REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW APPLICATION NO. E347 OF 2025 TOGETHER

WITH JUDICIAL REVIEW MISC APPLICATION NO.E144 OF 2025

HEXING TECHNOLOGY COMPANY LIMITED……..……..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 & ELECTRIC KENYA

COMPANY LTD……..4TH RESPONDENT

AND

SMART METER TECHNOLOGY LIMITED…...…1ST INTERESTED PARTY

INHEMETER AFRICA COMPANY LIMITED…..2ND INTERESTED PARTY

HEXING TECHNOLOGY COMPANY

LIMITED…….3RD INTERESTED PARTY

HOUSE OF PROCUREMENT LIMITED……..…4TH INTERESTED PARTY

ABCOS INDUSTRIAL LIMITED……5TH INTERESTED PARTY

AND

MAGNATE VENTURES LIMITED……..……..……..…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 & ELECTRIC KENYA

COMPANY LTD……..4TH RESPONDENT

AND

SMART METER TECHNOLOGY LIMITED…...…1ST INTERESTED PARTY

INHEMETER AFRICA COMPANY LIMITED…..2ND INTERESTED PARTY

HEXING TECHNOLOGY COMPANY

LIMITED…….3RD INTERESTED PARTY

HOUSE OF PROCUREMENT LIMITED……..…4TH INTERESTED PARTY

ABCOS INDUSTRIAL LIMITED……5TH INTERESTED PARTY

AND

MAGNATE VENTURES LIMITED……..…….…….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 & ELECTRIC KENYA COMPANY LTD.....4TH RESPONDENT

AND

SMART METER TECHNOLOGY LIMITED……..1ST INTERESTED PARTY

INHEMETER AFRICA COMPANY LIMITED…..2ND INTERESTED PARTY

HEXING TECHNOLOGY COMPANY LIMITED…….3RD INTERESTED PARTY

HOUSE OF PROCUREMENT LIMITED……..…..4TH INTERESTED PARTY

ABCOS INDUSTRIAL LIMITED……5TH INTERESTED PARTY

JUDGMENT

1. This matter concerns two different sets of motions, arising from the same public procurement process. The Applicant in **JR E 347 of 2025 is Hexing Technology Company Limited** whereas the applicant in **JR MISC E144 of**

2025 is Magnate Ventures Limited. They filed their respective separate Substantive originating motion applications challenging the Public Procurement Review Board's decision dated 23rd October 2025 in regard to the same tender that is Tender No. KP1/9A.3/RT/14/24-25 for the supply of Single-Phase Smart Meters (Local Manufacturers and Assemblers).

2. The parties in the two applications agreed for this court to prepare one judgment for both matters as the issues raised in the two matters are similar, with necessary modifications as appropriate while making reference to the respective motions and hence the court has outlined each party's case as presented and made one determination. Each of the two motions will have counterparts of the same Judgment uploaded on the CTS after delivery.

3. I further observe that, save for the 3rd Interested Party in JR E347 of 2025, who did not file a response in JR Miscellaneous Application No. E144 of 2025, the responses filed by the respective parties are substantially similar across the two applications. In the circumstances, the Court did not consider it necessary to reproduce those submissions separately. The submissions are accordingly treated as consolidated for purposes of this Judgment. The Applicants' cases, however, shall be set out separately. This approach is adopted in the interest of

judicial economy and efficiency and no party stands to suffer any prejudice thereby.

The Applicant's case in JR No. E347 OF 2025

4. The application in JR E347 of 2025 by Hexing Technology is brought by way of an originating motion that is dated 4th November 2025 and was filed on 5th November 2025.It is brought pursuant to Articles 10, 22, 23(3)(f) 47, 48, 50 (1) and 227 of the Constitution of Kenya 2010, Section 175 (1) of the Public Procurement and Asset Disposal Act, Sections 7, 9 and 11 of the Fair Administrative Actions Act, Rule 11(2) and 13 of the Fair Administrative Action Rules, 2024.
5. The motion seeks the following orders:

a) Spent.

b) Spent.

c) THAT a DECLARATION be and is hereby issued that the decision of the Public Procurement Administrative Review Board dated and delivered on 23rd October 2025 upon rehearing Request for Review Application No. 85 of 2025: CHINT METERS & ELECTRIC KENYA COMPANY LIMITED -VERSUS- THE CHIEF EXECUTIVE OFFICER/MANAGING DIRECTOR, KENYA

POWER & LIGHTING COMPANY PLC, KENYA POWER & LIGHTING COMPANY PLC, MAGNATE VENTURES LTD, HOUSE OF PROCUREMENT LIMITED, ABCOS INDUSTRIAL LTD is null and void ab initio by dint of section 175(6) of the Public Procurement and Asset Disposal Act having been made contrary to the binding Judgment of the High Court (Chigiti, J) dated and delivered on 9th October 2025 in HCJR/E262/2025 consolidated with HCJR/E264/2025 and HCJR/E271/2025.

d) <u>THAT AN ORDER OF CERTIORARI</u> be and is hereby issued removing to this Honourable Court for purposes of being quashed the entire decision, findings and holding of the Public Procurement Administrative Review Board dated and delivered on 23rd October 2025 upon rehearing of the Request for Review Application No. 85 of 2025: CHINT METERS & ELECTRIC KENYA COMPANY LIMITED -VERSUS- THE CHIEF EXECUTIVE OFFICER/MANAGING DIRECTOR, KENYA POWER & LIGHTING COMPANY PLC, KENYA POWER & LIGHTING COMPANY PLC, MAGNATE VENTURES LTD, HOUSE OF PROCUREMENT LIMITED, ABCOS INDUSTRIAL LTD.

e) <u>THAT AN ORDER OF PROHIBITION</u> be and is hereby issued to prohibit 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 2 and 3 in Tender No. KP1/9A.3/RT/14/24-25 for Supply of Single-Phase Smart Meters (Local Manufacturers And Assemblers).

f) <u>THAT AN ORDER OF MANDAMUS</u> be and is hereby issued compelling the 2nd and 3rd Respondents to execute a procurement contract with the Applicant in respect of its award for Lot No. 2 under Category 2 of the Tender No. KP1/9A.3/RT/14/24-25 for Supply of Single-Phase Smart Meters (Local Manufacturers And Assemblers).

g) THAT each party to bear their respective costs in light of section 175(7) of the Public Procurement and Asset Disposal Act.

6. The application is supported by the affidavit of Liang Gao sworn on 4th November 2025. The Applicant seeks judicial review of the decision of the Public Procurement Administrative Review Board (PPARB) dated 23rd October 2025, rendered upon a rehearing Request for Review No. 85 of 2025, relating to Tender No. KP1/9A.3/RT/14/24-25 for the supply of Single-Phase Smart Meters (Local Manufacturers And Assemblers). The Applicant states that it had

participated as an eligible bidder in Category 2 and was duly notified on 17th July 2025 that it had been awarded Lot 2 of Category 2.

7. That following the award, the 1st Interested Party (Chint Meters & Electric Kenya) challenged its disqualification by filing Request for Review No. 85 of 2025, and in a decision dated 19th August 2025, the 1st Respondent annulled the entire procurement process and directed re-tendering across all categories. That this decision was challenged in three judicial review applications HCJR/E262/2025, HCJR/E264/2025 and HCJR/E271/2025 which were consolidated and determined by the High Court on 9th October 2025.
8. The High Court is said to have quashed the Board's decision, upheld the Applicant's award as a lawful award, found the cancellation and re-tendering orders to be excessive and disproportionate, affirmed the separability of the tender categories, and expressly prohibited any re-advertising or re-tendering of Categories 1, 2, and 3. It is urged that no appeal was filed, rendering the judgment final and binding under section 175 of the PPAD Act.
9. The Applicant's case is that despite being a party to the proceedings before the High Court, the 1st Respondent reheard the review application and, in its impugned decision of 23rd October 2025, again nullified the notification of award for Categories 2 and 3 and directed fresh re-tendering. The Applicant

contends that this decision directly contravenes the binding High Court judgment and is therefore null and void under section 175(6) of the PPAD Act.

10. The Applicant further argues that the impugned decision is unlawful and ultra vires for several reasons. First, that the request for review was time-barred, as it sought to challenge the evaluation and qualification criteria contained in the tender document and Addendum No. 1 issued on 13th June 2025, contrary to section 167(1) of the PPAD Act and the applicable regulations.

11. Second, that the 1st Respondent lacked jurisdiction to entertain a challenge to Category 2 since the 1st Interested Party was not a tenderer in that category and therefore lacked *locus standi*. Third, that the 1st Respondent failed to consider mandatory and legally relevant considerations, including the binding High Court orders, the doctrine of res judicata, and prior judicial findings on the lawfulness of the evaluation criteria and proportionality of remedies.

12. The Applicant also challenges the decision on grounds of irrationality and unreasonableness, contending that Public Procurement Administrative Review Board contradicted itself by acknowledging that the evaluation complied with the tender document while simultaneously concluding that the evaluation and award were unlawful.

13. The Applicant states that the Board contradicted itself within its own decision creating unreasonableness at paragraphs 203 and 215 wherein it concluded that evaluation and award in the subject tender was not carried out in accordance with the procedures and criteria for evaluation and award set out in the Tender Document, yet at paragraph 193, the Board extensively observed, upon review of the confidential documents submitted by the 2nd and 3rd Respondents, that the successful bidders were determined through a procedure that was compliant with the mode of award stated in the tender document which therefore implies full compliance with section 80(2) and 86 of Public Procurement Asset Disposal Act as read with Article 227(1) of the Constitution.

14. The Board is said to have acted unreasonably in failing to find that the 1st Interested Party herein lacked *locus standi* to commence and continue the request for review application with respect to the distinct and separate Category 2 of the subject tender where the said 1st Interested Party was not a tenderer and further finding that it had pleaded loss and damage that it suffered and/or risked to suffer.

15. It is further argued that no reasonable tribunal could repeat actions already declared illegal, irrational, and disproportionate by the High Court, or direct re-tendering in the face of express prohibitory orders. The Applicant maintains that

the decision bears no rational connection to the evidence before the Board or the purpose of the statutory review mandate.

16. It also urges that Board violated its legitimate expectations by disregarding binding court orders, exceeding its statutory jurisdiction, and cancelling a tender award that had crystallised into a lawful and protected legal right. On these grounds, the Applicant seeks judicial review relief to quash the impugned decision, prohibit its implementation, and uphold the principles and objectives of public procurement under the Public Procurement Asset Disposal Act.

The Applicant in JR E144 OF 2025

17. The Applicant in JR E 144 of 2025 is Magnate Ventures Limited. It filed an originating motion dated 6th November 2025 and filed on 7th November 2025.

18. The application is brought pursuant to Articles 10, 47, 48, 50 (1) and 227 of the Constitution of Kenya 2010, Sections 7, 9, 10 and 11 of the Fair Administrative Actions Act.

19. The application seeks the following orders:

a. An order of CERTIORARI do issue to remove into this Honourable Court and quash the entire decision of the Public Procurement Administrative Review Board dated 23rd October 2025 in Public Procurement Administrative Review Board Application No. 85 of 2025

(Chint Meters & Electric Kenya Company Limited v The Chief Executive Officer/Managing Director, Kenya Power & Lighting Company PLC & Others), in respect of Tender No. KP1/9A.3/RT/14/24-25 for the Supply of Single-Phase Smart Meters (Local Manufacturers and Assemblers), the said decision having been made upon a rehearing pursuant to the orders of the High Court at Nairobi issued on 9th October 2025 in HCJR/E262 of 2025 (consolidated with HCJR/E264 of 2025 and HCJR/E271 of 2025).

b. That an order of CERTIORARI do issue to remove into this Honourable Court and quash the letter dated 5th November 2025 from the 2nd and 3rd Respondents, referenced KP1/9A3/RT/14/24-25/JN/bkk, cancelling Tender No. KP1/9A3/RT/14/24-25 for the Supply of Single-Phase Smart Meters, which cancellation was purportedly made pursuant to the orders of the Public Procurement Administrative Review Board dated 23rd October 2025 in PPARB Application No. 85 of 2025- Chint Meters & Electric Kenya Company Limited v The Chief Executive Officer/Managing Director, Kenya Power & Lighting Company PLC & Others, in respect of Tender No. KP1/9A3/RT/14/24-25 for the Supply of Single-Phase Smart Meters (Local Manufacturers

and Assemblers), the said decision having been made upon a rehearing pursuant to the orders of the High Court at Nairobi issued on 9th October 2025 in HCJR No. E262 of 2025 (consolidated with HCJR No. E264 of 2025 and HCJR No. E271 of 2025).

c. An order of PROHIBITION do issue restraining the 2nd and 3rd Respondents, whether by themselves, their servants, agents, or any other person acting under their authority, from implementing, enforcing, or in any way giving effect to the impugned decision of the Public Procurement Administrative Review Board dated 23rd October 2025, or from proceeding with any procurement or contractual process arising therefrom.

d. In the alternative to Order No. 2, this Honourable Court be pleased to issue an order of PROHIBITION, restraining the 2nd and 3rd Respondents, whether by themselves, their servants, agents, or any other person acting under their authority, from re-advertising or re-tendering for Categories 2 and 3 under Tender No. KP1/9A.3/RT/14/24–25, or from issuing fresh invitations or procurement processes for the same goods, until a lawful and transparent rehearing of the procurement process is undertaken.

e. Spent

f. Costs of these proceedings be provided for.

g. Such other alternative reliefs as this Honourable court may deem just and expedient.

20. The Applicant's case is that the 3rd Respondent, as the Procuring Entity, advertised its intention to procure the subject tender through limited tendering pursuant to Section 102(2)(c) and (d) of the Public Procurement and Asset Disposal Act (PPADA) and Regulation 89(8) of the 2020 Regulations, with tender documents to be downloaded from its website.

21. The 2nd Respondent is said to have later issued three addenda clarifying and or modifying various aspects of the Tender Document. The Applicant and the 1st to 5th Interested Parties it is urged submitted bids across different categories, and following evaluation, the 2nd Respondent issued a Notification of Intention to Award dated 17th July 2025, awarding the Applicant Lot 3 of Category 2 of the subject tender, and notifying unsuccessful bidders of the reasons for their disqualification.

22. That aggrieved, the 4th Respondent filed Request for Review No. 85 of 2025 before the 1st Respondent, which on 19th August 2025 allowed the request, cancelled all awards, and directed a fresh tendering process. Subsequently, that

several parties filed judicial review applications, and that by a consent dated 17th September 2025, the matters HCJR 8262/2025, HCJR 8264/2025, and HCJR E271/2025 were consolidated. The Applicant states that on 9th October 2025, the High Court found the Board's decision illegal, irrational, unreasonable, and procedurally improper, and it quashed the same, prohibited re-advertisement, and remitted the matter back for rehearing.

23. That upon rehearing on 22nd October 2025, the 1st Respondent issued the impugned decision on 23rd October 2025, nullifying and setting aside Categories 2 and 3 of Tender No. KP1/9A.3/RT/14/24-25 and ordering a fresh procurement for the Supply of Single-Phase Smart Meters (Local Manufacturers and Assemblers) for those categories.

24. The Applicant challenges this decision as illegal, irrational, and *ultra vires*, as according to it first, the Board erred at paragraph 211 by faulting notification letters for not disclosing unit prices per lot, erroneously citing section 87(3) of the Public Procurement Asset Disposal Act. The Applicant argues that Section 87(3) of the Act and Regulation 82 only require disclosure of (i) reasons for unsuccessful bids, (ii) names of successful bidders, and (iii) total contract price or unit prices, and do not mandate unit prices for each specific lot. That by imposing such a requirement, the Board introduced obligations not found in the

law, rendering its finding an error of law and contrary to the principle of legality.

25. Second, the Applicant contends that the Board unreasonably criticized the Procuring Entity's due diligence process, despite compliance with Section 83 of the Act and Regulation 80. It is urged that the Tender Document required factory inspection only for Local Manufacturers and Assemblers who had never previously supplied meters to the Procuring Entity and reliance is placed on Clause 2.2.6(ii), Part 1-Preliminary Evaluation Criteria, page 33. The Applicant also contends that the bidders with a proven supply record were expressly exempt from factory inspection as seen under Clause 2.2.6(i), page 33.

26. It is the Applicant's case that the Evaluation Committee properly conducted due diligence only on Abcos Industrial Ltd and House of Procurement Ltd, who were successful tenderers in Category 3 and had no prior supply history, and prepared due diligence reports as required. That the Board's view that due diligence should have been conducted for all bidders was irrational, exceeded its jurisdiction, and amounted to an unlawful substitution of its own interpretation of the tender requirements.

27. Third, the Board is said to have acted unreasonably by annulling both Category 2 and Category 3 despite the Request for Review having been filed solely by a

bidder that participated only in Category 3. This according to the Applicant violated the Wednesbury reasonableness standard, as no reasonable and law directed tribunal could annul a category in which the applicant before it did not participate. The Board is said to have further ignored a binding finding of the High Court in the earlier consolidated judgments, where the Court is said to have held at paragraph 55 at page 108 of 115 that the decision to cancel the whole tender despite the award criteria for the various categories being separate and distinct was unreasonable and irrational.

28. The Applicant maintains that the categories were in fact independent, as expressly set out in the Tender Document and Addendum No.1, with Category 2 reserved for prior suppliers to KPLC or public entities, and Category 3 reserved for all local manufacturers and assemblers. That evaluation and awards in each category were to be made separately under ITT 3.6 and ITT 40, based on lowest evaluated price per lot. According to the Applicant by treating the two categories as "interlinked," the Board effectively rewrote the tender contrary to Section 80(2) of the PPADA, which requires evaluation strictly per the tender document.

29. The Applicant urges that the Originating Motion is merited, that the impugned decision is illegal, irrational, unreasonable, and *ultra vires*, and that the Court

has jurisdiction under Section 175 of the PPADA to grant judicial review. The Applicant further states there is no other internal mechanism for redress, and unless the orders sought are granted, it will suffer substantial loss, including the value of its duly awarded tender in Category 3, Lot 2, amounting to Kshs. 561,015,000.00 (exclusive of VAT) and consequential damages, rendering its right to judicial review nugatory.

Responses

The 1st Respondent-Public Procurement Administrative Board's Replying Affidavit

30. The 1st Respondent filed replying affidavits in both matters both of which are sworn on 17th November 2025 by Philemon Kiprop who introduces himself as the Secretary of the Public Procurement Administrative Review Board, the 1st respondent herein.

31. Relying on **Kenya Pipeline Company Limited v Hyosung Ebara Company Limited & 2 Others [2012] KECA 104 (KLR),** the 1st Respondent asserts that it is a specialised statutory tribunal established to address breaches of procurement law, with wide powers under the Public Procurement and Asset Disposal Act, including the power to annul anything done by a procuring entity and substitute its decisions for those of a procuring entity. That as such, the

administrative review envisaged under the Act is indeed an appeal, and from the 1st Respondent's nature, it follows that its decisions in matters within its jurisdiction should not be lightly interfered with.

32. The 1st Respondent recounts that on 29th July 2025, Chint Meters & Electric Kenya Company Limited, filed Request for Review No. 85 of 2025 challenging Tender No. KP1/9A.3/RT/14/24-25 and sought, inter alia, annulment of the procurement proceedings, cancellation of the letters of intention to award dated 17th July 2025, re-evaluation of its bid, site visits to confirm local manufacturing and assembly status, and costs.

33. That on 19th August 2025, the Board exercised its powers under the Public Procurement Asset Disposal Act and cancelled all awards with respect to Lot 1 and Category 1 and Lots 1,2,3, and 4 with respect to under Categories 2. It also cancelled and set aside awards of Lots 1,2 and 3 with respect to category 3 which was issued to Abcos Industrial Ltd, Magnate Ventures Ltd and House of Procurement Limited respectively. The Board also directed for the re-tendering of the quantities of meters under Category 1, 2 and 3 afresh.

34. That Following judicial review proceedings in HCJR E262 of 2025 consolidated with E264 of 2025 and E271 of 2025, the High Court on 9th October 2025 quashed the Board's decision, prohibited re-tendering or re-

advertisement of Categories 1, 2, and 3, and remitted the matter to the Board for reconsideration within 14 days.

35. The 1st Respondent's case is that in compliance with these orders, it reheard the request for review on 22nd October 2025 and on 23rd October 2025 nullified the notifications of award for Categories 2 and 3, cancelled the procurement proceedings for those categories only, directed re-tendering for Categories 2 and 3, and ordered each party to bear its own costs.

36. The 1st Respondent states that in reaching its decision, it considered all pleadings, submissions, authorities, and confidential documents submitted pursuant to section 67(3)(e) of the Act. It identified and determined several jurisdictional and substantive issues, including its jurisdiction to rehear the matter, the competence and timeliness of the Request for Review under section 167(1), locus standi and pleading of loss, reliance on confidential information, the mode of award, compliance of evaluation and award with the Tender Document, the Constitution, the Public Procurement Asset Disposal Act, and Regulations 2020, compliance with section 87(3) of the Act and Regulation 82, and the appropriate remedies.

37. On preliminary objections, it is urged that the Board considered an objection raised by Smart Meter Technology Limited, contending that the person who

swore the Supporting Affidavit in the Request for Review lacked authority to act on behalf of the Chint Meters & Electric Kenya Co. Ltd by dint of Section 37(2) of the Companies Act and Order 4 Rule 1 (4) of the Civil Procedure Rules. The 1st Respondent contends that it held that this was not a pure question of law since its determination would necessitate examining evidence and as such, could not be determined as a preliminary objection.

38. That it found that while the ground relating to absence of site visits was time-barred under section 167(1), the challenge to the application of the mode of award crystallised upon issuance of the notification of intention to award on 17th July 2025 and was therefore filed within time. The Board further held that the Request for Review was not anchored on confidential information contrary to section 67 of the Act and that Chint Meters & Electric Kenya Co. Ltd had sufficiently pleaded loss and damage to meet the threshold under section 167(1).

39. On the merits, the 1st Respondent states that it addressed the mode of award under ITT 40 as amended by Addendum No.1 and found that the tender adopted a structured and sequential award system across Categories 2 and 3, where each bidder could only be awarded one lot with the highest quantity per category based on eligibility, with subsequent lots allocated sequentially subject to

prevailing market price. The Board is said to have interpreted Categories 2 and 3 as interlinked for purposes of award and found that the Evaluation Committee's approach was neither transparent, predictable, nor lawful.

40. That relying on Article 227 of the Constitution and sections 80, 83, 86 and 87 of the Act, the Board found that the evaluation and award process lacked transparency, failed the test of cost-effectiveness, and did not comply with the Tender Document. The Board is said to have also noted the absence of a detailed evaluation summary, selective and inconsistent application of due diligence contrary to section 83, and failure to conduct due diligence on certain bidders prior to award. Further, that the Board also found that the letters of notification of intention to award failed to disclose unit prices for each lot as required under section 87(3) of the Act and Regulation 80(3), thereby compounding opacity in the process.

41. The 1st Respondent maintains that these findings were consistent with, and in part affirmed by, the High Court in the consolidated judicial reviews, and that certain issues raised by the Applicants are *res judicata*. The Board is said to have further cautioned against reliance on outdated market surveys and underscored the need for adherence to stated evaluation criteria, citing **Minet Kenya Insurance Brokers Limited v PPARB & Others Judicial Review No.**

E092 of 2025 where according to it the court cautioned against introduction of unstated evaluation criterion in the Tender Document and pointed out in its Decision that the Evaluation Committee is under a duty to confine itself to the procedures and criteria set out in the Tender Document when evaluating bids as read with the provisions of the Act, Regulations 2020 and the Constitution.

42. In conclusion, the 1st Respondent asserts that its decision dated 23rd October 2025 was lawful, reasonable, procedurally fair, rational, and within its statutory mandate under the Constitution, the PPADA, Regulations 2020, and the Fair Administrative Action Act. It denies any illegality, irrationality, or jurisdictional overreach and prays that the Originating Motion be dismissed with costs, or in the alternative, that no costs be awarded pursuant to section 175(7) of the Act should the decision be set aside.

The 2nd and 3rd Respondents' Responses

43. In response the 2nd and 3rd respondents filed replying affidavits in both matters both of which are sworn on 24th November 2025 by Bernard Kosgei who introduces himself as a Supply Chain Officer at the 3rd Respondent.

44. The 2nd and 3rd Respondents state that they are equally dissatisfied with the 1st Respondent's decision of 23rd October 2025, which cancelled the tender awards they had issued for categories 2 and 3 of the smart-meter tender. That they

support the present application for that reason. They explain that the 3rd Respondent, a public utility company listed on the Nairobi Stock Exchange, is responsible for electricity distribution nationwide. They state that 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, 201, Public Procurement and Asset Disposal Regulations, 2020, Public Officers Ethics Act, CAP18, State Corporations Act, CAP446 and the Public Finance Management Act, 2012.

45. They emphasize that energy meters are essential for accurate billing, revenue collection, new customer connections, and meter replacements, and that any interruption in their annual procurement process directly harms consumers, slows service delivery, and causes significant revenue losses.

46. The 2nd and 3rd Respondents explain that there is an urgent backlog of about 420,000 electricity meters**,** which continues to grow and is already causing serious harm to the public. That without these meters, new customers including hospitals, schools, government facilities, telecom companies, farms, businesses, and households cannot be connected to power despite having paid for the service. They add that the shortage is also delaying key national and county projects, such as the Affordable Housing Programme and county street-lighting

initiatives, all of which require timely meter installation. It is also urged that the delay is also leading to significant daily revenue losses for the 3rd Respondent.

47. Mr. Kosgei states that it is against this backdrop that the 2nd and 3rd Respondents advertised the subject tender as a Restricted Limited Tender on the 3rd Respondent's website on 4th June 2025.

48. According to him the subject tender was set to close on 24th June 2025 at 10:00 a.m. However, that the 2nd and 3rd Respondents, acting within their mandate under section 75 of the Public Procurement Asset Disposal Act 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.

49. The 2nd and 3rd Respondents urge that the tender was divided into three (3) categories with various lots and that Addendum No. 3 provided for the quantities in each category and their respective lots as follows:

Category	**Eligibility**	**Lot No.**	**Quantities Required**
1	Local Manufacturers/Assemblers with ready stocks (for immediate delivery	Lot 1	167,000

	within 21 days)		
2	Local Manufacturers/Assemblers who have successfully supplied meters to KPLC or any public entity in Kenya	Lot 1	100,000
		Lot 2	85,000
		Lot 3	50,000
		Lot 4	35,000
3	Local Manufacturers/Assemblers	Lot 1	100,000
		Lot 2	65,000
		Lot 3	35,000

50. The 2nd and 3rd Respondents contend that the segregation of the said tender into distinct categories and lots was necessitated by the imperative to unbundle goods as supported by Regulation 154 of the Public Procurement and Asset Disposal Regulations 2020 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.

51. They also state that the tender was deliberately restricted to local manufacturers and assemblers to promote the Buy Kenya Build Kenya Initiative which supports unbundling and preference and reservation outlined under Section 155 of the PPADA, which gives preference to articles manufactured or assembled in Kenya.

52. They explain that Addendum 1 set out the award criteria under Appendix 1 and this included that awards would go to the lowest evaluated bidders per lot based on eligibility as stated in ITT 3.6 and that bidders were allowed to quote for all or as many items in the various lots as per their eligibility. The Appendix is said to have also provided that bidders with ready stock would be prioritized in Category 1 and any other categories so long as their bid prices were within market range. It is said to have also provided that in Categories 2 and 3, each successful bidder would receive only one lot, awarded sequentially as long as prices remained within market value.

53. The deponent also states that if no qualified subsequent bidder existed, the unallocated lot(s) would revert to the lowest evaluated bidder. Further, that if a bidder ranked lowest in more that one lot, they would only be awarded the lot

with the highest quantity. The 2nd and 3rd respondents' case is that ten local manufacturers and assemblers, including the Applicants, participated, and that the bids were opened on 1st July 2025 at Stima Plaza.

54. The deponent avers 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 as follows:

	Bidder's Name	**Category**	**Lot**	**Unit Price in KES VAT excl.**	**Tender sum as read out for all the categories, and lots applied for in KES**	**Tender sum awarded in KES (VAT excl.)**
1.	Smart Meter Technology Ltd.	1	1	10,595	6,843,183,400	**2,133,365,000**
		2	4	10,400		
2.	East Africa Meter Company	2	1	7,410	5,475,395,200	**741,000,000**

	Limited					
3.	Hexing Technology Company Limited	2	2	7,800	4,274,600,000	**663,000,000**
4.	Magnate Ventures Limited	3	2	8,631	4,704,728,000	**561,015,000**
5.	Inhemeter Africa Company Ltd.	2	3	10,530	7,873,291,200	**526,500,000**
6.	House of Procurement Limited	3	3	9,971	2,313,272,000	**348,985,000**
7.	Abcos Industrial Limited	3	1	8,190	3,486,646,800	**819,000,000**
TOTAL						**5,792,865,000**

55. That in respect of the 1st Interested Party/4th Respondent herein, 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. It is urged that this was communicated to all the bidders vide a Letter of Notification of Intention to Award dated 17th July 2025.

56. According to the deponent on 29th July 2025, the 1st Interested Party/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 3rd Respondent's, which decision is said to have been communicated through the Letter of Notification of Intention to Award dated 17th July 2025. The Request for Review according to the 2nd and 3rd Respondents was heard orally on 13th August 2025, and the 1st Respondent delivered its decision on 19th August 2025. The 1st Respondent it is urged *inter alia* cancelled the awards given under the tender and directed the 2nd and 3rd Respondents herein to re-tender afresh.

57. That however, on 9th October 2025, the court Hon. Justice J. Chigiti (SC) issued an order remitting the challenge to the award in the said Tender to the 1st Respondent for reconsideration within 14 days and pursuant to the 1st

Respondent's decision of 23rd October 2025, on 6th November 2025 the 2nd and 3rd Respondents issued cancellation letters to all the bidders, successful or otherwise, in the categories 2 and 3 of the subject tender.

58. It is urged that however, pursuant to the interim order issued by this court on 6th November 2023, the said letters have been held in abeyance during the pendency of the instant case.

59. The 2nd and 3rd Respondents argue that the 1st Respondent's decision of 23rd October 2025 is illegal, irrational, and based on errors of law. They claim the Board misinterpreted section 167(1) of the PPADA regarding the 1st Interested Party/4th Respondent's pleadings, section 87 of the PPADA read with Regulation 82 on notification of intention award, and sections 80 and 86 of the Public Procurement Asset Disposal Act read with the tender document concerning evaluation and award.

60. They add that cancelling both categories 2 and 3**,** despite the 1st Interested Party/4th Respondent bidding only for Category 3, was unreasonable and irrational. They fault the Board for ignoring the financial realities that energy meters 637,000 units in total generate significant revenue, with delays causing projected losses of Ksh. 1.274 billion per month (Ksh. 2,000 per meter), and

that a six-month procurement cycle and retendering could push losses beyond Ksh. 7 billion.

61. They also argue the Board unlawfully ordered a retender contrary to annual procurement plans and budgets, overlooked the consequences of the financial year lapsing, and failed to appreciate the bureaucratic delays in securing fresh budgets. They say the Board wrongly relied on alleged ambiguity in the award criteria even though no bidder sought clarification before the 15th July 2025 deadline and the complaint (PPARB Application No. 85 of 2025) was filed only on 29th July 2025.

62. They further accuse the Board of ignoring relevant matters, being biased, and committing procedural impropriety by disregarding their submissions on Regulation 154 and by overlooking that evaluation must strictly conform to the tender document and not to the 1st Respondent's subjective views of "best practice." contrary to section 80(2) of the Public Procurement Asset Disposal Act. They also state that the Board failed to consider the court's judgment delivered on 9th October 2025**,** and describe the retender directive as unfair and contrary to Article 227 of the Constitution, the Public Procurement Asset Disposal Act, and its Regulations, and urge that the orders sought by the Applicant be granted.

The 1st Interested Party/4th Respondent's-Chint Meters & Electric Kenya Company Limited Replying Affidavit

63. The 1st Interested Party/4th Respondent filed replying affidavits in both matters sworn on 11th November 2025 by Ying Du who introduces himself as the Director of the 1st Interested Party/4th Respondent.

64. In her affidavit she depones that the instant application is an Appeal seeking to overturn the findings of the 1st Respondent and that the Honourable Court sitting under the provisions of Section 175 (1) of the Public Procurement and Asset Disposal Act does not do so in its appellate capacity.

65. She relies on the cases of **John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others [2021] KESC 39 (KLR), SGS Kenya Limited v Energy Regulatory Commission & 2 others(Petition 2 of 2019) [2020] KESC 64 (KLR), Praxedes Saisi & 7 others v Director of Public Prosecutions & 2 others) (Petition 39 & 40 of 2019 (Consolidated)[2023] KESC 6 (KLR)** and **OJSC Power Machines Limited, TransCentury Limited & Civicon Limited**

(Consortium) vs. Public Procurement Administrative Review Board & 2 Others, on the role of the court in judicial review proceedings.

66. According to the deponent the issue raised by the Applicants on the interpretation and application of section 87(3) of the Public Procurement and Asset Disposal Act on the issuance of the Notification of Award and its contents was not challenged at the High Court in the consolidated applications and the findings were never disturbed.

67. That it is also factual that after re-hearing the Request for Review the 1st Respondent did not change its analysis and findings and it properly exercised its discretion and due process was followed as is evident from paragraph 204 to 213 of its Impugned Decision.

68. The 1st Interested Party/4th Respondent's case is that the exercise of discretion in the interpretation and application of Section 87 (3) of the Public Procurement and Asset Disposal Act as read with Regulation 82 of the 2020 Regulations is a matter than can only be challenged on Appeal and not in judicial review proceedings such as these. Further that due process was followed and there is no evidence of illegality. That whether the decision is wrong or right is not a matter that can be revisited by the Court in exercise of its supervisory jurisdiction.

69. The 1st Interested Party/4th respondent further notes that the Applicants challenge the Board's finding on due diligence, but that the Board had consistently held both in its earlier decision and again in the impugned 23rd November 2025 decision that due diligence was conducted selectively, contrary to equal treatment and in violation of section 83 of the Public Procurement Asset Disposal Act. That the High Court, in the consolidated judicial review, had already confirmed that the Board properly exercised its discretion on this issue and declined to engage in a merit review.

70. It is urged that the 1st Respondent exercised its discretion and judgment and made a determination that the mode of evaluation/award and any loss or damage suffered after its application is an issue that can only be entertained after a notification of award has been issued by the procuring entity after applying the "discoverability test."

71. It is further urged that in the impugned decision, the Board specifically found that the Applicants were awarded without proper due diligence, and also faulted the 2nd and 3rd Respondents for awarding tenders to the 4th and 5th Interested Parties without conducting due diligence on the Original Equipment Manufacturer in China. It is urged argue that these are factual and discretionary matters that can only be challenged on appeal, not through judicial review.

72. The deponent relies on the case of **Republic v Public Procurement Administrative Review Board Ex parte Meru University of Science & Technology; M/S Aaki Consultants Architects and Urban Designers (Interested Party) [2019] eKLR** and **Prasad v Minister for Immigration [1985] 6 FCR 155** where the courts are said to have addressed the test unreasonableness.

73. The 1st Interested Party/4th Respondent explains that the impugned decision of 23rd October 2025 differs from the earlier quashed decision because the Board separately assessed Category 1 and annulled only Categories 2 and 3, which shared a flawed and interlinked evaluation method. It argues that it would have been illogical to treat Categories 2 and 3 as severable when both relied on the same evaluation approach under ITT40 of the Tender document.

74. Further that Magnate Ventures Limited the Applicant in JR No. E144 OF 2025 exemplifies the interlinkage as it was initially set for Category 2, Lot 3**,** but, due to trade-offs in the evaluation, was instead awarded Category 3, Lot 2 with higher quantities thus benefiting from cross-category evaluation despite differing qualification and due-diligence requirements. They add that the Board could not properly review Category 3 without examining Category 2, and also

that excluding Smart Meter Technology Limited for lack of legal standing would have left it without any remedy.

75. According to it the finding that it had pleaded loss and damage sufficiently at paragraph 159 and 160 of the impugned Decision made by the 1st Respondent on 23rd October 2025 was made after a thorough examination of the pleadings, the provisions of section 167 (1) of the Public Procurement and Asset Disposal Act and relevant case law and such exercise of discretion and judgment is not a matter that can be subjected to merit review by the judicial review court.

76. Further, the 1st Interested Party/4th Respondent's case is that the 1st Respondent did not make any finding that it had *locus standi* in Category 2 where it had not placed any bids and the annulment of the awards in that category were collateral to determination that the mode of evaluation was flawed and since it was shared with the category it had bid in, the annulment was a natural consequence of the interlinkage.

The 3rd Interested Party/2nd Interested Party-Inhemeter Africa Company Limited's Replying affidavit

77. The 3rd Interested Party/2nd Interested Party filed only one replying affidavit in sworn on 14th November 2025 by William Gathecha Kabinga.

78. The 3rd Interested Party's case is that the impugned proceedings and decision of the 1st Respondent were unlawful, ultra vires, biased, and procedurally improper. It states that it is an Appellant in Civil Appeal No. E870 of 2025, which is pending hearing and determination and whose outcome might affect the unlawful proceedings that took place before the 1st Respondent.

79. It further argues that the 1st Respondent acted in excess of jurisdiction and illegally by revisiting and determining issues that had already been conclusively settled by the High Court in its judgment dated 9th October 2025, and by creating issues *suo moto,* despite the matter having been remitted strictly for reconsideration of orders and not for a fresh hearing.

80. That both the High Court and the 1st Respondent had previously found that Categories 1, 2, and 3 of the Tender were separate and distinct following amendments introduced through Addendum No. 1 issued on 13th June 2025 pursuant to section 75 of the Public Procurement and Asset Disposal Act.

81. It is Inhemeter's case that the 1st Respondent lacked jurisdiction to entertain any review touching on Category 2, as Chint Meters & Electric Kenya Company Limited neither submitted a bid nor participated in Categories 1 or 2 and was therefore not a "tenderer" within the meaning of section 167(1) of the PPADA.

82. It also contends that the reconsideration ordered by the High Court was confined to the propriety of remedies relating to Category 3 only, and that by extending its determination to Category 2, the 1st Respondent violated section 175(6) of the PPADA by acting contrary to binding High Court findings and orders.

83. Further that the Request for Review was time-barred under section 167(1) of the PPADA, as it challenged the evaluation criteria contained in the Tender ddocument issued on 5th June 2025 and Addendum No. 1 of 13th June 2025, long after the expiry of the statutory fourteen (14) day period. The 1st Interested Party (Chint Meters & Electric Kenya Co. Ltd) is said to have participated in the tender process without raising any objection or seeking clarification on the evaluation criteria prior to the tender submission deadline, thereby precluding the 1st Respondent from assuming jurisdiction.

84. It is also argued that the 1st Respondent failed to appreciate sections 79 and 86(1) of the Public Procurement Asset Disposal Act, as the addenda did not vary the mode of notification of award or the evaluation framework, and that Inhemeter's bid was properly evaluated and lawfully awarded under ITT 40 and ITT 41 as the most responsive bid in Category 2, Lot 3.

85. That the 1st Respondent further misapprehended Addendum No. 1 by conflating Categories 2 and 3, despite Category 2 being exclusively reserved for bidders with prior experience supplying meters to KPLC or other public entities. It is asserted that the decision was tainted with bias, bad faith, and improper motive, as the 1st Respondent abandoned its quasi-judicial neutrality by delving into unpleaded issues relating to Category 2, cancelling the entire tender, and purporting to infer loss and damage on behalf of the 1st Interested Party (Chint Meters & Electric Kenya Company Ltd).The 3rd Interested Party further urges that Chint Meters & Electric Kenya Company Limited neither pleaded nor demonstrated any loss as required, and in any event could not suffer loss in respect of a category in which it did not participate.

86. Further, it is contended that the impugned decision contravened Articles 47 and 227 of the Constitution by violating the Applicant's right to fair administrative action and undermining the principles of procedural fairness, and reasonableness in public procurement by cancelling Category 2 of the Tender.

87. The 3rd Interested Party maintains that the 1st Respondent acted *ultra vires*, contradicted its own prior findings, unlawfully expanded the scope of the Request for Review beyond Category 3, and rendered a decision that is illegal, irrational, contradictory, biased, and unreasonable. It is urged that unless

quashed, the decision will occasion grave prejudice to the Applicants, which stand to lose a lawfully awarded tender valued at Kshs. 526,500,000 exclusive of VAT and consequential damages, thereby rendering its right to judicial review nugatory.

The Parties' Written Submissions

88. The Parties canvassed the applications by way of written submissions.

Submissions by Hexing Technology Company Limited-Applicant in JR No. E347 of 2025

89. The Applicant in JR No. E347 of 2025 filed written submissions dated 25th November 2025. I t argues that the decision of the 1st Respondent dated 23rd October 2025 is null and void under section 175(6) of the Public Procurement and Asset Disposal Act, as it contradicts the High Court's binding judgment of 9th October 2025 in HCJR/E262/2025, HCJR/E264/2025, and HCJR/E271/2025, which was not appealed in accordance with section 175(4) of the PPAD Act.

90. That Section 175(6) provides that any action contrary to a decision of the Review Board or the High Court is null and void. The Applicant also submits that since 1st Respondent was a party to these proceedings any contrary decision is invalid. That despite the High Court determining that it was lawfully awarded

Lot 2 of Category 2 and prohibiting re-tendering for Categories 1, 2, and 3, the Board annulled the award and ordered fresh tenders, repeating its earlier "manifestly excessive, unnecessary, and disproportionate" cancellation of procurement in Categories 2 and 3, contrary to the binding High Court decision.

91. The Applicant relies on **Rentco East Africa Limited, Lantech Africa Limited, Toshiba Corporation Consortium v Public Procurement Administrative Review Board & another [2017] KECA 395 (KLR)**, where the Court of Appeal is said to have held that actions contrary to a High Court decision are null and void, citing **Macfoy v United Africa Co. Ltd [1961] 3 All E.R. 1169** for the principle that an act done without jurisdiction is a nullity.

92. The Applicant argues that PPARB's decision suffers from illegality, gross errors of law, irrationality, unreasonableness, and violation of legitimate expectations, warranting judicial review under sections 7(2)(d), 7(2)(e), 7(2)(f), 7(2)(i), 7(2)(k), and 7(2)(m) of the Fair Administrative Action Act (FAAA). It relies on **De Smith's Judicial Review 8th Edition** and **Halsbury's Laws of England**, where it is observed that errors of law arise when a public body misinterprets statutes, fails to consider relevant matters, or takes irrelevant considerations into account.

93. The Applicant submits that the 1st Respondent failed to consider legally relevant points, including the time-barred nature of the 1st Interested Party's/ 4th Respondent's review, lack of jurisdiction to entertain the review outside statutory timelines, and binding High Court prohibitions. It is further submitted that the decision was *ultra vires*, ignoring *res judicata*, the distinctness of tender categories, the lawfulness of evaluation criteria, and the proportionality of cancellation.

94. It is also submitted that the 1st Respondent acted unreasonably by repeating the quashed decision of 19th August 2025 without addressing the High Court's concerns, contradicting itself in analysing ITT 40, and cancelling procurement in Category 2 despite the 1st Interested Party having no *locus standi*. The Applicant also submits that the decision also violated its legitimate expectations, as held in **Kenya Revenue Authority & 2 others v Darasa Investments Limited [2018] eKLR** by disregarding the High Court's binding orders and exceeding statutory jurisdiction in reviewing Category 2.

95. On the efficacy and scope of the orders of certiorari, prohibition and mandamus the Applicant relies on the case of **Geoffrey Gathenji Njoroge & 9 others [1997] eKLR** and **Republic v PPARB & 2 others Ex Parte Akamai Creative Limited**, where the courts are said to have allowed quashing of decisions

tainted with illegality, error of law, irrationality, or unreasonableness, and prohibition of acts in excess of jurisdiction.

Submissions by Magnate Ventures Limited-Applicant in JR Misc. No.E144 OF 2025

96. The Applicant filed written submissions dated 21st November 2025.

97. According to the Applicant, the 1st Respondent exceeded its statutory mandate and misdirected itself in law in purporting to introduce an additional requirement with no basis in the governing legal instruments. To support this position, the Applicant relies on the case of **Republic v Public Procurement Administrative Review Board Ex parte Meru University of Science & Technology; M/S Aaki Consultants Architects and Urban Designers (Interested Party) [2019] KEHC 9313 (KLR)** where the court is said to have emphasised that a statutory body such as the 1st Respondent may only act within the granted powers. It is submitted that the 1st Respondent's decision therefore amounts to an unlawful exercise of power and is *ultra vires* for want of legal foundation.

98. The Applicant also submits that the 1st Respondent acted ultra vires by holding that due diligence ought to have been conducted on all bidders, and that this blanket requirement has no foundation in the law or the Tender Document.

99. It relies on the case of **Republic v Public Procurement Administrative Review Board Ex parte Meru University of Science & Technology; M/S Aaki Consultants Architects and Urban Designers (Interested Party) [2019] KEHC 9313 (KLR)** where the court is said to have held that the Review Board cannot introduce obligations not grounded in law or the tender documents.

100. According to the Applicant the Board ignored the clear, objective criteria in the Tender Document and substituted its own view for that of the Procuring Entity, contrary to what the court is said to have provided in the case of **Selex Sistemi Integrati [2008] KEHC 3915 (KLR),** as it is said to have emphasised that the Board must not interfere with lawful technical or administrative discretion.

101. The Applicant also submits that the Board's finding that due diligence was conducted "selectively" is internally inconsistent and self-defeating, as at paragraphs 202–203, the Board reaffirmed that the Evaluation Committee is under a duty to strictly confine itself to the procedures and criteria set out in the Tender Document, citing with approval this Court's holding in **JR E092 of 2025 – Minet Kenya Insurance Brokers Ltd v PPARB & Others**, which is said to have condemned the introduction of unstated evaluation criteria**.**

102. It is also submitted that the Board applied the very mischief it warned against, retroactively expanding evaluation criteria, exactly what the court in *Minet Kenya* declared unlawful, irrational, and *ultra vires*. This self-contradiction it is urged confirms that the Board misdirected itself on the governing legal framework, and its finding on due diligence cannot stand.

103. That a decision is liable to be quashed where it is so unreasonable that no reasonable tribunal, properly directing itself in law, could have reached it and to support this decision the Applicant relies on **Associated Provincial Picture Houses v Wednesbury Corporation [1948] 1 KB 223.**

104. The Applicant also submits that the Board erred both factually and legally in finding that Categories 2 and 3 were "intertwined," noting that the Tender Document and Addendum No. 1 clearly set separate eligibility and evaluation criteria for each, to be assessed independently under ITT 3.6 and ITT 40. That by treating the categories as inseverable, the Board effectively rewrote the tender contrary to section 80(2) PPADA and principles of legality and fairness. The Applicant adds that the 1st Interested Party/4th Respondent was not the lowest bidder in Category 3 and suffered no demonstrable prejudice.

105. It is also submitted that the annulment of both categories especially where the review request did not concern Category 2 was irrational, disproportionate, and

ultra vires. Further that the Board misinterpreted section 87(3)**,** imposed unstated due-diligence requirements contrary to section 83 and Regulation 80**,** exceeded its jurisdiction despite a binding High Court judgment, and issued an unreasonable and self-contradictory decision. These errors it is submitted violated Articles 47 and 227 of the Constitution and are said to justify the judicial review remedies sought.

The 1st Respondent's submissions

106. The 1st Respondent filed written submissions in both matters and both are dated 25th November 2025.

107. The 1st Respondent submits that the scope of judicial review is narrow, focusing on the decision-making process rather than merits, and a decision is unreasonable only if it is so absurd that no sensible authority could have made it, as was held in the case of **Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223.** It is urged that the Board, being a specialized body under Sections 27 and 29 of the PPADA, is entitled to deference in its factual and technical assessments, provided it acts within its mandate to ensure a procurement process that is fair, equitable, transparent, competitive, and cost-effective.

108. The 1st Respondent submits that the Applicants' argument that Chint Meters & Electric Kenya Company Limited lacked standing to challenge aspects of procurement outside their bidding category is unsustainable, because the Board's review focuses on the integrity of the entire procurement process, not just individual disputes. Further that systemic flaws, such as errors in evaluation methodology or a failure to adhere to fundamental principles of transparency, or illegal instructions from the procuring entity, can vitiate the entire process.

109. It is also submitted that Section 85 of the Public Procurement Asset Disposal Act grants the Board broad powers, including annulment or re-tendering of procurement proceedings. The 1st Respondent also submits that where fundamental illegality affects the procurement's foundation, cancellation of interconnected categories is a proportionate remedy. Also, that its finding that the categories were "intertwined" was a factual and legal determination supported by evidence, and its decision was therefore within jurisdiction. The 1st Respondent states that a bidder may highlight defects affecting the overall tender, not merely their own award, and the Board acted appropriately in safeguarding the integrity of the process.

110. Regarding the alleged premature cancellation letter, it is submitted that the Board's statutory function concluded with its reasoned decision on 23rd October

2025.That the 14-day period under Section 175(1) protects aggrieved parties but does not suspend or invalidate the Board's decision, and the actions of the 2nd and 3rd Respondents issuing the letter do not affect the Board's lawful ruling. It is submitted that the instant application challenging the Board's actions on these grounds is without merit and should be dismissed.

The 2nd and 3rd Respondent's written submissions

111. The 2nd and 3rd Respondents filed written submissions in both matters and they are dated 24th November 2025.

112. The 2nd and 3rd Respondents argue that this Court has supervisory jurisdiction under Article 165(6) of the Constitution to review the 1st Respondent's impugned decision. They submit that an applicant must show illegality, irrationality, or procedural impropriety as set out in **Pastoli v Kabale District Local Government Council & Others [2008] 2 EA 300.**

113. They further contend that judicial review is now anchored in Article 47 and Section 7 of the Fair Administrative Action Act, which broadens the scope of review to include reasonableness, proportionality, and fairness. They rely on the case of **Suchan Investment Ltd v Ministry of National Heritage & Culture & 3 Others [2016] eKLR,** where the court is said to have observed that the modern constitutional framework permits limited merit review without

substituting the administrator's decision. The 2nd and 3rd Respondents emphasise that the applicable standards are detailed under Section 7(2) of the Fair Administrative Action Act.

114. The 1st Respondent it is reiterated misinterpreted section 167(1) of the Public Procurement and Asset Disposal Act vis-à-vis the 1st Interested Party/4th Respondent's pleadings, 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, 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.

115. It is the 2nd and 3rd Respondents' submission that the 1st Respondent committed a serious error of law in holding that the non-joinder of the Magnate Ventures Limited herein as an Interested Party in PPARB Application No.85 of 2025 was not fatal given that it was not a successful tenderer under category 3, yet it simultaneously found that the award criteria for all the 3 categories were interlinked. According to them it ought to have held that the Applicant herein

was a necessary party, having participated and been awarded in categories 1 and 2.

116. The 2nd and 3rd Respondents contend that the 4th Respondent lacked *locus standi* to invoke the jurisdiction of the Board under section 167 of the Public Procurement and Asset Disposal Act, rendering the review request incompetent. They submit that the Board's jurisdiction strictly flows from and is circumscribed under Sections 28 and 167**,** and that it cannot act beyond the law.

117. It is submitted that only a candidate or tenderer who has participated in the procurement process and claims to have suffered or risks suffering loss or damage from a breach by the procuring entity may validly invoke the Board's jurisdiction. This it is urged was the position in the decision of the Court of Appeal in the case of **James Ayodi t/a Betoyo Contractors & Another v Elroba Enterprises Ltd & Another [2019] eKLR**. A similar position is said to have been held by the courts in the cases of **Republic v Public Procurement Administrative Review Board & 2 others; MFI Document Solutions Limited (Interested Party); Mal-Mart Enterprises Limited (Ex-parte) (Application E072 of 2024) [2024] KEHC 9582 (KLR) (Judicial Review) (2 August 2024) (Judgment)** and in **Peesam Limited vs Kenya Power & Lighting Company Limited PLC & 6 others HCJRMISC/E069/2025.**

118. According to the 2nd and 3rd Respondents in the wake of the above decisions, a candidate or a tenderer who has not pleaded suffering or risked suffering loss and damage because of breach of duty by the procuring entity has no *locus standi* to seek administrative review of the procuring entity's decision. The Black's Law Dictionary, 10th Edition, is relied on for the definition of *locus standi*.

119. It is submitted that in the present case, a thorough reading of the Request for Review dated 28th July 2025 reveals a myriad of alleged breaches of the Constitution, the PPADA and the tender document, all allegedly attributable to the Respondents. However, that the 1st Interested Party/4th Respondent did not plead that it had suffered or was at risk of suffering any loss because of the alleged breach and as such the 1st Respondent thus misdirected itself in assuming and exercising jurisdiction under section 167(1) of the PPADA where clearly it ought to have downed its tools.

120. The 2nd and 3rd Respondents state that under section 87 of the PPADA read with Regulation 82**,** the Accounting Officer must issue a written Notification of Intention to Award to both successful and unsuccessful bidders including the name of the successful tenderer/bidder, the tender price, and the reason why the

bid was unsuccessful. This notification is said to trigger a 14-day standstill period to allow for debriefing.

121. They submit that this promotes transparency and fairness. It is their submission that in the instant case, they issued the Notification on 17th July 2025**,** and that the same conformed to the statutory threshold as the same was in writing and contained the names of the successful bidders and their respective tender prices as quoted and as awarded. That they also notified the unsuccessful tenderers/bidders, including the 1st Interested Party/4th Respondent herein, of the reason for non-responsiveness of their respective tenders, namely that the prices offered were not competitive.

122. It is the 2nd and 3rd Respondents' submission that they fully complied with section 87 of the PPADA read with Regulation 82**,** and that the 1st Respondent erred in nullifying the Notification of Intention to Award. They further emphasise that a procuring entity must ensure that any award criteria aligns with the tender document, and to support this position they rely on the case of **Republic v Public Procurement Administrative Review Board & 2 others ex parte International Research and Development Actions Ltd [2017] KEHC 8088 (KLR)**.They also rely on the case of **Republic v Public Procurement Administrative Review Board & 2 others ex parte Akamai**

Creative Ltd [2016] KEHC 6149 (KLR) where Odunga, J. as he then was is said to have observed that a tender cannot lawfully be awarded solely for being the lowest if it does not comply with all conditions in the tender document.

123. The 2nd and 3rd Respondents refer to **PPARB Application No. 1 of 2020: Energy Sector Contractors Association vs KPLC & Another** where the 1st respondent is said to have recognized the need for unbundling of procurements and observed that it promotes competition in that local contractors would have an opportunity to participate in the tendering process thus promoting the local industries.

124. The 2nd and 3rd Respondents submit that the 1st Interested Party/4th Respondent did not bid for Category 1, Lot 1 because they lacked the required ready stock, nor for Category 2, Lots 1–4, as they had no prior supply history with the 3rd Respondent or other public institutions. That in Category 3, where the 1st Interested Party/4th Respondent was eligible, their bid was non-responsive due to uncompetitive pricing. The Respondents contend that this demonstrates full compliance with section 86(1) PPADA**,** Regulation 77(3) 2020 Regulations, and Articles 10 & 227 of the Constitution**,** following a fair, equitable, transparent, competitive, and cost-effective process. They argue that the 1st

Respondent's annulment of the awards was unjustified and irrational, contrary to the standards of Wednesbury unreasonableness.

The 1st Interested Party/4th Respondent's written submissions

125. The 1st Interested Party/4th Respondent also filed written submissions for both dated 25th November 2025 and 26th November 2025.
126. In its submissions it urges that that the Applicants challenged the 1st Respondent's interpretation and application of section 87(3) of the PPADA on the issuance of the Notification of Award dated 17th July 2025 and in particular that the same did not meet the provisions of Article 227 of the Constitution.
127. Further that the tender had three categories and eight lots with differing qualifications, and the initial Notification grouped awards without unit prices, which the 1st Respondent found unclear. Also, that the mode of evaluation had been applied in a manner that resulted to instances of the awards being made to the second lowest bidder, third Lowest bidder, fifth lowest bidders among others.
128. The 1st Interested Party/4th Respondent notes that the 1st Respondent's analysis in its impugned 23rd October 2025 decision followed due process, properly exercised discretion under Article 227**,** section 87(3) Public Procurement Asset Disposal Act**,** and Regulation 82**,** and that such discretion can only be

challenged on appeal, not by judicial review. The 1st Respondent is said to have found that failing to disclose unit prices breached transparency obligations under the Constitution and the Public Procurement Asset Disposal Act.

129. It is the 1st Interested Party/4th Respondent's submission that the High Court in the case of **Republic v Public Procurement Administrative Review Board *ex-parte* Masters Power Systems Limited (HCJR No. 162 of 2021)** while faced with the same question of interpretation and application of Section 87(3) of the Procurement Act observed that a judicial review court focuses on the legality and fairness of the decision-making process, not the merits or factual interpretations, and cannot overturn a decision that has been procedurally taken.

130. The 1st Interested Party/4th Respondent contends that under **ITT40(g)(d)** and **ITT 37.3** of the tender document, the 2nd and 3rd Respondents were required to conduct post-evaluation site visits and verify the declared technical capacity of all successful bidders, including the three successful bidders under category 3 but failed to do so, thereby breaching the mandatory provisions of Section 83 of the PPADA**.**

131. On the question of the mandatory nature of due diligence before the award of any tender, reliance is placed in the case of **Republic v Public Procurement Administrative Review Board Ex parte Meru University of Science &**

Technology; M/S Aaki Consultants Architects and Urban Designers (Interested Party) [2019] eKLR where the court is said to have observed that Section 83 of the PPADA requires that due diligence must be conducted and verified in writing before awarding a tender to ensure a fair, transparent, and competitive process consistent with Article 227 of the Constitution

132. The 1st Interested Party/4th Respondent argues that the 2nd and 3rd Respondents conducted an unlawful partial evaluation by exempting certain bidders from mandatory due diligence and relying on outdated site-visit reports, contrary to what the court provided in **Republic v Public Procurement Administrative Review Board & Anor Ex Parte University of Eldoret [2017] eKLR** rendering all Category 3 awards invalid, it maintains that any challenge to the 1st Respondent's assessment of these factual and discretionary issues lies in an appeal, not judicial review.

133. On what constitutes unreasonableness the 1st Interested Party/4th Respondent relies on the case of **Republic v Public Procurement Administrative Review Board Ex parte Meru University of Science & Technology; M/S Aaki Consultants Architects and Urban Designers (Interested Party) [2019] eKLR** and the case of **Prasad v Minister for Immigration {1985} 6 FCR 155**.

134. It is submitted that the Tramex decision that supports unbundling of tenders into Lots under Regulation 154 of the Procurement Regulations, 2020 was endorsed by the **Court of Appeal** in **Civil Appeal No.621 of 2025**

135. The 1st Interested Party/4th Respondent submits that, unlike in **Tramex Mediquin** where Lots were evaluated separately, the 2nd and 3rd Respondents used the same flawed evaluation method across Categories 2 and 3 despite differing qualification criteria rendering the process non-compliant with Article 227 and the tender document, and that scrutiny of such evaluation methods is a merits issue outside the Court's judicial review jurisdiction under Section 175(1) of the PPADA.

136. The 1st Interested Party/4th Respondent submits that, consistent with the principle affirmed in **Republic v PPARB; Lake Victoria North Water Works Development Agency & Another; Toddy Civil Engineering Co. Ltd (JR E031/2023)**, the High Court cannot re-evaluate the evidence, reconsider the merits, or determine bidder rankings, as such matters fall outside judicial review and squarely within the mandate of the Review Board or an appellate forum.

137. The 4th Respondent argues that Categories 2 and 3, though evaluated using the same method, remained distinct, and the High Court properly refrained from dictating the outcome on re-hearing, that the Review Board's decision was

neither irrational nor absurd, and that the application should be dismissed now academic in any event because bid securities were returned by the 2nd and 3rd Respondents and the procurement process effectively terminated.

138. On legitimate expectation the 4th Respondent relies on the case of **Transparency International Kenya V Teresa Carlo Omondi [2023] KECA 174(KLR)** where the Court of Appeal relying on the decisions in **Communications Commission of Kenya & 5 Others V Royal Media Services Ltd & 5 Others [2014] eKLR**, **the Southern African cases of South African Veterinary Council V Szymanski (4) S.A. 42 (SCA),** as well as **Walele V City of Capetown Town & Others 2008 (6) S.A. 129 (C.C)**, is said to observed legitimate expectation to arise only where a public authority makes a clear and lawful promise that is reasonable to rely on, and such an expectation cannot override explicit legal or constitutional provisions.

139. The 1st Interested Party/4th Respondent argues that, applying the principles of legitimate expectation, no clear or lawful promise was ever made by the court that the 1st Respondent would reach a specific outcome on re-hearing, the annulment of awards in Category 2 flowed naturally from the finding that the shared evaluation method was flawed, not from any promise or directive by the

Court, and any expectation to the contrary would be unreasonable and contrary to section 11 of the Fair Administrative Action Act.

Analysis and Determination

140. From the pleadings, affidavits, and submissions of the parties, the following issues emerge for determination:

i. ***Whether this Court has jurisdiction to entertain the application, or whether the Applicant is improperly inviting the Court to sit on appeal against the merits, factual findings, and discretionary determinations of the 1st Respondent, contrary to section 175 of the Public Procurement and Asset Disposal Act and the settled limits of judicial review.***

ii. ***Whether the Request for Review before the 1st Respondent was competent, having regard to the statutory fourteen-day limitation period under section 167(1) of the Public Procurement and Asset Disposal Act and the question of locus standi of the party who invoked the review jurisdiction.***

iii. ***Whether the 1st Respondent acted within the scope of the remittal ordered by the High Court under section 175(6) of the Public Procurement and Asset Disposal Act, or whether it exceeded its***

jurisdiction by reopening or determining matters already conclusively settled by the High Court.

iv. ***Whether the Applicant has established any illegality, irrationality, procedural impropriety, or constitutional violation in the impugned decision sufficient to warrant the grant of judicial review remedies.***

v. ***What orders should the Court make?***

i. Whether the Court has jurisdiction to entertain the application, or whether the Applicant is improperly inviting the Court to sit on appeal against the merits, factual findings, and discretionary determinations of the 1st Respondent, contrary to section 175 of the Public Procurement and Asset Disposal Act and the settled limits of judicial review.

141. In determining this first issue, it is important to note that the distinction between an appeal and judicial review is well established. Judicial review does not permit the Court to re-evaluate evidence, reassess factual findings, or substitute its own view for that of a specialized statutory body. Rather, it is concerned with the lawfulness, procedural propriety, rationality, and compliance with constitutional and statutory mandates.

142. This principle was restated by the Supreme Court in **John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others [2021] KESC 39 (KLR)** where the court held thus:

> ***"The considerations for judicial review were aptly captured by G V Odunga, J in the case of Republic v Chesang (Ms) Resident Magistrate & 2 others ex parte Paul Karanja Kamunge t/a Davisco Agencies & 2 others [2017] eKLR where he held as follows:***
>
> ***25.However, it is important to remember that Judicial Review is a special supervisory jurisdiction which is different from both (1) ordinary (adversarial) litigation between private parties and (2) an appeal (rehearing) on the merits. The question is not whether the Judge disagrees with what the public body has done, but whether there is some recognisable public law wrong that has been committed. Whereas private law proceedings involve the claimant asserting rights, judicial review represents the claimant invoking supervisory jurisdiction of the court through proceedings brought nominally by the Republic. See R v Traffic Commissioner for North Western Traffic Area ex parte Brake [1996] COD 248.***

26.Judicial review is a constitutional supervision of public authorities involving a challenge to the legal and procedural validity of the decision. It does not allow the court of review to examine the evidence with a view of forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or through a failure for any reason to take into account a relevant matter, or through taking into account an irrelevant matter, or through some misconstruction of the terms of the statutory provision which the decision maker is required to apply. While the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies, it is perfectly clear that in a case of review,

as distinct from an ordinary appeal, the court may not set about forming its own preferred view of the evidence. See Reid v Secretary of State for Scotland [1999] 2 AC 512."

101.Article 47 of the Constitution of Kenya, 2010 and subsequent enactment of the Fair Administrative Action Act No 4 of 2015 have sought to allow the courts to consider certain aspects of merit when considering an application for judicial review. The Court of Appeal in the case of Suchan Investment Limited v Ministry of National Heritage & Culture & 3 others [2016] KLR attempted to reconcile this expanded context as follows:

"54.The law on judicial review of administrative action is now to be found not exclusively in common law but in the principles of article 47 of Constitution as read with the Fair Administrative Action Act of 2015. The Act establishes statutory judicial review with jurisdictional error in section 2(a) as the centre piece of statutory review. The Act provides a constitutionally underpinned irreducible minimum standard of judicial review; the Act is built on the values of expeditious, efficient, lawful, reasonable, impartial, transparent and accountable decision making process in articles 47 and 10(2)(c)

of the Constitution. The extent to which the common law principles remain relevant to administrative review will have to be developed on a case-by-case basis as the courts interpret and apply the provisions of the Fair Administrative Action Act and the Constitution. As correctly stated by the High Court in Martin Nyaga Wambora v Speaker of the Senate [2014] eKLR it is clear that they - articles 47 and 50(1) - have elevated the rules of natural justice and the duty to act fairly when making administrative, judicial or quasi-judicial decisions into constitutional rights capable of enforcement by an aggrieved party in appropriate cases.

An issue that was strenuously urged by the respondents is that the appellant's appeal is bad in law to the extent that it seeks to review the merits of the Minister's decision while judicial review is not concerned with merits but propriety of the process and procedure in arriving at the decision. Traditionally, judicial review is not concerned with the merits of the case. However, section 7(2)(l) of the Fair Administrative Action Act provides proportionality as a ground for statutory judicial review. Proportionality was first adopted in England as an independent ground of judicial review

in R v Home Secretary; Ex parte Daly [2001] 2 AC 532. The test of proportionality leads to a "greater intensity of review" than the traditional grounds. What this means in practice is that consideration of the substantive merits of a decision play a much greater role. Proportionality invites the court to evaluate the merits of the decision; first, proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions; secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations; thirdly, the intensity of the review is guaranteed by the twin requirements in article 24(1) (b) and (e) of the Constitution to wit that the limitation of the right is necessary in an open and democratic society, in the sense of meeting a pressing social need and whether interference vide administrative action is proportionate to the legitimate aim being pursued. In our view, consideration of proportionality is an indication of the shift towards merit consideration in statutory judicial review applications.

Analysis of article 47 of the Constitution as read with the Fair Administrative Action Act reveals the implicit shift of judicial review to include aspects of merit review of administrative action. Section 7(2)(f) of the Act identifies one of the grounds for review to be a determination if relevant considerations were not taken into account in making the administrative decision; section 7(2)(j) identifies abuse of discretion as a ground for review while section 7(2)(k) stipulates that an administrative action can be reviewed if the impugned decision is unreasonable. Section 7(2) (k) subsumes the dicta and principles in the case of Associated Provincial Picture Houses Ltd v Wednesbury Corp [1948] 1 KB 223 on reasonableness as a ground for judicial review. Section 7(2)(i) and (iv) deals with rationality of the decision as a ground for review. In our view, whether relevant considerations were taken into account in making the impugned decision invites aspects of merit review. The grounds for review in section 7(2)(i) that require consideration if the administrative action was authorized by the empowering provision or not connected with the purpose for which it was take and the evaluation of the reasons given for the decision implicitly require

assessment of facts and to that extent merits of the decision. It must be noted that the even if the merits of the decision is undertaken pursuant to the grounds in section 7(2) of the Act, the reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make orders stipulated in section 11 of the Act. On a case by case basis, future judicial decisions shall delineate the extent of merit review under the provisions of the Fair Administrative Action Act.

In Mbogo & another v Shah (1968) EA 93 at 96, this court stated that an appellate court will not interfere with the exercise of discretion by a trial court unless the discretion was exercised in a manner that is clearly wrong because the Judge misdirected himself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. The dictum in Mbogo v Shah (supra) and the principles of rationality, proportionality and requirement to give reasons for

decision are pointers towards the implicit shift to merit review of administrative decisions in judicial review.

The essence of merit review is the power to substitute a decision. Under the Fair Administrative Action Act, there is no power for the reviewing court to substitute the decision of the administrator with its own decision. This imposes a limit to merit review under the Act. Section 11(1)(e) and (h) of the Fair Administrative Action Act, there is no power for the reviewing court to substitute the decision of the administrator with its own decision. This imposes a limit to merit review under the Act. Section 11(1)e/act/2015/4 Fair Administrative Action Act}} permits the court in a judicial review petition to set aside the administrative action or decision and or to declare the rights of parties and remit the matter for reconsideration by the administrator. The power to remit means that decision making on merits is the preserve of the administrator and not the courts."

102.Despite the shift from common law to codification in the Constitution and the Fair Administrative Action Act, the purpose of the remedy of judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial

review is made, but the decision–making process itself. This finding is further reinforced by the fact that though the court in determining a judicial review application may look at certain aspects of merit and even set aside a decision, it may not substitute its own decision on merit but must remit the same to the body or office with the power to make that decision. In this regard we cite the decision of Lord Hailsham LC in Chief Constable of North Wales Police v Evans (1982) 3 All ER at pg 141 said of the remedy of judicial review as follows:

It is important to remember in every case that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual Judges for that of the authority constituted by law to decide the matters in question. The court will not, however, on a judicial review application act as a "Court of Appeal" from the body concerned, nor will the court interfere in any way with the exercise of any power or discretion which has been conferred on that body, unless it has been exercised in a way which is not within the body's

jurisdiction, or the decision is Wednesbury unreasonable. The function of the court is to see that lawful authority is not abused by unfair treatment. If the court were to attempt itself the task entrusted to that authority by the law the court would, under the guise of preventing the abuse of power be guilty itself of usurping power." [Emphasis added]"

143. In public procurement matters, this restraint is reinforced by section 175 of the Public Procurement and Asset Disposal Act which circumscribes the Court's supervisory role to examining questions of illegality, unreasonableness, procedural impropriety and jurisdictional excess, without re-weighing evidence or revisiting discretionary decisions properly made by the Public Procurement Administrative Review Board.

144. Section 175 of the Act provides:

175. Right to judicial review to procurement

1) 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.

2) The application for a judicial review shall be accepted only after the aggrieved party pays a percentage of the contract value as security fee as shall be prescribed in Regulations.

3) The High Court shall determine the judicial review application within forty- five days after such application.

4) A person aggrieved by the decision of the High Court may appeal to the Court of Appeal within seven days of such decision and the Court of Appeal shall make a decision within forty-five days which decision shall be final.

5) If either the High Court or the Court of Appeal fails to make a decision within the prescribed timeline under subsection (3) or (4), the decision of the Review Board shall be final and binding to all parties.

6) A party to the review which disobeys the decision of the Review Board or the High Court or the Court of Appeal shall be in breach of this Act and any action by such party contrary to the decision of the Review Board or the High Court or the Court of Appeal shall be null and void.

7) Where a decision of the Review Board has been quashed, the High Court shall not impose costs on either party.

145. In the present twin applications, it is clear that the Applicant raises a combination of grievances. While some arguments challenge the correctness of the Board's findings or discretionary determinations, there are also valid grounds for judicial review, including allegations that the Board acted without jurisdiction or contrary to section 175, claims that the Board re-litigated matters already decided by the High Court, raising issues of *res judicata,* and allegations of procedural irregularity, unreasonableness, and illegality, including alleged failures in due process, transparency and compliance with statutory and constitutional requirements.

146. These grievances, in our view, constitute proper judicial review grounds and this Court's role is to examine these matters and determine whether the Board acted within the bounds of its statutory mandate and in accordance with law, without venturing into merit-based review of factual findings or discretionary decisions. The challenges that seek to reassess the correctness of the Board's evaluation, the interlinkage of categories, or whether a particular tenderer should have been awarded a lot fall outside the supervisory remit of judicial review and are, in essence, merit-based complaints.

147. This Court is guided by the case of **OJSC Power Machines Limited, TransCentury Limited, and Civicon Limited (Consortium) v Public**

Procurement Administrative Review Board Kenya & 2 others [2017] KECA 386 (KLR) where the Court of Appeal in discussing the role of a judicial review court held as follows:

> ***"That the purpose of judicial review is to ensure that a party receives fair treatment in the hands of public bodies; that it is the purpose of judicial review to ensure that the public body, after according fair treatment to a party, reaches on a matter which it is authorized by law to decide for itself, a conclusion which is correct in the eyes of the court in a judicial review proceedings. Put another way, judicial review is concerned with the decision making process, not with the merits of the decision itself. In that regard, the court will concern itself with such issues as to whether the public body in making the decision being challenged had the jurisdiction, whether the persons affected by the decision were heard before the decision was made and whether in making the decision, the public body took into account irrelevant matters or did not take into account relevant matters.***
>
> ***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 for 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 judicial review. See East African Railways Corp. vs. Anthony Sefu Dar-Es-Salaam (1973) EA 327.

The courts will also interfere with the decision of a public body if it is outside the band of reasonableness. Because all forms of power must be controlled, only those exercised usefully and reasonably will be approved by court. Professor William Wade and Christopher Forsyth in a passage in their text, Administrative Law, 5th Edition at page 362, explain the principle thus;

"The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those bounds, it acts ultra vires. The court must therefore resist the temptation to draw the bounds too lightly, merely according to its own opinion. It must strive to apply an objective standard which leaves to the deciding

authority the full range of choices which the legislature is presumed to have intended."

To justify interference with the decision of a public body, the court must be satisfied that that decision is so grossly unreasonable, so outrageous in defiance of logic or acceptable moral standards that no reasonable authority or body, addressing itself to the facts and the law would have arrived at it. See Associated Provincial Picture Houses Ltd, V. Wednesbury Corporation (1948)1 K.B. 223. This is what has come to be known as the Wednesbury principle in judicial review.

Finally, on the applicable principles, it is incumbent upon a party in a judicial review application who seeks the issuance of any of the orders to present proof of breach of any of the above criteria for that party to succeed in the claim."

148. Equally, in the case of **Republic v Public Procurement Administrative Review Board Ex parte Meru University of Science & Technology; M/S Aaki Consultants Architects and Urban Designers (Interested Party) [2019] KEHC 9313 (KLR)** it was observed that:

"74. In determining whether a decision is justifiable in terms of the reasons given for it, value judgments will have to be made which will, almost inevitably, involve the consideration of the 'merits' in some way or another. As long as the judge determining the issue is aware that he or she enters the merits not in order to substitute his or her own opinion on the correctness thereof, but to determine whether the outcome is rationally justifiable, the process will be in order.

83.Judicial intervention in Judicial Review matters is limited to cases where the decision was arrived at arbitrarily, capriciously or mala fide or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose, or where the functionary misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or where the decision of the functionary was so grossly unreasonable as to warrant the inference, or where the decision maker failed to apply his mind to the matter."

149. Accordingly, while some elements of the Applicants' complaint may touch on merits, the application is properly classified as one for judicial review and the

Court will confine its consideration to issues of illegality, unreasonableness, procedural irregularities and jurisdictional excess, leaving merit-based findings and discretionary evaluations to the Board or an appeal, if competent.

ii. Whether the Request for Review before the 1st Respondent was competent, having regard to the statutory fourteen (14) day limitation period under section 167(1) of the Public Procurement and Asset Disposal Act and the question of locus standi of the party who invoked the review jurisdiction.

150. Section 167(1) of the Public Procurement and Asset Disposal Act provides that a candidate or tenderer who claims to have suffered or risks suffering loss or damage due to a breach of a duty imposed on a procuring entity may seek administrative review within fourteen days of notification of award or the occurrence of the alleged breach.

151. The section states:

167. Request for a review

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.

152. Thus, the law establishes a strict timeline for filing Requests for Review and conditions the competence of the review on both the claimant's status as a tenderer or candidate and the existence of actual or potential loss.

153. In the instant case, the 1st Interested Party/4th Respondent filed its Request for Review on 29th July 2025 challenging the award of Categories 2 and 3, following the Letters of Notification of intention to award dated 17th July 2025. The 1st Respondent determined that while the ground relating to site visits was time-barred, the complaint regarding the mode of award crystallized upon issuance of the notification of intention to award and was therefore filed within time.

154. The 2nd and 3rd Respondents, however, contended that the Request for Review was time-barred, arguing that the 1st Interested Party/4th Respondent had prior knowledge of the evaluation and award criteria, including Addendum No. 1, well before the notification of intention to award. They argued further that no bidder sought clarification on the award criteria within the tender submission

period, implying that the Request for Review was an afterthought, filed only after the awards were communicated.

155. The 1st Interested Party/4th Respondent, as the Applicant in the impugned Request for Review, asserted that it had a legitimate complaint regarding the application of the mode of award, which allegedly affected the fairness of evaluation across interlinked categories. It further relied on the principle that the Board has discretion to entertain claims arising from breaches of procurement duties, provided that they are raised within the statutory period and there is a reasonable nexus to potential loss. The 4th Respondent contended that the Request for Review was therefore filed competently and within the statutory timeframe, and that the Board properly exercised its discretion in considering the matter.

156. At paragraphs 122 to 133 the Board addresses the issue of whether the Request for Review as filed is time barred. In its finding it held thus:

"127.Turning to the instant matter, the question that arises for determination is when the Applicant became aware of the breach complained of in the subject tender.

128. The Board notes that Smart Meter Technology Limited categorized the Applicant's Request for Review into three elements of the procurement

process, namely: the restriction of awards to one lot per category, the allowance of different pricing across awards, and the absence of site visits at the commencement of the tendering process. In light of this categorization and the Board's own review of the Request for Review, the Board finds that the Applicant's grounds can be consolidated into two core issues: (i) the mode of award and its application, and (ii) the absence of site visits at the commencement of the tendering process. Accordingly, the Board shall address the question of when the Applicant became aware of the alleged breaches based on this summary of the grounds. With regard to the award criteria and its application, the Board finds that determining when the Applicant became aware of the alleged breaches is closely linked to the Notification of Intention to Award letters issued on 17th July 2025. It was only upon receipt of these notification letters that the Applicant….

129. In line with the above finding that the Applicant became aware of the alleged breaches relating to the first category of grounds, as summarized above, the Board finds and holds that the statutory time for filing the Request for Review commenced on 17th July 2025.

130.In assessing whether the Request for Review was time-barred under Section 167(1) of the Act, the Board notes that the Request

for Review was filed on 29th July 2025. Having established that time commenced on 17th July 2025, the issue is whether the 14-day statutory period had elapsed at the time of filing. The Board finds that, as the Request for Review was filed on or about the 12th day from the commencement of the statutory period, it was filed within time and is therefore not time-barred.

131.In light of the foregoing analysis, the Board finds that, to the extent the Request for Review challenges the application of the award criteria, it is not time-barred and has been filed in compliance with Section 167(1) of the Act.

132.Turning to the grounds in the Request for Review concerning the absence of site visits, the Board finds that the Applicant became aware of this issue upon accessing the provisions of the Tender Document, As the precise date of access was not provided, the Board assumes, for the sake of argument, that the Applicant became aware on the time- tender opening date, 1st July 2025. In these circumstances, the Board finds that the Request for Review, filed on 29th July 2025, was time-barred, as the 14-day statutory period under Section 167(1) of the Act had already elapsed. The filing, occurring

near the end of the month, clearly exceeded the allowable period from the date the Applicant became aware of the matter.

133.Accordingly, based on the foregoing findings, the Board holds that the Request for Review as filed is not time-barred save for the allegations raised on the issue of the absence of site visits which we have deemed to be time barred. Notably, this finding of the Board was similarly not disturbed by the High Court in its Judgment in the Consolidated Judicial Reviews as captured at paragraphs 33 at page 106/115 of the said judgement.

157. In the case of **Lordship Africa Limited v Public Procurement Administrative Review Board & 2 others [2018] KEHC 7978 (KLR)** observed as follows on the issue of section 167(1):

"The Act mandates that a person who is dissatisfied with the decision of the procuring entity, or who may have suffered or risked suffering loss or damage due to breach of a duty imposed on a procuring entity may seek for 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.

Although the respondent and interested parties claim that the exparte applicant knew about the breach in July 2017 and that therefore it should have challenged the process at that time upon knowing of the breach, the wordings of the Act give the applicant two options namely, upon learning of the breach to file a request for review or in the alternative, to challenge the award 14 days after the notification.

158. The Court of Appeal in the case of **Amazon Transporters Limited v Public Procurement Administrative Review Board & 2 others; Jennygo Enterprises Limited (Interested Party) [2025] KECA 984 (KLR)** observed thus:

"Section 167(1) of the Public Procurement and Asset Disposal Act 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.

Clearly there are two stages at which a candidate or tenderer may challenge the procurement process. This can be done within 14 days of the date of the occurrence of an alleged breach of the procurement process. This means that the candidate or tenderer does not have to wait until the procurement process comes to an end and that if the breach is discovered after the notification of the award but before the contract is validly entered into, a candidate or a tenderer is not precluded from making a Request for Review. That was the view of this Court in Public Procurement Administrative Review Board v Four M Insurance Brokers Limited & 3 others (supra) where the following pronouncements were made:

> ***"45. We are constrained to have a broader interpretation of the words "or date of occurrence of the alleged breach at any stage of the procurement process" as set out in section 167(1) of the Act. This provision in our view, encompassed situations such as the appellant's where allegations of breach arise or become known after the lapse of time for notification of award. A narrow construction of***

the jurisdiction of the appellant will have untold ramifications in the sense that it will leave the litigants aggrieved with no obvious recourse.

46. Specifically with respect to procurement disputes, the question of how the date of occurrence of a breach is to be determined, was the subject of the persuasive decision by Elias JA of the English Court of Appeal in SITA vs Manchester Waste Management Authority (2011) EWCA Civ 156 wherein while applying the decision of the European Court of Justice in Uniplex (UK) Ltd vs NHS Business Services Authority (2010) 2 CMLR 47 extensively discussed when time starts to run with respect to a breach in procurement proceedings as follows:

> ***"…..In Uniplex, the Court of Justice decided to adopt a test of discoverability, not a test which would result in time running from the happening of an event of which the victim might not know. The paragraphs of the judgment in Uniplex which I wish to emphasis are paragraphs 30 and 31:***
>
> ***"30 However, the fact that a candidate or tenderer learns that its application or tender has been rejected does not place it in***

a position effectively to bring proceedings. Such information is insufficient to enable the candidate or tenderer to establish whether there has been any illegality which might form the subject-matter of proceedings.

31. It is only once a concerned candidate or tenderer has been informed of the reasons for its elimination from the public procurement procedure that it may come to an informed view as to whether there has been an infringement of the applicable provisions and as to the appropriateness of bringing proceedings."

46.The threshold therefore in determining the date of occurrence of a breach is the date of actual or constructive knowledge of the breach by an applicant. This indeed is one of the key reasons for the notification and stand still requirements in the award of tenders, so as to allow for informed and effective challenges to award decisions before the contracts are concluded."

159. In the case of **Republic v Public Procurement Administrative Review Board; Inhemeter Africa Company Ltd & 3 others (Exparte); Accounting Officer, Kenya Power & Lighting Company (Interested Party) [2022] KEHC 18101 (KLR),** the Court observed thus:

"14.In its decision, the respondent considered this provision of the law and several decisions that have been rendered by this court on its interpretation including Judicial Review Miscellaneous Application No E064 of 2021 Republic v Public Procurement Administrative Review Board and Judicial Review Application No 2 of 2019 Extreme Engineering Services Limited v Public Procurement Administrative Review Board & another.

15.The two decisions are in agreement that, according to this provision of the law, there are two instances when time starts to run for purposes of filing a request for review with the respondent; these are, first, the date of notification of the award upon conclusion of the tender process or, second, the date of occurrence of the alleged breach, at any stage of the procurement process.

16.The latter decision went further to state that a request for review ought to be filed within 14 days from the date the aggrieved party learns of the breach complained of.

17.The applicant's case largely revolves around the interpretation given to section 167 (1) of the Public Procurement Act by the respondent and, in the applicant's view, the respondent misconstrued

this particular provision of the law. This can easily be discerned from some of the paragraphs contained in the statutory statement as grounds upon which the application is based. Sample these:

18.That as a consequence, the respondent narrowly and restrictively interpreted section 167 of the PPADA on the meaning of a breach complaint of to find that the applicants complained of breaches which are of a continuing in nature and creates fresh causes of action to date since the offending clauses are still maintained in the tender documents prior to its closing date.

19.That in interpreting section 167(1) in a narrow and restrictive (sic) violates the principles of openness in the tendering process and thus unconstitutional as it restrict (sic) access to justice on continuing breach by the procuring entity without affording an opportunity to the public to participate in the judicial proceedings arising therefrom.

22.That the applicant avers that the in the circumstances the respondent gravely misconstrued the scope of its own powers as conferred by section 173 of the PPADA, unlawfully failed to exercise its jurisdiction under the Act and violated the applicant's legitimate

expectation that the respondent would exercise its lawful jurisdiction and hear the applicant on the merits of its request for review."

18.If the applicants are seeking this Court's opinion on the interpretation of section 167 (1) of the Public Procurement and Asset Disposal Act, different from that which was given by the respondent, they are in essence appealing against the respondent's decision although the application is couched as a judicial review application.

19.I wouldn't have any problem with the respondent's interpretation of this provision of the law if I was sitting as an appellate court because I am of the humble view that if it was the intention of the legislature that a party aggrieved by any breach in the procurement process is at liberty to lodge the request for review at any time the breach obtains, it would have stated so."

160. In the present case, the evidence shows that the Applicant filed its Request for Review on 29th July 2025, which was within fourteen (14) days from the issuance of the Letters of Notification of Intention to Award dated 17th July 2025. The Board correctly held that the statutory clock for filing a Request for Review commenced upon actual knowledge of the alleged breach, consistent with established and binding judicial pronouncements.

161. As observed in ***Lordship Africa Limited v PPARB [2018] KEHC 7978(KLR)*** and affirmed in ***Amazon Transporters Limited v PPARB & 2 Others; Jennygo Enterprises Limited [2025] KECA 984(KLR)***, a candidate or tenderer may lodge a Request for Review either within 14 days of notification of award or from the date the breach becomes known, ensuring the claimant has an informed basis to challenge the process.

162. Likewise, in **Republic vs. PPARB;*Inhemeter Africa Company Ltd [2022] KEHC 18101 KLR,*** the Court emphasized that the period for seeking review runs from the date the aggrieved party learns, or ought reasonably to have learned, of the breach. Applying these principles to the facts of this case, it is clear that the 1st Interested Party/4th Respondent's Request for Review application, relating to the mode of award, was filed within the statutory period. The Board was therefore correct to consider the matter on its merits, while its findings that allegations regarding site visits were time-barred aligns with the same legal framework.

163. On the issue of *locus standi* the 1st Respondent found that the Applicant had sufficiently pleaded loss or damage to satisfy the threshold under section 167(1).

164. On the other hand, the 2nd and 3rd Respondents challenged the Board's competence to entertain any claim concerning Category 2 by the Applicant, as the Applicant had not submitted a bid for that category.

165. The 3rd Interested Party challenged the Board's jurisdiction over Category 2, emphasizing that Chint Meters & Electric Kenya Co. Ltd did not bid in that category and was therefore not a "tenderer" within the meaning of section 167(1). They argued that any annulment of Category 2 was beyond the Board's statutory remit and that the Request for Review was therefore incompetent to the extent it sought relief for a category in which the Applicant had no participation nor suffered no loss.

166. The law is clear that *locus standi* under section 167(1) is confined to a candidate or tenderer claiming actual or prospective loss arising from a breach by the procuring entity.

167. On this issue the court Chigiti J, SC in its decision of 9th October 2025 observed as follows in the matter giving rise to the reconsideration of the request for review:

> ***"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 in a procedurally sound manner.***

The affected parties' case 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 carry the day. This court cannot interrogate the question as to whether or not the 1st Respondent misapprehended or misdirect itself in arriving at the impugned decision. To do so would mean that this court would be sitting on appeal which it 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."

168. During re-consideration of the Request for Review as directed by the court the 1st Respondent addressed the issue of Chint Meters & Electric Kenya Company Limited, and its locus to lodge the said Request for Review. This was addressed from paragraph 142 all the way up to paragraph 162.

169. In its finding on this issue the 1st Respondent observed as follows:

"157.The import of the above holdings is that locus standi refers to the right to appear and be heard in a court or other proceedings, literally meaning "a place of standing." Consequently, if a party is found to lack locus standi, it cannot be heard, regardless of whether its case has

merit. This issue alone may lead to the preliminary dismissal of the Request for Review without delving into its substantive aspects.

"158.In addressing this issue, the Board observes that Counsel for the Applicant did not draw its attention to any specific paragraph of the pleadings wherein the risk of loss or damage was pleaded as contemplated under Section 167(1) of the Act. Nevertheless, in order to conclusively determine the matter, the Board undertook a review of the pleadings and noted that at paragraphs 9 and 10 of the Request for Review, the Applicant stated as follows;

> ***9. THAT by lumping together successful bidders for different categories without disclosing which bidder won which lot in the different categories has greatly prejudiced the Applicant's ability to build a case in violation of Articles 47 and 50 of the Constitution of Kenya, 2010, since it is not clear which bidders were his competitors having bid under all the three lots in category three of the third (3) addendum to the tender document.***
>
> ***10. THAT by setting up a procurement system where the lowest evaluated bidder cannot be awarded a tender/contract in more than two lots they bid in, the procuring entity failed to set up a system that***

is cost-effective in compliance with Article 227 of the Constitution and prejudiced the Applicant.

159.The Board notes the above paragraphs to mean that the Applicant contends it suffered prejudice as a result of the manner in which the Respondents conducted the procurement process. In particular, the Applicant asserts that the failure to disclose the allocation of successful bidders to specific lots undermine its ability to know its competitors and thereby hindered the preparation of a proper case, which amounts to denial of fair administrative action and fair hearing under Articles 47 and 50 of the Constitution. Further, the Applicant avers that the restriction limiting the lowest evaluated bidder from being awarded more than two lots created a system that was not cost-effective, contrary to Article 227 of the Constitution, thereby causing it prejudice. 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.

160.In arriving at this conclusion, the Board is guided by the Court of Appeal decision in the James Oyondi case which acknowledged

that a party may plead loss or damage in an attempt to meet the statutory requirement. On the basis of the foregoing analysis, the Board is satisfied that the Applicant sufficiently met the threshold under Section 167(1) of the Act in pleading loss or damage attributable to the Respondents. Consequently, the Applicant has established locus standi, to properly appear before the Board. Moreover, this finding of the Board was similarly not disturbed by the High Court in its Judgment in the Consolidated Judicial Reviews as captured at paragraphs 21 to 32 at page 105/115 to 106/115 of its judgement."

170. Consequently, the Request for Review was competent and properly before the Review Board for determination, in full compliance with Section 167(1) of the Public Procurement and Asset Disposal Act.res

iii. Whether the 1st Respondent acted within the scope of the remittal ordered by the High Court, or whether it exceeded its jurisdiction by reopening or determining matters already conclusively settled by the High Court.

171. A brief background of the matter leading up to the court's judgment of 9th October 2025 by Justice Chigiti SC and which is what the above issue for

determination revolves around is that on 19th August 2025 the Public Procurement Administrative Review Board in Request for Review No.85 of 2025 is said to have cancelled the awards in Tender No. KP1/9A.3/RT/14/24-25 for Supply of Single-Phase Smart Meters. (Local Manufacturers And Assemblers) and directed the 2nd and 3rd Respondents herein to re-tender afresh.

172. Subsequent to this finding three judicial review applications were filed before the Court (Hon. Justice Chigiti, SC) and these were JR No. E262 OF 2025, JR No. E271 of 2025 and JR No. E262 OF 2025. The three applications were consolidated pursuant to a consent dated 17th September 2025.

173. Upon hearing the parties, the court made the following 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 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 Lighting 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 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 Limited vs. The Chief Executive Officer/ Managing Director, Kenya Power and Lighting Company PLC, Kenya Power Lighting 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 POHIBITION is hereby issued 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 Manufacturers 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 Board for reconsideration within fourteen (14) days.

5.No orders as to costs."

174. The Board upon re-consideration of Request for Review No.85 OF 2025 issued the following orders on 23rd October 2025:

"

A. The letters of Notification of Intent to Award Tender No. KP1/9A.3/RT/14/24-25 for Supply of Single-phase Smart Meters. (Local Manufacturers and Assemblers) dated July 17 2025, issued by the 1st Respondent to the Applicant and all other successful and unsuccessful bidders in regard to Categories 2 and 3 of the subject tender are hereby nullified and set aside.

B. The procurement proceedings in Tender No. KP1/9A.3/RT/14/24-25 for Supply of Single-phase Smart Meters. (Local Manufacturers and Assemblers) as pertains to categories 2 and 3 be and are hereby cancelled and set aside.

C. The 1st Respondent is hereby directed to re-tender for Supply of Single-Phase Smart Meters (Local Manufacturers And Assemblers) as pertains to categories 2 and 3 afresh while taking consideration of the Board's findings herein.

D. Each party shall bear its own costs in this Request for Review."

175. The fundamental question for determination therefore, is whether, upon the order for reconsideration, the 1st Respondent remained within the parameters set by the High Court, or whether it impermissibly reopened and re-determined issues that had already been conclusively settled by the High Court.

176. Upon reconsideration as directed by the Court, the jurisdiction of the Public Procurement Administrative Review Board was limited and exercisable strictly within the confines of the judgment and orders of the High Court. The Board's authority upon remittal was therefore derivative and circumscribed, arising from and bounded by the binding determinations and directions of a superior court, rather than original or unfettered. Its task was to give effect to the Court's decision faithfully and in obedience to its findings and prohibitory orders. It was not at liberty to reinterpret, qualify, revisit, or contradict matters that the High Court had already conclusively determined.

177. In the present matter, the High Court did not merely quash the Board's earlier decision. It issued express prohibitory orders, restraining the 2nd and 3rd Respondents from re-advertising, re-tendering, or issuing fresh invitations for Categories 1, 2, and 3 of the subject tender. Those orders were unequivocal and admitted of no exception and they necessarily defined and confined the scope of any reconsideration undertaken by the Board upon remittal.

178. Further, the Court made a definitive finding that the award criteria for the various categories were "separate and distinct," and that the participation of the 4th Respondent-Chint Meters and Electric Kenya Company Limited in Category 3 did not rationally justify cancellation of the entire tender.

179. At paragraph 55 on page 108/115 the High Court observed thus

> ***"55. The Court is also in agreement with the 2nd and 3rd Respondents that the 1st Respondent'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."***

180. This finding was not *obiter dicta* it was integral to the Court's reasoning and formed the basis upon which the earlier decision of the Board was quashed. It

therefore constituted a binding determination that the Board was obliged to follow and give effect to upon remittal.

181. Against that backdrop, the Board's decision on reconsideration to nullify the awards in Categories 2 and 3 and to direct fresh tendering for those categories constituted a clear departure from, and contradiction of, the High Court's findings and orders. The Board justified its decision on the alleged interlinkage between Categories 2 and 3 under ITT 40. However, that reasoning directly conflicted with the High Court's express determination that the categories were separate and distinct. The Board was not at liberty to revive the very rationale that the High Court had already rejected.

182. The Board addressed this issue from paragraph 161 to paragraph 203 of its decision and notably at paragraph 194 it observes as follows;

> ***"In making the above observations, the Board appreciates the High Court's finding at paragraph 55 of its Judgment in the Consolidated Judicial Reviews that the 3 categories in the subject tender are separate and distinct. We do however note that the mode of award as effected by the Evaluation Committee culminating to award of the subject tender was not transparent as seen from our observations above. From the Board's analysis, we note that there is a detailed summary of the***

evaluation and comparison of tenders prepared and availed on the prescribed evaluation criteria as effected by the Evaluation Committee in arriving at its recommendation for award of the subject tender. Hence, the Evaluation Commitee adopted a process that was neither predictable nor lawful in award of the subject tender and the Honourable Court agreed with the findings of the Board that the Board arrived at a correct finding as to failure of the impugned award criteria to uphold standards of lawfulness, integrity, fairness, equity, transparency competitiveness and cost-effectiveness as can be seen at paragraph 90,92 and 95 at pages 111/115 of the Judgement."

183. In finding as herein above, the Board effectively assumed an appellate position over the High Court's judgment, purporting to revisit and overturn conclusions of fact and law made by a superior court. That is a jurisdiction the Board does not possess. The doctrine of *stare decisis*, reinforced by the constitutional hierarchy of courts and tribunals, obliges the Board to follow and give effect to the High Court's determinations, whether or not it agrees with them and seek to appeal the decision if aggrieved, to get a different result.

184. Thus, in the instant case, once the High Court conclusively pronounced itself on the separateness of the categories and expressly prohibited re-tendering, the

Board became *functus officio* in respect of those specific issues. Its role upon remittal was confined to acting consistently with the Court's judgment and did not extend to reopening or re-determining questions that had already been finally settled. In the event that the Judgment was not clear on it was to be implemented, the review Board was at liberty to seek clarification of the Judgment from the same Judge that rendered it.

185. The argument advanced by the 4th Respondent that the Board was merely exercising discretionary judgment cannot stand. Discretion does not exist in a vacuum and cannot be exercised in defiance of binding court orders. A tribunal's discretion must be exercised within the law and in obedience to the express findings and prohibitions of a superior court which Court exercises supervisory jurisdiction over the review Board.

186. Equally persuasive is the position taken by the 3rd Interested Party that the Board lacked jurisdiction to entertain any review touching on Category 2, given that the 1st Interested Party/4th Respondent did not bid for that category. By the Review Board annulling the award in Category 2 and directing a fresh tender, the Board not only acted contrary to the High Court's orders but also extended its reach to a category over which its jurisdiction had not been properly invoked.

187. This Court finds that the 1st Respondent exceeded the scope of the reconsideration ordered by the court by annulling the awards in Categories 2 and 3 and in directing fresh tendering, the Board reopened and re-determined matters that had already been conclusively settled by the High Court, in direct defiance of express prohibitory orders.

188. The Board's reliance on an alleged interlinkage between Categories 2 and 3 was not only inconsistent with, but squarely contradicted, the High Court's binding finding that the categories were separate and distinct. In purporting to reach the opposite conclusion, the Board acted *ultra vires*, unlawfully assumed jurisdiction it did not possess, and violated the doctrine of *stare decisis*.

189. Accordingly, the impugned decision cannot stand. It is vitiated by illegality, jurisdictional error, and non-compliance with a superior court's orders, and is therefore liable to be quashed.

190. More so Section 175 of the Public Procurement and Asset Disposal Act delineates the supervisory jurisdiction of the High Court over decisions of the Public Procurement Administrative Review Board. Where, as in the present case, the Board acts in excess of its mandate upon remittal and in defiance of binding orders of the Court, that supervisory jurisdiction is properly invoked to quash the impugned decision.

191. In light of the foregoing analysis, this Court is satisfied that the 1st Respondent did not act within the scope of the reconsideration ordered by the High Court. The remittal was not an invitation to rehear the matter or to exercise fresh evaluative discretion, but a constrained directive requiring strict fidelity to the Court's binding findings and express prohibitory orders. By annulling the awards in Categories 2 and 3 and directing fresh tendering, the Board reopened and re-determined issues that had already been conclusively settled by a superior court, in direct defiance of unambiguous orders prohibiting re-tendering and definitive findings that the tender categories were separate and distinct.

192. I reiterate that in purporting to justify its decision on grounds previously rejected by the High Court, the Board assumed an appellate posture over a judgment it was constitutionally bound to obey. That conduct amounted to an excess of jurisdiction, was ultra vires, and offended the doctrines of stare decisis and *functus officio*, as well as the fundamental principle that subordinate tribunals must give full effect to the decisions of superior courts. The impugned decision is therefore tainted by illegality and jurisdictional error and cannot be sustained.

193. Accordingly, this Court finds and holds that the 1st Respondent acted outside the parameters of the remittal and in non-compliance with binding court orders. The decision made upon reconsideration is consequently liable to be quashed.

194. This Court further observes that the 1st Interested Party/4th Respondent has argued that the tender securities for the subject tender were returned to all bidders following the Board's *ultra vires* decision. This procedural act, however, does not extinguish the substantive legal rights of bidders whose awards were lawful and unaffected by the High Court's prohibitory orders. Accordingly, the return of tender securities does not prevent the issuance of mandamus for the execution of lawful awards under Category 2, nor does it affect the Court's prohibition restraining unlawful re-tendering

195. Having found that Issue No. 3 fully resolves the dispute and settles the question of the legality of the impugned decision, there is no need for the Court to consider Issue No. 4. Any views expressed on that issue would be academic and would not alter the outcome of the case.

196. In the premises, having considered the material on record, the submissions of the parties and the applicable legal principles espoused in the two motions, I make the following orders;

1. ***AN ORDER OF CERTIORARI is hereby issued removing into this Honourable Court for purposes of being quashed and quashing the entire decision, findings and holding of the Public Procurement Administrative Review Board dated and delivered on 23rd October 2025 upon rehearing of the Request for Review Application No. 85 of 2025: CHINT METERS & ELECTRIC KENYA COMPANY LIMITED -VERSUS- THE CHIEF EXECUTIVE OFFICER/MANAGING DIRECTOR, KENYA POWER & LIGHTING COMPANY PLC, KENYA POWER & LIGHTING COMPANY PLC, MAGNATE VENTURES LTD, HOUSE OF PROCUREMENT LIMITED, ABCOS INDUSTRIAL LTD.***
2. ***AN ORDER OF PROHIBITION is hereby issued prohibiting 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 2 and 3 in Tender No. KP1/9A.3/RT/14/24-25 for Supply of Single-Phase Smart Meters (Local Manufacturers And Assemblers).***
3. ***AN ORDER OF MANDAMUS is hereby issued compelling the 2nd and 3rd Respondents to execute procurement contracts with Hexing***

Technology Company Limited and Magnate Ventures Limited in respect of their lawful tender awards under Category 2 Lot 2 in favour of Hexing Technology Company Limited and under Category 2 Lot 3 in favour of Magnate Ventures Limited of the Tender No. KP1/9A.3/RT/14/24-25, in accordance with the original evaluation and award process prior to the Review Board's ultra vires decision.

4. ***Each party to bear their own costs in light of section 175(7) of the Public Procurement and Asset Disposal Act.***

197. I so order.

198. This file is closed.

Dated, Signed & Delivered virtually in Court at Nairobi this 19th Day of December 2025

R.E ABURILI
JUDGE