



**Accounting Officer, Kenyatta International Convention Centre & another v
Public Procurement Administrative Review Board; Paramax Cleaning Services
Limited & another (Interested Parties) (Judicial Review Application E085 of 2025)
[2025] KEHC 6031 (KLR) (Judicial Review) (13 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6031 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW APPLICATION E085 OF 2025**

**RE ABURILI, J
MAY 13, 2025**

BETWEEN

**THE ACCOUNTING OFFICER, KENYATTA INTERNATIONAL
CONVENTION CENTRE 1ST APPLICANT
KENYATTA INTERNATIONAL CONVENTION CENTRE 2ND APPLICANT**

AND

**THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW
BOARD RESPONDENT**

AND

**PARAMAX CLEANING SERVICES LIMITED INTERESTED PARTY
SPIC & SPAN CLEANING SERVICES LIMITED INTERESTED PARTY**

JUDGMENT

1. The application before this court is dated 3rd April 2025. It seeks the following orders:
 - a. That an order of certiorari be and is hereby issued removing into the High Court the Respondent's decision dated 20th March 2025, pursuant to the 1st Interested Party's Request for Review Application No. 128 of 2024 in regard to Tender No. KICC/05/2024-2026 for Provision of Cleaning and Garbage Collection Services;
 - b. That the Honourable Court do grant such further or other reliefs as it may deem just and expedient to grant;



- c. That costs of this Application be provided for.
2. The applicants are the Kenyatta Convention Centre (then procuring entity) and its Chief Executive Officer. The application is supported by the affidavit of Justus Kivindyio who introduces himself as the Legal Manager of the 2nd Applicant, sworn on 3rd April 2025.
 3. The Applicants' case is that they issued Tender No. KICC/05/2024-2026 for the Provision of Cleaning and Garbage Collection Services via the national supplier portal (www.tenders.go.ke) and their website (www.kicc.co.ke). The tender, which was exclusively open to AGPO categories (Youth, Women, and Persons with Disabilities), closed on 14th November 2024 at 10:30 am.
 4. According to applicants, a total of 11 bids were received and subjected to Preliminary, Technical, Detailed Technical, and Financial Evaluation. That after preliminary evaluation, only three bids, including those of the Interested Parties, were found responsive and were moved to the technical stage. All three passed the technical stage and proceeded to the detailed technical evaluation, at the end of which only two bids from the Interested Parties herein were found responsive and advanced to the financial evaluation.
 5. It is the applicants' case that the 1st Interested Party's bid was technically compliant but was not the lowest evaluated bid, as required under Section 79 of the *Public Procurement and Asset Disposal Act* (PPADA) and Regulation 74 of the Public Procurement and Asset Disposal Regulations (PPADR). That the 2nd Interested Party offered the lowest tender price of Kshs. 33,440,001.00 per annum (inclusive of taxes), compared to the 1st Interested Party's bid of Kshs. 33,441,765.00 per annum (inclusive of taxes).
 6. That the tenderers were notified of the evaluation outcome through a Notification of Intention to Award dated 11th December 2024.
 7. Aggrieved, the 1st Interested Party filed Request for Review Application No. 128 of 2024 – Paramax Cleaning Services Limited vs The Accounting Officer, Kenyatta International Convention Centre & 1 Other; Spic & Span Cleaning Services Limited before the Respondent
 8. The Applicants state that in response to the request for review, they filed a Replying Affidavit dated 2nd January 2025, reiterating that although the 1st Interested Party met technical requirements, their bid was not the lowest evaluated as per Section 79(1) of the PPADA. Further, that one tender requirement was the attachment of a NEMA "No Objection" letter for cleaning services. However, that NEMA, through a letter dated 23rd December 2024 from its Director-General, clarified that it does not issue No Objection letters for specific tenders, but rather generally. The Applicants therefore accepted general No Objection letters from both Interested Parties.
 9. Despite this, the Review Board is said to have held that the No Objection letter had to be specific, and on that basis awarded the tender to the 1st Interested Party, which the Applicants argue was a miscarriage of justice. It is urged that the Tribunal's decision dated 20th March 2025 directed that the award be issued to the 1st Interested Party, a power the Applicants assert the Board does not have under Section 173 of the PPADA.
 10. The Applicants contend that the Respondent acted ultra vires beyond the powers conferred by law. They cite Article 47 of *the Constitution* of Kenya, 2010 and Section 7(2)(a)(ii) of the *Fair Administrative Action Act* and argue that the Respondent must act within the confines of its legal authority when exercising administrative powers.



11. The Applicants further assert that upholding the Respondent's decision would compel them to exceed their allocated budget, causing financial loss, since the awarded bid was not the most economical. They argue that no prejudice would be suffered by the Respondent or Interested Parties if the decision is quashed and they urge this Court to invoke its powers to do so.
12. In their written submissions dated 22nd April 2025, the Applicants cite Section 175(1) of the *Public Procurement and Asset Disposal Act*, which allows for judicial review of a PPARB decision within 14 days. The Applicants argue that judicial review focuses on the decision-making process rather than the merits of the decision, and to support this position, reliance is placed on the case of Republic v Public Procurement & Administrative Review Board & 2 others; Peesam Limited (Exparte) [2023] KEHC 23398 and in Peninah Nadako Kiliswa v IEBC & 2 others [2015] eKLR.
13. The Applicants present two main grounds for their challenge. The first is that the Respondent acted beyond its authority by ordering the 1st Applicant to award the tender to the 1st Interested Party. The Applicants argue that this is ultra vires, referencing Sections 173 and 87 of the Public Procurement and Disposal Act, which emphasize that the responsibility to award the tender lies with the procuring entity's Accounting Officer, not the Review Board. They rely on the case of David Kimani Karogo v Thika Land Disputes Tribunal & 2 others [2017] KEELC 342 (KLR) where the court held that any decision made in excess of jurisdiction is null and void.
14. The second ground of challenge is that the Respondent's decision was irrational as both Interested Parties submitted a No Objection letter from NEMA, but the Respondent wrongly considered only the letter specific to the tender submitted by the 1st Interested Party. The Applicants rely on Republic v Public Procurement Administrative Review Board & 2 others Ex-Parte Pelt Security Services Limited [2018] KEHC 2068 (KLR), where the court held that where a decision maker takes into consideration irrelevant facts, the outcome of the decision may be affected by those defects.
15. The Applicants also discuss the need for a stay of the decision under Section 175(1), relying on Republic v Public Procurement Administrative Review Board Ex-Parte Transcend Media Group Limited [2017] eKLR, Republic v Public Procurement Administrative Review Board Ex-Parte Noble Gases International Limited [2013] eKLR and Republic v Public Procurement Administrative Review Board Ex-Parte Syner-Chemie Limited & 3 others [2016] eKLR, which clarify that judicial review suspends the binding nature of the Review Board's decision until the court resolves the case.
16. Lastly, the Applicants address the issue, whether their prayer for certiorari is fatally defective, citing Republic v Public Procurement Administrative Review Board & 3 others; Astronea Construction Limited (Exparte Applicant) [2024] KEHC 1429 (KLR), where the court granted certiorari and prohibition orders, underscoring that the court may grant other reliefs deemed just and expedient.

The Respondent's Submissions.

17. The Respondent in its written submissions claims to have filed a Replying Affidavit sworn on 10th April 2025. However, the same is not available on the Court Tracking System and therefore the Court will consider the Respondent's submissions dated 24th April 2025 on points of law only.
18. The Respondent's case is that during the hearing and determination of the impugned Request for Review, it considered all pleadings, documents, written and oral submissions, authorities, and confidential documents presented.
19. The Respondent further contends that Section 79 of the *Public Procurement and Asset Disposal Act* provides that a responsive tender must meet all requirements in the tender document and that mandatory requirements cannot be waived as minor deviations.



20. It is submitted that the 1st Interested Party presented a letter from NEMA dated 23rd December 2024 in support of its Request for Review, in which NEMA clarified that it does not issue ‘No Objection’ letters for specific tenders, though it did not preclude the possibility of issuing one when requested. According to the Respondent, this letter was not before the Evaluation Committee and thus could not have informed the latter’s decision.
21. The Respondent further submits that the 1st Interested Party also submitted a NEMA No Objection letter dated 11th November 2024, which was specifically issued for compliance with the tender requirements. The Respondent it is urged found that this justified a conclusion that the Evaluation Committee had a duty to follow the procedure and criteria in the tender document. According to the Respondent the 2nd Interested Party failed to comply with Mandatory Requirement No. 20 under the preliminary evaluation stage, as required by Sections 79 and 80(2) of the Act, and therefore should not have proceeded to financial evaluation.
22. It is also submitted that despite this, both Interested Parties were deemed to have attained the required 30 marks and were allowed to proceed to financial evaluation. According to the Respondent the Applicants failure to disqualify the 2nd Interested Party at the preliminary stage meant the 1st Interested Party, who was otherwise compliant, was denied the status of most responsive and lowest evaluated bidder.
23. The Respondent further submits that the Applicants have not demonstrated illegality, irrationality, or procedural impropriety in their decision, as it considered all relevant documents and adhered to the evaluation criteria under Mandatory Requirement No. 20 set out in Section III of the Tender Document at pages 26–29.
24. It is also submitted that under Section 173 of the PPADA, the Review Board is empowered to annul procurement decisions or direct corrective actions. The Respondent contends that due to the Evaluation Committee’s failure to apply the criteria properly, it was within its powers under Section 173 to direct the award to the 1st Interested Party as the most responsive and lowest evaluated bidder.
25. It is further argued that this action was in line with Article 227(1) of *the Constitution*, the Act, and the Tender Document, as it upheld fairness and a level playing field and could not be deemed ultra vires. In support, it relies on Civil Appeal No. 145 of 2011 – Kenya Pipeline Company Limited v Hyosung Ebara Company Limited & 2 others [2012] eKLR, where the Court of Appeal recognized the Review Board as a specialized tribunal empowered to substitute its decision for that of the procuring entity, and emphasized that such decisions should not be lightly interfered with by the courts.

The 1st Interested Party’s response.

26. The 1st Interested Party in response filed a Replying Affidavit sworn on 9th April 2025 by Duke Machongo Omori the Managing Director at the 1st Interested Party.
27. In the affidavit the 1st Interested Party contends that under Section 173 of the *Public Procurement and Asset Disposal Act*, 2015, the Respondent has specific powers, including the authority to substitute the decision of an accounting officer, to direct the accounting officer on actions to be taken or redone during procurement proceedings, and to order the issuance of a letter of notification of award. It is averred that the Board exercised these powers upon finding that the 1st Interested Party was the most responsive bidder.
28. In response to the Applicants’ argument concerning the lack of budget, the 1st Interested Party asserts that raising such an issue at the judicial review stage improperly converts the application into a merit-



- based appeal. Further, that in its Request for Review dated 24th December 2024, the 1st Interested Party disclosed that the Applicants' budget for cleaning and garbage collection services for the financial year 2024/2025 was Kshs. 35,200,000.
29. This amount, it is averred, exceeded the 1st Interested Party's tender sum of Kshs. 33,441,765 (inclusive of VAT) and this budget figure went unchallenged throughout the review proceedings. It is also stated that the Respondent made a finding of fact, based on the confidential evaluation report submitted by the Applicants, that the bids by both the 1st and 2nd Interested Parties were within budget. The 1st Interested Party further states that at no point during the review proceedings did the Applicants raise the issue of insufficient budget, making the argument an afterthought which should be disregarded by the Court.
 30. The 1st Interested Party further states that the Applicants have not shown that the Respondent's decision is vitiated by illegality, irrationality, or procedural impropriety. It is also alleged that the 2nd Applicant has been unlawfully renewing and extending the 2nd Interested Party's contract for cleaning and garbage collection services at the 1st Applicant's premises beyond the end of the 2023/2024 financial year, contrary to Section 139(4) of the *Public Procurement and Asset Disposal Act*, 2015. According to the 1st Interested Party, this conduct has prejudiced its rights and commercial interests.
 31. According to the 1st Interested Party, the current application is a deliberate attempt to frustrate its legitimate interests, while the 2nd Interested Party continues to benefit commercially from the impugned contract extension as litigation proceeds. The 1st Interested Party's case is that it wrote to the 1st Applicant requesting compliance with the Respondent's direction to issue a letter of notification of intention to enter into a contract but the order although not stayed has been ignored.
 32. Regarding the relief sought, the 1st Interested Party argues that the order of certiorari is fatally defective as framed, since it improperly asks the court to take unspecified action after quashing the impugned decision. It is submitted that this defect is fundamental, and on that basis alone, the application should be dismissed.
 33. The 1st Interested Party also filed written submissions their submissions dated 25th April 2025. According to the 1st Interested Party, the Respondent is a specialized body, and as was held by the court in the case of *Republic v Public Procurement Administrative Review Board & 2 Others Ex parte Rongo University* [2018] KEHC 9643 (KLR) its decisions should not be lightly interfered with.
 34. The 1st Interested Party reiterates that the Respondent acted within its legal mandate under Section 173 of the *Public Procurement and Asset Disposal Act*, 2015 by reviewing and substituting the accounting officer's decision after finding that the Evaluation Committee should have recommended the 1st Interested Party as the most responsive bidder. This according to the 1st Interested Party was consistent with the decision in *Republic v PPARB & 2 others ex parte Rongo University* [2018] KEHC 9643, which affirmed the Board's authority to intervene in procurement decisions. According to the 1st Interested Party the case is distinguishable from *Republic v PPARB & 2 others ex parte Masinde Muliro University* [2016] eKLR, where the court found the Board had unlawfully usurped the Evaluation Committee's role as there was no decision of the Accounting Officer to be substituted. In this case, however, it is submitted that the Respondent reviewed the decision of the accounting officer, not the Evaluation Committee, and thus acted lawfully.
 35. The 1st Interested Party also relied on the case of *Republic v Public Procurement Administrative Review Board & 2 others Ex parte Rongo University* [2018] KEHC 9643 (KLR) where the court is said to have also stated that a Judicial review cannot delve into the merits of the application.



36. It is also submitted that the Applicants' request for an order of Certiorari in the originating motion is fatally defective. Further that Section 11 of the *Fair Administrative Action Act* expands the powers of the court in judicial review beyond quashing decisions, allowing for remedies such as setting aside decisions or remitting matters for reconsideration. The 1st Interested Party urges that the Applicants have failed to specify what relief they seek, making their application incurably defective.

The 2nd Interested Party's response.

37. The 2nd Interested Party filed a Replying Affidavit sworn on 8th April 2025 in which it is deposed that the 2nd Interested Party had included a 'Letter of No Objection from NEMA in its bid documents, as required. Moreover, that Respondent's assertion that NEMA could have issued a specific letter of no objection for this tender, as suggested by the Respondent, was irrational and unreasonable, given NEMA's practice of issuing only a general compliance license for cleaning services.

38. It is also the 2nd Interested Party's case that the Respondent's finding that the 2nd Applicant's Evaluation Committee unfairly disqualified the 1st Interested Party is irrational and biased. It is urged that the Respondent's ruling directing the Applicants to award the tender to the 1st Interested Party is akin to awarding the tender itself, which is not within the Respondent's authority under Section 173 of the Public Procurement and Disposal Act, 2015. Further, that the power to award a tender lies solely with the procuring entity and the Respondent's role is limited to reviewing and making recommendations, not issuing final decisions.

39. Additionally, it is argued that the NEMA license issued to the 1st Interested Party was defective, as it was purportedly certified before its actual issuance. It is urged that the cancellation of the tender award to the 2nd Interested Party has caused significant prejudice, leading to potential loss and damage due to the expectations the 2nd Interested Party had after being initially awarded the contract.

40. The 2nd Interested Party filed this affidavit in support of the 1st and 2nd Applicants' application, seeking to have the Respondent's ruling set aside on the grounds that it was illegal, irrational, and procedurally unfair.

41. In its submissions dated 24th April 2025, the 2nd Interested Party urges that this Court's jurisdiction in procurement matters is outlined in Section 175(1) of the *Public Procurement and Asset Disposal Act* (PPADA), which allows judicial review when a party is aggrieved by a decision of the Public Procurement Administrative Review Board (PPARB). It is submitted that judicial review is intended to hold government entities accountable and ensure decisions are lawful, reasonable, and procedurally fair, as emphasized by the Supreme Court in *Saisi & 7 Others v Director of Public Prosecutions & 2 Others* (Petitions 39 & 40 of 2019, (Consolidated) [2023]). This case is said to have affirmed that judicial review safeguards constitutional principles and ensures administrative actions are not irrational or disproportionate, per Articles 23(3)(f) and 47(1) of *the Constitution*.

42. The 2nd Interested Party submits that the Respondent's decision contravenes the principles of fairness and transparency under Article 227(1) of *the Constitution* and Article 47(1), which guarantees lawful and fair administrative action. It is also urged that previous cases, including Review No. 45 of 2023 and Review No. 72 of 2024, show that the Respondent had previously accepted general environmental approvals for cleaning tenders, which further highlights the inconsistency in this case.

43. It is also submitted that the requirement for a specific NEMA letter of No Objection for cleaning services in the tender was not substantially different from the generic NEMA license provided to all bidders. Further, that NEMA license was therefore responsive to the tender requirements, as it only involved minor deviations that did not materially affect the tender. The 2nd Interested Party submits



that its licence was tender responsive and pursuant to Section 79(2) & (3) of the Public Procurement and Disposal Act, 2015, and the case Administrative Review Board Ex parte Meru University of Science & Technology; M/S Aaki Consultants Architects and Urban Designers (Miscellaneous Civil Application No. 85 OF 2018) that 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 or oversights that can be corrected without materially affecting the tender.

44. The 2nd Interested Party further submitsts that the Respondent's decision to revoke the tender award to it, was based on an unreasonable and factually flawed interpretation of MR 20. It argues that the Respondent failed to understand NEMA's role and practice, departed from past decisions and violated principles of fairness, thus acting irrationally. The case Republic v Public Procurement Administrative Review Board & another [2008] eKLR (Misc. Civil Application No.540 of 20028) is relied on to support the claim that the Respondent's decision was based on wrong facts, constituting irrationality and justifying court intervention.
45. On illegality of the Respondent's action in awarding the tender to the 1st Interested Party, reliance is placed in the case of Pastoli v Kabale District Local Government Council [2008] 2 EA 300, where it was held that decisions exceeding legal authority are illegal. According to the 2nd Interested Party, the Respondent's decision to direct the award of the tender to the 1st Interested Party was beyond its jurisdiction, as per Section 173 of the PPADA.
46. It is further submitted that the authority to award tenders lies with the procuring entity, not the review body, as clarified in Republic v Public Procurement Administrative Review Board & 2 Others ex-parte Numerical Machining Complex Limited [2016] KEHC 7468 (KLR). It is further submitted that the Respondent's action violated the separation of powers under Article 10 of *the Constitution* and was ultra vires, rendering it void.
47. The 2nd Interested Party also submits that such actions undermine the integrity of the procurement process and could distort the fairness and accountability expected in public procurement. Reliance is placed on the case of Republic v Public Procurement Administrative Review Board & Another [2008] KEHC 467 (KLR) where the court is said to have observed that adherence to the law guarantees fairness and that in the case of procurement law, the only guarantee of the attainment of fair competition, integrity, transparency, accountability and public confidence.
48. In conclusion, the 2nd Interested Party also submits that the revocation of the tender award was irrational and inconsistent with evidence, violating fairness and proportionality under Article 47 of *the Constitution* and Section 7 of the *Fair Administrative Action Act*. The Respondent, it is submitted, also exceeded its jurisdiction in awarding the tender to the 1st Interested Party.

Analysis and Determination.

49. I have considered the application, grounds, supporting affidavit, annexures and the responses by the interested parties and the respective parties' written submissions. The main issue for determination is whether the Originating Motion is merited.
50. The Applicants dispute the Respondent's decision dated 20th March 2025, arguing that it was a misinterpretation of the requirements and an overreach of the Board's statutory mandate under Section 173 of the PPADA. They maintain that both bidders submitted valid general "No Objection" letters, as per NEMA's standard practice, and that the Board acted outside its legal mandate in awarding the tender to the 1st Interested Party.



51. The Applicant invokes Article 47 of *the Constitution* and the *Fair Administrative Action Act* to challenge the legality of the Board's decision, asserting that enforcing it would lead to budgetary overspending without serving justice. The Applicant thus seeks the quashing of the Respondent's decision, arguing that no party would suffer prejudice if the court intervened.
52. In its submissions, the Respondent argues that under Section 79 of the PPADA, all mandatory tender requirements must be strictly met and cannot be treated as minor deviations. The Respondent notes that although NEMA issued a letter on 23rd December 2024 stating it generally does not provide "No Objection" letters for specific tenders, a specific "No Objection" letter dated 11th November 2024 was submitted by the 1st Interested Party.
53. Further argument is that since this letter met the tender's requirements, the Respondent held that the Evaluation Committee erred in allowing the 2nd Interested Party, who lacked such specific compliance, to proceed to the financial evaluation stage, thus violating the mandatory evaluation criteria.
54. The 1st Interested Party on the other hand supports the Respondent's decision in Review Application No. 128 of 2024, arguing that the Public Procurement Administrative Review Board lawfully exercised its powers under Section 173 of the PPADA by annulling the original notification of award and directing a new one in the 1st interested party's favour, having been found the most responsive bidder. They assert that the Applicants' argument on insufficient budget is an afterthought, as the approved budget exceeded the 1st Interested Party's bid.
55. The 1st Interested Party also contends that the Applicants have not demonstrated any illegality or procedural impropriety in the Board's decision, while accusing the 2nd Applicant of unlawfully extending the 2nd Interested Party's contract, to the detriment of its commercial interests. It further claims that the application is an attempt to frustrate the lawful procurement process and that the order of certiorari sought is fatally defective.
56. The 2nd Interested Party's case is that the Respondent acted illegally, irrationally and beyond its statutory mandate by annulling the award of Tender No. KICC/05/2024-2026 to them and directing that the 1st Interested Party be awarded the contract. They contend that they had submitted a valid general NEMA "No Objection" letter in compliance with tender requirements and that the expectation of a specific letter, contrary to NEMA's established practice, was irrational.
57. The Respondent is further accused of misinterpreting Mandatory Requirement 20, ignoring defects in the 1st Interested Party's documentation and effectively usurping the procuring entity's powers by directing the award. These actions, the 2nd Interested Party claims, caused prejudice and violated principles of fair administrative action under Article 47 of *the Constitution* and Section 7(2)(i) of the *Fair Administrative Action Act*. The 2nd Interested Party supports the Applicants' request to quash the Respondent's decision, citing its inconsistency with past rulings and established procurement law.
58. The first question to be resolved is whether or not the Respondent erred in finding that the 2nd Interested Party's bid failed to meet all mandatory requirements set out in the Tender Document on account of the Party's failure to attach a valid Letter of "No Objection" for cleaning services from NEMA for Cleaning Services for Tender No. KICC/05/2024-2026.
59. According to the Applicants and the 2nd Interested Party, the Director General of NEMA reportedly confirmed that no such tender-specific letters are issued by the Authority. The 2nd Interested Party is said to have annexed a valid NEMA licence to its bid. It is also urged that in prior decisions, such as Review No. 45 of 2023 and 72 of 2024, the Board had accepted such general environmental approvals.



60. This court has perused all the documents filed in these proceedings and observes that in this instance, the 1st Interested Party did submit a Letter of “No Objection” dated 29th April 2024 from NEMA and the same was clearly in regard to carrying out cleaning and fumigation services. This court also notes that the 1st Interested Party was issued with tender-specific Letter of “No Objection” from NEMA which is dated 11th November 2024, clearly referencing the subject tender. This contradicts the assertion that NEMA does not issue such letters.
61. Further, it is apparent that the Applicants only sought clarification from NEMA after the Notification of Intention to Award had already been issued to the 2nd Interested Party on 11th December 2024. The letter clarifying the position on the letter of objection is dated 23rd December 2024 which is 12 days after the Notification of Intention to Award had been issued to the 2nd Interested Party. This sequence of events indicates that the 2nd Interested Party had not fully complied with Mandatory Requirement 20 at the material time of evaluation.
62. This Mandatory Requirement reads as follows:

“Section III-Evaluation And Qualification Criteria

13. Mandatory Requirements

The following mandatory requirements must be met notwithstanding other requirements in the documents. Attached copies must be certified by an advocate/lawyer

NO	Description of requirement	of REQUIREMENTS	Must Meet
20.	NEMA Letter of “No Objection” for Cleaning services for this particular Tender	Attach copy of valid letter from NEMA for Cleaning services for Tender No.KICC/05/2024-2026	

63. Accordingly, this Court finds that the Respondent’s conclusion that the 2nd Interested Party was non-compliant was not irrational. On the contrary, the failure to produce a tender-specific letter where the 1st Interested Party had produced one as required in the tender documents being one of the mandatory requirements, cast doubt on the fairness and objectivity of the evaluation of the tender.
64. This court agrees with the Respondent’s argument that the letter dated 23rd December 2024 was not placed before the Evaluation Committee for consideration and as such, the Committee could not have relied on it in determining whether or not NEMA does or does not issue the tender specific letter.
65. While it is true that in previous matters such as Review No. 45 of 2023 and Review No. 72 of 2024, the Board accepted general environmental approvals in respect of cleaning tenders, the circumstances in the present case are materially distinguishable for reasons that, the tender document in this instance expressly required a specific letter of no objection relating directly to the subject tender.
66. For that reason, the Review Board, in evaluating compliance, was bound to give effect to this clear and mandatory requirement under the tender. Its decision to reject a general approval in favour of a tender-specific one was therefore not a departure from precedent but a necessary application of the express



terms of the specific tender. The Board cannot be faulted for adhering to the binding criteria set out in the Tender.

67. Having identified that the Respondent's finding on the issue of the 2nd Interested Party's compliance was not irrational, the next question is whether or not the Respondent in its decision acted in excess of its jurisdiction and therefore beyond the contemplation under section 173 of the Public Procurement Asset Disposal Act.

68. This Section 173 of the Act provides as follows:

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.

69. The Applicants argue that this section does not give the Respondent the power to dictate that a tender be awarded to a particular bidder.

70. The Respondent in its decision dated 20th March 2025 made the following final Orders:

“

“ 11. 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 this Request for Review:

A. The letter of Notification of Intention to Award dated 11th December 2024 with respect Tender No. KICC/05/ 2024-2026 for Provision of Cleaning and Garbage Collection Services issued to the Interested Party be and is hereby nullified and set aside.

B. The letters of Notification of Intention to Award dated 11th December 2024 with respect Tender No.KICC/05/2024-2026 for Provision of Cleaning and Garbage Collection Services addressed to the Applicant and to all other unsuccessful tenderers be and are hereby nullified and set aside.

C. The 1st Respondent is hereby ordered to proceed and issue a Notification of Intention to Award the subject tender to the Applicant being the most responsive evaluated bidder with the lowest evaluated tender price taking into consideration the findings of the Board in this Request for Review, the provisions of the Tender Document, the Act and *the Constitution*.

D. Further to Order No. C, the 1st Respondent is hereby ordered to proceed with the procurement process of Tender No. KICC/05/2024-2026 for Provision of Cleaning and



Garbage Collection Services to its logical conclusion taking into account the Board's findings herein.

E. Given the findings herein, each party shall bear its own costs in the Request for Review.”

71. In *Republic v Public Procurement Administrative Review Board; Rhombus Construction Company Limited (Interested Party) Ex parte Kenya Ports Authority & another* [2021] KEHC 8109 (KLR) the court observed thus:

“

- “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 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. These Residual powers can be derived from Section 173 of the Act which provides: “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.”
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.
50. In any event, the exparte applicant has already complied with the order for extension of the validity period by engaging in competitive negotiation whereby the I/Party emerged the lowest bidder (11) within the budgetary allocation. To that extent, the excuse that tax payers were to lose money by spending more than budgeted for does not arise. At para 33 of the verifying affidavit, the exparte Applicant admitted that the only reason why they could



not issue the notification letter was complaints regarding corruption against the I/party.

51. Having complied with the order partly by extending time, the exparte Applicant acknowledged the legality of the decision and therefore cannot be heard to allege commission of any illegality by the Board. How would they engage in an illegality themselves by accepting to extend time, engage in competitive negotiation within the budgetary allocation and then retreat by claiming that the board committed an illegality? To raise such an argument is a fallacy which in my view amounts to abuse of the court process. I do agree with the board's finding that, under section 173 of the Act, they have residual powers to direct extension of validity period more than once. Without those supervisory powers, the procuring entities can frustrate the tendering process. Since it was one day to the expiry, the I/party had to move with speed to avoid being trapped into the technicality of the validity period having expired hence nothing remaining to extend. Therefore, I do find that the extension of time was not illegal, unreasonable nor without jurisdiction.

52. It is worthy noting that the Respondent acts as an appeal channel in the procurement process against decisions or complaints against the procuring entity hence the powers to exercise inherent jurisdiction to make decisions even where there is no express provision for the just determination of a matter in controversy by applying section 173. In *Republic v Public Procurement Administrative Review Board & 3 others Ex-Parte Saracen Media Limited* [2018] eKLR, Mativo J cited the case of *Kenya Pipeline Ltd vs. Hyosung Ebara Company Ltd* [2012] eKLR where the Court of Appeal opined that:

“The Review Board is a specialized statutory tribunal established to deal with all complaints of breach of duty by the procuring entity. From the nature of powers given to the Review Board including annulling, anything done by the procurement entity and substituting its decision for that of the procuring entity that the administrative review envisaged by the Act is indeed an appeal”. [emphasis added]

72. This position was reiterated in *Republic v Public Procurement Administrative Review Board; Accounting Officer-Kenya Electricity Transmission Company Limited & another* (Exparte Applicants); *Rentco Africa Limited* (Interested Party) [2024] KEHC 16481 (KLR) and *Republic v Public Procurement and Administrative Review Board & another; Accounting Officer Kenya Electricity Generating Company PLC & 5 others* (Interested Parties); *Joymaxc Enterprises* (Exparte Applicant) [2025] KEHC 705 (KLR).

73. This was also the position in the Court of Appeal case of *Chief Executive Officer, the Public Service Superannuation Fund Board of Trustees v CPF Financial Services Limited & 2 others* [2022] KECA 982 (KLR) where the court while approving the finding in the case of *Republic v Public Procurement Administrative Review Board; Rhombus Construction Company Limited* (Interested Party) Ex parte *Kenya Ports Authority & another* [2021] KEHC 8109 (KLR) observed as follows;

“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 hellbent 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:

“173. 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.”

38. 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."
39. The above findings by Onyiego, J. were upheld by this Court in Kenya Ports Authority & another v Rhombus Construction Company Limited & 2 others [2021] eKLR.
40. Procurement of public goods and services plays an important role in the country's economic development. Over the years the Government has taken various measures to streamline it with a view to sealing many gaps that have made it prone to corruption. We, the people of Kenya, in adopting, enacting, and giving to ourselves *the Constitution* of Kenya, 2010 stated at Article 227 that:

"(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."

Sub-Article (2) required Parliament to enact a law that shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented. The *Public Procurement and Asset Disposal Act*, 2015 is the law that gives effect to Article 227 of *the Constitution*.

41. Section 3 of the PPAD Act sets out the guiding principles of public procurement and asset disposal.as hereunder:

"Public procurement and asset disposal by State organs and public entities shall be guided by the following values and principles of *the Constitution* and relevant legislation-

- a. the national values and principles provided for under Article 10;
- b. the equality and freedom from discrimination provided for under Article 27;



- c. affirmative action programmes provided for under Articles 55 and 56;
 - d. principles of integrity under the *Leadership and Integrity Act*, 2012 (No. 19 of 2012);
 - e. the principles of public finance under Article 201;
 - f. the values and principles of public service as provided for under Article 232;
 - g. principles governing the procurement profession, international norms;
 - h. maximisation of value for money;
 - i. promotion of local industry, sustainable development and protection of the environment; and
 - j. promotion of citizen contractors.”
42. The 2nd respondent (the Board) is an independent quasi-judicial creature of statute, and its broad powers are set out in sections 28 and 173 of the PPAD Act. It has power to give directions to accounting officers of procuring entities with respect to anything to be done or redone in procurement or disposal proceedings.
74. In *Jelt Marine A/S Western Marine Services Ltd (NPC North East Refining & Chemical Engineering Company Ltd /Pride Enterprises vs Public Procurement Administrative Review Board & 2 Others* [2015] eKLR it was held as follows;
- “.... when the Review Board decides that it can ignore the express provisions of a tender document and goes ahead to award the tender to another bidder, it crosses its statutory boundaries and in such circumstances. It is said that it has acted outside jurisdiction. Those who approach the Review Board must be sure of its parameters. The power bestowed upon the Review Board does not include authority to act outside the law. Such power can only be valid if it exercised for legitimate purposes. In the instant case, the Review Board exceeded its authority by purporting to read its own words in the tender documents.”
75. In the instant case, the Respondent reached the decision to award the Tender to the 1st Interested Party upon establishing that the 2nd Interested Party had failed to comply with Mandatory Requirement 20. It is evident that the Respondent, in making the impugned decision, acted within the ambit of the powers conferred upon it by section 173 (c) of the *Public Procurement and Asset Disposal Act*, which section permits the respondents to substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings.
76. The jurisprudence emerging from both the High Court and the Court of Appeal as has been cited above firmly supports the proposition that the Review Board is vested with broad discretionary powers to ensure the integrity, fairness, and finality of procurement processes. These powers include the authority to direct the issuance of a Notification of Award to a successfully evaluated bidder, where the Board has made a factual finding and determination that such bidder was the most responsive and compliant.
77. The argument advanced by the Applicants that the Respondent overstepped its jurisdiction by directing the award of the tender to the 1st Interested Party cannot stand in the circumstances of this case, in light of the Board’s statutory mandate to substitute its decision for that of the Accounting



- Officer of the procuring entity and to direct the doing of specific acts to remedy procurement irregularities.
78. this is not to say that the Board can out of the blues decide on which specific bidder should be awarded the tender, but that in this case, the Board's directive was clearly grounded in its finding that the 2nd Interested Party failed to meet the mandatory requirements of the Tender, and that the 1st Interested Party was the most responsive bidder. That decision was neither illegal, irrational nor procedurally unfair.
79. Another question raised by the 1st Interested Party before this court is that the order of Certiorari, as framed, is fundamentally flawed because the Applicants have not requested this court to take any further action following the removal of the impugned decision. In the court's view, the effect of the order of Certiorari, which seeks to remove the Respondent's decision dated 20th March 2025 in relation to the 1st Interested Party's Request for Review Application No. 128 of 2024 concerning Tender No. KICC/05/2024-2026 for Provision of Cleaning and Garbage Collection Services, is that the Applicants' decision to award the subject tender to the 2nd Interested Party will remain valid. In this court's opinion the prayer is not flawed.
80. The 1st Interested Party also urges that the 2nd Applicant has been illegally renewing and extending the contract of service of the 2nd Interested Party for provision of Cleaning and Garbage collection services from on or about the end of the Financial Year 2023/2024 when the 2nd Interested Party's contract formally ended, to date, which has prejudiced the rights and commercial interest of the 1st Interested Party, contrary to the provisions of section 139(4) of the *Public Procurement and Asset Disposal Act* 2015. While this allegation may raise a valid regulatory concern, it is peripheral to the judicial review proceedings before this Court, which relate to the decision of the Review Board.
81. On the question of budgetary constraints, this Court agrees with the 1st Interested Party's position. The 1st Interested party, in their Request for Review dated 24th December 2024, disclosed that the Applicants' annual budget for cleaning and garbage collection services for the Financial Year 2024/2025 was Kenya Shillings Thirty-Five Million Two Hundred Thousand (Kshs. 35,200,000), an amount that exceeds the 1st Interested Party's tender sum of Kenya Shillings Thirty-Three Million Four Hundred and Forty-One Thousand Seven Hundred and Sixty-Five inclusive of VAT (Kshs. 33,441,765).
82. This position has not been controverted by the Applicants. In the Court's view, the issue of budgetary constraints is therefore an afterthought. It is the Court's finding that awarding the tender to the 1st Interested Party would not in any way prejudice the Applicants, as adequate funds for the subject tender have already been budgeted.
83. The Applicants must also appreciate that consideration of the lowest tenderer as a form of cost effectiveness does not infer that the procuring entity must go for the lowest tender no matter the results of the evaluation of the bid.
84. This was the position in the case of *Republic v Public Procurement Administrative Review Board & another Ex-parte University of Eldoret* [2017] KEHC 4209 (KLR) where the court observed as follows:
134. Furthermore the evaluation committee is not just expected to consider the financial value of the bids while ignoring all other aspects of the tender process and requirements under the law. The consideration of the lowest tenderer



as a form of cost effectiveness as stated by Odunga J in Republic vs Public Procurement Administrative Review Board & 2 Others exparte Coast Water Services Board and Another [2016] eKLR, “does not infer that the procuring entity must go for the lowest tender no matter the results of the evaluation of the bid. Therefore, apart from the lowest tender, the Procuring Entity is under an obligation to consider all other aspects of the tender as provided for in the tender documents and where a bid does not comply with the conditions stipulated therein it would be unlawful for the Procuring Entity to award a tender simply on the basis that the tender is the lowest. It ought to be emphasized that Section 66(4) of the repealed Act talks of “the lowest evaluated price, as opposed to merely the lowest price. The issue for price must therefore follow an evaluation in accordance with the tender document.”

135. The learned judge in the above case was fortified by the decision in Public Procurement Administrative Review Board vs Kenya Revenue Authority Miscellaneous 540/2008[2008] e KLR where the court held:

“To my mind, failure by the respondents to have regard to mandatory provisions of the Act concerning procurement procedures violated the purpose of the Act which is clearly stated in Section 2. I find that any breach of a mandatory statutory provision does prejudice in some way the Section 2 objectives.... Adherence to the applicable law is the only guarantee of fairness and in the case of procurement law the only guarantee of the attainment of fair competition, integrity, transparency accountability and public confidence.

There cannot be greater prejudice to the applicant then failure by the decision maker to comply with provisions of the law. Failure to adhere to the applicable law gives rise to a presumption of bias and prejudice contrary to the argument put forward by the respondents’ counsel. The job in my view was not complete or done by just coming up with the mathematically lowest tenderer on top of the pile. The integrity of reaching there is equally important to this court. In many cases it is procedural propriety which is the stamp of fairness.”

136. And in Republic vs Public Procurement Administrative Review Board & 2 Others exparte Akamai Creative Limited, the court held that:

“It is therefore clear that apart from the lowest tender, the Procuring Entity is under obligation to consider all other aspects of the tender as provided for in the tender document and where a bid does not comply with the conditions stipulated therein, it would be unlawful for the procuring entity to award a tender simply on the basis that the tender is the lowest.”

85. Section 86(1) of the [Public Procurement and Asset Disposal Act](#), 2015 (PPADA) provides that:

“The successful tender shall be the one which meets all the requirements of the tender and is the lowest evaluated tender.”

86. This means the award is based on the lowest evaluated, not the lowest submitted tender. Under Section 3(i) of the PPADA, one of the guiding principles is promotion of competition and cost-effectiveness, but always subject to compliance with applicable criteria and procedures.



87. In Republic v Public Procurement Administrative Review Board & Another ex parte Gibb Africa Ltd [2012] eKLR, the High Court held that:
- “The lowest tenderer is not necessarily the winning bidder. What is crucial is the lowest evaluated tender, after compliance with all conditions and specifications set out in the tender document.”
88. In Republic v Kenya Power & Lighting Co Ltd & Another ex parte Solar World EA Ltd [2015] eKLR, the court emphasized that:
- “A procuring entity must consider not just the price, but also whether the bidder meets technical and financial qualifications.”
89. Thus, evaluation criteria must be clearly stated in the tender documents and followed strictly. Price alone is not determinative, especially where a low bid may compromise quality, fail to meet specifications or involve ineligible firms.
90. A bidder may quote the lowest price but still be disqualified during technical or financial evaluation.
91. For all the above reasons, this Court finds nothing in the Respondent’s decision that suggests that it was blemished on any of the grounds for judicial review.
92. There is no evidence that the impugned decision was illegal, for the Respondent to properly exercise its powers under the Public Procurement and Asset Disposal Act, 2015 including section 173 of the Act according to which it was entitled to make the decision it made.
93. The decision cannot be considered irrational or unreasonable, as it was based on the facts and the law. It does not defy logic or accepted moral standards to the extent that no reasonable person could have arrived at the same conclusion, as established in Council of Civil Service Unions & Others v. Minister for the Civil Service (1985) AC 374 and Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 KB 223. Furthermore, there was no procedural impropriety, as the Applicants were given a fair hearing, and no party had an unfair advantage during the review proceedings.
94. In conclusion, it is important to remind the parties herein that a procuring entity must at all times act with impartiality, transparency and fairness, and must never be seen to favour one bidder over another, except as dictated by the objective criteria set out in the tender documents. The only lawful basis for distinguishing among bidders is through merit-based evaluation, conducted in strict compliance with the provisions of the Public Procurement and Asset Disposal Act and the tender’s evaluation criteria. Any deviation, whether actual or perceived, undermines the integrity of the procurement process and constitutes a breach of the principles of fair competition and equal treatment enshrined in Section 3 of the Act.
95. In light of the above, I find and hold that the Originating Motion dated 3rd April 2025 is devoid of merit and is hereby dismissed with an order that each party shall bear their own costs of these proceedings.
96. This file is closed.
97. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI VIRTUALLY THIS 13TH DAY OF MAY, 2025

R.E. ABURILI

JUDGE

