,000.00***
2.	***Support and Maintenance fees***	***4 Years***	***5,933,375.00***	***23,733,500.00***
One Time and Recurrent Costs				***25,713,500.00***
Add Levy Order 0.03% (equivalent to 0.0003) of A				***7,714.05***
Add VAT 16% of A				***4,114,160.00***

No.	*Item description*	*Qty.*	*B1*	
			Unit Cost (Exclusive of Taxes)	*Total Cost (Exclusive of Taxes*
Grand Total Cost (A+B+C): To be carried to the Form of Tender				*29,835,374.05*

Evaluation Committee's Recommendation

9. The Evaluation Committee recommended award of the subject tender to M/s Better SMS Limited at their tender sum of Kenya Shillings Twenty-Nine Million, Eight Hundred Thirty-Five Thousand, Three Hundred Seventy-Four Shillings Cents five (Kes. 29,835,374.05) inclusive of VAT and Levy Order.

10. Further, the evaluation committee recommended that the bidder prior to signing the contract shall provide a performance security of 5% of the contract sum and in line with General Conditions of Contract (GCC) Clause 13.3.1 as amended in the Special Conditions of Contract.

First Professional Opinion

11. In a Professional Opinion dated 26th March 2026 (hereinafter referred to as the "First Professional Opinion"), the Director, Supply Chain Management, Mr. Peter Mwangi reviewed the manner in which the subject procurement process was undertaken including

evaluation of tenders and concurred with the recommendations of the Evaluation Committee with respect to award of the subject tender.

12. Thereafter, the Professional Opinion was approved as recommended on 30th March 2026.

Notification to Tenderers

13. Tenderers were notified of the outcome of evaluation of the subject vide letters dated 2nd April 2026.

REQUEST FOR REVIEW NO. 53 OF 2026

14. On 14th April 2026, Platinate Solutions Ltd, the Applicant herein, filed a Request for Review dated 14th April 2026 together with an Affidavit in Support of Request for Review sworn by Edwin Kirera Maina, on 14th April 2026 (hereinafter, "Request for Review No. 53 of 2026") through A.E. Kiprono & Associates seeking the following orders from the Board in verbatim:

a) An order annulling and setting aside the award of the Tender to Better SMS Limited at the tender sum of Kshs. 29,835,374.05;

b) An order quashing the Respondent's decision contained in the letter dated 2nd April 2026 declaring the Applicant's bid unsuccessful;

c) A declaration that the Respondent unlawfully, unreasonably and unfairly evaluated the Applicant's bid by applying undisclosed and subjective criteria at the technical capacity evaluation stage, in contravention of the Act, the Regulations and the Constitution;

d) An order directing the Respondent to re-evaluate the Applicant's bid at the technical capacity evaluation stage strictly in accordance with the criteria set out in the tender document and the directions of this Board;

e) In the alternative, an order directing the Respondent to award the Tender to the Applicant as the lowest evaluated responsive bidder;

f) An order awarding the costs of this Request for Review to the Applicant;

g) Any other or further relief that this Honourable Board may deem just and fit to grant in the circumstances.

15. Following hearing of Request for Review No. 53 of 2026, the Board issued the following orders in its Decision dated 5th May 2026:

A. The Respondents' Notice of Preliminary Objection dated 21st April 2026 and filed on even date be and is hereby dismissed.

B. The letter of Notification of Intention to Award dated 2nd April 2026 issued by the Respondent to the successful bidder with respect to Tender No. CA/SCM/OT/03/2025-2026 for the Provision of ID-TO-SIM Card Checker Services be and is hereby cancelled and set aside.

C. The letters of Notification of Intention to Award dated 2nd April 2026 issued by the Respondent to the Applicant and to all other unsuccessful tenderers with respect to Tender No. CA/SCM/OT/03/2025-2026 for the Provision of ID-TO-SIM Card Checker Services be and are hereby cancelled and set aside

D. The Respondent is hereby ordered to direct the Evaluation Committee of the Procuring Entity to admit the Applicant back to the Technical Capacity Evaluation stage and proceed with the procurement process to its logical and legal conclusion within 21 days while taking into consideration the findings of the Board in this decision, the provisions of the Tender Document, the Constitution, the Act.

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

RE-EVALUATION

16. Following the Decision of the Board in Request for Review No. 53 of 2026, the procurement proceedings in the subject tender were advanced as follows:

Technical Re-Evaluation

17. According to the Re-Evaluation Report dated 19th May 2026 (hereinafter, "the Re-Evaluation Report"), the Evaluation Committee was required to carry out a Technical Evaluation using the criteria provided under Clause B Technical Compliance Evaluation Stage and Clause C Technical Capacity Evaluation Stage of Section III-Evaluation and Qualification Criteria of the Tender Document.

18. At the end of the re-evaluation at the Technical Capacity Evaluation stage, one (1) tender was found to be non-responsive while two (2) tenders were determined to be responsive and progressed to Financial Evaluation.

Financial Re-Evaluation

19. At this stage of evaluation, the Evaluation Committee was required to examine tenders using the criteria provided under Clause D Financial Evaluation of Section III – Evaluation and Qualification Criteria of the Tender Document. Upon re-evaluation of the two (2) tender that had progressed at this stage, the Evaluation Committee found as follows:

In view of the above, the Committee established that B1 and B5 met the requirements of financial evaluation as stated herein above. The financial proposals for B1 and B5 are as tabulated in Table 4.

Table 4: Financial Proposal

No.	*Item description*	*Qty.*	*B1*		*B5*	
			Unit Cost (Exclusive of Taxes)	*Total Cost (Exclusive of Taxes*	*Unit Cost (Exclusive of Taxes)*	*Total Cost (Exclusive of Taxes*
1.	*One time system set up fees for Provision of ID-to-SIM card Checker Services*	*1*	*1,980,000.00*	*1,980,000.00*	*13,498,758.00*	*13,498,758.00*
2.	*Support and Maintenance fees*	*4 Years*	*5,933,375.00*	*23,733,500.00*	*2,761,822.61*	*11,047,290.44*
One Time and Recurrent Costs				*25,713,500.00*		*24,546,048.44*
Add Levy Order 0.03% (equivalent to 0.0003) of A				*7,714.05*		*7,363.81*
Add VAT 16% of A				*4,114,160.00*		*3,927,367.75*
Grand Total Cost (A+B+C)				*29,835,374.05*		*28,480,780.00*

Evaluation Committee's Recommendation

20. According to the Re-Evaluation Report, the Evaluation Committee upon conclusion of the technical and financial evaluation noted as follows:

a) that bidder B5 submitted agreements with foreign-based MNOs, while bidder B1, submitted agreements with Kenyan-based MNOs, whose databases they were going to query

b) Based on PPARB's observations on this matter, namely, the nature of the procurement in the subject tender relates to an ID to SIM Card Verification System which operates within a regulated telecommunications framework, and may in practice require integration with locally licensed operators, such a requirement as to relevance of the agreements to be submitted by bidders ought to have been clearly and expressly stated in the Tender Document at the outset to ensure fairness, transparency, and equal treatment of bidders. This is to enable the tender document to speak for itself.

c) On the above basis, the Board observed that under the mandatory evaluation stage, whereas other statutory requirements like business registration, tax compliance, and CR12 had been included, the requirements for a Content Service Provider (CSP) License, which is under

the regulatory purview of the Authority was not included among the mandatory requirements of the tender.

d) Noting the nature of the data to be queried is of personal nature, the committee notes that the entity entrusted with querying this data has to be registered by the Office of the Data Protection as a data processor, in line with the Data Protection Act. This requirement is also missing under the mandatory evaluation criteria.

21. The Evaluation Committee proceeded to recommend:

a) termination of the procurement process in view of the noted material governance issues, as reinforced by the PPARB observations in its ruling.

b) re-tender of the Procurement with proper and clear mandatory requirements that adhere to the PPRA requirements and any other Telecommunication Regulatory requirements that may have been omitted in the current Tender Document.

Second Professional Opinion

22. In a Professional Opinion dated 5th June 2026 (hereinafter referred to as the "Second Professional Opinion"), Mr. Philip Kiplagat for the

Director, Supply Chain Management, reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders and concurred with the recommendations of the Evaluation Committee with respect to termination of the subject tender.

23. Thereafter, the Professional Opinion was approved as recommended on 8th June 2026.

Notification to Tenderers

24. Tenderers were notified of the termination of the subject vide letters dated 9th June 2026.

REQUEST FOR REVIEW NO. 89 OF 2026

25. Dissatisfied, the Applicant on 18th June 2026 filed a Request for Review dated 16th June 2026 together with an Affidavit in Support of Request for Review sworn by Edwin Kirera Maina, on 16th June 2026 (hereinafter, "instant Request for Review") through A.E. Kiprono & Associates seeking the following orders from the Board in verbatim:

a) A declaration that the 1st Respondent's decision to terminate Tender No.CA/SCM/OT/03/2025-2026 for provision of ID-TO-SIM Card Checker Services is unlawful, null and void.

b) An order annulling and setting aside the 1st Respondent's letter to the Applicant dated 9th June 2026 terminating Tender No.CA/SCM/OT/03/2025-2026 for provision of ID-TO-SIM Card Checker Services.

c) An order annulling and setting aside the Respondent's decision to terminate Tender No.CA/SCM/OT/03/2025-2026 for provision of ID-TO-SIM Card Checker Services as contained in the letter dated 9th June 2026.

d) An order directing the Respondents to proceed with the procurement process to its logical and legal conclusion and as per the Board's decision in PPARB Application No.53 of 2026.

e) An order directing the Respondents to extend the tender validity for such period as the Review Board deems fit to enable the Respondents conclude the tender process.

f) An award of costs for the review to the Applicant.

g) Any other relief that the Review Board deems fit to grant under the circumstances.

26. In a Notification of Appeal and a letter dated 18th June 2026, the Board Secretary 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 18th June 2026.

27. On 26th June 2026, the Respondent filed through Kipkenda & Company Advocates a Notice of Appointment of Advocate dated 25th June 2026, Respondents' Replying Affidavit sworn on 25th June 2026 by David Mugonyi together with confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act.

28. *Vide* a Hearing Notice dated 26th June 2026, the Board Secretary, notified parties and all tenderers in the subject tender of an online hearing of the instant Request for Review slated for 2nd July 2026 at 11.00 a.m., through the link availed in the said Hearing Notice.

29. On 29th June 2026, the Applicant filed Written Submissions of even date.

30. On 2nd July 2026, the Respondents filed Written Submissions dated 1st July 2026 and a List and Bundle of Authorities dated 1st July 2026. On the same day of 2nd July 2026, the Respondents filed a letter in response to the instant Request for Review dated 23rd June 2026.

31. At the hearing of the instant Request for Review on 2nd July 2026 at 11.00 a.m. the Board read out the pleadings filed by parties in the matter and allocated time for parties to highlight their respective cases. Thus, the instant Request for Review proceeded for virtual hearing as scheduled.

PARTIES' SUBMISSIONS

Applicant's Submissions

32. The Applicant made reference to the Board's Decision in Request for Review No. 53 of 2026 and submitted that instead of complying with the Board's orders therein, the 1st Respondent vide letter dated 9th June 2026 terminated the subject tender pursuant to Section 63(1)(e) of the Act on account of detection of material governance issues during the tendering process.

33. The Applicant contends that other than restating in the notification letter that material governance issues have been detected during the tendering process, the Respondents did not state any of the alleged governance issues and that the request for debrief vide email of 10th

June 2026 did not elicit a response from them. The Applicant indicated that it is from the Replying Affidavit that the Respondents now seek to justify the termination of the subject tender on grounds that were never communicated to the Applicant. The Applicant argues that these new reasons constitute an afterthought introduced to retrospectively justify an otherwise unlawful decision.

34. The Applicant pointed out that Section 63 of the Act enjoins the Procuring Entity to, amongst others, give the Public Procurement Regulatory Authority a written report on the termination of a tender, while giving reasons for the said termination within 14 days, yet nothing in the response shows that the Respondents complied with this requirement. Further, that the Procuring Entity is under an obligation to notify all persons who submitted tenders of the decision to terminate the procurement proceedings, giving reasons thereof, within 14 days of termination, yet the Respondent did not fully comply with Section 63(4) of the Act and that it merely informed the Applicant that the tender had been terminated upon detection of material governance issues without stating the said issue.

35. The Applicant reiterated that the termination letter fails to disclose the nature, particulars, or factual basis of the alleged detection of material governance issues thereby contravening the rules of natural justice and made reference to the holdings in *Republic v Public Procurement Administrative Review Board & another ex parte SGS*

Kenya Limited (2017) eKLR, *PPARB Application No. 84 of 2017 Baraki International Ltd v Kenya Urban Roads Authority*, *PPARB Application No. 50 of 2020 Danka Africa (K) Limited v Accounting Officer*, *Kenya Ports & Another*, *PPARB Application No. 8 of 2026 Strategic Corporate Consultants Limited v Kenya Pipeline Company Limited & Another*, *Republic v Public Procurement Administrative Review Board & Another Ex parte SGS Kenya Limited (2017) eKLR*, and *PPARB Application No. 34 of 2018 Leeds Equipment & Systems Ltd v Kenya Vertinary Vaccines Production Institute*.

36. The Applicant submitted that a termination can only be sustained where the procuring entity demonstrates compliance with the requirements of Section 63 of the Act and that the 1st Respondent has not demonstrated such compliance thus falling short of the statutory requirements under Section 63 of the Act.

37. The Applicant further submitted that termination of the subject tender contravened the national values and principles of governance, public finance and public service under Articles 10, 201 and 232 of the Constitution; Article 47 of the Constitution read with sections 4(1), (2), (3)(d), 6(1) and (2) of the Fair Administrative Action Act for want of adequate reasons and Article 227(1) of the Constitution in addition to the obligations placed under section 44(1) of the Act.

38. In addressing paragraphs 23 of the Respondents' Replying Affidavit, the Respondents indicated that material governance issues highlighted therein were only raised after the reevaluation pursuant to the Board's decision in Request for Review No. 53 of 2026 and are an afterthought meant to deny the Applicant the award of the subject tender noting that if indeed the Procuring Entity felt that material governance issues had arisen, it would have evaluated the subject tender to the financial evaluation stage.

39. The Applicant argued that the Respondents are hellbent on denying it award of the subject tender despite clear orders and directions issued by the Board in Request for Review No. 53 of 2026 and cited the holding in *Transpower Energy Solutions Ltd v Kenya Pipeline Company Ltd, PPARB No. 1 of 2018*, for the proposition that it is not open to a procuring entity to elect whether it will comply with lawful orders issued by the Board.

40. It further argued that tenders are evaluated based on the requirements set out by the Procuring Entity in the Tender Document and having formulated the requirements to be met by bidders, the Procuring Entity is now estopped from alleging that the said requirements had shortcomings. In so saying, the Applicant placed reliance on the contra proferentem rule under which any ambiguity in an instrument is to be construed against its drafter and submitted that the ambiguity or shortcomings in the Tender Document

prepared by the Respondents cannot be construed to the detriment of the Applicant.

41. The Applicant submitted that in the absence of evidence of collusion, corruption or malpractice on the part of the Applicant, the Respondents' averment that the Tender was terminated pursuant to section 63(1)(e) must fail and relied further on the holding in *Republic v Public Procurement Administrative Review Board Ex Parte Nairobi City & Sewerage Company; Webtribe Limited t/a Jambopay Limited (Interested Party) [2019] eKLR*.

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

Respondents' submissions

43. The Respondents submitted that the basis of the tender proceedings in the subject tender is under Section 27A of the Kenya Information and Communications Act, Cap 411A, which requires Mobile Network Operators to register their subscribers before issuing SIM cards, given the bearing of SIM registration on national security, mobile financial services and social stability, and the continuing exploitation of the registration regime by criminals using the identification documents of unsuspecting persons.

44. They further submitted that the 2nd Respondent, as sector regulator, had accordingly procured the ID-to-SIM Card Checker service to enable members of the public to detect unauthorized registration of SIM cards against their identity and without their consent.

45. The Respondents explained that in compliance with the Board's orders in Request for Review No. 53, the Evaluation Committee proceeded with re-evaluation at the technical capacity evaluation stage based on the criteria outlined in the Tender Document and that two (2) bidders: i.e., Better SMS Ltd and the Applicant were deemed to have met the technical capacity requirements of the tender and qualified to the next stage of Financial Evaluation. Further, that the two bids were subjected to financial evaluation so as to determine the lowest evaluated bidder.

46. They pointed out that upon conclusion of the technical and financial evaluation, the Evaluation Committee observed that (a) the Applicant herein submitted agreements with foreign-based Mobile Network Operators (MNOs) while Better SMS Limited submitted agreements with Kenyan-based MNOs, whose databases they were going to query, (b) based on the Board's observations at Paragraph 135 of its Decision of 05.05.2026, specifically appreciating that the nature of the procurement in the subject tender related to an ID to SIM Card Verification System which operates within a regulated telecommunications framework, and may in practice require

integration with locally licensed operators, such a requirement as to relevance of the agreements to be submitted by bidders ought to have been clearly and expressly stated in the Tender Document at the outset to ensure fairness, transparency, and equal treatment of bidders; this would have enabled the tender document to speak for itself, (c) on this basis, the Board had observed that under the mandatory evaluation stage, whereas other statutory requirements like business registration, tax compliance, and CR 12 had been included, the requirement for a Content Service Provider (CSP) License, which is under the regulatory purview of the 2nd Respondent, was not included among the mandatory requirements of the tender, and (d) that the Tender Document had omitted a crucial mandatory requirement of having the bidders registered as Data Processors in line with the Data Protection Act Cap 411C Laws of Kenya noting that the nature of the data to be queried would be personal nature.

47. The Respondents submitted that to ensure that the evaluation process was transparent, fair treatment was accorded to all bidders and that the provisions of the Tender Documents did not flout the law on Data Protection, the Evaluation Committee in its Re-Evaluation Report, concluded by recommending the termination of the procurement process in view of the noted material governance issues, as reinforced by the Board's observations in its Decision in Request for Review No. 53 of 2026. Further, that the Evaluation Committee recommended for the re-tendering of the subject tender

with proper and clear mandatory requirements that adhere to the PPRA requirements, the Telecommunication Regulatory requirements and Data Protection law requirements that were omitted in the Tender Document.

48. As to whether the Respondents terminated the subject tender in accordance with Section 63 of the Act thus ousting the Board's jurisdiction to hear and determine the instant Request for Review, counsel submitted that the termination of procurement proceedings is governed by Section 63 of the Act and that when the said termination meets the threshold provisions, the jurisdiction of the Board is ousted under Section 167(4) (b) of the Act. Counsel referred to the holding in *Judicial Review Miscellaneous Application No. 142 of 2018, Republic v Public Procurement and Administrative Review Board & Another Ex Parte Kenya Veterinary Vaccines Production Institute (2018) eKLR*.

49. Counsel submitted that the principles of governance dictate that a procuring entity and bidders should avoid any form of malpractice that compromise a procurement process leading to failure of good governance practices and maintained that the termination of the subject tender was substantively justified by three governance concerns identified during re-evaluation, namely the want of an express requirement tying MNO agreements to locally licensed operators; the omission of a mandatory CSP Licence requirement;

and the omission of a mandatory requirement for registration of bidders as Data Processors under the Data Protection Act.

50. They Respondents referred to the definition of material governance issues articulated by the Board in *Danka Africa (K) Limited v Accounting Officer, Kenya Ports Authority & Another [2020] KEPPARB 38 (KLR)*, as significant or important governance issues detected in a procurement process that negatively affect a procuring entity's capability to guarantee compliance with the principles of governance, leadership and integrity, and as extended in *PPARB Decision No. 7 of 2022, Genafrica Asset Managers Ltd v The Public Service Superannuation Scheme*, to include operational challenges attributable to policy decisions influencing a procuring entity's process, and argued that the omissions in question fell within that extended definition.

51. The Respondents submitted that the Board's own observations at paragraph 135 of its Decision in Request for Review No. 53 of 2026 that the nature of the procurement, an ID-to-SIM Card Verification System operating within a regulated telecommunications framework, may in practice require integration with locally licensed operators, meant that a requirement as to the relevance of MNO agreements ought to have been clearly and expressly stated in the Tender Document.

52. They further submitted that terminating the subject tender afforded the Procuring Entity an opportunity to rectify this omission by making it a mandatory requirement that bidders' MNO agreements be with Kenyan operators to ensure fairness, transparency, and equal treatment of bidders as well as utilize public money in a prudent and responsible way and at the same time fulfil the objectives of the tender.

53. They reiterated that it remains unrefuted that if the subject tender had been awarded to the Applicant, who neither had pre-existing Agreements with MNOs in Kenya nor a valid Content Service Provider license, the provision of the service being procured would have been delayed indefinitely to enable the Applicant procure a CSP license and consequently enter into Agreements with MNOs in Kenya so as to be able to query their databases. They maintained that such delay would have been contrary to the objective of creating value to meet the needs of the Procuring Entity.

54. The Respondents submitted that the second material governance issue identified during Re-Evaluation was the fact that the Tender Document did not contain, as a mandatory requirement, the need for all bidders to be registered as Data Processors with the Office of the Data Commissioner in line with Section 18 of the Data Protection Act, Cap 411C. They indicated that the Evaluation Committee noted that

this omission was material in the sense that the data to be queried by the service provider was personal in nature.

55. They argued that pursuant to Section 27A of KICA, telecommunication/mobile network operators in Kenya are tasked to collect personal data from natural persons before selling them a SIM card and this data includes the person's full name, identity card number, date of birth, gender, physical and postal address. They further argued that in the context of the Data Protection Act, by collecting the aforesaid data, this makes the Mobile Network Operator a Data Controller.

56. The Respondents submitted that since the services sought in the subject tender would entail members of the public sending their identification (ID) number to a dedicated short code number and the system querying all the Mobile Network Operator's databases in Kenya and returning the list of numbers associated with the sent ID number, this would also make the Service Provider a Data Processor.

57. They indicated that sections 18, 19 and 73 of that Act make it an offence, carrying a fine of up to three million shillings or imprisonment of up to ten years or both, to act as a Data Processor without a Certificate of Registration and it was accordingly a grave and material omission for the Tender Document not to have mandated such registration, particularly given that other provisions

of the Tender Document already contemplated the sensitivity of the data by requiring masking or encryption.

58. The Respondents submitted that compliance with the Data Protection Act is indeed a material governance obligation and that Data Protection forms the foundational pillar of modern organizational governance, safeguarding customer trust, ensuring strict legal compliance, and mitigating costly data breaches and goes beyond IT security, requiring active board oversight, ethical stewardship, and formalized management frameworks.

59. The Respondents relied on the holding in *Kenya Shield Security v Kenya Pipeline Company, PPARB No. 26 of 2015*, for the proposition that a tender document inconsistent with the Constitution is a nullity, submitting that the omission of a mandatory Data Processor registration requirement rendered the Tender Document inconsistent with Article 31(c) and (d) of the Constitution on the right to privacy.

60. They submitted that the *contra proferentem* rule invoked by the Applicant, and considered by the Supreme Court of British Columbia in *Horne Coupar v Velletta & Co, 2010 BCSC 483*, had no application in the absence of any ambiguity, there being no ambiguity either in the Board's observations at paragraph 135 or in the Evaluation Committee's observation that the Data Processor registration requirement had been omitted.

61. The Respondents held the position that compliance with the legal requirements of the Data Protection Act could only be remedied by terminating the Tender Proceedings and re-advertising the same by mandatorily requiring all bidders to produce a valid Certificate of Registration as Data Processors issued by the Office of the Data Commissioner and as such, the Procuring Entity has demonstrated the reasonable steps it took to obtain real and tangible evidence of material governance issues.

62. The Respondents contended that Section 63(4) of the Act requires the 1st Respondent to only issue a concise statement of reasons and not a narration or justification, and that the notification letter of 9th June 2026 met that threshold and conformed with Article 47(2) of the Constitution.

63. They argued that the letter to the Secretary of the Board dated 10th June 2026, issued pursuant to section 67 of the Act, satisfied the notification obligation under section 63(2); and that the termination occurred, as required, prior to notification of tender award and without entry into a contract. They submitted that the Applicant's request for a debrief of 10th June 2026 did not strictly comply with the format prescribed at page 84 of the Tender Document, and that the Respondents, who had five business days within which to respond, were in the process of preparing a debrief when they were served with the instant Request for Review.

64. The Respondents submitted that the termination of the procurement proceedings in the subject tender complied with Section 63 of the Act and was done in good faith. They further submitted that the termination of the procurement proceedings in the subject tender does not prejudice the Applicant since it will have an opportunity to bid for the tender afresh once re-advertised and once the detected material governance issues are resolved.

65. They urged the Board to dismiss the Request for Review.

BOARD'S DECISION

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

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

In determining the first issue, the Board shall make a determination whether the procurement proceedings in the subject tender were terminated in accordance with Section 63

of the Act thereby ousting the jurisdiction of the Board pursuant to Section 167(4)(b) of the Act?

Depending on the determination of the first issue;

B. Whether the Respondents in terminating the subject tender complied with Section 63 of the Act.

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

<u>As to whether the Board has jurisdiction to hear and determine the instant Request for Review</u>

67. The Applicant in the instant Request for Review is aggrieved by the decision of the 1st Respondent to terminate the procurement proceedings in the subject tender as communicated in the letter dated 9th June 2026 which reads in part:

"……

We wish to inform you that the tender re-evaluation on the orders of the PPARB decision has been concluded and the Authority wishes to notify you that it has terminated the Tender for Provision of ID-to-SIM Card Checker Services – CA/SCm/OT/03/2025-2026 pursuant to Section 63 (1) (e) of

the Public Procurement and Assets Disposal Act (PPADA) Act 2015 because of material governance issues detected during the tendering process. The Tender will be re-advertised in due course.

We would however like to thank you for participating in this very competitive tender.

.....”

68. From the contents of the above letter, the Respondents informed the Applicant that upon re-evaluation, the subject tender had been terminated on account of material governance issues detected during the tendering process and that it would be re-advertised in due course.

69. During the hearing of the instant Request for Review, the Respondents submitted that upon re-evaluation of the subject tender pursuant to Orders of the Board issued in Request for Review No. 53 of 2026, the Evaluation Committee upon conclusion of the Technical and Financial Evaluation and in recommending for termination of the procurement proceedings in the subject tender on account of detection of material governance issues in line with Section 63 (1) (e) and for retendering of the same with proper and clear mandatory requirements, had observed the following:

a) The Applicant had submitted agreements with foreign-based Mobile Network Operators (MNOs), while Bidder No. B1 Better SMS Limited, submitted agreements with Kenyan-based MNOs, whose databases they were going to query.

b) That the Board's observations at paragraph 135 of its Decision in Request for Review No. 53 of 2026, (appreciating that the nature of the procurement in the subject tender relates to an ID to SIM Card Verification System which operates within a regulated telecommunications framework, and may in practice require integration with locally licensed operators), such a requirement as to relevance of the agreements to be submitted by bidders ought to have been clearly and expressly stated in the Tender Document at the outset to ensure fairness, transparency, and equal treatment of bidders; so as to enable the tender document to speak for itself.

c) On the above-mentioned basis, the Board observed that under the mandatory evaluation stage, whereas other statutory requirements like business registration, tax compliance, and CR12 had been included, the requirements for a Content Service Provider (CSP) License, which is under the regulatory purview of the Authority, was not included among the mandatory requirements of the tender.

d) The Tender Document had omitted a crucial mandatory requirement of having the bidders registered as Data Processors in line with the Data Protection Act Cap 411C Laws of Kenya noting that the nature of the data to be queried would be personal data.

70. The Respondents urged the position that the material governance issues detected during re-evaluation of the subject tender pointed out gaps and legal pitfalls contained in the Tender Document and pointed out that:

a) The Board itself in its determination in Request for Review No. 53 of 2026 observed that a requirement as to the relevance of MNO agreements to be submitted by bidders ought to have been clearly and expressly stated in the Tender Document at the onset to ensure fairness, transparency, and equal treatment of bidder;

b) The crucial mandatory requirement to have bidders registered as Data Processors by the Office of the Data Protection in line with the Data Protection Act noting the personal nature of the data to be queried was omitted in the Tender Document;

c) Termination of the procurement proceedings in the subject tender was inevitable upon detection of the material governance issues in the Tender Document during re-evaluation

bearing in mind the purpose and objective of procuring the services sought in the subject tender.

71. On its part, the Applicant contends that the Respondents terminated the procurement proceedings in the subject tender without lawful justification and in a manner that contravenes the Constitution and the Act and that:

a) The decision to terminate the subject tender lacked sufficient and reasonable grounds of termination in view of Section 63 (1) (e);

b) The decision to terminated the subject tender went against the orders of the Board issued in Request for Review No. 53 of 2026;

c) The Respondents failed to disclose sufficient reasons and the particulars of the alleged detection of material governance issues leading to the decision to terminate the subject tender contrary to Section 63(4) of the Act;and

d) The Respondents failed to satisfy the procedural requirements of Section 63(2), (3), and (4) of the Act in terminating the procurement proceedings in the subject tender.

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

73. The Board is cognizant of the objective of public procurement which is to provide quality goods and services in a system that implements the principles specified in Article 227 of the Constitution which reads:

"227. Procurement of public goods and services

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

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

a) .....

b) .....

c) ..... and

d) .....”

74. Further to the provisions of Article 227 of the Constitution, the national values and principles of governance under Article 10 of the Constitution apply to State organs and public entities contracting for goods and services.

75. Efficient good governance in public procurement proceedings provides tenderers with an assurance that public procurement and asset disposal processes are operating effectively and efficiently. Such processes are also underpinned by broader principles such as the rule of law, integrity, transparency and accountability amongst others.

76. Termination of procurement proceedings is governed by Section 63 of the Act and we note that where the procurement proceedings have been terminated in accordance with Section 63 of the Act, the Board is divested of its jurisdiction by dint of Section 167(4)(b) of the Act. The provisions of Section 167(4)(b) of the Act are conditional on such termination being in accordance with Section 63 of the Act and reads:

> ***"(4) The following matters shall not be subject to the review of procurement proceedings under subsection (1)—***
>
> ***(a) the choice of a procurement method;***
>
> ***(b) a termination of a procurement or asset disposal proceedings in accordance with section 63 of this Act; and***
>
> ***(c) where a contract is signed in accordance with section 135 of this Act.*** **[Emphasis by the Board]**

77. In essence, once a procuring entity terminates a procurement or asset disposal process following the procedures set out under Section 63 of

the Act, that decision cannot be challenged or subjected to review before the Board. Additionally, the choice of a procurement method and situations where a contract is signed as per Section 135 of the Act are similarly excluded from review by the Board.

78. It is trite law that courts and decision-making bodies should only act in cases where they have jurisdiction and when a question of jurisdiction arises, a Court or tribunal seized of a matter must as a matter of prudence enquire into it before doing anything concerning such a matter.

79. Superior Courts of this country have on numerous occasions offered guidance on the interpretation of Section 167(4) of the Act and the ousting of the Board's jurisdiction on account of the subject matter relating to termination of tenders.

80. We note that it is not in contest that the Board has the duty to question whether a decision by a procuring entity terminating a tender meets the threshold of Section 63 of the Act, and that this Board's jurisdiction is not ousted by the mere fact of the existence of a letter of notification terminating procurement proceedings.

81. The Respondents in their submissions made reference to the holding in **Judicial Review Miscellaneous Application No. 142 of 2018, Republic v. Public Procurement and Administrative Review**

Board & Another ex parte Kenya Veterinary Vaccines Production Institute (2018) eKLR (hereinafter referred to as "JR No. 142 of 2018") where the High Court held as follows:

> ***"The main question to be answered is whether the Respondent [Review Board] erred in finding it had jurisdiction to entertain the Interested Party's Request for Review of the Applicant's decision to terminate the subject procurement…***
>
> ***A plain reading of section 167 (4) (b) is to the effect that a termination that is in accordance with section 63 of the Act is not subject to review. Therefore, there is a statutory pre-condition that first needs to be satisfied in the said sub-section namely that the termination proceedings are conducted in accordance with the provisions of section 63 of the Act, and that the circumstances set outin section 63 were satisfied, before the jurisdiction of the Respondent can be ousted.***
>
> ***As has previously been held by this Court in Republic v Kenya National Highways Authority Ex Parte Adopt –A-Light Ltd [2018] eKLR and Republic v. Secretary of the Firearms Licensing Board & 2 others Ex parte Senator Johnson Muthama [2018] eKLR, it is for the public body***

which is the primary decision maker, [in this instance the Applicant as the procuring entity] to determine if the statutory pre-conditions and circumstances in section 63 exists before a procurement is to be terminated…

However, the Respondent [Review Board] and this Court as review courts have jurisdiction where there is a challenge as to whether or not the statutory precondition was satisfied, and/or that there was a wrong finding made by the Applicant in this regard…

The Respondent [Review Board] was therefore within its jurisdiction and review powers, and was not in error, to interrogate the Applicant's Accounting Officer's conclusion as to the existence or otherwise of the conditions set out in section 63 of the Act, and particularly the reason given that there was no budgetary allocation for the procurement. This was also the holding by this Court (Mativo J.) in R v Public Procurement Administrative Review Board & 2 Others Ex-parte Selex Sistemi Integrati which detailed the evidence that the Respondent would be required to consider while determining the propriety of a

termination of a procurement process under the provisions of section 63 of the Act"

82. Drawing from the above judicial pronouncements, this Board will first interrogate the termination of the subject tender to establish whether the termination of the subject tender was in accordance with the requirements under Section 63 of the Act. It is only upon satisfying itself that the said requirements have been met that the Board can down its tools in the matter. However, where any requirement has not been met, the Board will retain its jurisdiction to hear and determine the Request for Review.

83. Section 63 of the Act is instructive in the manner in which a procuring entity may terminate procurement or asset disposal proceedings and provides as follows:

"(1) An accounting officer of a procuring entity, may, at any time, prior to notification of tender award, terminate or cancel procurement or asset disposal proceedings without entering into a contract where any of the following applies—

(a) the subject procurement has been overtaken by—

(i) operation of law; or

(ii) substantial technological change;

(b) inadequate budgetary provision;

(c) no tender was received;

(d) there is evidence that prices of the bids are above market prices;

(e) material governance issues have been detected;

(f) all evaluated tenders are non-responsive;

(g) force majeure;

(h) civil commotion, hostilities or an act of war; or

(i) upon receiving subsequent evidence of engagement in fraudulent or corrupt practices by the tenderer.

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

(3) A report under subsection (2) shall include the reasons for the termination.

(4) An accounting officer shall notify all persons who submitted tenders of the termination within fourteen days of termination and such notice shall contain the reason for termination."

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

    i. The termination must be based on one of the grounds outlined under Section 63(1)(a) to (f) of the Act.
    ii. The Accounting Officer must submit a written report to the Public Procurement Regulatory Authority (PPRA) within 14 days of the termination, detailing the reasons for the decision.

    iii. The Accounting Officer must also issue a written notice to all tenderers within the same 14-day period, clearly communicating the reasons for the termination.

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

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

87. On the other hand, Section 63 (2), (3), and (4) outlines the procedure to be followed by a procuring entity when terminating a tender. These

include: (i) submitting a Written Report to the PPRA within 14 days of the termination and (ii) issuing termination notices to all participating tenderers within the same period, clearly stating the reasons for termination.

88. It is trite law that for the termination of procurement proceedings to pass the legal muster, a procuring entity must demonstrate compliance with both the substantive and procedural requirements under Section 63 of the Act.

89. In **Republic v Public Procurement Administrative Review Board; Leeds Equipment & Systems Limited (Interested Party); Ex parte Kenya Veterinary Vaccines Production Institute [2018] eKLR**, the High Court held that:

> ***"In a nutshell therefore and based on the above-cited cases where the decision of a procuring entity to terminate procurement process is challenged before the Board the procuring entity is to place sufficient reasons and evidence before the Board to justify and support the ground of termination of the procurement process under challenge. The procuring entity must in addition to providing sufficient evidence also demonstrate that it has complied with the substantive and procedural requirements set out under the provisions of Section 63 of the Act"***

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

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

91. We note from the confidential documents, specifically the Re-Evaluation Report and the Professional Opinion issued in the subject tender that termination of the procurement proceedings in the subject tender has been attributed to detection of material governance issues which has been argued, as seen from the Respondents' submission, to have emanated from gaps and legal pitfalls contained in the Tender Document.

92. The question that comes up for this Board's determination is whether the Respondents' decision to terminate the subject tender on the basis of detection of material governance issues has been substantiated and was in line with Section 63(1)(e) of the Act.

93. In answering the question that arises for our determination on what detection of material governance issues is, we note that governance and how it relates to public procurement is explained in the book

"Public Procurement: International Cases and Commentary, (2012) edited by Louise Knight, as follows:

> ***"Effective procurement practices provide governments with a means of bringing about social, economic and environmental reform. Conversely, malpractice within public procurement demonstrated a failure of governance and typically arises from corruption and fraud."***

94. In essence, the principles of governance require procuring entities and tenderers to avoid any form of malpractice that compromises the integrity of a procurement process of a tender. This Board has on numerous occasions addressed the question of what amounts to material governance issues in public procurement proceedings. In **PPARB Application No. 50 of 2020 Danka Africa (K) Ltd v The Accounting Officer, Kenya Ports Authority & Another** (hereinafter referred to as "the Danka Africa Case") the Board deduced the meaning of material governance in public procurement to mean:

> ***"Therefore, the Board observes that one may deduce the meaning of material governance in public procurement to mean: <u>significant or important governance issues detected in a procurement process that negatively affect the capability of a procuring</u>***

entity to guarantee compliance with principles of governance, leadership, and integrity when procuring for goods and services. Such material governance issues may emanate from malpractice during the procurement process by bidders, or by the bidder while colluding with a procuring entity, or operational challenges attributed from policy decisions influencing a procuring entity's procurement process."

95. We note that a procuring entity which seeks to terminate a procurement process on account of detection of material governance issues bears the burden of establishing with specificity what the said material governance issues are in the procurement process of the tender and how they affect its capability to guarantee compliance with principles of Article 227 of the Constitution of Kenya.

96. In **PPARB Application No. 19 of 2024 Enwealth Financial Services Limited v Board of Trustees, Kenya National Examination Council Staff Retirement Benefits Scheme, 2011 & Another,** the Board held that a procuring entity invoking material governance as a ground of termination bears the onus of establishing, with specificity, what the material governance issues are in the procurement in question and how they negatively affect its capability to guarantee compliance with the principles of Article 227 of the Constitution, so as to leave no room for conjecture in the mind of an

affected tenderer as to why the tender was terminated. That burden, the Board established, is not discharged by mere recitation of the statutory language, and still less by particulars supplied for the first time only after a challenge has been mounted by an aggrieved bidder. The Board emphasized that the evidential basis for termination must be capable of being tested against the reasons communicated to bidders at the point of termination itself, not reconstructed afterwards during review proceedings before it, to fit the outcome a procuring entity wishes to defend.

97. In the present proceedings, reference has been made by the Respondents to the Board's Decision in Request for Review No. 53 of 2026 and we deem it necessary to highlight several aspects of the said Decisions as follows:

    a) At paragraph 112, the Board noted that the issue in contest pertained to disqualification of the Applicant's tender and if the same was carried out in accordance with the requirements set out in the Tender Document as read with Section 79 and 80 of the Act.

    b) At paragraph 127, the Board noted the reason for disqualification of the Applicant's tender was because the agreements with MNOs provided were not relevant to the project.

c) At paragraph 129, the Board observed that Clause 1 (d) of the Technical Capacity Evaluation Stage under Section III – Evaluation and Qualification Criteria expressly required a bidder to submit in its bid at lease 3 Mobile Network Operators.

d) At paragraph 135, the Board held the view that while the nature of the procurement in the subject tender relates to an ID to SIM Card Verification System which operates within a regulated telecommunications framework, and may in practice require integration with locally licensed operators, such a requirement as to the relevance of the agreements to be submitted by bidders under Clause 1 (d) of the Technical Capacity Evaluation Stage ought to have been clearly and expressly stated in the Tender Document at the outset to ensure fairness, transparency, and equal treatment of bidders.

e) At paragraph 137, the Board determined that the reliance by the Evaluation Committee on the relevance of the MNO agreements submitted by the Applicant without clear and express anchor in the provided evaluation criteria introduced a degree of subjectivity inconsistent with the provisions of evaluation of tenders provided under Section 80(2) of the Act.

f) The Board in paragraph 137 further cautioned that the Evaluation Committee cannot go ahead and to evaluate tenders

against a different criterion other than what was categorically indicated in its Tender Document based on an assumption that the requirement was clear to all.

98. We note from the Decision in Request for Review No. 53 of 2026 that the Board determined that the Respondents had unlawfully disqualified the Applicant's tender at the Technical Capacity Evaluation stage contrary to the provisions of the Tender Document, the Act, and the Constitution hence the order issued to the Respondents for re-evaluation of the Applicant's tender and proceeding with the procurement process to its logical conclusion while taking into consideration the findings of the Board.

99. Having perused the Re-Evaluation Report prepared and signed by the Evaluation Committee upon re-admission of the Applicant's tender to the Technical Capacity Evaluation stage, we note that the Applicant was determined to be responsive and was progressed to the Financial Evaluation stage for further evaluation. There is no doubt as detailed in the Re-Evaluation Report that the Applicant met the requirements of financial evaluation. The said report reads:

In view of the above, the Committee established that B1 and B5 met the requirements of financial evaluation as stated herein above. The financial proposals for B1 and B5 are as tabulated in Table 4.

Table 4: Financial Proposal

No.	*Item description*	*Qty.*	*B1*		*B5*	
			Unit Cost (Exclusive of Taxes)	*Total Cost (Exclusive of Taxes*	*Unit Cost (Exclusive of Taxes)*	*Total Cost (Exclusive of Taxes*
1.	*One time system set up fees for Provision of ID-to-SIM card Checker Services*	*1*	*1,980,000.00*	*1,980,000.00*	*13,498,758.00*	*13,498,758.00*
2.	*Support and Maintenance fees*	*4 Years*	*5,933,375.00*	*23,733,500.00*	*2,761,822.61*	*11,047,290.44*
One Time and Recurrent Costs				*25,713,500.00*		*24,546,048.44*
Add Levy Order 0.03% (equivalent to 0.0003) of A				*7,714.05*		*7,363.81*
Add VAT 16% of A				*4,114,160.00*		*3,927,367.75*
Grand Total Cost (A+B+C)				*29,835,374.05*		*28,480,780.00*

100. The Board observes from Table 4 above that the Applicant, identified as Bidder B5, when compared to Bidder 1, had submitted the lowest total cost evaluated tender, a status that ordinarily attracts ranking and a recommendation for award. However, instead of ranking the responsive bidders and recommending award of the subject tender to the lowest evaluated bidder, the Evaluation Committee proceeded to make observations pertaining to the MNO agreements submitted by the Applicant and the omission in the Tender Document of mandatory requirements concerning (a) a Content Service Provider (CSP) License, and (b) registration as a Data Processor of a bidder entrusted to query personal data in line with the Data Protection Act.

101. These observations were subsequently classified by the Evaluation Committee as material governance issues leading to their recommendation for termination of the procurement proceedings in

the subject tender and re-tendering so as to include the said omitted mandatory requirements.

102. In view of the foregoing, and in applying the standard of what amounts to detection of material governance issues, as expounded in the Danka Africa Case and affirmed in the Enwealth Financial Services Case, the Board is not persuaded that the said omissions in the Tender Document identified by the Evaluation Committee following re-evaluation of bids concerning the subject tender, amount to material governance issues within the contemplation of Section 63(1)(e) of the Act. On the standard so established, material governance issues are significant governance concerns that negatively affect a procuring entity's capability to guarantee compliance with the principles of governance, leadership and integrity, and which characteristically emanate from malpractice on the part of a bidder, from collusion between a bidder and the procuring entity, or from operational challenges attributable to policy decisions influencing the procurement. Measured against that standard, the absence of a CSP Licence requirement and of a Data Processor registration requirement from the Tender Document falls within none of these categories. These are, on the Respondents' own characterisation as captured in their submissions, gaps and legal pitfalls in the Tender Document; that is to say, deficiencies in the Procuring Entity's own formulation of the evaluation criteria, and not governance failings occasioned by

the conduct of any bidder or by any external policy constraint operating upon the procurement.

103. The said omissions, in our considered view, cannot be attributed to any malpractice, collusion or wrongdoing on the part of the Applicant or any other bidder in the subject tender in the procurement process of the subject tender. A procuring entity's own drafting omissions cannot transform into a material governance issue that can be visited upon a bidder who tendered in good faith against the published Tender Document and to hold otherwise would allow a procuring entity to shield its own errors behind Section 63(1)(e) of the Act, at the expense of a compliant bidder.

104. It follows that the omissions cannot be attributed to any malpractice, collusion or wrongdoing on the part of the Applicant or of any other bidder in the procurement process of the subject tender. The burden of establishing, with specificity, both the existence of material governance issues and the manner in which they affect the Procuring Entity's capability to guarantee compliance with the principles of Article 227 of the Constitution rested upon the Respondents, and that burden is not discharged by affixing the label of 'material governance issues' to what are, in substance, the Procuring Entity's own drafting omissions. A procuring entity's drafting omissions cannot be transformed into a material governance issue and thereafter visited upon a bidder who tendered in good faith

against the Tender Document as published. To hold otherwise would permit a procuring entity to shield its own errors behind Section 63(1)(e) of the Act at the expense of a compliant bidder, and would leave an affected tenderer to conjecture as to the true basis of the termination, an outcome against which this Board expressly cautioned in the Enwealth Financial Services Case.

105. Moreover, the manner in which the Respondents now seek to rely on the highlighted omissions runs contrary to Section 80(2) of the Act which requires that tenders be evaluated strictly on the criteria set out in the Tender Document as floated. A CSP Licence requirement and a Data Processor registration requirement did not feature among the mandatory evaluation criteria of the Tender Document.

106. The significance of this is heightened by the sequence in which these matters were raised. The purported requirements were advanced neither at the point at which the tender was floated nor during the original evaluation, but only after this Board, in Request for Review No. 53 of 2026, had set aside the Applicant's unlawful disqualification and directed a re-evaluation, upon which the Applicant emerged as the lowest evaluated responsive bidder. As the Board cautioned in the Enwealth Financial Services Case, the evidential basis for a termination must be capable of being tested against the reasons communicated to bidders at the point of termination itself, and cannot be reconstructed after the fact. The introduction, at this late stage, of

evaluation requirements that formed no part of the Tender Document, so as to justify terminating rather than concluding a procurement that the Applicant was otherwise positioned to win, is precisely the species of subjectivity that Section 80(2) of the Act is designed to preclude.

107. In view of the foregoing, we find that the Respondents have failed to fulfil the substantive requirements for termination of procurement proceedings in the subject tender as required by Section 63(1)(e) of the Act on account of detection of material governance issues.

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

108. Turning to the procedural requirements under Section 63 of the Act, the Board notes that one of the mandatory procedural requirements is set out under Section 63(2) of the Act, read together with Public Procurement Regulatory Authority Circular No. 4/2022 dated 1st July 2022, which requires a procuring entity to submit a written report on the termination of procurement proceedings to the Public Procurement Regulatory Authority (PPRA) within fourteen (14) days of such termination. Section 63(3) of the Act requires that the report expressly state the reasons for termination of the procurement proceedings. Further, Section 63(4) of the Act requires the accounting officer to notify all persons who submitted tenders of the termination, and of the reasons for it, within fourteen (14) days of the decision. The Board

notes that these are not just directory formalities and are the means by which PPRA and bidders retain confidence, and oversight of the procuring entity's decision to terminate procurement proceedings.

109. In determining whether the foregoing requirements under Section 63 of the Act was complied with, the Board has perused the confidential documents and noted that the Respondents did not prepare a report addressed to the Director General of the Public Procurement Regulatory Authority upon termination the procurement proceedings in the subject tender. No evidence of reporting to PPRA, nor of compliance with Section 63 (2) & (3) of the Act has been placed before the Board.

110. Moreover, the letter dated 9th June 2026 notifying the Applicant of termination of the procurement proceedings in the subject tender falls short of the requirement stipulated under Section 63(4) of the Act. This notification letter only stated that material governance issues have been detected without identifying a single one of the concerns relied upon by the Respondents in the present proceedings in justifying termination of the procurement proceedings in the subject tender under Section 63(1)(e) of the Act.

111. The Board finds that the notification issued to the Applicant in the subject tender was not, and could not in law have been, a valid notification of termination under Section 63(4) of the Act. The Board

deems it important to caution the Respondents to note that they are under an obligation to provide sufficient reasons in termination letters issued to bidders and inform them of the circumstances giving rise to the termination of procurement proceedings.

112. It is therefore imperative for the Procuring Entity to ensure that it does not merely restate the wording under Section 63 of the Act as to the reason for termination but goes a step further and issues an explanation to bidders on the factual basis underpinning the said reason for termination. Such disclosure is consistent with the principle of transparency which is one of the pertinent constitutional values underpinning public procurement under Article 227 of the Constitution.

113. In view of the foregoing, the Board finds that the Respondents failed to comply with the procedural requirements governing termination under Section 63 of the Act.

114. Having established that the Respondents failed to satisfy both the substantive requirements for termination of procurement proceedings in the subject tender and the procedural statutory pre-conditions of termination of procurement proceedings in line with Section 63 of the Act, the Board finds and holds that the Respondents failed to terminate the procurement proceedings of the subject tender in accordance with Section 63 of the Act.

115. As such, the Board's jurisdiction to hear and determine the instant Request for Review has not been ousted by dint of Section 167(4)(b) of the Act.

As to whether the Respondents in terminating the subject tender complied with Section 63 of the Act.

116. The Board has already determined in the preceding issue that though the Respondents failed to satisfy both the substantive requirements for termination of procurement proceedings in the subject tender as required by Section 63(1)(e) of the Act on account of detection of material governance issues and the procedural statutory pre-conditions of termination of procurement proceedings in line with Section 63(2),(3) & (4) of the Act.

117. Consequently, the Board finds that the Respondent did not comply with the provisions of Section 63 of the Act in terminating the procurement proceedings with respect to the subject tender.

As to what orders should the Board grant in the circumstances?

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

119. The Board has also found that the Respondents failed to satisfy both the substantive requirements for termination of procurement proceedings in the subject tender as required by Section 63(1)(e) of the Act on account of detection of material governance issues and the procedural statutory pre-conditions of termination of procurement proceedings in line with Section 63(2), (3) & (4) of the Act.

120. We note that the Applicant sought under Prayer 5 of the instant Request for Review for an order directing the Respondents to extend the tender validity period for such as period deemed fit to enable the Respondents conclude the tender process.

121. Section 88 of the Act provides for extension of tender validity period as follows:

"88. Extension of tender validity period

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

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

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

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

122.In essence, the accounting officer of a procuring entity (a) may extend the tender validity period before expiry of such period;(b) give a written notice to tenderers of the extension of the tender validity period; (c) is restricted to extending the tender validity period for not more than thirty (30) days; and (d) is restricted to only extending the tender validity period once.

123.We are cognizant of provisions of section 173 of the Act which donates wide discretionary powers to the Board and provides:

"173. Powers of Review Board

Upon completing a review, the Review Board may do any one or more of the following—

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

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

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

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

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

124. This Board is cognizant of holding by Justice A.K. Ndungu in **Republic v Public Procurement Administrative Review Board & another Exparte Rentco Africa Limited Judicial Review Misc. Application No. E100 of 2022** (hereinafter referred to as "the Rentco Case") where he referred to the holding of by Court of Appeal in **Civil Appeal No. 510 of 2022 Chief Executive Officer, the Public Service Superannuation Fund Board of Trustees v CPF Financial Services Limited & 2 others [2022] KECA 982 eKLR** (hereinafter referred to as "Civil Appeal No.510 of 2022") where the Court of Appeal stated:

> ***"36. The overriding argument by the appellant is that upon the lapse of the tender period on 11th January, 2022, the subject tender was dead and could not be resuscitated, hence the justification for the 2nd respondent's finding in its decision dated 6th June 2022***

that 'the Applicant, the 1st Respondent and the 2nd Respondent could not extend the tender validity period after 11th January 2022.' On the other hand, the germane argument by the 1st respondent is that the appellant, who was acting on behalf of the procuring entity, was hell-bent on frustrating the award of the tender to it. The High Court made a finding that "the procuring entity had deliberately ran (sic) down the clock with a view to achieving expiry of the tender validity period." The learned judge held, and rightly so in our view, that "a rogue procuring entity cannot be allowed to hide behind the law to sanitize its injurious conduct, conduct that is inimical to the constitutional principles on accountable procurement processes in public procurement." The 1st respondent's contention was that in appropriate cases the 2nd respondent is bestowed with powers under the PPAD Act to rein in rogue procuring entities, such as the appellant, and bring finality to the procurement process.

37. This leads us to consider the powers of the 2nd respondent in such instances. Section 173 of the PPAD Act states as follows:

'……."

125. Justice Ndungu made further reference to Civil Appeal No. 510 of 2022 in addressing the question of the powers of the Board in directing a Procuring Entity to extend the tender validity period and noted that the Court of Appeal stated as follows:

"Did the 2nd Respondent have power to direct the appellant to extend the validity period of the tender in question? The answer to this question was, in our view, aptly provided by Onyiego, J in Republic v Public Procurement Administrative Review Board; Rhombus Construction Company Limited (Interested Party) Ex parte Kenya Ports Authority & another [2021] eKLR. The learned judge found as follows:

39. The crux of the issue in controversy is whether the Respondent (Review Board) has powers in law to order or direct the accounting officer of the Ex-parte Applicant as a procuring entity to extend the validity period of the subject tender more than once. Section 88 of the Act (PPDA) provides for the extension of the tender validity period...

40. What was the intention of the drafters of this legislation and in particular the inclusion of Section 88? In my view, this provision was intended to guard against any possible mischief or abuse of office or power by

accounting officers especially where uncontrolled timelines will give them a free hand to temper with the tendering process to favour their friends or closely related persons. In other words, once the already extended validity period for a period of 30 days lapses, the tendering process in respect of that tender becomes moot or rather it extinguishes (sic). Upon lapsing, the Procurement entity is at liberty to re-advertise for fresh tendering and the process then follows the full circle like it was never tendered for before.

41.Therefore, the foregoing provision permits extension of a tender validity period by an accounting officer only once and that extension must be made before the expiry of the already stipulated tender validity period. It is common knowledge that one cannot extend time that has already lapsed…

48.From the plain reading of that Section, it is only applicable and binding on the accounting officer and nobody else. Nothing would have been easier than [for] the legislators to include or provide the Review Board's mandate under that section. To that extent, I do agree with

counsel for the I/Party that Section 88(3) of the Act does not bar the Review board from making decisions that are deemed to be necessary for the wider attainment of substantive justice…

49.Under section 173(a)(b) & (c) of the Act, the Board has wide discretionary powers for the better management of tendering system to direct the doing or not doing or redoing certain acts done or omitted from being done or wrongly done by the accounting officer. Although the Act does not expressly limit the powers of the Board from extending tender validity period more than once, one can imply that the powers conferred upon the Review board includes powers to extend validity period to avert situations where the accounting officer can misuse powers under Section 88 to frustrate tenderers or bidders not considered favourable."[Emphasis ours]

126.Justice Ndungu then proceeded to hold as follows in the Rento case:

"56. From the material presented before the Board, it is quite clear that the 2nd Respondent herein acted mala fides in the subject procurement process. Such conduct must be deprecated and must not be left unchecked. The Public

Procurement Regulatory Authority must in such circumstances flex its legal muscle to monitor and enforce standards in public procurement and to weed out malfeasance in the processes. It must be borne in mind that any conduct that tends to defeat a fair, equitable, transparent, competitive and cost effective public procurement process is an attempt to overthrow the constitutional order espoused in Article 227 (1) of the Constitution. Any officer responsible for such conduct risks sanctions including but not limited to a declaration that they are unfit to hold public office.

57. A review of the decision by the Board shows that the same is laced with illegality arising from a glaring misapprehension of the law on extension of the tender validity period by the Board. From the disclosed facts the decision was also unreasonable as it tended to reward the 2nd Respondent for their fraudulent act of commission and omission."

127. In the above Rentco case, the High Court compelled the Board to exercise its powers under section 173(b) of the Act to extend the tender validity period of the subject tender for a period of 60 days or such period that it deemed necessary for the procuring entity to conclude the subject tender process.

128. In view of the foregoing, the Board has powers to order for extension of the tender validity period. As such, we deem it fit and just to extend the subject tender's validity period by 30 days from the date of this Decision to enable the Respondents conclude the procurement proceedings in the subject tender.

129. The upshot of our findings therefore is that the instant Request for Review succeeds in terms of the following final orders, subject to the right of any party aggrieved with this decision to seek judicial review by the High Court within fourteen days, pursuant to Section 175 of the Act.

FINAL ORDERS

130. 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 letters of Termination of Tender Proceedings dated 9th June 2026 issued by the 1st Respondent to the Applicant and other bidders with respect to Tender No. CA/SCM/OT/03/2025-2026 for the Provision of ID-TO-SIM Card Checker Services be and are hereby cancelled and set aside.

B. The tender validity period of Tender No. CA/SCM/OT/03/2025-2026 for the Provision of ID-TO-SIM Card Checker Services be and is hereby extended for 30 days from the date of this Decision.

C. The Respondents are hereby ordered to proceed with the procurement process to its logical and legal conclusion within 30 days while taking into consideration the findings of the Board in this decision, the provisions of the Tender Document, the Constitution, the Act.

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

Dated at NAIROBI this 9th Day of July 2026.

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PANEL CHAIRPERSON	**SECRETARY**
PPARB	**PPARB**