



Republic v Public Procurement Administrative Review Board; County Government of Nyeri & another (Interested Parties); Utmost Insurance Brokers Limited & another (Ex parte) (Judicial Review Application E001 & E002 of 2026 (Consolidated)) [2026] KEHC 1620 (KLR) (Judicial Review) (16 February 2026) (Judgment)

Neutral citation: [2026] KEHC 1620 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW APPLICATION E001 & E002 OF 2026 (CONSOLIDATED)
RE ABURILI, J
FEBRUARY 16, 2026**

BETWEEN

REPUBLIC APPLICANT

AND

THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD RESPONDENT

AND

COUNTY GOVERNMENT OF NYERI INTERESTED PARTY

AND

UTMOST INSURANCE BROKERS LIMITED EX PARTE

AND

GOLDFIELD INSURANCE BROKERS LIMITED INTERESTED PARTY

AND

GOLDFIELD INSURANCE BROKERS LIMITED EX PARTE

JUDGMENT

Introduction

In public procurement regulation, it is a general rule that procuring entities should consider only conforming, compliant or responsive tenders.[1] Tenders should comply with all aspects of the



invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents. Bidders should, comply with tender conditions; a failure to do so would defeat the purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some bidders were allowed to circumvent tender conditions. It is important for bidders to compete on an equal footing. Moreover, they have a legitimate expectation that the procuring entity will comply with its own tender conditions. Requiring bidders to submit responsive, conforming or compliant tenders also promotes objectivity and encourages wide competition in that all bidders are required to tender on the same work and the same terms and conditions.

Per *Mativo J in Republic v Public Procurement Administrative Review Board; Accounting Officer, Kenya Rural Roads Authority & 2 others (Interested Parties) Ex Parte Roben Aberdare (K) Ltd [2019] KEHC 5570 (KLR) Citing Arrowsmith, Linarelli and Wallace Regulating Public Procurement 650-673; Cibinic and Nash Formation of Government Contracts 537-592.*

1. This consolidated judgment determines two applications challenging the same decision rendered by the first respondent Public Procurement Administrative Review Board (the Review Board or the Board), rendered on 22nd December, 2025. The ex-parte Applicants in both cases are Utmost Insurance Brokers Limited and Goldfield Insurance Brokers Limited respectively. Each of the exparte applicants filed their separate applications which were consolidated on 13/1/2026 by consent of all the parties. The application by Utmost Insurance Brokers Limited was filed on 2nd January 2026 in this JR E001 of 2026, opening the new year as the first case which I am happy to determine within the first 45 days of the year as stipulated in section 175(3) of the *Public Procurement and Asset Disposal Act* (the Act), whereas the application by Goldfield Insurance Brokers Limited was filed on 5th January, 2026, as the second case of the new year and which is being determined within 42 days.
2. I will first outline the case for the exparte applicant in JR E001 of 2026 as set out before venturing into JR E002 of 2026 and finding the issues for determination in both cases. For avoidance of doubt, JR E 001 of 2026 shall be the parent file with the parties' descriptions as they are therein, in order to avoid any confusion as to which party is which.
3. In the application in JR E001 of 2026 filed by Utmost Insurance Brokers Limited, the exparte applicant seeks the following orders:
 - a. An order of Certiorari to remove into this Honourable Court and quash the decision of the Respondent delivered on 22nd December 2025 in Request for Review Application No. 111 of 2025 in relation to Tender No. CGN/CS/INS/01/2025-2026 for Provision of Comprehensive Medical Insurance Cover for Executive and Staff.
 - b. An order of prohibition restraining the Respondent and the Interested Parties from implementing, giving effect to, or in any way acting upon the said decision of the Public Procurement Administrative Review Board Request for Review Application No. 111 of 2025, including any steps towards cancellation, re-advertisement or fresh procurement founded on that decision.
 - c. An order of prohibition restraining the Respondent and the Interested Parties from commencing, progressing or concluding any fresh procurement process for provision of comprehensive medical insurance cover for Executive and Staff on the strength of, or pursuant to, the impugned decision of the Public Procurement Administrative Review Board in Review Application No. 111 of 2025.
 - d. An order of Mandamus compelling the Respondent and the Interested Parties, insofar as may be necessary upon quashing of the impugned decision, to proceed with the subject



procurement strictly in accordance with the law and the tender documents, and without reliance on or reference to the nullified decision of the Public Procurement Administrative Review Board in Review Application No. 111 of 2025.

- e. Such further or other orders and directions as this Honourable Court may deem fit and just to grant in the circumstances of this case.
 - f. That the costs of this Application be provided for.
4. The Notice of motion application was filed pursuant to leave to apply granted on 2nd January, 2026 and is predicated on the grounds on the face of the motion and the statutory statement dated 2nd January 2026 as verified by the affidavit sworn by Mr. Stanley Gikandi an authorised officer of the exparte applicant, a limited liability company.
 5. The exparte applicant's case as detailed in the statutory statement and the depositions by Mr Gikandi is that on 22nd December 2025, the Public Procurement Administrative Review Board delivered a decision in Public Procurement Administrative Review Board Application No. 111 OF 2025 in respect of Tender No. CGN/CS/INS/01/2025-2026 for Provision of Comprehensive Medical Insurance Cover for Executive and Staff.
 6. In the said decision which is impugned by the exparte applicant, the Respondent Review Board is said to have found that the substance of the dispute revolved around the manner in which the tender opening was conducted and that the alleged breach occurred and was known to the Applicant at the tender opening on 6th November 2025.
 7. The Respondent Review Board is said to have held that time for lodging of the Request for Review began to run from the notification of award dated 18th November 2025.
 8. The exparte applicant contends that the respondent Review Board misconstrued and misapplied section 167(1) of the *Public Procurement and Asset Disposal Act* and Regulation 203(2)(c)(iii) of the Public Procurement and Asset Disposal Regulations, 2020 which require a request founded on a mid-process breach to be filed within fourteen (14) days of the occurrence of that breach.
 9. According to the exparte applicant, on a proper construction of section 167(1) of the Act, the Request for Review filed on 1st December 2025 was incurably time-barred, and that the Respondent therefore lacked jurisdiction to entertain or determine the Public Procurement Administrative Review Board Application/ Request for Review No. 111 of 2025.
 10. The exparte applicant contends that the said Review Board's decision is tainted with illegality for want of jurisdiction on the part of the Respondent, and is allegedly further vitiated by irrationality, unreasonableness and abuse of power. That by arrogating jurisdiction to itself in the face of a statutory time bar, the Respondent acted without jurisdiction, ultra vires and illegally in hearing and determining the said Request for Review.
 11. It is asserted that the Respondent Review Board having so acted without jurisdiction, it further exceeded its powers by purporting to nullify the letters of notification of award, cancel the entire tender proceedings, direct the re-advertisement of the tender, and issue wide-ranging supervisory directions to the Accounting Officer of the County Government of Nyeri and to the Director-General of the Public Procurement Regulatory Authority.
 12. The exparte applicant avers that the Respondent's decision is irrational and unreasonable in that it treated tender-opening events of 6th November 2025 as sufficiently grave to "taint the entire tendering



process with illegality”, yet declined to treat those same events as the operative date for purposes of the statutory limitation period under section 167(1) of the Act.

13. The Respondent is further accused of acting unreasonably and disproportionately by collapsing the entire procurement and compelling a re-advertisement on the strength of a narrow bidder-specific grievance, thereby penalizing all bidders and the procuring entity for acts attributable to the tender opening committee and secretariat and not to the Applicant.
14. The Respondent is further stated to have failed to take into account relevant considerations, including the strict and mandatory nature of the timelines under section 167(1), the procurement-specific jurisprudence requiring complaints on mid-process breaches to be brought within fourteen (14) days of their occurrence, and the need to fashion remedies that are proportionate and confined to the specific breach established.
15. According to the *exparte* applicant, the re-advertising of the tender will occasion grave prejudice of the Applicant and is contrary to the law.
16. Further, that the wider interests of justice and good administration will best be served if the orders sought herein are granted, and that no prejudice will be suffered by the Respondents or the Interested Parties that cannot be adequately addressed within the framework of the procurement law.
17. The applicant invokes the supervisory jurisdiction of this Court and urges the Court to intervene and to quash the alleged illegal, unreasonable and manifestly unjust decision of the Respondent herein.

The Respondent’s Replying Affidavit

18. The Respondent Public Procurement Review Administrative Review Board whose decision rendered on 22nd December, 2025 is impugned by both applicants in the consolidated Judicial review applications, but for slightly different reasons, with the *exparte* applicant herein impugning the jurisdiction of the respondent on account of time lapse of the request for review and the alleged error by the procuring entity while the *exparte* applicant in JR E002 of 2026 basically challenges the action by the Respondent Review Board in its decision to annul the entire procurement process on account of the alleged fraud on the part of the tender opening Committee, and asserting that the Review Board should, upon its finding that the *exparte* applicant herein was non responsive have declared the applicant in JR E002 OF 2026 the highest evaluated bidder and therefore should have directed the procuring entity to award it the tender.
19. In the replying affidavit sworn by Mr. Philemon Kiprop the Board Secretary of the Review Board on 9th January, 2026, it is deposed that the application by the applicant is misconceived, devoid of merit and unsustainable in law as it is pegged on misapprehension and misinterpretation of the Respondent’s decision by the applicant.
20. The Respondent reproduces the orders sought in the request for review vide Request for Review No.111 of 2025 by the 2nd interested party Goldfield Insurance Brokers on 1st December, 2025 and that after the respondent assumed jurisdiction and upon hearing all the parties, it rendered its decision on 22nd December, 2025. The respondent also reproduces the orders which it made in its determination of the Request for Review by the 2nd interested party herein.
21. The respondent asserts that it acted within the confines of its statutory mandate after considering all the parties positions and the confidential documents guided by previous decisions of this Court on similar matters and identifying 3 issues which it determined namely, jurisdiction to hear and determine the request for review, whether the tender opening was done in accordance with the law and what appropriate orders should issue in the circumstances.



22. The respondent maintains that it was within the law in treating the request for review as having been filed within 14 days of notification of award being the moment when the cause of action crystallised, and in accordance with section 167(1) of the Act.
23. That after examining the tender opening committee minutes, it questioned the authority under which the procuring entity examined the tender documents to discover the error and called and send messages to the bidders' representatives having already departed from the opening venue and trying to return them to verify the information, which the respondent took issue as being contrary to section 64 (1) of the Act.
24. According to the respondent, the tender opening committee ought not to have instructed the secretary to contact bidders after conclusion of the opening exercise and their departure as that offended section 67 (1) of the Act.
25. That the alleged oversight amounted to serious breach of the law thereby rendering the entire procurement process tainted with illegality hence the nullification of the entire process.
26. That the applicant had not demonstrated any illegality, irrationality, procedural impropriety or unfairness in the manner in which it considered and interrogated the evidence, documents, pleadings and information before arriving at its now impugned decision in Request for Review No. 111 of 2025.
The Replying Affidavit By The Accounting Officer And Procuring Entity, the 1st Interested Party
27. The 1st Interested party, County Government of Nyeri, filed a replying affidavit sworn by Edward Irungu Mwangi, its County Secretary on 12th January, 2026. In the said affidavit, the procuring entity defends its decision which was impugned before the Review Board asserting that there was an oversight on the part of the tender opening Committee when it inadvertently readout that the applicant had provided a bid security of Kshs 3 million instead of Kshs 6.9 million.
28. That the oversight was subsequently identified and efforts were made to reconvene the bidders' representatives who, unfortunately, had already left the premises, with the intention of verifying the anomaly with all the parties involved and that when the parties could not be found physically, the procuring entity reached out to them via the mobile phone calls and follow ups with short message service.
29. That in the request for review, the 2nd interested party anchored its claim on alleged breach which was discovered on 6th November, 2025 when the bids were opened.
30. That the claim that the Review Board should have awarded the tender to the applicant herein is inconsistent with the principles of competitive bidding and further contradicts the applicant's prayers sought before the Review Board, where the applicant claimed that the process was fraudulent yet insisting that the tender should have been awarded to them.
31. That the procuring entity is apprehensive of institutional retribution in service provision if the ground 8 of imputing unprofessionalism is to be considered arguable.
32. That prayer 3 offends the Constitutional provisions of Article 227 that calls for fair, equitable, transparent, competitive and cost-effective model of public procurement by locking out interested parties that may offer value for money compared to the applicant.
33. That the applicant donated to the Review Board, in their omnibus prayer of any other or further relief that the Board deemed just and fit to grant, wide and sweeping powers hence the applicant cannot



appear selective on the orders that the Review Board ought to have granted, since the remedies include the nuclear option of fresh advertisement of the tender.

34. That the applicant is cherry picking on favourable orders while introducing new issues which were not before the Review Board after yielding to the jurisdiction of the Review Board to make any orders.
35. That the unreasonableness and the ultra vires nature of the decision has not been pleaded with specificity with the applicant only selectively picking issues of law that are favourable to it.
36. That the applicant has not demonstrated that the orders issued by the Review Board were inconsistent with the provisions of the Act.
37. That this judicial review application seeks to erode the discretion of the Review Board by imposing a favourable decision. That the Board in its decision took into account the urgent need for the procurement of the medical insurance services whose absence would occasion irreparable harm to the staff and the executive of the procuring entity.
38. The procuring entity also filed a similar replying affidavit sworn by the same deponent County secretary, opposing the application in JR E002 of 2026 on 5th January, 2026.

The 2nd Interested Party's Replying Affidavit

39. The 2nd Interested party in JRE001 of 2026, which is Goldfield Insurance Brokers Limited filed a replying affidavit sworn by Vincent Osewe, in response to the Ex-Parte Applicant's Notice of Motion dated 2 January 2026, the Chamber Summons, Statutory Statement and Verifying Affidavit of Stanley Gikandi dated 31 December 2025, and the 1st Interested Party's Replying Affidavit of Edward Irungu Mwangi dated 5 January 2026)
40. On the issue of the Review Board's jurisdiction, it is deposed that the Respondent (PPARB) was properly seized of jurisdiction under Section 167(1) of the Act, as the 14-day statutory period only commenced upon receipt of the Letter of Notification of Award dated 18 November 2025.
41. According to the 2nd interested party, the Ex-Parte Applicant's contention that time began to run on 6 November 2025 is a legal fallacy; since under Section 78(7) of the Act, a tenderer cannot be disqualified at the opening stage, and thus no actionable breach could have crystallized until the evaluation process was concluded and an award communicated.
42. The 2nd interested party supports the Review Board's decision in its application of the discoverability principle, finding that the cause of action only arose when the Ex-Parte Applicant could juxtapose the recorded tender security against the fact that the Interested Party had been declared the successful bidder. That to suggest that a bidder must file a review mid-process based on an SMS "clarification" is to invite a chaotic and fragmented procurement regime that contradicts the strict timelines and procedural order mandated by the Public Procurement and Asset Disposal Regulations, 2020.
43. Further, that the Respondent is a creature of statute with the mandate to review, hear, and determine disputes where a breach of duty is alleged and that once the Ex-Parte Applicant established that the 14-day window was met, excluding the date of notification as per Section 57 of the *Interpretation and General Provisions Act*, the Board's jurisdiction became absolute and non-derogable.
44. That the Board, having painstakingly analyzed the chronology of events, correctly clothed itself with the authority to intervene to protect the integrity of a public process that had been brazenly compromised by fraudulent manoeuvres.



45. On Alleged "Oversight" During Tender Opening, the 2nd Interested party deposes in contention that the Ex-Parte Applicant and the 1st Interested Party falsely characterize the recording of the tender security as a "minor error" or "oversight".
46. The deponent asserts that he was personally present at the tender opening on 6 November 2025, and that he confirms that the 1st Interested Party's Committee read aloud the Ex-Parte Applicant's tender security as KES. 3,000,000.00.
47. Further, that during the opening session, the Ex-Parte Applicant's representative, Mr. Muriithi, specifically volunteered the location of the bid bond, confirmed the KES. 3,000,000.00 amount, and expressed full satisfaction with that record.
48. That the Ex-Parte Applicant's representative having made an unequivocal admission at the point of opening, the Ex-Parte Applicant is now caught by the doctrine of estoppel and cannot be heard to contradict a public record that was created with their active participation and express consent.
49. That it is a contradiction for the Ex-Parte Applicant to now claim, and for the 1st Interested Party to support, that a different security of KES. 6,900,000.00 was "discovered" over an hour after the bidders had dispersed. I verily believe that any bid security of KES. 6,900,000.00 was introduced to favour the Ex-Parte Applicant after the tender opening process had been closed and the bidders had dispersed.
50. The deponent disputes the claim that a lawful "clarification" occurred, and contends that reliance on an informal SMS to alter a mandatory tender requirement was irregular, non-transparent and incapable of curing non-responsiveness.
51. On the alleged illegality of the post-opening sms "clarification", the 2nd interested party contends that the SMS sent at 1:56 p.m. (Thursday, 6 Nov) was not a lawful "clarification" under Section 81 of the Act.
52. According to the 2nd interested party, Section 78(6) of the Act mandates that bid particulars, specifically tender security, must be read aloud and recorded contemporaneously to ensure transparency.
53. Further, that the Review Board is duty-bound under Section 28 of the Act to determine disputes involving breaches of statutory duty; thus, ignoring a blatant post-opening document alteration would have amounted to a jurisdictional failure by the Board to uphold the integrity of the procurement system.
54. It is further contended that any attempt to "correct" or substitute a mandatory document after the public opening is "shut" constitutes a fraudulent manoeuvre to "sneak in" compliant documents that were never part of the original public record.
55. The 2nd interested party maintains that the Ex-Parte Applicant's bid was non-responsive at the point of opening and could not be "resurrected" by informal, non-auditable text messages.
56. In response to the 1st interested party's affidavit sworn by Edward Irungu Mwangi, the 2nd interested party deposes in contention, maintaining its position that the 1st Interested Party's Affidavit is an attempt to sanitize systemic procurement irregularities and to validate an unlawful evaluation.
57. Further, that the 1st Interested Party introduced a mysterious bidder, "Amana," in their technical evaluation who was never recorded at the tender opening, further proving that the entire process was tainted with illegality.



58. Additionally, that the 1st Interested Party's claim of acting in "good faith" is belied by the fact that they ignored the immediate SMS objection which warned that changing documents post-opening was unacceptable.
59. On the correctness of the Review Board's finding on illegality, the 2nd interested party refers to its separately instituted proceedings challenging the scope of the Board's remedy; but that in these proceedings it opposes the Ex-Parte Applicant's attack on the Board's jurisdiction and its finding that the procurement process was unlawful.
60. It maintains that the Ex-Parte Applicant is not entitled to the orders of Certiorari or Mandamus as it seeks to enforce an award founded on a fraudulent and procedurally flawed foundation.
61. On the merits of the judicial review orders sought, the 2nd interested party asserts that Judicial Review is an equitable jurisdiction, and that the Ex-Parte Applicant, by seeking to benefit from a clandestine and unauthorized SMS 'clarification' that bypassed formal procurement channels, comes to this Court with unclean hands, thereby disentiing itself to the discretionary orders of Certiorari, Prohibition or Mandamus.
62. Further, that the prayer for Certiorari is misplaced as it seeks to quash a Board decision founded on clear evidence of procedural impropriety, including the 1st Interested Party's admission of an unlawful post-opening alteration.
63. That an order of Prohibition cannot lie to stop the implementation of a decision that restored legality to a process where the 1st Interested Party introduced a mysterious bidder, "Amana," who was never present at the tender opening.
64. That the prayer for Mandamus is a gross abuse of court process, as it seeks to compel the 1st Interested Party to award a multi-million-shilling contract to a bidder who failed a mandatory preliminary requirement and whose bid was void ab initio.
65. That the Ex-Parte Applicant is not entitled to discretionary remedies from this Court as it comes with "unclean hands," having benefited from a fraudulent manoeuvre to alter their bid particulars mid-process.
66. The 2nd interested party urges this court to dismiss the judicial review application for want of merit as it is an attempt to reinstate a procurement fraud.

The Exparte Applicant's Further Affidavit

67. In the further affidavit sworn by the exparte applicant's Managing Director, on 2nd January, 2026, Mr. Stanley Gikandi reiterates the exparte applicant's position and in response to the replying affidavits sworn by Philemon Kiprop for the Respondent and the Replying Affidavit of Vincent Osewe for the 2nd interested party, Mr. Gikandi deposes that the respondent has mischaracterized the Applicant's Case in that contrary to the Respondent's assertion that the Notice of Motion and its supporting grounds were founded on a misapprehension of its decision, the Respondent rendered a decision that was irrational, unreasonable, unlawful and procedurally unfair, having failed to consider the totality of the evidence on record and the true factual position.
68. That the Respondent, without any lawful or reasonable justification, failed to consider the very documents forming the core of the dispute and the surrounding circumstances, notwithstanding that the same were plainly contained in the Applicant's Response to the Request for Review application, the bid document and were serialized, indexed and bound as part of the bid document submitted.



69. That in particular, the Respondent failed to examine and appreciate the distinction between the following two documents, namely: the Applicant's tender security dated 5th November 2025, appearing at page 43 (Item 12, pages 42-43 of the tender document), clearly addressed to the procuring entity, being the 2nd Respondent; and the SMEP Bank guarantee dated 6th March 2024 appearing at page 233, being a certified copy of a bank guarantee for Kshs. 3,000,000.00 deposited with the Insurance Regulatory Authority solely for regulatory licensing purposes.
70. That the two different documents served different purposes, and were expressly identified as such in the table of contents of the bid document, which both documents were also part of the requirements in the tender documents and that none was additional or outside the requirements of the tender documents.
71. Further, that had the Respondent examined the bid document as a whole, including serialization, the table of contents and documents themselves, it would not have reached the erroneous conclusion.
72. That instead, the Respondent placed undue reliance on the tender opening register and minutes, while declining to interrogate the contested documents themselves, thereby arriving at a conclusion that was not only factually incorrect but irrational and unreasonable.
73. That the Respondent's failure to take into account relevant, material and readily available evidence, while relying on incomplete secondary records, constituted a fundamental error of law and fact, thereby rendering the impugned decision amenable to this Honourable Court's supervisory jurisdiction by way of judicial review.
74. According to the *exparte* applicant, the Respondent failed to consider that, upon realizing an inadvertent error at the tender opening, the 1st Interested Party's tender opening committee took reasonable, transparent and proportionate steps to avert injustice to any tenderer by the tender opening committee recalling the representatives who had been present to clarify the error, and that upon learning that the representatives, including that of the Applicant and the 2nd Interested Party had already left the venue, promptly communicated through SMS to the telephone numbers supplied by bidders.
75. That the communication expressly clarified that the wrong document had been read out and that the correct tender security submitted by the Applicant was the Family Bank guarantee of Kshs. 6,900,000.00 contained at page 43 of the bid document.
76. That the Respondent failed to fairly consider the context, purpose and effect of the said communication and instead reduced the matter to procedural technicalities which did not address the substantive question of what documents were actually contained in the bid at the time of submission.
77. That the Respondent also failed to address the critical legal issue, namely, the effect of an inadvertent tender-opening error such as reading of the wrong tender security, bearing in mind that under Section 79 of the *Public Procurement and Asset Disposal Act*, no evaluation or determination of responsiveness is undertaken at the tender-opening stage.
78. That issues of responsiveness of a tender are reserved exclusively for the tender evaluation committee and not the tender opening committee.
79. That by treating a tender opening committee's error as determinative legality of the whole tender process, and by disregarding both the correction and the documentary record, the Respondent acted capriciously and in total disregard of the law thereby usurping the statutory mandate of the tender evaluation committee.



80. That in so doing, the Respondent acted outside the bounds of its lawful authority and rendered a decision that is unlawful and susceptible to being quashed by an order of Certiorari.
81. That in the circumstances, the cancellation of the award to the exparte applicant, on the basis of an error attributable solely to the tender opening committee, and not to the Applicant which had submitted a fully compliant tender security, was unreasonable, unfair and illogical.
82. That the impugned decision therefore offends the principles of legality, rationality and procedural fairness and unless quashed, will occasion manifest injustice by penalizing a compliant bidder for an error not of its making.
83. Responding to the Affidavit sworn by Vincent Osewe on behalf of the 2nd interested party, the exparte applicant's deponent contends, regarding the question of jurisdiction, that it was irrational and legally untenable for the Respondent to hold that it had jurisdiction while, in the same decision, expressly finding that the cause of complaint arose from the tender opening proceedings of 6th November 2025.
84. That by the Respondent's own findings, the 2nd Interested Party became aware of the alleged breach on 6th November 2025 and was therefore required, pursuant to section 167(1) of the Public Procurement and Asset Disposal Act and settled jurisprudence, to lodge its Request for Review within fourteen (14) days of that date. That it was therefore irrational and illegal for the Respondent to hold that a Request for Review filed on 1st December 2025 was within time, while simultaneously finding that the dispute concerned events that occurred during tender opening on 6th November 2025.
85. That the 2nd Interested Party's complaint did not relate to notification of award but to the manner in which tender opening was conducted, and limitation time could not lawfully be extended by recasting the dispute as one concerning evaluation and notification of award.
86. That by entertaining and determining a Request for Review that was filed outside the strict statutory timelines, the Respondent acted without jurisdiction and that therefore, any decision made without jurisdiction is null and void and liable to be quashed.
87. That in any event, the serialization, binding and table of contents of the exparte applicant's bid document demonstrate that there was no interference with, alteration of, or post-opening insertion into the bid as alleged by the 2nd Interested Party or at all.
88. That the Family Bank tender security and the SMEP/IRA guarantee existed in their proper locations within the bid document at the time of submission and for their distinct and lawful purposes.
89. That further, the 2nd Interested Party declined or failed to take up the opportunity afforded to peruse and examine the bid documents and cannot thereafter sustain allegations of alteration unsupported by evidence.
90. That contrary to the allegations advanced by the 2nd Interested Party, the Respondent made no finding whatsoever that the exparte applicant's bid was non-responsive on account of tender security or any other mandatory requirement, and further made no finding of fraud, fraudulent manoeuvre, manipulation or post-tender opening alteration of the bid documents.
91. That therefore all allegations of fraudulent conduct, interference or post-opening alteration are untrue, baseless, unsupported by evidence and legally void, and cannot lawfully be implied or inferred in the absence of an express and reasoned finding by the Respondent.



92. That from the foregoing, it is apparent that the errors and misdirection complained of herein go to jurisdiction, legality, rationality and the decision-making process itself, and are not mere disagreements on the merits of the decision.
93. That the Respondent failed to take into account relevant considerations, took into account irrelevant considerations, misdirected itself on the law, and arrived at a conclusion that no reasonable decision-maker properly directing itself could have reached.
94. That the Respondent's impugned decision therefore falls squarely within the scope of this Court's supervisory jurisdiction under Articles 47 and 165 of *the Constitution*, sections 7 and 11 of the *Fair Administrative Action Act* and section 167 of PPAD Act.
95. That unless this Court intervenes by granting the judicial review remedies sought, the Respondent's unlawful, irrational and procedurally unfair decision will stand, thereby undermining the integrity, certainty and fairness of the public procurement process.
96. The affidavit herein also covers the response to the JR E002 of 2026 where the present ex parte applicant is the 1st interested party.

The Ex parte Applicant's written submissions

97. In support of the Notice of Motion dated 2nd January 2026 in J.R. No. E001 of 2026 and opposing the 2nd Interested Party's Application dated 8th January 2026 in J.R. No. E002 of 2026, the ex parte applicant filed written submissions dated 14th January, 2026, covering both matters.
98. Regarding J.R. NO. E001 OF 2026, the ex parte applicant framed issues as to:

a. Whether the Respondent's assumption of Jurisdiction was Ultra Vires, illegal and contrary to Section 167(1) of the PPADA

99. It was submitted that the question of jurisdiction under Section 167(1) of the *Public Procurement and Asset Disposal Act* (PPADA) is a pure judicial review issue that goes to the legality of the Respondent's assumption of power, rather than to the merits of its conclusions. That Judicial review lies precisely to arrest decisions taken without jurisdiction or in excess of jurisdiction, as consistently affirmed in Kenyan jurisprudence.
100. The ex parte applicant relied on Section 167(1) of the PPADA which provides that a candidate or tenderer "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, whichever is earlier." Accordingly, the applicant submits that this provision must be read together with Regulation 203(2) (c)(iii) which reiterate that a request for review must be lodged "within fourteen days from the date of occurrence of the alleged breach." It argues that the statutory scheme is therefore unequivocal: the timelines are strict, jurisdictional, and non-extendable and not procedural technicalities capable of waiver or enlargement by the Respondent.
101. The ex parte applicant relied on the case of *Republic v Public Procurement Administrative Review Board & 3 Others ex parte Syner-Chemie Ltd* [2016] eKLR, where the High Court is said to have upheld the review Board's refusal to entertain a request for review filed outside the fourteen-day window, holding that once the statutory period lapses, the Board becomes functus officio, and that any purported assumption of jurisdiction is ultra vires.
102. Further reliance is placed on PPARB Application No. 01 of 2022; *Intertek International Limited & Another v The Accounting Officer, Kenya Bureau of Standards & 5 Others*, where it is stated that



- the Respondent Review Board emphatically rejected the notion that a bidder whose grievance arises mid-process may “sit back and await notification of award” before challenging the process, with the Review Board cautioning that such an approach would allow a tenderer “to have its cake and eat it” by taking a “second bite at the cherry”, thereby undermining the strict, time-bound framework established under the PPADA. It is submitted that this decision was upheld by the High Court in *Republic v Public Procurement Administrative Review Board ex parte Intertek International Limited; Accounting Officer, Kenya Bureau of Standards & 6 Others KEHC 1175 (KLR)*.
103. Further submission is that the High Court has reinforced this approach in the context of post-contract challenges, in *Republic v PPARB & Vice Chancellor, Kenyatta University & Another ex parte Madison Insurance KEHC 14767 (KLR)*, where Ngaah Jairus J. is said to have held that the Review Board’s misapprehension of section 167(4), in purporting to determine a request for review after a procurement contract had already been executed, rendered its decision tainted with illegality, procedural impropriety, and irrationality. That the Court emphasized that procedural impropriety arose because the applicant “ought not to have been subjected to proceedings before the Respondent in the first place”, underscoring that dragging a party through proceedings before a tribunal bereft of jurisdiction is itself a reviewable wrong.
 104. It is submitted that against this settled legal backdrop, the Respondent expressly found that the gravamen of the 2nd Interested Party’s complaint, concerned events at the tender opening held on 6th November 2025, specifically, the reading and recording of the Applicant’s tender security and the subsequent clarification by the tender-opening committee. That on the Respondent’s own findings, the “alleged breach” occurred, and was known to the complainant on 6th November 2025.
 105. According to the *ex parte* applicant, under Section 167(1) of the Act and Regulation 203(2)(c)(iii), the 2nd Interested Party was required to lodge any Request for Review within fourteen days of that date, that is, on or before 20th November 2025, considering the fact that the 2nd Interested Party objected to the clarification sent to it by the 1st Interested Party through an SMS sent on the same date.
 106. That instead, the Request for Review was filed on 1st December 2025, well outside the statutory window measured from the date of occurrence of the alleged breach.
 107. The *ex parte* applicant argues that consistent with *Syner-Chemie*, *Intertek*, and *Madison Insurance*(*supra*), cases, such a request for review was incurably time-barred and that the Respondent’s jurisdiction was thereby ousted. It urges that the Respondent nevertheless sought to avoid this consequence by re-anchoring the limitation period to the later notification of award dated 18th November 2025, effectively re-characterizing a tender opening grievance as if it arose at the award stage.
 108. The applicant further argues that this approach by the Respondent is fundamentally inconsistent with both the disjunctive structure of Section 167(1), which directs that time runs from the earlier of the notification of award or the date of breach, and the Respondent’s own factual findings that the complaint arose at the tender opening stage.
 109. The applicant argues that in judicial review terms, this amounted to a misdirection on jurisdiction and a refusal to give effect to clear statutory limits, which is the vice condemned in the *Madison Insurance* case(*supra*) hence it attracted the classical grounds of illegality, procedural impropriety, and irrationality.
 110. The applicant further relies on *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [KLR 1]* on jurisdiction being everything and that where a tribunal acts without it, its proceedings are a nullity and any decision “cannot be sanctified by acquiescence”.



111. It argues that once it is accepted that the alleged breach occurred on 6th November 2025, and all the parties were aware of it, the Request for Review filed on 1st December 2025 fell outside the mandatory fourteen-day period hence, the Respondent lacked jurisdiction ab initio.
112. On Whether the Respondent misdirected itself on the factual record and mischaracterized the Applicant's case, the applicant submits that the scope of this Court's intervention in judicial review is confined to illegality, irrationality and procedural impropriety, as classically articulated in *Pastoli v Kabale District Local Government Council & Others* (2008) 2 EA 300.
113. It argues that the Court of Appeal in *Suchan Investment Ltd v Ministry of National Heritage & Culture & 3 Others* [2016] eKLR reaffirmed that failure to take into account relevant considerations and/or reliance on irrelevant or incomplete considerations constitutes a reviewable error, attracting judicial review on grounds of unreasonableness and procedural unfairness. Further, that a public body must engage with the material properly placed before it and selective reliance on secondary or incomplete records is inconsistent with lawful and rational decision-making.
114. That the Applicant's case before the Respondent, was anchored on the actual contents of its serialized, indexed and bound bid, and not merely on what was inadvertently read out at tender opening.
115. It argues that its response to the Request for Review clearly drew the Respondent's attention to: the Family Bank guarantee dated 5th November 2025 for Kshs. 6,900,000.00 at page 43 (Item 12, pages 42–43), expressly addressed to the procuring entity as the tender security; and the distinct SMEP Bank/IRA guarantee dated 6th March 2024 at page 233, a certified copy lodged with the Insurance Regulatory Authority solely for licensing purposes, and identified as such in the table of contents.
116. The applicant maintains that the two documents were separately itemized in the table of contents, formed part of a fully paginated and serialized bid, and served different and complementary purposes. That while the Family Bank guarantee was the tender security required by the tender document, the SMEP/IRA Bank guarantee was proof of regulatory compliance. That therefore any confusion arose from a clerical error at tender opening, not from the structure or substance of its bid.
117. That notwithstanding this, the Respondent chose to base its findings exclusively on the tender opening register and minutes, which merely recorded the erroneous reading of the SMEP/IRA guarantee, and declined to interrogate the primary bid documents, the table of contents and the guarantees themselves. In doing so, the applicant argues that the Review Board treated an acknowledged tender-opening error as conclusive of what the bid contained, while ignoring the contemporaneous documentary evidence demonstrating that the correct Family Bank tender security was in the bid.
118. The applicant further argues that in doing so, the Respondent failed to consider highly material and readily available evidence that went to the core of the dispute (the presence and adequacy of the tender security), and that it instead relied on secondary, incomplete records that did not accurately reflect the bid as submitted hence, it failed to take into account relevant considerations or documents and took into account irrelevant or incomplete considerations, that the *Suchan Investment* case (*supra*) condemns as reviewable.
119. In further submission, it was argued on behalf of the *ex parte* applicant that guided by the principles in the *Pastoli* case (*supra*) and the *Suchan Investment* case (*supra*), the Respondent's conduct in ignoring the serialized bid, the table of contents and the two distinct guarantees, while elevating the tender opening register and minutes to determinative status, amounted to illegality, irrationality and procedural impropriety.



120. Additionally, the applicant reiterated that the Respondent thereby misdirected itself on the factual record, mischaracterized the Applicant's case as if it turned solely on what was read at tender opening, and arrived at a conclusion that no reasonable tribunal, properly directing itself to the law and the evidence before it, could have reached.
121. On Whether the Respondent Acted Unreasonably and Disproportionately in Treating a Tender-Opening Clerical Error as Fatal, the applicant submits citing section 78 of the Act which governs the opening of tenders, while Section 79 addresses the responsiveness of tenders at evaluation stage. It submits that tender opening is a mechanical, non-evaluative stage with section 78(7) providing that "no tenderer shall be disqualified by the procuring entity during opening of tenders". The applicant argues that at that stage, bids are only opened, basic particulars are read out and recorded and a tender-opening register is prepared. That no assessment of responsiveness or evaluation of bids is undertaken at tender opening and that responsiveness is a matter reserved for the evaluation committee which applies Section 79 of the Act and the evaluation criteria set out in the tender documents.
122. Further submission is that public procurement decisions are also subject to the constitutional guarantee of lawful, reasonable and procedurally fair administrative action under Article 47 of *the Constitution*, as operationalized by Sections 7 and 11 of the *Fair Administrative Action Act* and that therefore, administrative bodies are required to act proportionately and rationally, particularly when responding to clerical or inadvertent errors and to avoid outcomes that unjustifiably penalize compliant bidders for mistakes not of their making.
123. The applicant relied on the case of Republic v Public Procurement Administrative Review Board & 2 Others ex parte BABS Security Services Ltd [2019] eKLR, where the High Court is said to have emphasized that judicial review remedies, particularly Certiorari and Mandamus, serve to uphold practical justice in procurement, with the Court cautioning against rigid or formalistic reliance on errors where the statutory framework and the evidence support a proportionate and rational response. Further, that the cited decision stands for the proposition that minor or correctable clerical oversights should not be elevated into grounds for collapsing an entire procurement where the substance of the tender is compliant.
124. In the instant case, it is argued that at the tender opening on 6th November 2025, the tender-opening committee inadvertently read out and recorded the details of the SMEP/IRA guarantee at page 233, instead of the Family Bank tender security at page 43 of the Applicant's serialized bid, which was an admitted clerical error occurring squarely at the tender-opening stage, before any evaluation or determination of responsiveness under Section 79, which error, upon discovery, the procuring entity's tender opening Committee did not alter, replace or manipulate any bid documents and instead, took reasonable, transparent and proportionate steps to correct the record, by recalling the bidders' representatives who had been present at the opening and that when it became apparent that some representatives had already left, the procuring entity issued SMS messages to the contact numbers supplied by all bidders, clarifying that an incorrect document had been read and that the Applicant's correct tender security was the Family Bank guarantee for Kshs. 6,900,000.00 appearing at page 43 of its bid.
125. These measures, according to the applicant, were consistent with a rational administrative response to an obvious clerical error, which preserved the integrity of the procurement process, with the bid itself remaining unchanged and that the clarification merely aligned the tender-opening record with the documents actually contained in the bid.
126. Further submission is that under Section 79 of the Act, any question as to responsiveness ought to properly have been determined at the evaluation stage, by reference to the bid documents, the table of



- contents and the two tender security guarantees. The Respondent is said to have declined to recognize or give effect to this correction and instead, fixated on what had been mistakenly read at tender opening, treated the SMEP/IRA guarantee as determinative, and disregarded both the clarification issued by the 1st Interested Party and the underlying bid documentation.
127. In doing so, it is submitted that the Respondent elevated a correctable clerical error into a basis for nullifying the entire procurement and cancelling the tender, notwithstanding the undisputed existence of a compliant Family Bank tender security in the Applicant's bid. The applicant argues that this approach was unreasonable and disproportionate within the meaning of Article 47 and the *Fair Administrative Action Act*.
 128. Additionally, it was argued that rather than addressing the substantive question (namely, whether the Applicant had in fact submitted a compliant tender security) the Respondent confined itself to a mechanical reading of the tender opening minutes, which, according to the applicant, was contrary to the statutory scheme under Sections 78 and 79 and to the pragmatic, justice-oriented approach.
 129. The applicant further argues that in light of Sections 78 and 79 of the PPADA, the constitutional requirement of reasonable administrative action and the guidance in ex-parte BABS Security Services Ltd (supra), the tender-opening error in this case ought to have been treated as a correctable clerical oversight and that therefore, the Respondent's refusal to acknowledge the 1st Interested Party's reasonable corrective measures, and its decision to invalidate the entire procurement on the basis of a mis-read document, was irrational, disproportionate and procedurally unfair, thereby rendering the impugned decision amenable to quashing on judicial review.
 130. On Whether the Respondent acted ultra vires by unlawfully usurping the role of the Tender Evaluation Committee,
 131. It was argued that the alleged irregularity occurred at the tender-opening stage, which is non-evaluative and incapable of determining responsiveness under Section 79 of the Act. That responsiveness could only be lawfully assessed by the Evaluation Committee upon examining the Applicant's serialized bid, the table of contents and the two guarantees, and applying the mandatory requirements of the tender document.
 132. Further, that the Review Board, instead of respecting this statutory allocation of functions, it treated the tender opening clerical error as conclusive of the Applicant's responsiveness. That by focusing exclusively on the mistaken reading of the SMEP/IRA guarantee and declining to interrogate the bid documentation or the evaluation outcome, which had identified the Applicant as the lowest evaluated bidder, the Respondent effectively stepped into the shoes of the Evaluation Committee.
 133. In substance, the Respondent is said to have determined that the Applicant's tender security was deficient and that the procurement process was fatally compromised, without undertaking, remitting or directing a lawful evaluation under Section 79, which according to the applicant, amounted to a misdirection on the scope of its powers under Sections 167 and 173 of the PPADA and therefore constituted procedural impropriety and a case of institutional overreach. Reliance is placed on Shenzhen Instrument Co. Ltd & Another ex parte Kenya Power & Lighting Co. Ltd [2019] KEHC 9870 (KLR), where Mativo J is said to have cautioned that both the Board and the Court must be slow to interfere with, or redo the work of technical evaluation bodies where those bodies have acted within the law and within a range of reasonable outcomes.
 134. On whether the impugned decision is Wednesbury unreasonable and in violation of the *Fair Administrative Action Act*, it is submitted that the Respondent's decision is plainly Wednesbury unreasonable and unlawful for- failing to take into account relevant considerations by ignoring central



- documents in the Applicant's serialized and indexed bid, including the Family Bank tender security at page 43 and the SMEP/IRA guarantee at page 233, which were not peripheral documents as they went to the core question of whether the tender security had in fact been submitted and further, that the Respondent elevated an admitted clerical error at tender opening into a fatal defect, without interrogating the substance of what security was actually contained in the bid.
135. Further submission is that a reasonable tribunal, properly directing itself, would have distinguished between an administrative misreading at tender opening and the substantive contents of the tender documents themselves.
 136. In its submissions in response to and opposition to judicial review application No. E002 of 2026 filed by the 2nd interested party herein Goldfield Insurance Brokers Limited, the exparte applicant argues that the 2nd Interested Party's Allegations of alteration, non-responsiveness and fraud by the 1st Interested Party post-opening, are both factually unsupported and legally irrelevant in the judicial review inquiry before this Court. This is because, according to the applicant, the Respondent review Board, in its decision, did not expressly deal or make any determination on these allegations.
 137. The applicant reiterates its submissions in support of its case in JRE001 of 2026 that the evidence on record, demonstrates that the Applicant's bid was properly paginated, serialized, bound and indexed, and accompanied by a detailed table of contents. That the table of contents clearly identified the Family Bank tender security at page 43 and the distinct SMEP/IRA guarantee at page 233, thereby negating any suggestion of post-opening insertion, substitution or manipulation, there being no evidence of re-binding, re-pagination or document alteration produced.
 138. Further, that the 2nd Interested Party was expressly afforded an opportunity to inspect the bid documents but declined to do so and that having chosen not to inspect the primary documents, the 2nd Interested Party cannot now advance speculative allegations of alteration or fraud without any primary documentary proof.
 139. It was submitted that the Review Board itself made no express finding that the Applicant's bid was non-responsive for want of tender security or any other mandatory requirement nor did the Respondent make any finding of fraud, manipulation or post-opening interference with the bid documents. That the impugned decision rests entirely on the Respondent's treatment of the tender-opening error and its legal consequences, not on any concluded finding of fraud or non-responsiveness.
 140. It was therefore submitted that that the Court should interrogate the decision actually made, not hypothetical or reconstructed justifications advanced after the fact.
 141. It was submitted that the 2nd Interested Party's attempt to introduce allegations of fraud, alteration and non-responsiveness at this stage amounts to an impermissible effort to shore up an otherwise unlawful decision with new factual theories that were never part of the Respondent's reasoning.
 142. On whether the 2nd Interested Party's J.R. Application No. E002 of 2026 is an appeal disguised as judicial review, it was submitted by the applicant that the 2nd Interested Party invites this Court to interrogate the merits of the decision of the Review Board and to direct the award of the subject tender to it. The applicant argues that this Court's jurisdiction under Section 175(1) of the Act is strictly supervisory and confined to review of legality, rationality and procedural propriety and that it does not extend to a rehearing, re-evaluation, or substitution of the Review Board's decision with that of the Court. Reliance is placed on the Court of Appeal decision in *Energy Regulatory Commission v SGS Kenya Limited & 2 Others* [2018] KECA 616 (KLR), where the Court is said to have approved Lord Brightman's dictum in *Chief Constable v Evans* and cautioned that unless judicial review is confined to process, it risks degenerating into an appeal in disguise, affirming that "Judicial review is not an appeal



from a decision, but a review of the manner in which the decision was made,” and warned that where courts stray into the merits, they risk usurping powers vested in other statutory bodies.

143. Further reliance is placed on *OJSC Power Machines Limited, TransCentury Limited & Civicon Limited (Consortium) v Public Procurement Administrative Review Board & 2 Others* [2017] eKLR, where the Court of Appeal is said to have held that a court exercising judicial review jurisdiction “must never consider its role as appellate” and must avoid interrogating the sufficiency of evidence or substituting its opinion for that of the statutory decision-maker. Even an error on the merits, the Court held, is a matter for appeal and not for judicial review.
144. The applicant argues that J.R. Application No. E002 of 2026 plainly crosses the jurisdictional limit because the 2nd Interested Party contends that it ought to have been declared the lowest evaluated responsive bidder and seeks, in substance, orders compelling the procuring entity to award the tender to it. That granting such relief would require this Court to reopen the evaluation process, compare competing bids, reassess technical and financial responsiveness and pronounce itself on the correct award outcome, which according to the applicant, is not judicial review but a full merits appeal.
145. Further, that the impugned decision of the Respondent did not evaluate, rank, or pronounce upon the technical or financial responsiveness of the Applicant’s bid but instead, that the Respondent confined itself strictly to the legality of the tender-opening process hence, the 2nd Interested Party’s attempt to litigate questions of responsiveness and lowest evaluated price therefore proceeds from a misreading of the Respondent’s decision and improperly seeks to draw this Court into matters the Respondent itself did not determine.
146. Accordingly, it is argued that to the extent that J.R. Application No. E002 of 2026 invites this Honourable Court to declare who was the lowest evaluated bidder or to direct the award of the tender on the merits, it constitutes an appeal disguised as judicial review, offends the limited remit of Section 175(1) of the PPADA, and ought to be rejected on that ground alone.
147. On whether this Court has jurisdiction, in judicial review, to grant the orders of Mandamus in the manner sought in J.R. Application No. E002 of 2026, it is submitted on behalf of the applicant that in so far as the J.R. Application No. E002 of 2026 further prays for an order of Mandamus compelling the procuring entity’s organs to award the tender to the 2nd Interested Party, under the *Public Procurement and Asset Disposal Act*, the statutory mandate to evaluate bids, conduct due diligence, consider professional opinions and make the final award decision is vested in the Evaluation Committee, the head of procurement and the accounting officer of the procuring entity, which powers are not vested in the Respondent review Board and are certainly not vested in this Court sitting in judicial review.
148. The applicant cited the Court of Appeal decision *Makupa Transit Shade Limited & Another v Kenya Ports Authority & Another* [2015] eKLR on the nature and limits of Mandamus, where the Court is said to have held that that Mandamus issues only to compel the performance of a specific public duty imposed by statute. Further reliance is placed on *Energy Regulatory Commission v SGS Kenya Limited & 2 Others* [2018] KECA 616 (KLR), where the Court of Appeal is said to have reversed an order that effectively compelled the award of a tender to a particular party stating:

“Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a Mandamus cannot command the duty in question to be carried out in a specific way.”
149. The applicant therefore argues that applied to J.R. Application No. E002 of 2026, an order of Mandamus directing that the tender be awarded to the 2nd Interested Party would usurp the



- discretionary powers expressly vested by the Act in the Evaluation Committee and the accounting officer, thereby collapsing the statutory architecture separating procurement, administrative review and judicial oversight and improperly transforming this Court into a primary tender-awarding authority.
150. Further submission is that Mandamus may properly issue to compel a public body to act lawfully, for example, to complete an evaluation, to make a decision, or to comply with a quashing order but that it cannot, dictate the specific outcome of an evaluation or award where statute vests that choice in the procuring entity or an office within the procuring entity.
 151. For these reasons, and particularly in the context of Judicial Review Application No. E002 of 2026, the applicant submitted that this Court lacks jurisdiction to issue an order of Mandamus compelling the award of the tender to any particular party. That where grounds are established, the only lawful relief available is to quash the impugned decision and remit the matter to the competent statutory organs to act afresh in accordance with the law.
 152. On what are the appropriate Remedies in this Judicial Review matter, the applicant submitted that the nature and scope of judicial review remedies are well settled in the case of Kenya National Examinations Council v Republic ex parte Gathenji (supra), where the Court explained that Certiorari issues to quash a decision made without jurisdiction, in breach of the rules of natural justice, or in contravention of the law. Prohibition operates prospectively to restrain unlawful action, while Mandamus compels the performance of a public duty within lawful bounds.
 153. It is submitted that judicial review does not permit the Court to descend into the merits of procurement evaluation or to substitute its own views for those of statutory bodies. Rather, its role is supervisory; to ensure that public power is exercised lawfully, rationally and fairly.
 154. That in this case, the Applicant does not invite the Court to re-evaluate bids, reassess responsiveness, or determine pricing. That the relief sought is confined to quashing a decision reached through a flawed, ultra vires and irrational process, and to restore the procurement process to a lawful footing.
 155. Relying on Syner-Chemie Ltd case (supra) case, it is submitted that the High Court confirmed that where the Board misapplies the Act by assuming jurisdiction contrary to Section 167(1), ignoring mandatory statutory provisions, or otherwise acting unlawfully, its decision is liable to be brought up and quashed by Certiorari. That the Court further recognized that consequential orders may issue to prevent implementation of the unlawful decision and to guide a lawful re-engagement with the procurement process, which principle is said to apply with full force here.
 156. The applicant urged this Court to allow the Applicant's Notice of Motion Application in Judicial Review No. E001 of 2026 dated 2nd January 2026 as prayed and dismiss the 2nd Interested Party's Notice of Motion Application in Judicial Review No. E002 of 2026 with costs.

The Respondent's Submissions

157. The Respondent filed submissions dated 12th January 2026 restating the contents of the depositions in the replying affidavit which I have reproduced hereinabove and therefore there would be no need to rehash them here. Save that, the respondent framed one issue for determination which is, whether the decision by the Respondent was based on illegality, for want of jurisdiction, irrationality and unreasonableness. It relied on the case of Republic v PPARB and another Exparte Gibb Africa Ltd and another 2012]e KLR which set out the established reach of judicial review citing Council of Civil Service Unions v Minister for Civil Service [1984]3 ALL ER 935 and Grain Bulk Handlers Limited v J.B Maina & Co Ltd & 2 others [2006]e KLR.



158. The Respondent also cited *Pastoli v Kabale District Local Government Council and others* [2008]2 EA 300, citing other decisions on what an applicant ought to establish in order to succeed in judicial review application, and concluded that the respondent acted lawfully in discharging of its administrative duty by upholding principles that govern public procurement proceedings and asset disposal as provided for in [the Constitution](#), the PPAD Act and regulations made under the Act.

Submissions by the 2nd Interested Party

159. The 2nd interested party filed its written submissions dated 12th January, 2026 opposing the ex parte applicant's application dated 2nd January, 2026, relying on its replying affidavit. It highlights that judicial review proceedings are not an appeal. The 2nd interested party accuses the ex parte applicant and the 1st interested party for seeking to overturn a decision that rightfully nullified a procurement process tainted by admitted irregularities, post-tender opening alterations, and a brazen disregard for statutory transparency.
160. The 2nd interested party narrates its version of what transpired at the tender opening session and frames the following issues for determination in this matter:
- (i) Whether the Respondent (the Board) had jurisdiction to entertain the Request for Review filed on 1 December 2025, or whether it was time-barred as alleged by the Ex-Parte Applicant.
 - (ii) Whether the Board's Decision was rational and legal in finding that the post-opening "clarification" of the tender security constituted a fatal irregularity contrary to Section 78(6) of the Act.
 - (iii) Whether the Ex-Parte Applicant is entitled to the discretionary public-law remedies of judicial review in the circumstances of this case.
161. On the jurisdiction of the Board and timelines, the 2nd interested party submits that Section 167(1) of the PPADA expressly permits a request for review within fourteen (14) days of notification of award, or within fourteen (14) days of the occurrence of the alleged breach at any stage.
162. It maintains that the chronology of events following the tender opening and award of the tender on 18 November 2025, and the Request for Review being filed on 1 December 2025 clearly shows that the Request for Review was filed within the statutory fourteen-day window and is sufficient, without more, to dispose of the jurisdiction objection, such that this Court need not travel beyond that statutory trigger.
163. It is submitted that the attempt to peg time to tender opening (6 November 2025) is misconceived because it ignores the distinct statutory trigger expressly provided by Parliament, notification of award, and would produce the perverse outcome that an aggrieved tenderer must litigate before a procurement decision capable of legal consequence has crystallized.
164. Further, that in any event, even under the alternative "occurrence of breach" limb, the actionable breach in this case is the Procuring Entity's adoption and implementation of a decision to treat a bid recorded at opening as having an insufficient tender security as nonetheless responsive and to proceed to award it. According to the 2nd interested party, that operative procurement decision crystallised on the award/notification of 18 November 2025.
165. On the illegality of post-opening alterations (section 78(6) of the act), a submission was made that the PPADA is not indifferent to what happens at tender opening. That under Section 78(6), as each tender is opened, the tenderer's name, price (where applicable), and what has been given as tender security



- shall be read out loud and recorded in the tender opening register. The 2nd interested party submits that this is not a clerical nicety but rather, a legal mechanism that secures the transparency, auditability, and equality of treatment demanded by Article 227, fixing the competitive field at the deadline and prevents post-opening manipulation, whether by bidders or by procurement officials.
166. It is submitted that once the tender opening has concluded and the register/minutes reflect what was read out, a procuring entity cannot lawfully convene an informal “verification” session after bidders have dispersed to rehabilitate a bidder on a mandatory responsiveness requirement, that being what the species of post-opening conduct Section 78(6) is designed to prevent.
 167. The 2nd interested party submits that the Review Board therefore acted within its mandate in treating the post-opening “verification” and attempted alteration of the tender security position as a fatal statutory irregularity.
 168. It is submitted that the Review Board was correct in finding that relying on an informal SMS sent at 1:56 PM to “clarify” a mandatory requirement is irregular and non-transparent and that the ex-Parte Applicant’s bid was non-responsive at the point of opening and could not be “resurrected” by informal, non-auditable text messages.
 169. On the discretionary nature of judicial review relief and the applicant’s conduct, it is submitted that Judicial review remedies are discretionary public-law remedies such that the Court may decline relief where the orders sought would defeat statute and constitutional procurement values, or where the applicant’s conduct disentitles it to the Court’s discretion. Further, that even where a litigant alleges procedural unfairness, the Court is entitled to decline relief where the orders sought would defeat the statute and constitutional procurement values.
 170. Further, that in particular, Mandamus issues to compel performance of a clear public duty; it is not available to compel an outcome that would require the Court to endorse or perpetuate an unlawful procurement step. Mandamus compels performance of a public duty imposed by statute where there is a failure or refusal to perform it.
 171. The ex parte applicant’s motion is said to be seeking, in substance, to reinstate (and thereby protect) an award whose foundation was a post-opening process which the Board found unlawful. This Court was urged not to exercise its discretion to resurrect what the statute treats as non-compliant.
 172. It is submitted further that the Ex-Parte Applicant’s conduct at opening materially undermines its present case in that its own representative confirmed the KES. 3,000,000.00 figure during the public opening, and the same was recorded in the minutes. That having participated in and affirmed that contemporaneous statutory record, the Ex-Parte Applicant’s attempt to displace it through an informal post-opening “verification” is inherently unreliable and offends the integrity safeguards of public procurement. That by seeking to enforce an award born of this irregularity, the Ex-Parte Applicant is asking this Court to sanitize an illegality.
 173. The 2nd Interested Party submits that granting the orders sought would be contrary to public policy and the principles of Article 227 of *the Constitution*.
 174. Finally, it is submitted that, to the extent that the Board nullified the award of the tender to the Ex-Parte Applicant, the Decision of the Board dated 22 December 2025 was a robust defense of the sanctity of public procurement and that the Board correctly identified that the 1st Interested Party and Ex-Parte Applicant had engaged in a statutorily impermissible post-opening alteration of a mandatory requirement after the public opening. The 2nd Interested Party urged this Court to dismiss the Notice of motion dated 2nd January 2026 with costs to the 2nd Interested Party.



The 2nd interested Party's Case in JR E002 of 2026-Notice of motion dated 8th January, 2026

175. As earlier stated, the 2nd Interested Party is the ex parte applicant in JR E002 of 2026, in which the Respondents are the Review Board, the Accounting Officer of the Procuring Entity Nyeri County Government and the Procuring Entity itself. The Interested Party in the said proceedings is Utmost Insurance Brokers Limited, who is the ex parte applicant in JR E001 of 2026.
176. Owing to the consent of parties to consolidate the two cases into one, only the interested party filed a replying affidavit Utmost Insurance Brokers Limited in replying affidavit sworn on 10th January, 2026 in response to the Notice of motion dated 8th January, 2026. All the other parties relied on what they had filed in JR E 001 of 2026 save that the applicant also filed its submissions dated 12th January, 2026 to canvass its motion.
177. The Notice of motion dated 8th January 2026 seeks the following prayers:
- SUBPARA a.
- That an Order of declaration be and is hereby issued that the 1st Respondent acted ultra vires its statutory mandate by issuing systemic directives to the Director-General of the PPRA.
- SUBPARA b.
- That an Order of Certiorari be and is hereby issued to bring into this Honourable Court for purposes of quashing the Final Orders Nos. 3, 4, 5, 6, 7, and 8 of the 1st Respondent's decision dated 22 December 2025 in Application No. 111 of 2025, and specifically those orders cancelling Tender No. CGN/CS/INS/01/2025-2026, directing a fresh procurement process, and issuing collateral "systemic directives" to the Director-General of the Public Procurement Regulatory Authority (PPRA).
- SUBPARA c.
- That an Order of Mandamus be and is hereby issued compelling the 2nd and 3rd Respondents to conclude the procurement process for Tender No. CGN/CS/INS/01/2025-2026 by awarding the contract to the Ex-Parte Applicant, GOLDFIELD INSURANCE BROKERS LIMITED, who is the lowest evaluated responsive bidder, following the lawful disqualification of the Interested Party.
- SUBPARA d.
- That an Order of PROHIBITION be and is hereby issued restraining the 2nd and 3rd Respondents from re-advertising or commencing any fresh procurement process for the provision of Medical Insurance Cover for Executive and Staff pending the implementation of the Order of Mandamus herein.
- SUBPARA e.
- That the costs of this application be provided for.
178. The Notice of motion is supported by the statutory statement and the verifying affidavit of Vincent Osewe. In essence, the application is a counter to the application in JRE001 of 2026 while also attacking the Respondent's decision which the applicant contends' should have been in favour of the applicant as the most responsive bidder since the ex parte of 2026 had been found to be non-responsive, instead of the Respondent Review Board ordering for a fresh advertisement of the tender.
179. I will however highlight the brief facts relied on by the applicant since all the facts of the case have been reproduced in JR E001 of 2026.



180. The applicant Goldfield Insurance Brokers Limited asserts that while the Board correctly identified the Interested Party's (Utmost Insurance Brokers Limited) bid as a "procedural nullity" due to a deficient tender security (KES 3M vs KES 6.9M), it committed a Wednesbury non-sequitur by cancelling the entire tender. This "nuclear option" punishes the compliant Applicant for the Procuring Entity's illegalities.
181. According to the applicant, under Section 78 of the PPADA, the Tender Opening Register is an immutable "legal snapshot" and that the Board erred by validating the Respondents' attempt to bypass this through post-opening "verifications," thereby undermining the integrity of the procurement architecture.
182. It contends that the record is arithmetically clear, such that once the non-responsive bidder is excised, the Applicant is the lowest evaluated responsive bidder hence, the Board's refusal to invoke Section 173(c) to substitute the award is an abdication of its statutory duty.
183. The applicant asserts that the Review Board erred in law and fact by failing to find that the Procuring entity's post-opening manoeuvres were fraudulent attempts to "sneak in" documents to assist the Interested Party.
184. That the Review Board failed to appreciate that the Interested Party's own representative expressly confirmed the tender security value as KES 3,000,000.00 during the public opening, creating an immutable record that could not be varied by informal SMS "clarifications".
185. The Review Board is accused of acting ultra vires its statutory mandate under Section 173 of the PPADA by issuing systemic directives to the PPRA that were entirely unnecessary for the disposal of the specific Request for Review before it and that by compelling the Applicant to return to a fresh procurement overseen by the same Respondents, whom the Applicant had successfully litigated against, exposed the Applicant to a manifest risk of institutional retribution.
186. That ordering a fresh process when a viable, ranked, and responsive candidate exists is an exercise in futility and a gross waste of public funds, contrary to the Principle of Cost-Effectiveness.
187. The applicant maintained that it stood to suffer irreparable commercial loss, damage, and the total extinction of its accrued rights arising from the Respondents' flagrant breach of the mandatory duties imposed by the *Public Procurement and Asset Disposal Act* and the Regulations thereunder; specifically, the duty to award the tender to the lowest evaluated responsive bidder and the duty to preserve the integrity of a compliant procurement process.
188. The affidavit by Mr. Osewe Vincent annexes the impugned decision and documents and pleadings filed before the Review Board, together with the SMS sent to the applicant and interested party concerning the clarification of the tender security document.

The Interested party's replying affidavit in JR E002 of 2026

189. In response, the interested party filed a replying affidavit sworn by Stanley Gikandi annexing among others, the tender document subject of these proceedings.
190. That replying affidavit which I have read, is a replica of the verifying affidavit sworn by the same deponent on 31st December, 2025 in JRE001 of 2026 and therefore since I have captured all the depositions of that affidavit and grounds in the body of this Judgment while addressing JRE001 of 2026, I shall not reproduce it here.



The applicant's submissions in JR E002 of 2026

191. The applicant framed the following issues for determination, most of which are duplicated in JR E001 of 2026 and canvassed verbatim and therefore I will not reproduce the submissions here:
- i. Whether the Board had jurisdiction to entertain the Ex-Parte Applicant's Request for Review;
 - ii. Whether the Board's decision to cancel the entire tender was irrational, disproportionate, and a violation of the Principle of Severability;
 - iii. Whether the Board failed to take into account relevant considerations regarding the Ex-Parte Applicant's status as the lowest evaluated responsive bidder.
 - iv. Whether the Board acted ultra vires by issuing systemic directives to the PPRA; and
 - v. Whether the Ex-Parte Applicant is entitled to an order of Mandamus compelling the award due to exceptional circumstances.
192. On jurisdiction & timeliness, it was submitted in reiteration to the submissions made in JRE001 of 2026 that the Request for Review was properly anchored on the Procuring Entity's award decision and the consequential steps culminating in the notification of award. Therefore, that the Request was lodged within the statutory window reckoned from that actionable decision. That in any event, it is our humble submission that where a complaint concerns an illegality that matures into, and is consummated by, an award and intended contract execution, time cannot be weaponized to immunize an unlawful procurement outcome. That to hold otherwise would lead to an absurdity where a bidder must file a Review before an Award is even made hence, the Review Board is said to have correctly dismissed the Preliminary Objection, and this Court should similarly reject the Interested Party's attempt to evade justice through procedural subterfuge.
193. On irrationality and Wednesbury unreasonableness: the "nuclear option", the applicant submitted that the Board's finding that the entire procurement was "tainted with illegality" is a classic non-sequitur when applied to the Ex-Parte Applicant's bid. That the Board having correctly established that the Interested Party submitted a deficient tender security of KES. 3,000,000.00, the Board was legally bound to treat that specific bid, and only that bid, as "dead in law" pursuant to Section 79(1) of the PPADA.
194. On breach of proportionality and failure to give reasons, the submission was that under Section 7 of the *Fair Administrative Action Act*, a decision-maker must ensure that the remedy is the least restrictive available. In this case, it was submitted that the Board's choice of the "nuclear option", being total cancellation of the procurement process, is disproportionate to the identified breach.
195. On failure to exercise statutory remedial powers (substitution), it was submitted that the Board failed to consider that once the Interested Party's bid was excluded for non-responsiveness, the Ex-Parte Applicant emerged as the lowest evaluated responsive bidder according to the Evaluation Report. By failing to acknowledge this arithmetic reality, the Board abdicated its statutory duty under Section 86 of the PPADA to determine the "lowest evaluated responsive tenderer".
196. Further, that in failing to exercise its Power of Substitution under Section 173(c) of the PPADA to award the tender to the Ex-Parte Applicant, the Board neglected to grant the only effective remedy capable of restoring legality. By ordering a re-advertisement, the Board ignored the Principle of Cost-Effectiveness enshrined in Article 227(1) of *the Constitution*. That forcing a fresh procurement process when a viable, responsive candidate exists constitutes a waste of public funds and a manifest abuse of administrative discretion.



197. Additionally, that even if an anomaly existed regarding a "phantom bidder" (Amana) at the professional opinion stage, the Board failed to demonstrate any lawful nexus between that anomaly and the evaluation, ranking, or competitive position of the Ex-Parte Applicant's tender.
198. On jurisdictional excess and ultra vires directives, the submission was that the Board acted ultra vires by issuing coercive, "systemic" directives to the Director-General of the Public Procurement Regulatory Authority (PPRA) (Final Orders 6, 7, and 8). That these directives are not rationally connected to the specific dispute between the Ex-Parte Applicant and the Respondents and constitute a manifest jurisdictional overreach hence, the Board exceeded its lawful remit by issuing systemic, regulatory-type directives that are not demonstrably tethered to its dispute-resolution function.
199. According to the applicant, the Board's Final Orders Nos. 5, 6, 7, and 8 are not only ultra vires but legally and practically unenforceable. That the imposition of rigid, micro-managed timelines (24 and 36 hours) upon the Director-General of the Authority, who was not a substantive party to the dispute, is an irrational exercise of power, with the timelines that ignored the administrative realities and statutory procedures required for regulatory consultation under Section 9 of the Act. That an order that demands the impossible or the administratively unfeasible is void for irrationality.
200. On error of law on tender security sanctity, the submission was that the Interested Party's entire defense, set out in Paragraphs 6 through 13 of its Replying Affidavit, rests on the claim that a valid tender security existed "hidden" on Page 43 of its bid document, and that reading the wrong document was a "clerical oversight." This argument according to the applicant, must fail on account of statutory estoppel and estoppel by conduct since the interested party's representative was present confirmed the reading of the said tender security and secondly, the PPADA mandates that the tender security "shall be read out loud and recorded." That allowing a bidder to point to "unread pages" after the fact to cure a mandatory deficiency opens the door to fraud and manipulation, where a bidder could insert multiple contradictory documents and rely on whichever one suits the outcome.
201. On exceptional circumstances justifying Mandamus, the applicant submitted that the Interested Party, at Paragraph 48 of its Affidavit, argues that granting Mandamus would amount to this Court usurping the functions of the Evaluation Committee. According to the applicant, this is a misunderstanding of the Court's remedial power in judicial review. that while Courts generally do not direct awards, they have the jurisdiction to do so in exceptional circumstances where the result is a foregone conclusion and remitting the matter would be an exercise in futility. That therefore, where the facts are clear and only one decision is legally possible, the Court may direct that decision to be taken. That compelling the Respondents to accept this inevitable legal conclusion is not "usurpation" but is the enforcement of the rule of law to prevent further delay and waste of public resources on a fresh tender that is legally unnecessary.

Analysis And Determination

202. Before I analyse and determine the issues identified in the twin applications, it is important to note that this Court is seized of these two matters within the strict forty-five (45) day period prescribed under Section 175(3) of the *Public Procurement and Asset Disposal Act* (PPADA), 2015. Compliance with this timeline is a jurisdictional prerequisite and therefore, this judgment is rendered accordingly, within that timeline despite the heavy workload, to ensure finality and the rule of law in public procurement. Finality does not, however, preclude any party who is aggrieved by the Court's decision from challenging the same.
203. I have considered the two applications and the respective parties' responses thereto as well as the submissions in support and against the respective prayers sought. In my view, although the parties



placed so much material before me, which is commendable, for consideration, the issues that emerge for determination, from both applications are:

- a. whether the request for review was filed out of the 14 days period stipulated under section 167 (1) of the Act, thereby ousting the jurisdiction of the review Board to hear and determine the Request for Review.
 - b. Whether there was an error of oversight and inadvertence in the reading out of the tender document for the exparte applicant in JR E 001of 2026 and whether there was proof of fraud on the part of the procuring entity's tender opening committee
 - c. Whether the error if any was a minor oversight correctable under section 79 of the Act
 - d. Whether the Review Board could, upon nullification of the award, which was impugned for being fraudulent, declare that the interested party who is the applicant in JRE002 of 2026 was the most responsive and therefore lowest evaluated tenderer and direct the procuring entity to award the same tender to the 2nd interested party.
 - e. What orders should this Court make?
204. On the Issue of Limitation and when the time starts to run in public procurement cases, and in this particular case, a preliminary issue was raised not just before this Court but also before the Review Board regarding whether the Request for Review was filed out of time. The Procuring entity in its preliminary objection in limine dated 10th December, 2025 pleaded in contention that:
1. The pleadings filed by Goldfield Insurance Brokers Limited offend the provisions of Regulations 203 (c)(iii) of the PPAD Regulations, 2020 to wit:
 - a. That the alleged breach occurred on the 6th of November, 2025.
 - b. That the notification of award was done on 18th November, 2025
 - c. That the pleadings filed herein were filed on the 1st December, 2025
 2. Regulation 203 (c) (iii) of the PPAD Regulations, 2020 provide a strict timeline of fourteen days within the occurrence of the breach complained of, where the request is Made after making an award to the successful bidder
 3. The mandatory reading of the Regulations provide that the instant pleadings were filed outside the fourteen-day period.
 4. The procuring entity prayed that the request for review be struck out with costs.
205. Even before venturing into what the other parties including the applicant herein raised before the Review Board, the issue of limitation of time is a statutory one and which this Court will proceed to determine first because it is a jurisdictional issue that goes to the root and therefore competence of these proceedings challenging the decision of the Review Board that upset the procurement process undertaken by the procuring entity, which featured prominently on the alleged error of oversight at the time of opening the tenders.
206. In *Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 Others* [2013] eKLR, the Court of Appeal emphasized on the centrality of the issue of jurisdiction and held that:

“...So central and determinative is the issue of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings is concerned. It is a threshold question and



best taken at inception. It is definitive and determinative and prompt pronouncement on it, once it appears to be in issue, is a desideratum imposed on courts out of a decent respect for 24 economy and efficiency and a necessary eschewing of a polite but ultimately futile undertaking of proceedings that will end in barren cul de sac. Courts, like nature, must not act and must not sit in vain....”

207. The centrality of jurisdiction was appreciated by the Court of Appeal in *Isaak Aliaza v Samuel Kisiavuki* [2021] eKLR, that:

“Whether it is raised either by parties themselves or the Court suo moto, it has to be addressed first before delving into the interrogation of the merits of issues that may be in controversy in a matter.”

208. The Supreme Court in *Samuel Kamau Macharia and Another v Kenya Commercial Bank Ltd and 2 Others* [2012] eKLR pronounced itself regarding the source of jurisdiction of a court or any other decision-making body as follows:

“A court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with Counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter for without jurisdiction the Court cannot entertain any proceedings.”

209. Thus, jurisdiction of a court, tribunal, quasi-judicial body or an adjudicating body can only flow from either *the Constitution* or a Statute (Act of Parliament) or both.

210. However, it is important to highlight that the applicant and the procuring entity contend that the 14-day period under Section 167(1) began at the tender opening stage on 6th November, 2025, when the tender security bank guarantee was initially reported to have been misread since that is the date that the aggrieved party protested against the verification exercise communicated by the procuring entity after the opening of the tenders in the presence of all the representatives of the bidders, with the 2nd interested party alleging a fraud on the part of the procuring entity and the eventual successful bidder, the applicant in JRE001 OF 2026.

211. On the other hand, the 2nd interested party and the Review Board argue that the time for challenging the procurement started running from the date of award of the tender which was on 18th December, 2025.

212. The Review Board on its part, after considering the material placed before it and interpreting various provisions of the law, held that the benchmark event for the purpose of computing time is the date on which the applicant received the letter of notification of intention to award and that therefore the statutory fourteen day period had not lapsed or expired by the time the request for review was filed since the letter of award was issued on 18th November, 2025 while the request for review was filed on 1st December, 2025, within 14 days.

213. The refore, the question that must be answered is- when did the time for filing of a request for review to the Review Board start running? Ancillary to this question is whether the applicant in the request for review /aggrieved party had to wait until notification of intention to award the tender to the most responsive bidder so that if the it became an unsuccessful bidder, then that was the time to challenge the



alleged irregularity or insertion which had been brought to its attention immediately after the opening of the tender documents.

214. Ngaah J, confronted with a similar situation as is the case herein, had this to say in Misc. Civil Application No. E063 Of 2021 Republic Versus Public Procurement Administrative Review Board & N. K. Brothers Limited and Accounting Officer, Sports Arts and Social Development Fund Milicon's Limited Ex Parte: Sports, Arts and Social Development Fund, [2021] e KLR Judgment Delivered on 21ST June, 2021, and citing the Review Board's own decision on a similar issue:

“After considering the application before court and the submissions made by counsel, the immediate question that arises in my mind is whether there was indeed any or any valid application before the 1st respondent capable of determination. The legal basis for this question is found in section 167 (1) of the Act which states as follows:

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.

This section is plain that only a candidate or a tenderer, “who claims to have suffered or risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity” that may seek administrative review.

It is equally plain that where he is disposed to have been so aggrieved, then the candidate or tenderer can only initiate the administrative review “within fourteen days of notification of award or date of occurrence of the alleged breach”.

The 2nd respondent who was the applicant before the 1st respondent in the proceedings out of which the impugned decision arose was, no doubt, a candidate or tenderer, as understood in section 2 of the Act; in that section a “tenderer” is defined as “a person who submitted a tender pursuant to an invitation by a public entity.”

As noted earlier in this judgment, the 2nd respondent was among eighteen other bidders who submitted their bids or tenders in response to an invitation by the applicant and therefore, to that extent, there should not be any dispute that the 2nd respondent fits the description of a tenderer as understood in the Act.

The act which the 2nd respondent complained of in the review was the applicant's decision declaring the 2nd respondent's bid, amongst eighteen others, non-responsive.

It is apparent from the 1st respondent's own decisions in Request for Review No. 24 of 2021 and Request for Review No. 46 of 2021 that the bidders, including the 2nd respondent, were aware of the results of their bid as early as 3 February 2020. This is clear from page 6 of the 1st respondent's decision in Application No. 24 of 2021 and pages 5-6 in the Application No. 46 of 2021. In the former decision the 1st respondent noted as follows:



“Notification to Bidders The Procuring Entity prepared letters of notification of results dated 3rd February 2020 stating that the submission by the tenderers were not successful and thus, the Evaluation committee recommended a re-tender because none of the bidders met the condition during evaluation at the mandatory stage. Further, in letters dated 12th February 2021, the procuring entity notified bidders of the reasons why their bids were non-responsive and further informed bidders that the subject procurement proceedings were terminated pursuant to section 63 (1) (f) of the Act because all evaluated tenderers were non-responsive.”

This statement was repeated word for word in the latter decision. It was also reiterated at page 17 of the decision where the 1st respondent stated as follows:

“The instant Request for Review necessitates this Board to address the import of Order No. 1 and 2 of the decision in Review No. 24/2021 wherein the Board; nullified the letters of notification of results of the subject tender dated 3rd February which were addressed to all bidders and letters of notification of termination of the subject tender dated 12th February 2021 addressed to all bidders. The effect of this is that any communication by the Procuring Entity regarding termination of the subject tender and reasons for non-responsiveness of all bids were nullified.”

Under section 167(1), the limitation period within which the request for review of the applicant’s action for which the 2nd respondent allegedly suffered or risked suffering loss and damage lapsed upon expiry of 14 days of that action; fourteen days from 3 February 2021 expired on 17 February 2021. And even if it was to be assumed that the operative date was when the notifications were sent on 12 February 2021, the last day within which the review ought to have been lodged was 26 February 2021. The impugned decision, at page 11 thereof, shows that the Request for Review whose decision is impugned in these proceedings was filed on 6 April 2021, way beyond the deadline and, obviously, in breach of section 167(1) of the Act. Without belabouring the point, to the extent that the Request for Review No. 46 of 2021 was filed out of time and, in any event, in breach of the express provision of the law, the application, the proceedings that ensued and the purported decision are all a nullity. It follows that the answer to the question whether there was any valid application before the 1st respondent capable of determination in the nature of the purported 1st respondent’s decision dated 26 April 2021 is in the negative.

There is a further reason why prayer (b) of the request for review could not be considered by the 1st respondent. The reason is this: the 2nd respondent’s bid had been determined to be non-responsive at the preliminary stage. Since the decision to declare the 2nd respondent’s bid as non-responsive had neither been varied nor set aside and, in any event, the period within which it could possibly have been challenged had lapsed, the 2nd respondent could not be regarded as a candidate or a tenderer, who had either suffered or risked suffering loss or damage as a result of the award of the tender to the 2nd interested party. In short, having had its bid declared non-responsive and therefore disregarded in the subsequent technical and financial evaluations, there was no basis for



the applicant to invoke section 167(1) of the Act as long as the decision to declare its bid as non-responsive remained intact or unchallenged. The 2nd respondent had no further stake in the procurement process upon which he could lay any claim on the tender award or, alternatively challenge it. I note the 2nd respondent invoked the letter from the applicant dated 22 March 2020 purportedly notifying the rest of the bidders why their bids were unsuccessful.

All I can say about this letter is that it did not, and could not, extend time within which the 2nd respondent ought to have taken action on the applicant's decision to find its bid non-responsive. In any case, there is nothing in law that suggests that an aggrieved party can only move for a review once the procurement process is complete and parties have been notified accordingly. To the contrary, section 167(1) is clear that proceedings for review of a procuring entity's action that an aggrieved party deems to be breach of the procuring entity's duty and which breach has caused or may cause loss or damages, can be taken at any stage of the procurement process or disposal process. The 2nd respondent cannot therefore be heard to argue, that it is only after the letter of 22 March 2021 notifying the parties of their failed bids and the reasons for such failure was sent that they could be jolted into action when it is clear that it was aware of the fate of its bid long before the tender was eventually awarded to the 2nd interested party.

That the 1st respondent was aware that the 2nd respondent's request for review was out of time should not be in doubt. It has acknowledged in Application No. 48 of 2021, Fahmyasin Company Limited versus The Accounting Officer, Kenya Urban Roads Authority & Another that the application for review for any alleged breach must be filed timeously and, in any event, not later than 14 days from the date of the alleged breach.

In that case where the applicant alleged a breach at the technical review stage but waited until the award had been made to seek for review, the 1st respondent accepted as the correct interpretation of the law the argument that the applicant ought to have filed its application for review within 14 days of the breach. The pertinent part of its decision reads as follows:

"In the Respondent's view, if the applicant was not satisfied by the technical evaluation criteria, it ought to have sought clarification from the Procuring Entity. In the absence of any clarification, it is the Respondent's view that any complaint raised before the Board is time barred pursuant to section 167(1) of the Act. In addressing this issue, the Board observes that one of the scenarios provided in section 167(1) of the Act read together with Regulation 203(2) (c) of Regulations 2020 within which a request for review can be filed is fourteen days from the date of occurrence of the breach complained of where the request is made before the making of an award. With that in mind, the Board observes the statutory timeline provided under section 167(1) of the Act provides an opportunity within which an aggrieved candidate or tenderer may exercise its right to administrative review challenging a breach of duty by a procuring entity as soon as the breach occurs so that once the Board dispenses with a review application, the procurement process can proceed to its logical conclusion for the public good.



This Board has noted the rising number of bidders who abuse options under section 167(1) of the Act, whereby they learn of an alleged breach of duty during the early stages of a procurement process but wait for the outcome of their bids, and if such outcome is not favourable, they feel motivated to file a case against a procuring entity, raising complaints that could have been raised at any stage before evaluation is concluded. If the outcome of the bids is favourable, such applicants never raise any alleged breaches they might have identified at any stage of the procurement process or disposal process. The applicant participated in the subject procurement processes by submitting a tender by the tender submission deadline of 11th February 2021 without challenging those technical specifications in a request for review filed before this Board as opposed to participating in the procurement process. The applicant could have approached the Board within fourteen days after the tender submission deadline raising an allegation that the Tender Documents did not meet the provisions of the law. Had it been awarded the subject tender, the Board is persuaded that the applicant would not raise any complaint with the tender document. The applicant participated in the subject procurement process, waited patiently for the outcome of its bid and is now challenging the Tender Document, so late in the day after sleeping on its right to seek administrative review.”

od within which that declaration could have been challenged having lapsed as at the time the tender award was made. The 1st respondent’s decision smacked of irrationality for this reason: considering that the applicant lacked standing to bring proceedings before the 1st respondent at the time the award was made, it was unreasonable, in the *Wednesbury* sense (see *(Associated Provincial Picture Houses Limited vs. Wednesbury Corporation (1948) 1 K.B. 223)*, for the 1st respondent not only to entertain the 2nd respondent’s application but also to allow it. It was also unreasonable to reintroduce bids that did not meet the requirements spelt out in the tender document and had, in any event, been declared unresponsive in the procurement process. Finally, the decision was deficient of procedural propriety because the proceedings out of which it was conceived were instituted way out of time. And has been noted, the purported applicant had no *locus standi* to institute such proceedings. Subjecting the applicant and the 2nd interested party to proceedings that were invalid *ab initio* is another reason why the 1st respondent’s decision is impeachable for procedural impropriety. Considering that the proceedings were contrary to the express of the law, the entire exercise that culminated in the impugned decision was nothing more than an exercise in futility.”

215. Section 167(1) of the Act provides:

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.



216. The above section has been interpreted not only by the Courts as seen in the decision by Ngaah J above, but also by the Review Board itself in many decisions In PPARB Application No. 48 of 2021, Fahmyasin Company Limited versus The Accounting Officer, Kenya Urban Roads Authority & Another, the Review Board, and as correctly referred to by Ngaah J in the above cited case, held that the application for review for any alleged breach must be filed timeously and, in any event, not later than 14 days from the date of the alleged breach.
217. I will restate here what the Review Board stated in the Fahmyasin Company Limited (supra) case for emphasis purpose thus:

“In this case where the applicant alleged a breach at the technical evaluation stage but waited until the award had been made to seek for review, the Board accepted as the correct interpretation of the law the argument that the applicant ought to have filed its application for review within 14 days of the breach. The pertinent part of its decision reads as follows:

“In the Respondent’s view, if the applicant was not satisfied by the technical evaluation criteria, it ought to have sought clarification from the Procuring Entity. In the absence of any clarification, it is the Respondent’s view that any complaint raised before the Board is time barred pursuant to section 167(1) of the Act.

In addressing this issue, the Board observes that one of the scenarios provided in section 167(1) of the Act read together with Regulation 203(2) (c) of Regulations 2020 within which a request for review can be filed is fourteen days from the date of occurrence of the breach complained of where the request is made before the making of an award.

With that in mind, the Board observes the statutory timeline provided under section 167(1) of the Act provides an opportunity within which an aggrieved candidate or tenderer may exercise its right to administrative review challenging a breach of duty by a procuring entity as soon as the breach occurs so that once the Board dispenses with a review application, the procurement process can proceed to its logical conclusion for the public good.

This Board has noted the rising number of bidders who abuse options under section 167(1) of the Act, whereby they learn of an alleged breach of duty during the early stages of a procurement process but wait for the outcome of their bids, and if such outcome is not favourable, they feel motivated to file a case against a procuring entity, raising complaints that could have been raised at any stage before evaluation is concluded. If the outcome of the bids is favourable, such applicants never raise any alleged breaches they might have identified at any stage of the procurement process or disposal process.

The applicant participated in the subject procurement processes by submitting a tender by the tender submission deadline of 11th February 2021 without challenging those technical specifications in a request for review filed before this Board as opposed to participating in the procurement process.

The applicant could have approached the Board within fourteen days after the tender submission deadline raising an allegation that the Tender Documents did not meet the provisions of the law.

Had it been awarded the subject tender, the Board is persuaded that the applicant would not raise any complaint with the tender document. The applicant participated in the subject procurement process, waited patiently for the outcome of its bid and is now challenging



the Tender Document, so late in the day after sleeping on its right to seek administrative review.” [Emphasis mine]

218. Not long ago in Public Procurement Administrative Review Board Application No. 21/2023 Of 6 Th April 2023 Between Electra Recyclers And Systems Ltd Applicant And The Accounting Officer, Kenya Power & Lighting Company Plc And Kenya Power & Lighting CompanyPLC, the Review Board confronted with the question of when the time for challenging the procurement process is triggered had this to say:

“A reading of Regulation 203(1), (2)(c) & (3) of Regulations 2020 and the Fourteenth Schedule of Regulations 2020 confirms that an aggrieved candidate or tenderer invokes the jurisdiction of the Board by filing a request for review with the Board Secretary within 14 days of (i) occurrence of breach complained of, having taken place before an award is made, (ii) notification under Section 87 of the Act; or (iii) occurrence of breach complained of, having taken place after making of an award to the successful tenderer. Section 87 of the Act referred to in Regulation 203(2)(c)(ii) of Regulations 2020 provides as follows: “87. Notification of intention to enter into a contract (1) Before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity shall notify in writing the person submitting the successful tender that his tender has been accepted.

- (2) The successful bidder shall signify in writing the acceptance of the award within the time frame specified in the notification of award. (3) When a person submitting the successful tender is notified under subsection (1), the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof. (4) for greater certainty, a notification under subsection (1) does not form a contract nor reduce the validity period for a tender or tender security.”

It is therefore clear from a reading of Section 167(1) and 87 of the Act, Regulation 203(1), (2)(c) & (3) of Regulations 2020 and the Fourteenth Schedule of Regulations 2020 that an aggrieved candidate or tenderer invokes the jurisdiction of the Board by filing a request for review with the Board Secretary within 14 days of (i) occurrence of breach complained of, having taken place before an award is made, (ii) notification of intention to enter into a contract having been issued or (iii) occurrence of breach complained of, having taken place after making of an award to the successful tenderer. Simply put, an aggrieved candidate or tenderer can invoke the jurisdiction of the Board in three instances namely, (i) before a notification of intention to enter into a contract is made, (ii) when a notification of intention to enter into a contract is made and (iii) after a notification to enter into a contract has been made. The option available for an aggrieved candidate or tenderer in the aforementioned three instances is determinant on when occurrence of breach complained of took place and should be within 14 days of such occurrence of breach. It was not the intention of the legislature that where an alleged breach occurs before notification to enter into a contract is issued, the same is only complained of after notification to enter into a contract has been issued. We say so because there would be no need to provide the three instances within which a Request for Review may be filed.

The Board has in a plethora of cases held that procurement proceedings are time bound and a candidate or a tenderer who wishes to challenge a decision of a procuring entity with respect to a tender must come before the Board at the earliest, by using the earliest option available under Regulation 203(2)(c) of Regulations 2020 so as not to be accused of laches.



Having considered parties' pleadings and submissions, and the confidential documents contained in the confidential file submitted by the Respondents to the Board pursuant to section 67(3)(e) of the Act, the issue that calls for determination by this Board is what were the circumstances in the instant case that determine the period when the Applicant ought to have approached the Board?

Having noted from the Applicant's email dated 7th February 2023 seeking clarification on Addendum No. 2 that the Applicant requested the 2nd Respondent to assist with display of the Tender Document on the 2nd Respondent's system, and assuming that the Tender Document was displayed on the 2nd Respondent's system on 7th February 2023 making the Applicant aware of the breach on 7th February 2023, the 7th February 2023 is excluded pursuant to Section 57(a) of IGPA being the day which the Applicant learnt of occurrence of such alleged breach when it received the Tender Document. This means, 14 days started running from 8th February 2023 and lapsed on 21st February 2023. In essence, the Applicant had between 8th February 2023 and 21st February 2023 to seek administrative review before the Board with respect to challenging the contents of mandatory requirement 3.1.8 (a) on submission of a copy of the 44 Manufacturer's valid quality management system certification i.e ISO 9001- 2008 for goods from outside Kenya at page 35 of the Tender Document."

219. The Review Board in the above case found that the applicant failed to file the request for review within 14 days upon learning of alleged breach and it proceeded to strike out the Request for Review for want of jurisdiction.
220. Indeed, Section 167(1) of the Act allows a request for review within 14 days of the "occurrence of the alleged breach," it also provides for review within 14 days of the "notification of award". Thus, at whatever stage of the proceedings where there is an alleged breach, or after notification of award, an aggrieved party has 14 days to challenge the decision taken by the procuring entity, and notification of award is only but one of those stages towards the end after the evaluation process following submission and tender opening.
221. Therefore, a party cannot be heard to say that despite what it considered to be a breach at the tender opening stage, which alleged breach involved a correction on the reading of the tender security, it vehemently protested, claiming that the document must have been inserted in the tender document after the other parties had left, which the procuring entity maintained its position that it had verified and confirmed that it had read a wrong document from SMEP BANK dated 6th March, 2024 fixated at page 433 of the tender document which concerned Insurance and was addressed to the Commissioner of Insurance for Compliance on a different page and for a totally different purpose for the year 2024 as opposed to a FAMILY BANK TENDER SECURITY which was dated 5th November, 2025 fixated at page 43 of the tender document and addressed to the procuring entity and relevant to the subject tender, the aggrieved party nonetheless waited until after notification of award before filing a request for review, basing the grounds on the alleged error which it had knowledge of, immediately following the tender opening.
222. From the material placed on record and which is uncontroverted, the Procuring Entity's tender opening Committee realised that they had misread the tender security document which was a mandatory requirement document which error they considered to be a curable oversight, after satisfying itself that it had read out a wrong document to the parties, with the correct document being in situ, indexed, paginated and serialised sequentially with all the other tender documents and having the correct security amount being Kshs 6.9 million and not the misread document.



223. The procuring entity finalised the tender opening process at 12.00 noon and at 12.19, after they had identified the error of misreading, they called the 2nd interested party's representative Mr Vincent Osewe informing him of the discovery and calls were made to the other two bidders. At 12.35 and 1.02 pm respectively, they send SMS messages to the bidders after calling them and this information is captured by the review Board at pages 50, 51 and 52 of its decision.
224. There is every evidence which is not denied that the procuring entity quickly notified the tenderers' representatives of the misreading of the tender security, asked them to return and verify from the premises, followed them with SMS which were filed before the Review Board and in this Court, together with protests by the aggrieved party-2nd Interested Party herein and proceeded to record the discovery corrections before proceeding to the evaluation stage. The 2nd interested party refused to return, claiming that there must have been an insertion and fraud.
225. Section 167(1) of the Act as read with Regulation 203 (2) (c) provide that a breach of duty by the procuring entity can occur at any time of the procurement process and therefore a party cannot be expected to wait until they have been declared to be unsuccessful bidders before they can challenge the alleged breach. If the Act and Regulations made thereunder had intended that a challenge be mounted only after notification of intention to award the tender, nothing prevented the legislature from stating as much.
226. Regarding Regulation 203(2)(c)(iii) of the 2020 Regulations, and its relevance to the limitation period, the Regulation implements section 167(1) and specifically deals with the admissibility of a request for review while restating section 167(1) of the Act. The Regulation provides:
- 203.
- (1) A request for review under section 167(1) of the Act shall be made in the Form set out in the Fourteenth Schedule of these Regulations.
 - (2) The request referred to in paragraph (1) shall—
 - (a) state the reasons for the complaint, including any alleged breach of *the Constitution*, the Act or these Regulations;
 - (b) be accompanied by such statements as the applicant considers necessary in support of its request;
 - (c) be made within fourteen days of—
 - (i) the occurrence of the breach complained of, where the request is made before the making of an award;
 - (ii) the notification under section 87 of the Act; or
 - (iii) the occurrence of the breach complained of, where the request is made after making of an award to the successful bidder.
 - (d) be accompanied by the fees set out in the Fifteenth Schedule of these Regulations, which shall not be refundable.
227. The Regulation distinguishes the two situations in c (i) and (iii). Thus, the Act and Regulations clearly permit "midway" challenges and clothes the Review Board with jurisdiction to entertain any request for review at any stage of the tendering process.



228. In this case, the procuring entity had already made a decision based on what it identified to be a misreading oversight and notified the parties. Since the 2nd interested party herein, protested at the verification on account of what it considered to be a fraudulent manoeuvre to insert the missing document, that was the right time for it to challenge the action by the procuring entity's tender opening Committee. It did not have to wait until a successful bidder is announced.
229. As restated above in the decisions made by the Review Board itself:
- “The applicant could have approached the Board within fourteen days after the tender submission deadline raising an allegation that the Tender Documents did not meet the provisions of the law.
- Had it been awarded the subject tender; the Board is persuaded that the applicant would not raise any complaint with the tender document. The applicant participated in the subject procurement process, waited patiently for the outcome of its bid and is now challenging the Tender Document, so late in the day after sleeping on its right to seek administrative review.”
230. The above cited decisions are not the only decisions rendered by the same Review Board on when an aggrieved tenderer can challenge the procurement process. In yet another case of PPARB Application No. 19 of 2021 Total Security Surveillance Limited vs The Governor/The Accounting Officer, Central Bank of Kenya, the Central Bank of Kenya & Winguards Services Limited, the applicant lodged a Request for Review before the Board dated 18th June 2021 and filed on 25th June 2021 praying for orders as paraphrased below:
1. A declaration be issued that Addendum 1 in relation to the subject tender is illegal, null and void and be nullified.
 2. An order be issued that the requirements of Addendum 1 shall not form or be part of the evaluation criteria and/or be used in the evaluation of the subject tender by the Procuring Entity.
 3. An order be issued that the award to the 3rd Respondent in relation to the subject tender be nullified and set aside.
 4. The letter of regret dated 14th June 2021 and the decision it contains that the Applicant did not meet mandatory requirements (MR7 and MR8) contained in Addendum 1 in relation to the subject tender be nullified and set aside.
 5. The Board be pleased to review all records of the procurement process relating to the subject tender and be pleased to order the Respondent to re-evaluate the Applicant's tender and award the subject tender to the lowest evaluated tenderer as provided in the tender document.
 6. The Respondent be ordered to pay the costs of and incidental to these proceedings; and
 7. Such other or further relief as the board shall deem just and expedient.
231. The 3rd Respondent in the above matter filed a Preliminary Objection dated 7th July 2021 contending that the Request for Review was not filed within the statutory period of fourteen days from the date of occurrence of breach contrary to the express provisions of Section 167 (1) of the Act and Regulation 203 (2) (c) (i) of the Regulations, 2020, thus incompetent.
232. According to the 3rd Respondent, the substratum of the Request for Review was allegations of breach of duty imposed upon the Procuring Entity by law requiring the Procuring Entity to notify the



Applicant of an invitation to tender of the subject tender and subsequent existence and contents of Addendum 1, since the Applicant was a current service provider at the time of tendering of the subject tender.

233. The 3rd Respondent further contended that the Applicant was aware of the alleged breach during tender opening on 17th May 2021 and by virtue of the Applicant submitting documents in support of MR 7 and MR 8 to the Procuring Entity vide a letter dated 21st May 2021. With this, the 3rd Respondent contended that the fourteen days from occurrence of the alleged breach lapsed on 31st May 2021 or in the alternative latest on 5th June 2021 yet the Request for Review was filed on 25th June 2021.
234. At page 12 of its Ruling/decision, the Review Board, after quoting the provisions of Section 167 (1) of the Act and Regulation 203 (2) (c) (i) stated:

“From the foregoing provisions of law, it is clear that a Request for Review can be made at any stage of a procurement process. The framers of the Act, guided by the urgency with which procurement processes must be concluded, saw the need to provide for timelines in every step of a procurement process. One such timeline is the fourteen days from the date of occurrence of an alleged breach of duty imposed on the Procuring Entity by the Act, within which a dissatisfied candidate or tenderer can lodge a Request for Review at the Board. It is not the intention of the framers of the Act for a dissatisfied tenderer to await until the end of a procurement process to raise issues which a dissatisfied tenderer was aware of much earlier in such a procurement process. We say so because, a successful tenderer would never raise any malpractice of procurement process in which an award has been made to it even if it is aware of the malpractice in the early stages of a procurement process. However, a tenderer who finds itself as a non-responsive tenderer at the tail end of a procurement process should be estopped from challenging an award of a tender on the basis of its acquiescence of a malpractice that occurred at the earlier stages of a procurement process”.

235. The Review Board in the above detailed facts noted that the Applicant’s Request for Review is hinged on challenging:
1. The manner in which the Procuring Entity advertised the subject tender;
 2. The manner in which the Procuring Entity published Addendum 1; and
 3. The contents of Addendum 1.
236. The above complaints had nothing to do with evaluation process or award of tender. The Review Board also noted as follows from the confidential file:
1. The subject tender was advertised in both the PPIP Government tender’s portal website and the Procuring Entity’s website on 28th April 2021.
 2. Subsequently, the Procuring Entity published Addendum 1 that introduced 2 new mandatory requirements.
 3. The Applicant submitted its bid on 17th May 2021 by which date, the Applicant was aware of the manner in which the subject tender was advertised.
237. Thus, that in the circumstances, the Applicant ought to have approached the Board on or before 31st May 2021 being the 14th day from 17th May 2021. The Review Board further noted that:



1. Addendum 1 was published in the PPIP Government tenders' portal and the Procuring Entity's website on 7th May 2021 and 10th May 2021 respectively.
 2. Since the Applicant downloaded the subject tender from the Procuring Entity's website, it is expected that the logical thing would be for the Applicant to keep visiting the Procuring Entity's website for any communication from the Procuring Entity with respect to the subject tender because it already knew the mode of communication having downloaded the subject tender document from the Procuring Entity's website.
 3. The Applicant is deemed to have had knowledge of Addendum 1 and its contents thereof on 10th May 2021 when the same was published on the Procuring Entity's website and ought to have approached the Board on or before 24th May 2021.
238. Additionally, the Review Board observed that:
1. The Applicant submitted mandatory requirement 7 and 8 introduced in Addendum 1 to the Procuring Entity after the deadline for submission of tenders on 21st May 2021.
 2. This was a clear indication that the Applicant was aware of Addendum 1 and its contents thereof because there is no corresponding request that had been made by the Procuring Entity to the Applicant after the tender submission deadline to warrant the Applicant to forward mandatory requirements 7 and 8.
 3. In the circumstances and as an alternative to the date of 10th May 2021, the Applicant is deemed to have had knowledge of Addendum and its contents thereof on 21st May 2021 and ought to have filed its Request for Review on or before 4th June 2021.
239. After considering all the above, Review Board in the above cited case held that the latest the Applicant could have approached it with respect to advertisement of the subject tender is 31st May 2021 and with respect to Addendum 1 was 4th June 2021.
240. In totality, it was established that the Request for Review was filed on 25th June 2021 way after the fourteen days from occurrence of alleged breach of duty imposed on the Procuring Entity by the Act and was therefore incompetent and the Review Board therefore lacked jurisdiction to entertain an incompetent Request for Review. The Review Board proceeded to strike out the Request for Review and downed its tools.
241. From the above analysis, it is now clear that all the parties to public procurement processes need to appreciate that Public Procurement processes have several stages including tender advertisement, issuance of tender documents, pre-bid meetings if any for clarifications, submission of bids, tender opening, evaluation of tenders and issuance of notification of intention to award the tender. It is therefore very important for any bidder, whether a candidate or tenderer to ask themselves this question-when did they become aware of the alleged breach?
242. This is crucial because if the bidder becomes aware of the alleged breach prior to issuance of the notification of intention to award but files review proceedings after the notification of award, the Review Board becomes deprived of jurisdiction to entertain the merits of the challenge and all the Review Board can find is that the request for review is time barred, having been filed 14 days after the occurrence of the alleged breach.



243. All the above decisions are not new to the Review Board, the Respondent herein and the question that I have posed, just like Justice Ngaah did in the earlier cited case, is, what became of the Review Board and the need for consistency in its decision making, consistent with the law?
244. Albeit the 2nd interested party contends that section 78 (7) provides and it indeed provides that No tenderer shall be disqualified by the procuring entity during opening of tenders, the question is whether the section precludes an aggrieved tenderer alleging breach of duty by the tender opening Committee from challenging the alleged breach to the Review Board at that stage.
245. This Court's short answer is No. Section 78(7) of the *Public Procurement and Asset Disposal Act* (PPADA) does not preclude an aggrieved party from filing a request for review. This provision is, in fact, a protective measure for tenderers, not a limitation on their right to challenge irregularities.
246. In the view of this Court, the primary function of Section 78(7) is to prevent a procuring entity from summarily disqualifying a tenderer during the public opening session. The purpose of the tender opening is strictly for transparency and recording.
247. I reiterate that the right to file a Request for Review is derived from Section 167(1), which allows any candidate or tenderer who claims to have suffered loss or damage due to a breach of duty to seek administrative review. This right to request for review explicitly applies at "any stage of the procurement process."
248. In this case, upon discovery of the alleged breach on 6/11/2025, the procuring entity went ahead to correct what appeared to be a disqualifying mark and allowed the exparte applicant to proceed to the evaluation stage after notifying all tenderers. It is that act of allowing the applicant to proceed to evaluation stage and the exparte applicant turning out to be the most responsive tenderer that led to the 2nd interested party filing a request for review, claiming that the exparte applicant ought to have been disqualified for having failed to avail a Tender Security guarantee for 6.9 million.
249. Consequently, this court finds and holds that the Request for Review was filed outside the 14-day period contemplated in section 167(1) and Regulation 203 (2) (c) and that the 14-day clock was not triggered by the formal notification of the tender outcome but at the preliminary stage post the tender opening session on 6th November, 2025.
250. I further find and hold that Section 78(7) of the Act ensures the sanctity of the opening stage by prohibiting premature disqualification, while Section 167(1) preserves the bidder's right to challenge any breach of duty that occurs at any stage of the procurement process and therefore the candidate or bidder is not "precluded" from requesting for review, provided they do so within 14 days of the moment they become aware of the breach. A tenderer does not have to wait until they are disqualified for them to challenge the breach complained of at any stage of the procurement process, taking into account internal review mechanisms such as seeking for clarifications.
251. For the above reasons, I find and hold that the Review Board had no jurisdiction to entertain the merit review of the Request for Review Application No. 111 of 2025 filed by the 2nd interested party regarding Tender No. CGN/CS/INS/01/2025-2026 because the Request for Review was filed outside the 14 days period from the date of alleged breach of duty which was on 6th November, 2025.
252. Having so found, I could proceed to down my tools and say no more. However, in the event that I am found to be wrong on this point, which I highly doubt, I now proceed to determine the second issue on the correctability of the alleged oversight by the tender opening Committee, assuming that the request for review was made within 14 days of the allegation of breach, but which alleged breach, I



maintain, could only have occurred on 6th November, 2025 and not on the date of notification of the award to the most responsive bidder on 18th November, 2025.

253. Therefore, on whether the alleged oversight error of misreading the tender security was a minor procedural curable error, the procuring entity in its response to the request for review and in its replying affidavits filed before this Court sworn by the County Secretary Mr. Edward Irungu Mwangi deposes, conceding that indeed, the tender documents were read in open, in the presence of all the parties' representatives and minutes taken. That immediately thereafter, the tender opening Committee members realised that they had misread the tender security document which was a mandatory requirement for all tenderers. That the tender opening committee had read a tender security document which was for Kshs 3,000,000 of SMEP BANK that had no relevance to the specific tender and that the relevant security was that of Family Bank for Kshs 6.9 Million and which was also in situ as indexed, serialised and paginated. That they considered the misreading to be an inadvertent mistake which was curable under section 79 of the Act and that upon discovery, they reached out to all the bidders using mobile phone contacts supplied, by calling and even sending SMS for them to return to the premises and verify the discovery.
254. It is on record that the 2nd interested party herein refused to return and send protests saying there must have been changing of the documents after the opening process was complete, insisting that they will go by the figures of 3million which was read out and confirmed during the tender opening process where all of the parties were present.
255. All the communication that took place after the tender opening exercise is part of this court record. The procuring entity and Utmost Insurance Brokers maintain that the error was one of misreading of the tender document and that there was no fraud since it is the same bundle of tender documents where the correct security guarantee was discovered almost immediately after the parties had left thereby necessitating notification of the parties for verification purposes hence, curable under section 81 of the Act.
256. The 2nd interested party in JR E001 of 2026 who is the applicant in JR E002 of 2026 Goldfield Insurance Brokers Limited maintains that the post opening SMS clarification which it protested was an illegal exercise and that therefore it was not curable under section 81 of the Act, Further, that section 78(6) of the Act mandates that bid particulars specifically, tender security must be read aloud and recorded contemporaneously to ensure transparency. That the Review Board was duty bound under section 28 of the Act to determine disputes involving breaches of statutory duty hence ignoring a blatant post opening document alteration would have amounted to a jurisdictional failure by the Review Board to uphold the integrity of the procurement process.
257. The Review Board in its decision which is impugned on both ends, after dismissing the preliminary objection raised by the procuring entity, nullified and set aside the entire tender proceedings and ordered for a readvertisement of the entire process on account of statutory breaches and violation of the law having been anchored on procedurally flawed tender opening.
258. Section 78 of the Act deals with opening of tenders, section 79 with responsiveness of tenders, section 80 is on evaluation while section 81 is on clarification and section 82 is on correction, revision, adjustment or amendment of the tender.
259. I will reproduce all these sections below and apply them to this case, supported by relevant caselaw.
260. Under section 78 on opening of tenders:
78. Opening of tenders



- (1) An accounting officer of a procuring entity shall appoint a tender opening committee specifically for the procurement in accordance with the following requirements and such other requirements as may be prescribed—
 - (a) the committee shall have at least three members; and
 - (b) at least one of the members shall not be directly involved in the processing or evaluation of the tenders.
- (2) Any bid withdrawn in writing shall not be eligible for evaluation or consideration in the tender process.
- (3) Immediately after the deadline for submitting tenders, the tender opening committee shall open all tenders received before that deadline.
- (4) Those submitting tenders or their representatives may attend the opening of tenders.
- (5) The tender opening committee shall assign an identification number to each tender and record the number of pages received.
- (6) As each tender is opened, the following shall be read out loud and recorded in a document to be called the tender opening register—

SUBPARA (a)

the name of the person submitting the tender

 - (b) the total price, where applicable including any modifications or discounts received before the deadline for submitting tenders except as may be prescribed; and
 - (c) if applicable, what has been given as tender security.
- (7) No tenderer shall be disqualified by the procuring entity during opening of tenders.
- (8) The accounting officer of a procuring entity shall, on request, provide a copy of the tender opening register to a person submitting a tender. (9) Each member of the tender opening committee shall—
 - (a) sign each tender on one or more pages as determined by the tender opening committee; and (b) initial, in each tender, against the quotation of the price and any modifications or discounts, where applicable.
- (10) The tender opening committee shall prepare tender opening minutes which shall set out—
 - (a) a record of the procedure followed in opening the tenders; and
 - (b) the particulars of those persons submitting tenders, or their representatives, who attended the opening of the tenders.
- (11) To acknowledge that the minutes are true reflection of the proceedings held, each member of the tender opening committee shall—
 - (a) initial each page of the minutes;



(b) append his or her signature as well as initial to the final page of the minutes indicating their full name and designation.

(12) A person who causes the physical loss of tender documents provided for under this section commits an offence.

261. On responsiveness of tenders, section 79 provides:

79. Responsiveness of tenders

(1) A tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents.

(2) A responsive tender shall not be affected by—

(a) minor deviations that do not materially depart from the requirement set out in the tender documents; or

(b) errors or oversights that can be corrected without affecting the substance of the tender.

(3) A deviation described in subsection (2)(a) shall—

(a) be quantified to the extent possible; and

(b) be taken into account in the evaluation and comparison of tenders.

262. On evaluation of tenders, section 80 provides:

80. Evaluation of tenders

(1) The evaluation committee appointed by the accounting officer pursuant to section 46 of this Act, shall evaluate and compare the responsive tenders other than tenders rejected.

(2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the provisions of this Act and statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered

(3) The following requirements shall apply with respect to the procedures and criteria referred to in subsection (2)—

(a) the criteria shall, to the extent possible, be objective and quantifiable;

(b) each criterion shall be expressed so that it is applied, in accordance with the procedures, taking into consideration price, quality, time and service for the purpose of evaluation; and

(4) The evaluation committee shall prepare an evaluation report containing a summary of the evaluation and comparison of tenders and shall submit the report to the person responsible for procurement for his or her review and recommendation.

(5) The person responsible for procurement shall, upon receipt of the evaluation report prepared under subsection (4), submit such report to the accounting officer for approval as may be prescribed in regulations.



- (6) The evaluation shall be carried out within a maximum period of thirty days.
- (7) The evaluation report shall be signed by each member of evaluation committee.

263. On clarification of tenders, section 81 provides:

81. Clarifications

- (1) A procuring entity may, in writing request a clarification of a tender from tenderer to assist in the evaluation and comparison of tenders.
- (2) A clarification shall not change the terms of the tender.

264. On correction, revision and adjustment and amendment of tenders, section 82 provides:

82. Correction, revision, adjustment or amendment of tender

- (1) Subject to subsection (2) of this section, the tender sum as submitted and read out during the tender opening shall be absolute and final and shall not be the subject of correction, revision, adjustment or amendment in any way by any person entity.
- (2) For avoidance of doubt, the provisions of subsection (1) shall not apply to sections 103, 131 and 141 of this Act.

265. In *Bytewise Limited v Accounting Officer, Kenya Civil Aviation Authority; Indra Limited (Interested Party)* [2020] KEPPARB 35 (KLR) it was stated:

“Section 79 (1) of the Act is instructive that a tender is responsive if it conforms to eligibility and mandatory requirements in the tender documents. To qualify as a minor deviation, section 79 (2) of the Act provides guidance that responsive tenders should not be affected by minor deviations that do not materially depart from the requirements set out in the tender documents; or errors or oversights that can be corrected without affecting the substance of the tender. Having considered the conditions for determining what qualifies as a minor deviation and the ordinary meaning of the word “minor deviation”, the Board observes that for an error to qualify as a minor deviation, the same should be inconsequential and should not affect the substance of the tender if corrected or waived.”

266. Equally in *Republic v Public Procurement Administrative Review Board; Kenya Medical Supplies Authority (KEMSA) (Interested Party) Ex parte Emcure Pharmaceuticals Limited* [2019] KEHC 2976 (KLR) the High Court stated the following regarding a minor defect and or informality:

“A bid that contains “minor informalities” is not considered nonresponsive. A minor informality or irregularity, in turn, is defined as:-

“one that is merely a matter of form and not of substance. It also pertains to some immaterial defect in a bid or variation of a bid from the exact requirements of the invitation that can be corrected or waived without being prejudicial to other bidders. The defect or variation is immaterial when the effect on price, quantity, quality or delivery is negligible when contrasted with the total cost or scope of the supplies or services being acquired. The contracting officer either shall give the bidder an opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid or waive the deficiency, whichever is to the advantage of the Government.”



267. Further in Republic v Public Procurement Administrative Review Board & 2 others; Ex-Parte Central Kenya Fresh Merchants Limited [2018] KEHC 1203 (KLR) it was restated as follows, regarding correction of minor informalities:

“A bid that contains "minor informalities" is not considered nonresponsive. A minor informality or irregularity, in turn, is defined as: one that is merely a matter of form and not of substance. It also pertains to some immaterial defect in a bid or variation of a bid from the exact requirements of the invitation that can be corrected or waived without being prejudicial to other bidders. The defect or variation is immaterial when the effect on price, quantity, quality or delivery is negligible when contrasted with the total cost or scope of the supplies or services being acquired. The procuring entity can give the bidder an opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid or waive the deficiency, whichever is to the advantage of the procuring entity.”

268. Additionally, In Republic v Public Procurement Administrative Review Board; Accounting Officer, Kenya Rural Roads Authority & 2 others (Interested Parties) Ex Parte Roben Aberdare (K) Ltd [2019] KEHC 5570 (KLR), Mativo J (as he then was) stated as follows regarding errors in tender documents:

“128. An "acceptable tender" must be construed against the background of the system envisaged by Article 227(1) of *the Constitution*, namely one which is "fair, equitable, transparent, competitive and cost-effective." In other words, whether "the tender in all respects complies with the specifications and conditions set out in the bid documents" must be judged against these values.

129. It is correct to emphasize that an "acceptable tender" means any tender, which, in all respects, complies with the specifications and conditions of tender as set out in the tender document. Moreover, a tender may be regarded as acceptable, even if it contains minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set out in the tender documents or if it contains errors or oversights that can be corrected without touching on the substance of the tender.”

269. The learned Judge further stated as follows concerning errors in tenders in 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):

“58. There is a need to appreciate the difference between formal shortcomings which go to the heart of the process and the elevation of matters of subsidiary importance to a level which determines the fate of the tender. I am conscious of the ever-flexible duty of a tender committee to act fairly, and that fairness must be decided on the circumstances of each case. In the present case it is clear that post qualification was a mandatory requirement.

59. True, a procuring entity may condone some deficiencies. For example, a bona fide mistake should not in and of itself disqualify a bidder. Substance should prevail over form. A distinction should be drawn between a material factor and the evidence needed to prove that factor. Regard must be had to the facts as a whole in the context of the applicable legislation and the principles involved; and the words "acceptable tender" which involves a consideration of the degree of compliance with tender conditions. Essentially, a failure to



comply with prescribed conditions will result in a tender being disqualified as an "acceptable tender" unless those conditions are immaterial, unreasonable or unconstitutional.

60. As a general principle an administrative authority has no inherent power to condone failure to comply with a peremptory requirement. It only has such power if it has been afforded the discretion to do so. The definition of an "acceptable tender" does not grant the Respondent any discretion when evaluating compliance with tender conditions unless the conditions imposed are immaterial, unreasonable or unconstitutional.

62. The term "acceptable tender" means any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document. A tender may be regarded as acceptable, even if it contains minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set out in the tender documents or if it contains errors or oversights that can be corrected without touching on the substance of the tender. Any such deviation shall be quantified, to the extent possible, and appropriately taken account of in the evaluation of tenders. A tender shall be rejected if it is not acceptable."

270. Section 78 (5) and (6) mandates the public reading of bids and the recording of number of pages of the tender document submitted and 6(c) if applicable, what has been given as tender security. In this case, a tender security document was a mandatory document

271. That said, from a reading of sections 79 to 82, the law acknowledges that minor errors or deviations which do not go to the root of the mandatory tender requirements can be corrected and that correction is a fiduciary duty of the procuring entity. It is for this reason that section 79 (2) provides that (2) A responsive tender shall not be affected by— (a) minor deviations that do not materially depart from the requirements set out in the tender documents; or (b) errors or oversights that can be corrected without affecting the substance of the tender. (3) A deviation described in subsection (2)(a) shall— (a) be quantified to the extent possible; and (b) be taken into account in the evaluation and comparison of tenders.

272. Thus, if an error is discovered, such as mislabelling or a misreading of a security bank guarantee as an insurance guarantee, the tender opening committee has a legal obligation to inform the parties and correct the record.

273. Although the Review Board found the correction to be illegal and flawed, with the 2nd interested party herein claiming that there was post opening alteration which amounted to a jurisdictional failure by the procuring entity and that any attempt to correct or substitute a mandatory document after the public opening is shut constitutes a fraudulent manoeuvre to sneak in compliant documents that were never part of the original record of the procurement system, and that the exparte applicant's bid was non responsive at the point of opening and could not be resurrected by informal non auditable text messages, the view of this Court is that a transparent correction which involved calling all bidders back to witness the position was an act of good faith on the part of the procuring entity.

274. While Section 78(1) of the *Public Procurement and Asset Disposal Act* (PPADA) requires the reading and recording of bid securities at the opening, this record is not an end in itself. If the record is factually wrong and the document was actually in situ (physically present), then the record must yield to the physical reality of the bid.



275. Moreover, fraud requires concealment. By making the error public and correcting it on the record, less than 20 minutes after the closing of the tender opening session as was in this case, the procuring entity, in my most considered opinion, that transparency effectively dissipates and dispels any scintilla of a dishonest intent required to prove fraud.
276. Further, to succeed in a claim of fraud in judicial review, the applicant must meet a very high standard of proof. Particulars of fraud and how it could have been perpetuated within that short period, with the tender documents intact, paginated, indexed and the two documents readily stuck into the bound tender documents but on different pages and agreeing with the index.
277. In my humble view, with the tender security "in situ" the original sealed bid and with no evidence of tampering of the same the two instruments being for totally different purposes, the subsequent discovery of the correct document is a correction of a factual error which is envisaged under section 79(2)(b) of the Act to be (b) errors or oversights that can be corrected without affecting the substance of the tender.
278. It would also require evidence and none was availed to the Review Board or to this Court that the document was surreptitiously inserted after the tender opening and reading exercise.
279. I reiterate that since the document is physically part of the bid documents and was merely misread, the Review Board should have viewed this as a technicality of form rather than a substantive fraud.
280. In my humble view, procurement should not be a "game of traps" where a simple reading error invalidates an otherwise responsive bid.
281. Furthermore, this is a case where the Court must look at the transparency test, on how the correction was handled and the time it took to discover the misreading of the security bank guarantee. The test can be taken as follows: Invite: Did the procuring entity notify all bidders of the error? The answer is Yes. The Verification: Did they allow bidders to confirm the position? Yes they did. The Record: Is the "in situ" tender security document consistent with the original bid's pagination and all other features? Yes indeed, and this is verified from the tender documents filed in court at pages 43 and 233.
282. Although the 2nd interested party claims that under section 64 of the Act, communication could not have been such informal, I have read section 64 and it provides as follows:
64. Form of communications, electronic procurement and asset disposal
- (1) All communications and enquiries between parties on procurement and asset disposal proceedings shall be in writing.
 - (2) Information and Communication Technologies (ICT) may be used in procurement and asset disposal proceedings as prescribed with respect to—
 - (a) publication of notices;
 - (b) submission and opening of tenders;
 - (c) tender evaluation;
 - (d) requesting for information on the tender or disposal process;
 - (e) dissemination of laws, regulations and directives;
 - (f) digital signatures; or
 - (g) as may be prescribed by regulations.



283. In my view, the procuring entity having called the bidders on phone, they did not stop there and there is no dispute. They send SMS to all the bidders, which messages were responded to by the 2nd interested party with protests claiming manipulation of the documents by insertion of documents which were initially absent.
284. The SMS was a communication in writing in electronic form and which was retrievable. And in compliance with the provisions of sections 106A-106I of the *Evidence Act* on proof and admissibility and production of such evidence, with certificates of electronic evidence being filed.
285. Since the transparency test is met, the self-correction by the tender opening committee strengthens the process's integrity under Article 227 of *the Constitution*, which demands a system that is "fair, equitable, transparent, and competitive."
286. Accordingly, it is my finding that the Review Board's refusal to accept the correction is an attempt to use a procedural slip-up to eliminate a superior competitor and in my opinion, a procuring entity cannot be compelled to ignore a valid document that was already in its possession. To do so would force the procuring entity to act irrationally and against the public interest of getting the best value for money.
287. The PPARB's reversing the award and nullifying the entire procurement process solely because the document wasn't "read out" at the opening (despite its physical presence), in my view, was an error of law. The Board is empowered under the Act in making orders under Section 173 of the Act to ensure fairness and therefore, penalizing a bidder for a Procuring Entity's reading error violates the principle of treating competitors fairly.
288. In a South African case of *Millennium Waste Management (Pty) Ltd. v Chairperson of the Tender Board: Limpopo Province and Others* (31/2007) [2007] ZASCA 165; [2007] SCA 165 (RSA); [2008] 2 All SA 145; 2008 (2) SA 481; 2008 (5) BCLR 508; 2008 (2) SA 481 (SCA) (29 November 2007) the South African Supreme Court of Appeals held:
- “By insisting on disqualifying the appellant’s tender for an innocent omission, the tender committee acted unreasonably. Its decision in this regard was based on the committee’s error in thinking that the omission amounted to a failure to comply with a condition envisaged in the Preferential Procurement Act. Consequently, its decision was ‘materially influenced by an error of law’ contemplated in s 6 (2)(d) of PAJA, one of the grounds of review relied on by the appellant.”
289. On the alleged fraudulent manoeuvres allegations, this allegation must be weighed against the overt evidence available. In this case, the claim of fraud by the 2nd interested party and which the Review Board accepted is weakened by the bank guarantee security document's presence in the tender documents, minutes after the opening and recording session, and which presence is consistent with the bid's indexing, pagination and serialization. Such that, administrative errors by the procuring entity through misreading should not have resulted in the unjustified disqualification of a responsive bidder.
290. In *Metro Projects CC v Klerksdorp Local Municipality* 2004 (1) SA ,the South African court stated as follows on procedural fairness in procurement processes:
- “In the *Logbro Properties* case supra, paras [8] and [9] at 466H-467C, Cameron JA referred to the “ever-flexible duty to act fairly” that rested on a provincial tender committee. Fairness must be decided on the circumstances of each case. It may in given circumstances be fair to ask a tenderer to explain an ambiguity in its tender; it may be fair to allow a tenderer



to correct an obvious mistake; it may, particularly in a complex tender, be fair to ask for clarification or details required for its proper evaluation. Whatever is done may not cause the process to lose the attribute of fairness or, in the local government sphere, the attributes of transparency, competitiveness and cost-effectiveness.”

291. Finally, on unreasonableness, in *Republic v National Hospital Insurance Fund Board of Management & another Ex parte Law Society of Kenya* [2019] KEHC 11051 (KLR) the court restated the unreasonable test as follows:

“The simple test used throughout is whether the decision in question is one which a reasonable authority could reach. The converse was described by Lord Diplock[38] as ‘conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt.’ Review by a court of the reasonableness of a decision is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process but also with whether the decision falls within a range of possible, acceptable outcomes which are defensible with respect to the facts and law. Differently stated, the following propositions can offer guidance on what constitutes unreasonableness:- (i) *Wednesbury* unreasonableness is the reflex of the implied legislative intention that statutory powers be exercised reasonably; (ii) this ground of review will be made out when the Court concludes that the decision fell outside the area of decisional freedom which that legislative assumption authorizes, that is, outside the “range” within which reasonable minds may differ; (iii) the test of unreasonableness is whether the decision was reasonably open to the decision-maker in the circumstances of the case. To say that the decision was “not reasonably open” is the same as saying that “no reasonable decision maker” could have made it.”

292. In the instant case, I am satisfied that no reasonable tribunal would find that the reading of a wrong bank tender security document at the tender opening session would be final where it is established immediately thereafter, that therein the tender document, was the correct tender security and in view of section 79 of the Act which allows minor oversight errors to be rectified. Accordingly, I find the decision by the Review Board to be *Wednesbury* unreasonable.

293. It is for the above reasons that I find and hold that the Public Procurement Administrative Review Board (PPARB) committed an error of law and acted irrationally and unreasonably by reversing a decision of the procuring entity based on a verified factual correction that it prioritised an excusable technicality over substance. In that instance, this Court is entitled to interfere with such a decision, to ensure the public procurement process achieves its constitutional mandate of maximizing economy and efficiency.

294. I further find and hold that the failure to “see” the correct bank security guarantee at opening was a classic administrative oversight. Section 79(2)(b) of the Act is categorical that a responsive tenderer shall not be affected by errors or oversights that can be corrected without affecting the substance of the tender. Since the document was found “in situ” (physically present) and its discovery did not alter the bid price or technical specifications, the Procuring Entity acted within its statutory mandate to correct the record. The Review Board’s finding that suggested that the opening record is “final and unchangeable” is an error of law that effectively nullifies the saving provisions of Section 79.

295. More so, Articles 159 of *the Constitution* of Kenya and section 79 of the Act prioritize substantive justice over form. A “bid opening record” is a procedural tool, not a “sacred text” that overrides the physical reality of a bid. If the security bank guarantee was in situ (physically present) at the time of



- submission, the bidder has complied with the mandatory requirements. To disqualify them based on an erroneous reading is to prioritize a "procedural trap" over fairness and competition.
296. Onto the 2nd Interested Party's Claim to the Award, the 2nd Interested Party's application vide JR E002 of 2026 faults the Review Board for nullifying the entire procurement process and ordering for a readvertisement of the tender. It seeks orders that it ought to have been declared as the next most responsive tenderer. The procuring entity disagrees and argues that it was in the powers of the Review Board to make that finding and that the 2nd interested party/ applicant cannot fault the procuring entity for fraudulent manoeuvres and seek to rely on what it believes to be a fraudulent process to benefit from that flawed process by being declared the winner and be awarded the tender.
297. Having found the Applicant's bid to be substantially responsive by virtue of the "in situ" guarantee and that the error of misreading was curable vide Section 79 of the Act, and there being no other issue that would affect the integrity of the procurement process as the so-called Amana bidder was not among the evaluated bidders, out of the bids evaluated, I find that Utmost Insurance Brokers Limited remains the lowest evaluated responsive bidder. Under Section 86 of the Act, the award must go to the lowest responsive bidder to satisfy the constitutional mandate of cost-effectiveness under Article 227. It therefore follows that there was no basis upon which the Review Board annulled the entire procurement process and ordered for a readvertisement.
298. For the reasons stated above, this Court makes the following orders:
- a. Certiorari is hereby issued removing into this Court for purposes of quashing and I hereby quash the decision of the Public Procurement Administrative Review Board in its entirety regarding cancellation of tender No. CGN/CS/INS/01/2025-2026 and all the communication and directives issued to the Accounting Officer of the Procuring entity and the Director General of the Public Procurement Regulatory Authority on 22nd December, 2025 in Request for Review Application No. 111 of 2025.
 - b. Having quashed the entire decision of the Review Board, there is nothing left to be prohibited. Accordingly, the prayers for prohibition are declined.
 - c. Having found that the request for review was filed out of the statutory period of 14 days from the date when the alleged breach arose; and having established that the error of misreading the bank tender security was correctable under section 79(2) (b) of the PPADA, and having found that the exparte applicant was the most responsive tenderer, I hereby restore the legal status of the notification of intention to award made to Utmost Insurance Brokers Limited.
 - d. The procuring entity having issued a notification of intention to award, is directed to proceed and conclude the procurement process with the successful tenderer as stipulated in section 86 of the Act and in accordance with the law, with the time starting to run from the date of this judgment.
 - e. The 2nd Interested Party's Judicial Review Application in JR E002 of 2026 wherein it is the exparte applicant, and in so far as it seeks to be declared the most responsive and therefore lowest evaluated bidder on account of the Review Board's finding of the applicant herein Utmost Insurance Brokers Limited having failed to meet the criteria is found to be devoid of merit and is hereby dismissed.
 - f. Each party to bear their own costs of these proceedings, as dictated by section 175(7) of the *Public Procurement and Asset Disposal Act*.
299. This file is closed.



**DATED, SIGNED AND DELIVERED AT NAIROBI VIRTUALLY VIA MICROSOFT TEAMS
THIS 16TH DAY OF FEBRUARY, 2026 WITH ALL PARTIES' COUNSEL PRESENT.**

R.E. ABURILI

JUDGE

