REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR. NO. E262 OF 2025

(as consolidated with)

JR. NO. E264 OF 2025 AND JR. E271 OF 2025

BETWEEN

SMART METER TECHNOLOGY LIMITED ..... 1ST APPLICANT

INHEMETER AFRICA COMPANY LIMITED ..... 2ND APPLICANT

HEXING TECHNOLOGY COMPANY LIMITED .....3RD APPLICANT

VERSUS

PUBLIC PROCUREMENT AND ADMINISTRATIVE REVIEW BOARD ..... 1ST RESPONDENT

CHIEF EXECUTIVE OFFICER/MANAGING DIRECTOR, KENYA POWER &LIGHTING COMPANY PLC .....2ND RESPONDENT

KENYA POWER & LIGHTING COMPANY PLC .....3RD RESPONDENT

CHINT METERS and ELECTRIC KENYA COMPANY LTD .....4TH RESPONDENT

AND

MAGNATE VENTURES LIMITED ..... 1ST INTERESTED PARTY

HOUSE OF PROCUREMENT LTD ..... 2ND INTERESTED PARTY

ABCOS INDUSTRIAL LIMITED .....3RD INTERESTED PARTY

CONSUMERS FEDERATION OF KENYA .... 4TH INTERESTED PARTY

JUDGMENT

Brief Background;

1. On 19thAugust 2025 the Public Procurement Administrative Review Board issued a decision in Public Procurement Administrative Review Board Application No. 85 of 2025, Chint Meters and Electric Kenya Company Limited vs. The Chief Executive Officer/Managing Director, Kenya Power and Lighting Company PLC, Kenya Power and Lighting Company PLC, Magnate Ventures Limited, House of Procurement Limited and Abcos Industrial Limited, in respect of Tender No. KP1/9A.3/RT/14/24-25 for Supply of Single-Phase Smart Meters (Local Manufacturers and Assemblers). That has triggered the filing of the consolidated suits.

2. Through a consent dated 17th September 2025 the parties herein agreed to consolidate the above suits with JR E262 of

2025 being the lead file and further agreed that the Court shall be at liberty to deliver one Judgment in the consolidated suit.

3. Following are the reliefs sought in the various suits:

IN JR. NO. E262 OF 2025

4. Through the application dated 25th August 2025 the applicant seeks the following **ORDERS;**

1) THAT this Honorable Court be pleased to issue an order of CERTIORARI, to remove into the High Court and quash and/or set aside the Decision of the Public Procurement Administrative Review Board (the 1st Respondent) dated 19th August 2025 in Public Procurement Administrative Review Board Application No. 85 of 2025, Chint Meters and Electric Kenya Company Limited vs. The Chief Executive Officer/Managing Director, Kenya Power and Lighting Company PLC, Kenya Power and Lighting Company PLC, Magnate Ventures Limited, House of Procurement Limited and Abcos Industrial Limited, in respect of Tender No. KP1/9A.3/RT/14/24-25 for Supply of Single-Phase Smart Meters (Local Manufacturers and Assemblers).

2) THAT this Honorable Court be pleased to issue an order of PROHIBITION, directed at the 2nd and 3rd Respondents, prohibiting them from implementing the

Decision of the 1st Respondent dated 19th August 2025 in Public Procurement Administrative Review Board Application No. 85 of 2025, Chint Meters and Electric Kenya Company Limited vs. The Chief Executive Officer/Managing Director, Kenya Power and Lighting Company PLC, Kenya Power and Lighting Company PLC, Magnate Ventures Limited, House of Procurement Limited and Abcos Industrial Limited, in respect of Tender No. KP1/9A.3/RT/14/24-25 for Supply of Single-Phase Smart Meters (Local Manufacturers and Assemblers).

3) THAT this Honorable Court be pleased to issue an order of PROHIBITION, directed at the 2nd and 3rd Respondents, prohibiting them from Re-Advertising, Re-Tendering and/or Issuing Fresh Invitations for Sealed Tenders or Bids for the quantities of meters under Category 1, 2 and 3 in Tender No. KP1/9A.3/RT/14/24-25 for Supply of Single-Phase Smart Meters (Local Manufactures and Assemblers) through Limited Tender Open to Local Meter Manufacturers and Assemblers and/or through any other Method of Procurement.

4) THAT in the alternative to Order No. 3, this Honorable Court be pleased to issue an order of PROHIBITION, directed at the 2nd and 3rd Respondents, prohibiting them from Re-Advertising, Re-Tendering and/or Issuing

Fresh Invitations for Sealed Tenders or Bids in Respect to the quantities of meters under Lot 1 of Category 1 and Lot 4 of Category 2 of Tender No. KP1/9A.3/RT/14/24-25 for Supply of Single-Phase Smart Meters (Local Manufactures and Assemblers) through Limited Tender Open to Local Meter Manufacturers and Assemblers and/or through any other Method of Procurement.

5) THAT pending the hearing and determination of the substantive Originating Motion, that this Honorable Court be pleased to issue An Interim Order for Stay, to stay the Execution and/or Implementation of the Decision of the Public Procurement Administrative Review Board (the 1stRespondent) Dated 19th August 2025 in Public Procurement Administrative Review Board Application No. 85 of 2025, Chint Meters and Electric Kenya Company Limited vs. The Chief Executive Officer/Managing Director, Kenya Power and Lighting Company PLC, Kenya Power and Lighting Company PLC, Magnate Ventures Limited, House of Procurement Limited and Abcos Industrial Limited, in respect of Tender No. KP1/9A.3/RT/14/24-25 for Supply of Single-Phase Smart Meters (Local Manufacturers and Assemblers).

6) THAT pending the hearing and determination of the substantive Originating Motion, that this Honorable

Court be pleased to issue An Interim Order For Injunction, to restrain the 2nd and 3rd Respondents from Re-Advertising, Re-Tendering and/or Issuing Fresh Invitations for Sealed Tenders or Bids for the quantities of meters under Category 1, 2 and 3 in Tender No. KP1/9A.3/RT/14/24-25 for Supply of Single-Phase Smart Meters (Local Manufactures and Assemblers) through Limited Tender Open to Local Meter Manufacturers and Assemblers and/or through any other Method of Procurement.

7) THAT in the alternative to Order No. 6, that pending the hearing and determination of the substantive Originating Motion, this Honorable Court be pleased to issue AN INTERIM ORDER FOR INJUNCTION, to restrain the 2nd and 3rd Respondents from Re-Advertising, Re-Tendering and/or Issuing Fresh Invitations for Sealed Tenders or Bids in Respect to the quantities of meters under Lot 1 of Category 1 and Lot 4 of Category 2 of Tender No. KP1/9A.3/RT/14/24-25 for Supply of Single-Phase Smart Meters (Local Manufactures and Assemblers) through Limited Tender Open to Local Meter Manufacturers and Assemblers and/or through any other Method of Procurement.

8) THAT the costs of these proceedings to be provided for.

9) Such other, further, incidental and/or alternative relief(s) as this Honourable Court may deem just and expedient.

In JR 264 OF 2025

5. Through the application dated 28.8.25 the applicant seeks the following **ORDERS;**

1) **THAT** this Honorable Court be pleased to grant an Order of **CERTIORARI** to remove into the High Court for purposes of quashing the Decision of the 1st Respondent in Application No.85 of 2025 to cancel and set aside the Notification of Award of Tender in Tender No. **TENDER NO. KP1/9A.3/RT/14/24-25 FOR SUPPLY OF SINGLE PHASE SMART METERS. (LOCAL MANUFACTURERS AND ASSEMBLERS);**

2) **THAT** this Honorable Court be pleased to issue an order of **PROHIBITION** to prohibit the 2nd and 3rd Respondents whether by themselves, its servants, agents or otherwise howsoever from giving effect to, enforcing, or in any way implementing the impugned Decision on Application Number 85 of 2025 delivered on the 19th August 2025 by the 1stRespondent;

3) **THAT** this Honorable Court be pleased to grant an order of **PROHIBITION** to prohibit the 2nd and 3rd Respondents from re-tendering or advertising afresh the tender which relates to, **TENDER NO. KP1/9A.3/RT/14/24-25 FOR**

SUPPLY OFSINGLE PHASE SMART METERS. (LOCAL MANUFACTURERS AND ASSEMBLERS) until this Application herein is heard and determined in its entirety;

4) **THAT** this Honorable Court be pleased to issue an Order of Declaration to effect that the advertisement, evaluation and award of **TENDER NO. KP1/9A.3/RT/14/24-25 For Supply of Single Phase Smart Meters. (Local Manufacturers and Assemblers)** was done in conformity with the Constitution of Kenya 2010, Procurement Laws, Regulations as well as the process was fair, transparent, cost-effective and lawful as per the laid down Procedures.

5) The cost of this Application be borne by the 1st Respondent.

6) Any other Order that is just and equitable.

In JR. NO. E271 OF 2025

6. Through the application dated 1.9.25 the applicant seeks the following **ORDERS;**

1) **THAT** the honourable court does grant an order of certiorari to quash the irregular decision of the 1st Respondent herein, Public Procurement Administrative Board of 19th August, 2025 canceling and setting aside

the award in lot 1 Category 1 in Tender No. KP 1/9A.3RT1424-25- Supply of single phase smart meters (Local Manufacturers and Assemblers) issued to Smart Meter Technology Limited by the 2nd Respondent.

2) **THAT** the honourable court does grant an order of certiorari to quash the irregular decision of the 1st Respondent herein, Public Procurement Administrative Board of 19th August, 2025 canceling and setting aside the awards of lots 1, 2, 3 and 4 with respect to Category 2 in Tender No. KP 1/9A.3RT1424-25- Supply of single phase smart meters (Local Manufacturers and Assemblers) issued to East Africa Meter Company Limited, Hexing Technology Company Limited, Inhemeter Africa Company Limited and Smart Meter Technology Limited by the 2nd Respondent.
3) **THAT** the honourable court does grant an order of certiorari to quash the irregular decision of the 1st Respondent herein, Public Procurement Administrative Board of 19th August, 2025 canceling and setting aside the awards of lots 1, 2 and 3 with respect to Category 3 in Tender No. KP 1/9A.3RT1424-25- Supply of single phase 99 smart meters (Local Manufacturers and Assemblers)

issued to Abcos Industrial Ltd, Magnate Ventures Ltd and House of Procurement Limited respectively by the 2nd Respondent.

4) **THAT** the honourable court does grant an order of certiorari to quash the irregular decision of the 1st Respondent herein, Public Procurement Administrative Board of 19th August, 2025 canceling and setting aside Category 1, 2 and 3 in Tender No. KP 1/9A.3RT1424-25-Supply of single phase smart meters (Local Manufacturers and Assemblers).

5) **THAT** the honourable court does grant an order of certiorari to quash the irregular decision of the 1st Respondent herein, Public Procurement Administrative Board of 19th August, 2025 directing the 3rd respondent herein to re-tender the quantities of meters under Category 1, 2 and 3 afresh while taking consideration the findings of the 1st Respondent in its decision of 19th August, 2025.

6) **THAT** the honourable court does grant an order of prohibition to prohibit the 3rd and 4th Respondents from giving effect to the impugned decision of 19th August, 2025 by the 1st respondent.

7) **THAT** the costs of this application be born by the 1st and 2ndRespondents.

8) Such other order or direction as shall be considered fit for the Court to grant in the circumstances of the case.

JR. NO. E262 of 2025:

7. Having laid out the foregoing foundation, this court delves into the Applicant's case where it argues that it was the successful bidder in Lot 1 of Category 1 and Lot 4 of Category 2 of Tender No. KP1/9A.3/RT/14/24-25 for Supply of Single-Phase Smart Meters (Local Manufacturers and Assemblers) floated by the 2nd Respondent (hereinafter, the "subject tender").

8. It is its case that the 3rd Respondent, who is the Procuring Entity of the subject tender, published on its website www.kplc.co.ke an advertisement regarding its intention to procure the subject tender through limited tender, pursuant to Section 102(2)(c) and (d) of the Public Procurement and Asset Disposal Act, Chapter 412C of the Laws of Kenya (hereinafter, the "Procurement Act") read with Regulation 89(8) of the Public Procurement and Asset Disposal Regulations, 2020.

9. Subsequently, the 3rd Respondent restricted invitation for sealed bids for the subject tender to only local manufacturers/assemblers from interested eligible bidders by way of advertisement on its website, using the 2nd Respondent's electronic-procurement system known as SAP

Tendering Portal on the 2nd Respondent's website. The 2nd Respondent used the restricted tendering method of procurement.

10. Three (3) Addenda were issued amending the provisions of the tender being:

i. Addendum No.1 dated 13th June 2025;

ii. Addendum No.2 dated 16th June 2025; and

iii. Addendum No.3 dated 20th June 2025.

11. The subject tender comprised of a total of eight (8) lots distributed in three (3) Categories as follows:

i. Category 1 – Local Manufacturers/Assemblers with ready stocks for immediate delivery within 21 days.

a) Lot 1 required one to bid for 167,000 single phase smart meters

ii. Category 2 – Local Manufacturers/Assemblers who have successfully supplied meters to completion to KPLC or any public entity in Kenya before.

a. Lot 1 required one to bid for 100,000 single phase smart meters

b. Lot 2 required one to bid for 85,000 single phase smart meters

c. Lot 3 required one to bid for 50,000 single phase smart meters

d. Lot 4 required one to bid for 35,000 single phase smart meters

iii. Category 3 – All local meter Manufacturers/Assemblers

a. Lot 1 required one to bid for 100,000 single phase smart meters

b. Lot 2 required one to bid for 65,000 single phase smart meters

c. Lot 3 required one to bid for 35,000 single phase smart meters

12. THAT Single Phase Smart Meters are modern devices used to measure and record the consumption of electrical energy in a single-phase electrical system. It is a type of advance metering infrastructure technology that enables utilities to remotely monitor and manage electricity usage. The subject tender in procuring single phase smart meters aims at providing accurate, real-time information on electricity consumption, ensuring that bills precisely reflect actual usage. This transparency fosters trust between consumers and the 3rd Respondent, eliminating the frustration associated with unpredictable bills.

13. The Applicant obtained the Tender Document by downloading the same from the 3rd Respondent's website that detailed the requirements, tendering procedures and applicable guidelines, among others.

14. It completed its bid as required under the Tender Document and thereafter, submitted its bid with respect to all the eight (8) lots as distributed in the three (3) Categories of the subject tender before the close of the extended tender submission deadline of 1st July 2025.

15. The tender opening took place on 1stJuly 2025 when the applicants officer argues that he noted from the tender opening process, that the 4th Respondent did not submit its bid via the 3rd Respondent's E-procurement system/portal as required under Clause 1.3 of the Invitation for Tender at page 7 of the Tender Document read with ITT 20 of Section II – Tender Data Sheet (TDS) at page 31 of the Tender Document.

16. A letter of Notification of Intention to Award dated 17th July 2025, was issued by the 2nd Respondent informing the Applicant that it had been awarded Lot 1 of Category 1 and Lot 4 of Category 2 of the subject tender

17. The 4th Respondent herein felt aggrieved by the decision of the 2nd Respondent as communicated vide the Notification of Award and on the 29th July 2025, the 4th Respondent lodged a

Request for Review dated 27th July 2025 before the 1st Respondent seeking the following orders:

i. That the 1st Respondent annuls and quashes the impugned procurement proceedings for non-compliance with the cited provisions of the Constitution, the statute, subsidiary law and the tender document.

ii. That the 4th Respondent annuls and quashes the letter of intention to award dated 17.7.2025 and restrains the procuring entity from issuing award letters and contracts to the successful bidders.

iii. That costs be awarded to the 4th Respondent.

In the alternative;

iv. That the 1st Respondent be pleased to review or direct the independent re-evaluation of the 4th Respondent's bid by a fresh tender evaluation committee.

v. That the 1st Respondent visits the local plants for all the successful bidders and Applicant to ascertain that they are local manufacturers and assemblies.

vi. Such other orders that the 1st Respondent may deem just and expedient.

18. That the grounds for the 4th Respondent's dissatisfaction with the 2nd and 3rd Respondent's decision contained in the Notification of Award and the responses thereto are as adumbrated in the following pleadings that the parties hereto filed before the 1st Respondent, namely;

i. The 4th Respondent's Request for Review dated 27th July 2025 together with the Applicant's Supporting Affidavit sworn by Gan Zemin on 27th July 2025, copies whereof are annexed hereto and marked as ETO-7(a) and ET0-7(b) respectively.

ii. The 2nd and 3rd Respondents' Memorandum of Response dated 4th August 2025, a copy whereof is annexed hereto and marked as ETO-8.

iii. The 3rd Interested Party's Memorandum of Response and Notice of Preliminary Objection both dated 1stAugust 2025, copies whereof are annexed hereto and collectively marked as ETO-9.

iv. The 4th Respondent's Supplementary Affidavit sworn by Gan Zemin on 4th August 2025, a copy whereof is annexed hereto and marked as ETO-10

v. Applicant's Preliminary Objection dated 5th August 2025, a copy whereof is annexed hereto and marked as ETO-11.

vi. The 4th Interested Party's Replying Affidavit sworn by Zhou Xiping on 7th August 2025, a copy whereof is annexed hereto and marked as ETO-12

vii. The 1st Interested Party's Memorandum of Response dated 7th August 2025, a copy whereof is annexed hereto and marked as ETO-13

viii. The Applicant's Replying Affidavit sworn by Emmanuel Tongi Oroo on 8th August 2025, Affidavit sworn by Josphat Atanga Nyabate on 8th August 2025, and Affidavit sworn by Dennis Muthenya on 8th August 2025, copies whereof are annexed hereto and marked as ETO-14(a), ETO-14(b) and ETO-14(c) respectively.

ix. The 2nd Interested Party's Replying Affidavit sworn by Benard Odote on 8th August 2025, a copy whereof is annexed hereto and marked as ETO-15.

x. The 4th Respondent's Written Submissions dated 10thAugust 2025, a copy whereof is annexed hereto and marked as ETO-16.

xi. The 2nd and 3rd Respondents Written Submissions together with a list of authorities filed on 12th August 2025, copies whereof are annexed hereto and collectively marked as ETO-17.

xii. The Applicant's Written Submissions dated 13th August 2025 together with a list and bundle of authorities, copies whereof are annexed hereto and collectively marked as ETO-18

xiii. THAT the 1st Respondent after hearing all parties hereto, rendered its Decision dated 19th August 2025 (hereinafter, "impugned Decision"). In the impugned Decision, the 1st Respondent made, inter alia, the following findings and/or observations; -

i) The 1st Respondent found that the Applicant's claim of want of authority on the part of the 4th Respondent to institute the Request for Review proceedings before the 1st Respondent, is not a pure question of law, as its determination necessitates examining evidence to establish whether such authority existed, and does not therefore meet the threshold of a pure point of law, and cannot therefore be determined at the preliminary objection stage (Refer to Paragraph 123 of the impugned Decision).

ii) The 1st Respondent held that it has jurisdiction to consider legal issues raised by the Applicant and the 1stto 4th Interested Parties subject to limitation and that they cannot introduce fresh factual matters or seek remedies beyond those

sought by the 4th Respondent (Refer to Paragraph 136 of the impugned Decision).

iii) The 1st Respondent held that the 4th Respondent was not a tenderer in respect of all lots under Categories 1 and 2, and that the 1st Respondent shall confine its determination to Category 3 where the 4th Respondent participated as a tenderer, and shall accordingly down its tools with respect to Categories 1 and 2, while at the same time stating that it retains jurisdiction to examine mode of award as pertains Category 1, 2 and 3 and relied on its determination in PPARB Application No. 59 of 2025 Tramex Mediquip Ltd v Chief Executive Officer, Kenya Medical Supplies Agency and 3 Others which did not in any event support its reasoning (Refer to Paragraph 146 and 190 of the impugned Decision).

iv) The 1st Respondent found that the 4th Respondent complied with Section 167(1) of the Procurement Act which required the 4th Respondent to plead or claim to have suffered, or at risk of suffering, loss or damage as a result of a breach of a duty imposed on a procuring entity by the Procurement Act or its Regulations (Refer to

Paragraph 160 and 236 of the impugned Decision).

v) The 1st Respondent, in consideration of the Applicant's objection to aspects of the Request for Review before the 1st Respondent that were time barred, consolidated the same to two core issues, one being mode of award and its application, then proceeded to address the question when the Applicant became aware of the alleged breach by linking the same to the date of notification, and found that the concerned aspects of the Request for Review claimed to be time barred were not time barred (Refer to Paragraphs 161, 169 to 173 and 236 of the impugned Decision).

vi) The 1st Respondent considered the provisions of Section 67 of the Procurement Act and the question of confidential information, and in noting that the 4thRespondent did not annex any document that can be deemed confidential within the meaning of the Procurement Act, found that the 4th Respondent did not rely on any confidential document under Section 67 of the Procurement Act (Refer to Paragraphs 176 to 185 and 237 of the impugned Decision).

vii) The 1st Respondent found that the non-joinder of the Applicant as an Interested Party is not fatal given that it was not a successful tenderer under Category 3 which is the primary focus of the Request for Review before the 1st Respondent (Refer to Paragraph 192 and 235 of the impugned Decision).

viii) The 1st Respondent found that it has jurisdiction over Category 2 to the extent that the mode of award in Category 2 were applied hand in hand with Category 3 and that its jurisdiction extends correspondingly to Category 3 in that regard only (Refer to Paragraph 234 of the impugned Decision).

ix) The 1st Respondent found that the mode of award was applied in a manner that contravenes Section 86 of the Procurement Act read with Addendum 1 dated 13th June 2025, undermined transparency, and consequently rendered the awards in Categories 2 and 3 inconsistent and unlawful (Refer to Paragraphs 213, 214, 216, 218, 219 and 238 of the impugned Decision).

x) The 1st Respondent noted that with respect to Lot 1 of Category 1, the net effect of the impugned mode of award, which was applied

interchangeably across all categories, impacted the fairness of the entire procurement process, and held that in order to create a level playing field, it was only fair that the said category be subjected to a re-tender process (Refer to Paragraph 240 of the impugned Decision).

xi) The 1st Respondent held that the Evaluation Committee of the 3rd Respondent had a discretion to conduct due diligence exercise on entities with no prior record of supply with the 3rd Respondent, while at the same time holding that the due diligence conducted in the subject tender was unlawful, having been applied selectively and inconsistently undermining transparency required in any lawful tendering process to the extent of bidders who benefited from Category 3 on quantities in Category 2 (Refer to Paragraph 14, 232, 233 and 239 of the impugned Decision).

xii) The 1st Respondent ordered that the award of lot 1 with respect to Category 1 in Tender No. KP1/9A.3/RT/14/24-25 for Supply of Single-Phase Smart Meters (Local Manufactures and Assemblers) is cancelled and set aside (Refer to Paragraph 242(1) of the impugned Decision).

xiii) The 1st Respondent ordered that the awards of lots 1, 2, 3 and 4 with respect to Category 2 in Tender No. KP1/9A.3/RT/14/24-25 for Supply of Single-Phase Smart Meters (Local Manufactures and Assemblers) issued to East Africa Company Limited, Hexing Technology Company Limited, Inhemeter Africa Company Limited and Smart Meter technology Limited respectively by the 2nd Respondent be cancelled and set aside (Refer to Paragraph 242(2) of the impugned Decision).

xiv) The 1st Respondent ordered that the Tender No. KP1/9A.3/RT/14/24-25 for Supply of Single-Phase Smart Meters (Local Manufactures and Assemblers) with respect to Category 1, 2 and 3 be cancelled and set aside (Refer to Paragraph 242(4) of the impugned Decision).

xv) The 1st Respondent ordered that the 2nd Respondent re-tender the quantities of meters under Category 1, 2 and 3 afresh (Refer to Paragraph 242(5) of the impugned Decision)

19. The decision of the 1st Respondent did not seat well with the Applicant who has moved this Court seeking the orders as set out hearinabove.

20. It is its case that the 1st Respondent's impugned Decision is tainted with illegalities and/or irregularities, as demonstrated hereunder: -

i) That at paragraph 123 of the impugned Decision, the 1stRespondent stated that the Applicant's preliminary objection filed before it was premised on a claim that the person who swore the 4th Respondent's Supporting Affidavit that had been filed before the 1st Respondent lacked authority to act on behalf of the 4th Respondent. The 1st Respondent found that, that was not a pure question of law as its determination necessitates examining evidence and that the same cannot be determined at the preliminary objection stage. This finding is tainted with illegality and/or irregularity for the reasons that;

a) The 1st Respondent failed to appreciate that competency of pleadings raises a jurisdictional issue which is a pure question of law.

b) The Applicant pleaded at paragraph 2 of its Preliminary Objection dated 5th August 2025 filed before the 1st Respondent; at paragraph 20.4 of its Replying Affidavit sworn on 8th August 2025 filed before the 1st Respondent; and further submitted at paragraph 19 of its Written Submissions dated 13thAugust 2025 filed before the 1st Respondent; that

the Applicant's pleadings were incompetent and/or defective for want of authority under Section 37(2) and 40(1) of the Companies Act, and further that the Applicant had lied on oath.

c) All these pleadings by the Applicant were not controverted by the 4th Respondent in any of its pleadings filed before the 1st Respondent. The 4thRespondent did not file any reply to counter any of the Applicant's claim. It therefore follows that there was no contested fact that required to be ascertained.

d) The Applicant's preliminary objection on this issue was therefore a proper one in law and the 1stRespondent ought to have determined the same.

e) Be that as it may, even if the 1st Respondent's holding was that it could not determine the preliminary objection at the preliminary objection stage, the same objection was raised at paragraph 20.4 of the Applicant's Replying Affidavit filed before the 1stRespondent and further submitted at paragraph 52 (ii) of the Applicant's Written Submissions dated 13thAugust 2025 filed before the 1st Respondent, and the 1st Respondent was enjoined to make a determination thereon on merit after hearing the Request for Review substantively as it did. This, however, did not happen.

f) The 4th Respondent's representative not only lacked authority from the 4th Respondent, but also lied on oath, thus tainting the Request for Review with illegality, and this goes to the root of the jurisdiction of the 1st Respondent which cannot be invoked on the basis of an illegality.

g) The 1st Respondent failed to make a finding on the question of competency of the pleadings before it on merit.

ii) It is its case that at paragraph 136 of the impugned Decision, the 1st Respondent held that it has jurisdiction to consider legal issues raised by the Applicant and the 1st to 4th Interested Parties, subject to limitation, and that they cannot introduce fresh factual matters or seek remedies beyond those sought by the 4th Respondent.

iii) According to the Applicant, this was an error in law as demonstrated below; -

a) The Applicant and the 1st to 4th Interested Parties were all successful bidders in various Categories and Lots in the subject Tender.

b) Pursuant to Section 170(c) of the Procurement Act, successful bidders are mandatory parties in Request for Review proceedings before the 1st Respondent.

The 1st Respondent in fact held as such at paragraph 131 of the impugned Decision.

c) Being mandatory parties, they become substantive parties by dint of the said Section 170(c) of the Procurement Act, with the same right to fully participate in proceedings before the 1st Respondent. They can raise new factual matters or issues and even seek reliefs beyond what was sought by the 4thRespondent (who was the Applicant) before the 1st Respondent, where necessary.

d) That successful bidders, often cited as interested parties, are not parties who are joined in proceedings at the discretion of the 1st Respondent. They are distinguishable from interested parties in ordinary civil proceedings under the Civil Procedure Rules whose participation is discretionary.

e) The 1st Respondent therefore misdirected itself by finding that the extent of the successful bidders' participation in proceedings before it is limited.

iv) The 1st Respondent erroneously found at paragraph 160 of the impugned Decision that the 4th Respondent complied with the requirements of Section 167(1) of the Procurement Act, which provision required the 4th Respondent to plead or claim to have suffered, or at risk

of suffering, loss or damage as a result of a breach of a duty imposed on a procuring entity by the Procurement Act or its Regulations. The reasoning of the 1st Respondent and its finding is ultra vires the law for the following reasons; -

a. At paragraph 150 of the impugned Decision, the 1stRespondent quoted the provisions of Section 167(1) of the Procurement Act. The 1st Respondent was very clear on this provision as demonstrated at paragraph 151 of the Decision where the 1st Respondent listed the conditions that the 4th Respondent must satisfy including making a claim to have suffered, or be at risk of suffering loss or damage as a result of breach of duty imposed on a procuring entity by the Procurement Act and its Regulations.

b. In fact, at paragraph 152 and 153 of the impugned Decision, the 1st Respondent appreciated the holding of the Court of Appeal in **James Ayodi T/A Betoyo Contractors and Another vs Elroba enterprises Limited and Another (2019) eKLR,** which the 1st Respondent expressly states provided clarity on the requirement to plead and demonstrate actual or potential loss in such proceedings.

c. It is noteworthy that at paragraph 158 of the impugned Decision, the 1st Respondent observed that its attention had not been drawn to any specific paragraph of the pleadings where the 4th Respondent pleaded risk of loss or damage as contemplated under Section 167(1) of the Procurement Act. No such pleading in fact exists.

d. In an interesting twist, and notwithstanding its foregoing observation which would have warranted it to down its tools, the 1st Respondent, at paragraph 158 of its impugned Decision, purported to stretch the interpretation of Section 167(1) of the Procurement Act as settled by the Court of Appeal in the James Ayodi Case (supra), by referring to paragraphs 9 and 10 of the Request for Review filed before it, and claiming that the 4th Respondent satisfied the requirement of Section 167(1) of the Procurement Act despite the fact that the 4th Respondent neither pleaded loss nor damage in the stated paragraphs.

e. That at paragraph 159 of the impugned Decision, the 1st Respondent purported to interpret the meaning and effect of the stated paragraphs 9 and 10 of the 4thRespondent's Request for Review before it, by stating that the subject paragraphs meant that the 4thRespondent contended it suffered prejudice as a

result of the manner in which the 2nd and 3rd Respondents conducted the procurement process. This is not synonymous with pleading loss and damage.

f. Claim of prejudice is not the same as claim of loss and damage. Whereas the Court of Appeal whose decision is binding to the 1st Respondent is clear on what is to be pleaded, the 1st Respondent purported to overrule and/or disregard the Court of Appeal and it instead came up with its own law which has no bearing on the provisions of Section 167(1) of the Procurement Act.

v) In considering whether certain aspects of the Request for Review filed before the 1st Respondent were time barred under Section 167 (1) of the Procurement Act, the 1stRespondent misconstrued the Applicant's preliminary objection. At paragraphs 161 and 169 of the impugned Decision, the 1st Respondent stated that the Applicant herein urged that the 4th Respondent's challenge related to three elements of the procurement process, that is, restriction of awards to one lot per category, allowance of different pricing across awards, and absence of site visits. Noteworthy at paragraph 169 of the impugned Decision, the 1st Respondent consolidated the 4th Respondent's grounds to two core issues, that is, mode of award and its application, and absence of site visits at commencement

of the tendering process. The 1st Respondent then proceeded at paragraphs 170 to 173 of its impugned Decision to address the question of when the 4th Respondent became aware of the alleged breach, linked the same to the date of notification of 17th July 2025, and found that the Request for Review was accordingly not time barred. The 1st reasoning and finding is irregular for the following reasons; -

a. Paragraphs 10 to 12 of the 4th Respondent's Request for Review filed before the 1st Respondent as read with paragraphs 16 to 24 of its Supporting Affidavit, make it clear that the 4th Respondent was aggrieved by various provisions in the Tender Document that set up the subject tender's procurement system in the Tender Document as detailed therein.

b. Accordingly, paragraphs 1(b)(i) to (iii) of the Applicant's preliminary objection dated 5th August 2025 filed before the 1st Respondent as read with paragraph 20.3 of the Applicant's Relying Affidavit filed before the 1st Respondent, and paragraphs 41 to 50 of the Applicants Written Submissions filed before the 1st Respondent, objected to the 1st Respondent's jurisdiction for being time barred, to the extent that the Request for Review filed before the 1st Respondent challenged the set-up of the subject

tender's procurement system in the Tender Document as detailed therein.

c. Contrary to the very clear point of objection, the 1st Respondent twisted the Applicant's objection by claiming that the Applicant herein urged that the 4thRespondent's challenge related to three elements which it consolidated to two core issues that is, mode of award and its application, and absence of site visits at commencement of the tendering process.

d. It is noteworthy that in consolidating the core issues as above, the 1st Respondent missed the point and misconstrued the Applicant's objection to Paragraphs 10 to 12 of the 4th Respondent's Request for Review filed before the 1st Respondent as read with paragraphs 16 to 24 of its Supporting Affidavit, which make it clear that the 4th Respondent was aggrieved by various provisions in the Tender Document that set up the subject tender's procurement system as detailed therein, and which grievances ought to have been raised by 15th July 2025, being 14 days from the tender submission deadline of 1st July 2025.

e. The 1st Respondent ought to have downed its tools with respect to claims made at paragraphs 10 to 12 of the Request for Review filed before it as read with paragraphs 16 to 24 of the Supporting Affidavit,

noting that all the stated claims relate to express provisions of the Tender Document that was within the 4th Respondent's knowledge way before the Notification of Award.

vi) The 1st Respondent considered the question of confidential information at paragraphs 176 to 185 of the impugned Decision, and noted at paragraph 183 thereof, that the 4thRespondent did not annex any document that can be deemed confidential within the meaning of Section 67 of the Procurement Act, and then found at paragraph 184 of the impugned Decision that the 4th Respondent did not rely on any confidential document under Section 67 of the Procurement Act. This reasoning and finding was irregular for the reasons that; -

a. At paragraph 3 of the Applicant's preliminary objection filed before the 1st Respondent as read with paragraph 20.5 of the Applicant's Replying Affidavit filed before the 1st Respondent, the Applicant expressly stated that the Request for Review was grounded on not just confidential documentation, but confidential information in breach of Section 67 of the Procurement Act.

b. The 1st Respondent at paragraph 178 of its impugned Decision referred to the provision of Section 67 of the Procurement Act, and listed information that no

procuring entity and no employee or agent of a procuring entity or member of board, commissions of committee of a procuring entity shall disclose. It is noteworthy that the law uses the word information and not document.

c. The Applicant herein led the 1st Respondent to paragraphs 21 and 28 of the 4th Respondent's Request for Review before it, which paragraphs contained information that was confidential, and could only be within the knowledge of the 2nd and 3rd Respondents. Instead of addressing its mind to this claim and making a determination on merit, the 1st Respondent summarily dismissed the 4th Respondent's contentions as speculative.

d. The 1st Respondent in the circumstances failed to correctly apply and/or interpret the provisions of Section 67 of the Procurement Act, and this led to its consideration of a Request for review that was otherwise tainted with an illegality.

vii) The impugned decision violated the Applicant's legitimate expectation that the 1st Respondent would strike out the Applicant's Request for Review for want of Jurisdiction.

viii) In light of the totality of the foregoing, it is evident that the impugned decision was materially influenced by an error of

law; that the 1st Respondent failed to take into account relevant considerations; that the 1st Respondent abused its discretion and failed to act in discharge of its duty as imposed by law; and further that the impugned decision violated the Applicant's legitimate expectation. Section 7(2)(d), 7(2)(f), 7(2)(j) and 7(2)(m) of the Fair Administrative Action Act Chapter 7L of the Laws of Kenya (hereinafter referred to as the "FAA Act") empower this Honourable Court to review the impugned decision under the afore-stated circumstances.

21. It is its case further that the 1st Respondent's impugned decision in addition defied logic, was irrational, unreasonable and biased as the same was not governed by law, reason, mental clarity or understanding, and a fair consideration of facts or evidence as demonstrated hereunder.

22. It refers the court to paragraph 146 of the impugned Decision, the 1st Respondent held that the 4th Respondent was not a tenderer in respect of all lots under Categories 1 and 2. It stated that "Consequently, the Board shall confine its determination to category 3, where the Applicant participated as a tenderer, and shall accordingly down its tools with respect to categories 1 and 2." Interestingly the 1st Respondent at the same time stated that it retains jurisdiction to examine mode of award as pertains Category 1, 2 and 3.

23. It is its case that the 1st Respondent was irrational, unreasonable and biased in its impugned Decision as shown below; -

i. Despite the 1st Respondent downing its tools with respect to Category 1 and Category 2, it went on to hold at paragraph 146 of the impugned decision that it retains jurisdiction to examine mode of award as pertains Category 1 and 2.

ii. Interestingly, in making the above contradictory statement, the 1st Respondent relied on **PPARB Application No. 59 of 2025 Tramex Mediquip Limited vs Chief Executive Officer Kenya Medical Supplies Agency and 3 Other** where the 1st Respondent held that while two lots originated from the same tender, they remained distinct and separate. This finding does not support the 1st Respondent's finding in the impugned Decision.

iii. The 1st Respondent's contradictory statements and findings depict outright irrationality and unreasonableness.

iv. It is noteworthy that from the 1st Respondent's entire analysis and finding on application of mode of award at paragraphs 193 to 219 of the impugned Decision, there is nowhere that Category 1 featured. The 1st Respondent

analysed application of criteria in respect of Category 2 (despite downing its tools as above) and Category 3, as expressly stated at paragraph 212 of the impugned Decision, which paragraph lists the observations that the 1st Respondent made. No observation whatsoever was made in respect of Category 1. Further, the findings at paragraphs 213, 214, 218 and 219 of the impugned Decision are clear and nothing relates to a finding on Category 1.

v. It is also noteworthy that the analysis undertook by the 1stRespondent on application of the mode of award at paragraph 212 of the impugned decision, the 1stRespondent observed that the awards of Lot 1, 2, 3 and 4 of Category 2 and Lot 1, 2 and 3 of Category 3 of the subject tender were proper and made in accordance with Section 86(1) of the Procurement Act and Addendum 1 dated 13th June 2025 and that the 4th Respondent did not quote for Lot 1, 2, 3 and 4 of Category 2 of the subject tender.

vi. Interestingly, despite the foregoing, the 1st Respondent held at paragraph 213 to 218 that the mode of award applied in respect of the said categories lacked transparency, was unpredictable and inconsistent and the system applied undermined the constitutional value under Article 227 of the Constitution read with Section 86 of the

Procurement Act and Addendum 1 dated 13th June 2025. Further, the 1st Respondent held that the evaluation of the 4th Respondent's bid was unlawful to the extent that the application of the mode of award was unlawful.

vii. In fact, at paragraph 190 of the impugned Decision, the 1st Respondent stated that the tender was divided into three categories, and observed that focus of the Request for Review before it was confined to Category 3, where the 4th Respondent herein submitted its bid. It then made a determination at paragraphs 191 and 192 of the impugned Decision that since the Applicant herein was not successful in Category 3, its non-joinder was not fatal as the Applicant doesn't fall within Section 170(c) of the Procurement Act.

viii. Interestingly, despite the foregoing, the 1st Respondent made the following orders that directly affect Category 1 and 2.

a. At paragraph 242(1) of the impugned Decision, the 1stRespondent ordered that the award of lot 1 with respect to Category 1 in Tender No. KP1/9A.3/RT/14/24-25 for Supply of Single-Phase Smart Meters (Local Manufactures and Assemblers) is cancelled and set aside.

b. At paragraph 242(2) of the impugned Decision, the 1stRespondent ordered that the awards of lots 1,2,3 and 4 with respect to Category 2 in Tender No. KP1/9A.3/RT/14/24-25 for Supply of Single-Phase Smart Meters (Local Manufactures and Assemblers) issued to East Africa Company Limited, Hexing Technology Company Limited, Inhemeter Africa Company Limited and Smart Meter technology Limited respectively by the 2nd Respondent be cancelled and set aside.

c. At paragraph 242(4) of the impugned Decision, the 1stRespondent ordered that the Tender No. KP1/9A.3/RT/14/24-25 for Supply of Single-Phase Smart Meters (Local Manufactures and Assemblers) with respect to Category 1, 2 and 3 be cancelled and set aside.

d. At paragraph 242(5) of the impugned Decision, the 1stRespondent ordered that the 2nd Respondent re-tender the quantities of meters under Category 1, 2 and 3 afresh despite the 4th Respondent having not prayed for such an order in its Request for Review.

ix. In ordering for a re-tender of the quantities of meters under Category 1, 2 and 3 afresh, an order that was not prayed for by the 4th Respondent in its Request for Review, the 1st Respondent violated the rules of natural

justice pertaining to fair hearing on account that the Applicant was not granted an opportunity to respond and be heard on the same.

x. In ordering for a re-tender of the quantities of meters under Category 1, 2 and 3, an order that was not prayed for by the 4th Respondent in its request for Review, the 1stRespondent was biased in favour of the 4th Respondent by granting the 4th Respondent a second bite to the cherry, having noted that the 4th Respondent's bid price for lots 1, 2 and 3 of Category 3 were higher than those of the successful bidders in Category 3 and a re-evaluation of the 4th Respondent's bid as prayed for by the 4th Respondent in its Request for Review, would not be of any assistance to the 4th Respondent.

24. It refers the court to paragraph 14 and 232 of the impugned Decision, the 1st Respondent held that the Evaluation Committee of the 3rd Respondent had discretion to conduct due diligence on entities with no prior record of supply with it. Interestingly the 1st Respondent at the same time went on to hold that the due diligence conducted in the subject tender was unlawful, having been applied selectively and inconsistently.

25. The 1st Respondent was irrational and unreasonable in its impugned Decision as shown below; -

i) Despite the 1st Respondent holding that the Evaluation Committee had discretion to conduct or not to conduct due diligence on only entities with no prior record of supply with the 3rd Respondent, it went on to hold at paragraph 233 of the impugned decision that the due diligence conducted in the subject tender was unlawful, having been applied selectively.

ii) The 1st Respondent's contradictory statements and findings, where it on one hand holds that the due diligence was to be applied selectively to entities with no prior record of supply and on another hold that such selective due diligence was unlawful, depict outright irrationality and unreasonableness.

The Applicant's Written Submissions:

26. Reliance is placed in the case of **Godfrey Ajoung Okumu and another v Engineers Board of Kenya [2020] KECA 203 (KLR),** where the Court of Appeal considered the scope of Judicial Review in light of the foregoing provisions and observed that: -

> *"…With respect, we agree that for a longtime judicial review was not concerned with the merits of the decision being challenged but with the decision-making process itself. That was the ratio decidendi in the Ugandan case of Pastoli vs. Kabale District Local Government Council and*

Others [2008] 2 EA 300, which has been followed by courts in this country....

But a reading of the post 2010 decisions will show a clear and consistent trend and a departure from the previous approach to the scope of judicial review, as we shall shortly demonstrate.

We reiterate, by way of background, that prior to the enactment of the Fair Administrative Action Act, the substantive basis for judicial review applications in Kenya was the Law Reform Act. Upon the enactment of the Fair Administrative Action Act, one would have expected to see in the new law some transitional or consequential provisions specifically in relation to the Law Reform Act or at least some reference to it. But this is not so, save for section 14 of the Fair Administrative Action Act in which it is stipulated that all proceedings pending at the time of the coming into force of the new Act, the provisions of the Act will apply, without affecting the validity of anything previously done. Similarly, it saves the practice and procedure obtaining before its enactment. We venture to state, as we have observed elsewhere in this judgment, that with the passage of the Fair Administrative Action Act, the statutory grounds for judicial review in Kenya are now found, in addition to the common law in that Act. Those grounds are the same ones in the Constitution. This

important conceptual development in modern judicial review theory and practice has been interpreted to mean a shift from exclusively reviewing the process by which a decision is made, to reviewing, in appropriate cases, the merits of the decision in question….

We can do no better than cite the decisions where this has been declared to be the norm by all levels of court system."

27. It submits that The Supreme Court in **Communication Commission of Kenya vs. Royal Media Services and 5 Others [2014] eKLR** set the stage for the new thinking by observing that;

"… the Constitution of 2010 has elevated the process of judicial review to a pedestal that transcends the technicalities of common law…. the power of judicial review in Kenya is found in the Constitution".

28. Article 23, the Constitution recognizes that the court, in appropriate cases can issue an order of judicial review and then goes ahead in Article 47(1) to command that;

"Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair". (Our emphasis).

29. It is submitted that the intention of the framers of the above provision, in our view, was to extend the scope of judicial review beyond procedural fairness of the decision. This is also the spirit of section 7 of the Fair Administrative Action Act, which enjoins the court to inquire into questions of whether an administrative action or decision was materially influenced by an error of law; or was taken with an ulterior motive or purpose calculated to prejudice the legal rights of the Applicant; or the administrator failed to take into account relevant considerations; or the administrative action or decision is not rationally connected to; the purpose for which it was taken, or connected to the information before the administrator; or the administrative action or decision is unreasonable; or is not proportionate to the interests or rights affected; or the decision is simply unfair; or taken or made in abuse of power…"

30. Further in **Saisi and 7 Others v Director of Public Prosecutions and 2 Others [2023] KESC 6 (KLR),** the Supreme Court of Kenya observed that; -

> *"74.It is our considered opinion that the framers of the Constitution when codifying judicial review to a constitutional right, the intention was to elevate the right to fair administrative action as a constitutional imperative not just for state bodies, but for any person, body or authority. It was a clarion call to ensure that the*

constitutional right to fair administrative actions permeated every aspect of the lives of Kenyans, from their engagements with educational facilities such as universities, to employer-employee relationships, to engaging with public bodies in whatever capacity, or any body, person or authority that exercises quasi- judicial functions. We further take the view, that this approach is consistent with realizing the right of access to justice because justice can be obtained in other places besides a courtroom.

75.In order for the court to get through this extensive examination of section 7 of the FAAA, there must be some measure of merit analysis. That is not to say that the court must embark on merit review of all the evidence. For instance, how would a court determine whether a body exercising quasi-judicial authority acted reasonably and fairly "in the circumstances of the case", without examining those circumstances and measuring them against what is reasonable or fair, and arriving at the conclusion that the action taken was within or outside the range of reasonable responses. However, it is our considered opinion that it should be limited to the examination of uncontroverted evidence. The controverted evidence is best addressed by the person, body or authority in charge. To borrow the words of the Court of Appeal in Judicial Service Commission and

another v Lucy Muthoni Njora, Civil Appeal 486 of 2019; [2021] eKLR there is nothing doctrinally or legally wrong about a judge adopting some measure of review, examination, or analysis of the merits in a judicial review case in order to arrive at the justice of the matter. Rather a failure to do so, out of a misconception that judicial review is limited to a dry or formalistic examination of the process only leads to intolerable superficiality. This would certainly be against article 259 of the Constitution which requires us to interpret it in a manner that inter alia advances the rule of law, permits the development of the law and contributes to good governance."

31. It submits that it is evident from the jurisprudence cited above, that where a party invokes the jurisdiction of the Court pursuant to the provisions of the Constitution, particularly in the context of alleged violations of constitutional rights or duties, the Supreme Court, in **Saisi and 7 Others v Director of Public Prosecutions and 2 Others** (supra), has now settled the legal position that this Court is enjoined to go beyond a mere procedural or formalistic review. In such instances, the Court is obligated to undertake a substantive and merit-based review of the impugned action or decision, with a view to determining its constitutional validity.

32. Therefore, contrary to the depositions made at paragraphs 5 and 6 of the 4th Respondent's Replying Affidavit, the applicant

invites the court to consider the Application within the framework of modern Judicial Review theory and practice as it has evolved in Kenya, particularly in light of the transformative constitutional changes brought about by the Constitution.

33. It submits that whereas the 4th Respondent relied on the Court of Appeal case of **OJSC Power Machines Limited, Trans Century Limited and Civicon Limited (Consortium) vs. Public Procurement Administrative Review Board and 2 Others** as cited in the High Court decision of **Republic vs Public Procurement Administrative Review Board; Principal Secretary, State Department of Interior and Co-ordination of National Government (Interested Party); Ex-Parte Applicant CMC Motors Group Limited (2020) eKLR**, it is appreciable that the two cited decisions, being from the Court of Appeal and the High Court, rank lower in authority, and that the Supreme Court decision referred to above is binding.

34. Indeed, at paragraph 87 of another Supreme Court decision in **Dande and 3 Others v Inspector General, National Police Service and 5 Others [2023] KESC 40 (KLR)**, the Supreme Court stated as follows:-

> *"With utmost respect to the learned Judges of the Court of Appeal, we disagree with the above reasoning and find that the appellants had clothed their grievances as constitutional questions believing that their fundamental*

rights had been violated. Therefore, this required the superior courts to conduct a merit review of the questions before them and dismissal of their plea as one requiring no merit review was misguided. A court cannot issue judicial review orders under the Constitution if it limits itself to the traditional review known to common law and codified in Order 53 of the Civil Procedure Rules. The dual approach to judicial review does exist as we have stated above but that approach must be determined based on the pleadings and procedure adopted by parties at the inception of proceedings."

35. The Applicant has isolated the following issues for determination by this Court with the first issue being whether the 1st Respondents impugned Decision was irrational and/or unreasonable and/or biased.

36. The Applicant has challenged the 1st Respondent's Decision dated 19th August 2025 (hereinafter, the "impugned Decision") for the principal reason that it defied logic and was irrational and/or unreasonable and/or biased. It is instructive to note that these grounds have been codified under Section 7(2)(a)(iv)(v); Section 7(2)(i); and Section 7(2)(k) of the FAA Act.

37. Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have

made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards.

38. Pedestal to proffering our Submissions under this issue, we refer Your Lordship to the particulars of irrationality and/or unreasonableness and/or bias as adumbrated at Ground Number 14 (1) to (5) on the face of the Application (See Pages 11 to 14 of the Application), as read together with paragraphs 22 to 24 of the Supporting Affidavit (See Pages 31 to 34 of the Supporting Affidavit). The Applicant's instant Submissions are grounded thereon.

39. It proceeds to highlight the glaring aspects of irrationality and/or unreasonableness and/or bias, as evident in the impugned Decision, in five respects, as hereunder.

40. Firstly, it refers the Court to paragraph 146 of the impugned Decision, where the 1st Respondent held that the 4th Respondent was not a tenderer in respect of all lots under Categories 1 and 2. It stated that "Consequently, the Board shall confine its determination to category 3, where the Applicant participated as a tenderer, and shall accordingly down its tools with respect to categories 1 and 2." Further, at paragraph 190 of the impugned Decision, the 1st Respondent stated that the focus of the Request for Review before it was confined to Category 3. Strangely, despite the 1stRespondent downing its tools with respect to Categories 1 and 2 and confining itself to Category 3, we wish to flag out the following

glaring inconsistencies and/or contradictions in the impugned Decision that demonstrate irrationality, unreasonableness and bias; -

i. The 1st Respondent contradicted itself, by stating, at paragraph 146 of the impugned Decision, that it retains jurisdiction to examine mode of award as pertains Category 1 and 2 in Tender No.KP1/9A.3/RT/14/24-25 for Supply of Single-Phase Smart Meters (Local Manufacturers and Assemblers) (hereinafter, the "subject tender"). In making this contradictory statement, the 1st Respondent relied on PPARB Application No. 59 of 2025 Tramex Mediquip Limited vs Chief Executive Officer Kenya Medical Supplies Agency and 3 Other where it had held that while two lots originated from the same tender, they remained distinct and separate. We invite, My Lord, to note that the 1st Respondent's own finding in this decision that it relied on, does not even support its finding in the impugned Decision.

ii. It is also noteworthy that, from the 1st Respondent's entire analysis and finding on application of mode of award at paragraphs 193 to 219 of the impugned Decision, there is nowhere that Category 1 featured. The 1st Respondent analyzed application of criteria in respect of Category 2 (despite downing its tools as above) and Category 3, as expressly stated at paragraph 212 of the

impugned Decision, which paragraph lists the observations that the 1st Respondent made. All the observations with respect to the application of the mode of award in Category 2 and 3 as analyzed by the 1st Respondent at paragraph 212 of the impugned Decision points out to the mode of award being in compliance with Section 86(1) of the Procurement Act and the Addendum No. 1 dated 13th June 2025. No observation whatsoever was made in respect of Category 1. Further, the findings at paragraphs 213, 214, 218 and 219 of the impugned Decision are clear and nothing relates to a finding on Category 1.

iii. Strangely, despite the foregoing, the 1st Respondent made various orders that directly affect Category 1 and 2 as highlighted below; -

a. At paragraph 242(1) of the impugned Decision, the 1st Respondent ordered that the award of Lot 1 with respect to Category 1 in Tender No. KP1/9A.3/RT/14/24-25 for Supply of Single-Phase Smart Meters (Local Manufactures and Assemblers) be cancelled and set aside.

b. At paragraph 242(2) of the impugned Decision, the 1st Respondent ordered that the awards of lots 1,2,3 and 4 with respect to Category 2 in Tender No. KP1/9A.3/RT/14/24-25 for Supply of Single-Phase Smart

Meters (Local Manufactures and Assemblers) issued to East Africa Company Limited, Hexing Technology Company Limited, Inhemeter Africa Company Limited and Smart Meter technology Limited respectively by the 2nd Respondent be cancelled and set aside.

c. At paragraph 242(4) of the impugned Decision, the 1stRespondent ordered that the Tender No. KP1/9A.3/RT/14/24-25 for Supply of Single-Phase Smart Meters (Local Manufactures and Assemblers) with respect to Category 1, 2 and 3 be cancelled and set aside.

d. At paragraph 242(5) of the impugned Decision, the 1stRespondent ordered that the 2nd Respondent re-tender the quantities of meters under Category 1, 2 and 3 afresh.

iv. The Applicant submits that the above inconsistencies and/or contradictions evident in the 1st Respondent's impugned Decision are ridiculous and constitute a grave legal embarrassment that cannot be sanctified by this Court.

41. It then submits that the award of the foregoing orders against the Applicant in respect of Category 1 and 2, in a Request for Review that was filed by the 4th Respondent, as purported, was extremely irrational and unreasonable, noting that the 4th

Respondent did not participate in Category 1 and Category 2 of the subject tender.

42. It is its submission that the 4th Respondent has no legitimate grievance with respect to Category 1 and Category 2 of the subject tender, but is the kind of busy body that Section 167(1) of the Procurement Act was designed to keep out because it has not and is not likely to suffer any loss or damage due to alleged breach of duty imposed on the 3rd Respondent by the Procurement Act or the Procurement Regulations with respect to award of Category 1 and 2. The 4th Respondent had no interest or involvement whatsoever in the same; and is therefore not capable of suffering any loss or damage as a result of the alleged breach of duty imposed on the 3rd Respondent by the Procurement Act and the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter, the "Procurement Regulations") with respect to awarding of lots in Category 1 and Category 2 of the subject tender. We invite Your Lordship to be persuaded by the reasoning in the case of **Power Parts (Kenya) Limited v Procurement Administrative Review Board and 2 others (Judicial Review Miscellaneous Application E006 of 2025) [2025] KEHC 6921 (KLR) (16 May 2025) (Judgment)**, where the Court observed thus: -

> *"…64. It cannot, therefore, be assumed that the Applicant could qualify for standing to initiate the request for*

review under section 161 of the Act only after he obtained the tender document in respect of the subject tender. The legal presumption is that a person obtains a tender document for purposes of participating in a tender, and for that reason, the person qualifies to be identified as a "candidate" in the technical sense.

65.The point am making is that it is untenable that the Applicant would seek to impeach a tender in which, for all intends and purposes, sought to participate in. It follows that the Applicant had neither legal nor factual basis to institute the request for review in the first place…"

43. Thirdly, it submits that in the Request for Review before the 1st Respondent, the 4th Respondent did not pray for an order for a re-tender of the quantities of the meters under Category 1, 2 and 3. However, the 1st Respondent, at paragraph 242(5) of the impugned Decision, ordered that the 2nd Respondent re-tender the quantities of meters under Category 1, 2 and 3 afresh. It is our submission that this was unreasonable. In ordering for a re-tender of the quantities of meters under Category 1, 2 and 3, which order was not prayed for by the 4thRespondent, the 1st Respondent was openly biased towards the 4th Respondent as it gave it a second bite to the cherry, having noted that the 4th Respondent's bid price for lots 1, 2 and 3 of Category 3 were higher than those of the successful bidders in Category 3, and a re-evaluation of the 4th

Respondent's bid as prayed for by the 4th Respondent, in its Request for Review, would not be of any assistance to the 4th Respondent. This was done unfairly, irrationally and by procedural impropriety in violation of the rules of natural justice pertaining to fair hearing on account that the Applicant was not granted an opportunity to respond and be heard on the same.

44. Fourthly, at paragraph 14 and 232 of the impugned Decision, the 1st Respondent held that the Evaluation Committee of the 3rd Respondent had discretion to conduct due diligence on entities with no prior record of supply with it. Interestingly, the 1st Respondent, at the same time, went on to hold at paragraph 233 of the impugned Decision that the due diligence conducted in the subject tender was unlawful, having been applied selectively. Put differently, the 1stRespondent on one hand held that due diligence could be applied selectively to entities with no prior record of supply, and on another hand held that such selective due diligence was unlawful. This was most irrational and unreasonable.

45. Fifthly, it invites the court to take note of the 1st Respondent's observations at paragraph 212 of the impugned Decision, to the effect that the awards of Lot 1, 2, 3 and 4 of Category 2 and Lot 1, 2 and 3 of Category 3 of the subject tender were proper and made in accordance with Section 86(1) of the Procurement Act and Addendum 1 dated 13th June 2025, and

that the 4th Respondent did not quote for Lot 1, 2, 3 and 4 of Category 2 of the subject tender. Contrary to its own express observations, the 1st Respondent, in a very disturbing turn of events, held, at paragraphs 213 to 218 of the impugned Decision, that the mode of award applied in respect of the said categories lacked transparency, was unpredictable and inconsistent, and that the system applied undermined the constitutional value under Article 227 of the Constitution read with Section 86 of the Procurement Act and Addendum 1 dated 13th June 2025.

On the issue whether the 1st Respondent's impugned decision was illegal and/or irregular?

46. The Applicant has, in addition, sought judicial review of the impugned Decision for being tainted with illegalities and/or irregularities. It is instructive to note that grounds of judicial review that the Applicants are advancing under this issue have been codified under Section 7(2)(d); Section 7(2)(i)(ii)(iii); Section 7(2)(n); and Section 7(2)(o) of the FAA Act.

47. Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality.

48. The particulars of illegalities and/or irregularities in the impugned Judgment have been adumbrated at Ground Number 6 to 13 on the face of the Application (See Pages 6 to 11 of the Application), as read together with paragraph 21 of the Supporting Affidavit (See Pages 26 to 31 of the Supporting Affidavit). The Applicant's instant Submissions are grounded thereon.

49. Through the submissions, it advances the grounds of illegality and/or irregularity in six fronts;

> ***a) That the 1st Respondent irregularly failed to determine whether there was a legally cognizable and/or competent Request for Review to warrant the exercise of its Jurisdiction, notwithstanding the parties' pleadings and submissions thereon.***

50. It places reliance on our detailed pleading at Ground Number 7 (i) to (vii) on the face of the Application as read with paragraphs 21 (i)(a) to (g) of the Supporting Affidavit to advance our arguments under this issue. Firstly, that the impugned Decision was ultra vires Section 37(2) and 40(1) of the Companies Act; secondly, that the 1st Respondent failed to take into account the fact that the 4th Respondent's representative lied on oath, thus tainting the Request for Review with illegality; and thirdly, that the 1st Respondent did not make a merit determination on the 4th Respondent's defective Supporting Affidavit that was filed before it on merit.

51. Firstly, with respect to its submission that the 1stRespondent's impugned Decision was ultra vires the provisions of Section 37(2) and 40(1) of the Companies Act, i to take note of part refers the court to paragraph 123 of the impugned Decision, where the 1st Respondent stated that the Applicant's preliminary objection filed before it was premised on claim that the person who swore the 4th Respondent's Supporting Affidavit that had been filed before the 1stRespondent lacked authority to act on behalf of the 4th Respondent. The 1st Respondent found that, that was not a pure question of law as its determination necessitates examining evidence and that the same cannot be determined at the preliminary objection stage. The same was therefore dismissed.

52. It submits that this finding is tainted with illegality and/or irregularity for the reasons that; -

i. The Applicant pleaded at paragraph 2 of its Preliminary Objection dated 5th August 2025 filed before the 1stRespondent; at paragraph 20.4 of its Replying Affidavit sworn on 8th August 2025 filed before the 1st Respondent; and further submitted at paragraph 19 of its Written Submissions dated 13th August 2025 filed before the 1stRespondent; that the Applicant's pleadings were incompetent and/or defective for want of authority under Section 37(2)

and 40(1) of the Companies Act, and further that the Applicant had lied on oath.

ii. All these pleadings by the Applicant were not controverted by the 4th Respondent in any of its pleadings filed before the 1st Respondent. The 4th Respondent did not file any reply to counter any of the Applicant's claim. It therefore follows that there was no contested fact that required to be ascertained. The Applicant’s preliminary objection on this issue was therefore a proper one in law and the 1st Respondent ought to have determined the same.

iii. Be that as it may, even if the 1st Respondent's holding was that it could not determine the preliminary objection at the preliminary objection stage, it is noteworthy that the same objection was raised at paragraph 20.4 of the Applicant's Replying Affidavit filed before the 1stRespondent and further submitted at paragraph 52 (ii) of the Applicant's Written Submissions dated 13th August 2025 filed before the 1st Respondent, and the 1st Respondent was enjoined to make a determination thereon on merit after hearing the Request for Review substantively as it did. This, however, did not happen. The 1st Respondent failed to make a finding

on the question of competency of the pleadings before it on merit, despite the same having been raised as a substantive issue.

53. Section 37 (2) of the Companies Act Provides as hereunder:

> Section 37 Execution of documents
>
> (2)A document is validly executed by a company if it is signed on behalf of the company—
>
> (a) by two authorized signatories; or
>
> (b) by a director of the company in the presence of a witness who attests the signature.

54. Further Section 40 (1) provides as follows; -

> Execution of deeds or other documents by attorney;
>
> (1) A company may, in writing, authorize a person, either generally or in respect of specified matters, as its attorney to execute deeds or other documents on its behalf.

55. In **Republic v Public Procurement Administrative Review Board and 2 others; Ex-Parte Central Kenya Fresh Merchants Limited [2018] KEHC 1203 (KLR),** the Court stated thus; -

"79. Further, on the question of the absence of a company resolution authorizing the filing of the Request for Review, the authorities cited by the Exparte Applicant do not support his argument. The correct legal position is that failure to file a resolution is not fatal. It can be filed any time before the hearing.

56. In **Athi Highway Developers Limited v West End Butchery Limited and 6 others [2015] eKLR**, the Court of Appeal cited the case of United Assurance co Ltd v Attorney General: SCCA No 1 of 1998 where the Supreme Court of Uganda held that:

"...it was now settled, as the law, that, it does not require a board of directors, or even the general meeting of members, to sit and resolve to instruct Counsel to file proceedings on behalf and in the names of the Company. Any director, who is authorized to act on behalf of the company, unless the contrary is shown, has the powers of the board to act on behalf of that Company."

57. It submits that a company, being an artificial legal person, can only act through its duly authorized agents, and the primary organ with the authority to initiate legal proceedings is the Board of Directors/Director. Without a formal resolution, the individual purporting to act on the company's behalf and who is not a director has no demonstrable authority, and their actions cannot be validated.

58. A court cannot presume that a non-director has been duly authorized to bind a company in proceedings of such significance. To do so would risk encouraging frivolous litigation and exposing companies to legal action initiated by individuals lacking proper authority. The integrity of the judicial process demands that any party instituting proceedings on behalf of a company must demonstrate clear and unequivocal authority to do so. In the absence of a board resolution, the 1st Respondent ought to have upheld the Applicant's Preliminary Objection and strike out the Request for Review or at the very least, the 1st Respondent should have substantively considered the issue on its merits since the Applicant had alternatively raised it as a substantive issue.

59. It is submitted that this is not just a mere technicality; it is a fundamental issue of corporate governance and legal capacity. Lack of authority to sue, especially when the supporting affidavit is sworn by a person who is not a director, is a fatal defect that renders the entire suit incompetent and an abuse of the court process.

60. The Applicant placed before the 1st Respondent a copy of the CR-12, which was exhibited through an affidavit sworn by Mr. Josphat Atang'a Nyabate, a holding over advocate at the firm of NOW Advocates LLP, the law firm duly instructed to act for the Applicant in these proceedings. The CR-12 clearly demonstrated that the individual who swore the

4thRespondent's Supporting Affidavit was not a director of the 4th Respondent as claimed in the Supporting Affidavit.

61. It is noteworthy that the 4th Respondent, at all times prior to the hearing, had the opportunity of filing the Written Authority to Act/Board Resolution before the 1st Respondent. The evidential burden shifted to the 4th Respondent to demonstrate that the said individual had the requisite authority to act on its behalf, either by way of a board resolution or other written authority, in accordance with Section 40(1) of the Companies Act. The 4th Respondent, however, failed to discharge this burden.

62. In **Spire Bank Limited v Land Registrar and 2 Others [2019] eKLR**, the Court of Appeal rendered itself thus: -

> *"It is essential to appreciate that the intention behind order 4 rule 1 (4) was to safeguard the corporate entity by ensuring that only an authorized officer could institute proceedings on its behalf. This was to address the mischief of unauthorized persons instituting proceedings on behalf of corporations, and obtaining fraudulent or unwarranted orders from the court. The company's seal that is affixed under the hand of the directors ensured that they were aware of, and had authorized such proceedings together with the persons enlisted to conduct them. And where evidence was produced to demonstrate that a person was unauthorized, the burden shifted to*

such officer to demonstrate that they were authorized under the company seal. With this in mind, we dare say that the provision was not intended to be utilized as a procedural technicality to strike out suits, particularly where no evidence was produced to demonstrate that the officer was unauthorized."

63. The 1st Respondent erred in failing to address itself to the competency of the 4th Respondent's pleadings filed before it even after a substantive hearing of the matter in total disregard to the provisions of Section 37(2) and 40(1) of the Companies Act.

64. It is further submitted that the 1st Respondent failed to take into account the fact that the 4th Respondent's representative lied on oath, thus tainting the Request for Review with illegality. The 1st Respondent did not make a determination on this issue on merit, notwithstanding the fact that apart from the preliminary objection, the same issue was raised in the Applicant's Replying Affidavit and Written Submissions that were filed before the 1st Respondent in response to the Request for Review.

65. In the case of **Andrew Ireri Njeru and 14 Others v Attorney General and 2 Others and another [2014] KEHC 3627 (KLR**),the Court observed that;-

"Looking at the plaintiffs' pleadings, it is clear that this suit is meant to be a representative suit. There is a letter signed by fourteen (14) plaintiffs and dated 25th March 2013 authorizing the 1st plaintiff to file this suit on their behalf. Among them are DANSON NJIRU, MUNG'ORI NDII, STEPHEN NJIRU KARUGA and MUGO MWANIKI whom, as I have indicated above, have filed affidavits denying having given the 1st plaintiff any authority to file this suit. There is also the statement made by the 12th plaintiff, himself an advocate of this court, in which he said he had given no such authority to the 1st plaintiff to file this suit. Given those circumstances, and bearing in mind that an affidavit is a solemn declaration affirming the truth of its contents, the plaint herein must be treated with a lot of circumspection. The legitimacy of a representative suit flows from the authority that the individual parties to the suit have given whoever has filed the suit on their behalf. If there is no such authority or if the authority was obtained through fraudulent means, then the plaint or other pleadings can only be declared defective or incompetent. A plaintiff cannot be made to sue a defendant against his will. It follows therefore that the verifying affidavit sworn by MOTOKAA NTHAUTHO the (2nd plaintiff herein) in which he had deponed, inter alia, that he is "---- authorized and hence competent to swear this verifying affidavit on behalf of 14 other plaintiff

-----"cannot be true. This affects the veracity of the pleadings herein and in my view, amounts to an abuse of the Court process. This is not a case where there is no verifying affidavit or where the verifying affidavit has a genuine mistake that can be rectified. This is a case where the verifying affidavit is deliberately misleading. Such affidavit cannot in law satisfy the requirements of Order 4(2) of the Civil Procedure Rules. Such an affidavit and the pleadings that go with it can only be candidates for striking out. I would accordingly up-hold the Preliminary Objection as it is clearly questionable whether indeed there was any lawful authority granted to the 1st plaintiff to file this suit and whether there is a verifying affidavit in support of the suit as known in law."

66. And in **James Mulinge v Freight Wings Ltd and 3 others [2016] KEELRC 11 (KLR),** the Court observed that:-

"32. ...Where the Court finds a party under oath has given false averments, this Court basing its findings on the basis of such sworn affidavit and where found false, there is the inherent powers of the Court to punish. As a superior Court of record, a party who makes a false affidavit knowing the same to be so, not only commits perjury but the same amounts to an abuse of Court process.

33. I find the subject affidavit deponed by Ms Okallo and dated 28th July 2016 and the matters submitted by the

Claimant with regard to averments set out in Ms Okallo's affidavit sworn and dated 14th April 2016 bear conflicting information with regard to her position held with the Respondent and her position held with the objectors. Where there is no clarification as to nature of changes leading to the factual differences in terms of positions held in either entity, and when challenged with regard to the same reliance was gone into the technicality of jurisdiction, either affidavit must be false. This does not aid the course of justice to make affidavits and statements under oath knowing the same to be false and or intended to derail the course of justice.

34. An application thus made with the outright aim of derailing the course of justice should be dismissed instantly. It should not see the light of day. Even where a sanction is due, the instant dismissal is safe enough to secure the inherent powers of the Court to accord justice to all parties before it."

67. In **Joshua Muthama Mutua and another v Josephine Nduleve Maingi [2021] KEHC 13482 (KLR)**; GV Odunga observed that:-

"11. As pointed out by the Respondent, the affidavit in support of the application is sworn by one Kevin Ngure who has deposed that he is the Defendant/Applicant. However, the Applicants herein are indicated as Joshua

Muthama Mutua and Starline Global Logistics. It is therefore unclear who the deponent is in these proceedings. To that extent, the said affidavit is incompetent and being incompetent it cannot be the basis upon which the application may be granted.

12. Consequently, the application is incompetent and is hereby struck out with costs to the Respondents."

68. Further in the cases **Kitushi Motor Limited and another v Simion Mwaluko Mumo [2021] KEHC 13487 (KLR); Joseph Ndau Kyengo v Peter Kiindu Nyala [2021] KEHC 13475 (KLR); Joseph Ndau Kyengo v Jackline Mueni Wambua [2021] KEHC 2383 (KLR)** at paragraphs 11 and 12 Justice GV Odunga emphasized the inadmissibility of documents deposed by strangers to the cause and consequently striking out applications supported by such affidavits.

69. It submits that the impugned Decision failed to take into account the Applicant's claim that the Request for Review was premised on incompetent pleadings tainted by a false affidavit. The failure to take into consideration the uncontested fact that the 4thRespondent's representative lied on oath amounted to a serious miscarriage of justice.

70. It is further submitted that the impugned Decision was irregular as the 1st Respondent did not make a determination

on the 4th Respondent's defective Supporting Affidavit that was filed before it on merit. In response to the 4th Respondent's averment at Paragraph 18 of its Replying Affidavit on this issue and it submits as follows; -

i. Admittedly, Regulation 203(2)(b) of the Procurement Regulations does not prescribe a specific form of a statement to be relied on by a party to support its Request for Review. The Regulation leaves it open for a party to elect the kind and/or form of a statement that they will rely upon.

ii. In the instant case, the 4th Respondent elected to file a Supporting Affidavit as the statement in support of their Request for Review under the said Regulation 203(2)(b). It submits that they acquiescence to be bound by the strict rules governing such a document. The 1st Respondent was therefore enjoined to evaluate sufficiency of the Supporting Affidavit as filed by the 4th Respondent, which they failed to do.

iii. Reliance is placed on the Court of Appeal decision in **Pharmacy and Poisons Board and another; Mwiti and 21 others (Respondent)(Civil Appeal E144 of 2021)[2021] KECA 97 (KLR) (22 October 2021) Ruling) Neutral citation: [2021] KECA 97 (KLR)** where it observed as follows :

"5.Notwithstanding the foregoing, it would be remise of us not to comment on, albeit obiter, to set the law straight on this and other issues that emerge from the application before us. With regard to the unsigned supporting affidavit, the unmarked and unsealed annexures, it would suffice to observe that such an affidavit is fatally defective and of no value to the Applicants' Motion…

7.The same fate befalls unmarked and unsealed annexures. They are of no value to the application to which they relate in view of the fact that an Affidavit and the annexures attached thereto constitute evidence. To qualify as evidence, such annexures must be marked and sealed by a Commissioner for oaths as required by Rule 9 of the Oaths and Statutory Declarations Rules."

iv. Counsel for the 4st Respondent misconstrued the law in his submissions as captured at paragraph 100 of the impugned Decision, that the Request for Review is competent on its own, independent of any supporting statement or affidavit; this submission is misplaced and not tenable as observed in Republic v Public Procurement Administrative Review Board; Lake Victoria North Water Works Development Agency and another (Interested

Parties); Toddy Civil Engineering Company Limited (Exparte Applicant) (2023) KEHC 3699 (KLR), that;-

a) The Exparte Applicant argued that the request for review is a stand-alone document. This is not an accurate position. The Exparte Applicant proceeded to file the Supporting Statement under Regulation 203 (2) (b) which the Respondent found to be defective. The Exparte Applicant is blowing hot and cold air.

b) The fact that the Regulations do not specify or point out a particular or specific form of statement is neither here nor there...

v. The 1st Respondent irregularly dismissed the Applicant's claim by holding that it could not determine the preliminary objection at the preliminary objection stage, without taking into consideration the fact that the same issue was raised substantively at paragraph 20.4 of the Applicant's Replying Affidavit filed before the 1st Respondent, and that the 1st Respondent was enjoined to make a determination thereon on merit after hearing the Request for Review substantively.

71. Finally, it is submitted that the 4th Respondent has, at paragraph 17 (17.5) of its Replying Affidavit filed herein, sought to challenge the Affidavit sworn by Josphat Atang'a, by

raising a counter argument that the said Affidavit was sworn by a holding over lawyer at the firm of NOW Advocates LLP, who was not duly authorized by the Applicant. In response, it submits as follows: -

i) Whereas the 4th Respondent had every opportunity to challenge the subject affidavit in its submissions before the 1st Respondent, it did not do so. At no point during the proceedings before the 1st Respondent did the 4th Respondent controvert, challenge or otherwise dispute the said affidavit.

ii) Nevertheless, the firm of NOW Advocates LLP was properly on record for the Applicant, and Mr. Josphat Atang'a Nyabate, a lawyer holding over at the said firm, conducted a company search on the Business Registration Service in regards to the 4th Respondent Company. Accordingly, he was competent to depone to the Affidavit. It is noteworthy that Mr. Nyabate's deposition was confined to the contents of the CR-12 as generated by the Business Registration Service, a public record of company directorship. This is a formal matter of law and record, upon which counsel is perfectly competent to depone.

It also submits that the 1st Respondent granted an order that was neither pleaded nor prayed for in the Request for Review, to wit, an order for a re-tender of the quantities of meters under Category 1, 2 and

3 afresh, in blatant violation of the rules of natural justice and fair hearing.

72. It refers the court to paragraph 17 (i) of the Supporting Affidavit, where we have produced exhibit ETO-7 (a), being a copy of the 4th Respondent's Request for Review that was filed before the 1st Respondent and invite s the court to peruse the said exhibit ETO-7(a) and take note of all the Orders expressly sought therein. From a reading thereof, it is evident that the 4th Respondent did not pray for an order for a re-tender of the quantities of meters under Category 1, 2 and 3 afresh.

73. However, at paragraph 242(5) of the impugned Decision, the 1st Respondent, on its own motion, and without granting the parties an opportunity to be heard on the matter, capriciously ordered that the 2nd Respondent re-tender the quantities of meters under Category 1, 2 and 3 afresh. This was done unfairly and through procedural impropriety in violation of the rules of natural justice pertaining to fair hearing on account that the Applicant was not granted an opportunity to respond and be heard on the same.

74. A Court can only grant orders that have been sought in pleadings. It buttresses this argument through the case of **Julius Ndolo Sila v Kalpataru Power Transmission Ltd [2021] KEHC 7709 (KLR)**, and the case of **Chalicha Farmers' Co-operative Society Limited v George**

Odhiambo and 9 Others [1987] KECA 70 (KLR) the Court of Appeal held that; -

> *"...As stated earlier, there was no counter-claim filed. However, sympathetic the judge may be towards the defendants, no order can be made (unless by consent) outside the pleading. Two decisions of this court are on this point one in Captain Harry Gandy v Caspair Air Charters Ltd (1956) 23 EACA 139 at page 140 Sinclair V P stated:*
>
> *"The object of pleadings is of course, to secure that both parties shall know what are the points in issue between them, so that each may have full information of the case he has to meet and prepare his evidence to support his own case or to meet that of his opponent. As a rule relief not founded on the pleadings will not be given. As the English Practice Scrutton, L J said in Blay v Polland and Morris [1930] 1 KB 628.*
>
> *"Cases must be decided on the issues on the record, and if it is desired to raise other issues they must be placed on the record by amendment. In the present case the issue on which the judge decided was raised by himself without amending the pleadings, and in my opinion, he was not entitled to take such a course".*

*This decision was considered in **Bhag Bhari v Mehdi Khan [1965] EA 94**. The order the judge gave is a nullity. It is not one of the prayers asked for by the plaintiffs or the defendant in the absence of a counter-claim."*

75. Further, in the case of **Fondo and Another v Commission for Human Rights and Justice and Another [2023] KECA 927 (KLR),** the Court observed that the effect of such an irregular order is to deny the opposing party an opportunity of being heard and stated as follows;-

"21. In the case before us, we have considered the pleadings as well as the evidence and we are unable to find that the parties were given an opportunity to address the issue of the amendment of the 1st appellant's letter of appointment and that the said issue was left to the court to decide. While we understand the 1st Respondent to be saying that the court in so doing was only safeguarding the Constitution, the Constitution itself in Article 22(3)(d) states that: The court while observing rules of natural justice, shall not be unreasonably restricted by procedural technicalities.

22.Therefore, the Court cannot purport to be enforcing the Constitution while violating the right to a hearing. We therefore find that the issue of amendment of the 1st appellant's letter of appointment having not been

properly placed before the trial court and having not formed part of the issues for determination, the declaration amending the said letter cannot be allowed to stand."

76. The Applicant submits that, in ordering for a re-tender of the quantities of meters under Category 1, 2 and 3, which order was not sought, the 1st Respondent acted outside the scope of its jurisdiction, and in breach of the rules of natural justice. By introducing a remedy not pleaded for, and without affording the Applicant an opportunity to be heard on such a consequential directive, the 1st Respondent rendered a decision that was procedurally irregular, substantively unjust, and prejudicial to the Applicant. Further, and as already submitted above, this irregularity also depicted bias, as its net effect was to grant the 4th Respondent a second bite to the cherry, the 1st Respondent having noted that the 4th Respondent's bid price for lots 1, 2 and 3 of Category 3 were higher than those of the successful bidders in Category 3, and that a re-evaluation of the 4th Respondent's bid as prayed for by the 4th Respondent in its Request for Review, would not be of any assistance to the 4th Respondent.

77. On another front it submits it that the *1st Respondent's impugned Decision was ultra vires Section 170(c) of the Procurement Act, the 1st Respondent having misdirected itself by finding that the extent of the successful bidders'*

participation in proceedings before it is limited, and that the non-joinder of the Applicant was not fatal.

78. At paragraph 136 of the impugned Decision, the 1st Respondent held that it has jurisdiction to consider legal issues raised by the Applicant and the 1st to 4th Interested Parties, subject to limitation, and that they cannot introduce fresh factual matters or seek remedies beyond those sought by the 4th Respondent.

79. At paragraphs 191 and 192 of the impugned Decision, the 1st Respondent held that since the Applicant herein was not successful in Category 3, its non-joinder was not fatal as the Applicant doesn't fall within Section 170(c) of the Procurement Act. This is notwithstanding the fact that the 1st Respondent made various substantive orders against the Applicant in respect of Category 1 and 2 at paragraph 242(1) to (5) of the impugned Decision, as we have already submitted above.

80. Section 170 of the Procurement Act, provides as follows;

> 170. Parties to review
>
> The parties to a review shall be—
>
> (a) the person who requested the review;
>
> (b) the accounting officer of a procuring entity;

(c) the tenderer notified as successful by the procuring entity; and

(d) such other persons as the Review Board may determine.

81. It submits that the 1st Respondent's holding that the Applicant's participation may be limited, was an error in law as we have detailed at paragraph 8 of the Grounds on the face of the Application as read with Paragraph 21(ii) of the Supporting Affidavit, which we highlight as follows;

i) It is not in dispute that the Applicant and the 1st to 4th Interested Parties were all successful bidders in various Categories and Lots in the subject Tender.

ii) Section 170 of the Procurement Act, is couched in mandatory terms for the parties mentioned in Section 170 (a), (b) and (c) above, and that the only non-mandatory party is the one mentioned at (d), who is such other party the Review Board may deem necessary. Accordingly, successful bidders are mandatory parties in Request for Review proceedings before the 1st Respondent.

It refers the court to the case of **Republic v Public Procurement Administrative Review Board and 3 Others; Brooklyn Cleaning Services Limited (Ex-parte) (Application E161 of 2024) [2024] KEHC 10635 (KLR)** (Judicial Review) (6 September 2024)

(Judgment), where Hon. Justice Ngaah Jairus observed that: -

> *"26. The 1st Respondent's decision would fall on the ground of illegality because the 1st Respondent flouted the provisions of section 170 of the Act in entertaining a request for review when, the Applicant, being a mandatory party, was omitted from the application. Without belabouring the point, the 1stRespondent either deliberately disregarded the provisions of section 170 of the Act or simply, it did not give effect to this provision.*
>
> *27. The 1st Respondent's decision would fall on ground of procedural impropriety because the Respondent simply failed to observe basic rules of natural justice or failed to act with procedural fairness towards the Applicant who was obviously affected by the 1 Respondent's decision…."*

iii) It therefore follows that Interested Parties, who are successful bidders in Request for Review proceedings, should be distinguished from interested parties in ordinary civil proceedings under the Civil Procedure Rules, whose participation is discretionary. The 4th Respondent's averment at Paragraph 21 sub-paragraph 21.1 of the 4th Respondent's Replying Affidavit is

therefore a misconstrued and narrow interpretation of the law.

iv) Being mandatory parties, successful bidders, joined as interested parties in Request for Review proceedings, have the same right to fully participate in the subject proceedings before the 1st Respondent. They can raise new factual matters or issues of law, where necessary. The 1st Respondent accordingly misdirected itself by finding that the extent of the successful bidders' participation in proceedings before it is limited.

82. The 1st Respondent misdirected itself by narrowly construing and/or disregarding the provisions of Section 170(c) of the Procurement Act, thereby unlawfully excluding the Applicant from proceedings that directly affected its award in Categories 1 and 2 of the subject tenders. Despite acknowledging that the Request for Review was confined to Category 3 where the 4th Respondent had submitted its bid, the 1st Respondent proceeded to issue far-reaching orders affecting all categories, including those in which the Applicant had been determined successful. This constituted an egregious violation of the express provisions of the law and the rules of natural justice.

83. On another front the applicant submits that ***the 1st Respondent's impugned Decision was ultra vires Section 167(1) of the Procurement Act, the 1stRespondent***

having misdirected itself on the legal requirement of pleading loss or damage.

84. The 1st Respondent erroneously found at paragraph 160 of the impugned Decision that the 4th Respondent complied with the requirements of Section 167(1) of the Procurement Act.

85. Section 167(1) of the Procurement Act provides that; -

> (1) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.

86. In the case of **El Roba Enterprises Limited and 5 others v James Oyondi t/a Betoyo Contractors 5 others [2018] eKLR** where the High Court held as follows: -

> *"38. As for issue No. 2, the Petitioners averred that under Section 167 of the Public Procurement and Asset Disposal Act, the Applicants in Review applications no. 76 of 2017 and 77 of 2017 needed to demonstrate that they had suffered loss or were likely to suffer loss which they failed to do hence they lacked locus standi to appear before the 5th Respondent.*

Section 167 (1) of the Public Procurement and Asset Disposal Act reads:

(1) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.

A keen perusal of the proceedings and pleadings before the 5th Respondent reveals that the 1st and 2ndRespondents, then the Applicants, did not state or suggest that they had suffered damage as a result of the procuring entity breaching its duty ..... It is the finding of the court that the 1st and 2nd Respondents had suffered no loss and hence could not have access to the Review Board…"

87. The Court of Appeal fortified the above holding in the case of **James Oyondi t/a Betoyo Contractors and another v Elroba Enterprises Limited and 8 others [2019] eKLR,** where it stated thus: -

"…It is not in dispute that the appellants never pleaded nor attempted to show themselves as having suffered loss

or damage or that they were likely to suffer any loss or damage as a result of any breach of duty by KPA. This is a threshold requirement for any who would file a review before the Board in terms of section 167(1) of the PPADA;"(1) subject to the provisions of this part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed." It seems plain to us that in order to file a review application, a candidate or tenderer must at the very least claim to have suffered or to be at the risk of suffering loss or damage. It is not any and every candidate or tenderer who has a right to file for administrative review. Were that the case, the Board would be inundated by an avalanche of frivolous review applications. There is sound reason why only candidates or tenderers who have legitimate grievances may approach the Board. ..... They therefore were, with respect, the kind of busy bodies that section 167(1) was designed to keep out. The Board ought to have ruled them to have no locus, and the learned Judge was

right to reverse it for failing to do so. We have no difficulty upholding the learned Judge…"

88. In the case of **Space Contractors and Suppliers Investment Limited v Public Procurement Administrative Review Board and 23 others [2023] KECA 1457 (KLR)** where the Court of Appeal while reinforcing the above position stated thus;

"61… In our view, the answer to Mr Gikandi's submission is to be found in section 167(1), which requires that the person seeking administrative review by way of a Request for Review be a candidate or a tenderer who ought to claim that it has suffered, or was at the risk of suffering, loss or damage due to the breach of a duty imposed on a procuring entity by the Act or the Regulations. Therefore, it does not suffice to allege breach. One must go ahead and plead that it has suffered or risk suffering loss or damage as a result of the breach. In our considered view, it is not enough to simply contend that some of those awarded the tender were not qualified as the appellant contended here. The appellant ought to have pleaded what loss, if any, it suffered or risked suffering as a result thereof. It failed to do so."

89. It is submitted that the reasoning of the 1st Respondent and its finding is ultra vires the law for the following reasons; -

i. The 1st Respondent was very clear on the provisions of Section 167(1) of the Procurement Act, as demonstrated at paragraph 151 of the impugned Decision, where the 1st Respondent listed the conditions that the 4th Respondent must satisfy, including making a claim to have suffered, or be at risk of suffering loss or damage as a result of breach of duty imposed on a procuring entity by the Procurement Act and its Regulations.

ii. At paragraph 152 and 153 of the impugned Decision, the 1st Respondent appreciated the holding of the Court of Appeal in **James Ayodi T/A Betoyo Contractors and Another vs Elroba enterprises Limited and Another (2019) eKLR**, which the 1st Respondent expressly states provided clarity on the requirement to plead and demonstrate actual or potential loss in such proceedings.

iii. Important to note is that at paragraph 158 of the impugned Decision, the 1st Respondent observed that its attention had not been drawn to any specific paragraph of the pleadings where the 4th Respondent pleaded risk of loss or damage as contemplated under Section 167(1) of the Procurement Act. No such pleading in fact exists.

iv. However, in an interesting twist, and notwithstanding the 1st Respondent's own acknowledgment that it hadn't been pointed to any specific paragraph of the pleadings where the 4th Respondent pleaded risk of loss or damage

as contemplated under Section 167(1), which acknowledgment should have warranted it to down its tools, the 1st Respondent, instead, at paragraph 158 of its impugned Decision, purported to stretch the interpretation of Section 167(1) of the Procurement Act as settled by the Court of Appeal in the James Ayodi Case (supra), by referring to paragraphs 9 and 10 of the Request for Review filed before it, and claiming that the 4th Respondent satisfied the requirement of Section 167(1) of the Procurement Act. This is despite the fact that the 4th Respondent neither pleaded loss nor damage in the stated paragraphs.

v. That at paragraph 159 of the impugned Decision, the 1stRespondent purported to interpret the meaning and effect of the stated paragraphs 9 and 10 of the 4th Respondent's Request for Review before it, by stating that the subject paragraphs meant that the 4th Respondent contended it suffered prejudice as a result of the manner in which the 2nd and 3rd Respondents conducted the procurement process.

vi. It submits that claim of prejudice is not the same as claim of loss and damage as held by the Court of Appeal in Space Contractors and Suppliers Investment Limited(supra). Whereas the Court of Appeal, whose decision is binding to the 1st Respondent, is clear on what

is to be pleaded, the 1st Respondent purported to overrule and/or disregard the Court of Appeal and it instead came up with its own law which has no bearing on the provisions of Section 167(1) of the Procurement Act.

90. In light of the foregoing, we submit that the 1st Respondent acted ultra vires its statutory mandate by disregarding the express requirements of Section 167(1) of the Procurement Act and the binding authority of the Court of Appeal in the James Ayodi and Space Contractors cases. Despite acknowledging that the 4th Respondent failed to plead or demonstrate actual or potential loss as required, the 1stRespondent erroneously proceeded to entertain the Request for Review. This amounted to a misapplication of the law and a fundamental departure from settled jurisprudence. The 1stRespondent's attempt to conflate a generic claim of "prejudice" with a legally mandated pleading of "loss or damage" is both misleading and legally untenable.

91. It submits that t**he impugned Decision was ultra vires Section 167(1) of the Procurement Act and Regulation 203 (1) and (2) (c) of the Procurement Regulations, the 1st Respondent having misdirected itself in finding that certain aspects of the Request for Review were not time barred.**

92. It invites the court to peruse paragraphs 10 to 12 of the 4th Respondent's Request for Review filed before the 1st

Respondent, as read with paragraphs 16 to 24 of its Supporting Affidavit (Exhibit ETO-7(a) and ETO-7(b)). The pleading in the subject paragraphs make it clear that the 4th Respondent was aggrieved by various provisions in the Tender Document that set up the subject tender's procurement system as detailed therein.

93. It is noteworthy that the 4th Respondent expressly reiterates, in its Replying Affidavit dated 30th August 2025 filed herein, that it was aggrieved by various provisions contained in the Tender Document, which established the procurement framework for the subject tender. This position is evident from paragraphs 27, 52 (specifically sub-paragraphs 52.6 and 56.7), 53, 54, and 61 of the 4th Respondent's Replying Affidavit.

94. Section 167 (1) of the Procurement Act provides that; -

> (2) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.

95. Further, Regulation 203 (1) and (2) (c) of the Procurement Regulations provides that:

(1) A request for review under section 167(1) of the Act shall be made in the Form set out in the Fourteenth Schedule of these Regulations.

(2) The request referred to in paragraph (1) shall—

(c) be made within fourteen days of—

(i) the occurrence of the breach complained of, where the request is made before the making of an award;

(ii) the notification under section 87 of the Act; or

(iii) the occurrence of the breach complained of, where the request is made after making of an award to the successful bidder.

96. The Applicant submits that the 4th Respondent ought to have filed its complaints regarding the provisions in the Tender Document that set up the subject tender's procurement system by, the very latest, on 15th July 2025, being 14 days from the tender submission deadline of 1st July 2025.

97. Accordingly, at paragraphs 1(b)(i) to (iii) of the Applicant's preliminary objection dated 5th August 2025 filed before the 1stRespondent at exhibit ETO-11) produced at paragraph 17(v) of the Supporting Affidavit, as read with paragraph 20.3 of the Applicant's Replying Affidavit filed before the 1stRespondent (exhibit ETO-14(a)) produced at paragraph 17(viii) of the Supporting Affidavit, and paragraphs 41 to 50 of the

Applicants Written Submissions filed before the 1stRespondent (exhibit ETO-18) produced at paragraph 17(xii) of the Supporting Affidavit, the Applicant herein objected to the 1st Respondent's jurisdiction, for being time barred, to the extent that the Request for Review challenged the setup of the subject tender's procurement system in the Tender Document as detailed therein.

98. In **Republic v Public Procurement Administrative Review Board and 2 others Ex- Parte Kemotrade Investment Limited [2018] eKLR,** it was held that the determination of when time begins to run will depend upon an examination of the alleged breach, and at what stage the aggrieved tenderer had knowledge of the said breach, or ought to have reasonably known of it.

99. Further in **Republic v Public Procurement Administrative Review Board and Another ex parte Sports, Arts and Social Development Fund; Accounting Officer, Sports, Arts and Social Development Fund and Another [2021] eKLR,** the Court observed that:

> *"the application for review for any alleged breach must be filed timeously and, in any event, not later than 14 days from the date of the alleged breach. In that case where the Applicant alleged a breach at the technical review stage but waited until the award had been made to seek for review, the 1st Respondent accepted as the correct*

interpretation of the law the argument that the Applicant ought to have filed its application for review within 14 days of the breach.”

100. And in **Space Contractors and Suppliers Investment Limited v Public Procurement Administrative Review Board and 23 others [2023] KECA 1457 (KLR);** the Court of Appeal held that;

“52. Our reading of these provisions reveals that transgressions contemplated under the said provisions may occur at three stages: during the procurement process but before the award is made; at the time of the notification of the award; or after an award is made to the successful party. The first stage may comprise of complaints arising from the tender documents, and this includes the advertisement, addenda, any order restraining the tender process, as well as the conduct of the procuring entity during the tender process; the second stage may arise where the tender is not awarded to the person found to have been the most responsive in the process of the tender; and the third stage may arise if it is discovered, after the tender is awarded, that the person awarded the tender is non-existent.

53.According to Mr. Gikandi, time for the purposes of making a Request for Review must start running from the date of notification of the tender. With due respect to Mr.

Gikandi, our considered view is that Parliament deliberately set out to demarcate the three stages at which Request for Review may be made. To our mind, that deliberate demarcation was meant to ensure that, for example, complaints in the procurement process are resolved as soon as they arise so that a party ought not to wait till the end of the process to lodge a complaint regarding the propriety of the tender documents."

101. It is its submission that as clearly enumerated by the Court of Appeal in Space Contractors and Suppliers Investment Limited (supra), pursuant to the provisions of Section 167(1) of the Procurement Act, the first stage may comprise of complaints arising from the tender documents, and this includes the advertisement, addenda, any order restraining the tender process, as well as the conduct of the procuring entity during the tender process. The 4th Respondent's assertion (at paragraph 33 of the 4th Respondent's Replying Affidavit sworn on 30th August 2025), that filing a Request for Review after issuance of a Tender Document would have been premature, is untenable. A deliberate demarcation was intended to ensure that complaints arising in the procurement process are addressed promptly, such that parties are not required to wait until the conclusion of the process to challenge the propriety of the tender documents. The provisions of Section 167 are couched in mandatory terms, and accordingly, a party who

fails to exercise its legal rights within the prescribed 14-day period forfeits the right to make a claim.

102. The 1st Respondent twisted and misconstrued the Applicant's preliminary objection. At paragraph 161 and 169 of the impugned Decision, the 1st Respondent stated that the Applicant herein urged that the 4th Respondent's challenge related to three elements of the procurement process, that is, restriction of awards to one lot per category, allowance of different pricing across awards, and absence of site visits. Noteworthy, at paragraph 169 of the impugned Decision, the 1st Respondent consolidated the 4thRespondent's grounds to two core issues, that is, mode of award and its application, and absence of site visits at commencement of the tendering process. The 1st Respondent then proceeded, at paragraphs 170 to 173 of its impugned Decision, to address the question of when the 4thRespondent became aware of the alleged breach, linked the same to the date of notification of 17th July 2025, and found that the Request for Review was accordingly not time barred.

103. The 1st Respondent erred in introducing the element of application of the mode of award, which was not part of the pleadings of the 4th Respondent and which was never raised by any of the parties in the Request for Review proceedings. In doing so, the 1st Respondent formulated it is own issue and did an analysis and made a determination without according the

parties an opportunity to be heard on the issue. A reading of paragraphs 10 to 12 of the Request for Review and paragraphs 16 to 24 of the Supporting Affidavit as filed before the 1st Respondent clearly reveals that the 4th Respondent was challenging the setup of the mode of award and has in fact used the word set-up in all the said paragraphs.

104. Reliance is placed in the Court of Appeal's decision in **Chalicha Farmers' Co-operative Society Limited (Supra)** where the Court observed that;-

> *"In the present case the issue on which the judge decided was raised by himself without amending the pleadings, and in my opinion, he was not entitled to take such a course".*

105. They urge this Honourable Court to find that the 1stRespondent ought to have downed its tools with respect to claims made at paragraphs 10 to 12 of the Request for Review filed before it as read with paragraphs 16 to 24 of the Supporting Affidavit, noting that all the stated claims relate to express provisions of the Tender Document that was within the 4th Respondent's knowledge way before the Notification of Award.

106. It submits further that t***he impugned Judgment was ultra vires Section 67 for failure to correctly and/or aptly***

interpret the provisions of Section 67 of the Procurement Act.

107. Section 67 of the Procurement Act provides as follows: -

> 67. Confidentiality
>
> (1) During or after procurement proceedings and subject to subsection (3), no procuring entity and no employee or agent of the procuring entity or member of a board, commission or committee of the procuring entity shall disclose the following—
>
> (a)information relating to a procurement whose disclosure would impede law enforcement or whose disclosure would not be in the public interest;
>
> (b)information relating to a procurement whose disclosure would prejudice legitimate commercial interests, intellectual property rights or inhibit fair competition;
>
> (c)information relating to the evaluation, comparison or clarification of tenders, proposals or quotations; or(d)the contents of tenders, proposals or quotations.
>
> (2) For the purposes of subsection (1) an employee or agent or member of a board, commission or committee of the procuring entity shall sign a confidentiality declaration form as prescribed.

(3) This section does not prevent the disclosure of information if any of the following apply—

(a)the disclosure is to an authorized employee or agent of the procuring entity or a member of a board or committee of the procuring entity involved in the procurement proceedings;

(b)the disclosure is for the purpose of law enforcement;

(c)the disclosure is for the purpose of a review under Part XV or requirements under Part IV of this Act;

(d)the disclosure is pursuant to a court order; or

(e)the disclosure is made to the Authority or Review Board under this Act.

(4)Notwithstanding the provisions of subsection (3), the disclosure to an Applicant seeking a review under Part XV shall constitute only the summary referred to in section 68 (2)(d)(iii).

(5)Any person who contravenes the provisions of this section commits an offence as stipulated in section 176(1)(f) and shall be debarred and prohibited to work for a government entity or where the government holds shares, for a period of ten years.

108. In **Republic v Public Procurement and Another Exparte Hyosung Ebara Company LIMITED [2011] KEHC 4283 (KLR)** the court observed that:-

> *"The spirit of confidentiality as stated under Section 44 of the Act and strict adherence to the evaluation criteria of tenders in the tendering process as required in Section 66 of the Act must be guarded jealously if the objectives of the Public Procurement and Disposal Act are to be realized. If it were not so, nothing would prevent a competitor from causing damaging information to be sent to a procuring entity or its committees during the various stages of the procurement process with a view to causing disqualification of other competitors."*

109. The 1st Respondent considered the question of confidential information at paragraphs 176 to 185 of the impugned Decision, and noted at paragraph 183 thereof, that the 4thRespondent did not annex any document that can be deemed confidential within the meaning of Section 67 of the Procurement Act, and then found at paragraph 184 of the impugned Decision that the 4th Respondent did not rely on any confidential document under Section 67 of the Procurement Act. This reasoning and finding was irregular for the reasons that; -

> *"v. At paragraph 3 of the Applicant's preliminary objection filed before the 1st Respondent as read with*

paragraph 20.5 of the Applicant's Replying Affidavit filed before the 1st Respondent, the Applicant expressly stated that the Request for Review was grounded on not just confidential documentation, but confidential information in breach of Section 67 of the Procurement Act.

vi. The 1st Respondent at paragraph 178 of its impugned Decision referred to the provision of Section 67 of the Procurement Act, and listed information that no procuring entity and no employee or agent of a procuring entity or member of board, commissions of committee of a procuring entity shall disclose. It is noteworthy that the law uses the word information and not document."

110. It is submitted that the 1st Respondent erred in summarily dismissing the Applicant's claim as speculative instead of making a determination on merit despite the glaring breach of section 67 of the Procurement Act in paragraphs 21 and 28 of the 4th Respondent's Supporting Affidavit filed before the 1st Respondent, which paragraphs contained information that was confidential, and could only be within the knowledge of the 2nd and 3rd Respondents. For avoidance of doubt the said paragraphs read as hereunder; -

"21. THAT from the bid documents presented by these companies, the labour costs and electricity costs to produce the large quantities of the single-phase meters required to be supplied in the contracts would be

humongous and would be reflected in the estimate of the expenses to be incurred.

28. THAT from the evaluation report that should form a part of the Respondent's record we offered the most reasonable price for a local manufacturer."

111. It submits that by dismissing the Applicant's claim as speculative, the 1stRespondent failed to probe how, and the manner in which the 4th Respondent obtained the said information, considering the fact that there was no evidence, such as an official request or waiver, demonstrating that the 4th Respondent lawfully obtained the information.

112. The information upon which the 4th Respondent grounded its Request for Review constitutes highly confidential material within the meaning of Section 67(1) of the Procurement Act. This information could only have been maliciously, unlawfully, and unprocedurally disclosed to the 4th Respondent, a direct competitor of the Applicant.

113. The unauthorized and illegal acquisition of the Applicant's confidential bid-related information including trade secrets and commercially sensitive information not only compromised the integrity of the procurement process but has also exposed the Applicant's proprietary interests to the public domain. In these circumstances, and given the express prohibitions contained in Section 67, it is the Applicant's respectful

submission that the 4th Respondent's Request for Review was fundamentally flawed, having been premised on unlawfully obtained confidential information. As such, the Request for Review was both oppressive and prejudicial, and the 1stRespondent was enjoined to analyze these claims and issue on its merit rather than summarily dismissing it.

114. In **Republic v Public Procurement Administrative Review Board; Nairobi City Water and Sewerage Company Limited and another (Interested Parties) Exparte Fourway Construction Company Ltd [2018] eKLR,** it was held; -

> *"42. In addition, the 2nd Interested Party did not point out to this court the specific sections of its tender document that contain financial information or information as to its trade secrets it considered confidential, to enable this Court make necessary orders and measures as to the safeguarding and protection of that information, including redaction if necessary."*

115. In the above decision, the Court confirmed that financial information and sensitive business information (like financial indicators and strategies) are protected under Section 67 and that disclosure of such information without leave is oppressive and prejudicial. No such leave was sought (no evidentiary document was filed to controvert this claim) and as such, the Applicant having pointed the 1st Respondent to specific

information relied upon by the 4th Respondent, the 1st Respondent was enjoined to examine the issue and determine it on its merits. It was illegal and irrational to summarily dismiss the claim as speculative.

116. The 1st Respondent fundamentally erred in law by failing to properly interpret and apply the provisions of Section 67 of the Procurement Act. By summarily dismissing the Applicant's legitimate objection as speculative, despite the clear reference to specific confidential content in the 4th Respondent's Affidavit, the 1st Respondent abdicated its duty to interrogate the legality of how such information was accessed and used. This omission not only rendered the impugned decision irrational and procedurally unfair, but also facilitated the violation of statutory confidentiality safeguards designed to protect the integrity of the procurement process.

117. The Applicant has demonstrated that the impugned Judgment was tainted with illegality and/ or irregularity, and further that the same was irrational and/or unreasonable and/or bias, it is our humble submission that the reliefs sought are merited.

The 1st Respondents Case;

118. It Smart Meter Technology Limited's case that on 29th July 2025, the Applicant herein, filed Request for Review Application No. 85 of 2025 before the Respondent (hereinafter

referred to as “Request for Review No. 85 of 2025”), seeking the following orders:

a. THAT the Public Procurement Administrative Review Board annuls and quashes the impugned procurement proceedings for non-compliance with the cited provisions of the Constitution, the statute, subsidiary law and the tender document.

b. THAT Public Procurement Administrative Review Board annuls and quashes the letter of intention to award dated 17.7.2025 and restrains the procuring entity from issuing award letters and contracts to the successful bidders.

c. THAT costs be awarded to the Applicant.

In the alternative

d. THAT the Public Procurement Administrative Review Board be pleased to review or direct the independent re-evaluation of the Applicant’s bid by a fresh tender evaluation committee.

e. THAT the Public Procurement Administrative Review Board visits the local plants for all the successful bidders and Applicant to ascertain that they are local manufacturers and assemblies.

f. Such other orders that the Public Procurement Administrative Review Board may deem just and expedient.

119. On 19th August 2025, the 1st Respondent, in the exercise of the powers conferred upon it under the Public Procurement and Asset Disposal Act (hereinafter referred to as "the Act"), made the following final orders with respect to Request for Review No. 85 of 2025:

a. The award of lot 1 with respect to Category 1 in Tender No. KP1/9A.3/RT/14/24-25 – Supply of Single-Phase Smart Meters. (Local Manufacturers and Assemblers) issued to Smart Meter Technology Ltd by the 2nd Respondent is hereby cancelled and set aside.

b. The awards of lots 1, 2, 3 and 4 with respect to Category 2 in Tender No. KP1/9A.3/RT/14/24-25 – Supply of Single Phase Smart Meters. (Local Manufacturers and Assemblers) issued to East Africa Meter Company Ltd, Hexing Technology Company Ltd, Inhemeter Africa Company Ltd, and Smart Meter Technology Ltd respectively by the 2nd Respondent be and is hereby cancelled and set aside.

c. The awards of lots 1, 2 and 3 with respect to Category 3 in Tender No. KP1/9A.3/RT/14/24-25 – Supply of Single Phase Smart Meters. (Local Manufacturers and

Assemblers) issued to Abcos Industrial Ltd, Magnate Ventures Ltd and House of Procurement Limited respectively by the 2nd Respondent be and is hereby cancelled and set aside.

d. The Tender No. KP1/9A.3/RT/14/24-25 – Supply of Single Phase Smart Meters. (Local Manufacturers and Assemblers) with respect to Category 1, 2, and 3 be and is hereby cancelled and set aside.

e. The 1st Respondent be and is hereby directed to re-tender the quantities of meters under Category 1, 2 and 3 afresh while taking into consideration the findings of the Board in this Decision.

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

120. The 1st Respondent identified that the following issues called for determination:

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

b. Whether the mode of award adopted in the subject tender, together with its application, was consistent with the requirements of the law.

c. Whether the Letters of Notification of Intention issued in the subject tender complied with Section 87 of the Act.

d. What orders the Board should issue in the circumstance.

121. The 1st Respondent tested every preliminary objection against the Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696 standard.

122. Under Section 167(1) of the Act, a candidate or tenderer acquires standing to seek review if it "*claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity.*"

123. It is its case that the statute does not demand proof of actual quantified loss at the threshold stage; it is enough that prejudice is pleaded as a consequence of the breach alleged.

124. It argues that the 1st Respondent meticulously examined the Request for Review and identified that in paragraphs 9 and 10 thereof, the Applicant pleaded prejudice flowing from two breaches: that the Procuring Entity failed to disclose lot-specific outcomes in the Notifications of Intention to Award, and that the Procuring Entity imposed an award cap of two categories per tenderer, a restriction alleged to undermine value for money. It is its case that by pleading prejudice in this form, the Applicant demonstrated the requisite risk of suffering detriment.

125. According to it, prejudice equals the legal harm that the review mechanism is designed to forestall, that is, being denied fair opportunity, equal treatment, or transparency in competition.

This is the very essence of “loss or damage” under Section 167(1) of the Act, since unfair or opaque evaluation erodes the Applicant’s commercial opportunity and undermines legitimate expectation of a fair contest.

126. The 1st Respondent properly held that the Applicant had crossed the statutory standing threshold by linking pleaded breaches to pleaded prejudice.

127. On statutory time limits, the 1st Respondent drew a careful distinction: for challenges to the application of the award criteria, time ran from the Notifications of Intention to Award dated 17th July 2025; filing on 29th July 2025 was therefore on or about Day 12, within time and thus within jurisdiction.

128. Conversely, the site-visit complaint was deemed known by 1st July 2025 and, being filed on 29th July 2025, was time-barred, whereupon the 1st Respondent downed its tools. It’s its case that this split holding proves the Board actively policed the boundaries of its jurisdiction.

129. It is its case that on confidentiality, the 1st Respondent interrogated the impugned affidavit paragraphs and found no confidential documents were exhibited; the statements were matters of belief, and nothing in the record triggered Section 67 of the Act bar. This finding removed any confidentiality-based inhibition on the Board’s competence to hear the review.

130. It is its case that successful tenderers were invited and participated; non-joinder of a particular entity that was not a successful tenderer in the Applicant's category was not fatal. This ensured all mandatory parties were before the Board to the extent required, again, a jurisdiction-affirming, not jurisdiction-defeating, conclusion.

131. The Board explicitly held that it had jurisdiction to hear and determine the Request for Review, with the following contours: (a) no jurisdiction over the site-visit ground as it was time-barred; (b) jurisdiction over Category 2, and, because the award criteria were applied "hand-in-hand", a corresponding remit to interrogate their application across Category 3; (c) locus satisfied; and (d) no confidentiality bar.

132. The Applicant faults the 1st Respondent's findings on the award criteria and notifications, yet these findings were firmly rooted in both law and fact.

133. The Board scrutinized ITT 40 of the Tender Document together with Addendum No. 1 dated 13th June 2025 and noted that the Procuring Entity adopted criteria that were neither transparent nor predictable. Specifically, the award mechanism provided no clear basis upon which tenderers could ascertain in advance how lots would be distributed or capped across categories.

134. Section 86(1) of the Act, the award of tenders must be made to the tenderer with the lowest evaluated price in accordance with the evaluation criteria set out in the tender documents. Equally, Article 227(1) of the Constitution requires that public procurement systems be fair, equitable, transparent, competitive and cost-effective.

135. The Board found that the Procuring Entity's criteria failed these standards, as they left room for arbitrariness and selective allocation rather than a predictable "lowest evaluated tender" outcome.

136. The 1st Respondent further found that the Notifications of Intention to Award, issued on 17th July 2025, did not comply with Section 87(3) of the Act. That provision requires a notification to state: the name of the successful tenderer, the tender price, and the reason why an unsuccessful tender was not successful.

137. It is its case that the notifications in question omitted critical particulars, including lot-specific results and unit prices, thereby denying tenderers essential information needed to assess compliance and decide whether to exercise their statutory right to review. This omission was not a mere procedural lapse but a substantive breach that went to the heart of transparency and accountability.

138. The 1st Respondent also found that due diligence was conducted selectively on some tenderers but not on others, undermining the uniformity of the evaluation process. Selective application of due diligence compounds opacity and violates the equal treatment requirement under procurement law.

139. On the strength of these findings, the 1st Respondent held that the award criteria and notifications were unlawful and incapable of supporting a valid award. It therefore properly intervened under Section 173 of the Act, which empowers it to annul anything done in the procurement process that contravenes the law and to give consequential directions.

140. Contrary to the allegations made by the Applicant in this Judicial Review Application, the 1st Respondent, in its Decision, duly considered all the parties' pleadings, written submissions, oral arguments, and confidential documents.

141. It is evident that the 1st Respondent acted within the confines of the Constitution, the Public Procurement and Asset Disposal Act, the Public Procurement and Asset Disposal Regulations, 2020, the Fair Administrative Action Act, and the rule of law in rendering its decision in Request for Review No. 85 of 2025.

142. The Applicant has failed to demonstrate any elements of illogicality, illegality, irrationality, procedural impropriety, or unfairness in the manner in which the Respondent considered

and interrogated the evidence, documents, pleadings, and information before it in arriving at its Decision in Request for Review No. 85 of 2025.

143. In the event this Honourable Court finds that the Applicant's Application is merited, we respectfully urge the Court, in accordance with Section 175(7) of the Act, to disallow the prayer on costs.

The First Respondent Submissions:

The 2nd and 3rd Respondents' case:

144. The 3rd Respondent is a public utility company listed in the Nairobi Securities Exchange with the mandate to plan for sufficient electricity generation and transmission capacity to meet demand and further, the 3rd Respondent is mandated to build and maintain the power distribution and transmission network and retail supply of electricity to its customers. The 2nd Respondent is the accounting officer of the 3rd Respondent.

145. The subject matter of the instant application is the decision of the 1st Respondent dated 19th August 2025 which cancelled the awards made by the 2nd and 3rd Respondents under TENDER NO. KP1/9A.3/RT/14/24-25 FOR THE SUPPLY OF SINGLE-PHASE SMART METERS (LOCAL MANUFACTURERS

AND ASSEMBLERS) (hereinafter referred to as “the subject tender”).

146. The 2nd and 3rd Respondents are also aggrieved by the said decision. It is their case that the orders sought by the Applicant should be granted to preserve and uphold the purpose and principles enshrined under Article 227 of the Constitution of Kenya, 2010 as read with the Public Procurement and Asset Disposal Act and its regulations.

147. The principal legislative framework governing the operations of the 2nd Respondent is the Constitution of Kenya, 2010; Energy Act, 2019; Public Procurement and Asset Disposal Act, 2015; Public Procurement and Asset Disposal Regulations, 2020; Public Officers Ethics Act, CAP183; State Corporations Act, CAP446 and Public Finance Management Act, 2012 among other laws.

148. The 3rd Respondent is charged with the responsibility, as a distribution and retail supply licensee, of supplying consistent and steady electricity to millions of Kenyan consumers in their homes and to all their ventures. In order for the 3rd Respondent to perform its mandate efficiently, the 3rd Respondent procures energy meters for domestic and commercial customers.

149. The energy meters are key devices for the 3rd Respondent as they are used for measuring electricity consumption at every

power installation to facilitate electricity sales and billing of customers for every unit of consumption.

150. It is its case that the continuous availability of meters is fundamental to supporting the 3rd Respondent's revenue collection efforts and monitoring power usage. The unavailability of energy meters translates to direct loss of revenue and affects the 3rdRespondent's ability to connect new consumers or undertake meter replacements as and when requested by the consumers.

151. Currently, there is an acute and urgent backlog of 420,000 energy meters to connect new consumers and replace the faulty and obsolete meters. This backlog is escalating by the day and thereby causing major injury to the public interests of consumers who require the energy meters (as they cannot access electricity supply without meters) and resulting in substantial daily revenue losses to the 3rd Respondent.

152. The 420,000 meters are required by critical and essential services providers such as hospitals, health centers, dispensaries, schools, government installations, telecommunications companies, enterprises, agricultural farms, domestic customers, among others, who have paid for these services and are awaiting the supply of meters to enable them access electricity supply to their premises.

153. The subject tender was set to close on 24th June 2025 at 10:00 a.m. However, the 2nd and 3rd Respondents, acting within their mandate under Section 75 of the PPADA extended the closing date to 26th June 2025 and then 1st July 2025 through three (3) Addenda dated 13th, 16th and 20th June 2025 respectively. (see Exhibits ETO-4, ETO-5 and ETO-6 at pages 119-134 of the Applicant's documents)

154. The tender was divided into three (3) categories with various lots and that the segregation of this tender into distinct categories and lots was necessitated by the imperative to unbundle goods so as to foster competitiveness, to apportion and mitigate the procurement risks and to secure enforceability of warranties, since meters constitute special equipment of which the 3rd Respondent is in constant and continuous need.

155. Unbundling of procurement is supported by Regulation 154 of the Public Procurement and Asset Disposal Regulations 2020 which allows unbundling a category of goods in practicable quantities to ensure maximum participation.

156. The subject tender was open only to Local Manufacturers/ Assemblers with intent to promote the Buy Kenya Build Kenya Initiative which supports unbundling and preference and reservation outlined in section 155 of the PPADA which gives preference to articles manufactured or assembled in Kenya.

157. It is their case that addendum 1 provided the award criteria under its Appendix 1 which can be summarized as follows:

a) An award shall be to the tenderer(s) with the lowest evaluated price as per lot based on eligibility as stated in ITT 3.6 and bidders may quote for all or as many items in the various lots as per their eligibility.

b) Bidders with ready stock will be considered for award under category one (1) and any other category as long as their bid price is within the market price.

c) Every successful bidder will be awarded one lot per category for categories 2 and 3 based on their eligibility subject to:

   i. Subsequent lots shall be awarded sequentially until all the lots are allocated provided that the price of the subsequent qualified bidder is within the prevailing market price.

   ii. In case there is no other qualified subsequent tenderer for the unallocated lot(s) in a given category, the award will revert to the tenderer with the lowest evaluated price per lot, notwithstanding the above condition.

d) If a bidder emerges as the lowest in more than one lot, they will be awarded the lot with the highest quantity.

i. Ten (10) bidders, including the Applicant herein, expressed their interest in participating in the tender process and submitted their respective bids.

ii. The Tender was opened on 1st July 2025 at 10:30 a.m. at Stima Plaza, the 3rd Respondent's headquarters.

iii. on 15th July 2025, the Evaluation Committee recommended that the tender be awarded as per the award criteria in Appendix 1 of Addendum 1.

158. In respect of the 4th Respondent herein, M/S chintmeters and Electric Kenya Company Limited, the Evaluation Committee found that the said bid was non-responsive because of the price offered, which was not competitive when compared with the other bids that were ultimately found responsive. This was communicated to all the bidders vide a Letter of Notification of Intention to Award dated 17th July 2025.

159. On 29th July 2025, the 4th Respondent filed a Request for Review No. 85 of 2025 dated 28th July 2025 which culminated in the impugned decision of 19th August 2025.

160. The 1st Respondent inter alia cancelled the awards given under the tender and directed the 2nd and 3rd Respondents herein to re-tender afresh. The 2nd and 3rd Respondents are aggrieved by the whole of the said decision.

161. It is their case that the 1st Respondent misinterpreted the provisions of section 167(1) of the Public Procurement and Asset Disposal Act vis-à-vis the 4th Respondent's pleadings and arrived at a decision which was ultra vires, illegal and irrational.

162. The 1st Respondent misinterpreted the provisions of section 87 of the Public Procurement and Asset Disposal Act as read together with Regulation 82 of the Public Procurement and Asset Disposal Regulations 2020 vis-à-vis the 2nd and 3rd Respondents Letter of Notification of Intention to Award dated 17th July 2025 and arrived at a decision which was illegal, unreasonable and irrational.

163. They argue that the 1st Respondent misinterpreted the provisions of sections 80 and 86 of the Public Procurement and Asset Disposal Act as read together with the tender document vis-à-vis the award of the 2nd and 3rd Respondents evaluation committee and arrived at a decision which was illegal, unreasonable and irrational.

164. According to them, the 1stRespondent's decision to cancel the whole tender despite the award criteria for the various categories being separate and distinct and also the fact that the 4th Respondent bid only for category 3 was unreasonable and irrational.

165. The 1st Respondent acted irrationally by failing to discern that energy meters form the backbone of the 3rdRespondent's financial sustainability, as meters are critical components in registering sales and collection of revenues and that a shortage of energy meters will, therefore, adversely affect the 3rd Respondent's financial health and overall operations, with the further consequence that any prolonged delay is projected to occasion revenue losses of at least Ksh. 1.274 billion per month (being Ksh. 2,000 per meter per month multiplied by approximately 637,000 meters [which are the subject of this procurement]).

166. The 1st Respondent acted irrationally by failing to take into account that the total lead time for the procurement of meters is approximately six (6) months, which period encompasses the tendering process, assembly by local manufacturers and delivery to the 3rd Respondent's stores and that, consequently, the cancellation of the aforesaid tender will have the long-term effect of causing acute shortages to the detriment of the innocent public members who require the energy meters.

167. The 1st Respondent acted irrationally by failing to appreciate that the tender was for a total of 637,000 meters and based on an average revenue of Ksh. 2,000 per meter, the consequential loss amounts to approximately Ksh. 1.274 billion per month and further, that should the procurement process be delayed

by an additional six (6) months, the cumulative loss would exceed Ksh. 7 billion.

168. The submit that the 1st Respondent acted illegally by ordering a retender, whereas the procurement of meters and other procurements by the 3rd Respondent and indeed other public bodies are undertaken on an annual basis, guided strictly by the annual procurement plan and budget for each respective financial year and upon the lapse of a financial year, the 3rdRespondent and other public bodies ceases to utilize the procurement plan and the corresponding budget of that financial year and procurement activities thereafter are conducted strictly in accordance with the procurement plan and budget of the succeeding financial year

169. The 1st Respondent acted irrationally by failing to appreciate that the lapse of the financial year results in loss of the allocated quantities and budget and that the process of obtaining a fresh budget prior to procuring the said quantities is a protracted bureaucratic exercise which cannot be accommodated in this instance given the urgency of the requirements, the stocks in some categories having already been exhausted while others are on the verge of exhaustion.

170. The decision of the 1st Respondent is materially influenced by an error of law, in that if there existed any ambiguity in the evaluation criteria in the tender document, the bidders were at liberty to seek clarifications during the pendency of the tender

process, which they failed to do and as such, any allegation of ambiguity at the Review stage amounts to an afterthought.

171. The 1st Respondent acted in a manner that amounted to procedural impropriety by disregarding the submissions made by the 2nd and 3rd Respondents during the hearing held on 13th August 2025, concerning the unbundling of procurements pursuant to Regulation 154 of the Public Procurement and Asset Disposal Regulations, 2020.

172. The 1st Respondent disregarded the strict provisions of section 80 (2) of the Public Procurement and Asset Disposal Act, which stipulates that evaluation must strictly conform to the tender document and not to the 1stRespondent's subjective views of "best practice."

173. Upon the 1st Respondent finding that the award criteria was ambiguous, it thereby lacked jurisdiction to entertain the matter any further, as the purported ambiguity existed throughout the entire bidding period prior to the closure of the tender on 1st July 2025, as all the bidders were fully aware of this criteria when perusing the tender document and willingly submitted their bids in the context of that award criteria and any contestation on the award criteria ought to have been raised by 15th July 2025 (which was never done by any of the bidders), however, in view of the fact that PPARB Application No. 85 of 2025 was filed on 29th July 2025, the 1st Respondent, in proceeding as it did, committed an error of law.

174. The 1st Respondent committed a serious error of law in holding that the non-joinder of the Applicant herein as an interested party in PPARB Application No. 85 of 2025 was not fatal given that the Applicant herein was not a successful tenderer under category 3; yet the 1st Respondent simultaneously found that the award criteria for all the 3categories were interlinked and therefore ought to have held that the Applicant herein was a necessary party, having participated and been awarded in categories 1 and 2.

The 4th Respondent's case:

175. The aforementioned tender, the 4th Respondent only participated in Category 3 where the 1st, 2nd and 3rd Interested Parties in the instant Application were awarded tenders.

176. In Court of Appeal case of **OJSC Power Machines Limited, TransCentury Limited and Civicon Limited (Consortium) vs. Public Procurement Administrative Review Board and 2 Others as cited in the High Court decision of Republic v Public Procurement Administrative Review Board; Principal Secretary, State Department of Interior, Ministry of Interior and Co-ordination of National Government (Interested Party) ; Exparte Applicant CMC Motors Group Limited [2020] eKLR** it was stated that:-

"Save for a limited scope, which we shall return to later, the court, considering a judicial review application, must never consider its role as appellate court and must avoid any temptation to go into the substance of the impugned decision itself or to ask questions, whether there was or there was no sufficient evidence to support the decision of the public body concerned. It is not for the court or individual judges to substitute their opinion for that of the public body constituted by law to decide the matter in question. See Republic vs. Kenya Revenue Authority ex parte Yaya Towers Limited (2008) Misc. Civil Appl. No. 374 of 2006. In judicial review proceedings, the mere fact that the public body's decision was based on insufficient evidence, or on misapplication of evidence, cannot be a ground granting judicial review remedies. Whether that decision was right or not, the affected party ought to challenge it on appeal. In reaching its determination, it must, however, be recognized that a tribunal or statutory body or authority has jurisdiction to err and the mere fact that in the course of its inquiry it errs on the merits is not a ground for quashing the decision by way of judicial review as opposed to an appeal. It is only an appellate tribunal which is empowered and in fact enjoined in cases of the first appeal to reevaluate the evidence presented at the first instance and arrive at its own decision on facts. Whereas a decision may properly be overturned on an

appeal, it does not necessarily qualify as a candidate for juridical review. See East African Railways Corp. vs. Anthony Sefu Far-Es-Salaam (1973) EA 327."

177. The Applicant's Originating Motion is essentially and Appeal clothed in Judicial Review robes. It relies on the documents that were filed before 1st Respondent, the Public Procurement Administrative Review Board, and which form part of the Applicant's record in the instant Application: -

7.1 the 4th Respondent's Request for Review dated 28.7.2025 and filed on 29.7.2025 (See pages 136-145 of the Applicant's documents);

7.2 the 4th Respondent's Submissions before 1st Respondent date 10.8.2025 and filed on 12.8.2025(See pages 354-385 of the Applicant's documents).

178. It is a local manufacturer of smart single phase meters who has incurred huge capital investments to set up a state of the art manufacturing plant located at Graylands Park Phase 6 Warehouse M15-M16, Athi River, Machakos County, which received certification from the 3rd Respondent on 12.11.2024 as evidenced by a letter dated 12.11.2024 and exhibited in the 2nd and 3rd Respondents Memorandum of Response filed before the 1st Respondent.

179. It is not in dispute that the 4th Respondent is a tenderer within the meaning of Section 2 of the Public Procurement and Asset

Disposal Act (hereinafter “the Procurement Act”) having responded to the 1stRespondent’s invitation for bids under tender KP1/9A.3/RT/14/24-25 of 11th June 2025 FOR SUPPLY OF SINGLE PHASE METERS (LOCAL MANUFACTURERS AND ASSEMBLIES) Through the e-procurement portal.

180. The 4th Respondent maintains that he was a tenderer for tender KP1/9A.3/RT/14/24-25 of 11TH JUNE 2025 FOR SUPPLY OF SINGLE PHASE METERS (LOCAL MANUFACTURERS AND ASSEMBLIES) and not just category 3 thereof as advanced by the Applicant.

181. On 17.7.2025, the 2nd and 3rd Respondent through a notification of letter of award informed the 4th Respondent that they were an unsuccessful bidder for the reason of unresponsiveness because uncompetitive prices

182. This led to the filing of the Request for Review Application No. 85 of 2025 by the 4th Respondent on 29.7.2025 before the 1st Respondent which was determined on the 19.8.2025 wherein the 1st Respondent’s with the 2nd and 3rd Respondents being ordered to re-advertise and/or re-tender for the smart single-phase meters.

183. It argues that the finding by the 1st Respondent at paragraph 123 of the impugned decision, that the Applicant’s preliminary objection on the lack of authority by Gan Zemin to swear the supporting affidavit in support of the Application for Review

was not a pure point of law within the confines of **Mukisa Biscuit Manufacturing Co. Ltd Vs West End Distributors LTD (1969) EA 696** was tainted with illegality and/or irregularity.

184. It is its case that the 1st Respondent did not commit an illegality and/or irregularity in finding that the Applicant's preliminary objection was improperly raised and it exercised its discretion lawfully in dismissing it. In this respect, it matters not if the decision reached was wrong or right and in the circumstances an invitation of the court to invoke its appellate jurisdiction and substitute the 1st Respondent's decision with its own must be declined.

185. The Applicant filed a Notice of Preliminary Objection supported by two sworn Affidavits by Emmanuel Tongo Oroo, Joseph Atatanga Nyabate both sworn on 8.8.2025 and the Applicant's assertion that the Affidavits were in themselves applications independent of the Notice of Preliminary objection is disingenuous and insincere.

186. The Applicant had the legal burden to prove in the terms of Section 106-109 of the Kenyan Evidence Act and the fact of lack of authority was disputed and there was no admission of defect or want of competency by the 4th Respondent at any point.

187. Importantly, the fact that the Notice of Preliminary Objection was supported by affidavits, which are ordinarily tools of evidence on the face of it proves that in indeed, the issue raised was not a pure point of law and it required the ascertainment of disputed facts through tender of evidence.

188. It argues that the affidavit sworn by Josephat Atanga Nyabate that exhibited the 4th Respondent's CR12 was a tool of evidence that was sworn by a Pupil under tutelage at the firm of m/s NOW Advocates, LLP who was not duly authorized by the Applicant company, if the argument by the Applicant that supporting affidavits had to be sworn by individuals duly authorized in writing holds any legal weight. The Applicant cannot be seen to approbate and reprobate on this issue.

189. The competency of the Request for Review was an issue that was only raised by the Applicant who despite being a mandatory party to the proceedings in the terms of Section 170 (c) of the Procurement Act was not a principal/primary party but an interested party who cannot raise fresh issues as settled by the Supreme Court in Francis Karioko Muruatetu and Another V Republic and 5 Others [2016] eKLR where the apex stated that:

> *"in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the Court will always remain the issues as presented by*

the principal parties, or as framed by the Court from the pleadings and submissions of the principal parties."

190. It is of the strong persuasion that The Civil Procedure Rules on the filing of verifying affidavits to accompany a Plaint or a Counterclaim under Order 4 Rule (1) (4) of the Civil Procedure Rules 2010 have no place in the Review Board where the dominant procedural law applicable are the Procurement Regulations of 2020;

191. The 4th Respondent did not file a verifying affidavit because none is required to accompany an application for Request for Review.

192. The provisions of Regulation 203 (2) (b) are clear that an application for review "may be accompanied by such statements as the Applicant considers necessary in support of its request" meaning that any composition, a combination of documents or a written statement of any nature would suffice. The importation of statements to mean affidavits is restrictive, erroneous and untenable;

193. The provisions of Regulation 203 (2) (b) do not make it mandatory to file any statement to accompany an application for review and any statements filed should not necessarily be statements made under oath. In that respect, a Request for Review can stand on its own even without supporting statements, which additionally need not be affidavits.

194. There is no mandatory requirement for express authority to make a statement in support of a Request for Review. If the drafters of the regulations had deemed it necessary to seek authority before making a statement to accompany a review application, nothing would have been easier than to say so. We cannot impute statutory intention where none exists or expand rules procedure through craft.

195. According to the 4th Respondent, the concerns raised as a preliminary legal issue under this heading is a procedural technicality that should be viewed through the prism of Article 159 (2) (d) of the Constitution and dismissed. The 1st Respondent was supplied with arguments and made a decision that cannot be substituted through judicial review.

196. It argues secondly that at paragraph 8 of the grounds set out in the Originating Motion and paragraph 20 (ii) of the supporting affidavit, the Applicant joins issue with the finding of the 1st Respondent at paragraph 136 of the impugned decision that though the Applicant had jurisdiction to determine legal issues raised by the interested parties, there was a legal limitation that they cannot introduce fresh issues or seek remedies beyond those sought by the primary/principal parties to the Request for Review.

197. The 4th Respondent counters this as follows: - Interested parties joined in tender disputes under Section 170 (c) of the Procurement Act are not distinguishable from the interested

parties' in ordinary civil proceedings and constitutional references and their participatory rights in review applications are limited by the aforementioned decision of the Supreme Court in **Francis Karioko Muruatetu and Another V Republic and 5 Others [2016] eKLR**.

198. At paragraph 135 of the impugned decision the 1st Respondent held as follows, *"in the present Request for Review, the Board observes that the said parties did not introduce new factual issues nor seek substantive remedies. Their participation was therefore proper, being expressly sanctioned by law. What the Applicant perceived as new matters were in fact legal issues on the jurisdiction of the Board, which cannot be excluded on that account."*

199. While this statement was not in response to any issues identified or isolated for determination but was an obiter dictum, it was a finding based on sound legal principles and cannot be the faulted as an error of law.

200. It is its case that the Applicant has not exhibited or demonstrated what legal issues were disregarded by the 1st Respondent by misapplication or misapprehension of the law and what prejudice it suffered after the alleged illegality or irregularity.

201. At paragraph 9 of the grounds for review in the Originating Motion and paragraph 20 (iii) of the Supporting Affidavit, the

Applicant faults the 1st Respondent's finding at Paragraph 160 of the Judgment that the 4th Respondent herein had complied with the mandatory provisions of Section 167(1) of the Procurement Act and had pleaded loss and damage.

202. In response the 4th Respondent argues that; the Applicant appreciates that the 1st Respondent in the impugned decision at Paragraphs 150, 152 and 153 correctly interpreted the provisions of Section 167(1) of the Procurement Act and the binding decision of the Court of Appeal in **James Oyondi t/a Betoyo Contractors and another v Elroba Enterprises Limited and 8 others [2019] eKLR.**

203. At paragraph 149 of the impugned decision the 1st Respondent highlighted the arguments posited by the 4th Respondent by summarizing them as follows;

> *"the Act and Regulation 203(2) of the Regulations 2020 do not prescribe the manner in which loss and damage should be pleaded, and that whether a party has sufficiently pleaded loss and damage is a matter for the Board's discretion, not a proper subject for a preliminary objection. Counsel further submitted that loss and damage can be expressly pleaded or inferred from the pleadings, and in this case, the Applicant had detailed violations in its Review Application, supporting affidavits, and supplementary affidavit."*

204. The relevant statements in the **James Oyondi t/a Betoyo Contractors and another case (supra)** states as follows;

> *" …….. It is not in dispute that the appellants never pleaded nor attempted to show themselves as having suffered loss or damage or that they were likely to suffer any loss or damage as a result of any breach of duty by KPA. This is a threshold requirement for any who would file a review before the Board in terms of section 167(1) of the PPADA."*

205. It argues that The 1st Respondent did not misapprehend or misdirect itself on the applicable statutory law and case law in its finding that the 4th Respondent at paragraphs 9 and 10 of the Request for Review had pleaded that they stood to suffer prejudice from breaches of duty by the 2nd and 3rd Respondent as highlighted at paragraph 158 of the impugned decision, which the Applicant has clearly misunderstood to mean that since our Advocate did not highlight the specific paragraphs during the oral haring on 13.8.2025, then the 1st Respondent had no duty to scour the pleadings and satisfy itself that there was indeed due compliance with mandatory statutory provisions that had jurisdictional implications.

206. Courts and quasi-judicial bodies have a duty to satisfy themselves that they have the requisite jurisdiction to hear and determine disputes on their own motion even when parties have not highlighted the issue and there is also a duty to avoid

taking the draconian step of striking out pleadings as expressed in **D.T. Dobie and Company (Kenya) Limited v Joseph Mbaria Muchina and another[1980] eKLR** where it was stated that;

> *"the court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof, before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court."*

207. The Applicant's assertion that the claim of prejudice as dissected by the 1st Respondent at Paragraph 159 and 160 of the impugned decision was not synonymous with pleading or attempting to plead loss or damage was addressed by the Review Board it its finding that; *"the Board understands the reference to prejudice in this context to mean that the Applicant suffered or stood to suffer loss and damage as a result of the said actions."*

208. There was no error of law as to constitute an illegality or irregularity as a ground for review by the court, which does not sit as an appellate court with authority to substitute the 1st Respondent's decision with its own decision, since it clear that the Review Board correctly appreciated the binding law on the issue of locus standi and proceeded to apply it with an outcome that preserved the Request for Review.

209. That the Applicant faults the 1st Respondent for:

a. Failing to find that the pleadings at paragraphs 10 and 12 of the Request for Review as read with paragraphs 16 to 24 of the supporting affidavit were all time barred; and

b. Consolidating the issues for determination into two core issues after considering the pleadings instead of the three proposed by the Applicant.

210. The Request for Review that paragraphs 10 and 12 of the Request for Review challenged the mode of evaluation and its application as set out in the tender document and for which a breach of duty could only occur after the evaluation committee had evaluated all the tenders and awarded the tenders, therefore, time started running upon the issuance of a Notification of Award as by the 1st Respondent at paragraphs 170-173 of the impugned decision.

211. It raises issues with paragraph 11 of the Request for Review in so far as it highlighted the failure to set up a procurement system that allowed for site visits at the commencement of the process and the prejudice suffered is some bidders who were not local manufacturers of assemblies were awarded tenders, a breach that would only crystalize upon the award of tenders and issuance of a Notification to Award.

212. With respect to the findings of the 1st Respondent at paragraphs 174-175 declining to entertain the issue of site

visits after the commencement of the procurement process, the 4th Respondent is aggrieved by the findings but since the same was done after appreciating the applicable law, the determination is not an illegality or irregularity that would warrant the intervention of the Court, which is not exercising its appellate jurisdiction.

213. The 1st Respondent has duty to sort out pleadings and listen to the parties to a review before sifting and filtering the concerns and isolating issues for determination, a duty that the Review Board lawfully performed at paragraph 169 of the impugned decision and cannot be faulted for doing so by an Applicant who feels that they could have distilled the issues for determination differently and in a manner that suits their preliminary objection.

214. It argues that inviting the Court to re-look at the pleadings and submissions by parties and to proceed distill issues of determination afresh is not a jurisdiction exercisable by a Court that is not sitting as an appellate court.

215. It is its case that the 1stRespondent addressed itself on the applicable statutory law under Section 167 (1) of the Procurement Act and the relevant case law and proceeded to apply the same on the objection raised by the Applicant, and which objection had not been raised by the Principal/Primary parties to the request for Review. In particular, the 2nd and

3rd Respondents did not feel that any issues raised by the 4th Respondent were time barred.

216. It argues that the 1st Respondent considered the 4th Respondent's assertions at paragraph 36-41 of its submissions and adopted the proposed "discoverability test," which puts into account that procurement of goods and services is a process and not an event, and a party shall only file an application upon breach of duty by a procuring entity or upon issuance of a Notification of Award.

217. A Request for Review after the issuance of the tender document by the 1st and 2nd Respondent in the manner proposed by the Applicant would have been premature since no breach of duty had crystalized and compliance with all the locus standi conditions under Section 167 (1) of the Procurement Act would have been onerous.

218. The Applicant asserts that there was irregularity with the finding by the 1st Respondent that the 4th Respondent did not rely on or anchor its Request for Review on confidential information in violation of Section 67 of the Procurement Act.

219. It responds in the following lines:

> *35.1 The allegedly offending pleadings are to be found at paragraph 21 and 28 of the 4th Respondent's supporting affidavit and do not form any grounds for review set out in the Request for Review.*

35.2 There was no issue (s) for determination isolated by the 1stRespondent that turned on the two paragraphs of the supporting affidavit highlighted above and if they had been found to be scandalous, offensive or oppressive the 1st Respondent had the authority to disregarded them or strike them out.

35.3 The 1st Respondent highlighted at paragraph 178 of the judgment that it had considered the provisions of Section 67 of the Procurement Act and stated as follows, "the Board is mindful of the provisions of Section 67 of the Act, which mandates the confidentiality of procurement documents and proceedings by the procuring entity, subject to disclosures permitted by law."

35.4 The 4th Respondents submissions that the statements in question were matters of belief, that the information relied upon was not confidential under Section 68(2)(d)(iii) of the Act, and that parts of the evaluation report had already been disclosed by the Respondents was considered by the 1st Respondent who termed the impugned statements as mere speculation by a tenderer who was a local manufacturer and knew what it took to manufacture a smart single phase meter.

35.5 The invitation by the Applicant to sit on appeal on the issue as determined at paragraph 184 of the impugned decision, which was clearly based on the

relevant statutory law, and to come to a different conclusion would occasion an error of law.

220. In administrative law there is a settled test for unreasonableness. In Republic **v Public Procurement Administrative Review Board Ex parte Meru University of Science and Technology; M/S Aaki Consultants Architects and Urban Designers (Interested Party) [2019] eKLR** the Court held that;

> *"the test of Wednesbury unreasonableness has been stated to be that the impugned decision must be "objectively so devoid of any plausible justification that no reasonable body of persons could have reached it and that the impugned decision had to be "verging on absurdity" in order for it to be vitiated."*

221. In **Prasad v Minister for Immigration {1985} 6 FCR 155**, the court opined that, *"the decision must be one which no reasonable person could have reached and to prove such a case required "something overwhelming." It must have been conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt and when "looked at objectively, is so devoid of any plausible justification that no reasonable body of persons could have reached them."*

222. It refers to Section 7(2) (i) of the Fair Administrative Action Act, *"A court or tribunal under subsection (1) may review an administrative action or decision, if- (i) the administrative action or decision is not rationally connected to- a) the purpose for which it was taken; (b) the purpose of the empowering provision;(c) the information before the administrator; or (d) the reasons given for it by the administrator."*

223. The Supreme Court of Kenya in **Hon. Lady Justice Kalpana Rawal vs Judicial Service Commission and Another** detailed as follows on the question of bias;

> *"... claim of actual bias requires proof that the decision maker approached the issues with a closed mind or had prejudged the matter and, for reasons of either partiality in favour of a party or some form of prejudice affecting the decision, could not be swayed by the evidence in the case a hand.*"

224. It is the 4th Respondents case that firstly, the Applicant at paragraph 14 of the grounds set out in the Originating Motion and 22 and 23 of the supporting affidavit faults the 1st Respondent for finding that the 4th Respondent was not a tenderer for Categories 1 and 2 of the Tender Document but retained the jurisdiction to examine the mode of award as pertains the said categories and proceeds to term the decision as irrational, unreasonable and biased.

225. In the impugned decision, the 1st Respondent found that the tender was divided in three categories that were separate and distinct and since the 4th Respondent had only participated in Category 3, the analysis of the mode of evaluation would be confined to that category where the 1st, 2nd and 3rd Interested Parties in the instant Application had been awarded the tenders. There was an admission in the dispositive paragraphs that the categories were interlinked since they shared the same mode of evaluation.

226. The 1st Respondent at paragraph 192 of the impugned decision held that the Applicant who had not been initially joined in the proceedings, but was later invited by the Review Board as an Interested Party, was not in any way prejudiced by the initial non-joinder. In any event, they were not bidders under category 3 though they participated fully in the proceedings. Clearly, the 1st Respondent went out of the way to promote the right of everyone to be heard.

227. To say that theses finding were devoid of justification and verged on absurdity, that no reasonable and sensible Review Board would make would be the unreasonable conclusion.

228. The 1st Respondent at paragraph 201 of the impugned decision held that the starting point for determination of the issue whether the mode of evaluation and its application, issues that were being handled concurrently, was Article 227 of the Constitution, thereby appreciating the guiding principles

of a compliant tender process being fair, equitable, transparent, competitive and cost effective.

229. Further at paragraph 204 of the impugned decision, the 1st Respondent in interpreting Section 80 of the Procurement Act held that; *"the Board interprets a fair evaluation system as one that ensures Equal treatment of all tenders based on transparently defined criteria in the Tender Document."*

230. At Paragraph 206 of the impugned decision, the 1st Respondent in interpreting Section 86 of the Procurement Act held, *"the Board interprets the above legal provision to mean that the law prescribes, in mandatory terms, the criteria upon which a successful tender shall be determined, strictly as specified in the tender documents. The procuring entity is bound to award the tender only to the bidder who emerges successful under one of the four methods outlined in the section."*

231. According to it, there is nothing irrational, unreasonable or biased in the adopted interpretations of Section 80 and 86 of the Procurement Act.

232. At paragraph 209 of the impugned decision, the 1st Respondent acknowledged that the tender document at ITT40 and the 1st Addendum provided for the mode of evaluation of the tender and set out to interpret it at paragraph 211 where it held as follows, "the Board further understands the Addendum

No. 1 to provide that for Categories 2 and 3, the award is limited to one lot per successful bidder, with the lot containing the highest quantity being prioritized where a bidder qualifies for more than one lot.

233. The subsequent lots are to be allocated sequentially, provided that the price of the next qualifying bidder falls within the prevailing market price. Where there is no subsequent qualified bidder for a given lot, the award is to revert to the lowest evaluated tenderer for that lot. Finally, in the event of a tie, the award is to be shared among the tied bidders."

234. Further at paragraph 202 of the impugned decision, the 1st Respondent applied the mode of evaluation as per the tender document and tabulated its findings, it is not true that by doing so, the Review Board endorsed the evaluation criteria as being compliant with Article 227 and Section 86 of the Procurement Act as posited by the Applicant at paragraph 23 (v) of the supporting affidavit yet this erroneous premise is the founding stone of its challenge. There is a clear misapprehension of the 1st Respondent's decision.

235. The 4th Respondent had joined issue with the application of the stated mode of evaluation at paragraph 87 of our submissions and the substance of the argument is summarized as follows: -

1) ITT 33.2 provided that evaluation shall be done per Lot while ITT 40 provides that Each successful bidder will be awarded one lot per category for category two (2) and category three (3) based on their eligibility, subject to (e) and (f) below. If a bidder emerges as the lowest in more than one lot, they will be awarded the lot with the highest quantity.

2) It means that the restriction was on the award of more than one lot per category with Category 2 and 3 being distinct and separate. (See paragraph 146 of the impugned decision) The interpretation by the 2nd and 3rd Respondent of this duty was an error of law. By following this evidently illegal criteria:

   a) 52.2.1 Inhemeter Africa Company Limited that was awarded Category 2 Lot 3 being the fourth lowest bidder should not have been awarded. Instead Magnate ventures that had the third lowest price would have been awarded the tender. There was no justification to move Magnate Ventures Limited to Category 3 Lot 2 since they were not the lowest bidder in Category 2 Lot 3 to benefit from the provision on award of a lot with more quantities.

   b) 52.2.2 If the mode of evaluation set out in the tender document was adhered to, Smart Meter Technology Limited being the fifth lowest bidder in Category 2

Lot 3 would not have been awarded the tender. The same would have been awarded to the fourth lowest evaluated bidder.

c) 52.2.3 If Magnate Ventures which appears to have been offering Kshs. 8,631 per unit had been awarded the 50,000 units in Category 2 Lot 3 the 2nd Respondent would have saved money since the awarded company Inhemeter Africa Company Limited had offered a price of Kshs. 10,530 per unit to win the bid.

d) 52.2.4 If the evaluation criteria set out in the tender document had been adhered to, Smart Meter Technology would not have been awarded the 35,000 units for category 2 Lot 3 at the very high Kshs. 10,400 per unit.

e) 52.2.5 With the Criteria set out in the amendment to ITT40 being clear that evaluation was to be done per Lot with the restriction that the lowest bidder in every category cannot be awarded twice, it was imperative that in category 3, the bids be evaluated independently from Category 2 without any decisions made in category 2 affecting the outcomes in category 3. This was not done.

3) Abcos Industries Limited, should not have been awarded Category 3 Lot 2 since it was not the lowest evaluated bid in that category. The reason given for the award was they were the lowest evaluated bidder that was not awarded in category 2, a reason not supported by the evaluation mode set out in the tender document.

4) Magnate Ventures Limited was awarded Category 2 lot 2 yet they were not the lowest evaluated bidder in terms of price.

5) House of Procurement were not the lowest evaluated price when they were awarded Category 3 Lot 3. The reason that they were the lowest evaluated bidder not awarded in category 2 was an extraneous consideration that is not supported by the tender document. The same bogus reason was given for awarding Abcos Industries Limited.

6) The procuring entity introduced new terms like “second lowest evaluated bidder,” “next lowest evaluated bidder,” to justify the employment of a flawed mode of evaluation that did not comply with Section 86 of the Procurement Act.

7) The goal posts kept shifting in the evaluation process. There was no simplicity or consistency.

236. The 4th Respondent's position was that the mode of evaluation for Category (2) and (3) was ambiguous and deliberately so.

237. It notes that the mode of evaluation was capable of multiple meanings denying it consistency and transparency. It was convoluted and complicated so as to deny some the 4th Respondent the benefit of a fair and transparent system. The 1st Respondent agreed with our submissions in this respect.

238. At paragraphs 213 to 216 of the impugned judgment, the 1stRespondent clearly justified the decision to find the mode of evaluation and its application unlawful and gave reasons for finding it opaque and not cost-effective. According to it ,that these findings cannot be opened up for merit review.

239. Further, at paragraph 14 (1) (e) and (f) of the grounds set out in the Originating Motion, the 1st Respondent is faulted for ordering a re-tender despite the fact the 4th Respondent did not seek the prayer and is accused of bias.

240. It is its case that The 4th Respondent core prayer was for the annulment of the procurement proceedings and restriction of the procuring entity from issuing contracts. These prayers were granted within the provisions of Section 173 (a) of the Procurement Act which gives the 1st Respondent has powers to 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 and this includes

directing a re-tender. Re-tender is a direct and natural consequences of the annulment of the procurement proceedings and the Applicant participated fully in the hearing of the Request for Review did not have to be consulted by the 1st Respondent in order for an order of re-tender to issue.

241. It matters not if the 4th Respondent would have been awarded a tender or not after the Request for Review, if there were constitutional and statutory violations the tendering process could not be sanitized.

242. At paragraph 14 (2) of the Originating Motion and paragraph 24 of the supporting affidavit, the 1st Respondent is faulted for its findings that due diligence conducted was selective and inconsistent. It responds as follows:

1) The 4th Respondent argues that this is an invitation for a merit review of the findings which should be declined.

2) The selective manner in which due diligence was carried out by the procuring entity was challenged by the 4th Respondent during the Request for Review for the following reasons: -

    i. The treatment of different suppliers differently when they are to supply the same item was discriminatory and an affront to the dictates of fairness and nondiscrimination. It is imperative for bidders to compete on equal footing.

ii. The assumption that previous successful suppliers still had manufacturing or assembly capabilities and leaving them to self-evaluate did not give all the tenderers equal footing in a competitive process.

iii. The failure to disclose whether or to demonstrate that the exemption for pre-bid site visits for previous suppliers was based on previous tender documents with similar evaluation criteria and for supply of single phase smart meters under the same terms as the current tender makes it difficult to justify the assumption made by the 2nd and 3rd Respondents that these former suppliers under different contracts had capabilities to perform the new contracts that they were seeking.

iv. It was uncontroverted that the awards to the 2nd and 3rdRespondents was done without full due diligence on the Original Equipment Manufacturer Licenses (OEM) in China and this amounted to partial/incomplete evaluation as stated at paragraph 239 of the impugned decision.

v. There was nothing that stopped the 2nd and 3rd Respondent from carrying out due diligence for all the ten (10) bidders before the procurement process in order to treat the parties fairly and equally. It was not possible to ascertain whether the companies that

were exempted from the site visits and due diligence indeed possessed the capabilities they had when they participated in previous bid processes with the Respondent or other public bodies.

vi. Under ITT40 (g) (d), the Respondents is required to make consideration of among other things the outcome of the due diligence visit during evaluation. This evidently creates an obligation of visits to all successful bidders. The evaluation committee concluded its evaluation process on 15.7.2027 and did not carry out the post evaluation visits in compliance with the mandatory provisions of Section 83 of the PPAD Act. This would have mitigated the failure to do site visits before the invitation to tender.

vii. Under ITT37.3 on due diligence, there was an imperative to verify declared technical capacity indicated in the manufacturer's declaration forms, something that was never done by the 2nd and 3rd Respondents.

viii. The 1st Respondent at paragraphs 231 and 232 of the impugned decision held as follows;

"in determining this issue, the Board perused the confidential files and the documents filed by the parties and observed that the 1st Interested Party

(Magnate Ventures Limited), despite being among the entities awarded in Category 3, had no record of due diligence having been conducted on it. Coupled with the findings highlighted in the preceding paragraphs, this demonstrates that the evaluation of tenders in Categories 2 and 3 was opaque and lacked the transparency required by law. The absence of explanations in the tender records for such gaps reinforces the Board's conclusion on the lack of transparency as noted above."

"A transparent procurement system, as envisaged by the law, would ordinarily require that due diligence be conducted on entities with no prior record of supply with the Procuring Entity. In the present case, several entities with no history of dealings with the Procuring Entity were not subjected to any due diligence. This reinforces the Board's finding that the procurement process lacked both transparency and consistency."

243. These findings cannot be faulted for being unreasonable or irrational as they are based on facts in confidential files supplied to the 1st Respondent by the 2nd and 3rd Respondents in the instant Application.

244. There was no breach of the Applicant's legitimate expectation since it participated fully during the hearing of the Request for

Review having been accorded that opportunity by the 1stRespondent. The Applicant's pleadings and arguments were considered on the various issues raised and reasons for decisions given. The 1stRespondent relied on statutory provisions and binding case law to determine the Request for Review.

245. The participation of the 4th Respondent in a clearly flawed procurement process was not an endorsement of the same and this cannot be construed as acquiescence.

The 1st Interested Party's Case:

It urges this Court to allow the Application dated 25th August 2025 for the following reasons: -

246. The 3rd Respondent invited sealed tenders in response to Tender No. KP I /9A.3/RT/ 14/24-25 for Supply of Single-Phase Smart Meters. (Local Manufacturers and Assemblers) through a limited tender open to Local Meter Manufacturers and Assemblers by way of an advertisement published on the 3rd Respondent's website www.kplc.co.ke and on the Public Procurement Information Portal (PPIP) website www.tenders.go.ke.

247. The mode of submission of tenders was electronic through the 3rd Respondent's SAP tendering portal.The tender submission deadline was initially set for 24th June 2025 at 10:00 a.m.

248. The 3rd Respondent subsequently issued three (3) Addenda to the subject tender, namely Addendum No. 1 dated 13th June 2025, Addendum No. 2 dated 16th June 2025, and Addendum No. 3 dated 20th June 2025. The said Addenda amended the Tender Document and extended the tender submission deadline to 1st July 2025 at 10:00 a.m. Addendum No. 1 dated 13th June 2025 amended the award criteria under its Appendix 1. The criteria provided that awards would be made to the lowest evaluated bidder per lot, based on eligibility.

249. Bidders with ready stock would first be considered under Category I and could also compete in other categories provided their prices were within the prevailing market price. For Categories 2 and 3, each successful bidder would be restricted to one lot, with subsequent lots awarded sequentially to the next lowest bidder, provided their prices were within market range. Where no subsequent bidder was qualified for the remaining lots, the award would revert to the lowest evaluated bidder. Further, if a bidder emerged the lowest in more than one lot, they would only be awarded the lot with the highest quantity,

250. It is its case that through Addendum No. 3, the 3rd Respondent divided the tender into three categories, each containing specific lots with defined quantities.

251. Under Category 1, which was reserved for local manufacturers and assemblers with ready stock available for delivery within

twenty-one (21) days, the 3rd Respondent required 167,000 meters in Lot 1.

252. Under Category 2, reserved for local manufacturers and assemblers who had previously and successfully supplied meters to the 3rd Respondent or any other public entity in Kenya, the 3rd Respondent required the following: 100,000 meters in Lot 1, 85,000 meters in Lot 2, 50,000 meters in Lot 3, and 35,000 meters in Lot 4.

253. Under Category 3, which was reserved for all local manufacturers and assemblers, the 3rd Respondent required the following: 100,000 meters in Lot 1, 65,000 meters in Lot 2, and 35,000 meters in Lot 3.

254. The 1st Interested Party duly submitted its bid in compliance with the instructions to the tenderers detailed in the tender document. Upon evaluation, the 3rd Respondent issued a Notification of Intention to Award dated 1 7th July 2025, in accordance with Section 87 of the Public Procurement and Asset Disposal Act (PPADA).

255. The notification indicated that the 1st Interested Party had been awarded Category 3, Lot 2, having emerged as the lowest evaluated bidder in line with ITT 40, at a contract price of KES 561 exclusive of VAT.

256. On 29th July 2025, the 4th Respondent lodged a Request for Review (Application No. 85 of 2025) before the 1st Respondent challenging the awards made under the subject tender.

257. The 1st Respondent herein issued a decision in Request for Review No. 85 of 2025 cancelling the awards given under the tender and directed the 2nd and 3rd Respondents to re-issue the subject tender afresh.

258. The 1st Interested Party is aggrieved by the decision of the 1st Respondent, which it believes to be illegal, unlawful, irrational, and disproportionate.

259. It maintains that the 1st Respondent acted illegally, unreasonably, and irrationally by annulling the award made to the 1st Interested Party, notwithstanding that the 4th Respondent's bid of Kshs. 685,1 65000/= was higher than the 1st Interested Party's bid of Kshs. 561 by approximately Kshs.124.

260. This violated the principles of fairness, transparency, competitiveness, and value for money under Article 227 of the Constitution, Section 3 of PPADA, and Regulation 80 of the Regulations, the 1st Respondent further acted illegally and ultra vires Section 86(1)(a) of PPADA by disregarding the findings of the 3rd Respondent's Evaluation Committee, which had correctly determined that the 1st Interested Party was the lowest evaluated responsive bidder in Category 3.

261. The 1st Respondent's decision lacked lawful justification, was manifestly unreasonable, and amounted to an abuse of discretion by favouring a more expensive and uncompetitive bidder.

262. It is its case that the 1st Respondent misapprehended the provisions of Sections 80, 86 and 87 PPADA as read together with the tender document by purporting to annul an evaluation process and Notification of Intention to Award that had been lawfully undertaken in compliance with Section 80(2) PPADA.

263. It is strongly persuaded that the 1st Respondent acted beyond its powers by substituting its own interpretation of ITT 40 and Addendum No. I for that of the 3rd Respondent, thereby tainting the decision with illegality.

264. The 1st Respondent erred in law by unlawfully disregarding ITT Clause 40 and Addendum No. 1 of 13th June 2025 of the Tender, which clearly stipulated award to the lowest evaluated responsive bidder per lot, with priority to the highest quantity lot where a bidder emerged lowest in more than one lot. The 1st Respondent wrongly claimed this provision was indiscernible without justification.

265. The 1st Respondent contradicted itself within its own decision: at paragraphs 207—209, it acknowledged that ITT 40 provided a clear framework for evaluation, yet at paragraph 213, it held

that the same provision was not discernible. This inconsistency renders the decision irrational and unreasonable

266. The 1st Respondent did not provide a cogent basis for its decision to annul the awards. Its findings were bare conclusions without supporting reasoning, contrary to Article 47 of the Constitution. This omission renders the decision unlawful and procedurally unfair.

267. The 1st Respondent at paragraph 214 faulted the mode of award, terming it inconsistent and incapable of guaranteeing transparency, and on that basis at paragraph 219 declared the awards under Categories 2 And 3 unlawful. This finding was contrary to the evidence before it and ignored ITT 40 and Addendum No. 1.

268. The 1st Respondent further erred by faulting the Notification of Intention to Award dated 1 7th July 2025, which was in full compliance with Section 86(1) and (2) PPADA and Regulation 82 of the Regulations, as it duly notified both successful and unsuccessful bidders of the outcome.

269. The 1st Respondent's decision to cancel and set aside the awards of lots 1, 2 and 3 with respect to Category 3 in the Tender, unfairly dislodged the 1st Interested Party from a lawfully awarded contract, disrupted the 3rd Respondent's procurement plan, and delayed supply of critical electricity meters.

270. The prejudice to the 1st Interested Party, the 3rd Respondent, and the public is grossly disproportionate.

271. The 4th Respondent, did not demonstrate any harm, loss, or damage that it would suffer from the awards made by the 3rd Respondent.

272. In the absence of such prejudice, there was no lawful or reasonable basis for the 1st Respondent to cancel and set aside the awards of lots 2 and 3 in respect to Category 3 of the tender, the 1st Respondent admitted at paragraph 146 that the 4th Respondent was not a tenderer under Categories 1 and 2 and that it lacked jurisdiction over those categories yet proceeded to issue orders touching on them. This constituted an unlawful assumption of power.

273. It is by the annulment of awards across all categories, despite each being severable and independent, was irrational and exceeded the scope of the 4th Respondent's complaint, given it only participated in Category 3.

274. The 1st Respondent resorted to the drastic remedy of cancelling the entire tender despite the limited scope of the complaint and without demonstrating harm, loss or damage to the 4th Respondent.

275. This was manifestly excessive, unnecessary, and disproportionate thereby acted in excess of its statutory

mandate under Section 173 PPADA by annulling a lawful award and directing a fresh procurement process.

276. Illegality, disproportionality, ultra vires and irrationality constitute sufficient grounds for the grant of judicial review orders. It urges this Court to allow the Application dated 25th August 2025.

The 2nd Interested Party's Case:

It supports the Originating Motion dated 25 August 2025.

277. Its bid was responsive as it met all the mandatory, technical and financial requirements of the tender as stipulated in the Tender Documents and all the addenda thereto.

278. Section 79 of the act provides for Responsiveness of tenders and that a contract must be awarded to the tenderer who scores the highest points, unless objective criteria justify the award to another tenderer.

279. The 2nd Respondent reviewed and evaluated all the bids under the said tender and informed the company that it was the successful bidder under Category 3 Lot 3.

280. The award was in line with the award criteria contained initt.40 and Addendum 1 of 13 June 2025 of the tender document that; *“every successful bidder will be awarded one lot per category for categories 2 and 3 based on their eligibility and that subsequent lots shall be awarded sequentially until*

the lots are allocated provided that the price of the subsequent qualified bidder is within the prevailing market price."

281. This precipitated the filing of a review by one of the unsuccessful bidders.

282. The 1st Respondent upheld the Request for Review and set aside the awards to the Applicant and the Interested Parties by the 2ndRespondent ordering the 2ndRespondent to re-tender the quantities of meters in categories 1,2 and 3 afresh.

283. It strongly believes that the 2nd Respondent adhered to the terms of the procurement process, especially ITT.40 as read with addendum number 1 of 13 June 2025 and the whole process was not tainted with illegality, irrationality or procedural impropriety.

284. It argues that the decision to award the tenders under Categories 1, 2 and 3 to the Interested Parties and the Applicant was a decision to which any reasonable decision-maker could have arrived at in the circumstances and as provided for in the tender documents and addenda thereto.

285. The 1st Respondent's decision to cancel, set aside and order for re-tender of all the categories was illegal, irrational, unreasonable, tainted with procedural impropriety.

286. It argues that the 2nd Respondent adhered to the Evaluation criteria provided for in the tender document and addendum.

287. These criteria offered all potential bidders a fair and equitable method of having their proposal reviewed and considered as a potential solution in a consistent and fair manner; and provided the evaluators with a clear and concise method of identifying the competent proposals and ultimately the best overall bids.

288. From the tender award criteria (ITT.40 and addendum No. 1 of 13 June 2025), it is clear this tender under category 3 Lot 3 was awarded to the company since it had the lowest evaluated bid.

289. The Procurement entity did due diligence on the company and was satisfied it met the criteria to supply the goods under Category 3. Indeed, the company supplied the 2nd Respondent with a Factory Inspection Letter and Approval to Manufacture as was required.

290. Section 83(1) of the Act which provides that an evaluation committee may, after tender evaluation, but prior to the award of the tender, conduct due diligence and present the report in writing to confirm and verify the qualifications of the tenderer who submitted the lowest evaluated responsive tender to be awarded the contract in accordance with this Act.

291. It argues that it has local manufacturing capabilities as a Manufacturer and Assembler, a fact confirmed by the 2ndRespondent on 11 July 2025.

292. The 2nd Interested Party clearly and sufficiently demonstrated that it is a Local Manufacturer and Assembler and, in that regard, supplied the procuring entity with all relevant documents to support this fact.

293. It argues that in light of the above, the 2nd Respondent complied with Articles 10 and 227 of the Constitution, Section 80 of the PPADA as read with Regulation 77 of the Public Procurement and Asset Disposal Regulations, 2020, as well as the tender award criteria contained in the Tender Document.

294. The decision to award the tenders under categories 1, 2 and 3 to the Applicant and the Interested Parties was NOT tainted by illegality, irrationality, unreasonableness and procedural impropriety.

295. The decision by the 2nd Respondent was also not ultra vires and was in accordance with section 80(2) of the act which provides that the evaluation and comparison shall be done using procedures and criteria set out in the tender documents.

296. These were clearly provided for under ITT 40 and Addendum No. 1 of 13 June 2025. A decision to award a tender constitutes administrative action and the 1st Respondent erred in its finding as it was not flawed.

297. The 2nd Respondent did not: -

a. Contravene or exceed the terms of the power which authorized the 2nd Respondent to award the tenders as per the categories;

b. Pursue an objective other than that for which the power to make the decision was conferred;

c. Contravene or fail to implement public duty.

298. This court should not interfere with the tender awards.

The Consumers Federation of Kenya Case:

299. It opposes the application. It is The Consumers Federation of Kenya, is an independent, self-funded, multi-sectorial, non-political and apex non-profit Federation committed to consumer protection, education, research, consultancy, litigation, anti-counterfeits campaign and business rating on consumerism and customer care issues.

300. It advocates for the constitutionally protected rights and interests of all consumers and works towards a fair, just and safe marketplace for all Kenyan and regional consumers in all sectors of the economy, both public and private.

301. It is its case that from the onset, public procurement, by its very nature, implicates public resources and consumer welfare. It is therefore of critical public interest that procurement processes are conducted in a manner that is

lawful, transparent, accountable, competitive, and cost-effective as commanded by Article 227(1) of the Constitution.

302. It is its case that The Application is devoid of merit, misconceived, and amounts to an appeal on the merits of the 1st Respondent's decision, which is not permissible in law.

303. The application seeks to dilute constitutional procurement norms, ignore consumer interests under Article 46, or invite this Court to substitute a merits review for the specialized statutory scheme.

304. It argues that the 1st Respondent (PPARB), being a specialized statutory tribunal under Section 27 of the PPADA, 2015, acted squarely within its mandate in annulling the impugned procurement process after finding serious breaches of law in the evaluation criteria and notifications.

305. The 1st Respondent correctly found that:

a) The award criteria were neither transparent nor predictable, contrary to Section 86 of the PPADA and Article 227 of the Constitution.

b) The Notifications of Intention to Award dated 17th July 2025 failed to meet the statutory requirements of Section 87(3) of the PPADA as they omitted critical particulars necessary for tenderers to exercise their review rights.

c) Due diligence was selectively conducted, undermining equality of treatment and the integrity of the process.

306. It holds that the findings were not irrational, as alleged, but rather were rooted in a careful examination of pleadings, documents, oral and written submissions, as well as confidential documents availed under Section 67(3)(e) of the Act.

307. The 1st Respondent annulled the unlawful awards and directed a re-tendering exercise, thereby safeguarding public interest, consumer protection, and the constitutional principles of procurement within Section 173 of the PPADA, judicial review does not lie to challenge the merits of a decision but only the process.

308. The Applicant herein has failed to demonstrate any element of illegality, irrationality, or procedural impropriety in the impugned decision.

309. The record shows the Board:

a. Accepted jurisdiction where the Act so allowed.

b. Declined jurisdiction on time-barred complaints (such as the site visit), and

c. Invited all mandatory parties as required under Section 170 of the PPADA.

310. It is its case that as a public watchdog organization, it has a duty to support decisions that enhance transparency, accountability, and fairness in procurement.

311. Allowing the Application would frustrate consumer protection, erode public confidence in tendering systems, and encourage opacity in the expenditure of taxpayer resources.

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The Applicant's Case:

312. It is its case that the 2nd and 3rd Respondents being the Procuring Entity invited sealed tenders in response to Tender No.KP1/9A.3/RT/14/24-25 for Supply of Single-Phase Smart Meters. (Local Manufacturers and Assemblers).

313. The subject Tender was distributed as follows: -

(i). **Category 1 - local manufacturers/assemblers with ready stocks for immediate delivery within 21 days.**

a. Lot 1 required one bid for 167,000 single phase smart meters.

(ii). **Category 2 - local manufacturers/assemblers who have successfully supplied meters to**

completion to KPLC or any public entity in Kenya before.

a. Lot 1 required one to bid for 100,000 single phase smart meters

b. Lot 2 required one to bid for 85,000 single phase smart meters

c. ***Lot 3 required one to bid for 50,000 single phase smart meters***

(iii). **Category 3 - all local meter manufacturers/assemblers.**

a. Lot 1 required one to bid for 100,000 single phase smart meters

b. Lot 2 required one to bid for 65,000 single phase smart meters

c. Lot 3 required one to bid for 35,000 single phase smart meters

314. The Applicant successfully submitted its bid after which it received a Notification of Award dated 17thJuly 2025 being listed as one of the successful bidders.

315. On 29th July 2025, an Application for Request for Review was lodged by the 4th Respondent dated 27th July 2025 subsequent

to which the 1st Respondent delivered its decision on the 19th August 2025 as follows: -

"In the exercise of the powers conferred upon it by section 173 of the Act, the Board makes the following orders in the Request for Review dated 29th July 2025:

a) The award of lot 1 with respect to Category 1 in Tender No.KP1/9A.3/RT/14/24-25 – Supply of Single Phase Smart Meters (Local Manufacturers and Assemblers) issued to Smart Meter Technology Ltd by the 2ndRespondent is hereby cancelled and set aside.

b) The awards of lots 1, 2, 3 and 4 with respect to Category 2 in Tender No. KP1/9A.3/RT/14/24-25 – Supply of Single Phase Smart Meters. (Local Manufacturers and Assemblers) issued to East Africa Meter Company Ltd, Hexing Technology Company Ltd, Inhemeter Africa Company Ltd and Smart Meter Technology Ltd respectively by the 2nd Respondent be and is hereby cancelled and set aside.

c) The awards of lots 1, 2 and 3 with respect to Category 3 in Tender No. KP1/9A.3/RT/14/24-25 – Supply of Single Phase Smart Meters. (Local Manufacturers and Assemblers) issued to Abcos Industrial Ltd, Magnate Ventures Ltd and House of

Procurement Limited respectively by the 2nd Respondent be and is hereby cancelled and set aside.

d) The Tender No. KP1/9A.3/RT/14/24-25 – Supply of Single Phase Smart Meters. (Local Manufacturers and Assemblers) with respect to Category 1, 2 and 3 be and is hereby cancelled and set aside.

e) The 1st Respondent be and is hereby directed to re-tender the quantities of meters under Category 1, 2 and 3 afresh while taking into consideration the findings of the Board in this Decision.

f) Each party shall bear its own costs of the proceedings."

316. The Applicant never participated in the said proceedings as per the Request for Review filed, it was not joined as a necessary and substantive party to the Review.

317. The 1st Respondent in its Ruling, at paragraphs 143–146 expressly found that the 4th Respondent was not a Tenderer in Categories 1 and 2, and further acknowledged that the 4thRespondent mounted no challenge to those categories and at paragraph 146, the 1st Respondent itself indicated that: -

"Arising from the foregoing, the Board finds that the Applicant was not a tenderer in respect of any lot under Categories 1 and 2.

Consequently, the Board shall confine its determination to Category 3, where the Applicant participated as a tenderer, and shall accordingly down its tools with respect to Categories 1 and 2. Notwithstanding this, the substantive issue in the instant Request for Review concerns the application of the mode of award, which links Categories 1, 2 and 3 in terms of how they were applied. To this extent, the Board retains jurisdiction to examine the mode of award as it pertains Categories 1, 2 and 3, insofar as their application is interrelated. To this extent the Board relies on its previous decision in PPARB Application No.59 of 2025 Tramex Mediquip Ltd v Chief Executive Officer, Kenya Medical Supplies Agency and 3 others where the Board at paragraph 136 thereof held that while two lots originate from the same tender, they remain distinct and separate."

318. As from paragraphs 190–191, the 1st Respondent was categorical that the Request for Review would be confined to Category 3 being the only category in which the 4th Respondent participated.

319. Further, at paragraph 192, the 1st Respondent reiterated that non-joinder of Smart Meter Technology Limited was not fatal

precisely because it was not a successful tenderer in Category 3.

320. Having made those unequivocal findings, the 1st Respondent perversely and without jurisdiction proceeded to clothe itself with powers to entertain matters touching on Categories 1 and 2 — categories in which the 4th Respondent had no locus, and the necessary parties who had participated in categories 1 and 2 had not been joined.

321. The above analysis the 1st Respondent acted ultravires, contradicted its own findings, and unlawfully expanded the scope of the Request for Review beyond Category 3, thereby rendering its decision illegal, irrational, null and void.

322. At paragraph 190,191 and 192 the 1st Respondent was also very clear and categorical the Request for Review would be confined to Category 3 by stating the following: -

> *"190.Turning to the present Request for Review, the Board notes that the tender was divided into three categories, as outlined in the preceding paragraphs. Based on the prior analysis, the Board further observes that the focus of this Request for Review is confined to Category 3, the category in which the Applicant submitted its bid.*
>
> *191. Having narrowed the focus to Category 3, the main question for determination is whether Smart Meter*

Technology Limited falls within the description set out in Section 170(c) of the Act. Upon review of all documents filed before the Board, it is noted that Smart Meter Technology Limited was nota

successful tenderer in any of the lots under Category 3. The successful tenderers under this category were, however, duly joined as Interested Parties.

192. In light of the foregoing analysis, the Board finds and holds that the non-joinder of Smart Meter Technology Limited as an Interested Party is not fatal, given that it was not a successful tenderer under Category 3."

323. The applicant is concerned that the 1st Respondent despite holding the above, proceeded and clothed itself with jurisdiction to entertain tenders under category 1 and 2 knowing very well that there were parties who were not joined for the fact that the Request for Review under category 3 did not have any impact on them hence the reason for non-joinder. Therefore, the 1st Respondent acted ultra vires by not confining themselves to issues raised under category 3 where the 4th Respondent had only participated.

324. The 1st Respondent was very categorical at Paragraph 208 and paragraph 210 that they understood the criteria that was used by the 2nd and 3rd Respondents and the regulations were to be

read together with provisions of Tender document and were not to be read in isolation.

325. At paragraph 212 of the 1st Respondent's decision and its analysis, at column 3, the 1st Respondent contradicted itself in the most untenable manner by noting that the Applicant had emerged successful in Category 2, Lot 3, on account of having complied with the prescribed mode of award and not having been awarded in any other category, yet in the same breath noted that the 4th Respondent had not quoted for that Category nor the Lot.

326. Such an inconsistent and self-defeating finding as stated above exposes the 1st Respondent's decision as contradictory, illogical, irrational, biased and patently unreasonable, thereby portraying an ill-conceived disregard for the record and for the Applicant's lawful rights.

The Applicants Submissions;

327. Being the Procuring Entity invited sealed tenders in response to Tender No. KP1/ 9A.3/RT/14/24-25 for Supply of Single-Phase Smart Meters. (Local Manufacturers and Assemblers).

328. The Applicant received a Notification of Award dated 17th July 2025 being listed as one of the successful bidder.

329. On the 29th July 2025, an Application for Request for Review The 1st Respondent delivered its decision on the 19th August 2025.

330. To note is that the Applicant never participated in the said proceedings as per the Request for Review filed, it was not joined as a necessary and substantive party to the Review.

i). Whether the 4th Respondent submitted bid was in conformity with the Tender Document guidelines?

331. The Applicant herein is of the view that the 4th Respondent noncompliance with the tender conditions is fatal. The Tender document *(annexure WGK2)* gave elaborate instruction to all tenderers on the mode of preparation and submission of their tenders at **Section II – Tender Data Sheet (TDS) from page 28 to 33**.

332. On the particulars of Appendix to Instructions to Tenders, **ITT 1.2(a) on Electronic –Procurement System it states that: -**

> *"KPLC shall use the following electronic-procurement system to manage this tendering process: SAP Tendering Portal on www.kplc.co.ke (NB: Bidders are required to log on and register via this link to be able to participate in this tender)*

The electronic-procurement system shall be used to manage the following aspects of the tendering process:

(Issuing Tendering document, submission of Tenders, opening of Tenders)

Proof of receipt will be done via the bidder's Submitted Response Number for the RFx."

333. Further, on the submission and Opening of Tenders, **ITT 20 states that, "Mode of submission will be electronic through the KPLC SAP tendering portal,** it submits that all the Tender documents, it is evident that all bids were required to be submitted via the KPLC E-Procurement System.

334. However, and as elaborated at *paragraph 3 of the 1st Respondent's Decision, (at page 152) it states that the Tender Opening Committee in its minutes dated 1st July 2025*noted that: -

"The Tender Opening Committee recorded that a total of nine (9) tenders had been successfully submitted in the subject tender. It was further noted that the bid by M/s Chint Meters and Electric Kenya Co. Ltd, the Applicant herein, was attached but had not been submitted in the KPLC E-Procurement System, as evidenced by the attached screen print. the Applicant's documents were found in the collaboration folders confirming the system indication that no bid had been submitted by the said

bidder. The Tender Opening Committee nonetheless proceeded to read out the Applicant's prices, resulting in a total of ten (10) tenders being opened in the presence of tenderers' representatives in attendance."

335. In the case of **Nomads Construction Company Limited Versus Kenya National Highways Authority, Review Application Number 01 of 2017 page 24 the Board stated:**

"A mandatory requirement set out in the tender document cannot be waived and once a bidder fails to comply with it, then its tender must be declared non responsive at the preliminary evaluation stage and cannot proceed for further evaluation….

In view of several failures by the Applicant to comply with mandatory requirements, the Board's hands are tied since requirements cannot be treated as minor deviations and cannot also be waived. The Applicant had no option other than to comply with them and failure to comply with the requirements could only have one ultimate result, namely to have the Applicant's bid disqualified at Preliminary evaluation stage as the Procuring Entity did."

336. Reliance is placed in the case of **Republic v Public Procurement Administrative Review Board; Consortium of GBM Projects Limited and ERG InsaatTicaretVeSanayi**

as (interested party); National Irrigation Board Ex parte [2020] Eklr stated that ***a bid qualifies as a responsive bid if it meets all the requirements as set out in the bid document. Further that bid requirements usually relate to compliance with regulatory prescripts, bid formalities, or functionality/ technical, pricing and empowerment requirements.***

337. It submits that from the 1st Respondent own analysis it is evident that the 4th Respondent never submitted its bid as required and as per the guidelines issued in the Tender Document dated 4th June 2025.

338. In as much as the tender opening committee chose to overlook that, the 1st Respondent was duty bound to look into the actions of the Tendering Committee and The Evaluation Committee vis-à-vis the requirement of the Tender Document.

339. To note the use of the word, “shall” connotes that it was a mandatory requirement for all the bids to be submitted through the KPLC SAP’S electronic procurement portal.

340. It submits that the 1st Respondent made a grave error of law and fact by failing to recognize the illegality that had been occasioned by the 2nd and 3rd Respondent who failed to immediately reject the bid for being unresponsive as it did not confirm to the set-out criteria.

341. The 2nd and 3rd Respondent cannot purport to waive a mandatory requirement or term it as a "minor deviation" since a mandatory requirement is instrumental in determining the responsiveness of a Tender and is a first hurdle that a tender must overcome in order to be considered for further evaluation.

342. The High Court **in Miscellaneous Civil Application 140 of 2019 Republic v Public Procurement Administrative Review Board; Accounting Officer, Kenya Rural Roads Authority and 2 others (Interested Parties) Ex Parte Roben Aberdare (K) Ltd [2019] eKLR where it held:**

> *"It is evident that compliance with the requirements for a valid tender process including terms and conditions set out in the bid documents, issued in accordance with the constitutional and legislative procurement framework, is thus legally required. These requirements are not merely internal prescripts that a bidder or the Respondent may disregard at whim. To hold otherwise would undermine the demands of equal treatment, transparency and efficiency under the Constitution. Mandatory requirements in bid document must be complied with. Deviations from mandatory bid requirements should not be permissible."*

343. For the 4th Respondent's tender to have been considered as compliant and responsive, the 4th Respondent ought to have

submitted it online on the KPLC electronic-procurement system: SAP Tendering Portal noting that it was a mandatory requirement for the Form of Tender to be submitted online and that the Tender Document specifically stated the portal to be used.

344. During the proceedings before the 1st Respondent, The Counsel for Smart Meter Technology Limited at paragraph 88 *submitted that: -*

> *"It was also submitted that the Applicant was not a tenderer within the meaning of Section 2 of the Act, as it did not submit its bid through the 2nd Respondent's e-procurement portal as required. This fact, Counsel noted, was uncontroverted. Consequently, the Applicant could not claim to have suffered any loss in respect of the tender. Further, it was emphasized that the Applicant only participated in Category 3 of the tender and did not bid for Categories 1 and 2. As such, it had no legitimate grievance regarding those categories and lacked standing to challenge them."*

345. It submits that the aforementioned submission was unreasonably disregarded by the 1st Respondent in the course of its analysis.

346. Having the above in mind, the principles of transparency, accountability and fairness envisioned under Articles 10 and

227(1) of the Constitution of Kenya 2010 read with Section 79 of the Public Procurement and Asset Disposal Act, CAP. 412C and provisions of the Tender Document would dictate that the 2nd and 3rdRespondent would not consider and evaluate the 4thRespondent's Tender and Form of Tender submitted physically.

347. It submits that in evaluating the bids, the 2nd and 3rd Respondent's Tender Evaluation Committee was NOT guided by the evaluation criteria set out in law and in the Tender document provided to all candidates.

348. It further submits that the 2nd and 3rd Respondents deviated from the Tender Evaluation Criteria provided in the Tender Bid Document.

349. In failing to take cognizance of the minutes of the Tendering Opening Committee which stated very clearly that the 4thRespondent did not submit its tender via the KPLC electronic procurement portal as required and it proceeded with evaluating the 4th Respondent's tender yet the 4th Respondent had failed to adhere to the mandatory requirement stipulated in ITT1.2(a) and ITT20 of the Tender Document.

350. However, the 1st Respondent chose when making its decision chose to commit an error of law by annulling the whole Tender in full glare of the facts not in dispute and in total defiance of logic and acceptable moral standards.

351. In arguing the issue whether the 1st Respondent's decision dated 19th August 2025 is ultra vires as the Board did not have jurisdiction to hear and determine a Request of Review filed by a party that was not a bidder under category 2 reliance is placed in the case of the **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1,** Justice Nyarangi (as he then was), stated as follows: -

> *"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."*

352. The jurisdiction of this Board flows from **Section 167 (1)** of the Public Procurement and Asset Disposal Act, CAP. 412C which provides that: -

> *"Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.*

Further Section 2 of the act defines: -

> **"*candidate*"** *means a person who has obtained the tender documents from a public entity pursuant to an invitation notice by a procuring entity;*
>
> **"*tenderer*"** *means a person who submitted a tender pursuant to an invitation by a public entity*

353. The applicant submits that having found that from the onset the bid as submitted by the 4th Respondent was unresponsive and ought to have been disqualified for failing to adhere to the mandatory requirements.

354. The 2nd and 3rd Respondents invited sealed tenders through limited tender open to Local Meter Manufacturers and Assemblers and was by way of an advertisement on 4th June 2025.

355. **In Philip Nyandieka (Suing on his own behalf and on behalf of the general public) v National Government CDF- Bomachoge Borabu constituency [2019] KEHC 11105 (KLR)**the court held that:

> *"19. Section 2 of the Act defines a "candidate" as "a person who has obtained the tender documents from a public entity pursuant to an invitation notice by a procuring entity". The said section defines a "tenderer" to*

mean "a person who submitted a tender pursuant to an invitation by a public entity".

20.This Court notes that the above provisions of the Act are restrictive on the persons who may approach the Board in the event of dissatisfaction with the tendering process and cannot overlook disadvantage faced by the petitioner in as far as seeking a remedy before the said Board is concerned considering the fact that Section 165(1) of the Act more or less closes the door to persons who do not fall within the meaning of a candidate and/or tenderer."

356. The court is guided by the decision of the Court of Appeal while upholding the findings of ***Odunga J. in Civil Appeal 63 of 2017, Al Ghurair Printing and Publishing LLC vs Coalition for Reforms and Democracy and Others wherein it was held: "It is common sense that once a person is locked out of accessing the Review Board to as provided under the provisions of the Public Procurement and Asset Disposal Act; they can only proceed by way of an alternative remedy or remedies."***

357. The 2nd and 3rd Respondents issued three (3) Addenda to the subject Tender, namely Addendum No. 1 dated 13th June 2025,

Addendum No. 2 dated 16th June 2025 and Addendum No. 3 dated 20th June 2025 annexed as **WGK3**.

358. The said Addenda amended the Tender Document and extended the tender submission deadline to 1st July 2025 at 10:00 a.m. That Addendum No. 1 dated 13th June 2025 as from page 118-126 of the Applicant's annexures details the various amendments introduced by the procuring entity and specifically the various categories and lots. The Applicant submitted its various bids and was awarded the tender for Category 2 Lot 3.

359. This prompted the 2nd and 3rdrespondents to issue the Notification of Award dated 17th July 2025 whereby the Applicant was listed as a successful bidder.

360. The 1st Respondent in its Decision at paragraphs 143–146 *(at page 206)* expressly found that the 4th Respondent was not a Tenderer in Categories 1 and 2, and further acknowledged that the 4th Respondent mounted no challenge to those categories and at paragraph 146, the 1st Respondent itself indicated that: -

> *"Arising from the foregoing, the Board finds that the Applicant was not a tenderer in respect of any lot under Categories 1 and 2.*
>
> *Consequently, the Board shall confine its determination to Category 3, where the Applicant participated as a*

tenderer, and shall accordingly down its tools with respect to Categories 1 and 2. Notwithstanding this, the substantive issue in the instant Request for Review concerns the application of the mode of award, which links Categories 1, 2 and 3 in terms of how they were applied. To this extent, the Board retains jurisdiction to examine the mode of award as it pertains Categories 1, 2 and 3, insofar as their application is interrelated. To this extent the Board relies on its previous decision in PPARB Application No.59 of 2025 Tramex Mediquip Ltd v Chief Executive Officer, Kenya Medical Supplies Agency and 3 others where the Board at paragraph 136 thereof held that while two lots originate from the same tender, they remain distinct and separate."

361. It submits that in view of the above findings, the 1st Respondent ought to have downed all its tools with regards to Category 1 and 2. That it is our submission that the 1st Respondent lacked the jurisdiction to annul the awards made under category 1 and 2.

362. This is because the 4th Respondent was not a bidder under those categories and therefore the 4th Respondent does not fit the definition of a candidate or tenderer on persons who can approach the 1st Respondent under Section 167(1) of the Public Procurement and Asset Disposal Act, CAP. 412C Requesting for a Review.

363. In PPRB vs. KRA Misc. Civil Application No. 540 of 2008, [2008] eKLR the Honorable Court held that the Review Board cannot disregard mandatory provisions of the Act and where it does so, it amounts to a fundamental misdirection or failure to address the applicable law or a fundamental error of law thereby rendering the decision reached devoid of legality and therefore void.

The Court went further to state as follows;

> *"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 than failure by the decision maker to comply with positive 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 Respondent's 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."

364. It submits that for one to be a candidate or tenderer it must be a person who has obtained the tender document from the public entity or who has submitted a tender and in both cases, the person making the challenge must have received an invitation from the procuring entity.

365. In this case the 4th Respondent may well have come into possession of the Tender Document, but never submitted a bid under Category 1 nor 2.

366. It submits that the 2nd and 3rd Respondent having amended the Tender Document by introducing the categories and lots as per Addendum No. 1 issued on the 13th June 2025, made the Tender No. KP1/ 9A.3/RT/14/24-25 for Supply of Single-Phase Smart Meters. (Local Manufacturers and Assemblers) as three divisible and/or Separate Tender.

367. Each category had different specifications and specs differing per category that a bidder had to have in order for their bid to qualify as a responsive bid in that category.

368. Tender document are the ultimate pedestal of Tenderers' Legitimate Expectation of the tests, standards and evaluation that they would be subjected to in their bids.

369. It is therefore clear that both in the 2nd and 3rd Respondent view and the proceedings before the 1st Respondent the various categories 1, 2 and 3 which had been brought forth in Addendum No. 1 issued on 13th June 2025 were treated as distinct and separate Tender.

370. To note the 4thRespondent never challenged that basis in its pleading nor before the 1st Respondent. Reliance is placed in ***Section 80(2) of the Public Procurement and Asset Disposal Act, 2015 (PPADA) which*** mandates that the evaluation of tenders must strictly adhere to the criteria and procedures set out in the Tender Document.

371. A procuring entity, and by extension, the Review Board, may not introduce or apply new unstated criteria during the evaluation process. Section 80 states as follows:

Evaluation of tenders;

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

(2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the provisions of this Act and statutory instruments issued by the relevant professional

associations regarding regulation of fees chargeable for services rendered.

372. The Act is very clear that the Tender document should at all times be the guiding factor.

373. It submits that the 1st Respondent acted unlawfully, irrationally, or ultra vires in assuming jurisdiction on different categories other than the category that the 4thRespondent had only submitted its bid.

374. In clothing itself with jurisdiction, the 1st Respondent decision was flawed to the extent that it proceeded to cancel awards made in Category 1 and 2 whereas it never had jurisdiction to entertain the 1 and 2 category.

375. It is therefore our submission that the 1st Respondent acted beyond the scope of its mandate and gave orders with regards to Category 1 and 2 yet the Request for Review by the 4th Respondent was addressing Category 3 in which the 4th Respondent only submitted its bid to, thus its decision and orders were an abuse of power, unreasonableness, in breach of a duty to act in good faith, ultra-vires, and unlawful.

376. In arguing the issue w**hether the Request for Review is fatally defective for failure to join the Applicant who was successful bidder as a party to the Request for Review it refers to Section 170 of the Public Procurement and Asset Disposal Act, CAP. 412C** which stipulates as follows: -

"The parties to a review shall be—

(a) The person who requested the review;

(b) The accounting officer of a procuring entity;

(c) The tenderer notified as successful by the procuring entity; and

(d) Such other persons as the Review Board may determine."

377. In As per the Request for Review filed by the 4th Respondent and dated 27th July 2025, the Applicant was never listed as a Party in the proceedings.

378. Judicial Review No. 21 of 2019, **Republic v. Public Procurement Administrative Review Board v. Kenya Ports Authority and Another Exparte Jalaram Industrial Suppliers Limited (2019) eKLR** it was held as follows: -

"The requirement that the accounting officer and the successful tenderer to be made parties to a request for review is both statutory and mandatory. Section 170 is couched in mandatory and express terms. It was therefore not open to the Interested Party to pick and choose against which party to file the Request for Review. In the present case, the Interested Party failed to enjoin both the accounting officer of the procuring entity and the successful tenderer as required by law. The Ex Parte

Applicants therefore raised the PO challenging this omission. It is well settled that parties form an integral part of the trial process and if any mandatory party listed in Section 170 of the Act is omitted in proceedings then a request for review cannot be sustained. Failure to comply with these express provisions rendered the Request for Review filed by the Interested Party incompetent. No Court or tribunal has jurisdiction to entertain an incompetent claim brought before it...

In the instant case, the Request for Review was incompetent from inception for failure to enjoin mandatory parties. An incompetent request for review is for striking out and cannot be cured by amendment...

In the circumstances, the Court is satisfied that the Respondent acted ultra vires the jurisdiction conferred upon it by the Act".

379. Thus, the failure by the 4th Respondent to join a successful bidder, or the failure to notify the successful bidder of the hearing interferes with the successful bidder's right to a fair hearing who later learns that a decision was made against its award.

380. The right to a fair hearing is a principle of natural justice recognized under **Article 50** of the Constitution which states as follows: - ***"Every person has the right to have any***

dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body."

381. Further, **Article 47** of the Constitution which deals with fair administrative action provides the following: -

> *"47. (1) every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.*
>
> *(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.*
>
> *(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall— (a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and (b) promote efficient administration"*

382. The successful bidder's right to a fair hearing (under Article 50) and right to fair administrative action (under Article 47) was affected in the Request for Review, noting that the purpose of section 170 (c) of the Act was not achieved as the

Applicant being a successful bidder never participated in the proceedings as it was never joined as a party.

383. The 4th Respondent's failure to join the successful bidder to the Request for Review was in essence denying the Applicant a chance to be heard and therefore made the Review application fatally incompetent.

384. Further at as from paragraphs 189–191, the 1st Respondent was categorical that the Request for Review would be confined to Category 3 being the only category in which the 4th Respondent participated. In the above-mentioned paragraphs of its Decision, the 1st Respondent indicated that: -

> *"Based on the foregoing legal provision, the Board observes that a tenderer notified as successful by the Procuring Entity must be a party to a Request for Review. The provision is framed in mandatory terms, indicating that inclusion of the successful tenderer as a party is required.*
>
> *Turning to the present Request for Review, the Board notes that the tender was divided into three categories, as outlined in the preceding paragraphs. Based on the prior analysis, the Board further observes that the focus of this Request for Review is confined to Category 3, the category in which the Applicant submitted its bid.*

Having narrowed the focus to Category 3, the main question for determination is whether Smart Meter Technology Limited falls within the description set out in Section 170(c) of the Act. Upon review of all documents filed before the Board, it is noted that Smart Meter Technology Limited was not a successful tenderer in any of the lots under Category 3. The successful tenderers under this category were, however, duly joined as Interested Parties.

In light of the foregoing analysis, the Board finds and holds that the non-joinder of Smart Meter Technology Limited as an Interested Party is not fatal, given that it was not a successful tenderer under Category 3."

385. In the 1st Respondent's own words as stated in the above paragraphs, it found that since, Smart Meter Technology Limited was not a successful tenderer in any of the Lots under Category 3, it's non-joinder as an Interested Party was not fatal.

386. However, even after the 1st Respondent had made the above findings, it proceeded to deal with issues and made a determination with regards to Category 1 and 2 in total contravention to its findings and in the absence of tenderers who had submitted bids in those categories.

387. A failure to notify a successful tenderer that there are proceedings with regards to a tender it has been declared successful offends Article 47 of the Constitution of Kenya 2010.This is because a lot goes on behind the scene in the preparation to bid for all the tenderers. A lot of resources are channeled and expended towards securing or winning the bid. Tenderers put in a lot of time into the procurement preparation because it is a very competitive, tedious and rigorous process.

388. It submits that in the circumstances any aggrieved party who seeks to institute a Request for Review proceedings against a successful tenderer needs to ensure they notify them on time to ensure the full participation. The notification is at the heart of the principle of fair hearing.

389. The Applicant had a legitimate expectation that as a party whose interests and rights were likely to be affected by an administrative action has a legitimate and reasonable expectation that they will be given a hearing before any adverse action is taken as provided under Article 47(2) of the Constitution.

390. **In Republic v Public Procurement Administrative Review Board; Shenzhen Instrument Co. Limited and another (interested party) Ex parte Kenya Power and Lighting Company Limited 120191 eKLR** the Honorable Court held that;

"...a decision suffers from procedural impropriety if in the process of it making the procedures prescribed by statute are not followed or if the "rules of natural justice' are not adhered to. Decision makers must act fairly in reaching their decisions."

391. The 1st Respondent notified all bidders via email of the ongoing proceedings. The 1st Respondent did not include the Applicant herein.

392. In tackling the issue **whether the Applicant's bid was evaluated in accordance with the mandatory criteria set out in the tender document** the 2nd and 3rd Respondents as the tender inviting authority is the best person to understand and interpret the requirements of the Tender Document.

393. The Courts have on numerous occasions restated the established principle of restraint for judicial review, stating that courts or quasi-tribunals should not interfere with a tender-related decision if the authority's interpretation is in consonance with the tender document's language, and only interfere in cases of irrationality, unreasonableness, or bias.

394. In Nairobi Misc. Civil Application No. 513 of 2015 - **Republic – vs. The Public Procurement and Administrative Review Board and 2 Others ex parte Akamai Creative Limited** in which the Court in the below paragraphs held the view that:

"44. It is therefore clear that 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 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."

50. It was similarly appreciated in Republic vs. Public Procurement Administrative Review Board and 3 Others Ex Parte Olive Telecommunication PVT Limited [2014] eKLR that: "Whereas we appreciate that the Board's latitude in applications for review is wide, such latitude ought not to be expanded to such an extent that it renders the idea conceived by the PE totally useless. In providing its own definition of what an OEM is the Board in essence altered the bid documents which can only be done as provided by the Act and by the PE.

51.The Board, in my view while has wide powers of review ought not to make a determination whose effect would amount to a decision totally different from the one which the procuring entity set out to achieve by commencing the tender process."

395. The 2nd and 3rd Respondents as the procuring entity are the originators of the Tender Document and are in charge of

evaluating and awarding the successful bids which confirm to the set-out criteria on the tender document.

396. As such the 1st Respondent does not have powers to evaluate tenders as its powers are limited to making orders and giving directions arising from a determination that there has been a breach of the Act or regulations.

397. In this particular scenario, the 1st Respondent in its Decision at 213-215 paragraph (at page 238) stated that: -

> *"From the foregoing analysis, the Board finds that the mode of award applied in respect of the said categories lacked transparency, in that it remained confined to the minds of the Evaluation Committee without being expressly discernible to the tenderers. This opacity is further demonstrated by the absence of a detailed summary of the evaluation and comparison of tenders prepared and availed in line with the prescribed evaluation criteria.*
>
> *In arriving at the foregoing conclusion, the Board observed that the mode of award applied was unpredictable and inconsistent, thereby failing to guarantee a transparent procurement process. By way of illustration, the lowest evaluated bidder was not assured of award in any given lot, owing to the contradictory and convoluted nature of the mode of award, which rendered*

the outcome uncertain and incapable of objective prediction.

The Board notes that the mode of award envisaged under Section 86 of the Act is designed to foster transparency and consistency in the making of awards, in consonance with Article 227 of the Constitution, which mandates that public procurement be conducted in a system that is fair, equitable, transparent, competitive, and cost-effective."

398. It submits that the above assertion by the 1st Respondent are not correct. This Honorable Court should note that addendum No.1 issued on the 13th June 2025, amended ITT 40 to the following extent: -

The mode of award shall be in accordance with the following: -

a) *Award shall be to the tenderer(s) with the lowest price per lot based on eligibility as stated in ITT 3.6.*

b) *Bidders with ready stock will be considered for award under category one (1) and any other category as long as their bid [rice is within the market price. Bidders may quote for all or as many items in the various lots as per their eligibility as stated in ITT 3.6 above.*

c) *In case the verified ready stocks are more than the total requirements, the award shall be prorated*

depending on price and ready stocks and in case the verified ready stocks are less than the total quantify required, the award shall be on prorate basis based on the pricing: declared delivery period and the production capacity.

d) *Each successful bidder will be awarded one lot per category two (2) and category three (3) based on their eligibility, subject to (e) and (f) below. If a bidder emerges as the lowest in more than one lot, they will be awarded the lot with the highest quantity.*

e) *Consequently, the subsequent lots shall be awarded sequentially following (d) above until all the lots are allocated provided that the price of the subsequent bidders is within the prevailing market price.*

f) *In case there is no other qualified subsequent tenderer for the unallocated lot(s) in a given category, the award will revert to the tenderer with the lowest evaluated price per lots, notwithstanding (e) above.in case of a tie, the award will be spilt amongst the bidders.*

KPLC shall also take into consideration the following: -

(a) *Delivery capability as per the information given in the capacity declaration form;*

(b) *The monthly production capacity*

(c) *The outcome of the due diligence;*

(d) *Timely delivery as per the delivery schedule in the previous order and satisfactory performance as per the provided delivery schedule or at least 50% delivery on previous orders.*

399. The instruction as issued above clarified the mode of award and specifically stated what and/or how the 2nd and 3rd Respondents in awarding the various category would take into consideration.

400. The 1st Respondent in its decision, paragraph 212 has a schedule which has elaborated the criteria used by the 2nd and 3rd Respondent. However, the 1st Respondent by purporting that the category was unpredictable and inconsistent was in effect usurpation of the evaluation committee's mandate. In essence the 1st Respondent was stating that the 2nd and 3rd Respondents ought to have disregarded the criteria on mode of award as set forth under the tender document.

401. The amendment that was done under ITT 40 on mode of award makes it mandatory for the procuring entity to undertake evaluation strictly in compliance with criteria set out in tender document.

402. The findings of the 1st Respondent amounted to the review board usurping the discretion of the 2nd and 3rd Respondent's Evaluation Committee. In belittling the value of the Tender

Document which was very clear on the mode of award, the 1st Respondent was in fact not only undermining the authority of the Tender Document guidelines but also attacking the merit of the decision taken by the Evaluation Committee and thereby taking the Evaluation Committee's place as the assessor of the bids.

403. Section 80 (2) of the Public Procurement and Asset Disposal Act, 2015 (PPADA) on evaluation of tender states that, *"the evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the provisions of this Act and statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered."*

404. Reliance is placed in **Republic v Public Procurement Administrative Review Board; Nairobi City Water and Sewerage Company Limited and another (Interested Parties) Exparte Fourway Construction Company Limited [2019] KEHC 8471 (KLR)** at paragraph 50 quoted the case of *Republic v Public Procurement Administrative Review Board and 2 others Exparte BABS Security Services Limited [2018] eKLR where the learned Judge held as follows:*

> *"19. It is a universally accepted principle of public procurement that bids which do not meet the minimum requirements as stipulated in a bid document are to be*

regarded as non-responsive and rejected without further consideration. [9] Briefly, the requirement of responsiveness operates in the following manner: - a bid only qualifies as a responsive bid if it meets with all requirements as set out in the bid document. Bid requirements usually relate to compliance with regulatory prescripts, bid formalities, or functionality/technical, pricing and empowerment requirements. [10] Bid formalities usually require timeous submission of formal bid documents such as tax clearance certificates, audited financial statements, accreditation with standard setting bodies, membership of professional bodies, proof of company registration, certified copies of identification documents and the like. Indeed, public procurement practically bristles with formalities which bidders often overlook at their peril.[11] Such formalities are usually listed in bid documents as mandatory requirements – in other words they are a sine qua non for further consideration in the evaluation process.[12] The standard practice in the public sector is that bids are first evaluated for compliance with responsiveness criteria before being evaluated for compliance with other criteria, such as functionality, pricing or empowerment. Bidders found to be non-responsive are excluded from the bid process regardless of the merits of their bids.

Responsiveness thus serves as an important first hurdle for bidders to overcome.

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

405. It is our submission that the 1st Respondent made an error in its interpretation and application of the law. In the first instance, the requirement of the 2nd and 3rd Respondent during evaluation of bids to adhere to the tender document is mandatory as stated in Section 80(2) of the Act and there is no

ambiguity to what the mode of award as stated in Addendum No. 1, ITT 40 as amended to the criteria that was provided for by the procuring entity.

406. The 1st Respondent erred as the mode or manner of award as provided for in the Tender Document cannot be varied having been clearly set down by the Tender Document.

407. Clause 42 of the tender document *(annexure WGK2 PAGE 26)* on the notice of Intention to enter into a Contract stated that: -

> *Upon award of the contract and Prior to the expiry of the Tender Validity Period KPLC shall issue a Notification of Intention to Enter into a Contract / Notification of award to all tenderers which shall contain, at a minimum, the following information:*
>
> *a) the name and address of the Tenderer submitting the successful tender;*
>
> *b) the Contract price of the successful tender;*
>
> *c) a statement of the reason(s) the tender of the unsuccessful tenderer to whom the letter is addressed was unsuccessful, unless the price information in (c) above already reveals the reason;*
>
> *d) the expiry date of the Standstill Period; and*

e) instructions on how to request a debriefing and/or submit a complaint during the standstill period;

408. Per the Notification of Intention to Award dated 17th July 2025 the Applicant received the notification which was in full satisfaction of the requirements of clause 42 as stated above.

409. As has been shown and explained in the foregoing, the requirement on the mode of award as provided for in the tender document were adhered to by the 2nd and 3rd Respondent since they were expressly stated in the Tender Document and the Act to be mandatory.

410. The Applicants supplementary submissions 264 of 2025.On the question whether the Applicant herein falls under the category of an aggrieved party as per section 175 (1) of the Public Procurement and Asset Disposal Act and whether the Applicant has locus standi.

411. Section 175(1) of the Public Procurement and Asset Disposal Act, 2015 (PPADA) provides that**,** *"A person aggrieved by a decision made by the Review Board may seek judicial review by the High Court within fourteen days from the date of the Review Board's decision, failure to which the decision of the Review Board shall be final and binding to both parties."*

412. The Applicant herein was a successful tenderer as confirmed by the Letter of Notification of Award dated 17th July 2025 issued by the 2nd and 3rd Respondent.

413. Consequently, the Applicant had no justification to approach the 1st Respondent seeking any orders whatsoever.

414. To fortify the foregoing, the Applicant having been duly awarded the tender as one of the successful tenderers had no lawful or justifiable reason to seek any intervention or orders from the 1st Respondent, whose jurisdiction at that stage was not warranted.

415. On the other hand, the 4th Respondent, having been listed as an unsuccessful tenderer approached the 1st Respondent seeking various orders and such actions was consistent with their status as an unsuccessful tenderer.

416. It is, however, apparent from a careful perusal of the pleadings filed by the 4th Respondent, the parties joined where the board states that, ***"190.Turning to the present Request for Review, the Board notes that the tender was divided into three categories, as outlined in the preceding paragraphs. Based on the prior analysis, the Board further observes that the focus of this Request for Review is confined to Category 3, the category in which the Applicant submitted its bid.",*** that the scope of the Request for Review was expressly limited to tenderers who participated under Category 3 only.

417. It would therefore follow that it was not necessary for the Applicant to participate in proceedings which it's not a party to and further it had no issues with category 3.

418. The Applicant only became an aggrieved party when the 1st Respondent, without any basis in the Request for Review and contrary to its findings proceeded to address and ultimately annul Categories 1 and 2 of the tender and being a successful tender under category 2, it prompted the Applicant to file the current Judicial Review proceedings.

419. That section 175 (1) **of the Public Procurement and Asset Disposal Act, 2015** is very clear. Upon the 1st Respondent making a decision that annulled the Applicant's successful bid, the Applicant became an aggrieved party within the meaning of the law and is therefore properly before this Court in seeking redress.

420. On the issue **Whether the 1st Respondent Non consideration of relevant matters of fact and the law led to the 1st Respondent issuing a decision that is unreasonable and unjustifiable in the Wesdnesbury sense.**

421. The court in **Republic v Mumba and 2 others; Katana (Exparte Applicant) (Judicial Review 6 of 2022) [2023] KEELC 18563 (KLR) (5 July 2023) (Judgment) at paragraph 28 quoted the following case law: -**

28.The principles governing the issuance of Judicial Review orders are as stated for example in the decision in Chimbevo v Chief Land Registrar and 3 others; Kalama (Interested Party) (Judicial Review Miscellaneous Application 11 of 2019) [2022] KEELC 4773 (KLR) (9 September 2022) (Ruling) where Odeny J. stated as follows:

"Judicial review is concerned with the process that leads to the outcome. If the process is flawed, full of irregularities, bias, and impropriety in deciding as was held in the cases of R v Nairobi City County Ex-parte: Gurcharn Singh Sihora and 4 Others [2014] eKLR, and of Municipal Council of Mombasa v Republic Umoja Consultants Ltd, Nairobi Civil Appeal No 185 of 2007[2002] eKLR, the Court of Appeal held that: -

"The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who make the decision have the power i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision maker take into account relevant matters or did they take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with and such court is not entitled to

act as a Court of Appeal over the decider. Acting as an appeal court over the decider would involve going into the merits of the decision itself - such as whether this was or there was no sufficient evidence to support the decision and that as we have said, is not the province of Judicial Review".

422. In arguing the issue w**hether the 4th Respondent submitted bid was in conformity with the Tender Document guidelines it argues that f**urther to it is submitted dated the 4th Respondents replying affidavit dated 13th September 2025 has annexed YD-06A and YD-06B. Annexure YD-06B confirms the assertions made by the tendering committee that,

"..... It was further noted that the bid by M/s Chint Meters and Electric Kenya Co. Ltd, the Applicant herein, was attached but had not been submitted in the KPLC E-Procurement System, as evidenced by the attached screen print. the Applicant's documents were found in the collaboration folders confirming the system indication that no bid had been submitted by the said bidder."

423. Annexure YD-06B (in the 4th Respondent's documents) clearly shows that the 4th Respondent's bid was in the collaboration

folders to mean the bid was never submitted successfully and there is no data in the attachment section.

424. The 1st Respondent in its Replying Affidavit dated 5th September 2025 states in the following paragraphs that: -

> *"12. that in determining the request for review no. 85 of 2025, the 1st respondent began by addressing several preliminary issues as to whether the board had jurisdiction.*
>
> *14. that the applicant contends that the 4th Respondent lacked locus standi; however, the board correctly rejected that argument. Under section 167(1) of the act, a candidate or tenderer acquires standing to seek review if it claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity." The statute does not demand proof of actual quantified loss at the threshold stage; it is enough that prejudice is pleaded as a consequence of the breach alleged."*

425. The 1st Respondent failed to address the issue on the bid submitted by the 4th Respondent. We reiterate that during the proceedings before the 1st respondent, the issue was raised by the Counsel for Smart Meter Technology Limited at paragraph 88 *(annexure WGK6 at page 187)* ***submitted that the 4thRespondent was not a tenderer within the meaning of***

Section 2 of the Act, as it did not submit its bid through the 2nd and 3rdRespondent's e-procurement portal as required. The 1stRespondent disregarded that contention and chose to ignore it and thereby arriving at a biased conclusion.

426. It submits that the 1st Respondent failed to establish any illegality, irrationality or procedural impropriety on the mandatory requirement of submitting the bid when it was very clear that it was a mandatory requirement as per the Tender Document to submit the bid via the e-procurement portal and failure to do so should have rendered the 4th Respondent bid for category 3 as unresponsive and disqualified.

427. It submits that the 4th Respondent therefore lacked the capacity to institute the Request for Review and therefore could not purport to have suffered any loss arising from the award of the tender and did not qualify as a tenderer as per section 2 of the Public Procurement and Asset Disposal Act, 2015.

428. On the issue **Whether the 1st Respondent's decision dated 19th August 2025 is ultra vires as the Board did not have jurisdiction to hear and determine a Request of Review filed by a party that was not a bidder under category 2,it** relies on the recent Court of Appeal decision in, **Civil Appeal No. E621 of 2025, *Tramex* Mediquip Limited VS Public Procurement Administrative Review Board,**

Chief Executive Officer Kenya Medical Supplies Authority, Kenya Medical Supplies Authority, Suken International Limited and Quest Pharmaceuticals Limited, the Court of Appeal Bench of Judges held at paragraph 34 that*:* -

> *"As for the splitting of the tender into lots, the appellant's tender was only in respect of Ready-to-Use Therapeutic Food. It did not submit a tender for Fortified Blended Flour. This is evidence that the appellant understood the tender to be divisible and capable of separate legal outcomes. There was clearly no expectation that was legitimized by the fact of advertising the two lots under one tender number. We agree with the 5th respondent that there is no basis for challenging the whole tender including the lot which the appellant was not interested in and did not apply for."*

429. It submits that the Court should also note that Category 2 dealt with ***local manufacturers/assemblers who have successfully supplied meters to completion to KPLC or any public entity in Kenya before*** while Category 3 dealt with ***all local meter manufacturers/assemblers.*** We therefore reiterate that Addendum No.1 issued on the 13th June 2025, made the tender to be distinct and divisible into three categories and the 1stRespondent had no jurisdiction to deal

with category 1 and 2 where the 4th Respondent never submitted a bid.

430. On the issue **whether the Applicant's bid was evaluated in accordance with the mandatory criteria set out in the tender document it** submits that, the 1st Respondent at paragraph 212 *(page 234-238 of applicant's annexures*) of its decision undertook an analysis of the application of award in respect of Categories 2 and 3, noting that the same criteria were applied concurrently to both categories. In its analysis of category 2 lot 3 the 1st Respondent noted that: -

> *"The bidder with the lowest price pursuant to Section 86(1) of the Act in this category and in this lot was M/s Hexing Technology Company Ltd at Ksh. 7,400.00, followed by M/s East Africa Meter Company Ltd at Ksh. 7,410.00. However, the mode of award, as stipulated in the addendum, limits a successful bidder to one lot per category for Categories 2 and 3, unless the bidder has the highest quantity, which would allow for a trade-off. Consequently, both Hexing Technology Company Ltd and East Africa Meter Company Ltd were ineligible in this category for any subsequent lots (Lots 3, and 4) unless they met the highest quantity requirement for trade-off consideration.*
>
> *The next lowest evaluated bidder pursuant to Section 86(1) of the Act was M/s Magnate Ventures Ltd, at Ksh. 8,803.00, with a Lot 3 quantity of 50,000 pieces. In the following*

Category 3 Lot 2, 65,000 pieces were required, and Magnate Ventures Ltd's price of Ksh. 8,631.00 was the lowest, making them eligible for award in accordance with the mode of award provision, which states: "If a bidder emerges as the lowest in more than one lot, they will be awarded the lot with the highest quantity."

Therefore, the next lowest evaluated bidder in Category 2 Lot 3 was M/s Inhemeter Africa Company Ltd, at Ksh. 10,530.00, which complied with the mode of award and had not been awarded in any other category. The Applicant in Application No. 85 of 2025 did not quote for this lot."

431. From the 2nd and 3rd Respondent's submissions at paragraph 35 as from page 11 to 12, they have duly explained the award criteria and reasons why various tenderers bids emerged successful. The 2nd and 3rd Respondent on the award on Category 2 Lot 3 states that: -

" 35.2.3. Lot 3 was awarded to Inhemeter Africa Company Ltd., which was the fourth lowest evaluated bid since the company with the third lowest evaluated bid- Magnate Ventures Ltd., emerged as the lowest evaluated bidder in Category 3, Lot 2 and was awarded that instead, because they had the highest quantity as compared to Category 2 Lot 3. This was in accordance with the award criteria that provided that if a bidder emerges as the lowest in more

than one lot, they will be awarded the lot with the highest quantity."

432. The 2nd and 3rd Respondents evaluation committee awarded the bids in full conformity of the Tender Document and taking cognizance of **section 79 (1) and 80 (3) and (4) of the Public Procurement and Asset Disposal Act, 2015 (PPADA).**

433. It submits that the 4th Respondent never submitted bids for Lots 1, 2, 3, or 4 under Category 2, as it did not possess a prior history of supplying meters to the 2nd and 3rd Respondents or to any other public institution and that requirement of prior experience was mandatory eligibility criterion for participation in Category 2.

434. The 4th Respondent could not have suffered any prejudice as a result of not being awarded any contract under the said Category2.

435. They submit that the 4th Respondent never submitted its bid for Category 3 via the e-procurement portal as this was a mandatory requirement in the Tender Document. As such the 1stRespondent decision dated 19th August 2025 was unreasonable to the extent that it clothed itself with jurisdiction to hear and determine a Request for Review which had been presented by a party that was not a Tenderer in the meaning of Section 2 of the Act.

436. Further that the three Categories 1, 2 and 3 are distinct and in no way should the invalidation of Category 3 affect the award made in Category 2, this is because the evaluation process and award under Category 2 was fully compliant with the criteria set out in the Tender Document and the procurement laws.

437. The applicant further submits that, when the 4th Respondent prepared its bid under Category 3 it was well aware of the set-out criteria in the Tender Document and at no time did it raise any issue, object or seek clarification. The 4th Respondent cannot now seek recourse from the courts to challenge and/or frustrate a tender process in which it fully and voluntarily participated.

438. The 4th Respondent was also fully aware of the criteria set out for evaluation of the bids and the mode of award as set out in the Tender Document.

The 1st Respondents Case.

439. The 1st Respondent acted within the confines of the Constitution, the Public Procurement and Asset Disposal Act, the Public Procurement and Asset Disposal Regulations, 2020, the Fair Administrative Action Act, and the rule of law in rendering its decision in Request for Review No. 85 of 2025.

440. It argues that this Judicial Review Application be dismissed with costs to the 1st Respondent.

441. On 29th July 2025, Chint Meters and Electric Kenya Company Limited, the 4th Respondent herein, filed Request for Review Application No. 85 of 2025 before the Respondent.

442. On 19th August 2025, the 1st Respondent, made the following final orders:

a. The award of lot 1 with respect to Category 1 in Tender No. KP1/9A.3/RT/14/24-25 – Supply of Single Phase Smart Meters. (Local Manufacturers and Assemblers) issued to Smart Meter Technology Ltd by the 2nd Respondent is hereby cancelled and set aside.

b. The awards of lots 1, 2, 3 and 4 with respect to Category 2 in Tender No. KP1/9A.3/RT/14/24-25 – Supply of Single Phase Smart Meters. (Local Manufacturers and Assemblers) issued to East Africa Meter Company Ltd, Hexing Technology Company Ltd, Inhemeter Africa Company Ltd, and Smart Meter Technology Ltd respectively by the 2nd Respondent be and is hereby cancelled and set aside.

c. The awards of lots 1, 2 and 3 with respect to Category 3 in Tender No. KP1/9A.3/RT/14/24-25 – Supply of Single Phase Smart Meters. (Local Manufacturers and Assemblers) issued to Abcos Industrial Ltd, Magnate Ventures Ltd and House of Procurement Limited

respectively by the 2nd Respondent be and is hereby cancelled and set aside.

d. The Tender No. KP1/9A.3/RT/14/24-25 – Supply of Single Phase Smart Meters. (Local Manufacturers and Assemblers) with respect to Category 1, 2, and 3 be and is hereby cancelled and set aside.

e. The 1st Respondent be and is hereby directed to re-tender the quantities of meters under Category 1, 2 and 3 afresh while taking into consideration the findings of the Board in this Decision.

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

443. In its Decision, it considered all the parties' pleadings, documents, written and oral submissions, the list and bundle of authorities, as well as the confidential documents submitted to the Board pursuant to Section 67(3)(e) of the Act.

444. In determining Request for Review No. 85 of 2025, the 1st Respondent first tested every preliminary objection against the Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696 standard (pure point of law, assumed facts), then only proceeded with those that actually met that threshold. This was not a cursory treatment; it was a structured gatekeeping analysis that filtered locus standi, time-bar and confidentiality as proper jurisdictional points, while striking out objections that required factual proof.

445. Under Section 167(1) of the Act, a candidate or tenderer acquires standing to seek review if it "claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity." The statute does not demand proof of actual quantified loss at the threshold stage; it is enough that prejudice is pleaded as a consequence of the breach alleged.

446. It is its case that the 1st Respondent meticulously examined the Request for Review and identified that in paragraphs 9 and 10 thereof, the 4th Respondent pleaded prejudice flowing from two breaches: that the Procuring Entity failed to disclose lot-specific outcomes in the Notifications of Intention to Award, and that the Procuring Entity imposed an award cap of two categories per tenderer, a restriction alleged to undermine value for money.

447. It is its case that the 4th Respondent demonstrated the requisite risk of suffering detriment. In line with the 1st Respondent's previous decisions, prejudice equals the legal harm that the review mechanism is designed to forestall, that is, being denied fair opportunity, equal treatment, or transparency in competition. This is the very essence of "loss or damage" under Section 167(1) of the Act, since unfair or opaque evaluation erodes the applicant's commercial opportunity and undermines legitimate expectation of a fair contest.

448. The 1stRespondent properly held that the 4th Respondent had crossed the statutory standing threshold by linking pleaded breaches to pleaded prejudice. The Applicant's contrary assertion mischaracterizes the standard, which is one of pleading, not proving, loss or damage at the threshold stage.

449. The 1st Respondent argues that it drew a careful distinction: for challenges to the application of the award criteria, time ran from the Notifications of Intention to Award dated 17th July 2025; filing on 29th July 2025 was therefore on or about Day 12, within time and thus within jurisdiction. Conversely, the site-visit complaint was deemed known by 1st July 2025 and, being filed on 29th July 2025, was time-barred, whereupon the 1st Respondent downed its tools. This split holding proves the Board actively policed the boundaries of its jurisdiction.

450. The 1st Respondent found no confidential documents were exhibited; the statements were matters of belief, and nothing in the record triggered Section 67 of the Act bar.

451. This finding removed any confidentiality-based inhibition on the Board's competence to hear the review.

452. Successful tenderers were invited and participated; non-joinder of a particular entity that was not a successful tenderer in the Applicant's category was not fatal. From the foregoing the Board explicitly held that it had jurisdiction to hear and determine the Request for Review.

453. The Board scrutinized ITT 40 of the Tender Document together with Addendum No. 1 dated 13th June 2025 and noted that the Procuring Entity adopted criteria that were neither transparent nor predictable.

454. Specifically, the award mechanism provided no clear basis upon which tenderers could ascertain in advance how lots would be distributed or capped across categories.

455. Under Section 86(1) of the Act, the award of tenders must be made to the tenderer with the lowest evaluated price in accordance with the evaluation criteria set out in the tender documents. Equally, Article 227(1) of the Constitution requires that public procurement systems be fair, equitable, transparent, competitive and cost-effective. The Board found that the Procuring Entity's criteria failed these standards, as they left room for arbitrariness and selective allocation rather than a predictable "lowest evaluated tender" outcome.

456. The 1st Respondent further found that the Notifications of Intention to Award, issued on 17th July 2025, did not comply with Section 87(3) of the Act.

457. That provision requires a notification to state: the name of the successful tenderer, the tender price, and the reason why an unsuccessful tender was not successful.

458. The Notifications in question omitted critical particulars, including lot-specific results and unit prices, thereby denying

tenderers essential information needed to assess compliance and decide whether to exercise their statutory right to review. This omission was not a mere procedural lapse but a substantive breach that went to the heart of transparency and accountability.

459. The 1st Respondent also found that due diligence was conducted selectively on some tenderers but not on others, undermining the uniformity of the evaluation process. Selective application of due diligence compounds opacity and violates the equal treatment requirement under procurement law.

460. The 1st Respondent held that the award criteria and notifications were unlawful and incapable of supporting a valid award.

461. It therefore properly intervened under Section 173 of the Act, which empowers it to annul anything done in the procurement process that contravenes the law and to give consequential directions.

The 2nd and 3rd Respondent's case

462. In supporting the Application and it argues that on 29th July 2025, the 4th respondent filed a Request for Review No. 85 of 2025 dated 28th July 2025 seeking inter alia to nullify the decision of the 2nd and 3rdrespondent's herein, which decision was communicated through the Letter of Notification of

Intention to Award dated 17th July 2025. The Request for Review was heard orally on 13th August 2025 and the 1st respondent delivered its decision on 19th August 2025.

463. The 1st respondent inter alia cancelled the awards given under the tender and directed the 2nd and 3rd respondents herein to re-tender afresh.

464. The 2nd and 3rd respondents are aggrieved by the whole of the said decision in so far as the same is tainted with illegality, error of law and irrationality as substantively argued by the applicant herein and for the additional reasons directly affecting the 2nd and 3rd respondents in the succeeding paragraphs.

465. The 2nd and 3rd respondents aver that the 1strespondent misinterpreted the provisions of section 167(1) of the Public Procurement and Asset Disposal Act vis-à-vis the 4th respondent's pleadings and arrived at a decision which was ultra vires, illegal and irrational.

466. The 2nd and 3rd respondents aver that the 1strespondent misinterpreted the provisions of section 87 of the Public Procurement and Asset Disposal Act as read together with Regulation 82 of the Public Procurement and Asset Disposal Regulations 2020 vis-à-vis the 2nd and 3rd respondents Letter of Notification of Intention to Award dated 17th July 2025 and

arrived at a decision which was illegal, unreasonable and irrational.

467. The 1strespondent misinterpreted the provisions of sections 80 and 86 of the Public Procurement and Asset Disposal Act as read together with the tender document vis-à-vis the award of the 2nd and 3rd respondents evaluation committee and arrived at a decision which was illegal, unreasonable and irrational.

468. The 2nd and 3rd respondents aver that the 1strespondent's decision to cancel the whole tender despite the award criteria for the various categories being separate and distinct and also the fact that the 4th respondent bid only for category 3 was unreasonable and irrational.

469. The 1st respondent acted irrationally by failing to discern that energy meters form the backbone of the 3rdrespondent's financial sustainability, as meters are critical components in registering sales and collection of revenues and that a shortage of energy meters will, therefore, adversely affect the 3rd respondent's financial health and overall operations, with the further consequence that any prolonged delay is projected to occasion revenue losses of at least Ksh. 1.274 billion per month (being Ksh. 2,000 per meter per month multiplied by approximately 637,000 meters [which are the subject of this procurement]).

470. The 1st respondent acted irrationally by failing to take into account that the total lead time for the procurement of meters is approximately six (6) months, which period encompasses the tendering process, assembly by local manufacturers and delivery to the 3rd respondent's stores and that, consequently, the cancellation of the aforesaid tender will have the long-term effect of causing acute shortages to the detriment of the innocent public members who require the energy meters.

471. The 1st respondent acted illegally by ordering a retender, whereas the procurement of meters and other procurements by the 3rd respondent and indeed other public bodies are undertaken on an annual basis, guided strictly by the annual procurement plan and budget for each respective financial year and upon the lapse of a financial year, the 3rdrespondent and other public bodies ceases to utilize the procurement plan and the corresponding budget of that financial year and procurement activities thereafter are conducted strictly in accordance with the procurement plan and budget of the succeeding financial year

472. The decision of the 1st respondent is materially influenced by an error of law, in that if there existed any ambiguity in the evaluation criteria in the tender document, the bidders were at liberty to seek clarifications during the pendency of the tender process, which they failed to do and as such, any allegation of ambiguity at the Review stage amounts to an afterthought.

473. The 1st respondent acted in a manner amounting to procedural impropriety and thereby committed illegalities by completely ignoring the express provisions of the tender document which stipulated that due diligence, including factory inspection, would only be mandatory for local manufacturers and assemblers who had not previously supplied meters to the 3rd respondent, namely the 4threspondent and Abcos Industrial Limited and House of Procurement Limited. In so doing, the 1st respondent further disregarded the strict provisions of section 80 (2) of the Public Procurement and Asset Disposal Act, which stipulates that evaluation must strictly conform to the tender document and not to the 1st respondent's subjective views of "best practice."

474. upon the 1st respondent finding that the award criteria was ambiguous, it thereby lacked jurisdiction to entertain the matter any further, as the purported ambiguity existed throughout the entire bidding period prior to the closure of the tender on 1st July 2025, as all the bidders were fully aware of this criteria when perusing the tender document and willingly submitted their bids in the context of that award criteria and any contestation on the award criteria ought to have been raised by 15th July 2025 (which was never done by any of the bidders), however, in view of the fact that PPARB Application No. 85 of 2025 was filed on 29th July 2025, the 1st respondent, in proceeding as it did, committed an error of law.

475. The 1st respondent committed a serious error of law in failing to consider that the non-joinder of the applicant herein as an interested party in PPARB Application No. 85 of 2025 was fatal given that the applicant herein was not a successful tenderer under category 3; yet the 1st respondent simultaneously found that the award criteria for all the 3categories were interlinked and therefore ought to have held that the applicant herein was a necessary party, having participated and been awarded in category 2 Lot 3.

The 4th Respondent's Case;

476. In E264 of 2025 the 4th Respondent only participated in Category 3 of the tender while the Applicant in the instant Application were awarded the tender under Category 2 Lot 3.

477. The role of the court in judicial review proceedings which was summarized in Court of Appeal case of OJSC Power Machines Limited, TransCenturyLimited and Civicon Limited (Consortium) vs. Public Procurement Administrative Review Board and 2 Others as cited in the High Court decision of Republic v Public Procurement Administrative Review Board;Principal Secretary, State Department of Interior, Ministry of Interior and Co-ordination of National Government

(Interested Party) ; Ex Parte Applicant CMC Motors Group Limited [2020] eKLR it was stated that:-

"Save for a limited scope, which we shall return to later, the court, considering a judicial review application, must never consider its role as appellate court and must avoid any temptation to go into the substance of the impugned decision itself or to ask questions, whether there was or there was no sufficient evidence to support the decision of the public body concerned. It is not for the court or individual judges to substitute their opinion for that of the public body constituted by law to decide the matter in question.

See Republic vs. Kenya Revenue Authority ex parte Yaya Towers Limited (2008) Misc. Civil Appl. No. 374 of 2006.

478. The Applicant's Originating Motion is essentially an Appeal by a party who declined the invitation to participate in the proceedings before the 1st Respondent and it is clothed in Judicial Review garb and it was necessary to cite the above judicial decision since it codifies the guiding legal principles since every single ground of review raised is controverted and challenged.

479. The 4th Respondent maintains that he was a tenderer for tender KP1/9A.3/RT/14/24-25 of 11TH JUNE 2025 FOR SUPPLY OF SINGLE PHASE METERS (LOCAL MANUFACTURERS AND ASSEMBLIES) and that there was

only one invitation to tender, one tender document, one tender opening meeting, one evaluation process based on the same evaluation criteria for Category 1 and 2 and one notification of award making the various categories and lots intertwined and interlinked.

480. On 17.7.2025, the 3rd and 4th Respondent through a notification of letter of award informed the 4th Respondent that they were an unsuccessful bidder for the reason of unresponsiveness because uncompetitive prices. This is an undisputed fact.

481. The Notification of Award precipitated a tender dispute that culminated with the filing of the Request for Review Application No. 85 of 2025 by the 4th Respondent on 29.7.2025 before the 1stRespondent.The Request for Review was determined on the 19.8.2025 within 21 days of its lodgment.

482. The Applicant has no locus standi to bring the present application. In opposition to the grant of the orders sought in the Notice of Motion, the 4th Respondent denies the singular and several allegations and averments set out in the Applicant’s pleadings including the Originating Motion and accompanying affidavit.

483. The Applicant has not pleaded with any clarity and specificity the issues that the 1st Respondent created on its own motion and what determinations were made on the said issues.

484. The Applicant through the omnibus ground for review seeks to have the court analyze and review the entire record before the 1st Respondent, in a hard look manner, and come to a different conclusion.

485. The Applicant seeks a merit review of the impugned Decision in a clear attempt at a fishing expedition for grounds to set aside the 1st Respondent's Decision.

486. The allegation as set out denies the 4th Respondent an opportunity to mount a proper defense on the issue and curtails its rights as enshrined under Article 47 and 50 of the Constitution.

487. The 4th Respondent never submitted its bid as required on the 3rd Respondent's e-Procurement system.

488. This was not an issue raised by any participating party in the Request for Review and the 1st Respondent did not make a finding of fact on the same at paragraph 3 of the Impugned Decision.

489. The 4th Respondent submitted its bid through the e-procurement system and the same is confirmed by the email in

protest that it lodged at the time of the tender opening demonstrating that it had indeed lodged our bid as required.

490. The Tender Opening Committee admitted our bid as one of the 10 Tenderer and the misunderstanding on the issue of failure to submit the bid through the eProcurement portal was resolved and was, therefore, moot before the 1stRespondent.

491. The impugned decision from shows that the 4th Respondent was duly evaluated at the preliminary evaluation stage, the two technical evaluation stages, sample testing and results and finally the financial evaluation stage.

492. It is improbable that the 2nd and 3rd Respondents would have thoroughly evaluated the 4th Respondents without having their bid documents.

493. Any dispute for any breach of duty by the 2nd and 3rd Respondent arising during the tender opening and being raised at this stage of the tender dispute is time barred under Section 167 (1) of the Procurement Act.

494. The Applicant herein has severally pleaded, including at paragraph 3 of its grounds for review, that 1st Respondent's finding that the 4th Respondent was only a tenderer under Category 3 where the Applicant was not a successful bidder was the correct decision and as such it is a logical conclusion that it was not a mandatory party under Section 170 (c) of the Procurement Act.

495. In the circumstances, the Applicant would only have participated in the Request for Review upon invitation by the 1st Respondent under Section 170 (d) of the Procurement Act, an opportunity that was accorded but the Applicant failed to appear before the Board.

496. There was no basis for a legitimate expectation to participate in the proceedings if indeed the tender dispute related to Category 3 only as pleaded by the Applicant.

497. The Applicant, a party who was duly invited to participate in the proceedings but declined the to take the opportunity to actively participate in the proceedings cannot turn back and claim a violation of the right to be heard or a violation of the right to natural justice.

498. On the argument that the 1st Respondent is faulted for interrogating the mode of evaluation/award for both Category 2 and 3 yet the 4thRespondent had only participated under Category 3, and then proceeding to cancel the entire tender as stated at paragraph 3, 8 and 11 of the grounds supporting the Originating Motion.

499. The threshold for finding a decision of a public body as being irrational and/or unreasonable is a high one and has been the subject of many court decisions as well as having a statutory underpinning under the Fair Administrative Action Act.

500. The test for unreasonableness is as enunciated in the case of Republic v Public Procurement Administrative Review Board Ex parte Meru University of Science and Technology; M/S Aaki Consultants Architects and Urban Designers (Interested Party) [2019] eKLR the Court held that; *"the test of Wednesbury unreasonableness has been stated to be that the impugned decision must be "objectively so devoid of any plausible justification that no reasonable body of persons could have reached it and that the impugned decision had to be "verging on absurdity" in order for it to be vitiated."*

501. Reliance is also placed in **Prasad v Minister for Immigration {1985} 6 FCR 155** and Section 7(2) (i) of the Fair Administrative Action Act, which provides that "A court or tribunal under subsection (1) may review an administrative action or decision, if- (i) the administrative action or decision is not rationally connected to- a) the purpose for which it was taken; (b) the purpose of the empowering provision;(c) the information before the administrator; or (d) the reasons given for it by the administrator."

502. The 1st Respondent's decision cannot be faulted for being irrational and/or irresponsible. The question of contradictory findings by the 1st Respondent cannot arise.

503. As the 2nd Respondent we had joined issue with the application of the mode of evaluation at paragraph 87 of our

written submissions and the substance of the argument which it paraphrased as follows:

35.1 ITT 33.2 provided that evaluation shall be done per Lot while ITT 40 provides that Each successful bidder will be awarded one lot per category for category two (2) and category three (3) based on their eligibility, subject to (e) and (f) below. If a bidder emerges as the lowest in more than one lot, they will be awarded the lot with the highest quantity.

35.2 It means that the restriction was on the award of more than one lot per category with Category 2 and 3 being distinct and separate. (See paragraph 146 of the impugned decision) The interpretation by the 2nd and 3rd Respondent of this duty was an error of law. By following this evidently illegal criteria:

35.2.1 Inhemeter Africa Company Limited (the Applicant) that was awarded Category 2 Lot 3 being the fourth lowest bidder should not have been awarded. Instead Magnate ventures that had the third lowest price would have been awarded the tender. There was no justification to move Magnate Ventures Limited to Category 3 Lot 2 since they were not the lowest bidder in Category 2 Lot 3 to benefit from the provision on award of a lot with more quantities.

35.2.2 If the mode of evaluation set out in the tender document was adhered to, Smart Meter Technology Limited being the fifth lowest bidder in Category 2 Lot 3 would not have been awarded the tender. The same would have been awarded to the fourth lowest evaluated bidder.

35.2.3 If Magnate Ventures which appears to have been offering Kshs. 8,631 per unit had been awarded the 50,000 units in Category 2 Lot 3 the 2nd and 3rd Respondent would have saved money since the awarded company Inhemeter Africa Company Limited had offered a price of Kshs. 10,530 per unit to win the bid.

35.2.4 If the evaluation criteria set out in the tender document had been adhered to, Smart Meter Technology would not have been awarded the 35,000 units for category 2 Lot 3 at the very high Kshs. 10,400 per unit.

35.2.5 With the Criteria set out in the amendment to ITT40 being clear that evaluation was to be done per Lot with the restriction that the lowest bidder in every category cannot be awarded twice, it was imperative that in category 3, the bids be evaluated independently from Category 2 without any decisions made

in category 2 affecting the outcomes in category 3. This was not done.

35.3 Abcos Industries Limited, should not have been awarded Category 3 Lot 2 since it was not the lowest evaluated bid in that category. The reason given for the award was they were the lowest evaluated bidder that was not awarded in category 2, a reason not supported by the evaluation mode set out in the tender document.

35.4 Magnate Ventures Limited was awarded Category 2 lot 2 yet they were not the lowest evaluated bidder in terms of price.

35.5 House of Procurement were not the lowest evaluated price when they were awarded Category 3 Lot 3. The reason that they were the lowest evaluated bidder not awarded in category 2 was an extraneous consideration that is not supported by the tender document. The same bogus reason was given for awarding Abcos Industries Limited.

35.6 The procuring entity introduced new terms like “second lowest evaluated bidder,” “next lowest evaluated bidder,” to justify the employment of a flawed mode of evaluation that did not comply with Section 86 of the Procurement Act.

35.7 The goal posts kept shifting in the evaluation process. There was no simplicity or consistency.

504. The 4th Respondent's position was that the mode of evaluation for Category (2) and (3) was ambiguous and deliberately so. The mode of evaluation was capable of multiple meanings denying it consistency and transparency. It was convoluted and complicated so as to deny some the 4th Respondent the benefit of a fair and transparent system. The 1st Respondent agreed with this respect.

505. At paragraphs 213 to 216 of the impugned judgment, the 1stRespondent clearly justified the decision to find the mode of evaluation and its application unlawful and gave reasons for finding it opaque and not cost-effective after reviewing disputed facts and varied positions.

506. Section 80 and 86 of the Procurement Act were juxtaposed with the mandatory provisions of Article 227 of the Constitution and whether these findings were right or wrong, or whether another judicial body seized of the same disputed facts and law would come to a different finding or not, the impugned decision cannot be overturned in judicial review proceedings.

507. By reaching the conclusion that the mode of evaluation/award was opaque and unpredictable so as to offend the provisions of Article 227 of the Constitution, the 1st Respondent considered

the pleadings and submissions from all the parties before making the determination. There was no violation of due process of law or the breach of laws of natural justice and the 1st respondent at all times exercised powers granted to it by Statute.

508. Since the evaluation criteria or mode of award for both Category 2 and 3 was shared and interlinked, it would have been an absurd conclusion by the 1st Respondent to annul procurement proceedings for Category 3 and allow the 2nd and 3rd Respondent to proceed with the award of contracts for category 2 after finding that the shared mode of award was flawed and did not comply with Article 227 of the Constitution.

509. It is its case that while the finding that Categories 2 and 3 were distinct and separate is sound in law, the interlinked and shared mode of evaluation meant they could not be untangled. It was clear from paragraph 212 of the impugned Decision that the outcomes of award in Category 2 affected the outcomes in Category 3.

510. The Applicant has clearly misapprehended the holding of the 1st Respondent in **PPARB Application No. 89 of 2025 Tramex Mediquin Limited vs Chief Executive Officer Kenya Medical Supplies Agency and 3 Others** on the position that while two lots originated from the same tender, they remained distinct and separate when in that case, the

different unbundled Lots had different evaluation criteria and could be severed.

511. The 1st Respondent is not bound by its previous decisions since every case is handled on its own facts and merits. On another front it argues that the 1st Respondent appreciated the law on addenda as expressed under section 75 of the Procurement Act and all the addenda to the tender document were mentioned, reviewed and properly applied in the impugned Decision.

512. The 1st Respondent appreciated the mode of evaluation at paragraph 212 of the impugned Decision and it is not true that it failed to appreciate and take cognizance of section 79 and 86(1) of the Procurement Act to the extent that when the 2nd and 3rdRespondents issued various addenda, they never varied the mode of notification of award.

513. The 1st Respondent indeed found that the 4th Respondent was not a tenderer for Category 1 and 2 and clearly appreciated the provision of Section 167 (1) of the Procurement Act.

514. The 1st Respondent in inviting the Applicant to participate in the review proceedings despite the fact that the dispute related to Category 3 where it was not a successful bidder shows a clear appreciation of Section 170 of the Procurement Act.

515. The 1st Respondent is a specialised body that has wide powers as expressed under section 173 of the Procurement Act, which include annulment of entire tender proceedings for good cause that was shown in the impugned Decision.

516. An interrogation as to whether the 1st Respondent was right or wrong in annulling the entire tender was justified would entail a process of analysing and reviewing evidence on disputed facts, a jurisdiction that the judicial review court lacks.

The 4th Respondent Submissions;

517. In answering;

a) whether the Applicant has locus standi to lodge the Application for failure to exhaust statutory remedies under the Procurement Act;

b) whether the Request for Review is fatally defective for failure to join the Applicant who was a successful bidder as a party to the Request for Review; c. whether the 4th Respondent's submitted bid was in conformity with the tender document guidelines;

c) whether the 1st Respondent's decision dated 19th August 2025 is ultra vires as the Board did not have jurisdiction to hear and determine a Request for Review filed by a party that was not a bidder under Category 2;

d) whether the Applicant's bid was evaluated in accordance with the mandatory criteria set out in the tender document;

e) whether the Applicant has locus standi to lodge the Application for failure to exhaust statutory remedies under the Procurement Act.

518. It submits that the Applicant's Originating Motion ought to be struck out in limine since there is a clear case of non-exhaustion of all statutory remedies before invoking the jurisdiction of this court under Section 175 of the Procurement Act by a party who deliberately failed to honour an invitation to participate in the Request for Review before the 1st Respondent.

519. All the 7 successful bidders as per the Notification of Award were notified of the Request for Review in writing on 5.8.2025. the Applicant in its written submissions admitted that;

> *"This boil down, to the extent the 1st Respondent notified all bidders via email of the ongoing proceedings. However, on the face of it, the parties that had been indicated in the documents filed before the 1st Respondent did not include the applicant herein. ..."*

520. It submits that The Applicant urges that the notification from the 1st Respondent was only for purposes of information. Yet, it was on this basis that Smart Meter Technology Limited and

Hexing Technology Company Limited participated in the hearing of the Request for Review on 13.8.2025 despite the fact that they had not been expressly suited as Interested Parties.

521. Further, the Applicant herein has severally pleaded, including at paragraph 3 of its grounds for review, that 1st Respondent's finding that the 4th Respondent was only a tenderer under Category 3 where the Applicant was not a successful bidder was the correct legal position and as such it is a logical conclusion that it was not a mandatory party under Section 170 (c) of the Procurement Act. In that case, their non-joinder was not fatal.

522. It submits that There was no basis for a legitimate expectation to participate in the proceedings if indeed the tender dispute related to Category 3 only as pleaded by the Applicant.

523. The Applicant would only have participated in the Request for Review upon invitation by the 1st Respondent under Section 170 (d) of the Procurement Act, which opportunity was accorded but the Applicant failed to appear before the Board. It submits that the Applicant, a party who was duly invited to participate in the proceedings but declined the to take the opportunity.

524. It is clear that the Applicant never participated in Request for Review PPARB Application 85 of 2025 and therefore, cannot

invoke the provisions of Section 175 (1) of the Procurement Act which states as follows: -

> *“A person aggrieved by a decision made by the Review Board may seek judicial review by the High Court within fourteen days from the date of the Review Board's decision, failure to which the decision of the Review Board shall be final and binding to both parties.”*

525. The 4th Respondent believes that the Applicant is not an aggrieved person within the meaning of the cited provision and is only appearing before this court as the first port of call.

526. Reliance is placed in Court of Appeal in **Capital Markets Authority v Ciano and another (Civil Appeal 314 of 2018) [2023] KECA 581 (KLR) (26 May 2023)** (Judgment) stated as follows:

> *“The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks judicial review of that action without pursuing available remedies before the agency itself. The court must decide whether to review the agency's action or to remit the case to the agency, permitting judicial review only when all available administrative proceedings fail to produce a satisfactory resolution.”*

The same court at paragraph 22 of the Judgment proceeded to state as follows: -

"This doctrine of exhaustion of remedies has consistently been appreciated by our superior courts to the extent that it is correct to state that the doctrine is now of esteemed juridical lineage in Kenya. (See the High Court in Republic v Independent Electoral and Boundaries Commission (I.E.B.C.) Ex parte National Super Alliance (NASA) Kenya and 6 others (2017) eKLR). The doctrine was fittingly explained by the Court of Appeal in Speaker of National Assembly v Karume (1992) KLR 21, a pre-2010 decision in the following words:

> *"Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.*"

At paragraph 23 of the same decision, the Court of Appeal went ahead to state as follows: -

"Many post-2010 court decisions have found the reasoning sound and have provided justification and rationale for the doctrine under the 2010 Constitution. For example, the Court of Appeal provided the constitutional justification for the doctrine in ***Geoffrey***

Muthinja Kabiru and 2 Others v Samuel Munga Henry and 1756 Others (2015) eKLR *as follows: "*

"It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be for a of last resort and not the first port of call the moment a storm brews... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts...This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution."

527. Section 9(2) of the FAA Act reproduced earlier provides that the High Court or a subordinate court under sub-section (1) shall not review an administrative action or decision under the Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted. Also relevant is sub-section (3) which provides that "the High Court or a Subordinate Court shall, if it is not satisfied that the remedies referred to in sub-section (2) have been exhausted, direct that an applicant shall first exhaust such remedy before instituting proceedings under sub-section (1)."

The Court of Appeal went ahead and found as follows:

> *Section 9(2) and (3) of the FAA Act is couched in mandatory terms. The only way out is the exception provided by subsection (4), which provides that:*
>
> *"Notwithstanding subsection (3), the High Court or a Subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.*"
>
> *"Two requirements flow from the above sub-section. First, the applicant must demonstrate exceptional circumstances. Second, on an application by the applicant, the court may grant an exemption. Our reading of the law is that it is compulsory for the aggrieved party in all cases to exhaust the relevant internal remedies before approaching a court for review, unless exempted from doing so by way of a successful application under Section 9(4) of the FAA Act. The person seeking exemption must satisfy the court, first that there are exceptional circumstances, and, second, that it is in the interest of justice that the exemption be given. Section 9(4) of the FAA Act postulates an application to the court by the aggrieved party for exemption from the obligation to exhaust any internal remedy."*

528. The it submits that the Applicant has neither made a formal application for grant of an exception or demonstrated any exceptional circumstances to warrant such an exemption.

529. From the foregoing, the Applicants Originating Motion should be struck out in limine with orders as to cost.

530. Without Prejudice to the foregoing, the 4th Respondent advanced invites the court to determine the issue whether the Request for Review is fatally defective for failure to join the Applicant who was a successful bidder as a party to the Request for Review.

531. The Notification of Award shows that the Applicant was awarded the tender under Category 2 Lot 3 and as detailed under paragraph 212 of the impugned decision of the 1stRespondent, it was the “next lowest evaluated bidder who had not been awarded in any other category” with a unit price of Kshs. 10,530 for the tender item while the lowest evaluated bidder m/s Hexing Technology Company Limited had quoted a unit price of Kshs. 7,400.

532. The Applicant was a not a successful bidder under Category 3 of the Tender Document as read with Addendum one.

533. The 4th Respondent only joined the three successful bidders under Category 3, where it was a bidder, with the 1st Respondent proceedings to invite all the other successful bidders under Category 1 and 2 for the Request for Review.

534. In the Court of Appeal decision in **Musila v Thengi and 2 others (Civil Appeal 607 of 2019) [2025] KECA 750 (KLR) (9 May 2025)** where another Court of Appeal decision in the case of **Union Insurance Co. of Kenya Ltd. vs. Ramzan Abdul Dhanji, Civil Application No. 179 of 1998** was cited. The Court had held that:

> *"Whereas the right to be heard is a basic natural justice concept and ought not to be taken away lightly, looking at the record before the court, the court is not impressed by the point that the applicant was denied the right to defend itself. The applicants were notified on every step the respondents proposed to take in the litigation but on none of these occasions did their counsel attend. Clearly the applicant was given a chance to be heard and the court is not convinced that the issue of failure by the High Court to hear the applicant will be such an arguable point in the appeal. The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilised, then the only point on which the party not utilising the opportunity can be heard is why he did not utilise it." (emphasis added).*

535. The Applicant has no legal standing to challenge the findings of the 1st Respondent in its impugned Decision.

536. It then submits on the issue whether the 4th Respondent's submitted bid was in conformity with the tender document guidelines. It submits that this was not an issue raised by any participating party in the Request for Review and the 1st Respondent did not make a finding of fact on the same at paragraph 3 of the Impugned Decision.

537. It submits that the 2nd and 3rd Respondent who form the procuring entity recognize the 4th Respondent as a bidder at paragraph 21 of their Replying Affidavit dated 9.9.2025.

538. The 4th Respondent submitted their bid through the e-procurement system and the same is confirmed by the email in protest that was lodged at the time of the tender opening demonstrating that they had indeed lodged our bid as required. This is evidenced by its annexures marked YD-06A and YD-06B.

539. The Tender Opening Committee admitted the 4thRespondent's bid as one of the 10 Tenderer and the misunderstanding on the issue of failure to submit the bid through the e-Procurement portal was resolved and was, therefore, moot before the 1st Respondent.

540. The 4th Respondent was duly evaluated at the preliminary evaluation stage, the two technical evaluation stages, sample testing and results and finally the financial evaluation stage.

541. Without prejudice to the foregoing, it submits that any dispute for any breach of duty by the 2nd and 3rd Respondent arising during the tender opening and being raised at this stage of the tender dispute is time barred under Section 167 (1) of the Procurement Act. Reliance shall be placed in the Court of Appeal in the case of **Public Procurement Administrative Board v Four M Insurance Brokers Limited and 3 others (Civil Appeal E1009 of 2023) [2024] KECA 79 (KLR) (9 February 2024) (Judgment).**

542. It submits that this is an invitation to the court to conduct a merit review Reliance is placed in the Supreme Court judgment in Praxedes Saisi (Supra).

543. In submitting whether the 1st Respondent's decision dated 19th August 2025 is ultra vires as the Board did not have jurisdiction to hear and determine a Request for Review filed by a party that was not a bidder under Category 2.

544. The Applicant is a challenging the findings of the 1st Respondent based on irrationality and/or illegality and bias as grounds for review.

545. In **Republic v Public Procurement Administrative Review Board Ex parte Meru University of Science and Technology; M/S Aaki Consultants Architects and Urban Designers (Interested Party) [2019] eKLR** the Court held that;

"the test of Wednesbury unreasonableness has been stated to be that the impugned decision must be "objectively so devoid of any plausible justification that no reasonable body of persons could have reached it and that the impugned decision had to be "verging on absurdity" in order for it to be vitiated."

546. Under Section 7(2) (i) of the Fair Administrative Action Act:

"A court or tribunal under subsection (1) may review an administrative action or decision, if- (i) the administrative action or decision is not rationally connected to- a) the purpose for which it was taken; (b) the purpose of the empowering provision;(c) the information before the administrator; or (d) the reasons given for it by the administrator."

547. The 4th Respondent had challenged the mode of award/evaluation and at paragraph 212 of the impugned decision, the 1st Respondent applied the mode of evaluation as per the tender document and tabulated its observations.

548. It submits that it is not true that by doing so, the Review Board endorsed the evaluation criteria as being compliant with Article 227 and Section 86 of the Procurement Act as implied by the Applicant, which is a clear misapprehension of the 1st Respondent's decision.

549. It submits that the question of contradictory findings by the 1st Respondent cannot arise.

550. The 4th Respondent had joined issue with the application of the stated mode of evaluation at paragraph 87 of its written submissions before the 1st respondent and the substance of the argument can be paraphrased in the following manner:

550.1 ITT 33.2 provided that evaluation shall be done per Lot while ITT 40 provided that Each successful bidder will be awarded one lot per category for category two (2) and category three (3) based on their eligibility, subject to (e) and (f) below. If a bidder emerges as the lowest in more than one lot, they will be awarded the lot with the highest quantity.

551.2 It meant that the restriction was on the award of more than one lot per category with Category 2 and 3 being distinct and separate. (See paragraph146 of the impugned decision) The interpretation by the 2nd and 3rd Respondent of this duty was an error of law.

The 2nd and 3rd Respondents (procuring entity) introduced new terms like “second lowest evaluated bidder,” “next lowest evaluated bidder,” to justify the employment of a flawed mode of evaluation that did not

comply with Section 86 of the Procurement Act. The goal posts kept shifting in the evaluation process. There was no simplicity or consistency.

551. The 4th Respondent's position was that the mode of evaluation for Category (2) and (3) was ambiguous and deliberately so. The mode of evaluation was capable of multiple meanings denying it consistency and transparency. It was convoluted and complicated so as to deny the 4th Respondent the benefit of a fair and transparent system. The 1st Respondent agreed with our submissions in this respect.

552. The 1st Respondent clearly justified the decision to find the mode of evaluation and its application unlawful and gave reasons for finding it opaque and not cost-effective after reviewing disputed facts and varied positions.

553. The Provisions of Section 80 and 86 of the Procurement Act were juxtaposed with the mandatory provisions of Article 227 of the Constitution and whether these findings were right or wrong, or whether another judicial body seized of the same disputed facts and law would come to a different finding or not, the impugned decision cannot be overturned in these judicial review proceedings.

554. It submits further, by reaching the conclusion that the mode of evaluation/award was opaque and unpredictable so as to offend the provisions of Article 227 of the Constitution, the 1st

Respondent considered the pleadings and submissions from all the parties before making the determination.

555. It submits that since the evaluation criteria or mode of award for both Category 2 and 3 was shared and interlinked, it would have been an absurd conclusion by the 1st Respondent to annul procurement proceedings for Category 3 and allow the 2nd and 3rdRespondent to proceed with the award of contracts for category 2 after finding that the shared mode of award was flawed and did not comply with Article 227 of the Constitution.

556. It submits that while finding that Categories 2 and 3 were distinct and separate is sound in law, the interlinked and shared mode of evaluation meant they could not be untangled.

557. It confirms that the outcomes of award in Category 2 affected the outcomes in Category 3 and it submits that there is no contradiction in the determination made by the 1stRespondent.

558. The 2nd and 3rd Respondents and the Applicant have clearly misapprehended the holding of the 1st Respondent in PPARB Application No. 89 of 2025 Tramex Mediquin Limited vs Chief Executive Officer Kenya Medical Supplies Agency and 3 Otherson the position that while two lots originated from the same tender, they remained distinct and separate when in that case, the different unbundled Lots had different evaluation

criteria and could be severed. This position was recently endorsed by the Court of Appeal in the same case.

559. It submits that it was within the realms of reasonableness and rationality to cancel and annul awards under category 2 and 3, which shared the same mode of evaluation/award after a finding that this shared mode of evaluation/award was ambiguous, unpredictable, opaque and didn't promote the Constitutional ideals of transparency and cost effectiveness.

560. It then proceeded to submit that the impugned decision so perverse, in defiance of logic that no reasonable quasi-judicial body would have arrived to it? Has the court has been supplied with something overwhelming to interfere?

561. The findings by the 1st Respondent in these circumstances cannot be opened up for a merit review, since it would be an invitation to relook at the pleadings.

562. In **Republic v Public Procurement Administrative Review Board; Lake Victoria North Water Works Development Agency and another (Interested Parties); Toddy Civil Engineering Company Limited (Ex parte Applicant) (Judicial Review E031 of 2023)** and recognizing its jurisdiction as espoused in the Praxedes Saisi case (supra) and cited at paragraph 45 of the Judgement stated as follows at paragraph 60-64:

"It is this court's view and that such evidence as set out in the Verifying Affidavit dated March 8, 2023 would best be attended to and/or canvassed on appeal and not by way of proceedings by way of Judicial Review which this Court'spowers are limited to. This Court also lacks the jurisdiction to analyze, review, or assess the contents of the memorandum of response, Amended Memorandum of Response as this form the primary documents that the Respondent would have analyzed while presiding over the request for review on merit which it didn't. This Court does not have the powers to determine who the highest bidder was. The power to do so rests elsewhere and it would lead to gross injustice to the litigants for this court to attempt to get into that arena. The court lacks the legislative capacity.

Issues of preliminary, financial or any other form of evaluations are governed by a totally different legislative structure and not this Court."

563. It is further submitted that from the pleadings, the Applicant is aggrieved by the decision of the 1st Respondent as the same exceeded its jurisdiction in purporting to apply sections 75,79, 86, 167 and 170 of the Procurement Act in blatant disregard of the laid down procurement procedures governing the procurement entity.

564. Relying on the Capital Markets Authority case cited above, it submits that the Court of Appeal found as follows on what constitutes procedural impropriety:

> *"Procedural impropriety generally encompasses two things: procedural ultra vires, where administrative decisions are challenged because a decision-maker has overlooked or failed to properly observe statutory procedural requirements; and common law rules of natural justice and fairness. Lord Diplock noted that "failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice, is a form of procedural impropriety."*

565. A keen review of the impugned Decision clearly shows the following:-

565.1 The 1st Respondent appreciated the law on addenda as expressed under section 75 of the Procurement Act and all the addenda to the tender document were mentioned, reviewed and properly applied in the impugned Decision.

565.2 The 1st Respondent appreciated the mode of evaluation at paragraph 212 of the impugned Decision

and it is not true that it failed to appreciate and take cognizance of section 79 and 86(1) of the Procurement Act to the extent that when the 2nd and 3rd Respondents issued various addenda, they never varied the mode of evaluation or award.

565.3 the 1st Respondent indeed found that the 4th Respondent was not a tenderer for Category 1 and 2 and clearly appreciated the provision of Section 167 (1) of the Procurement Act.

565.4 The 1st Respondent in inviting the Applicant to participate in the review proceedings despite the fact that the dispute related to Category 3 where it was not a successful bidder shows a clear appreciation of Section 170 of the Procurement Act.

565.5 The 1st Respondent is a specialised body that has wide powers as expressed under section 173 of the Procurement Act, which include annulment of entire tender proceedings for good cause that was shown in the impugned Decision.

566. It finally submits that the interrogation as to whether the 1st Respondent was right or wrong in annulling the entire tender would entail a process of analysing and reviewing evidence on disputed facts, a jurisdiction that the judicial review court lacks.

567. Reliance is placed on this court's decision in Republic v Public Procurement Administrative Review Board; Lake Victoria North Water Works Development Agency and another (Interested Parties); Toddy Civil Engineering Company Limited (Ex parte Applicant) (Judicial Review E031 of 2023).

JR. NO. E271 OF 2025

568. It is the Applicant's case that on 29th July 2025, Chint Meters and Electric Kenya Company Limited, the 2nd Respondent herein, filed Request for Review Application No. 85 of 2025 before the Respondent (hereinafter referred to as "Request for Review No. 85 of 2025"), seeking the following orders:

a. That the Public Procurement Administrative Review Board annuls and quashes the impugned procurement proceedings for non-compliance with the cited provisions of the Constitution, the statute, subsidiary law and the tender document.

b. That Public Procurement Administrative Review Board annuls and quashes the letter of intention to award dated 17.7.2025 and restrains the procuring entity from issuing award letters and contracts to the successful bidders.

c. That costs be awarded to the Applicant.

In the alternative

d. That the Public Procurement Administrative Review Board be pleased to review or direct the independent re-evaluation of the Applicant's bid by a fresh tender evaluation committee.

e. That the Public Procurement Administrative Review Board visits the local plants for all the successful bidders and Applicant to ascertain that they are local manufacturers and assemblies.

f. Such other orders that the Public Procurement Administrative Review Board may deem just and expedient.

569. On 19th August 2025, the 1st Respondent made the following final orders:

a. The award of lot 1 with respect to Category 1 in Tender No. KP1/9A.3/RT/14/24-25 – Supply of Single-Phase Smart Meters. (Local Manufacturers and Assemblers) issued to Smart Meter Technology Ltd by the 2nd Respondent is hereby cancelled and set aside.

b. The awards of lots 1, 2, 3 and 4 with respect to Category 2 in Tender No. KP1/9A.3/RT/14/24-25 – Supply of Single-Phase Smart Meters. (Local Manufacturers and Assemblers) issued to East Africa Meter Company Ltd, Hexing Technology Company Ltd, Inhemeter Africa Company Ltd, and Smart Meter Technology Ltd

respectively by the 2nd Respondent be and is hereby cancelled and set aside.

c. The awards of lots 1, 2 and 3 with respect to Category 3 in Tender No. KP1/9A.3/RT/14/24-25 – Supply of Single-Phase Smart Meters. (Local Manufacturers and Assemblers) issued to Abcos Industrial Ltd, Magnate Ventures Ltd and House of Procurement Limited respectively by the 2nd Respondent be and is hereby cancelled and set aside.

d. The Tender No. KP1/9A.3/RT/14/24-25 – Supply of Single-Phase Smart Meters. (Local Manufacturers and Assemblers) with respect to Category 1, 2, and 3 be and is hereby cancelled and set aside.

e. The 1st Respondent be and is hereby directed to re-tender the quantities of meters under Category 1, 2 and 3 afresh while taking into consideration the findings of the Board in this Decision.

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

570. The 1st Respondent, in its Decision, duly considered all the parties' pleadings, the following issues called for determination:

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

b) Whether the mode of award adopted in the subject tender, together with its application, was consistent with the requirements of the law.

c) Whether the Letters of Notification of Intention issued in the subject tender complied with Section 87 of the Act.

d) What orders the Board should issue in the circumstance.

571. The 1st Respondent began by first testing every preliminary objection against the **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696** standard (pure point of law, assumed facts), then only proceeded with those that actually met that threshold.

572. The Applicant contends that the 2nd Respondent lacked locus standi; however, the Board correctly rejected that argument. Under Section 167(1) of the Act, a candidate or tenderer acquires standing to seek review if it "claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity."

573. The statute does not demand proof of actual quantified loss at the threshold stage; it is enough that prejudice is pleaded as a consequence of the breach alleged.

574. The 1st Respondent found that the 2nd Respondent pleaded prejudice flowing from two breaches: that the Procuring Entity failed to disclose lot-specific outcomes in the Notifications of

Intention to Award, and that the Procuring Entity imposed an award cap of two categories per tenderer, a restriction alleged to undermine value for money.

575. It found that by pleading prejudice in this form, the 2nd Respondent demonstrated the requisite risk of suffering detriment. And that this is the very essence of "loss or damage" under Section 167(1) of the Act, since unfair or opaque evaluation erodes the Applicant's commercial opportunity and undermines legitimate expectation of a fair contest.

576. The 1stRespondent properly held that the 2nd Respondent had crossed the statutory standing threshold by linking pleaded breaches to pleaded prejudice.

577. It is its case that for challenges to the application of the award criteria, time ran from the Notifications of Intention to Award dated 17th July 2025; filing on 29th July 2025 was therefore on or about Day 12, within time and thus within jurisdiction.

578. Conversely, the site-visit complaint was deemed known by 1st July 2025 and, being filed on 29th July 2025, was time-barred, whereupon the 1st Respondent downed its tools.

579. This split holding proves the Board actively policed the boundaries of its jurisdiction. On confidentiality, the 1st Respondent interrogated the impugned affidavit paragraphs and found no confidential documents were exhibited; the

statements were matters of belief, and nothing in the record triggered Section 67 of the Act bar.

580. This finding removed any confidentiality-based inhibition on the Board's competence to hear the review.

581. Under Section 170 of the Act: successful tenderers were invited and participated; non-joinder of a particular entity that was not a successful tenderer in the Applicant's category was not fatal.

582. This ensured all mandatory parties were before the Board to the extent required, again, a jurisdiction-affirming, not jurisdiction-defeating, conclusion.

583. On the award criteria The Board scrutinized ITT 40 of the Tender Document together with Addendum No. 1 dated 13th June 2025 and noted that the Procuring Entity adopted criteria that were neither transparent nor predictable.

584. Specifically, the award mechanism provided no clear basis upon which tenderers could ascertain in advance how lots would be distributed or capped across categories.

585. Under Section 86(1) of the Act, the award of tenders must be made to the tenderer with the lowest evaluated price in accordance with the evaluation criteria set out in the tender documents.

586. Equally, Article 227(1) of the Constitution requires that public procurement systems be fair, equitable, transparent, competitive and cost-effective.

587. The Board found that the Procuring Entity's criteria failed these standards, as they left room for arbitrariness and selective allocation rather than a predictable "lowest evaluated tender" outcome.

588. The 1st Respondent further found that the Notifications of Intention to Award, issued on 17th July 2025, did not comply with Section 87(3) of the Act.

589. That provision requires a notification to state: the name of the successful tenderer, the tender price, and the reason why an unsuccessful tender was not successful.

590. The Notifications in question omitted critical particulars, including lot-specific results and unit prices, thereby denying tenderers essential information needed to assess compliance and decide whether to exercise their statutory right to review.

591. This omission was not a mere procedural lapse but a substantive breach that went to the heart of transparency and accountability.

592. The 1st Respondent also found that due diligence was conducted selectively on some tenderers but not on others, undermining the uniformity of the evaluation process.

Selective application of due diligence compounds opacity and violates the equal treatment requirement under procurement law.

593. On the strength of these findings, the 1st Respondent held that the award criteria and notifications were unlawful and incapable of supporting a valid award.

594. Section 173 of the Act, which empowers it to annul anything done in the procurement process that contravenes the law and to give consequential directions.

595. In the event this Honourable Court finds that the Applicant's Application is merited, we respectfully urge the Court, in accordance with Section 175(7) of the Act, to disallow the prayer on costs. The said section is clear that, in the event the Decision of the Respondent is set aside, no costs shall be awarded to the parties.

The 2nd Respondent's Case;

596. It opposes the Notice of Motion dated 1.9.2025. The 2nd Respondent only participated in Category 3 of the tender where the 1st, 2nd ….

597. The Applicant herein was awarded the tender under Category 2 Lot 2 and as detailed under paragraph 212 of the impugned decision of the 1st Respondent, it was the "next lowest evaluated bidder" with a unit price of Kshs. 7,800 for the

tender item while the lowest evaluated bidder m/s East Africa Meter Company Limited had quoted a unit price of Kshs. 7,410.

598. In Court of Appeal case of OJSC Power Machines Limited, TransCentury Limited and Civicon Limited (Consortium) vs. Public Procurement Administrative Review Board and 2 Others as cited in the High Court decision of Republic v Public Procurement Administrative Review Board; Principal Secretary, State Department of Interior, Ministry of Interior and Co-ordination of National Government (Interested Party); Exparte Applicant CMC Motors Group Limited [2020] eKLR it was stated that: -

> *"Save for a limited scope, which we shall return to later, the court, considering a judicial review application, must never consider its role as appellate court and must avoid any temptation to go into the substance of the impugned decision itself or to ask questions, whether there was or there was no sufficient evidence to support the decision of the public body concerned. It is not for the court or individual judges to substitute their opinion for that of the public body constituted by law to decide the matter in question.*

See Republic vs. Kenya Revenue Authority ex parte Yaya Towers Limited (2008) Misc. Civil Appl. No. 374 of 2006.

In judicial review proceedings, the mere fact that the public body's decision was based on insufficient evidence, or on misapplication of evidence, cannot be a ground granting judicial review remedies. Whether that decision was right or not, the affected party ought to challenge it on appeal. In reaching its determination, it must, however, be recognized that a tribunal or statutory body or authority has jurisdiction to err and the mere fact that in the course of its inquiry it errs on the merits is not a ground for quashing the decision by way of judicial review as opposed to an appeal. It is only an appellate tribunal which is empowered and in fact enjoined in cases of the first appeal to re-evaluate the evidence presented at the first instance and arrive at its own decision on facts. Whereas a decision may properly be overturned on an appeal, it does not necessarily qualify as a candidate for juridical review. See East African Railways Corp. vs. Anthony Sefu Far-Es-Salaam (1973) EA 327."

599. The Applicant's Originating Motion is essentially an Appeal clothed in Judicial Review garb.

600. The 4th Respondent is a duly registered private limited liability company and a local manufacturer of smart single-phase meters who has incurred huge capital investments to set up a state-of-the-art manufacturing plant located at Graylands Park Phase 6 Warehouse M15M16, Athi River, Machakos County, which received certification from the 4th Respondent on 12.11.2024 as evidenced by a letter dated 12.11.2024.

601. The 4th Respondent is a tenderer within the meaning of Section 2 of the Public Procurement and Asset Disposal Act (hereinafter "the Procurement Act") having responded to the 1st Respondent's invitation for bids under tender KP1/9A.3/RT/14/24-25 of 11th JUNE 2025 FOR SUPPLY OF SINGLE-PHASE METERS (LOCAL MANUFACTURERS AND ASSEMBLIES) through the e-procurement portal.

602. The 2nd Respondent maintains that it was a tenderer for tender KP1/9A.3/RT/14/24-25 of 11TH JUNE 2025 FOR SUPPLY OF SINGLE-PHASE METERS (LOCAL MANUFACTURERS AND ASSEMBLIES) and not just in category 3.

603. Thereof as advanced by the Applicant who is well aware that there was only one invitation to tender, one tender document, one tender opening meeting, one evaluation process based on the same evaluation criteria and one notification of award making the various categories and lots intertwined and interlinked.

604. On 17.7.2025, the 3rd and 4th Respondent through a notification of letter of award informed the 2nd Respondent that they were an unsuccessful bidder for the reason of unresponsiveness because uncompetitive prices.

605. The Notification of Award precipitated a tender dispute that culminated with the filing of the Request for Review Application No. 85 of 2025 by the 2nd Respondent on 29.7.2025 before the 1stRespondent that was determined on the 19.8.2025 finding that the tender process was legally flawed for various reasons and proceeded to annul it with the 3rd and 4th Respondents ordered to re-advertise and/or re-tender for the smart single-phase meters.

606. The 1st Respondent's decision, the Applicant filed the instant Application which the 2nd Respondent opposes.

607. It is its case that in the Notice of Motion, the Applicant makes a broad allegation that the 1st Respondent committed "an illegality in interpreting the entire procurement laws, tender document, public procurement and Asset Disposal Act, the Fair Administrative Action Act, principles of natural justice and the Constitution with no specific allegation on the actual legal provision that was the subject of the illegality or irregularity.

608. That it argies denies the 2nd Respondent the opportunity to respond to the accusations leveled against the 1st Respondent. The 1st Respondent is generally accused of making a finding

that the mode of evaluation applied by the 3rd and 4th Respondents was unpredictable and inconsistent thereby failing to guarantee a transparent process.

609. The 1st Respondent is also accused of considering issues outside the scope of the request for review though these issues are not clearly mentioned by the Applicant. It is argued that this has the effect of denying the 2nd Respondent an opportunity to confront the alleged illegality. The 1st Respondent heard all the parties within Article 227 of the Constitution.

610. The 2nd Respondent had challenged the mode of award/evaluation and at paragraph 212 of the impugned decision, the 1st Respondent applied the mode of evaluation as per the tender document and tabulated its findings, it is not true that by doing so, the Review Board endorsed the evaluation criteria as being compliant with Article 227 and Section 86 of the Procurement Act as implied by the Applicant, which is a clear misapprehension of the 1st Respondent's decision.

611. The 2nd Respondent we had joined issue with the application of the stated mode of evaluation at paragraph 87 of our written submissions and the substance of the argument can be paraphrased: -

1) ITT 33.2 provided that evaluation shall be done per Lot while ITT 40 provides that Each successful bidder will be awarded one lot per category for category two (2) and category three (3) based on their eligibility, subject to (e) and (f) below. If a bidder emerges as the lowest in more than one lot, they will be awarded the lot with the highest quantity.

2) It means that the restriction was on the award of more than one lot per category with Category 2 and 3 being distinct and separate. (See paragraph 146 of the impugned decision) The interpretation by the 3rd and 4th Respondent of this duty was an error of law. By following this evidently illegal criteria:

    i. Inhemeter Africa Company Limited that was awarded Category 2 Lot 3 being the fourth lowest bidder should not have been awarded. Instead Magnate ventures that had the third lowest price would have been awarded the tender. There was no justification to move Magnate Ventures Limited to Category 3 Lot 2 since they were not the lowest bidder in Category 2 Lot 3 to benefit from the provision on award of a lot with more quantities.

    ii. If the mode of evaluation set out in the tender document was adhered to, Smart Meter Technology Limited being the fifth lowest bidder in Category 2

Lot 3 would not have been awarded the tender. The same would have been awarded to the fourth lowest evaluated bidder.

iii. If Magnate Ventures which appears to have been offering Kshs. 8,631 per unit had been awarded the 50,000 units in Category 2 Lot 3 the 2nd Respondent would have saved money since the awarded company Inhemeter Africa Company Limited had offered a price of Kshs. 10,530 per unit to win the bid.

iv. If the evaluation criteria set out in the tender document had been adhered to, Smart Meter Technology would not have been awarded the 35,000 units for category 2 Lot 3 at the very high Kshs. 10,400 per unit.

v. With the Criteria set out in the amendment to ITT40 being clear that evaluation was to be done per Lot with the restriction that the lowest bidder in every category cannot be awarded twice, it was imperative that in category 3, the bids be evaluated independently from Category 2 without any decisions made in category 2 affecting the outcomes in category 3. This was not done.

3) The 3rd Interested Party, Abcos Industries Limited, should not have been awarded Category 3 Lot 2 since it was not the lowest evaluated bid in that category. The reason given for the award was they were the lowest evaluated bidder that was not awarded in category 2, a reason not supported by the evaluation mode set out in the tender document.

4) The 1st Interested Party, Magnate Ventures Limited was awarded Category 2 lot 2 yet they were not the lowest evaluated bidder in terms of price.

5) The 2nd Interested Party, House of Procurement were not the lowest evaluated price when they were awarded Category 3 Lot 3. The reason that they were the lowest evaluated bidder not awarded in category 2 was an extraneous consideration that is not supported by the tender document. The same bogus reason was given for awarding Abcos Industries Limited.

6) The procuring entity introduced new terms like “second lowest evaluated bidder,” “next lowest evaluated bidder,” to justify the employment of a flawed mode of evaluation that did not comply with Section 86 of the Procurement Act.

7) The goal posts kept shifting in the evaluation process. There was no simplicity or consistency.

612. The 2nd Respondent's position was that the mode of evaluation for Category (2) and (3) was ambiguous and deliberately so. The mode of evaluation was capable of multiple meanings denying it consistency and transparency. It was convoluted and complicated so as to deny some the 2nd Respondent the benefit of a fair and transparent system.

613. The 1st Respondent agreed with the 2nd Respondents submissions in this respect. The 1stRespondent clearly justified the decision to find the mode of evaluation and its application unlawful and gave reasons for finding it opaque and not cost-effective. The findings by the 1st Respondent in these circumstances cannot be opened up for a merit review.

Irrationality/unreasonableness/contradictions;

614. The Applicant has grossly misunderstood the import of paragraph 212 as read with paragraph 213-216 of the impugned decision since it is clear that there was no endorsement of the of the mode of evaluation/award and all the 1st Respondent did was to summarize the findings of the evaluation committee as contained in the evaluation report.

615. The threshold for finding a decision of a public body as being irrational and/or unreasonable is a high one and has been the subject of many court decisions as well as having a statutory underpinning under the Fair Administrative Action Act.

616. It submits that the settled test for unreasonableness. In Republic v Public Procurement Administrative Review Board Exparte Meru University of Science and Technology; M/S Aaki Consultants Architects and Urban Designers (Interested Party) [2019] eKLR the Court held that;

> *"The test of Wednesbury unreasonableness has been stated to be that the impugned decision must be "objectively so devoid of any plausible justification that no reasonable body of persons could have reached it and that the impugned decision had to be "verging on absurdity" in order for it to be vitiated." It also relies on Prasad v Minister for Immigration {1985} 6 FCR 155."*

617. Under Section 7(2) (i) of the Fair Administrative Action Act, "A court or tribunal under subsection (1) may review an administrative action or decision, if- (i) the administrative action or decision is not rationally connected to- a) the purpose for which it was taken; (b) the purpose of the empowering provision;(c) the information before the administrator; or (d) the reasons given for it by the administrator."

618. The contentions made by the Applicant are an invitation for a merit review of a decision that was made within the confines of the Procurement Act, regulations made thereunder and the Constitution after considering the pleadings and submissions of all parties.

Procedural impropriety/failure to follow due process;

619. Procedural impropriety as a ground for review was the subject of interpretation in **Republic v Public Procurement Administrative Review Board; Principal Secretary, State Department of Interior, Ministry of Interior and Co-ordination of National Government (Interested Party); Ex Parte Applicant CMC Motors Group Limited [2020] eKLR** where it was held that;

> *"The most basic rules of administrative law are first that decision makers may exercise only those powers which are conferred on them by law and, second, that they may exercise those powers only after compliance with such procedural prerequisites as exist. So long as administrators comply with these two rules, their decisions are safe."*

620. It argues that the Applicant did not plead with specificity and precision the substantive and procedural legal rules that were not observed or complied with. Inviting the court to review the entire record of the proceedings before the 1st Respondent in a fishing expedition.

621. By reaching the conclusion that the mode of evaluation/award was opaque and unpredictable so as to offend the provisions of Article 227 of the Constitution, the 1st Respondent considered

the pleadings and submissions from all the parties before making the determination.

622. There was no violation of due process of law or the breach of laws of natural justice and the 1st Respondent at all times exercised powers granted to it by Statute.

623. There was no violation of legitimate expectations in circumstances where a party was invited by the 1st Respondent to be heard and all the rules of procedure were followed to come to a decision that is clearly legal, rational and unreasonable.

The 3rd and 4th Respondents' Case;

They support the Notice of Motion dated 1st September 2025.

624. The 3rd and 4th Respondents are also aggrieved by the said decision for all the reasons elaborated in the succeeding paragraphs and as such are in support of the instant application.

625. The 3rd Respondent is the Accounting Officer of the 4th Respondent.

626. THAT the principal legislative framework governing the operations of the 4th Respondent is the Constitution of Kenya, 2010; Energy Act, 2019; Public Procurement and Asset Disposal Act, 2015; Public Procurement and Asset Disposal Regulations, 2020; Public Officers Ethics Act, CAP183; State

Corporations Act, CAP446 and Public Finance Management Act, 2012 among other laws.

627. The 4th Respondent is charged with the responsibility, as a distribution and retail supply licensee, of supplying consistent and steady electricity to millions of Kenyan consumers in their homes and to all their ventures.

628. For the 4th Respondent to perform its mandate efficiently, the 4threspondent procures energy meters for domestic and commercial customers.

629. Availability of meters is fundamental to supporting the 4th Respondent's revenue collection efforts and monitoring power usage.

630. The unavailability of energy meters translates to direct loss of revenue and affects the 4threspondent's ability to connect new consumers or undertake meter replacements as and when requested by the consumers.

631. Currently, there is an acute and urgent backlog of 420,000 energy meters to connect new consumers and replace the faulty and obsolete meters. 420,000 meters are required by critical and essential services providers such as hospitals, health centers, dispensaries, schools, government installations, telecommunications companies, enterprises, agricultural farms, domestic customers, among others, who have paid for

these services and are awaiting the supply of meters to enable them access electricity supply to their premises.

632. It is against this backdrop that the 3rd and 4th Respondents advertised the subject tender as a Restricted Limited Tender.

633. The segregation of this tender into distinct categories and lots was necessitated by the imperative to unbundle goods to foster competitiveness, to apportion and mitigate the procurement risks Within Regulation 154 of the Public Procurement and Asset Disposal Regulations 2020 which allows unbundling a category of goods in practicable quantities to ensure maximum participation.

634. The subject tender was open only to Local Manufacturers/ Assemblers with intent to promote the Buy Kenya Build Kenya Initiative which supports unbundling and preference and reservation outlined in section 155 of the PPADA which gives preference to articles manufactured or assembled in Kenya.

635. Addendum 1 provided the award criteria under its Appendix 1 which can be summarized as follows:

a. An award shall be to the tenderer(s) with the lowest evaluated price as per lot based on eligibility as stated in ITT 3.6 and bidders may quote for all or as many items in the various lots as per their eligibility.

b. Bidders with ready stock will be considered for award under category one (1) and any other category as long as their bid price is within the market price.

c. Every successful bidder will be awarded one lot per category for categories 2 and 3 based on their eligibility subject to:

    i. Subsequent lots shall be awarded sequentially until all the lots are allocated provided that the price of the subsequent qualified bidder is within the prevailing market price.

    ii. In case there is no other qualified subsequent tenderer for the unallocated lot(s) in a given category, the award will revert to the tenderer with the lowest evaluated price per lot, notwithstanding the above condition.

d. If a bidder emerges as the lowest in more than one lot, they will be awarded the lot with the highest quantity.

636. Ten (10) bidders, including the Applicant herein, expressed their interest in participating in the tender process and submitted their respective bids. The Tender was opened on 1st July 2025 at 10:30 a.m. at Stima Plaza, the 4th Respondent's headquarters.

637. at the conclusion of the tender evaluation process on 15th July 2025, the Evaluation Committee recommended that the tender be awarded as per the award criteria in Appendix 1 of Addendum 1

638. In respect of the 2nd Respondent herein, M/S Chint Meters and Electric Kenya Company Limited, the Evaluation Committee found that the said bid was non-responsive because of the price offered, which was not competitive when compared with the other bids that were ultimately found responsive. This was communicated to all the bidders vide a Letter of Notification of Intention to Award dated 17th July 2025.

639. On 29th July 2025, the 2nd Respondent filed a Request for Review No. 85 of 2025 dated 28th July 2025 seeking inter alia to nullify the decision of the 3rd and 4th Respondent's herein, which decision was communicated through the Letter of Notification of Intention to Award dated 17th July 2025.

640. The 1st Respondent delivered its decision on 19th August 2025. The 1st Respondent inter alia cancelled the awards.

641. The 3rd and 4th Respondents are aggrieved by the whole of the said decision in so far as the same is tainted with illegality, error of law and irrationality as substantively argued by the Applicant herein and for the additional reasons directly

affecting the 3rd and 4th Respondents in the succeeding paragraphs.

642. The 1st Respondent misinterpreted the provisions of section 167(1) of the Public Procurement and Asset Disposal Act vis-à-vis the 2nd Respondent's pleadings and arrived at a decision which was ultra vires, illegal and irrational.

643. The 3rd and 4th Respondents aver that the 1st Respondent misinterpreted the provisions of section 87 of the Public Procurement and Asset Disposal Act as read together with Regulation 82 of the Public Procurement and Asset Disposal Regulations 2020 vis-à-vis the 3rd and 4thRespondents Letter of Notification of Intention to Award dated 17th July 2025 and arrived at a decision which was illegal, unreasonable and irrational.

644. The 1st Respondent misinterpreted the provisions of sections 80 and 86 of the Public Procurement and Asset Disposal Act as read together with the tender document vis-à-vis the award of the 3rd and 4th Respondents evaluation committee and arrived at a decision which was illegal, unreasonable and irrational.

645. The 3rd and 4th Respondents aver that the 1stRespondent's decision to cancel the whole tender despite the award criteria for the various categories being separate and distinct and also the fact that the 4th Respondent bid only for category 3 was unreasonable and irrational.

646. The 1st Respondent acted irrationally by failing to discern that energy meters form the backbone of the 4thRespondent's financial sustainability, as meters are critical components in registering sales and collection of revenues and that a shortage of energy meters will, therefore, adversely affect the 4th Respondent's financial health and overall operations, with the further consequence that any prolonged delay is projected to occasion revenue losses of at least Ksh. 1.274 billion per month (being Ksh. 2,000 per meter per month multiplied by approximately 637,000 meters [which are the subject of this procurement]).

647. The 1st Respondent acted irrationally by failing to take into account that the total lead time for the procurement of meters is approximately six (6) months, which period encompasses the tendering process, assembly by local manufacturers and delivery to the 4th Respondent's stores and that, consequently, the cancellation of the aforesaid tender will have the long-term effect of causing acute shortages to the detriment of the innocent public members who require the energy meters.

648. The 1st Respondent acted irrationally by failing to appreciate that the tender was for a total of 637,000 meters and based on an average revenue of Ksh. 2,000 per meter, the consequential loss amounts to approximately Ksh. 1.274 billion per month and further, that should the procurement process be delayed

by an additional six (6) months, the cumulative loss would exceed Ksh. 7 billion.

649. The 1st Respondent acted illegally by ordering a retender, whereas the procurement of meters and other procurements by the 4th Respondent and indeed other public bodies are undertaken on an annual basis, guided strictly by the annual procurement plan and budget for each respective financial year and upon the lapse of a financial year, the 4thRespondent and other public bodies ceases to utilize the procurement plan and the corresponding budget of that financial year and procurement activities thereafter are conducted strictly in accordance with the procurement plan and budget of the succeeding financial year

650. The 1st Respondent acted irrationally by failing to appreciate that the lapse of the financial year results in loss of the allocated quantities and budget and that the process of obtaining a fresh budget prior to procuring the said quantities is a protracted bureaucratic exercise which cannot be accommodated in this instance given the urgency of the requirements, the stocks in some categories having already been exhausted while others are on the verge of exhaustion.

651. The decision of the 1st Respondent is materially influenced by an error of law, in that if there existed any ambiguity in the evaluation criteria in the tender document, the bidders were at liberty to seek clarifications during the pendency of the tender

process, which they failed to do and as such, any allegation of ambiguity at the Review stage amounts to an afterthought.

652. The 1st Respondent acted in a manner that amounted to procedural impropriety by disregarding the submissions made by the 3rd and 4th Respondents during the hearing held on 13th August 2025, concerning the unbundling of procurements pursuant to Regulation 154 of the Public Procurement and Asset Disposal Regulations, 2020.

653. The 1st Respondent completely ignoring the express provisions of the tender document which stipulated that due diligence, including factory inspection, would only be mandatory for local manufacturers and assemblers who had not previously supplied meters to the 4th Respondent, namely the 2ndRespondent and Abcos Industrial Limited and House of Procurement Limited- the 2nd and 3rd interested parties herein.

654. The 1st Respondent further disregarded the strict provisions of section 80 (2) of the Public Procurement and Asset Disposal Act, which stipulates that evaluation must strictly conform to the tender document and not to the 1stRespondent’s subjective views of “best practice.”

655. The 1st Respondent finding that the award criteria was ambiguous, it thereby lacked jurisdiction to entertain the matter any further, as the purported ambiguity existed

throughout the entire bidding period prior to the closure of the tender on 1st July 2025, as all the bidders were fully aware of this criteria when perusing the tender document and willingly submitted their bids in the context of that award criteria and any contestation on the award criteria ought to have been raised by 15th July 2025 (which was never done by any of the bidders), however, in view of the fact that PPARB Application No. 85 of 2025 was filed on 29th July 2025, the 1st Respondent, in proceeding as it did, committed an error of law.

656. The 1st Respondent committed a serious error of law in failing to consider that the non-joinder of the Applicant herein as an interested party in PPARB Application No. 85 of 2025 was fatal given that the Applicant herein was not a successful tenderer under category 3; yet the 1st Respondent simultaneously found that the award criteria for all the 3 categories were interlinked and therefore ought to have held that the Applicant herein was a necessary party, having participated and been awarded in category 2 Lot 3.

The Applicant's Submissions;

657. In addressing the issue whether the 1st Respondent's decision of 19th August, 2025 was Irregular and/or Illegal, the Applicant submits that what is in dispute is the process of the decision making resulting in canceling and setting aside the tender award and directing the 3rd Respondent herein to re-

tender the quantities of meters under Category 1, 2 and 3 afresh while taking into consideration the findings of the Board in this Decision.

658. Reliance is placed in the case of **Republic vs Attorney General And 4 Others Ex-Parte Diamond Hashim Lalji And Ahmed Hasham Lalji** (2014) e KLR. The court deliberated the scope of judicial review as follows:

> *"...Judicial review applications do not deal with the merits of the case but only with the process. In other words judicial review only determines whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect urges the Court to determine the merits of two or more different versions presented by the parties the Court would not have jurisdiction in a judicial review proceeding to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved...The Court in judicial review proceedings is mainly concerned with the question of fairness to the applicant in the institution..."*

659. It submits that that the 1st Respondent made an illegality in misinterpreting the entire procurement laws, Tender Document, Public Procurement and Asset Disposal Act Sections 28, 80, 82, 86, 87 and167(1), the Fair Administration Actions Act, principles of natural justice, the Constitution vis-a- vis the ex-parte applicant's, respondents and interested parties pleadings and thus arriving at an irregular, making errors of law and an illegal decision.

660. In the case of **Pastoli Vs Kabale District Local Government Council And Others(2008)2 EA 300 Cited In Republic V Medical Practitioners And Dentists Board Ex-Parte Kenyatta National Hospital Board And Another [2017] eKLR** the Court defined an illegality as follows;

> *"...Illegality is when the decision-making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality...."*

661. The observation that the mode of award applied was unpredictable and inconsistent, thereby failing to guarantee a transparent procurement process; By way of illustration, the lowest evaluated bidder was not assured of award in any given lot, owing to the contradictory and convoluted nature of the mode of award, which rendered the outcome uncertain and

incapable of objective prediction is contradictory to its findings and therefore not only illegal but also a nullity.

662. Reliance is placed on the case of MACFOY VS UNITED AFRICA COMPANY LTD [1961] 3 ALL ER1169 AT 1172 which was cited authoritatively in REPUBLIC V MEDICAL PRACTIONERS AND DENTISTS BOARD EX-PARTE KENYATTA NATIONAL HOSPITAL BOARD and ANOTHER [2017] eKLR Where the court held that:

"If an act is void, it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so."

663. Section 167 of the PPADA 2015 is clear on when a candidate can invoke the 1st Respondent's jurisdiction. It states that;

" 167. Request for a review

1) Subject to the provisions of this part, a candidate or a tenderer, who claims to have suffered or risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within 14 days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed…"

664. It submits that the request for review by the 2nd Respondent flaunted the foregoing express provision of PPADA since it neither pleaded nor demonstrated any prejudice or specific loss or damage suffered or likely to have been suffered.

665. The 2ndRespondent failed to give the particulars of breach (if any) and the request as it is does not constitute a claim of having suffered a loss or risk/ damage or potential loss under the foregoing provision.

666. To this extent the 2ndRespondent lacked the requisite locus standi as objected by the 3rd and 4th respondents herein to pursue the instant impugned review.

667. The 1st Respondent perversely and without jurisdiction proceeded to clothe itself with power to entertain matters touching on Categories 1 and 2- which Categories the 3rd Interested Party had no locus.

668. This is clearly, an assumption of jurisdiction by the 1stRespondent contrary to the Mandatory provisions of Section 167 (1) of the PPADA.

669. It relies on the decision from MOMBASA JAMES OYONDI T/A BETOYO CONTRACTORS and ANOTHER VS ELROBA ENTERPRISES LIMITED and OTHERS (2019) e KLR Mombasa Civil Appeal No. 131 of 2018 which was a constitutional petition arising from a procuring entity, the Court held as

follows regarding Section 167(1) of PPADA and lack of locus standi;

"It is not in dispute that the appellants never pleaded nor attempted to show themselves as having suffered loss or damage or that they were likely to suffer any loss or damage as a result of any breach of duty by KPA.This is a threshold requirement for any who would file a review before Board in terms of Section 167(1) of the PPADA;

" 167. Request for a review

1) Subject to the provisions of this part, a candidate or a tenderer, who claims to have suffered or risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within 14 days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed…

It seems plain to us that in order to file a review application, a candidate or tendered must at the very least claim to have suffered or to be at risk of suffering loss or damage. It is not any and every candidate or tenderer who has a right to file for administrative review. Were that the case, the Board would be inundated by an avalanche of frivolous review applications. There is sound reason why only candidates or tenderers who

have legitimate grievances may approach the Board. In the present case, it is common ground that the appellants were eliminated at the very preliminary stages of the procurement process, having failed to make it even to the evaluation stage. They therefore were, with respect, the kind of busy bodies that Section 167(1) was designed of keep out. The Board ought to have ruled them to have no locus, and the Learned Judge was right to reverse it failing to do so. We have no difficulty upholding the Learned Judge. Having come to those conclusions on the locus standi of the appellants, and having found that the Learned Judge properly quashed the Board's proceedings and decision, we think it is only logical that the dispositive orders made by the Learned Judge be also upheld. The tendering process was complete and successful candidates, the petitioners, were known. The process had been delayed by all manner of factors including at the last, the review proceedings filed by the appellants. It was only logical and fair and in the interests of sound management of public resources, that the process be completed, hence the direction by the Learned Judge that the contracts be executed. We see no error in that direction…

The upshot is that this appeal is dismissed…".

670. ii. Whether the 1st Respondent's decision of 19th August, 2025 was marred with irrationality, unreasonableness and

contradictions therein reliance is placed in the case of COUNCIL FOR CIVIL SERVICE UNIONS VS. MINISTER FOR CIVIL SERVICE [1985] A.C. 374, at which was cited authoritatively by G. V Odunga J. in the case of REPUBLIC VS INSPECTOR GENERAL OF POLICE DAVID KIMAIYO, EX-PARTE AKITCH OKOLA

"...By 'irrationality' I mean what can now be succinctly referred to as "Wednesbury unreasonableness'.....it applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it ..."

671. It submits that the Board acted arbitrary and irrationally in its interpretation and annulling the tenders respectively despite the fact that the Board found the award for lot 2 category 2 to be in full compliance with the mode of award outlined in the tender.

672. This has not been disputed by the respondents in their replies. The entire decision was thus entirely based on the non-logical and unreasonable assumption of both facts and law for annulling and canceling the entire tender of the quantities for the entire categories.

673. It is submitted that the said decision is unreasonable, irrational, marred with illegalities and contrary to the Tender

Document, Public Procurement and Asset Disposal Act, the Fair Administration Actions Act and the Constitution.

674. An example, is canceling and annulling the entire tender despite the fact that the award criteria for the various categories being separate and distinct from each category which is also noted by the 1st respondents decision of 19thAugust, 2025 at paragraph 146.

675. There was therefore no evidence or insufficient evidence whatsoever to support the cancellation and annulment of the entire tender process.

676. It is further submitted that the failure by the 1st respondent to take all relevant considerations into account, pleadings, tender documents and the relevant provisions of the law and proceeded to act on the basis of illegal delegation is totally unreasonable and in bad faith and its decision ought to be quashed in its entirety.

677. It is submitted that the Board's decision to cancel the award was unreasonable, irrational or disproportionate as cancellation of the same possess a bigger financial burden on the innocent members of the public not only due to the delay but also due to the legitimate expectation and revenue loss that flows from the impugned decision of the 1strespondent rendered on 19th August, 2025.

678. On the question whether the 1st Respondent's decision was marred with Procedural impropriety and failed to follow due process the applicant submits that the 1st Respondent herein acted unprocedural and considered extraneous matters and failed to follow due process whereas it had already found that the ex-parte applicant herein was the next lowest evaluated bidder for the awarded lot and consistent with addendum criteria.

679. It submits that the 1st Respondent gravely misdirected itself since the Request for review was strictly confined in Category 3, the only category in which the 3rd Interested Party had submitted its bid.

680. There was no specific findings made by the 1st respondent against the ex-parte applicant's bid. It submits that the impugned decision is a result of the Respondent's breach of the Tender Document, Public Procurement and Disposal Act, Fair Administration Actions Act and the Constitution of Kenya 2010.

681. It places reliance in the case of **Republic Vs Kenya Medical Practitioners and Dentists Board and 2 Others (2013) eKLR** where the Honourable Court was not satisfied that the Respondent therein, conducted itself in a manner that met the criteria set out in Article 47 of the Constitution with respect to procedural fairness hence certiorari was issued to quash its decision. Hon. Jutice G.V Odunga held as follow;

"1 An order of certiorari is hereby issued removing the decision by the Medical Services and Dentists Board issued on 23rd May 2011 in PIC Case No. 13 of 2009 dismissing the applicants' complaint against Dr. Hooker, Prof. Wasuna and the Aga Khan Hospital to this Court and is hereby quashed.

2 An order of mandamus is hereby issued compelling the Respondent to proceed with the hearing of the ex parte applicants' case in accordance with the law.

3 The costs of this application are awarded to the ex parte applicants".

682. It submits that the 1st respondent being a Central Independent Procurement Appeals Review Board established under Section 27 (1) of the Public Procurement and Asset Disposal Act (Revised Edition 2022), it ought to follow a laid down procedure in interpreting and applying the entire procurement laws, Tender document, public procurement and Asset Disposal Act, the Fair Administration Actions Act, principles of natural justice and the Constitution of Kenya 2010 which was not followed at all thus arriving at an irregular and biased decision.

683. On 29th July 2025, Chint Meters and Electric Kenya Company Limited, the 2nd Respondent herein, filed Request for Review Application No. 85 of 2025 before the Respondent (hereinafter

referred to as “Request for Review No. 85 of 2025”), seeking the following orders:

A) that the Public Procurement Administrative Review Board annuls and quashes the impugned procurement proceedings for non-compliance with the cited provisions of the Constitution, the statute, subsidiary law and the tender document.
B) THAT Public Procurement Administrative Review Board annuls and quashes the letter of intention to award dated 17.7.2025 and restrains the procuring entity from issuing award letters and contracts to the successful bidders.
C) THAT costs be awarded to the Applicant.

In the alternative;

D) THAT the Public Procurement Administrative Review Board be pleased to review or direct the independent re-evaluation of the Applicant’s bid by a fresh tender evaluation committee.

E) THAT the Public Procurement Administrative Review Board visits the local plants for all the successful bidders and applicant to ascertain that they are local manufacturers and assemblies.

F) Such other orders that the Public Procurement Administrative Review Board may deem just and expedient.

684. On 19th August 2025, the 1st Respondent made the following final orders:

a) The award of lot 1 with respect to Category 1 in Tender No. KP1/9A.3/RT/14/24-25 – Supply of Single-Phase Smart Meters. (Local Manufacturers and Assemblers) issued to Smart Meter Technology Ltd by the 2nd Respondent is hereby cancelled and set aside.

b) The awards of lots 1, 2, 3 and 4 with respect to Category 2 in Tender No. KP1/9A.3/RT/14/24-25 – Supply of Single Phase Smart Meters. (Local Manufacturers and Assemblers) issued to East Africa Meter Company Ltd, Hexing Technology Company Ltd, Inhemeter Africa Company Ltd, and Smart Meter Technology Ltd respectively by the 2nd Respondent be and is hereby cancelled and set aside.

c) The awards of lots 1, 2 and 3 with respect to Category 3 in Tender No. KP1/9A.3/RT/14/24-25 – Supply of Single Phase Smart Meters. (Local Manufacturers and Assemblers) issued to Abcos

Industrial Ltd, Magnate Ventures Ltd and House of Procurement Limited respectively by the 2nd Respondent be and is hereby cancelled and set aside.

d) The Tender No. KP1/9A.3/RT/14/24-25 – Supply of Single Phase Smart Meters. (Local Manufacturers and Assemblers) with respect to Category 1, 2, and 3 be and is hereby cancelled and set aside.

e) The 1st Respondent be and is hereby directed to re-tender the quantities of meters under Category 1, 2 and 3 afresh while taking into consideration the findings of the Board in this Decision.

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

685. The 1st Respondent, in its Decision, duly considered all the parties' pleadings, the following issues called for determination:

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

b) Whether the mode of award adopted in the subject tender, together with its application, was consistent with the requirements of the law.

c) Whether the Letters of Notification of Intention issued in the subject tender complied with Section 87 of the Act.

d) What orders the Board should issue in the circumstance.

686. The 1st Respondent began by first testing every preliminary objection against the **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696** standard (pure point of law, assumed facts), then only proceeded with those that actually met that threshold.

687. The Applicant contends that the 2nd Respondent lacked locus standi; however, the Board correctly rejected that argument.

688. Under Section 167(1) of the Act, a candidate or tenderer acquires standing to seek review if it "claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity."

689. The statute does not demand proof of actual quantified loss at the threshold stage; it is enough that prejudice is pleaded as a consequence of the breach alleged.

690. The 1st Respondent found that the 2nd Respondent pleaded prejudice flowing from two breaches: that the Procuring Entity failed to disclose lot-specific outcomes in the Notifications of Intention to Award, and that the Procuring Entity imposed an

award cap of two categories per tenderer, a restriction alleged to undermine value for money.

691. It found that by pleading prejudice in this form, the 2ndRespondent demonstrated the requisite risk of suffering detriment.

692. And that this is the very essence of “loss or damage” under Section 167(1) of the Act, since unfair or opaque evaluation erodes the applicant’s commercial opportunity and undermines legitimate expectation of a fair contest.

693. The 1stRespondent properly held that the 2nd Respondent had crossed the statutory standing threshold by linking pleaded breaches to pleaded prejudice.

694. It is its case that for challenges to the application of the award criteria, time ran from the Notifications of Intention to Award dated 17th July 2025; filing on 29th July 2025 was therefore on or about Day 12, within time and thus within jurisdiction.

695. Conversely, the site-visit complaint was deemed known by 1st July 2025 and, being filed on 29th July 2025, was time-barred, whereupon the 1st Respondent downed its tools.

696. This split holding proves the Board actively policed the boundaries of its jurisdiction.

697. On the issue of confidentiality, the 1st Respondent interrogated the impugned affidavit paragraphs and found no

confidential documents were exhibited; the statements were matters of belief, and nothing in the record triggered Section 67 of the Act bar.

698. This finding removed any confidentiality-based inhibition on the Board's competence to hear the review. Under Section 170 of the Act: successful tenderers were invited and participated; non-joinder of a particular entity that was not a successful tenderer in the Applicant's category was not fatal.

699. This ensured all mandatory parties were before the Board to the extent required, again, a jurisdiction-affirming, not jurisdiction-defeating, conclusion.

700. On the question of the award criteria, The Board scrutinized ITT 40 of the Tender Document together with Addendum No. 1 dated 13th June 2025 and noted that the Procuring Entity adopted criteria that were neither transparent nor predictable.

701. Specifically, the award mechanism provided no clear basis upon which tenderers could ascertain in advance how lots would be distributed or capped across categories.

702. Under Section 86(1) of the Act, the award of tenders must be made to the tenderer with the lowest evaluated price in accordance with the evaluation criteria set out in the tender documents.

703. Equally, Article 227(1) of the Constitution requires that public procurement systems be fair, equitable, transparent, competitive and cost-effective.

704. The Board found that the Procuring Entity's criteria failed these standards, as they left room for arbitrariness and selective allocation rather than a predictable "lowest evaluated tender" outcome.

705. The 1st Respondent further found that the Notifications of Intention to Award, issued on 17th July 2025, did not comply with Section 87(3) of the Act.

706. That provision requires a notification to state: the name of the successful tenderer, the tender price, and the reason why an unsuccessful tender was not successful.

707. The Notifications in question omitted critical particulars, including lot-specific results and unit prices, thereby denying tenderers essential information needed to assess compliance and decide whether to exercise their statutory right to review.

708. This omission was not a mere procedural lapse but a substantive breach that went to the heart of transparency and accountability.

709. The 1st Respondent also found that due diligence was conducted selectively on some tenderers but not on others, undermining the uniformity of the evaluation process.

Selective application of due diligence compounds opacity and violates the equal treatment requirement under procurement law.

710. On the strength of these findings, the 1st Respondent held that the award criteria and notifications were unlawful and incapable of supporting a valid award.

711. Section 173 of the Act, which empowers it to annul anything done in the procurement process that contravenes the law and to give consequential directions.

712. It finally submits that in the event this Court finds that the Applicant's Application is merited, it respectfully urge the Court, in accordance with Section 175(7) of the Act, to disallow the prayer on costs.

The 2nd Respondent's Case;

713. The 2nd Respondent only participated in Category 3 of the tender where the 1st, 2nd.It argues that the Applicant herein was awarded the tender under Category 2 Lot 2 and as detailed under paragraph 212 of the impugned decision of the 1st Respondent, it was the "next lowest evaluated bidder" with a unit price of Kshs. 7,800 for the tender item while the lowest evaluated bidder m/s East Africa Meter Company Limited had quoted a unit price of Kshs. 7,410.

714. In Court of Appeal case of **OJSC Power Machines Limited, Tran Century Limited and Civicon Limited (Consortium) vs. Public Procurement Administrative Review Board and 2 Others** as cited in the High Court decision of **Republic v Public Procurement Administrative Review Board; Principal Secretary, State Department of Interior, Ministry of Interior and Co-ordination of National Government (Interested Party); Ex Parte Applicant CMC Motors Group Limited [2020] eKLR** it was stated that: -

> *"Save for a limited scope, which we shall return to later, the court, considering a judicial review application, must never consider its role as appellate court and must avoid any temptation to go into the substance of the impugned decision itself or to ask questions, whether there was or there was no sufficient evidence to support the decision of the public body concerned. It is not for the court or individual judges to substitute their opinion for that of the public body constituted by law to decide the matter in question. See Republic vs. Kenya Revenue Authority ex parte Yaya Towers Limited (2008) Misc. Civil Appl. No. 374 of 2006.*
>
> *In judicial review proceedings, the mere fact that the public body's decision was based on insufficient evidence, or on misapplication of evidence, cannot be a ground granting judicial review remedies. Whether that decision*

was right or not, the affected party ought to challenge it on appeal. In reaching its determination, it must, however, be recognized that a tribunal or statutory body or authority has jurisdiction to err and the mere fact that in the course of its inquiry it errs on the merits is not a ground for quashing the decision by way of judicial review as opposed to an appeal. It is only an appellate tribunal which is empowered and in fact enjoined in cases of the first appeal to re-evaluate the evidence presented at the first instance and arrive at its own decision on facts. Whereas a decision may properly be overturned on an appeal, it does not necessarily qualify as a candidate for juridical review. See East African Railways Corp. vs. Anthony Sefu Far-Es-Salaam (1973) EA 327."

715. The Applicant's Originating Motion is essentially an Appeal clothed in Judicial Review garb.

716. The 4th Respondent is a duly registered private limited liability company and a local manufacturer of smart single phase meters who has incurred huge capital investments to set up a state of the art manufacturing plant located at Graylands Park Phase 6 Warehouse M15M16, Athi River, Machakos County, which received certification from the 4th Respondent on 12.11.2024 as evidenced by a letter dated 12.11.2024.

717. The 4th Respondent is a tenderer within the meaning of Section 2 of the Public Procurement and Asset Disposal Act

(hereinafter “the Procurement Act”) having responded to the 1st Respondent’s invitation for bids under tender KP1/9A.3/RT/14/24-25 of 11th June 2025 For Supply of Single-Phase Meters (Local Manufacturers and Assemblies) through the e-procurement portal.

718. The 2nd Respondent maintains that he was a tenderer for tender KP1/9A.3/RT/14/24-25 of 11th June 2025 For Supply of Single Phase Meters (Local Manufacturers And Assemblies) and not just in category 3.

719. Thereof as advanced by the Applicant who is well aware that there was only one invitation to tender, one tender document, one tender opening meeting, one evaluation process based on the same evaluation criteria and one notification of award making the various categories and lots intertwined and interlinked.

720. On 17.7.2025, the 3rd and 4th Respondent through a notification of letter of award informed the 2nd Respondent that they were an unsuccessful bidder for the reason of unresponsiveness because uncompetitive prices.

721. The Notification of Award precipitated a tender dispute that culminated with the filing of the Request for Review Application No. 85 of 2025 by the 2nd Respondent on 29.7.2025 before the 1stRespondent that was determined on the 19.8.2025 finding that the tender process was legally

flawed for various reasons and proceeded to annul it with the 3rd and 4th Respondents ordered to re-advertise and/or re-tender for the smart single phase meters.

722. The 1st Respondent's decision, the Applicant filed the instant Application which the 2nd Respondent opposes.

723. It is its case that in the Notice of Motion, the Applicant makes a broad allegation that the 1st Respondent committed "an illegality in interpreting the entire procurement laws, tender document, public procurement and Asset Disposal Act, the Fair Administrative Action Act, principles of natural justice and the Constitution with no specific allegation on the actual legal provision that was the subject of the illegality or irregularity.

724. That it argues denies the 2nd Respondent the opportunity to respond to the accusations leveled against the 1st Respondent.

725. The 1st Respondent is generally accused of making a finding that the mode of evaluation applied by the 3rd and 4th Respondents was unpredictable and inconsistent thereby failing to guarantee a transparent process.

726. The 1st Respondent is also accused of considering issues outside the scope of the request for review though these issues are not clearly mentioned by the Applicant.

727. It is argued that this has the effect of denying the 2nd Respondent an opportunity to confront the alleged illegality.

728. The 1st Respondent heard all the parties within Article 227 of the Constitution.

729. The 2nd Respondent had challenged the mode of award/evaluation and at paragraph 212 of the impugned decision, the 1st Respondent applied the mode of evaluation as per the tender document and tabulated its findings, it is not true that by doing so, the Review Board endorsed the evaluation criteria as being compliant with Article 227 and Section 86 of the Procurement Act as implied by the Applicant, which is a clear misapprehension of the 1st Respondent's decision.

730. The 2nd Respondent we had joined issue with the application of the stated mode of evaluation at paragraph 87 of our written submissions and the substance of the argument can be paraphrased: -

730.1 ITT 33.2 provided that evaluation shall be done per Lot while ITT 40 provides that Each successful bidder will be awarded one lot per category for category two (2) and category three (3) based on their eligibility, subject to (e) and (f) below. If abidder emerges as the lowest in more than one lot, they will be awarded the lot with the highest quantity.

730.2 It means that the restriction was on the award of more than one lot per category with Category 2 and 3

being distinct and separate. (See paragraph 146 of the impugned decision) The interpretation by the 3rd and 4th Respondent of this duty was an error of law by following this evidently illegal criteria:

730.2.1 Inhemeter Africa Company Limited that was awarded Category 2 Lot 3 being the fourth lowest bidder should not have been awarded. Instead Magnate ventures that had the third lowest price would have been awarded the tender. There was no justification to move Magnate Ventures Limited to Category 3 Lot 2 since they were not the lowest bidder in Category 2 Lot 3 to benefit from the provision on award of a lot with more quantities.

730.2.2 If the mode of evaluation set out in the tender document was adhered to, Smart Meter Technology Limited being the fifth lowest bidder in Category 2 Lot 3 would not have been awarded the tender. The same would have been awarded to the fourth lowest evaluated bidder.

730.2.3 If Magnate Ventures which appears to have been offering Kshs. 8,631 per unit had been awarded the 50,000 units in Category 2 Lot 3 the

2nd Respondent would have saved money since the awarded company Inhemeter Africa Company Limited had offered a price of Kshs. 10,530 per unit to win the bid.

730.2.4 If the evaluation criteria set out in the tender document had been adhered to, Smart Meter Technology would not have been awarded the 35,000 units for category 2 Lot 3 at the very high Kshs. 10,400 per unit.

730.2.5 With the Criteria set out in the amendment to ITT40 being clear that evaluation was to be done per Lot with the restriction that the lowest bidder in every category cannot be awarded twice, it was imperative that in category 3, the bids be evaluated independently from Category 2 without any decisions made in category 2 affecting the outcomes in category 3. This was not done.

730.3 The 3rd Interested Party, Abcos Industries Limited, should not have been awarded Category 3 Lot 2 since it was not the lowest evaluated bid in that category. The reason given for the award was they were the lowest evaluated bidder that was not awarded in category 2, a

reason not supported by the evaluation mode set out in the tender document.

730.4 The 1st Interested Party, Magnate Ventures Limited was awarded Category 2 lot 2 yet they were not the lowest evaluated bidder in terms of price.

730.5 The 2nd Interested Party, House of Procurement were not the lowest evaluated price when they were awarded Category 3 Lot 3. The reason that they were the lowest evaluated bidder not awarded in category 2 was an extraneous consideration that is not supported by the tender document. The same bogus reason was given for awarding Abcos Industries Limited.

730.6 The procuring entity introduced new terms like “second lowest evaluated bidder,” “next lowest evaluated bidder,” to justify the employment of a flawed mode of evaluation that did not comply with Section 86 of the Procurement Act.

730.7 The goal posts kept shifting in the evaluation process. There was no simplicity or consistency.

The 2nd Respondent’s position was that the mode of evaluation for Category (2) and (3) was ambiguous and deliberately so.

731. The mode of evaluation was capable of multiple meanings denying it consistency and transparency. It was convoluted and complicated so as to deny some the 2nd Respondent the benefit of a fair and transparent system.

732. The 1st Respondent agreed with the 2nd respondents' submissions in this respect. The 1stRespondent clearly justified the decision to find the mode of evaluation and its application unlawful and gave reasons for finding it opaque and not cost-effective.

733. The findings by the 1st Respondent in these circumstances cannot be opened up for a merit review.

734. On the issue of irrationality/unreasonableness/contradictions it is argued that the Applicant has grossly misunderstood the import of paragraph 212 as read with paragraph 213-216 of the impugned decision since it is clear that there was no endorsement of the of the mode of evaluation/award and all the 1st Respondent did was to summarize the findings of the evaluation committee as contained in the evaluation report.

735. The threshold for finding a decision of a public body as being irrational and/or unreasonable is a high one and has been the subject of many court decisions as well as having a statutory underpinning under the Fair Administrative Action Act.

736. It submits that the settled test for unreasonableness. In **Republic v Public Procurement Administrative Review**

Board Ex parte Meru University of Science and Technology; M/S Aaki Consultants Architects and Urban Designers (Interested Party) [2019]eKLR the Court held that *"the test of Wednesbury unreasonableness has been stated to be that the impugned decision must be "objectively so devoid of any plausible justification that no reasonable body of persons could have reached it and that the impugned decision had to be "verging on absurdity" in order for it to be vitiated."*

737. It also relies on Prasad v Minister for Immigration {1985} 6 FCR 155." under Section 7(2) (i) of the Fair Administrative Action Act, "A court or tribunal under subsection (1) may review an administrative action or decision, if- (i) the administrative action or decision is not rationally connected to- a) the purpose for which it was taken; (b) the purpose of the empowering provision;(c) the information before the administrator; or (d) the reasons given for it by the administrator."

738. The contentions made by the Applicant are an invitation for a merit review of a decision that was made within the confines of the Procurement Act, regulations made thereunder and the Constitution after considering the pleadings and submissions of all parties.

739. On the issue of Procedural impropriety/failure to follow due process procedural impropriety as a ground for review was the

subject of interpretation in **Republic v Public Procurement Administrative Review Board; Principal Secretary, State Department of Interior, Ministry of Interior and Co-ordination of National Government (Interested Party) ; Ex Parte Applicant CMC Motors Group Limited [2020] eKLR** where it was held that;

> *"The most basic rules of administrative law are first that decision makers may exercise only those powers which are conferred on them by law and, second, that they may exercise those powers only after compliance with such procedural prerequisites as exist. So long as administrators comply with these two rules, their decisions are safe."*

740. It argues that the Applicant did not plead with specificity and precision the substantive and procedural legal rules that were not observed or complied with. Inviting the court to review the entire record of the proceedings before the 1st Respondent in a fishing expedition.

741. By reaching the conclusion that the mode of evaluation/award was opaque and unpredictable so as to offend the provisions of Article 227 of the Constitution, the 1st Respondent considered the pleadings and submissions from all the parties before making the determination.

742. There was no violation of due process of law or the breach of laws of natural justice and the 1st respondent at all times exercised powers granted to it by Statute.

743. There was no violation of legitimate expectations in circumstances where a party was invited by the 1st Respondent to be heard and all the rules of procedure were followed to come to a decision that is clearly legal, rational and unreasonable.

The 3rd and 4th Respondent's Case;

744. The 3rd and 4th respondents are also aggrieved by the impugned decision for all the reasons elaborated in the succeeding paragraphs and as such are in support of the instant application.

745. It is their case that the principal legislative framework governing the operations of the 4th respondent is the Constitution of Kenya, 2010; Energy Act, 2019; Public Procurement and Asset Disposal Act, 2015; Public Procurement and Asset Disposal Regulations, 2020; Public Officers Ethics Act, CAP183; State Corporations Act, CAP446 and Public Finance Management Act, 2012 among other laws.

746. The 4th respondent is charged with the responsibility, as a distribution and retail supply licensee, of supplying consistent and steady electricity to millions of Kenyan consumers in their homes and to all their ventures.

747. For the 4th respondent to perform its mandate efficiently, the 4threspondent procures energy meters for domestic and commercial customers. Availability of meters is fundamental to supporting the 4th respondent's revenue collection efforts and monitoring power usage.

748. The unavailability of energy meters translates to direct loss of revenue and affects the 4threspondent's ability to connect new consumers or undertake meter replacements as and when requested by the consumers. Currently, there is an acute and urgent backlog of 420,000 energy meters to connect new consumers and replace the faulty and obsolete meters.

749. 420,000 meters are required by critical and essential services providers such as hospitals, health centers, dispensaries, schools, government installations, telecommunications companies, enterprises, agricultural farms, domestic customers, among others, who have paid for these services and are awaiting the supply of meters to enable them access electricity supply to their premises.

750. It is against this backdrop that the 3rd and 4threspondents advertised the subject tender as a Restricted Limited Tender. The tender was divided into three (3) categories with various lots. Addendum No. 3 provided for the quantities in each category and their respective lots.

751. The segregation of this tender into distinct categories and lots was necessitated by the imperative to unbundle goods to foster competitiveness, to apportion and mitigate the procurement risks Within ***Regulation 154 of the Public Procurement and Asset Disposal Regulations 2020*** which allows unbundling a category of goods in practicable quantities to ensure maximum participation.

752. The subject tender was open only to Local Manufacturers/ Assemblers with intent to promote the Buy Kenya Build Kenya Initiative which supports unbundling and preference and reservation outlined in ***section 155 of the PPADA*** which gives preference to articles manufactured or assembled in Kenya. Addendum 1 provided the award criteria under its Appendix 1 which can be summarized as follows:

a. An award shall be to the tenderer(s) with the lowest evaluated price as per lot based on eligibility as stated in ITT 3.6 and bidders may quote for all or as many items in the various lots as per their eligibility.

b. Bidders with ready stock will be considered for award under category one (1) and any other category as long as their bid price is within the market price.

c. Every successful bidder will be awarded one lot per category for categories 2 and 3 based on their eligibility subject to:

i. Subsequent lots shall be awarded sequentially until all the lots are allocated provided that the price of the subsequent qualified bidder is within the prevailing market price.

ii. In case there is no other qualified subsequent tenderer for the unallocated lot(s) in a given category, the award will revert to the tenderer with the lowest evaluated price per lot, notwithstanding the above condition.

d. If a bidder emerges as the lowest in more than one lot, they will be awarded the lot with the highest quantity.

753. Ten (10) bidders, including the applicant herein, expressed their interest in participating in the tender process and submitted their respective bids. The Tender was opened on 1st July 2025 at 10:30 a.m. at Stima Plaza, the 4th respondent's headquarters.

754. At the conclusion of the tender evaluation process on 15th July 2025, the Evaluation Committee recommended that the tender be awarded as per the award criteria in Appendix 1 of Addendum 1. In respect of the 2nd respondent herein, M/S Chint Meters and Electric Kenya Company Limited, the Evaluation Committee found that the said bid was non-responsive because of the price offered, which was not

competitive when compared with the other bids that were ultimately found responsive.

755. This was communicated to all the bidders vide a Letter of Notification of Intention to Award dated 17th July 2025. On 29th July 2025, the 2nd respondent filed a *Request for Review No. 85 of 2025* dated 28th July 2025 seeking *inter alia* to nullify the decision of the 3rd and 4th respondent's herein, which decision was communicated through the Letter of Notification of Intention to Award dated 17th July 2025.

756. The 1st respondent delivered its decision on 19th August 2025. The 1st respondent *inter alia* cancelled the awards.

757. The 3rd and 4th respondents are aggrieved by the whole of the said decision in so far as the same is tainted with illegality, error of law and irrationality as substantively argued by the applicant herein and for the additional reasons directly affecting the 3rd and 4th respondents in the succeeding paragraphs.

758. The 1st respondent misinterpreted the provisions of ***section 167(1) of the Public Procurement and Asset Disposal Act*** vis-à-vis the 2nd respondent's pleadings and arrived at a decision which was ultra vires, illegal and irrational.

759. The 3rd and 4th respondents aver that the 1st respondent misinterpreted the provisions of ***section 87 of the Public Procurement and Asset Disposal Act as read together***

with Regulation 82 of the Public Procurement and Asset Disposal Regulations 2020 vis-à-vis the 3rd and 4threspondents Letter of Notification of Intention to Award dated 17th July 2025 and arrived at a decision which was illegal, unreasonable and irrational.

760. The 1st respondent misinterpreted the provisions of ***sections 80 and 86 of the Public Procurement and Asset Disposal Act*** as read together with the tender document vis-à-vis the award of the 3rd and 4th respondents evaluation committee and arrived at a decision which was illegal, unreasonable and irrational.

761. The 3rd and 4th respondents aver that the 1strespondent's decision to cancel the whole tender despite the award criteria for the various categories being separate and distinct and also the fact that the 4th respondent bid only for category 3 was unreasonable and irrational.

762. The 1st respondent acted irrationally by failing to discern that energy meters form the backbone of the 4threspondent's financial sustainability, as meters are critical components in registering sales and collection of revenues and that a shortage of energy meters will, therefore, adversely affect the 4th respondent's financial health and overall operations, with the further consequence that any prolonged delay is projected to occasion revenue losses of at least Ksh. 1.274 billion per month (being Ksh. 2,000 per meter per month multiplied by

approximately 637,000 meters [which are the subject of this procurement]).

763. The 1st respondent acted irrationally by failing to take into account that the total lead time for the procurement of meters is approximately six (6) months, which period encompasses the tendering process, assembly by local manufacturers and delivery to the 4th respondent's stores and that, consequently, the cancellation of the aforesaid tender will have the long-term effect of causing acute shortages to the detriment of the innocent public members who require the energy meters.

764. The 1st respondent acted irrationally by failing to appreciate that the tender was for a total of 637,000 meters and based on an average revenue of Ksh. 2,000 per meter, the consequential loss amounts to approximately Ksh. 1.274 billion per month and further, that should the procurement process be delayed by an additional six (6) months, the cumulative loss would exceed Ksh. 7 billion.

765. The 1st respondent acted illegally by ordering a retender, whereas the procurement of meters and other procurements by the 4th respondent and indeed other public bodies are undertaken on an annual basis, guided strictly by the annual procurement plan and budget for each respective financial year and upon the lapse of a financial year, the 4threspondent and other public bodies ceases to utilize the procurement plan and the corresponding budget of that financial year and

procurement activities thereafter are conducted strictly in accordance with the procurement plan and budget of the succeeding financial year.

766. The 1st respondent acted irrationally by failing to appreciate that the lapse of the financial year results in loss of the allocated quantities and budget and that the process of obtaining a fresh budget prior to procuring the said quantities is a protracted bureaucratic exercise which cannot be accommodated in this instance given the urgency of the requirements, the stocks in some categories having already been exhausted while others are on the verge of exhaustion.

767. The decision of the 1st respondent is materially influenced by an error of law, in that if there existed any ambiguity in the evaluation criteria in the tender document, the bidders were at liberty to seek clarifications during the pendency of the tender process, which they failed to do and as such, any allegation of ambiguity at the Review stage amounts to an afterthought.

768. The 1st respondent acted in a manner that amounted to procedural impropriety by disregarding the submissions made by the 3rd and 4th respondents during the hearing held on 13th August 2025, concerning the unbundling of procurements pursuant to Regulation 154 of the Public Procurement and Asset Disposal Regulations, 2020.

769. The 1st respondent completely ignoring the express provisions of the tender document which stipulated that due diligence, including factory inspection, would only be mandatory for local manufacturers and assemblers who had not previously supplied meters to the 4th respondent, namely the 2ndrespondent and Abcos Industrial Limited and House of Procurement Limited- the 2nd and 3rd interested parties herein.

770. The 1st respondent further disregarded the strict provisions of section 80 (2) of the Public Procurement and Asset Disposal Act, which stipulates that evaluation must strictly conform to the tender document and not to the 1strespondent's subjective views of "best practice."

771. The 1st respondent finding that the award criteria was ambiguous, it thereby lacked jurisdiction to entertain the matter any further, as the purported ambiguity existed throughout the entire bidding period prior to the closure of the tender on 1st July 2025, as all the bidders were fully aware of this criteria when perusing the tender document and willingly submitted their bids in the context of that award criteria and any contestation on the award criteria ought to have been raised by 15th July 2025 (which was never done by any of the bidders), however, in view of the fact that PPARB Application No. 85 of 2025 was filed on 29th July 2025, the 1st respondent, in proceeding as it did, committed an error of law.

772. The 1st respondent committed a serious error of law in failing to consider that the non-joinder of the applicant herein as an interested party in PPARB Application No. 85 of 2025 was fatal given that the applicant herein was not a successful tenderer under category 3; yet the 1st respondent simultaneously found that the award criteria for all the 3 categories were interlinked and therefore ought to have held that the applicant herein was a necessary party, having participated and been awarded in category 2 Lot 3.

Analysis and determination;

Upon perusing the applications, the responses by the various parties for and in opposition to the application, rival submissions and authorities cited by counsel, the following issues call for determination;

1) Whether the Applications have merit.

2) Who shall bear the costs?

Whether or not the application has merit;

773. In order to succeed, the Applicants have to demonstrate that the 1st Respondent acted illegally, irregularly and with procedural impropriety. In determining whether the Applicants have proven their case, I am guided by **The Supreme Court in Samson Gwer and 5 others v Kenya Medical Research**

Institute and 3 others (2020) KLR where it was held as follows:

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

774. Being a Judicial Review case, the Applicants are under a duty to prove that their cases fall within the principles that were enunciated in the case of **Pastoli vs Kabale District Local Government Council and Others, (2008) 2 EA 300**, where it was held that:

> *"In order to succeed in an application for Judicial Review, the Applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See Council of Civil Service Union v Minister for the Civil Service [1985] AC 2; and also, Francis Bahikirwe Muntu and others v Kyambogo University, High Court, Kampala, Miscellaneous Application Number 643 of 2005 (UR).*

Illegality is when the decision-making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality....

Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: Re an Application by Bukoba Gymkhana Club [1963] EA 478 at page 479 paragraph "E".

Procedural impropriety is when there is failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (Al-Mehdawi v Secretary of State for the Home Department [1990] AC 876)."

775. Further in determining this suit, this court has referred to the findings in **Republic v Public Procurement Administrative Review Board Exparte Meru University of Science and Technology; M/S Aaki Consultants Architects and Urban Designers (Interested Party) [2019] eKLR** where the Court held thus:

> *"The role of the court in Judicial Review proceedings was well stated in Republic vs National Water Conservation and Pipeline Corporation and 11 Others [9] where it was held that once a Judicial Review court fails to sniff any illegality, irrationality or procedural impropriety, it should down its tools forthwith. Judicial intervention is posited on the idea that the objective is to ensure that the agency did remain within the area assigned to it by Parliament. If the agency was within its assigned area then it was prima facie performing the tasks entrusted to it by the legislature, hence not contravening the will of Parliament, then a court will not interfere with the decision."*

776. The court has taken cognizance of the fact that it is not sitting on appeal. Having observed above, this court shall proceed to determine whether the consolidated suit has merit.

777. The Applicants herein have issues with the decision of the Public Procurement Administrative Review Board (the 1st Respondent) dated 19thAugust 2025 in Public Procurement Administrative Review Board Application No. 85 of 2025, Chint

Meters and Electric Kenya Company Limited vs. The Chief Executive Officer/Managing Director, Kenya Power and Lighting Company PLC, Kenya Power and Lighting Company PLC, Magnate Ventures Limited, House of Procurement Limited and Abcos Industrial Limited, in respect of Tender No. KP1/9A.3/RT/14/24-25 for Supply of Single-Phase Smart Meters (Local Manufacturers and Assemblers).

778. The 2nd and 3rd Respondents are also aggrieved by the whole of the said decision in so far as the same is tainted with illegality, error of law and irrationality as substantively argued by the Applicant herein.

779. According to the Applicant in JR.262 of 2025, its procurement officer attended the tender opening on 1st July 2025 and noted from the tender opening process, that the 4th Respondent did not submit its bid via the 3rd Respondent's E-procurement system/portal as required under Clause 1.3 of the Invitation for Tender at page 7 of the Tender Document read with ITT 20 of Section II – Tender Data Sheet (TDS) at page 31 of the Tender Document.

780. Vide a letter of Notification of Intention to Award dated 17th July 2025, the 2nd Respondent informed the Applicant in JR.262 of 2025 that it had been awarded Lot 1 of Category 1 and Lot 4 of Category 2 of the subject tender (hereinafter, the "Notification of Award").

781. This did not sit well with the 4th Respondent herein. Aggrieved by the decision as communicated vide the Notification of Award, on the 29th July 2025, it lodged a Request for Review dated 27th July 2025 that culminated in the impugned decision dated 19th August 2025.

782. According to the Applicant, the 1st Respondent's impugned decision is tainted with illegalities and/or irregularities, since: -

783. According to it, at paragraph 123 of the impugned Decision, the 1st Respondent stated that the Applicant's preliminary objection filed before it was premised on a claim that the person who swore the 4th Respondent's Supporting Affidavit that had been filed before the 1st Respondent lacked authority to act on behalf of the 4th Respondent.

784. The 1st Respondent found that, that was not a pure question of law as its determination necessitates examining evidence and that the same cannot be determined at the preliminary objection stage.

785. The Applicant further argued that the 1st Respondent failed to appreciate that competency of pleadings raises a jurisdictional issue which is a pure question of law. According to the Applicant, this was not controverted by the 4th Respondent in any of its pleadings filed before the 1st Respondent and it therefore follows that there was no contested fact that required to be ascertained.

786. This court is in agreement with the 4th Respondent that on this issue the 1st Respondent arrived at a determination after exercising its discretion and this court cannot reopen that. The Applicant admits that even if the court were to reopen the decision then it would call for the tendering and analysis of the evidence which this court cannot achieve. The Applicant should have lodged an appeal. This limb of the Application fails.

The next issue is whether the Applicant was a primary party who was consequently competent to raise issues.

787. At paragraph 136 of the impugned decision, the 1st Respondent held that it has jurisdiction to consider legal issues raised by the Applicant and the 1st to 4th Interested Parties, subject to limitation, and that they cannot introduce fresh factual matters or seek remedies beyond those sought by the 4th Respondent. This according to the Applicant was an error in law.

788. According to the 4th Respondent, The competency of the Request for Review was an issue that was only raised by the Applicant who despite being a mandatory party to the proceedings in the terms of Section 170 (c) of the Procurement Act was not a principal/primary party but an interested party who cannot raise fresh issues as settled by the Supreme Court in **Francis Karioko Muruatetu and Another V Republic and 5 Others [2016] eKLR** where the apex stated that:

"In every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the Court will always remain the issues as presented by the principal parties, or as framed by the Court from the pleadings and submissions of the principal parties."

789. It is not in doubt that the Applicant and the 1st to 4th Interested Parties were all successful bidders in various Categories and Lots in the subject Tender. They were indeed mandatory parties under Section 170(c) of the Procurement Act being successful bidders which the 1st Respondent confirmed at paragraph 131 of the impugned Decision.

790. Section 5 (1) of The PPAD Act provides that this Act shall prevail in case of any inconsistency between this Act and any other legislation or government notices or circulars, in matters relating to procurement and asset disposal except in cases where procurement of professional services is governed by an Act of Parliament applicable for such services. Section 5 excludes the application of The Civil Procedure Rules in procurement matters, the provisions in so far as the participation of successful bidders his is different from the civil proceedings under the Civil Procedure Rules whose participation is discretionary.

791. This court is of the view that this made them substantive parties to the proceedings and that they were clothed with the locus standi to raise new factual matters or issues and even

seek reliefs beyond what was sought by the 4thRespondent (who was the Applicant) before the 1stRespondent, where necessary and I so hold.

792. This court makes a finding that the 1st Respondent misdirected itself by finding that the extent of the successful bidders' participation in proceedings before it is limited and I so hold.

The next sub issue is whether the 4th Respondent pleaded to have suffered, or would be at risk of suffering loss or damage as a result of breach of duty imposed on a procuring entity by the Procurement Act and its Regulations

793. The Applicant advanced the argument that The 1st Respondent erroneously found at paragraph 160 of the impugned Decision that the 4th Respondent complied with the requirements of Section 167(1) of the Procurement Act, which provision required the 4th Respondent to plead or claim to have suffered, or at risk of suffering, loss or damage as a result of a breach of a duty imposed on a procuring entity by the Procurement Act or its Regulations.

794. According to the Applicant, the 1st Respondent was very clear on this provision as demonstrated at paragraph 151 of the Decision where the 1st Respondent listed the conditions that the 4th Respondent must satisfy including making a claim to have suffered, or be at risk of suffering loss or damage as a

result of breach of duty imposed on a procuring entity by the Procurement Act and its Regulations.

795. The Applicant argued that at paragraph 152 and 153 of the impugned Decision, the 1st Respondent appreciated the holding of the Court of Appeal in James Ayodi T/A BetoyoContractors and Another vs Elroba enterprises Limited and Another (2019) eKLR, which the 1st Respondent expressly states provided clarity on the requirement to plead and demonstrate actual or potential loss in such proceedings.

796. The Applicant argued that at paragraph 158 of the impugned Decision, the 1st Respondent observed that its attention had not been drawn to any specific paragraph of the pleadings where the 4th Respondent pleaded risk of loss or damage as contemplated under Section 167(1) of the Procurement Act.

797. It is the Applicants case that notwithstanding the foregoing observation which would have warranted it to down its tools, the 1st Respondent, at paragraph 158 of its impugned Decision, made a finding that the 4th Respondent satisfied the requirement of Section 167(1) of the Procurement Act.

798. The Applicant argues that at paragraph 159 of the impugned Decision, the 1st Respondent purported to interpret the meaning and effect of the stated paragraphs 9 and 10 of the 4th Respondent's Request for Review before it, by stating that the subject paragraphs meant that the 4th Respondent contended it

suffered prejudice as a result of the manner in which the 2nd and 3rd Respondents conducted the procurement process.

799. Under Section 167(1) of the Act, a candidate or tenderer acquires standing to seek review if it “claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity.” However, the statute does not demand nor call for the proof of actual quantified loss at the threshold stage; it is enough that prejudice is pleaded as a consequence of the breach alleged.

800. The 1st Respondent is of a different view.It argues that it meticulously examined the Request for Review and identified that in paragraphs 9 and 10 thereof, the Applicant pleaded prejudice flowing from two breaches: that the Procuring Entity failed to disclose lot-specific outcomes in the Notifications of Intention to Award, and that the Procuring Entity imposed an award cap of two categories per tenderer, a restriction alleged to undermine value for money.

801. According to the 1st Respondent, by pleading prejudice in this form, the Applicant demonstrated the requisite risk of suffering detriment.

802. On its part, the 4th Respondent’s case is that the 1st Respondent did not misapprehend or misdirect itself on the applicable statutory law and case law in its finding that the 4thRespondent at paragraphs 9 and 10 of the Request for

Review had pleaded that they stood to suffer prejudice from breaches of duty by the 2nd and 3rd Respondent as highlighted at paragraph 158 of the impugned decision, which the Applicant has clearly misunderstood to mean that since its Advocate did not highlight the specific paragraphs during the oral haring on 13.8.2025, then the 1st Respondent had no duty to peruse the pleadings to satisfy itself that there was indeed due compliance with mandatory statutory provisions that had jurisdictional implications.

803. It was further the 4th Respondent's case that the Applicant's assertion that the claim of prejudice as dissected by the 1st Respondent at Paragraph 159 and 160 of the impugned decision was not synonymous with pleading or attempting to plead loss or damage was addressed by the Review Board.

804. This court is satisfied that the 1st Respondent applied its mind to the issue of whether the 4th Respondent pleaded the risk of loss or that it would suffer damage the way it did I a procedurally sound manner. The affected parties' cases were considered by the 1st Respondent. Since due process was followed, it is this court's informed finding that it cannot interrogate the decision that the 1st Respondent found to be the one to carry the day. This court cannot interrogate the question as to whether or not the 1st Respondent misapprehend or misdirect itself in arriving at the impugned decision. To do so would mean that this court would be sitting

on appeal which must not do. The judicial review court cannot determine an appeal on a question of law that emanates from the 1st Respondent's decisions. This limb fails.

805. At paragraphs 161 and 169 of the impugned Decision, the 1st Respondent stated that the Applicant herein urged that the 4th Respondent's challenge related to three elements of the procurement process, that is, restriction of awards to one lot per category, allowance of different pricing across awards, and absence of site visits. The 1st Respondent consolidated the 4th Respondent's grounds to two core issues, that is, mode of award and its application, and absence of site visits at commencement of the tendering process. The 1stRespondent then proceeded at paragraphs 170 to 173 of its impugned Decision to address the question of when the 4th Respondent became aware of the alleged breach, linked the same to the date of notification of 17th July 2025, and found that the Request for Review was accordingly not time barred.

806. On another sub issue, the 1st Respondent considered the question of confidential information at paragraphs 176 to 185 of the impugned Decision, and noted at paragraph 183 thereof, that the 4th Respondent did not annex any document that can be deemed confidential within the meaning of Section 67 of the Procurement Act, and then found at paragraph 184 of the impugned Decision that the 4th Respondent did not rely on any

confidential document under Section 67 of the Procurement Act. This reasoning and finding was inconsistent.

807. In the Applicant's preliminary objection filed before the 1st Respondent the Applicant expressly stated that the Request for Review was grounded on not just confidential documentation, but confidential information in breach of Section 67 of the Procurement Act.

808. The Applicant's argument that it led the 1st Respondent to paragraphs 21 and 28 of the 4th Respondent's Request for Review before it, which paragraphs contained information that was confidential, and could only be within the knowledge of the 2nd and 3rd Respondents. The court does not find any fault on the part of the 1st Respondent in dismissing the 4th Respondent's contentions as speculative.

809. This court is satisfied that the 1st Respondent at paragraph 178 of its impugned Decision referred to the provision of Section 67 of the Procurement Act, and listed information that no procuring entity and no employee or agent of a procuring entity or member of board, commissions of committee of a procuring entity shall disclose. This court finds that the Applicant is misplaced in so far as it advances the reasoning that the law uses the word information and not document.

810. It is this court's finding that information can be contained in a document or in any other form or foundation other than in

documents. A document is one of the many forms in which information can be stored or transmitted.

811. The 1st Respondent applied its mind to the way it handled the issue of confidential information. The 1st Respondent applied and/or interpret the provisions of Section 67 of the Procurement Act legality.

812. On this aspect, it is this court's finding that the impugned decision did not violate the Applicant's legitimate expectation that the 1st Respondent would strike out the Applicant's Request for Review for want of Jurisdiction. A claim for the breach of a right to a legitimate expectation cannot be sustained nor avail in the circumstances and I so hold.

813. The court has gleaned from paragraph 146 of the impugned Decision, where the 1stRespondent held that the 4th Respondent was not a tenderer in respect of all lots under Categories 1 and 2. It stated that "Consequently, the Board shall confine its determination to category 3, where the Applicant participated as a tenderer, and shall accordingly down its tools with respect to categories 1 and 2." Interestingly the 1st Respondent at the same time stated that it retains jurisdiction to examine mode of award as pertains Category 1, 2 and 3. The 1st Respondent was irrational, unreasonable and biased in its impugned Decision.

814. This court wonders how then despite the 1st Respondent downing its tools with respect to Category 1 and Category 2, it went on to hold at paragraph 146 of the impugned decision that it retains jurisdiction to examine mode of award as pertains Category 1 and 2. It is this court's finding that this culminated in an inconsistent outcome and finding that is awash with irrationality and unreasonableness.

815. The 1st Respondent analysed the application of the criteria in respect of Category 2 despite downing its tools and Category 3, as expressly stated at paragraph 212 of the impugned Decision, where it listed the observations that it made. No observation whatsoever was made in respect of Category 1.

816. The analysis undertaken by the 1st Respondent on the application of the mode of award in the impugned decision, the 1st Respondent observed that the awards of Lot 1, 2, 3 and 4 of Category 2 and Lot 1, 2 and 3 of Category 3 of the subject tender were proper and made in accordance with Section 86(1) of the Procurement Act and Addendum 1 dated 13th June 2025.The 4th Respondent did not refer nor make reference to Lot 1, 2, 3 and 4 of Category 2 of the subject tender.

817. Despite the foregoing, the 1st Respondent held at paragraph 213 to 218 that the mode of award applied in respect of the said categories lacked transparency, was unpredictable and inconsistent and the system applied undermined the constitutional value under Article 227 of the Constitution read

with Section 86 of the Procurement Act and Addendum 1 dated 13th June 2025.

818. The court has noted that in the impugned decision, the 1st Respondent stated that the tender was divided into three categories, and observed that focus of the Request for Review before it was confined to Category 3, where the 4th Respondent herein submitted its bid. It then made a determination at paragraphs 191 and 192 of the impugned Decision that since the Applicant herein was not successful in Category 3, its non-joinder was not fatal as the Applicant doesn't fall within Section 170(c) of the Procurement Act.

819. It is curious to note that despite the foregoing, the 1st Respondent then proceeded to order that the award of lot 1 with respect to Category 1 in Tender No. KP1/9A.3/RT/14/24-25 for Supply of Single-Phase Smart Meters (Local Manufactures and Assemblers) is cancelled and set aside. It ordered that the awards of lots 1,2,3 and 4 with respect to Category 2 in Tender No. KP1/9A.3/RT/14/24-25 for Supply of Single-Phase Smart Meters (Local Manufactures and Assemblers) issued to East Africa Company Limited, Hexing Technology Company Limited, Inhemeter Africa Company Limited and Smart Meter technology Limited respectively by the 2nd Respondent be cancelled and set aside.

820. The 1st Respondent also ordered that the Tender No. KP1/9A.3/RT/14/24-25 for Supply of Single-Phase Smart

Meters (Local Manufactures and Assemblers) with respect to Category 1, 2 and 3 be cancelled and set aside.

821. It further ordered that the 2nd Respondent re-tender the quantities of meters under Category 1, 2 and 3 afresh.

822. It is this court's finding that this was in total defiance and departure from the fact that the 4th Respondent had not prayed for such an order in its Request for Review.

823. It was the 4th Respondent's case that the 1st Respondent is faulted for ordering a re-tender despite the fact the 4th Respondent did not seek the prayer and is accused of bias.

824. The 4th Respondent argued that its core prayer was for the annulment of the procurement proceedings and restriction of the procuring entity from issuing contracts. These prayers were granted within the provisions of Section 173 (a) of the Procurement Act which gives the 1st Respondent the power to 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 and this includes directing a re-tender.

825. The court is of the view that any order whether it is the core or consequential that is issued under Section 173 (a) of the Procurement Act cannot take away nor detract from the right of any party in an administrative process to fair hearing under Article 50 of The Constitution. Article 25 of The Constitution

does not allow for the limitation of this right. All the parties were entitled to the right to be heard before the impugned orders were issued.

826. In any event, "The Wednesbury's unreasonableness" (Associated Provincial Picture Houses Ltd. v. Wednesbury's Corporation [1948] 1 K.B. 223) applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in Edwards v. Bairstow [1956] A.C. 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. "Irrationality" by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review."

827. The court is also in agreement with The 2nd and 3rd Respondents that the 1stRespondent's decision to cancel the whole tender despite the award criteria for the various categories being separate and distinct and also the fact that

the 4th Respondent bid only for category 3 was unreasonable and irrational.

828. The court is further in agreement with the 2 nd and 3rd Respondents argument that the 1st Respondent committed a serious error of law in holding that the non-joinder of the Applicant herein as an interested party in PPARB Application No. 85 of 2025 was not fatal given that the Applicant herein was not a successful tenderer under category 3; yet the 1st Respondent simultaneously found that the award criteria for all the 3categories were interlinked and therefore ought to have held that the Applicant herein was a necessary party, having participated and been awarded in categories 1 and 2.

829. This court is satisfied that the 1st Respondent acted unreasonably on this issue to say the least. It violated the rules of natural justice as guaranteed under Article 50 of the Constitution that guarantees all to the right to fair hearing to the extent that the Applicant was not granted an opportunity to respond and be heard on the same. The Applicant was consequently condemned unheard.

830. This amounts to an illegality which this court cannot countenance. The illegality vitiates the finding of the 1st Respondent and I so hold.

831. On another front, this court is invited to determine the issue of the legitimacy of the due diligence as conducted by the Evaluation Committee.

832. The Applicant argued that despite the 1st Respondent holding that the Evaluation Committee had discretion to conduct or not to conduct due diligence on only entities with no prior record of supply with the 3rd Respondent, it went on to hold at that the due diligence conducted in the subject tender was unlawful, having been applied selectively.

833. According to the 4th Respondent, the 1st Respondent at paragraphs 231 and 232 of the impugned decision held as follows,

> *"in determining this issue, the Board perused the confidential files and the documents filed by the parties and observed that the 1st Interested Party (Magnate Ventures Limited), despite being among the entities awarded in Category 3, had no record of due diligence having been conducted on it. Coupled with the findings highlighted in the preceding paragraphs, this demonstrates that the evaluation of tenders in Categories 2 and 3 was opaque and lacked the transparency required by law. The absence of explanations in the tender records for such gaps reinforces the Board's conclusion on the lack of transparency as noted above."*

834. Further according to the 4th Respondent; “A transparent procurement system, as envisaged by the law, would ordinarily require that due diligence be conducted on entities with no prior record of supply with the Procuring Entity. In the present case, several entities with no history of dealings with the Procuring Entity were not subjected to any due diligence. This reinforces the Board’s finding that the procurement process lacked both transparency and consistency.”

835. The 4th Respondent argues that these findings cannot be faulted for being unreasonable or irrational as they are based on facts in confidential files supplied to the 1st Respondent by the 2nd and 3rd Respondents in the instant Application.

836. According to the 4th Respondent, the participation of the 4th Respondent in a clearly flawed procurement process was not an endorsement of the same and this cannot be construed as acquiescence.

837. The Applicant is inviting this court for a merit review of the findings which should be declined.

838. This court is of the informed view that where on one hand a decision maker holds that the due diligence was to be applied selectively to entities with no prior record of supply and then proceeds to hold that such selective due diligence was unlawful, leads to an irrational and unreasonableness outcome

that offends the letter and the spirit of Article 227 of the Constitution and I so hold.

839. The 1st interested party in JR 262 of 2025 also advanced the argument that the 1st Respondent at paragraph 214 faulted the mode of award, terming it inconsistent and incapable of guaranteeing transparency, and on that basis at paragraph 219 declared the awards under Categories 2 and 3 unlawful.

840. The 1st Respondent's decision to cancel and set aside the awards of lots 1, 2 and 3 with respect to Category 3 in the Tender, unfairly dislodged the 1st Interested Party from a lawfully awarded contract, disrupted the 3rd Respondent's procurement plan, and delayed supply of critical electricity meters.

841. The prejudice to the 1st Interested Party, the 3rd Respondent, and the public is grossly disproportionate.

842. This finding was contrary to the evidence before it and ignored ITT 40 and Addendum No. 1. The 1st Respondent did not challenge this.

843. According to the 1st Interested party, the annulment of awards across all categories, despite each being severable and independent, was irrational and exceeded the scope of the 4th Respondent's complaint, given it only participated in Category 3.

844. It argues that the 1st Respondent resorted to the drastic remedy of cancelling the entire tender despite the limited scope of the complaint and without demonstrating harm, loss or damage to the 4th Respondent.

845. This court holds the view that this was manifestly excessive, unnecessary, and disproportionate and the 1st Respondent ultra vires its statutory mandate under Section 173 PPADA by annulling a lawful award and directing a fresh procurement process.

846. The decision was thus illegal, disproportional and irrational constituting sufficient grounds for the grant of judicial review orders and I so hold.

847. The next issue was the question around how due diligence was carried out. The 1st Respondent also found that due diligence was conducted selectively on some tenderers but not on others, undermining the uniformity of the evaluation process. Selective application of due diligence compounds opacity and violates the equal treatment requirement under procurement law.

848. On the strength of these findings, the 1st Respondent held that the award criteria and notifications were unlawful and incapable of supporting a valid award. It therefore properly intervened under Section 173 of the Act, which empowers it to

annul anything done in the procurement process that contravenes the law and to give consequential directions.

849. According to the 2nd interested party the Procurement entity did due diligence on the company and was satisfied it met the criteria to supply the goods under Category 3. Indeed, the company supplied the 2nd Respondent with a Factory Inspection Letter and Approval to Manufacture as was required.

850. Section 83(1) of the Act which provides that an evaluation committee may, after tender evaluation, but prior to the award of the tender, conduct due diligence and present the report in writing to confirm and verify the qualifications of the tenderer who submitted the lowest evaluated responsive tender to be awarded the contract in accordance with this Act.

851. The 2nd Interested Party argued that it has local manufacturing capabilities as a Manufacturer and Assembler, a fact confirmed by the 2ndRespondent on 11 July 2025 and that it clearly and sufficiently demonstrated that it is a Local Manufacturer and Assembler and, in that regard, supplied the procuring entity with all relevant documents to support this fact.

852. It further argued that in light of the above, the 2nd Respondent complied with Articles 10 and 227 of the Constitution, Section 80 of the PPADA as read with Regulation

77 of the Public Procurement and Asset Disposal Regulations, 2020, as well as the tender award criteria contained in the Tender Document and that the decision to award the tenders under categories 1, 2 and 3 to the Applicant and the Interested Parties was not tainted by illegality, irrationality, unreasonableness and procedural impropriety.

853. The decision by the 2nd Respondent was also not ultra vires and was in accordance with Section 80(2) of the PPAD Act which provides that the evaluation and comparison shall be done using procedures and criteria set out in the tender documents.

854. According to the 5th interested party, due diligence was selectively conducted, undermining equality of treatment and the integrity of the process.

855. It holds that the findings were not irrational, as alleged, but rather were rooted in a careful examination of pleadings, documents, oral and written submissions, as well as confidential documents availed under Section 67(3)(e) of the Act.

856. The court finds that the 1st Respondent applied its mind to this issue in exercising its discretion in determining this issue. As such only an appeal can undo the 1st Respondent's finding and I so hold.

857. On another issue, the Applicant faults the 1st Respondent's findings on the award criteria and notifications.

858. According to the 1st Respondent, The Board scrutinized ITT 40 of the Tender Document together with Addendum No. 1 dated 13th June 2025 and noted that the Procuring Entity adopted criteria that were neither transparent nor predictable.

859. Specifically, the award mechanism provided no clear basis upon which tenderers could ascertain in advance how lots would be distributed or capped across categories.

860. Section 86(1) of the Act, the award of tenders must be made to the tenderer with the lowest evaluated price in accordance with the evaluation criteria set out in the tender documents. Equally, Article 227(1) of the Constitution requires that public procurement systems be fair, equitable, transparent, competitive and cost-effective.

861. The Board found that the Procuring Entity's criteria failed these standards, as they left room for arbitrariness and selective allocation rather than a predictable "lowest evaluated tender" outcome.

862. The 2nd and 3rd Respondent argued that the decision of the 1st Respondent is materially influenced by an error of law, in that if there existed any ambiguity in the evaluation criteria in the tender document, the bidders were at liberty to seek clarifications during the pendency of the tender process, which

they failed to do and as such, any allegation of ambiguity at the Review stage amounts to an afterthought. The court does not agree with this. The 1st Respondent arrived at the correct finding in order to uphold the integrity of the procurement process and it cannot be faulted.

863. It was the 4th Respondent's position that the mode of evaluation for Category (2) and (3) was ambiguous and deliberately so. The evaluation process was capable of achieving multiple meanings and outcomes took away the intended Article 22 of The Constitution spirit of fairness, consistency and transparency. It was convoluted and complicated to deny some bidders the benefit of transparent procurement system. It is ambiguous and self-defeating in the eyes of the fair administrative action dictates and the rule of law.

864. At paragraphs 213 to 216 of the impugned judgment, the 1stRespondent clearly justified the decision to find the mode of evaluation and its application unlawful and gave reasons for finding it opaque and not cost-effective and these findings cannot be opened up for merit review.

865. On its part, the 2nd interested party in support of the application argues that the 2nd Respondent adhered to the Evaluation criteria provided for in the tender document and addendum.

866. It argues that these criteria offered all potential bidders a fair and equitable method of having their proposal reviewed and considered as a potential solution in a consistent and fair manner; and provided the evaluators with a clear and concise method of identifying the competent proposals and ultimately the best overall bids. This finding was contrary to the evidence before it and the provisions of ITT 40 and Addendum No. 1.

867. The court is in agreement with the 1st and 4th Respondent and the 1st interested party on this issue.

868. This finding is fortified by the fact that the court notes that the 1st Respondent contradicted itself within its own decision creating unreasonableness at paragraphs 207—209, it acknowledged that ITT 40 provided a clear framework for evaluation, yet at paragraph 213, it held that the same provision was not discernible. This inconsistency renders the entire decision irrational and unreasonable and illegal.

869. The sum totality of the foregoing is that this court finds that the 1st Respondent did not provide a cogent basis for its decision to annul the awards. Its findings were bare conclusions without supporting reasoning, contrary to Article 47 of the Constitution. This omission renders the decision unlawful and procedurally unfair.

870. The 1st Respondent at paragraph 214 faulted the mode of award, terming it inconsistent and incapable of guaranteeing

transparency, and on that basis at paragraph 219 declared the awards under Categories 2 and 3 unlawful.

871. The 1st Respondent's decision to cancel, set aside and order for re-tender of all the categories was illegal, irrational, unreasonable, tainted with procedural impropriety.

On the sub issue of the Affidavit;

872. The Applicant filed a Notice of Preliminary Objection supported by two sworn Affidavits by Emmanuel Tongo Oroo, Josephat Atanga Nyabate both sworn on 8.8.2025 and the Applicant's argue that the Affidavits were in themselves independent of the Notice of Preliminary objection.

873. The fact that the Notice of Preliminary Objection was supported by affidavits, which are ordinarily tools of evidence proves that in indeed, the issue raised was not a pure point of law and it required the ascertainment of disputed facts through the tendering of evidence.

874. The affidavit sworn by Josephat Atanga Nyabate that exhibited the 4th Respondent's CR12 was a tool of evidence that was sworn by a Pupil under tutelage at the firm of m/s NOW Advocates. The argument by the Applicant that supporting affidavits had to be sworn by individuals duly authorized in writing though the correct legal position, the said Affidavit had no relevance if it was intended and anchor points of law.

875. I say so because unlike a Notice of Motion which has to be supported by an Affidavit, a Notice of Preliminary Objection is a standalone document that raises points of law that don't call for evidence under the Mukisa Biscuits Principles.

876. This court holds the view that the issues around the Affidavit arose at the level of the determination of the Notice of Preliminary Objection where Affidavit evidence does not carry any relevance.

877. On the sub issue of non-joinder of mandatory parties, the court has looked at the Applicant's case in JR E264/25 alongside Section 170 of the Public Procurement and Asset Disposal Act, CAP. 412C provides as follows: -

> "The parties to a review shall be—
>
> (a) The person who requested the review;
>
> (b) The accounting officer of a procuring entity;
>
> (c) The tenderer notified as successful by the procuring entity; and
>
> (d) Such other persons as the Review Board may determine."

878. This court is guided by the findings in **Judicial Review No. 21 of 2019, Republic v. Public Procurement Administrative Review Board v. Kenya Ports Authority and Another ex parte Jalaram Industrial Suppliers Limited (2019) eKLR** where it was held as follows: -

"The requirement that the accounting officer and the successful tenderer to be made parties to a request for review is both statutory and mandatory. Section 170 is couched in mandatory and express terms. It was therefore not open to the Interested Party to pick and choose against which party to file the Request for Review. In the present case, the Interested Party failed to enjoin both the accounting officer of the procuring entity and the successful tenderer as required by law. The Ex Parte Applicants therefore raised the PO challenging this omission. It is well settled that parties form an integral part of the trial process and if any mandatory party listed in Section 170 of the Act is omitted in proceedings then a request for review cannot be sustained. Failure to comply with these express provisions rendered the Request for Review filed by the Interested Party incompetent. No Court or tribunal has jurisdiction to entertain an incompetent claim brought before it...In the instant case, the Request for Review was incompetent from inception for failure to enjoin mandatory parties. An incompetent request for review is for striking out and cannot be cured by amendment. In the circumstances, the Court is satisfied that the Respondent acted ultra vires the jurisdiction conferred upon it by the Act".

879. Going with the Request for Review filed by the 4th Respondent and dated 27th July 2025, in JR E264/25, the Applicant was not

listed as a Party in the proceedings. The failure by the 4th Respondent to join a successful bidder, or the failure to notify the successful bidder of the hearing interferes with the mandatory and successful bidder's right to a fair hearing. It matters not in which category the affected party was successful in since the grand outcome affects them in one way or the other should the entire tender be set aside like happened as a result of the impugned decision.

880. In the 1st Respondent's own words as stated in the above paragraphs, it found that since, Smart Meter Technology Limited was not a successful tenderer in any of the Lots under Category 3, it's non-joinder as an Interested Party was not fatal.

881. The 1st Respondent notified all bidders via email of the ongoing proceedings. The 1st Respondent did not include the Applicant herein.

882. According to the 4th Respondent, The Applicant would only have participated in the Request for Review upon invitation by the 1st Respondent under Section 170 (d) of the Procurement Act, which opportunity was accorded but the Applicant failed to appear before the Board. Ultimately, The Applicant did not participate in Request for Review PPARB Application 85 of 2025.

883. The court is concerned that, even after the 1st Respondent had made the above findings, it proceeded to deal with issues and made a determination with regards to Category 1 and 2 in total contravention to its findings and in the absence of tenderers who had submitted bids in those categories.

884. The successful bidder's right to a fair hearing under Article 50 and right to fair administrative action under Article 47 was violated and the purpose of section 170 (c) of the Act was not achieved as the Applicant being a successful bidder never participated in the proceedings as it was never joined as a party.

885. The Applicant had a legitimate expectation that as a party whose interests and rights were likely to be affected by an administrative action had a legitimate and reasonable expectation that they would be given an opportunity in the hearing before any adverse action is taken as provided under Article 47(2) of the Constitution.

886. In Republic v Public Procurement Administrative Review Board; Shenzhen Instrument Co. Limited and another (interested party) Ex parte Kenya Power and Lighting Company Limited 120191 eKLR the Honorable Court held that;

> *"...a decision suffers from procedural impropriety if in the process of it making the procedures prescribed by statute are not followed or if the "rules of natural justice' are not*

adhered to. Decision makers must act fairly in reaching their decisions."

887. Section 175 (1) of the Procurement Act which states as follows: - "A person aggrieved by a decision made by the Review Board may seek judicial review by the High Court within fourteen days from the date of the Review Board's decision, failure to which the decision of the Review Board shall be final and binding to both parties."

888. The Notification of Award shows that the Applicant was awarded the tender under Category 2 Lot 3. The Applicant was a not a successful bidder under Category 3.

889. The Applicant only became an aggrieved party when the 1stRespondent, without any basis in the Request for Review and contrary to its findings proceeded to address and ultimately annul Categories 1 and 2 of the tender and being a successful tender under category 2, it prompted the Applicant to file the current Judicial Review proceedings.

890. That section 175 (1) of the Public Procurement and Asset Disposal Act, 2015 is very clear. Upon the 1st Respondent making a decision that annulled the Applicant's successful bid, the Applicant became an aggrieved party within the meaning of the law and is therefore properly before this Court in seeking redress. The court is satisfied that the applicant was an aggrieved person and its right to fair hearing was violated.

Determination;

891. Public procurement, by its very nature, implicates public resources and consumer welfare. It is therefore of critical public interest that procurement processes are conducted in a manner that is lawful, transparent, accountable, competitive, and cost-effective as commanded by Article 227(1) of the Constitution.

892. It is evident from the foregoing that the 1st Respondent failed to act within the confines of the Constitution, the Public Procurement and Asset Disposal Act, the Public Procurement and Asset Disposal Regulations, 2020, the Fair Administrative Action Act, and the rule of law in rendering its decision in Request for Review No. 85 of 2025.

893. The court is convinced that the Decision of the Public Procurement Administrative Review Board dated 19th August 2025 in Public Procurement Administrative Review Board Application No. 85 of 2025, Chint Meters and Electric Kenya Company Limited vs. The Chief Executive Officer/Managing Director, Kenya Power and Lighting Company PLC, Kenya Power and Lighting Company PLC, Magnate Ventures Limited, House of Procurement Limited and Abcos Industrial Limited, in respect of Tender No. KP1/9A.3/RT/14/24-25 for Supply of Single Phase Smart Meters (Local Manufacturers and Assemblers) did not meet the standards as set out in Article 227 of the constitution.

894. The prayer that this Honorable Court be pleased to issue Declaration to effect that the advertisement, evaluation and award of **TENDER NO. KP1/9A.3/RT/14/24-25 For Supply of Single-Phase Smart Meters. (Local Manufacturers and Assemblers)** was done in conformity with the Constitution of Kenya 2010, Procurement Laws, Regulations as well as the process was fair, transparent, cost-effective and lawful as per the laid down Procedures is not properly before this court.

895. The evidence that would lead to such a declaration remains for the board to determine within its special mandate if it is invited to consider the issue when it sits to rehear the review as directed herein in the orders of this court.

896. If the court issues this order, then it will overstep its mandate and terrain wade into the 1st Respondents space and I decline the invitation.

Costs;

897. This court in invoking Section 175(7) of the PPAD Act will not award costs.

Orders;

1. An order of **CERTIORARI is hereby issued** removing into the Court quashing and setting aside the Decision of the Public Procurement Administrative Review Board dated 19thAugust 2025 in Public Procurement

Administrative Review Board Application No. 85 of 2025, Chint Meters and Electric Kenya Company Limited vs. The Chief Executive Officer/Managing Director, Kenya Power and Lighting Company PLC, Kenya Power and Lighting Company PLC, Magnate Ventures Limited, House of Procurement Limited and Abcos Industrial Limited, in respect of Tender No. KP1/9A.3/RT/14/24-25 for Supply of Single Phase Smart Meters (Local Manufacturers and Assemblers).

2. An order of **PROHIBITION is hereby issued** directed at the 2nd and 3rdRespondents, prohibiting them from implementing the Decision of the 1stRespondent dated 19th August 2025 in Public Procurement Administrative Review Board Application No. 85 of 2025, Chint Meters and Electric Kenya Company Limited vs. The Chief Executive Officer/Managing Director, Kenya Power and Lighting Company PLC, Kenya Power and Lighting Company PLC, Magnate Ventures Limited, House of Procurement Limited and Abcos Industrial Limited, in respect of Tender No. KP1/9A.3/RT/14/24-25 for Supply of Single-Phase Smart Meters (Local Manufacturers and Assemblers).

3. An order of **PROHIBITION is hereby issued** directed at the 2nd and 3rdRespondents, prohibiting them from Re-Advertising, Re-Tendering and/or Issuing Fresh

Invitations for Sealed Tenders or Bids for the quantities of meters under Category 1, 2 and 3 in Tender No. KP1/9A.3/RT/14/24-25 for Supply of Single-Phase Smart Meters (Local Manufactures and Assemblers) through Limited Tender Open to Local Meter Manufacturers and Assemblers and/or through any other Method of Procurement.

4. The matter shall be remitted to the Public Procurement Administrative Review Board for reconsideration within fourteen (14) days.

5. No orders as to costs.

Dated, signed and delivered at Nairobi this 9th Day of October 2025.

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J. CHIGITI (SC)

JUDGE

In the presence:

Nyabuto/Juliana – Court Assistants

Faith Gichuri and Munene Njeru – 2nd Applicant

Ms. Owano – 2nd and 3rd Respondent

Ms. Tuwei holding brief for Kirimi – 3rd Applicant

Kerubo holding brief for Mwiti – 4th Respondent

Ms. Main holding brief for Ms. Nungo – 1st Applicant

Ms. Wamuyu – 1st Respondent

Ms. Obura holding brief for Seko – 2nd Interested Party

Ms. Njari – 1st Interested Party