

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NUMBER 1/2020 OF 6TH JANUARY 2020

BETWEEN

ENERGY SECTOR CONTRACTORS

ASSOCIATION.....APPLICANT

AND

THE ACCOUNTING OFFICER,

THE KENYA POWER AND LIGHTING COMPANY

LIMITED.....RESPONDENT

AND

ZOEC-ZHEPEDC-NGINU.....INTERESTED PARTY

Review against the decision of Kenya Power and Lighting Company Limited in respect of the Tender Document issued on 20th August 2019 in relation to Tender for Procurement of Design, Supply, Installation, Commissioning of Transmission Lines and Substations (AFD), Project IPC No: KP1/6A.1/PT/3/19/A72.

BOARD MEMBERS

- | | |
|------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Dr. Joseph Gitari | -Member |
| 3. Mr. Nicholas Mruttu | -Member |
| 4. Ms. Rahab Chacha | -Member |

IN ATTENDANCE

- | | |
|-------------------------|------------------------------|
| 1. Mr. Philemon Kiprop | -Holding brief for Secretary |
| 2. Ms. Maryanne Karanja | -Secretariat |

PRESENT BY INVITATION

APPLICANT

-ENERGY SECTOR CONTRACTORS ASSOCIATION

- | | |
|---------------------|--|
| 1. Mr. Kibe Mungai | -Advocate, Kinoti & Kibe Company Advocates |
| 2. Mr. C N Nduati | -Member |
| 3. Mr. S. Kigera | -Chairman |
| 4. Mr. Rodgers Adai | -Member |

PROCURING ENTITY

-KENYA POWER & LIGHTING COMPANY

- | | |
|------------------------|--|
| 1. Mr. Jude Ochieng' | -Advocate, Litigation and Prosecutions |
| 2. Mr. Robert Njoroge | -Engineer |
| 3. Mr. Peter Kioko | -Engineer |
| 4. Ms. Stella Mucheke | -Engineer |
| 5. Ms. Ashene Eshitubi | -CSCO-PS&A |

INTERESTED PARTY

-ZOEC-ZHEPEDC-NGINU

- | | |
|----------------------|--------------------------------------|
| 1. Mr. Njogu Njuru | -Advocate, Njuru & Company Advocates |
| 2. Mr. Moses Njiru | -Advocate |
| 3. Mr. Samuel Thande | -Procurement |

OTHER INTERESTED PARTIES

A. AVIC INTERNATIONAL HOLDING

1. Ms. Sheila Muga

B. KALPATARU POWER TRANSMISSION LIMITED

1. Mr. Anand Kumar -Senior Manager

C. CHINA WUYI KENYA

1. Mr. Jairus Atuti -Contract

D. SHYAMA POWER INDIA

1. Ms. Anne Wangui -Administration

E. KEC INTERNATIONAL LTD

1. Mr. Sandeep Dubey -Manager, BD

BACKGROUND TO THE DECISION

Kenya Power and Lighting Company Limited (hereinafter referred to as “the Procuring Entity”) advertised Tender for Procurement of Design, Supply, Installation, Commissioning of Transmission Lines and Substations (AFD), Project IPC No: KP1/6A.1/PT/3/19/A72 (hereinafter referred to as “the subject tender”) in the local dailies on 20th August 2019 and on the Procuring Entity’s Website and the DG Market (that is, the portal for

tenders with official tenders from World Bank, European Union, *Agence Française de Développement* and other agencies).

Bid Submission Deadline and Opening of bids

The Procuring Entity received a total of 31 No. bids by the tender closing date of 7th January 2020. The tenders were opened shortly thereafter but the Procuring Entity received a notification of the existence of Request for Review No. 1/2020 of 6th January 2020 filed by M/s Energy Sector Contractors Association, with the Board, hence did not commence evaluation.

THE REQUEST FOR REVIEW

M/s Energy Sector Contractors Association (hereinafter referred to as "the Applicant") lodged a Request for Review on 6th January 2020 together with the Statement in Support of the Request for Review sworn and filed on even date (hereinafter referred to as "the Applicant's Statement") and Submissions dated and filed on 17th January 2020 (hereinafter referred to as "the Applicant's Written Submissions"). In response, the Procuring Entity filed a Response to the Request for Review dated 10th January 2020 and filed on 13th January 2020 (hereinafter referred to as "the Procuring Entity's Response") together with its Submissions dated 14th January 2020 and filed on 16th January 2020 (hereinafter referred to as "the Procuring Entity's Written Submissions") and Further Submissions dated and filed on 13th January 2020 (hereinafter referred to as "the Procuring Entity's Further Submissions"). M/s Zoec-Zhepedc-Nginu (hereinafter referred to as "the

Interested Party”) lodged a Response to the Request for Review dated 17th January 2020 and filed on 20th January 2020 (hereinafter referred to as “the Interested Party’s Response”).

During the hearing, the Applicant was represented by Mr. Kibe Mungai on behalf of the firm of Kinoti & Kibe Company Advocates, the Procuring Entity was represented by its in-house Counsel, Mr. Jude Ochieng’ appearing together with Ms. Irene Walala, while the Interested Party was represented by Mr. Njogu on behalf of the firm of Njuru & Company Advocates.

When the matter came up for hearing, Counsel for the Applicant, Mr. Mungai challenged the admission of two documents attached to the Procuring Entity’s Further Submissions. On his part, Counsel for the Procuring Entity prayed that the documents attached to its Further Submissions, that is, a Record of Delivery which is not dated, and a document containing a List of Contractors for “Last Mile Connectivity Project Phase 1, 2 and 3” which is dated 1st July 2019 be admitted as forming part of the documents of the Procuring Entity submitted in Response to the Request for Review.

The Board having considered the parties’ submissions observed that the Procuring Entity sought to introduce evidence before the Board through submissions when the Applicant had not had an opportunity to study the contents and challenge the same, if need be. The Board further took the

view, that this would interfere with the Applicant's right to a fair hearing under Article 50 (2) (k) of the Constitution, which provides that:-

"Every person has the right to a fair trial which includes the right

(k) to adduce and challenge evidence"

Accordingly, the Board expunged the aforementioned two documents from the record of proceedings before the Board.

PARTIES' SUBMISSIONS

Applicant's Submissions

In his oral submissions, Counsel for the Applicant, Mr. Kibe Mungai, fully relied on the Request for Review, the Applicant's Statement and the Applicant's Written Submissions together with the Applicant's List of Authorities attached thereto.

With respect to the Procuring Entity's Objection to the jurisdiction of the Board, Mr. Mungai submitted as follows:-

On the question whether the Request for Review was filed within statutory timelines provided for in section 167 (1) of the Act, Mr. Mungai submitted that it is not in dispute that the Procuring Entity uploaded its Tender

Document on its website on 20th August 2019, but that the Applicant only approached the Board on 6th January 2020. Despite this, Counsel submitted that the Applicant lodged this Request for Review on 6th January 2020 before the tender opening date of 7th January 2020. He therefore took the view that the Applicant was at liberty to approach the Board at any time before tender opening.

On further enquiry as to when the Applicant realize the alleged defect in the contents of the Tender Document, Counsel submitted that as from the time the Applicant got the Tender Document it realized the breach in terms of the provisions of the Tender Document and thereafter sought clarifications from the Procuring Entity, However, the last clarifications issued vide addendum dated 24th December 2019 did not address the Applicant's concerns raised with the Procuring Entity. This prompted the Applicant to approach the Board through the instant Request for Review.

On the issue of *locus standi* raised in the Procuring Entity's Objection to the jurisdiction of the Board, Mr. Mungai referred the Board to section 2 of the Act on the meaning of a candidate, and further submitted that the Applicant obtained the Tender Document applicable in the subject procurement process and even attached the same to its Request for Review and is therefore a candidate within the meaning of section 2 of the Act.

On the third issue raised by way of an objection to the jurisdiction of the Board relates to section 4 (2) (f) and 6 (1) of the Act. In response, Mr. Mungai submitted that in so far as its Authority No. 2 and 3 of the Applicant's List of Authorities are concerned, courts have held that even where donor funds are used for purposes of any procurement process and a procuring entity does further to prepare a tender document relying on provisions of the 2015 Act, the Procuring Entity is estopped from alleging that the jurisdiction of the Board would be ousted.

Upon further enquiry by the Board as to whether the Tender Document was prepared in accordance with the Laws of Kenya, Mr. Mungai submitted that public procurement in Kenya is subject to the Constitution and the 2015 Act and where a procuring entity uses funds that belong to the Government of Kenya and used by an implementing agency such as the Procuring Entity herein, even if those funds were obtained through a loan facility from a foreign agency the jurisdiction of the Board cannot be ousted.

Counsel made reference to the decision by Justice Lenaola in **Petition No. 58 of 2014, Okiya Omtatah Okoiti & 2 others v. Attorney General & 3 others [2014] eKLR** and submitted that the Learned Judge held that the jurisdiction of this Board would only be ousted if there was an express provision in the Loan agreement to that effect. Mr. Mungai then referred to the decision by Justice Odungain **Judicial Review Application No. 623**

of 2016 (Consolidated with Judicial Review Application No. 645 of 2016), Republic v. Public Procurement Administrative Review Board ex parte Kenya Power and Lighting Company Limited (2017) eKLR and submitted that the same outlined the parties to the Loan agreement within the meaning of section 4 (2) (f) of the Act required to pass the test for ousting the jurisdiction of the Board. He concluded that the Procuring Entity is not the Government of Kenya and does not therefore pass the test of section 4 (2) (f) of the Act.

Upon enquiry by the Board as to whether or not the Board would have jurisdiction in instances where there is no express provision ousting the jurisdiction of the Board, but that there is a contradiction between Guidelines issued by the Financier and the provisions of the Laws of Kenya, Counsel submitted that careful consideration ought to be made to first establish the parties to the said Loan agreement, if the parties meet the criteria of section 4 (2) (f) of the Act, then where a conflict arises, the provisions of the Loan agreement would prevail on account of Article 2 (5) of the Constitution wherein it is provided that conventions and treaties ratified by Kenya form part of the laws of Kenya.

As to the allegation that the Applicant failed to state who its members are in the association, Counsel submitted that the Board need not venture into company law principles to establish its jurisdiction, since the 2015 Act does not exclude any person from participating in a procurement by virtue of

being a member of a society so long as such persons obtain a Tender Document of subsequently thereafter submit a tender in response to the Procuring Entity's Invitation Notice.

In summary, Mr. Mungai urged the Board to find that it has the jurisdiction to entertain the Request for Review.

On the substantive Request for Review application, Mr. Mungai submitted that same raises the following main issues:-

- a) The Procuring Entity's Tender Document is defective and discriminatory to the extent that:-
 - *It excludes application of section 155 of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act");*
 - *It provides an exact tender security for the respective Lots 1 & 2 which exceeds 2% contrary to the requirement of section 61 (2) of the Act;*
 - *The Evaluation Criteria under clause 3.1 of Section III. Evaluation and Qualification Criteria of the Bidding Document on cash flow requirement is unreasonable;*
 - *The requirement under clause 4.2 (b) at page 43 of the Tender Document for Lot 1 demonstrates that the Procuring Entity failed to unbundle substation work in the subject procurement process.*

To support the issues raised in the substantive Request for Review, Mr. Mungai referred the Board to Part (F) of the Applicant's Written Submissions and submitted on the first sub-issue outlined herein before that, pursuant to Article 227 (1) of the Constitution, every State organ and public entity is required to contract for goods in a system that is fair, equitable, transparent, competitive and cost-effective. He further submitted that Article 227 (2) of the Constitution gave Parliament the obligation to enact a law dealing with the categories of preference and reservations applicable in public procurement. To that effect, Counsel submitted that the 2015 Act was enacted and that section 155 thereof provided for the categories of preference and reservations envisioned by Article 227 (2) of the Constitution.

In that regard, Counsel submitted that the Procuring Entity could not therefore make provision in the Tender Document excluding application of preference and reservation schemes as it did by dint of Clause 33.1 of Section I Instructions to Bidders read together with ITT Clause 33.1 of Section II. Bid Data Sheet, Clause 2 of Section III. Evaluation and Qualification Criteria at page 36 of the Bidding Document. In Counsel's view, these provisions call for nullification of the subject procurement process and issuance of a new Tender Document that conforms to the provisions of the Act.

On the second sub-issue in the substantive Request for Review, Counsel referred the Board to paragraphs 64 and 64 of the Applicant's Written Submissions and stated that the Procuring Entity contravened section 61 (2) (c) of the Act by specifying an exact amount of tender security to be provided by bidder, which amount in the Applicant's view, exceeds 2% required under section 61 (2) of the Act.

On the third sub-issue, Counsel referred the Board to clause 3.1 of Section III. Evaluation and Qualification Criteria of the Bidding Document. According to Counsel, the Procuring Entity specified unrealistic cash flow requirements therein that could not be met by bidders in the respective Lots, having specified an amount of 1.4 Million Euros for Lot 1 and 1.3 Million Euros for Lot 2.

On the fourth sub-issue, Mr. Mungai submitted that the Procuring Entity failed to unbundle the works in the subject procurement. He therefore submitted that the Procuring Entity ought to have unbundled the substation works to allow contractors to share in the works in the subject tender in case they desired to sub-contract the works.

The Board enquired from Counsel whether the Tender Document allowed for Joint Ventures to participate and whether such provision was conditional. In response Mr. Mungai submitted that Joint Ventures are allowed but that no conditions were imposed in the Tender Document, in

respect of the structure that the joint ventures would take. He therefore took the view that where two local companies enter into a joint venture arrangement and participate in this procurement process, they would not be benefiting since the requirements set out by the Procuring Entity, in his view, can only be met by foreign contractors and not local contractors.

In conclusion, Counsel urged the Board to annul the entire procurement process directing the Procuring Entity to prepare a new Tender Document that complies with provisions of the law including section 155 of the Act and to grant costs of the Request for Review to the Applicant.

Procuring Entity's Submissions

In his submissions, Counsel for the Procuring Entity, Mr. Jude Ochieng', fully relied on the Procuring Entity's Response, Written Submissions, the Further Submissions together with the List of Authorities attached to each of the submissions and made reference to confidential documents submitted to the Board pursuant to section 67 (3) of the Act.

Mr. Ochieng' began his submissions by giving a background to the procurement process in that the same was advertised in local newspapers on 20th August 2019 and closed on 7th January 2020 when the Procuring Entity proceeded to open the bids shortly thereafter. He further submitted

that the Procuring Entity received a total of 31 tenderers under which 7 were Joint Venture Companies.

Mr. Ochieng' further submitted that the Request for Review was filed on 6th January 2020 and that according to the Procuring Entity's internal records, it received notice of the said application from the Board on 7th January 2020 at 11.35 am and immediately suspended the procurement process.

As regards the objections raised challenging the jurisdiction of the Board, Mr. Ochieng' submitted on his first ground that the Procuring Entity is a State Corporation under which the Government of Kenya has the majority controlling stake. He referred the Board to page 61 of Executive Order No. 1 of 2018 issued by the President of Kenya wherein Institutions under the Ministry of Energy are outlined, among them, Kenya Power and Lighting Company Limited, the Procuring Entity herein.

Mr. Ochieng' attempted a definition of what "Government of Kenya" is stating that "it is that body or that formation of persons under the Constitution of Kenya who are bestowed with the power to control the affairs of the Republic of Kenya and its citizens" In his view, this formation comprises of 2 levels of government commonly known as, national government and county government as stated in Article 2 of the Constitution. At National Government level, there are 3 arms namely, the Executive, Legislature and Judiciary. He further submitted that the

Executive arm of government comprises of Ministries, Departments and other institutions that are implementing agencies, semi-autonomous government agencies, state corporations among others. He therefore concluded that by the definition and explanation given and in view of Executive Order No. 1 of 2018, the Procuring Entity herein is the Government of Kenya. As a result, Counsel submitted that section 4 (2) (f) and 6 (1) of the Act therefore oust the jurisdiction of the Board.

Mr. Ochieng' went further to explain where the jurisdiction of the Board comes from by referring to sections 27, 28 and 167 (1) of the Act, which jurisdiction can be ousted by dint of section 4 (2) (f) of the Act for the reasons explained in his earlier submissions noting that the Procuring Entity is part of Government and received funding from a bilateral agency, that is, *Agence Française de Développement* (AFD) through a bilateral agreement between AFD and the Procuring Entity.

Upon enquiry by the Board as to the terms of repayment of the loan obtained from AFD, Mr. Ochieng submitted that the loan was granted directly to the Procuring Entity upon obtaining consent from the National Treasury to borrow, but confirmed that the National Government did not guarantee the loan upon being referred to Paragraphs 2, 3, 4, 7 and 8 of a letter dated 24th June 2015 from the Principal Secretary of the National Treasury addressed to the Principal Secretary of the Ministry of Energy and Petroleum contained in the confidential file submitted to the Board.

Mr. Ochieng' then referred the Board to a letter dated 6th June 2015 and submitted that the context of the said letter must be considered. In his view, the Board of Directors of the Procuring Entity were given responsibility by the National Treasury to ensure repayment of the loan is done. In his view, this was not an indication that the Government of Kenya is not involved in the loan repayment to AFD.

Counsel made reference to the Procurement Guidelines for AFD-Financed Contracts in Foreign Countries, February 2017 and submitted that the same are applicable in the subject procurement process. He further referred the Board to clause 2.1 of Section I. Instructions to Bidders of the Bidding Document which indicates the source of the funds applied in the subject tender to be AFD and that by virtue of application of the AFD Guidelines to the subject procurement process and the Loan Agreement between the Procuring Entity and AFD, the jurisdiction of the Board is ousted by dint of section 4 (2) (f) and 6 (1) of the Act.

Mr. Ochieng' further submitted that since the Bidding Document contains a clause that expressly excluded application of preferences in the subject procurement process, then there exists a conflict. In his view, the preferences that would apply are the ones allowed by the Standard Bidding Document issued by AFD, which the Procuring Entity used to develop the Bidding Document applied in this procurement process. He took the view

that in so far as the AFD Guidelines are concerned, Part XII of the 2015 Act does not apply in this procurement process.

Mr. Ochieng' further submitted that application of preference is a question of threshold. He submitted that since the subject tender was above the threshold of 1 Billion Kenya Shillings from the Procuring Entity's estimated value of the project, then the Public Procurement and Disposal (Preference and Reservations) Regulations 2011 would not apply. In that regard, he submitted that for Lot 1 of the subject tender, the Engineer's Estimate was 16 Million Euros translating to 2 Billion Kenya Shillings and for Lot 2, the Engineer's Estimate was 15.8 Million Euros translating to 1.9 Billion Kenya Shillings at an exchange rate of 126.3 Kenya Shillings.

He then submitted that Regulation 28 of the Public Procurement and Disposal (Preference and Reservations) Regulations 2011 requires the Procuring Entity to reserve at least 30 % of its procurement for a specific target group, which provisions the Procuring Entity complied with, but that such target groups do not apply in the subject procurement process, therefore the Procuring Entity has no obligation to apply any preference and reservation its procurement in the instant tender. He further submitted that even if the Board finds that Part XII of the Act applies in this instance, the Applicant would not benefit from the same for its failure to submit a tender. Upon enquiry by the Board as to how the Procuring Entity would ensure the guiding principles under section 3 (i) and (j) of the Act are

achieved, Counsel submitted that the Procuring Entity believes that local firms are able to undertake the project in the subject tender thus the principles under that provisions have not been contravened.

On his second objection to the jurisdiction of the Board, Counsel submitted that the Request for Review was filed out of the statutory period imposed under section 167 of the Act. To support his submissions, Mr. Ochieng' referred the Board to paragraph 94 of the decision in **Republic v. Public Procurement Administrative Review Board ex parte Kenya Power and Lighting Company Limited (2017) eKLR** where the court held that the failure to comply with statutory timelines renders a decision unlawful. Counsel also relied on the case of **Republic v. Public Procurement Administrative Review Board & 2 Others ex parte Ministry of Defence (2018) eKLR** where the Court addressed the question when the aggrieved Applicant knew of the alleged breach by the Procuring Entity in order for it to approach the Board.

On the third of objection by the Procuring Entity based on the Applicant's locus standi, Mr. Ochieng' submitted that the Applicant is neither a candidate nor a tenderer within the meaning of section 2 of the Act. To support this view, Counsel referred the Board to the Pre-Bid Meeting Minutes and Site Visit Attendance Register and submitted that the Applicant failed to attend the Pre-Bid Meeting and Site Visit since it was presumed that those who attended the Pre-Bid Meeting and Site Visit are

the ones who obtained the Procuring Entity's Bidding Document. He further took the view that the Applicant ought to have raised its grievance with the Public Procurement Regulatory Authority pursuant to section 9 of the Act, and not to approach the Board under Section 167 (1) of the Act, as the Applicant lacks the requisite locus standi.

Upon being questioned on the manner prospective candidates were to obtain the Bidding Document, Mr. Ochieng' submitted that the same could be downloaded on the Procuring Entity's website or a hard copy purchased physically from the Procuring Entity's offices. He took the view that those who obtained the Bidding Document from the Procuring Entity's website were the ones who attended the Pre-Bid meeting and Site Visit. On further enquiry by the Board, Counsel confirmed that the Bidding Document could be obtained on 6th January 2020, a day before the tender closing date, noting that by 6th January 2020 the Pre-Bid Meeting and Site Visit already took place. To support his submissions, Counsel made reference to the case of **Republic v. Public Procurement Administrative Review Board & 2 Others ex parte Ministry of Defence (2018) eKLR.**

In terms of the issues raised in the substantive Request for Review, Mr. Ochieng' began his submissions on the issue of tender security. He made reference to section 61 (2) (c) of the Act and took the view that the same allows a Procuring Entity to provide engineering estimates of the value of the tender, which it did in the subject procurement process. He therefore

submitted that for Lot 1, the estimated value was 16 Million Euros equivalent to 2.02 Billion Kenya Shillings, and 15.8 Million Euros equivalent to 1.9 Billion Kenya Shillings. He added that the value of 2% of the estimate value of the lots would constitute the tender security required by bidders, that is, 330,000 Euros equivalent to 41.7 Million Kenya Shillings for Lot 1, and 310,000 Euros equivalent to 39,1 Million Kenya Shillings for Lot 2, which in his view are below the 2% threshold set under section 61 (2) (c) of the Act.

According to Counsel, all the 31 tenderers who submitted their bids by the tender closing date of 7th January 2020 complied with this requirement including the requirement of cash flow annual turnovers.

On the technical requirements spelt out in the Tender Document, Counsel submitted that the Procuring Entity intends to commission a Gas Insulated Sub-Station Switch Gear (GIS Switch Gear) and that the experience in Air Insulated Sub-Station Switch Gear (AIS Switch Gear) cannot substitute the experience required by the Procuring Entity in so far as the GIS Switch Gear is concerned. Upon enquiry by the Board, the Procuring Entity's Engineer, Eng. Njoroge explained the difference between GIS Switch Gear and AIS Switch Gear Sub-Stations in that the difference lies in the equipment installed but that the purpose of the two substations is the same. He further submitted that with GIS Switch Gear, equipments are installed in a special way that are compatible to use a smaller space

available. On further enquiry, Eng. Njoroge submitted that this installation has been done in Kenya in the past in four substations, to wit; Ragati in Upper Hill, Mamlaka Road near University of Nairobi, the City Centre next to Railways Bus Station and Juja Sub-Station in Dandora, which he confirmed are all Gas Insulated Switch Gear Sub-Stations.

On the question whether or not the requirements in the Bidding Document are discriminatory, Counsel submitted that the Applicant failed to demonstrate to the Board how the Bidding Document has discriminated against them. In his view, the Applicant has admitted to lack the requisite technical requirements to execute the subject tender and are praying that the Board orders the Procuring Entity to split the tender so that it meets the Applicant's circumstances. He viewed this to be an offence prohibited by section 54 and 176 (1) (h) of the Act.

Interested Party's Submissions

In his submissions, Counsel for the Interested Party, Mr. Njogu, fully relied on the Interested Party's Response.

Counsel began his submission by stating that the Bidding Document allowed for companies to enter into joint venture arrangements, which the Interested Party did in order to meet the technical requirements in the Bidding Document. He further submitted that the Interested Party complied

with the requirement of providing a tender security of the amount specified in the Bidding Document and that the Interested Party attended the Pre-Bid Meeting and Site Visit organized by the Procuring Entity.

On the applicability of section 4 (2) (f) of the Act, Mr. Njogu submitted that the even though Article 227 (1) of the Constitution requires an Act of Parliament to provide for categories of preference and reservations, where such categories are excluded by dint of an agreement falling within the confines of section 4 (2) (f) of the Act, the Board has not mandate to question the constitutionality of section 4 (2) (f) of the Act, and the Board has no option but to apply the said provision.

Mr. Njogu further submitted that from the Procuring Entity's Invitation Notice, all bidders were informed that the subject procurement process is subject to a bilateral agreement between the Procuring Entity and AFD, therefore any Guidelines issued by AFD would prevail when the issue of application of the 2015 Act is in question. To support this view, Counsel relied on the decision of the Board in **PPARB Application No. 3 of 2015, PowerTechnics ltd v. Kenya Power and Lighting Company Limited** and submitted that the Board found it lacked jurisdiction having addressed its mind on applicability of World Bank Guidelines in the procurement process, subject of the aforementioned decision.

According to Mr. Njogu, the Applicant failed to demonstrate to the Board how the technical requirements of the Bidding Document violate the provisions of section 60 of the Act neither did the Applicant demonstrate how it had the capability to meet the technical requirements necessary to execute the subject tender. He took the view that the Board ought to have been supplied with an Engineer's Report giving professional opinion why the technical requirements set out by the Procuring Entity in the Bidding Document are discriminatory. He took the view therefore that the Technical requirements set out in the Bidding Document are in consonance with what the Procuring Entity sought to achieve in the implementation of the subject tender.

On the issue of unbundling of procurements, Mr. Njogu made reference to Regulations 19 and 20 of the Public Procurement and Disposal (Preference and Reservations) Regulations, 2011 which in his view state that unbundling only happens where the tenders is for disadvantaged groups, small and micro-enterprises and other disadvantaged groups. Since the Applicant does not fall in such disadvantaged groups, Counsel took the view that the Board is therefore under no legal obligation to under the Procuring Entity to unbundle the subject procurement process.

On the issues of preference, Mr. Njogu concurred with submissions by the Procuring Entity that section 157 (8) (ii) of the Act requires exclusive preference to be given to local contractors where the value of the tender is

One Billion Kenya Shillings and below, but that where the value of the tender is above One Billion Kenya Shillings, exclusive preference to local contractors is not mandatory.

He summed up his submission by stating that the Applicant had an option to enter into a Joint Venture arrangement in order to meet the technical specifications in the Bidding Document but failed to do so. In his view, the Applicant's contention that no local or citizen contractors have the requisite capacity to implement the subject tender are factual suppositions which require evidence that has not been adduce before the Board by the Applicant.

Mr. Njogu urged the Board to dismiss the Request for Review and to grant costs as appropriate.

Applicant's Rejoinder

In a rejoinder, Mr. Mungai made reference to section 3 of the Act and took the view that the said provision gives the Procuring Entity an obligation to ensure that there is promotion of the local industry in its procurement process. He submitted that the Bidding Document does not specify where bidders would acquire the materials to be used to execute the subject tender, fails to make provision for sub-contracting and supervision of the works by a local engineer. In essence, Counsel took the view that it is

possible for foreign contractors to be the successful bidders in this tender, and execute the same using foreign materials but that such foreign contractors would, if need be, engage locals as “watu wa mkono” when executing the works in the subject tender.

As regards the submission by the Procuring Entity that the value of the works in Lots 1 and 2 are over One Billion Kenya Shillings, hence not subject to exclusive preference, Counsel took the view that the Procuring Entity over-estimated the works to discriminate against some contractors.

Mr. Njogu further submitted that if the Procuring Entity would have unbundled the subject procurement process, the estimated value would have been below One Billion Kenya Shillings for the respective unbundled categories, in order for the exclusive preference under section 157 (8) (ii) of the Act to be achieved.

Upon enquiry by the Board, the Applicant’s Engineer, Eng. Komu submitted that unbundling means creating different bundles in the form of Lots. He submitted that even though the subject procurement already has two Lots, the same could be unbundled further to more lots, with each respective lots having different scope of works.

As regards the submission by the Procuring Entity that it has installed 4 GIS Switch Gear Sub-Stations in its previous procurement processes,

Counsel submitted that the aforementioned works were done by foreign contractors since in his view, no local contractor has capacity to install GIS Switch Gear Sub-Stations but that most local contractors have technical capacity to execute works of AIS Switch Gear Sub-Stations, which are similar to the expertise of GIS Switch Gear Sub-Stations.

On the question whether the Procuring Entity is the Government of Kenya, Mr. Mungai submitted that there is no definition of what Government is, however, he made reference to Articles 4 and 5 of the Constitution which in his view which makes the Government of Kenya a sovereign Republic. To buttress this view, Counsel submitted that the Procuring Entity herein cannot be the Government, since Article 131 (1) (a) of the Constitution is clear on who is the Head of State and Head of Government, and that is, the President. Accordingly, the President cannot be in-charge of the Procuring Entity since the Procuring Entity is not Government noting that the Procuring Entity has its own Managing Director and Board of Directors.

Mr. Mungai urged the Board to interrogate the Financing Agreement subject of the funding of the project in the subject tender to confirm whether or not the Government of Kenya is part to the said Agreement. He further submitted that in litigation proceedings where the Government is a party, the Office of the Attorney General represents the Government of Kenya which is not the case in the subject proceedings before the Board. Upon enquiry by the Board, Counsel further submitted even if external

lawyers are appointed to represent the Government of Kenya rather than the State Counsel at the State Law Office, the said external lawyers would indicate that they are representing the Government of Kenya by authority from the Attorney General. According to Mr. Njogu, section 6 of the Act must be considered with a view of establishing whether there is any involvement of the Government of Kenya in the subject procurement process and that if the Government is directly involved as a party to the Financing Agreement, then the Board's jurisdiction would be ousted.

In conclusion, Counsel urged the Board to grant the prayers sought in the Request for Review with costs to the Applicant.

BOARD'S DECISION

The Board has considered each of the parties' cases, the documentation filed before it, including confidential documents submitted to it pursuant to section 67 (3) (e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") and oral submissions of the parties.

The issues for determination are as follows: -

I. Whether the Board has jurisdiction to entertain the Request for Review;

In order to address the above issue, the Board shall make a determination in respect of the following three sub-issues:-

a) Whether the Request for Review was filed outside the statutory period under Section 167 (1) of the Act, thus ousting the jurisdiction of this Board;

Depending on the determination of the above sub-issue:-

b) Whether the Applicant has the locus standi required to lodge a Request for Review within the meaning of Section 2 read together with Section 167 (1) of the Act;

Depending on the determination of the above sub-issue:-

c) Whether the subject procurement process meets the conditions set out in section 4 (2) (f) read together with section 6 (1) of the Act, thus ousting the jurisdiction of this Board.

Depending on the determination of Issue No. 1 above:-

II. Whether the provisions of the Procuring Entity's Bidding Document applicable in the subject tender contravene Articles 227 (1) and (2) of the Constitution; Sections 3 (a),

(b), (i) and (j); 60 (1) and (3) (d); 70 (6) (e) (vi) and (k); 155 and 157 read together with the Public Procurement and Disposal Regulations, 2006; Regulation 19 and 20 of the Public Procurement and Disposal (Preference and Reservation) Regulations, 2011; and the Public Procurement and Disposal (Preference and Reservation) (Amendment) Regulations, 2013.

The Board now proceeds to address the above issues as follows:-

It is trite law that courts and decision making bodies can only act in cases where they have jurisdiction. In the Court of Appeal case of **The Owners of Motor Vessel "Lillian S" v. Caltex Oil Kenya Limited (1989) KLR 1**, it was held that jurisdiction is everything and without it, a court or any *other decision making body* has no power to make one more step the moment it holds that it has no jurisdiction.

Similarly, in the case of **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 stated thus:-

"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. "

The Supreme Court in the case of **Samuel Kamau Macharia and Another vs. Kenya Commercial Bank Ltd and 2 Others, Civil Application No. 2 of 2011** pronounced itself regarding where the jurisdiction of a court or any other decision making body flows from. It held 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."

The decision of the Supreme Court in *Samuel Kamau Macharia Case* is very critical in determining where the jurisdiction of this Board flows from. The Board's attention is drawn to section 167 (1) of the Act which states as follows:-

"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.” [Emphasis by the Board]

As relates to the first sub-issue of the first issue framed for determination, an aggrieved candidate or tenderer is required to approach the Board within fourteen days from:-

- *the date of notification of award; or*
- *the date such aggrieved candidate or tenderer learns of the alleged breach of duty by a procuring entity at any stage of the procurement process, or disposal process.*

In the instant case, the Board is required to determine when the Applicant learnt of the alleged breach of duty by the Procuring Entity in the subject procurement process. The Board heard submissions by the Applicant that it was aggrieved by the contents of the Bidding Document issued by the Procuring Entity pursuant to the Procuring Entity’s Invitation Notice of 20th August 2019. According to the Applicant, an aggrieved candidate or tenderer may approach the Board at any time before the deadline for submission of tenders. Since the deadline for submission of tenders was 7th

January 2020 and that the Request for Review was lodged on 6th January 2020, the Applicant took the view that the same was lodged within the required statutory timeline.

Upon enquiry by the Board, Counsel for the Applicant submitted that when the Applicant obtained the Bidding Document, it sought clarification from the Procuring Entity. However, according to Counsel for the Applicant, the last Addendum issued by the Procuring Entity on 24th December 2019 failed to address any of the issues raised by the Applicant, as a result, it lodged the instant Request for Review.

Counsel for the Procuring Entity took a different view and submitted that the Applicant learnt of the alleged breach as from 20th August 2019 when the Procuring Entity advertised the subject tender and issued the Bidding Document. Hence, according to Counsel for the Procuring Entity, the Applicant only waited until the month of January 2020 to raise an issue with the contents of the Bidding Document issued on 20th August 2019.

The Board having considered parties' submissions on the question whether or not the Applicant lodged its Request for Review within the statutory period under section 167 (1) of the Act, proceeds to make the following findings:-

All parties to this Request for Review are in agreement that the Bidding Document was issued in the month of August 2019, at least by virtue of the Procuring Entity's Invitation Notice dated 20th August 2019. The provisions of the Procuring Entity's Bidding Document allow the Procuring Entity to amend the Bidding Document at any time before the deadline for submission of tenders. Clause 8 of Section I. Instructions to Bidders of the Bidding Document provides as follows:-

"8.1 At any time prior to the deadline for submission of bids the Employer may amend the Bidding Documents by issuing amendments.

8.2 Any amendment issued shall be part of the Bidding Documents and shall be communicated in writing to all who have obtained the Bidding documents from the Employer in accordance with ITB 6.3. The Employer shall also promptly publish the amendment on the Employer's web page in accordance with ITB 7.1 [Emphasis by the Board]

8.3 To give Bidders reasonable time in which to take an amendment into account in preparing their bids, the Employer may, at its discretion, extend the deadline for the submission of bids, pursuant to ITB 22.2'

The above provision gives the Procuring Entity the right to amend its Bidding Document, and communicate the amendment to all bidders. The purpose of this communication is to allow bidders to take such amendments into consideration while preparing their tenders since, any amendment issued by a procuring entity becomes part of the tender document as was stated in clause 8.2 of Section I. Instructions to Bidders of the Bidding Document.

Section 75 of the Act contains a similar provision as it states:-

- "(1) A procuring entity may amend the tender documents at any time before the deadline for submitting tenders by issuing an addendum without materially altering the substance of the original tender.***
- (2) An amendment may be made on the procuring entity's own initiative or in response to an inquiry by a candidate or tenderer.***
- (3) A procuring entity shall promptly provide a copy of the addendum to each person to whom the procuring entity provided copies of the tender documents.***
- (4) The addendum shall be deemed to be part of the tender documents." [Emphasis by the Board]***

Section 75 (2) of the Act provides two instances when amendments may be issued by a procuring entity, that is, on the procuring entity's own initiative or in response to an inquiry by a candidate or tenderer. The right of a candidate or tenderer to seek clarification was stipulated in clause 7.1 of Section I. Instructions to Bidders of the Bidding Document as follows:-

"A Bidder requiring any clarification of the Bidding Document shall contact the Employer in writing at the Employer's address specified in the BDS or raise its enquiries during the pre-bid meeting if provided or in accordance with ITB 7.4. The Employer will respond in writing to any request for clarification, provided that such request is received no later than 14 days prior to the deadline for submission of bids"

Accordingly, once a procuring entity's tender document is amended on the procuring entity's own initiative or pursuant to a clarification sought by a candidate or tenderer, such amendment becomes part of the tender document previously issued by such procuring entity. In this case, the Procuring Entity's Bidding Document only became complete on the date it issued the last amendment in the form of an Addendum prior to the tender closing date. These amendments would be taken into consideration by bidders as being part and parcel of the Bidding Document previously issued after the Procuring Entity's Invitation Notice of 20th August 2019.

This therefore leads the Board to address the question, when was the Bidding Document of the subject tender complete by virtue of amendments issued by the Procuring Entity on its own initiative or in response to an inquiry by a candidate or tenderer, for consideration by such candidates or tenderers?

From the confidential file that was submitted to the Board by virtue of section 67 (3) (e) of the Act, the Procuring Entity, following clarifications sought on various issues in the Bidding Document, issued the Last Addendum dated 24th December 2019, known as Clarification No. 2. Therefore, the Procuring Entity's Bidding Document was deemed complete as at 24th December 2019 when the last Addendum/Clarification No. 2 was issued.

The Board studied the Addendum/Clarification No. 2 dated 24th December 2019 and notes that it sought to respond to some of the issues currently being raised in the Request for Review as follows:-

<p>34</p>	<p>We refer to the following conditions on the tender document. The conditions seem to discriminate against the people of Kenya</p> <p>1. Must have completed EPC electrical works of at least 5 substation and lines of similar size and complexity within the last 10 years</p> <p>(a) similar size project have only be done by foreign owned firms</p> <p>2. (ii) A minimum number of similar ⁽¹⁾ contracts specified below that have been</p>	<p>Domestic Preference shall not apply</p> <p>Refer to Volume. 1 ITB. 33.1 on margin of preference and Section III, Clause 2 on domestic preference:</p> <p>This shall be as per issued bidding document,</p>
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	<p>satisfactorily and substantially⁴completed as a prime contractor, joint venture member ⁽²⁾, management contractor or subcontractor between 1st January 2009 and application submission deadline: (a).....; (b).....;</p> <p>3.; (a).....</p> <p>4.; (a).....;</p> <p>5..... (a).....;</p> <p>Could an exception be done for local and citizen bidders, who have not been exposed to large projects due to what they have been awarded in the past</p>	<p>Clarifications No. 1 and Amendment No. 3</p> <p>Domestic Preference shall not apply</p>
35	<p>For local citizen must have participated in EPC electrical works of at least 1 substation and lines of similar size and complexity within the last 10 years where,s size is land area.....</p>	<p>Domestic Preference shall not apply</p>

The Procuring Entity referred the Board to the decision of Justice Nyamweya in **Judicial Review Application No. 318 of 2018, Republic v. Public Procurement Administrative Review Board & 2 others ex parte Ministry of Defence (2018) eKLR** where it was held as follows:-

"This Court notes that there are two applicable instances when time will start to run for purposes of filing a request for review with the Respondent, that are provided by an ordinary reading of section 167 (1) of the Act, namely the

date of notification of the award, or the date of occurrence of the alleged breach at any stage of the procurement process or disposal process

A reading of the grounds in the Interested Party's Request for Review shows that the breach alleged by the Interested Party is the premature termination of its existing contract by the Applicant arising from Tender No MOD/423(01011)2015/2016, and the advertisement of a new tender for the same items supplied by the Interested Party in Tender No MOD/423(01011)2017/2018...

The answer then to the question when time started to run in the present application can only be reached upon an examination of when the Interested Party had knowledge of the alleged breach by the Applicant. It is in this regard clearly and severally stated in the Request for Review in the grounds reproduced in the foregoing that the Interested party became aware of the premature termination of its contract by the Applicant on 18th September 2017. As this is the only alleged breach put forward by the Interested Party in its Request for Review, the Request for Review was obviously out of time as the 14-day limit that is specified in section 167 (1) of the Act had long lapsed by the time the Request for Review was filed on 27th June 2018"

From the above case, the court was dealing with the question when the aggrieved applicant in that case (who was the procuring entity's supplier) became aware of the procuring entity's premature termination of its contract and advertisement of a new tender which sought to procure for services being implemented by the said applicant. The court found that time started running when the applicant learnt of the premature termination of its contract on 18th September 2017.

It is the Board's considered view that the Applicant in the instant Request for Review had a right to approach the Board where there was an alleged breach of duty arising from the contents of the Bidding Document which became complete as a result of the last Addendum issued on 24th December 2019, since as at that date, it became apparent that the response to clarifications sought by bidders would remain as per the last Addendum/Clarification No. 2 dated 24th December 2019.

The Procuring Entity also referred the Board to paragraph 94 of the decision by Justice Odunga in **Judicial Review Application No. 623 of 2016 (Consolidated with Judicial Review Application No. 645 of 2016), Republic v. Public Procurement Administrative Review Board ex parte Kenya Power and Lighting Company Limited (2017) eKLR** where it was held as follows:-

"In my view, unless the Court finds that the timelines provided in a statute are unlawful or its not mandatory but simply directory, the failure to comply therewith renders the decision unlawful. In this case, the Respondent by its ruling on the preliminary objection delivered on 30th November 2016 was alive to this fact" [Emphasis by the Board]

At paragraph 97, the Court held as follows:-

"As the request was filed on 15th November 2016, that day was excluded in reckoning of time. However, the 21st day from 16th November, 2016 was included in the computation of time. As the Respondent itself appreciated, "owing to the fact that the 21-day period within which the Request for Review ought to be determined under the provisions of section 171 of the Act shall expire on 6th December, 2016, both the procuring entity and the successful bidder shall file their responses by the close of the business on 1st November, 2016"

The Court in the above case was dealing with the statutory period of 21 days provided in section 171 (1) of the Act within which this Board must hear and determine a matter before it and emphasized that the failure to comply with the timelines set in the Act for the Board to render a decision makes such decision unlawful. The Board observes that the circumstances

of the decision in the above case relate to the instant Request for Review only to the extent that an aggrieved candidate or tenderer must comply with the timelines under section 167 (1) of the Act, just the way this Board must comply with its own timelines for rendering a decision.

In order to determine whether the Applicant complied with the timelines under section 167 (1) of the Act, the Board is guided by section 57(a) of the Interpretation and General Provisions Act, Chapter 2, Laws of Kenya which provides as follows with respect to computation of time:-

"In computing time for the purposes of a written law, unless the contrary intention appears, a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done."

The High Court in **Miscellaneous Civil Application 491 of 2016, Republic versus Public Procurement Administrative Review Board & 4 Others ex parte J. Knieriem BV [2016] eKLR** found that the above provision applies to the timelines in the Act and further held as follows at paragraph 28:-

"It is therefore my view and I so find that section 57 of the Interpretation and General Provisions Act, applies to the

***timelines under Public Procurement and Asset Disposal Act...
As parties agree that if the date of the decision is excluded
then these proceedings were commenced within the
prescribed 14 days, it follows that these proceedings cannot
be faulted on that basis."***

As the last Addendum which became part of the Procuring Entity's Bidding Document was issued on 24th December 2019, that day is excluded in the computation of time. It therefore follows that the Applicant had a right to approach this Board within 14 days after 24th December 2019 and the said period lapsed on 7th January 2020. The Applicant filed its Request for Review on 6th January 2020 which was within 14 days from the date it learned of the Procuring Entity's alleged breach of duty arising from the Last Addendum/Clarification No. 2 issued on 24th December 2019 which forms part of the Procuring Entity's Bidding Document.

The Board finds that the Applicant's Request for Review was filed within the statutory period required under section 167 (1) of the Act.

On the second sub-issue of the first issue framed from determination, the Board heard submissions by the Applicant that it obtained the Bidding Document by downloading a copy from the Procuring Entity's Official Website and attached the same to its Request for Review, therefore meets the definition of a candidate under section 2 of the Act.

On its part, the Procuring Entity submitted that the Applicant was neither a candidate nor a tenderer in the subject procurement process since in the Procuring Entity's view, it is only those who attended the Pre-Bid Meeting and Site Visit that obtained the Bidding Document issued by the Procuring Entity. Upon enquiry by the Board, Counsel for the Procuring Entity submitted that prospective candidates and tenderers were at liberty to download the Bidding Document on the Procuring Entity's Official Website free of charge, or to obtain a hard copy at the Procuring Entity's offices upon payment of a fee. On further enquiry by the Board, Counsel for the Procuring Entity confirmed that there was no registration process in its Official Website required for persons who wished to download the Bidding Document from the Procuring Entity's Official Website. Therefore, the Procuring Entity could not track the persons who downloaded the said Bidding Document.

Having considered parties' submissions on the question whether the Applicant has the requisite locus standi to move this Board by way of a Request for Review, the Board deems it fit to revisit the definition of a "candidate" under section 2 of the Act, which provides as follows:-

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

The Court in **Petition No. 237 of 2018, Philip Nyandieka (Suing on his own behalf and on behalf of the general public) v. National Government CDF- Bomachoge Borabu constituency [2019] eKLR** while considering the meaning of a “candidate” and “tenderer” under section 2 of the Act had this to say:-

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

This Court notes that the above provisions of the Act are restrictive on the persons who may approach the Board in the event of dissatisfaction with the tendering process and cannot overlook the disadvantage faced by the petitioner in as far as seeking a remedy before the said Board is concerned considering the fact that Section 167 (1) of the Act more or less closes the door to persons who do not fall within the meaning of a candidate and/or tenderer. [Emphasis by the Board]

Further, in **Miscellaneous Application No. 637 of 2016, Republic v Independent Electoral and Boundaries Commission & another Ex Parte Coalition for Reform and Democracy & 2 others [2017] eKLR**, the court while considering persons who may approach this Board held as follows:-

"With respect to the matters raised in these proceedings, it is clear that the applicant could not move the Review Board for determination. I agree with the IEBC that pursuant to section 167(1) of the Public Procurement and Asset Disposal Act, 2015 administrative review is available only to the candidates or tenderers and that the Applicant was neither a candidate nor a tenderer in the subject procurement. Strictly speaking therefore, it was not the spirit or text of that law that parties other than candidates or tenderers should be permitted to challenge procurement processes before the Review Board through the procedure provided for under the Act. To that extent I agree that persons who fall within the category of the Applicant herein who neither obtained the tender document nor participated in the tendering process have no locus to commence proceedings before the Review Board"[Emphasis by the Board]

From the above decisions, the Board notes that the Courts were alive to the fact that it is only candidates (persons who have obtained a procuring

entity's tender document) and tenderers (persons who participate in the tendering process) that may approach this Board. From the definition provided in section 2 of the Act, for one to be a candidate in a procurement proceeding or asset being disposed, what that person has to do is to obtain the tender documents from a public entity pursuant to an invitation notice by a procuring entity.

The Procuring Entity in this instance provided two methods that any person could have used to obtain the tender document, and the Applicant chose to exercise one of the two, that is, to download a copy of the Bidding Document applicable to the subject tender from the Procuring Entity's Official Website. The Act does not require such person to do anything further in order to qualify as a candidate, but to merely obtain the Bidding Document issued by the Procuring Entity.

The Board heard submissions by the Procuring Entity that it presumed that those who attended the Pre-Bid Meeting and Site Visit organized before the tender closing date, are the ones who obtained the Bidding Document. The Board finds this argument to lack justifiable basis for the following reasons:-

Firstly, Section 98 of the Act on provision of tender documents provides as follows:-

- "(1) Upon advertisement, the accounting officer of a procuring entity shall immediately provide copies of the tender documents and in accordance with the invitation to tender and the accounting officer shall upload the tender document on the website.***
- (2) The accounting officer of a procuring entity may charge such fees as may be prescribed for copies of the tender documents." [Emphasis by the Board]***

An accounting officer of a procuring entity has the responsibility to provide tender documents applicable in its procurement process either by uploading the tender document on the procuring entity's website or to charge a fee to those who may wish to obtain copies of the tender documents.

In providing tender documents, a procuring entity may impose a requirement for bidders to participate in a Pre-Bid meeting and Site Visit which assists the bidders to obtain information necessary in the preparation of their tenders. In most cases, a procuring entity may make such Pre-Bid Meetings and Site Visits compulsory to the effect that those who attend such events sign their names in an attendance register and may be issued with a copy of the duly completed attendance register, which is then attached in the tender document submitted by a bidder. The procuring entity may then stipulate in its tender document a requirement at the preliminary evaluation stage for bidders to attach the said site

attendance register. In essence, Pre-Bid Meetings and Site Visits relate to eligibility and mandatory requirements that the accounting officer of a procuring entity may set out in its tender document that is issued to bidders, and does not in any way negate the requirements for a person to be a candidate or tenderer within the meaning of section 2 of the Act.

Secondly, the Procuring Entity herein admitted that its official website did not provide any registration process that bidders would have followed to obtain log in details and subsequently download tender documents. Had there been such a registration process, then perhaps the Procuring Entity would track the persons who downloaded the Bidding Document in the subject tender since its Site Administrator would retrieve such details, because prospective candidates would have created their usernames and passwords to enable them download the Bidding Document. In the absence of any registration process and login details, the Procuring Entity would not ascertain the persons who downloaded the Bidding Document.

Accordingly, the allegation that the Applicant did not download the Bidding Document since it did not attend the Pre-Bid Meeting and Site Visit, lacks merit.

Thirdly, the Board notes that the Procuring Entity admitted that it was possible for any person to download the Bidding Document on 6th January 2020, a day before the tender closing date. As at that date, the Procuring

Entity had already conducted a Pre-Bid Meeting on 4th September 2019 and Site Visits on 5th, 6th and 9th September 2019, as can be seen from the Procuring Entity's confidential file, yet bidders could still download the Bidding Document at any time prior to the tender opening date of 7th January 2020 and would therefore meet the definition of a candidate under section 2 of the Act.

Fourthly, the Procuring Entity submitted that it doubted the Applicant's corporate identity and took the view that the Applicant's legal personality is not known. To buttress this view, Counsel for the Procuring Entity referred the Board to section 9 (h) of the Act and submitted that the proper avenue wherein the Applicant could have raised its complaint against the Procuring Entity is with the Public Procurement Regulatory Authority (hereinafter referred to as "the Authority").

Having noted that a candidate is a person who has obtained a tender document from a procuring entity, the Board finds that the form in which the Applicant's legal personality takes, is immaterial for purposes of establishing whether or not the Applicant has the locus standi to exercise its right to administrative review under section 167 (1) of the Act as a candidate.

In any case, Article 2 of the Constitution states that:-

"person" includes a company, association or other body of persons whether incorporated or unincorporated"

This means whether the Applicant, (being an association of contractors) is incorporated or unincorporated, it meets the definition of a person under the Constitution, who would have obtained the Procuring Entity's Bidding Document.

Indeed, section 9 (h) of the Act that was cited by Counsel for the Procuring Entity gives the Authority power to:-

"investigate and act on complaints received on procurement and asset disposal proceedings from procuring entities, tenderers, contractors or the general public that are not subject of administrative review"

It is worth noting that section 9 (h) of the Act gives the Authority power to investigate complaints received from tenderers on procurement and asset disposal proceedings. It appears that section 9 (h) of the Act does not cite candidates as one of the persons that may lodge a complaint with the Authority, as such, such candidates would have an avenue before this Board. Even if a complaint is lodged at the Authority by a tenderer, in practice, the Authority upon considering the nature of the complaint, that

is, whether the same is of an investigatory nature, or whether it ought to be entertained by way of administrative review, may refer such matters to this Board for hearing and determination if the latter instance applies.

In all the scenarios cited by the Procuring Entity, the Board observes that none of them affect the jurisdiction of the Board to hear and determine an application before it where the Applicant has demonstrated it was a candidate in procurement proceedings initiated under the Act. The Applicant herein filed a copy of the Bidding Document and upon perusal, the same is a copy of the Bidding Document issued by the Procuring Entity in so far as the subject procurement process is concerned.

Accordingly, the Board finds that the Applicant has the *locus standias* a candidate to file a Request for Review before this Board as required under section 167 (1) of the Act read together with section 2 of the Act.

On the third sub-issue of the first issue framed for determination, the Board proceeds to make the following findings:-

On 21st April 2015, the Principal Secretary of the Ministry of Energy and Petroleum addressed a letter to the National Treasury requesting the National Treasury's concurrence for the Procuring Entity herein to obtain a Term Loan of 56 Million Euros from *Agence Française de Développement* (AFD) for capital budget requirements. Consequently, on 24th June 2015,

the Principal Secretary to the National Treasury approved the said request stating that:-

"In view of the foregoing and in accordance with the State Corporations Act, section 5 (2) and on the strength of the assurance from your Ministry, the Cabinet Secretary to the National Treasury has granted concurrence for KPLC to obtain a term loan of Euro 56 Million from Agence Française de Développement (AFD) for capital budget requirements"

Moving forward, on 11th December 2015, the Procuring Entity and AFD executed a Credit Facility Agreement under which it was stated as follows:-

"(A) The Borrower [described as Kenya Power and Lighting Company Limited] intends to implement (i) part of the investments described in the Distribution Master Plan for 2012-2017, (ii) a technical assistance for the procurement and the implementation of the financed investments and (iii) regular audits on the use of the funds borrowed to finance these investments as detailed further in Schedule 2 (Project Description), together, the "Project"

(B) The Borrower has requested that the Lender [described as AFD] makes a facility available for the purpose of

financing and/or refinancing the Project, as detailed in Schedule 2 and Schedule 3 ("the Facility")

(C) Pursuant to its board resolution no. C 201 40 671 dated December, 18th 2014, the Lender has agreed to make the Facility available to the Borrower pursuant to the terms and conditions of this Agreement" [Emphasis by the Board]

These events then paved way for the Procuring Entity's Tender Advertisement Notice of 20th August 2019, wherein it is stated as follows:-

- "1. The Government of the Republic of Kenya received a credit from Agence Française de Développement (AFD) towards the cost of the Kenya Power Distribution Master Plan Projects. It is intended that part of the proceeds of this credit will be applied to eligible payments under the contracts***
- 2. The Kenya Power & Lighting Company Limited now invites sealed bids from eligible bidders for the above as detailed below..."***

It was therefore the Procuring Entity's contention that the subject procurement process is subject to donor funds received pursuant to an

Agreement between a bilateral agency and the Government of Kenya and that by virtue of section 4 (2) (f) and (6) (1) of the Act, the Board lacks the jurisdiction to entertain the Request for Review and even if it were to entertain the same, where the provisions of the Act conflict with any obligations of the Republic of Kenya arising from such agreement to which Kenya is a party, the agreement shall prevail.

Counsel for the Procuring Entity submitted that the Credit Facility Agreement dated 11th December 2015 was entered into between AFD, a bilateral agency and Kenya Power and Lighting Company Limited, which according to the Procuring Entity, is the Government of Kenya.

The Applicant refuted these submissions and took the view that the Procuring Entity's interpretation of what the Government of Kenya means has no legal basis. Counsel for the Applicant cited court decisions to support his view that, the parties to the Credit Facility Agreement dated 11th December 2015 is the Procuring Entity herein, which is not the Government of Kenya and a bilateral agency and that the Procuring Entity failed to demonstrate the conflict arising from Kenya's obligation under the said agreement, hence falling short of the threshold required for section 4 (2) (f) and 6 (1) of the Act to apply.

The Board having considered parties' submission on the interpretation of section 4 (2) (f) and 6 (1) of the Act and the judicial authorities relied on

by parties, deems it fit to first interrogate the aforementioned statutory provisions. Section 4 (2) (f) of the Act provides as follows:-

"4 (2) For avoidance of doubt, the following are not procurements or asset disposals with respect to which this Act applies—"

(a)

(b)

(c)

(d)

(e)

(f) procurement and disposal of assets under bilateral or multilateral agreements between the Government of Kenya and any other foreign government, agency, entity or multilateral agency unless as otherwise prescribed in the Regulations

In order to understand the import of section 4 (2) (f) of the Act, the Board interrogated the parties named under the said provision. The Applicant cited the decision of Justice Odunga in **Miscellaneous Application No 402 Of 2016(Consolidated with Misc. Application No. 405 Of**

2016), Republic v. Public Procurement Administrative Review Board & another Ex parte Athi Water Service Board & Another [2017] eKLR (hereinafter referred to as “the Athi Water Case”) where the Learned Judge at paragraphs 152 to 154 pronounced himself on the import of section 4 (2) (f) of the Act as follows:-

[152] The issue for determination was whether the instant procurement was a Procurement and disposal of assets under bilateral or multilateral agreement between the government of Kenya and any other foreign government, agency, entity or multilateral agency. In making this determination the sole consideration is who the parties to the procurement are. A literal reading of this section clearly shows that for a procurement to be exempted under section 4(2)(f), one of the parties must be the Government of Kenya. The other party must be either a Foreign Government, foreign government Agency, foreign government Entity or Multi-lateral Agency. The rationale for such provision is clear; the Government of Kenya cannot rely on its procurement Law as against another Government. Such procurement can only be governed by the terms of their bilateral or multilateral agreement.

[153] In this case, the Procuring Entity, Athi Water Services Board, is a Parastatal created under section 51 of the Water Act 2002 with perpetual succession and a common seal, with power, in and by its corporate name, to sue and be sued. It's not the Government of Kenya. In the instant procurement, the Government of Kenya was not a party to the procurement and accordingly the Procurement is not exempted under section 4(2) (f).

154. Again the other party in the procurement must be either a Foreign Government, foreign government Agency, foreign government Entity or Multi-lateral Agency. Neither the second applicant nor the interested parties, who were the bidders before the Board were either a Foreign Government, foreign government Agency, foreign government Entity or Multi-lateral Agency. On this limb also the procurement is not exempted.

On her part, Justice Nyamweya in **Judicial Review Application No. 181 of 2018, Republic v Public Procurement Administrative Review Board & 2 others Exparte Kenya Power & Lighting Company [2019] eKLR**(hereinafter referred to as "the KPLC Case") cited by the Procuring Entity herein, held at paragraphs 61 to 65 as follows:-

"61. It is notable that the determinant factor that was found relevant by the Respondent in assuming jurisdiction in this case was that the subject tender involved the use of donor funds which were to be repaid back by the Kenya public at the end of the day. It however did not engage in any determination of the nature of the ouster clause that was provided for by section 4(2)(f), and in particular abdicated its discretion and duty to make a finding as to whether the subject procurement process was being undertaken pursuant to a bilateral grant agreement between the Government of Kenya and a foreign international entity, which was what was in issue and was specifically raised and canvassed by the parties as shown in the foregoing.

62. This Court also notes that the Applicant in this regard annexed a copy of the agreement that was entered into between the Government of Kenya and the Nordic Development Fund that it relied upon. The agreement was annexed to a supplementary affidavit that it filed with the Respondent on 16th April 2018.

63. In my view, a reading of section 4(2)(f) shows that the operative action is procurement under a bilateral

agreement entered into by the Government of Kenya and a foreign government or agency, and not procurement by the Government of Kenya. One of the meanings of the word "under" in the Concise Oxford English Dictionary is "as provided for by the rules of; or in accordance with". The plain and ordinary meaning and contextual interpretation of section 4(2)(f) of the Act is therefore a procurement that is undertaken as provided for or in accordance with the terms of a bilateral agreement that is entered into between the Government of Kenya and a foreign government, entity or multi-lateral agency is exempted from the provisions of the Act...

- 64. It was in this respect incumbent upon the Respondent to satisfy itself that section 4(2)(f) was not applicable before assuming jurisdiction, especially as the said section was an evidential ouster clause that was dependant on a finding that the subject procurement was one that was being undertaken pursuant to a bilateral agreement between the Government of Kenya and a foreign Government or entity.***

65. *The Respondent in its finding equated the requirements of section 4(2)(f) to the use of funding under a loan or grant where the Government of Kenya is a party, whereas the section specifically states that the Respondent should satisfy itself that the procurement is not being made pursuant to the terms of a bilateral treaty or agreement between the Government of Kenya and a foreign government, entity or multilateral agency.* [Emphasis by the Board]

In light of the foregoing decisions, the Board observes that Justice Odunga in the "*Athi Water Case*" took the view that jurisdiction of this Board would be ousted by section 4 (2) (f) of the Act where parties to a procurement are:-

- i. The Government of Kenya; and
- ii. The other party being either; a Foreign Government, Foreign Government Agency, Foreign Government Entity or Multi-lateral Agency.

However, Justice Nyamweya in the *KPLC Case* took the view that section 4 (2) (f) of the Act ousts the jurisdiction of this Board where a procurement is undertaken as provided for or in accordance with the terms of a bilateral agreement or multilateral agreement that is entered into between:-

- i. The Government of Kenya; and
- ii. The other party being either; a foreign government, agency, entity or multilateral agency (which she termed as foreign international entities at paragraph 61 of her judgement).

The Board notes that for section 4 (2) (f) of the Act to apply, one of the parties to a procurement (as per Justice Odunga's decision in the *Athi Water Case*) or a procurement undertaken as provided for or in accordance with the terms of a bilateral or multilateral agreement (as per Justice Nyamweya in the *KPLC Case*) *must be* the Government of Kenya.

This therefore leads the Board to interrogate the parties to the bilateral agreement which is subject of this procurement process. As earlier observed, the Credit Facility Agreement dated 11th December 2015 names Kenya Power and Lighting Company Limited, the Procuring Entity herein as the Borrower and AFD as the Lender. Despite this, the Procuring Entity contended that it is the Government of Kenya. To support this view, Counsel for the Procuring Entity cited Executive Order No. 1 of 2018 which sets out the Organization of the Government of Kenya as follows:-

"THAT the Government shall be organized as set out in this Order;

- i. THAT this Order contain portfolio responsibilities and changes made in the structure of Government***
- ii. THAT this Order assigns functions and institutions among Ministries and State Departments...”***

At page 61 of Executive Order No. 1 of 2018, the Ministry of Energy and Petroleum is cited as one of the institutions that form the Organization of Government. The functions of and institutions under the Ministry of Energy and Petroleum are then listed, among such institutions is the Procuring Entity herein.

In order to understand what the Government of Kenya means, the Black’s Law Dictionary (8th Edition) defines the term “government” as being:-

- "1. The structure of principles and rules determining how a State or organization is regulated;***
- 2. The sovereign power in a Nation or State;***
- 3. An organization through which a body of people exercises political authority; the machinery by which sovereign power is expressed...”***

Section 2 of the Interpretation and General Provisions Act, defines the term ‘government’ as:-

"the Government of Kenya”

The Board notes that Article 1 of the Constitution begins by stating that:-

"1 (1) All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with the Constitution

(2)

(3) Sovereign power under this Constitution is delegated to the following State organs which shall perform their functions in accordance with this Constitution—

(a) Parliament and the legislative assemblies in the county governments;

(b) the national executive and the executive structures in the county governments; and

(c) the Judiciary and independent tribunals.

(4) The sovereign power of the people is exercised at—

(a) the national level; and

(b) the county level”

According to Article 131 (1) (a), the President is ***"the Head of State and Government"***. On its part, Article 189(1) (a) of the Constitution of Kenya, 2010, provides that:-

"Government at either level (national and county government) shall perform its functions, and exercise its powers, in a manner that respects the functional and institutional integrity of government at the other level, in the case of county government, within the county level. "

The Honourable Justice Odunga in **Miscellaneous Civil Application 93 of 2015 Republic v Attorney General & another ex-parte Stephen Wanyee Roki [2016] eKLR** held that:-

"In my view a holistic approach to this provision (Article 189 (1) (a) of the Constitution) would lead to the conclusion that there is only one Government being exercised at two levels both levels complementing each other and operating in the spirit of co-operation and complementariness. It would follow that both levels subject to the Constitution exercise similar powers under the Constitution."

In order for the sovereign power of the People of Kenya to be exercised, the Constitution deemed it fit to provide structures in the form of Government at the National Level and County level within which such sovereign power is exercised. At the National Level of Government, the Constitution identifies three arms of government under which such

sovereign power is exercised that is, the Executive, Legislature and the Judiciary. Chapter Nine of the Constitution further explains how executive authority may be exercised, in particular, Article 129 (1) of the Constitution states that:-

"Executive authority derives from the people of Kenya and shall be exercised in accordance with the Constitution"

Further, Article 130 (1) states that:-

"The National Executive of the Republic of Kenya comprises the President, the Deputy President and the rest of the Cabinet"

From the foregoing provisions, the Board notes that the Constitution of Kenya donates sovereign power to the People of Kenya. However, such sovereign power is to be exercised in accordance with the Constitution through delegation to various state organs identified in Article 1 (3) (a), (b) and (c) of the Constitution.

Simply put, delegation of powers to various state organs is provided in the Constitution to ensure that power is not vested in the hands of few, but clearly donated to the three arms of government so that none should have excessive powers. Justice Ojwang' in his book, ***"The Constitutional***

development in Kenya: Institutional adaptation and social change (1990) (Revised Edition, 2013)”, at page 41 thereof stated as follows:-

"With the promulgation of the Constitution of Kenya in 2010 it became clearer, the separation of powers from the previous more powerful constitutional dispensation that had a President with unfettered powers to influence the Legislature and Judiciary. It was also augmented that Kenya had presidential absolutism. The people of Kenya delegated their sovereign power under the Constitution to the Legislature, Executive and the Judiciary at both national and county levels."

It is the Board's considered view that, the Government of Kenya is headed by a President who is the Head of State and Head of Government. In order to give full effect to the exercise of executive authority on behalf of the People of Kenya, the President as the Head of Government, has the obligation to define executive structures that would undertake functions of the executive.

To that end, Ministries, Departments, Agencies and other Institutions undertake functions which fall under the executive arm of government. This is not to say that Heads of such Ministries, Departments, Agencies and other Institutions are the Head of Government of Kenya, noting that some of the said departments, agencies and institutions have their own

establishing laws and management structures, but may undertake certain functions that help achieve government policies in their capacity as implementing institutions or agencies. Institutions and agencies implement government functions for the simple reason that it is impracticable to expect that the Head of State would carry out all government policies when elected President single handedly without the help of other institutions and agencies.

It is within public knowledge that in 2019, the Procuring Entity herein announced a change of name to become a public limited company upon being issued by a Certificate of Change of Name under the Companies Act, 2015 by the Registrar of Companies. Section 65 thereof provides as follows:-

"(1) On receiving a notice of a change of a company's name and on being satisfied-

(a) that the new name complies with the requirements of this Act; and

(b) that the requirements of this Act and any relevant requirements of the articles of the company, with respect to a change of name are complied with, the Registrar shall enter the new name on the register in place of the former name.

(2) As soon as practicable after registering the newname, the Registrar shall issue a certificate of change of name to the company."

According to its official website (i.e. kplc.co.ke), the Procuring Entity has its own managing structure in the form of 12 Board of Directors inclusive of a Chairperson and a Senior Management Team. The said website also indicates that the Government has a controlling stake in the Procuring Entity. The court in **Miscellaneous Civil Appeal No. 413 of 2004, Samuel Kimuchu Gichuru v. Hon. Ochilo Ayako & 6 others [2005] eKLR** while differentiating the Procuring Entity from the Government held as follows:-

"Our understanding is that the Government owns 40% of the shares of the KPLC, and is thus the majority shareholder in Interested Party in this case, being represented on its Board of Directors by two Permanent Secretaries – namely Energy and the Treasury. In our view, KPLC was exempted from the State Corporations Act purely for the purposes of getting round the Government bureaucracy in management that bog down State Corporations Act. Further, KPLC is an important policy body for the growth and the promotion of the energy sector within the country's economy."

The finding in the above case supports the Board's view that, even though the Government may have a controlling stake in the Procuring Entity, it is an institution that supports the implementation of government policies relating to growth and promotion of the energy sector within our country's economy.

Further, in **Petition No. 381 & 430 of 2014, Council of Governors & 3 others v Senate & 53 others [2015] eKLR**, the court while considering the office that represents the Government of Kenya when joined as a party to court proceedings, held as follows:-

"Article 156(4)(b) of the Constitution provides that the Attorney General:

"...shall represent the national government in court or in any other legal proceedings to which the national government is a party."

As the national government, through the Senate and the National Assembly, is part of these proceedings, the Attorney General is constitutionally mandated to represent the national government and he is automatically part of these proceedings. In any case as this Court recently held in The Council of Governors and Others vs. The Senate Petition No. 413 of 2014:

"The Constitution, 2010 allows the Attorney General the right to represent the National Government in Court proceedings"

From the above case, it is worth noting that, if the Procuring Entity was the Government of Kenya in these proceedings, it would have been represented by the Attorney General pursuant to Article 156 (4) (b) of the Constitution, or by another person who has obtained authority from the Attorney General to represent the Government of Kenya in proceedings before this Board.

However, this was not the case herein, noting that the Procuring Entity was represented by its own in-house Counsel, Mr. Jude Ochieng' appearing together with Ms. Irene Walala from the Procuring Entity's Litigation and Prosecutions Section.

It is the Board's finding therefore that the Procuring Entity herein is not the Government of Kenya. Accordingly, the Government of Kenya was not a party to a procurement or a party where a procurement is undertaken as provided for or in accordance with the terms of a bilateral or multilateral agreement contemplated under section 4 (2) (f) of the Act.

The Board further notes that in the communication between the National Treasury and the Ministry of Energy and Petroleum, the Principal Secretary

of the National Treasury stated as follows in his letter dated 24th June 2015:-

"2. KPLC had partnered with AFD over the years to provide affordable credit which have all been guaranteed by the Government on an on-lent basis...

3. However, the term loan of Euro 56 Million being sought is on a direct basis to the Company on the strength of the Company's balance sheet

....

7. Based on the submitted cash flow projections and ratio analysis, KPLC has the capacity and ability to repay all its loans and other obligations over the term loan without recourse to the National Exchequer for bailout and meet all covenants of other credit facilities

...

It is important for the Ministry of Energy and Petroleum and KPLC to note that the National Treasury concurrence does not in any way constitute the Government guarantee for the said term loan. In this regard, the Board of Directors and Management of KPLC should ensure that all obligations arising from the loan facility are honored

***promptly without recourse to the National Exchequer”
[Emphasis by the Board]***

From the above excerpt, the Board notes that the National Treasury expressly stated that the concurrence it gave for the Procuring Entity to obtain a term loan from AFD does not constitute Government guarantee for the said term loan. This letter supports the Board’s finding that the Government of Kenya was not a party to the Credit Facility Agreement dated 11th December 2019 neither did the Government of Kenya guarantee payment of the said term loan in case of any default by the Procuring Entity.

David Seddon in his book, ***The Europa Political and Economic Dictionary Series: A Political and Economic Dictionary of Africa, (Routledge, 2005)***, describes AFD at page 15 thereof as follows:-

“Established in 1941, the Agence Française de Développement (AFD) was formerly the French Development Fund. It is a French development bank which lends to member states and former member states of the Franc zone and several other states and executes the financial operations of the Government Aid and Cooperation Fund. In early 1994, AFD made available substantial funds to assist in the establishment of the Economic and Monetary Community of Central Africa. It serves as the secretariat for the French

Fund for the World Environment created in 1994. Since 2000, AFD has been implementing France's support for World Bank's Heavily Indebted Poor Countries Initiative"

The Official Website of AFD (www.afd.fr) describes the said agency as:-

"an international development agency that funds, supports and accelerates the transitions to a fairer and more sustainable world by focusing on climate, biodiversity, peace, education, urban development, health and governance in order to achieve sustainable development goals"

The above excerpts support the view that AFD is a foreign agency, that implements policies of the France government related to financial aid to other countries.

Accordingly, the subject procurement process is being undertaken in accordance with the terms of a Credit Facility Agreement dated 11th December 2015 between the Procuring a public limited company registered under the Companies Act, 2015 (Entity (not the Government of Kenya as hereinbefore held) and a foreign agency, that is, AFD.

The Board finds that the Credit Facility Agreement dated 11th December 2015 fails to satisfy the threshold of section 4 (2) (f) of the Act since the subject procurement proceedings was undertaken under a bilateral agreement between a public limited company instead of the Government of Kenya (the Procuring Entity) and a foreign agency (AFD).

As regards, the issue of conflict with any obligations of the Republic of Kenya arising from a treaty, agreement or other convention ratified by Kenya, and to which Kenya is a party, section 6 (1) of the Act provides as follows:-

"Subject to the Constitution, where any provision of this Act conflicts with any obligations of the Republic of Kenya arising from a treaty, agreement or other convention ratified by Kenya and to which Kenya is party, the terms of the treaty or agreement shall prevail"

The Board observes that section 6 (1) of the Act takes cognizance of the application of treaties, agreements and conventions ratified by Kenya by dint of Article 2 (5) and (6) of the Constitution which provides as follows:-

"2 (5) The general rules of international law shall form part of the law of Kenya.

(6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution"

This provision supports the view that the Republic of Kenya cannot rely on its procurement Law where there is a conflict with any obligations of the Republic of Kenya arising from a treaty, agreement or other convention ratified by Kenya and to which Kenya is a party. Such procurement in case of a conflict, should be governed by the terms of the treaty, agreement or other convention ratified by Kenya and to which Kenya is a party, which form part of the law of Kenya by virtue of Article 2 (6) of the Constitution. This position was reiterated by Justice Nyamweya in the *KPLC Case* cited hereinbefore at paragraphs 55-57 as follows:-

"[55] In addition, section 6 resolves any conflict between the Act and the terms of any treaty, agreement or convention to which the Government of Kenya is a party, by providing that the terms of the treaty and agreement shall supersede and apply, subject to the provisions of the Constitution.

[56] This exemption is in line with the legal position that the enforcement of international agreements is governed by international law, and in particular the law relating to treaties, and even though many

of the functions of such agreements may be analogous to those of domestic law, their efficacy is not judged in the same manner as domestic law because they operate between parties on an international level and re more likely to result in difficulties of interpretation and enforcement. The main purpose of the section is to avoid subjecting foreign countries and agencies to domestic law, and to facilitate international comity and co-operation with such foreign countries and agencies

[57] It is also expressly provided for by Article 2(5) and (6) of the Constitution that the general rules of international law shall form part of the law of Kenya, and that any treaty or convention ratified by Kenya shall form part of the law of Kenya under the Constitution. '[Emphasis by the Board]

Having established that the Government of Kenya was not a party to the Credit Facility Agreement dated 11th December 2019, the Board notes that section 6 (1) of the Act speaks of the Republic of Kenya and it is therefore important to understand its meaning with a view to determining whether the term "Government of Kenya" serves the same purpose in section 4 (2)

(f) of the Act as the term "Republic of Kenya" serves, in section 6 (1) of the Act. According to the Black's Law Dictionary, 7th Edition, "Republic" means:-

"a form of government which derives all its powers directly or indirectly from the general body of citizens, and in which the executive power is lodged in officers chosen by and representing the people, and holding office for a limited period, or at most during good behavior or at the pleasure of the people"

Further, Article 4 of the Constitution states that:-

"(1) Kenya is a sovereign Republic.

(2) The Republic of Kenya shall be a multi-party democratic State founded on the national values and principles of governance referred to in Article 10"

From the foregoing, the Board notes, "a Republic" is a form of government which derives all its powers directly or indirectly from the general body of citizens, and in which the executive power is lodged in officers chosen by and representing the people.

Kenya is a sovereign Republic, headed by a President who is in other words referred to as the Head of Government. Thomas Hobbes in his book,

Theory of Social Contract (Cambridge University Press, 1998) explains that:-

"The state or, more precisely, civil society is the product of a contract, a covenant, an agreement, or a compact."

The Social Contract theory supports the view that the state represented by a sovereign, i.e. a President, derives his powers directly or indirectly from the general body of citizens during an election, and in which the executive power is lodged in officers chosen by and representing the people. Hence, the Republic of Kenya is for all intents and purposes represented by the Government of Kenya headed by a President.

The Applicant herein cited the decision of Justice Lenaola in **Petition No. 58 of 2014, Okiya Omtatah Okoiti & 2 others v. Attorney General & 3 others [2014] eKLR**. where the Court considered the import of section 6 (1) of the repealed Public Procurement and Disposal Act, 2005 and held as follows:-

"As is evident, by virtue of the above provision i.e. Section 6(1) of the Public Procurement and Disposal Act the provisions of the said Act would not apply in regard to the contested procurement and I therefore agree with Mr. Kimani that Section 6(1) is clear that the Act does not apply in instances of negotiated loan or grants, because the SGR Project is being financed by a loan from the government of

China through Exim Bank of China. This fact is undisputed and being so it follows that the terms and conditions of the loan as negotiated would be applicable in the event there is a conflict with the Public Procurement and Disposal Act. The issue that I must therefore address my mind to is whether there is a conflict between the terms of the loan with Exim Bank and the provisions of the Public Procurement and Disposal Act. I am clear in my mind that there is no conflict at all. I say so, because the Act has laid down procedures to be followed in public procurement of goods and services. In particular, it demands the use of open tendering in procurement with set down procedures and requirements and matters which ought to be evaluated as well as the notification of successful parties and the unsuccessful parties. I have already stated elsewhere above the conditions which the Government of Kenya had to satisfy before the financing of the SGR project. They include the following; the finances required would be met by the Chinese Government and that the mode of procurement of the SGR project had to be in line with the conditions made by Exim Bank; i.e. the 4th Respondent had to be awarded the contract. Whether that term of the contract was oppressive or not is not for this Court to interrogate as in fact all evidence before me points to the fact that Parliament has already done so and found it to be lawful. To my mind therefore, the arguments made by

the Petitioners that the Government was involved in a restricted tendering or indirect procurement would not be valid. It is obvious therefore that the Public Procurement and Disposal Act does not apply to the issues at hand and I so find"

The Board has carefully read the decision in the *Okiya Omtata Case* cited above and finds that the court was considering section 6 (1) of the repealed Public Procurement and Disposal Act, 2005 (hereinafter referred to as "the Repealed Act") which states as follows:-

"Where any provision of this Act [the Repealed Act) conflicts with any obligations of the Republic of Kenya arising from a treaty or other agreement to which Kenya is a party, this Act shall prevail except in instances of negotiated grants or loans."

Firstly, according to the above section, the Repealed Act would prevail where its provisions conflict with obligations of the Republic of Kenya arising from a treaty or agreement ratified by Kenya. However, in instances of negotiated grants or loans, the provisions of the Repealed Act would not prevail.

Secondly, the contract in the above case was as a result of an agreement between the Government of China and the Government of Kenya under which the Government of Kenya was to comply with the following conditions; finances would be met by the Chinese Government, the mode of Procurement for the SGR Project had to be in line with the conditions made by Exim Bank and that the Memorandum of Understanding in the *Okiya Omtata Case* identified the party to be awarded the contract.

Even though Justice Lenaola found no conflict with the provisions of the Repealed Act arising from the agreement between the Government of Kenya and the Government of China, he held that the Repealed Act would not prevail since the procurement was undertaken under a negotiated loan.

The High Court in **Miscellaneous Application 116 of 2016 Republic v Public Procurement Administrative Review Board & 2 others Ex-parte Coast Water Services Board & another [2016] eKLR** while considering section 6 (1) of the Repealed Act further held that:-

"...It is in this light that in my view Parliament enacted section 6(1) of the repealed Act which provides as follows-

.....

In other words, the provisions of the Act (that is, the Repealed Act) applied to all obligations of the Country whether arising from treaties or other agreements to which

the Country is a party and would supersede any provisions contained in the said treaties or agreement save that they would not apply to negotiated grants and loans.

The question however, is whether there was a conflict between the provisions of the Act and the conditions imposed by the donors. In my view, even assuming there was such a conflict, section 6(1) does not deprive the Board of the jurisdiction to entertain a matter that falls within its jurisdiction. What section 6 (1) provides is that where there is a conflict between the provisions of the Act and the terms and conditions of the donor in instances of negotiated grants or loans the Board in determining the dispute ought to take into account the fact that those terms and conditions supersede the provisions of the Act. In my view the Board's jurisdiction would only be ousted if the terms and conditions of the agreement expressly excluded the application of the repealed Act.

Having considered the findings of the court in the above case, the Board makes an observation that the provision of section 6 (1) of the Repealed Act is not similar to section 6 (1) of the 2015 Act. According to section 6 (1) of the Repealed Act, provisions of the said Repealed Act would not prevail where they conflict with any obligations of the Republic of Kenya

arising from a treaty or other agreement to which Kenya is a party in instances of negotiated grant or loans. In the absence of negotiated grants or loans, the provisions of the Repealed Act would prevail.

On its part, where any provision of the 2015 Act, conflicts with any obligations of the Republic of Kenya arising from a treaty, agreement or other convention ratified by Kenya and to which Kenya is party, the terms of the treaty or agreement shall prevail as stated in section 6 (1) thereof. It is therefore immaterial whether or not there are negotiated grants or loans.

Accordingly, the Board proceeds to make the following observations with respect to section 6 (1) of the Act:-

- i.** The main purpose of section 6 (1) of the Act is to avoid subjecting foreign countries and agencies to domestic law, and to facilitate international comity and co-operation with such foreign countries and agencies;
- ii.** Section 6 (1) of the Act does not automatically oust the jurisdiction of the Board by virtue of a mere existence of obligations of the Republic of Kenya arising from a treaty, agreement or other convention ratified by Kenya and in which Kenya is a party;
- iii.** The Board must have due regard to the terms and conditions of the treaty, agreement or other convention to establish whether or not a conflict exists;

- iv.** The Board's jurisdiction would only be ousted if the terms and conditions of the treaty, agreement or other convention expressly exclude application of the Act.

The Board shall now turn to examine the terms of the Credit Facility Agreement between the Procuring Entity and AFD.

The Board studied the provisions of the Credit Facility Agreement to determine whether there is any express provision excluding application of the 2015 Act and proceeds to make the following findings:-

"Clause 10.5 Binding Obligations

The obligation expressed to be assumed by the Borrower under each of the Financing Documents and the Project Documents comply with all laws and regulations applicable to the Borrower in its jurisdiction of incorporation and are legal, valid, binding and enforceable obligations which are effective in accordance with their terms

From the above provision, the Board notes that in so far as procurement is concerned, the Credit Facility Agreement dated 11th December 2015

emphasized on the applicability of the laws and regulations governing the Borrower in the jurisdiction of its incorporation, in this case, the laws governing the Procuring Entity herein which is a public limited company incorporated in Kenya.

The Board studied the provisions of the AFD Guidelines referenced in the Credit Facility Agreement and notes that at clause 1.2.1 of the AFD Guidelines it is stated as follows:-

"The present Guidelines shall apply to the beneficiary without prejudice to relevant applicable laws and regulations. In other words, compliance with the Guidelines should not result in the Beneficiary's violation of laws and regulations in so far as they apply to it...

The Beneficiary is fully responsible for the implementation of AFD-financed projects in compliance with relevant applicable laws and regulations concerning all aspects of the procurement procedure (i.e. drafting of Procurement Documents, award, administration and performance of the contracts). AFD shall only intervene to ensure the terms and conditions of its financing are fully met"

This brings us to the question, what are the applicable laws and regulations that apply to the Beneficiary?

It is worth noting that the AFD Guidelines expressly state that the said guidelines are incorporated in the Credit Facility Agreement. Further to this, the Credit Facility Agreement state that the obligations to be assumed by the Procuring Entity under each of the Financing Documents and the Project Documents shall comply with all laws and regulations applicable to the Procuring Entity in its jurisdiction of incorporation.

The Board further studied the provisions of the Bidding Document applicable in the subject tender and notes that the law governing the contract to be executed in respect of the subject tender was specified in Clause 1.4 of Section IX, Particular Conditions of the Bidding Document as **“Kenyan Law”**. During its oral submissions, the Procuring Entity confirmed that it received a “No Objection” at every process of preparation of the Bidding Document from AFD. This is the same Bidding Document that cites “Kenyan Law” as the applicable law and further the AFD Guidelines are deemed incorporated in the Credit Facility Agreement which states applicable laws and regulations shall be the one in the jurisdiction of the Procuring Entity.

In the circumstances, and having studied the terms of the Credit Facility Agreement, the AFD Guidelines and the Bidding Document, the Board finds

that the Procuring Entity and AFD intended that the Laws of Kenya apply in so far as the subject procurement process is concerned noting that the Procuring Entity confirmed that it received a "No Objection" from AFD at every stage of preparation of the Bidding Document.

The Board would like to make an observation that Clause 10.8 read together with Clause 17.1 of the Credit Facility Agreement dated 11th December 2015 states as follows:-

"10.8 (a) The choice of French Laws as the governing law of this Agreement will be recognized by the courts and arbitration tribunals in the jurisdiction of incorporation of the Borrower

(b) Any judgment obtained in relation to this Agreement in a French court or any award by an arbitration tribunal will be recognized and enforced in the jurisdiction of incorporation of the Borrower

17.1 This Agreement is governed by French Law"

Having studied the provisions of the Credit Facility Agreement, the Board observes that the said Agreement specifies French Law as the law governing the Credit Facility Agreement in so far as the relationship of the parties (the Procuring Entity and AFD) and dispute resolution is concerned.

However, in so far as procurement procedure arising from the term loan granted to the Procuring Entity is concerned (i.e. drafting of Procurement Documents, tendering, award, administration and performance of the contracts), the said Agreement states that the laws and regulations applicable to the Borrower shall be applied, and as already established, such laws are the Laws of Kenya.

The Board having studied the provisions of the Credit Facility Agreement, the AFD Guidelines and the Procuring Entity's Bidding Document did not find any express provision excluding application of the 2015 Act. In contrast, the provisions in the aforesaid documents support the view that the Procuring Entity and AFD's intention was that the Laws of Kenya would be applicable in so far as the subject procurement process is concerned.

The Board observes that the Credit Facility Agreement signed between AFD and the Procuring Entity herein ought to have taken into consideration the fact that the Procuring Entity is not the Government of Kenya neither is it the Republic of Kenya thereby failing to meet the requirements of section 4 (2) (f) of the Act. Article 10 (2) (c) of the Constitution states that:-

- "10 (1)**
- (2) *the national values and principles of governance include"***
 - (a)**

(b);

*(c) **good governance, integrity, transparency and accountability***”

To that end, it was incumbent on the Procuring Entity to negotiate favourable terms for the loan granted to it to undertake public procurement noting that the Procuring Entity is accountable to the public for such a process pursuant to Article 10 (2) (c) of the Constitution.

In summary, having studied the documents filed before it and authorities cited by parties, the Board finds that the subject procurement fails to meet the threshold of section 4 (2) (f) of the Act in order to oust the jurisdiction of the Board and section 6 (1) of the Act in order for the terms of the Credit Facility Agreement to prevail over the provisions of the Act.

In totality of the first issue framed for determination, the Board finds that it has the jurisdiction to entertain the Request for Review and shall now address the substantive issues framed for determination.

On the second issue framed for determination, the Board proceeds to make the following findings:-

A. Preference Schemes

On the first sub-issue of the second issue framed for determination, the Applicant contended that the Bidding Document excludes application of section 155 of the Act to the subject procurement process.

Article 227 (2) (a) of the Constitution provides that:-

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

(a) categories of preference in the allocation of contracts...

(b) the protection or advancement of persons, categories of persons or groups previously disadvantaged by unfair competition or discrimination"

The law contemplated under Article 227 (2) (a) and (b) is the Act, which outlines several preference and reservation schemes under Part XII thereof. Section 155 which falls under Part XII of the Act provides that:-

155. Requirement for preferences and reservations

(1) Pursuant to Article 227(2) of the Constitution and despite any other provision of this Act or any other legislation, all procuring entities shall comply with the provisions of this Part.

- (2) Subject to availability and realization of the applicable international or local standards, only such manufactured articles, materials or supplies wholly mined and produced in Kenya shall be subject to preferential procurement.**
- (3) Despite the provisions of subsection (1), preference shall be given to—**
- (a) manufactured articles, materials and supplies partially mined or produced in Kenya or where applicable have been assembled in Kenya; or**
 - (b) firms where Kenyans are shareholders.**
- (4) The threshold for the provision under subsection (3) (b) shall be above fifty-one percent of Kenyan shareholders.**
- (5) Where a procuring entity seeks to procure items not wholly or partially manufactured in Kenya—**
- (a) the accounting officer shall cause a report to be prepared detailing evidence of inability to procure manufactured articles, materials and supplies wholly mined or produced in Kenya; and**
 - (b) the procuring entity shall require successful bidders to cause technological transfer or create**

employment opportunities as shall be prescribed in the Regulations.

Parliament enacted the provisions of section 155 of the Act and Part XII in general, in order to give effect to Article 227 (2) (a) and (b) of the Constitution. Despite this, the Procuring Entity contended that it was not mandatory for it to apply preference and reservation schemes in the subject procurement process, hence the same was excluded in its Bidding Document in the following specific clauses:-

Clause 33 of Section I. Instructions to Bidders of the Bidding Document provides as follows:-

"Unless otherwise specified in the BDS, a margin of preference for domestic bidders shall not apply"

On its part, ITB Clause 33.1 of Section II. Bid Data Sheet of the Bidding Document states that:-

"A margin of preference shall not apply"

This exclusion clause was further reproduced at Clause 2 of Section III. Evaluation and Qualification Criteria of the Bidding Document as follows:-

"Domestic Preference N/A"

Lastly, clause 34 at page 6 of Addendum dated 24th December 2019 provides as follows:-

"Refer to Volume 1. ITB. 33.1 on margin of preference and Section III, clause 2 on domestic preference:

This shall be as per issued bidding document"

Even though the Procuring Entity's Bidding Document and the Last Addendum/Clarification No. 2 of 24th December 2019, that became part of the Bidding Document, both excluded the application of domestic preference in the subject procurement process, the AFD Guidelines recognized domestic preference at clause 2.1.4 (a) thereof which states as follows:-

"When, and only when, applicable laws required the Beneficiary to revert to domestic preference, AFD may agree to it, on the conditions that (i) it is conducted in a fully transparent manner by applying a margin of preference for goods produced locally, or for contractors for works from the Beneficiary's country, and that it is expressly provided for the Procurement Documents and (ii) it shall not lead to a de facto exclusion of foreign competition. In any case, domestic preference margin shall not exceed 15% of the import price excluding taxes in case of procurement of goods or 7.5% of

the price in case of procurement of works and shall not be applicable to consulting services

Other provisions to promote domestic products or labour (such as requiring a minimum of local products and/or local labour or requiring association with a local contractor or consultant) are not eligible to AFD's financing, unless (i) it is required by the applicable law and (ii) AFD determines that those provisions shall not jeopardize compliance with the International Good Practices and fulfilment of the expected outcome of the financing"

From the above provision, AFD states that if applicable laws, in this case, the Laws of Kenya require the Beneficiary (i.e. the Procuring Entity) to revert to domestic preference, AFD may agree to it, subject to the conditions set in the above excerpt. This therefore means that at the first instance, the AFD Guidelines took cognizance that the Laws of Kenya which are applicable to the Procuring Entity may provide for domestic preference and the same may be applied in the subject procurement process. Nonetheless, the Procuring Entity proceeded to exclude the preferences provided under Part XII of the Act applicable in public procurement processes in Kenya.

In its Invitation for Bids dated 20th August 2019, the Procuring Entity at Clause 3 thereof stated that:-

"Bidding will be conducted through the International Competitive Bidding procedures as specified in the Agence Française de Développement Guidelines; Procurement Guidelines for AFD-Financed Contracts in Foreign Countries published by the Bank in February 2017 and is open to all eligible bidders as defined in the Procurement Guidelines"
[Emphasis by the Board]

This being a tender that applied International Competitive Bidding Procedures, the Board observes that the Act provides for preference schemes applicable when such method is applied. It is worth noting, and as earlier observed, the AFD Guidelines recognized application of domestic preference in so far as the laws governing the Procuring Entity may provide.

The Applicant herein referred the Board to the case of **Judicial Review Miscellaneous Application No. 540 of 2008, Republic v. Public Procurement Administrative Review Board & Kenya Revenue Authority** where the court held that:-

"The margin of preference consideration was a statutory one and although in the Act the provision is couched in discretionary terms due to the use of the word may, in

Regulation 28 (2) (a) the preference is couched in mandatory terms and therefore forms part of the substantive law on procurement...”

The court in the case cited above took the view that even though the Act makes provision for preference and reservation but couches the same in discretionary terms, the preference and reservations would still be applicable as they are imposed in mandatory terms in the Public Procurement and Disposal Regulations, 2006 (hereinafter referred to as “the 2006 Regulations”). It is worth noting that Regulation 28 of the 2006 Regulations referenced in the above decision provides that:-

- "28. (1) For the purposes of section 39(8) of the Act, the threshold below which exclusive preference shall be given to citizens of Kenya, shall be the sum of –***
- (a) fifty million shillings for procurements in respect of goods or services;***
 - (b) two hundred million shillings for procurements in respect of works.***
- (2) The margin of preference-***
- (a) for the purposes of section 39(8) (b) (i) of the Act, shall be fifteen percent of the evaluated price of the tender;***

(b) for the purposes of section 39(8) (b) (ii) of the Act, shall be-

(i) six percent of the evaluated price of the tender where the percentage of shareholding of the locals is less than twenty percent; and

(ii) eight percent of the evaluated price of the tender where the percentage of shareholding of the locals is less than fifty-one percent but above twenty percent”

On the other hand, section 70 (6) (e) (vi) of the Act provides that:-

“70 (6) The tender documents shall set out the following—

... (e) instructions for the preparation and submission of tenders including—

(vi) the procurement function ensuring that where necessary, the preferences and reservations of the tender are clearly spelt out in the bidding documents

It is the Board’s considered view that section 70 (6) (e) (vi) of the Act requires the procuring entity to ensure that where necessary, the preferences are clearly spelt out in the bidding documents. This does not

however mean that a procuring entity may choose to provide exclusion clauses in its Bidding Document where it is not necessary to specify the preference schemes applicable to its procurement process. Assuming that a procuring entity has not provided preference schemes in its tender document, this does not mean that a bidder who qualifies for preferential treatment would not be entitled to a margin of preference, simply because the tender document did not specify the preference scheme applicable.

The court in **Republic vs. Public Procurement Administrative Review Board & 2 others Ex-Parte Microhouse Technologies Ltd [2016] eKLR** held that:-

"It goes without saying that the issue of preference and reservations is one provided for by the procurement laws – see Section 39(8) of PP&DA, 2005 and Regulation 28 of the Public Procurement and Disposal Regulations, 2006. The Board was under a duty to consider the question and make a determination. Its ultimate decision was therefore made without taking this very relevant question into consideration"

Further, the Board is guided by the decision of Justice Warsame in **Civil Suit No. 55 of 2005, Church Road Development Co. Ltd v. Barclays Bank of Kenya Ltd & 2 Others [2007] eKLR** where it was held that:-

"...My position is that a contract cannot be used to override the provisions of the law. And when there is a conflict, the law is supreme. A party cannot seek an immunity from an Act of Parliament through an agreement which is in contravention of the said Act... I entertain no doubt at all that the clause in the charge contract which puts an illusory legal obligation on the plaintiff is void and has no force of the law..."

The High Court of India in **Universal Petrochemicals Ltd v. Rajasthan State Electricity, AIR 2001 Cal 102 (2001, 2 CALLT 417 HC, 2001 (2) CHN 300**, while considering ouster clauses overriding statutory provisions held as follows:-

"43 ***Here it is nobody's case that the forum selection clause is contrary to public policy. But the question is whether such a clause will override the express provision of section 31 (4) of the Act. The answer has to be in the negative as it is well settled as a principle of law that act of parties cannot defeat the intention of the legislature...***

63 ***...We make it clear that the statutory provisions will obviously override any agreement between parties and a private contract cannot override a statute"***

Whereas the Court of Appeal of Kenya in **Civil Appeal No. 36 of 2002, Gulf Architects & 2 Others v. Attorney General** held as follows:-

"It is a principle of contract law that a court cannot enforce a contract that has been impliedly or expressly prohibited by statute..."

"If the contract is of this class it does not matter what the intent of the parties is, it is unenforceable, whether the parties meant to break the law or not"

From the foregoing cases, the Board observes that preference schemes having been provided under the 2015 Act, a procuring entity ought not to exclude them by ouster clauses in its tender document. Such exclusions cannot override express provisions of the Act, especially in instances where they conflict with the Act. The ouster clauses in the Procuring Entity's Bidding Document offend the guiding principles in section 3 (i) and (j) of the Act, and such ouster clauses cannot be enforced.

The provisions on preference were laid down in order to give effect to the guiding principles under section 3 (i) and (j) of the Act which state that:-

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

- (a) the national values and principles provided for under Article 10;**
- (b) the equality and freedom from discrimination provided for under Article 27 (c)**
- (d)**
- (e)**
- (f)**
- (g)**
- (h)**
- (i) promotion of local industry, sustainable development and protection of the environment; and**
- (j) promotion of citizen contractors.”**

It is the Board’s considered view, that these principles would serve no purpose if the same are excluded by a procuring entity in its procurement process despite express provisions of the Act requiring application of preference and reservations under section 155 of the Act. The provisions of the Bidding Document must be in conformity with the 2015 Act whenever a State organ or public entity procures for goods and services in order to ensure the guiding principles under section 3 (i) and (j) of the Act can be achieved.

These principles are outlined in order to ensure that local and citizen contractors are not discriminated against in international tenders where foreign contractors are likely to have an advantage as a result of their technical expertise. Section 3 (b) of the Act cites the provisions on equality and freedom from discrimination provided for under Article 27 of the Constitution as being part of the guiding principles under the Act. Article 27 (1) of the Constitution stipulates that *"every person is equal before the law and has the right to equal protection and equal benefit of the law."* As relates procurement and asset disposal proceedings under the Act, local and citizen contractors are entitled to equal protection and benefit even when they participate in international tenders where foreign contractors participate.

Further the national values and principles of governance under Article 10 of the Constitution, which are referenced in section 3 (a) of the Act as part of its guiding principles provide that:-

"(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—

(a) applies or interprets this Constitution;

(b) enacts, applies or interprets any law; or

(c) makes or implements public policy decisions.

- (2) The national values and principles of governance include—***
- (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;***
 - (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized;***
 - (c) good governance, integrity, transparency and accountability; and***
 - (d) sustainable development.”***

It is the Board's considered view that the principles of good-governance and accountability under Article 10 (2) (c) of the Constitution applies in public procurement processes and this can be implemented by affording local and citizen contractors, the benefits available under the Act, if they qualify for the same.

In so far as international tenders are concerned, section 157 (9) of the Act provides that:-

"For the purpose of ensuring sustainable promotion of local industry, a procuring entity shall have in its tender documents a mandatory requirement as preliminary

evaluation criteria for all foreign tenderers participating in international tenders to source at least forty percent of their supplies from citizen contractors prior to submitting a tender”

This provision directs procuring entities to make provision in their tender documents as a mandatory requirement forming part of preliminary evaluation criteria, for all foreign tenderers participating in international tenders to source at least forty percent of their supplies from citizen contractors prior to submitting a tender.

Further to this, section 89 (f) of the Act provides that:-

“If there will not be effective competition for a procurement unless foreign tenderers participate, the following shall apply—”

(f) where local or citizen contractors participate they shall be entitled to preferences and reservations as set out in section 155

It is worth noting that section 89 (f) of the Act expressly states that the provisions of section 155 of the Act will apply in the case of international tendering and competition in order to afford local and citizen contractors the preferences and reservations set out in section 155 of the Act.

Section 89 (f) read together with section 157 (9) of the Act gives the impression that it is necessary (rather than discretionary) in international tendering and competition for a procuring entity to make provision in its tender document as a mandatory requirement forming part of preliminary evaluation criteria for all foreign tenderers participating in international tenders to source at least forty percent of their supplies from citizen contractors prior to submitting a tender.

The Board heard submissions by the Procuring Entity that no preference scheme would be applicable in the subject tender since, the value of the tender in the respective Lots are more than One Billion Kenya Shillings, that is, for Lot 1, the estimated value of the project was 16 Million Euros translating to 2.2 Billion Kenya Shillings and for Lot 2, the estimated value of the project was 15.8 Million Euros translating to 1.9 Billion Kenya Shillings at an exchange rate of 126.3 Kenya Shillings.

Justice Odunga has had occasion to address this issue in the *Athi Water Case* where, while citing with approval, the decision in **Republic vs. Public Procurement Administrative Review Board & Another [2008] eKLR**, he held as follows:-

"The applicants seem to have misunderstood the exclusive margin of preference and other margins. This distinction was made in Republic vs. Public Procurement Administrative

Review Board & Another [2008] eKLR where it was held that:

"The Board concluded that because the tender was above the prescribed threshold reserved for citizens it held that the Procuring Entity was entitled to ignore the issue of the second margin of preference. In other words, the Board failed to distinguish the two categories of statutory margins of preferences namely the exclusive preference upon which the board proceeded to make its holdings and a margin of preference in specified circumstances set out in Section 39 (8) (b) (i) and Regulation 28(2) (a) which the Board did not address at all. I find that the second category of preference was a relevant consideration which the Board ignored and instead relied wholly on the Regulation 28(1) (a) cited above."

It is not in dispute that the subject procurement process had an estimated value of the project that is above One Billion Kenya Shillings. Indeed, section 157 of the Act provides that:-

- "157 (1)**
- (2)**

- (3)**;
- (4) For the purpose of protecting and ensuring the advancement of persons, categories of persons or groups previously disadvantaged by unfair competition or discrimination, reservations, preferences and shall apply to—**
 - (a) candidates such as disadvantaged groups;**
 - (b) micro, small and medium enterprises;**
 - (c) works, services and goods, or any combination thereof;**
 - (d) identified regions; and**
 - (e) such other categories as may be prescribed**
- (5)**;
- (6)**;
- (7)**
- (8) In applying the preferences and reservations under this section—**
 - (a) exclusive preferences shall be given to citizens of Kenya where:-**
 - (i) the funding is 100% from the national government or county government or a Kenyan body; and**

(ii) the amounts are below the prescribed threshold;

(iii) the prescribed threshold for exclusive preference shall be above five hundred million shillings"

Further, section 86 (2) of the Act states that:-

"For the avoidance of doubt, citizen contractors, or those entities in which Kenyan citizens own at least fifty-one per cent shares, shall be entitled to twenty percent of their total score in the evaluation, provided the entities or contractors have attained the minimum technical score"

Regulation 12 of the Public Procurement and Disposal (Preference and Reservation) Regulations, 2011 (hereinafter referred to as "the 2011 Regulations) as amended by Regulation 4 of the Public Procurement and Disposal (Preference and Reservation) (Amendment) Regulations, 2013 (hereinafter referred to as "the 2013 Amendment Regulations") states as follows:-

"4. The principal Regulations are amended by deleting regulation 12 and substituting thereof the following new regulation-

12. For purposes of section 39 (4) (d) of the Act [which is section 157 (4) (e) of the 2015 Act],

public entities shall grant exclusive preference to local preference to local contractors offering-

(a) motor vehicle, plant and equipment that are assembled in Kenya

(b) construction material and other material used in the transmission and conduction of electricity of which such material is made in Kenya

(c) furniture, textiles, foodstuffs and other foods made or locally available in Kenya [Emphasis by the Board

On its part, Regulation 13 of the 2011 Regulations as amended by Regulation 5 of the 2013 Amendment Regulations provides as follows:-

"For the purposes of section 39(8) (a) (ii) of the Act [which is section 157 (8) (a) (ii) of the 2015 Act], the threshold below which exclusive preference shall be given to citizen contractors, shall be the sum of –

(a) one billion shillings for procurements in respect of road works, construction materials and other materials used in transmission and conduction of electricity of which the material is made in Kenya;

- (b) five hundred million shillings for procurements in respect of other works;***
- (c) one hundred million shillings for procurements in respect of goods; and***
- (d) fifty million shillings for procurements in respect of services.”***

The above provisions support the view that exclusive preference is given to citizens of Kenya where the value of the tender is above Five Hundred Million Shillings as stated in section 157 (8) (a) (iii) of the Act but not exceeding One Billion Shillings for procurements in respect of road works, construction materials and other materials used in transmission and conduction of electricity of which the material is made in Kenya as stated in Regulation 13 (a) of the 2011 Regulations as amended by Regulation 5 of the 2013 Amendment Regulations.

This does not mean that citizens and local contractors would not be entitled to other margins of preference when the estimated value of the tender exceeds the threshold of section 157 (8) (a) (iii) of the Act read together with Regulation 13 (a) of the 2011 Regulations as amended by Regulation 5 of the 2013 Amendment Regulations.

The Board studied the 2011 Regulations together with the 2013 Amendment Regulations and notes that, Regulation 8 and 16 of the 2011 Regulations further provide that:-

8. Notwithstanding the foregoing, a foreign contractor may

apply benefit from the preference and reservation schemewhere it enters into a joint venture or subcontracting arrangements, as evidenced by written agreement, with a local contractor, where the local contractor has a majority share.

16. Where citizen contractors have entered into contractual arrangements with foreign contractors pursuant to regulation 8, a ten percent margin of preference in the evaluated price of the tender shall be applied

As can be seen from the provisions of Regulation 8 and 14 of the 2011 Regulations, local and citizen contractors may benefit from a margin of preference if they meet the threshold set in the aforesaid Regulations.

Further, Regulation 15 of the 2011 Regulations provides that:-

"For the purposes of section 39(8) (b) (ii) of the Act, the margin of preference shall be-

- (a) six percent of the evaluated price of the tender, where percentage of shareholding of the Kenyan citizens is less than twenty percent;***
- (b) eight percent of the evaluated price of the tender, where the percentage of shareholding of Kenyan citizens is less than fifty-one percent but above twenty percent; and***
- (c) ten percent of the evaluated price of the tender, where the percentage of shareholding of the Kenyan citizens is more than fifty percent.***

As regards, preference schemes for joint ventures with citizen contractors, Regulation 16 of the 2011 Regulations states as follows:-

"Where citizen contractors have entered into contractual arrangements with foreign contractors pursuant to regulation 8, a ten percent margin of preference in the evaluated price of the tender shall be applied"

From the foregoing, the Board observes that the 2015 Act, the 2011 Regulations and the 2013 Amendment Regulations provide for preference schemes applicable to local and citizen contractors where a procuring entity applies international competitive bidding procedures, such as is the case herein in order to achieve the guiding principles under section 3 (i) and (j)

of the Act, provided the local and citizen contractors can demonstrate that they meet the threshold set for preferential treatment.

Therefore, the Board finds that Clause 33 of Section I. Instructions to Bidders read together with ITB 33.1 of Section II. Bid Data Sheet and Clause 2 of Section III. Evaluation and Qualification Criteria of the Bidding Document read together with the Last Addendum/Clarification No. 2 dated 24th December 2019 contravene the provisions of Articles 27 and 227 (2) (a) and (b) of the Constitution; Section 3 (a), (b) (i) (j); 86 (2), 89 (f); 155, 157 (8) and (9); read together with Regulation 28 of the 2006 Regulations, and the provisions of the 2011 Regulations and 2013 Amendment Regulations outlined hereinbefore.

B. Tender Security

On the second sub-issue of the second issue framed for determination, the Applicant contended that the Procuring Entity contravened section 61 (2) of the Act by specifying an exact amount as tender security for the respective Lots 1 & 2 which exceeds 2%.

To support its view, the Applicant referred the Board to the clauses in the Bidding Document that deal with tender security. Clause 19.1 of Section 1. Instructions to Bidders of the Bidding Document states that:-

"The Bidder shall furnish as part of its bid, either a Bid Securing Declaration or a Bid Security as specified in the BDS, in original form and, in the case of a Bid Security, in the amount and currency specified in the BDS"

ITB 19.1 of Section II. Bid Data Sheet of the Bidding Document provides as follows:-

"A bid security shall be required

The Bidder shall furnish a bid security in the form of a Bank Guarantee only; the amount and currency of the bid security shall be

Lot No.	Minimum Bid Security in (EUR) or an equivalent amount in KES	
	EUROS	KES
KP1/6A.1/PT/3/19/A72 LOT 1	Euro 330,000	41,700,000
KP1/6A.1/PT/3/19/A72 LOT 2	Euro 310,000	39,176,000

The Board observes that section 61 of the Act provides that:-

"(1) An accounting officer of a procuring entity may require that tender security be provided with tenders, subject to such requirements or limits as may be prescribed.

(2) The form of tender security in subsection (1) shall be—

- (a) as prescribed in the Regulations;*
 - (b) stated as an absolute value;*
 - (c) an amount of not more than two percent of the tender as valued by the procuring entity.*
- (3) Tender security shall be forfeited if the person submitting the tender—*
- (a) withdraws the tender after the deadline for submitting tenders but before the expiry of the period during which tenders shall remain valid; or*
 - (b) refuses to enter into a written contract as required under section 136 or fails to furnish any required performance security.”*

Regulation 41 of the 2006 Regulations provides as follows:-

- "41. (1) The amount of any tender security under section 57 (2) of the Act [i.e. section 61 (2) of the 2015 Act] shall be expressed either as a fixed amount or as a percentage of the estimated value of the contract and shall not in either case exceed two percent of the estimated value of the contract.**
- (2) In determining the amount of tender security under paragraph (1), a procuring entity shall take into account-**

- (a) the cost to tenderers of obtaining a tender security;**
- (b) the estimated value of the contract; and**
- (c) the risk of tenderers failing to fulfill the conditions of their tenders."**

On its part, tender security is defined in section 2 of the Act as:-

"a guarantee required from tenderers by the procuring entity and provided to the procuring entity to secure the fulfillment of any obligation in the tender process and includes such arrangements as bank or insurance guarantees, surety bonds, standby letters of credit, cheques for which a bank is primarily liable, cash deposits, promissory notes and bills of exchange tender securing declaration, or other guarantees from institutions as may be prescribed"

Further, section 70 (6) (e) (iii) of the Act states that: -

- "70 (1)**
- (2)**
- (3)**
- (4)**
- (5)**

- (6) The tender documents shall set out the following—**
- (a)**
 - (b)**
 - (c)**
 - (d)**
 - (e) instructions for the preparation and submission of tenders including**
 - (i)**
 - (ii)**
 - (iii) any requirement that tender security be provided and the formand amount of any such security”**

From the above provisions of the Act and the 2006 Regulations, the Board observes thatsection 61 (2) (b) of the Act allows a procuring entity to provide an absolute value of tender security in the form of tender security. However, pursuant to section 61 (2) (c) of the Act, this value should not exceed the amount of 2% as valued by the procuring entity.

This prompted the Board to confirm whether the Procuring Entity’s absolute value of tender security provided in Section II. Bid Data Sheet of the Bidding Document meets the threshold of the Act. During oral

submissions, Counsel for the Procuring Entity submitted that the value of the tender as estimated by the Procuring Entity's Engineer was 16 Million Euros translating to 2.2 Billion Kenya Shillings for Lot 1, and 15.8 Million Euros translating to 1.9 Billion Kenya Shillings for Lot 2, at an exchange rate of 126.3 Kenya Shillings. The Procuring Entity then submitted that the tender security for the respective lots was; Three Hundred and Thirty Thousand Euros (330,000 €) translating to Forty-One Million, Seven Hundred Thousand Shillings for Lot 1 and Thirty-Nine Million, One Hundred and Seventy-Six Million Shillings for Lot 2.

Upon computation, the Board noted the following percentage of tender security:-

	Estimate Value of the Project (Kshs)	Tender Security (Kshs)	Percentage	Approximate percentage
Lot 1	2,200,000,000/-	41,700,000/-	1,895%	2%
Lot 2	1,900,000,000/-	39,176,000/-	2.061%	2%

From the foregoing, the Board observes that even though the Procuring Entity provided an absolute value of tender security for the respective lots, such value is within the threshold of 2% required in section 61 (2) (c) of the Act. The Applicant based its arguments that the Procuring Entity exceeded the amount of 2% required in the Act, by taking the bid prices submitted by bidders and finding an average of such prices. To the

Applicant, such average ought to have been the basis for providing tender security.

At paragraph 65 of the Applicant's Submissions, it is averred as follows:-

"The value of the bid bond should not have exceeded 2% as per PPDA Clause 61.2. In this tender there was relevant value guides to estimate the bid bond values. In the tender A72 and related figures in the opening results which are set out below and also contained in the opening register

Lot 1: Prices averaged 1,000,000,000, the Bid Bond should not have therefore been more than 20,000,000 yet the tender document prescribed for the sum of 41,700,000 which is 2 times over and above the statutory requirement

Lot 2: Prices averaged 1,200,000,000.000. The prescribed Bid Bond should have been more than 24,000,000 yet the tender document required a bid bond of Kshs 39,176,000 which is 1.6 times above the statutory requirements"

The Board studied the Act on tender security and did not find any provision requiring tender security to be based on the average bid price provided by bidders. The Act gives the Procuring Entity leeway to provide an absolute value of tender security provided such value is not more than 2% of the

estimated value of the tender. It is therefore the Board's considered view that the Applicant's argument that tender security ought to have been based on 2% of the averaged bid prices provided by bidders is misguided and is not supported by any provision in law.

However, the Board notes that, in practice, a procuring entity may direct bidders to provide a percentage of the value of their tender sum as tender security. This practice is appealing for the reason that whoever is the successful bidder, the tender sum provided would be based on its tender sum subject to the percentage by the Procuring Entity, which percentage should not exceed 2%.

In this instance, the Procuring Entity specified an amount in its Bidding Document, which upon computation, is 2% of the Procuring Entity's estimated value of the contract.

Despite the foregoing findings, from the Tender Opening Certificates dated 7th January 2020, the Board notes that, bid prices for Lot 1 and Lot 2 (recorded at the Procuring Entity's Auditorium at Stima Plaza) for all bidders, were far way below the Procuring Entity's estimated value of the project for Lot 1 and Lot 2 as can be seen from the tables below:-

Table 1

Lot 1		
Bidder No.	Currency	Bid Price

Lot 1		
Bidder No.	Currency	Bid Price
1	Shillings	304,891,427.00
	Euros	6,689,857.00
2	Euros	9,433,444.00
	Shillings	377,150,170.00
3	USD	6,773,659.67
	Shillings	420,304,828.56
4	Euros	9,460,431.26
	Shillings	311,297,922.21
5	Euros	9,665,863.00
	Shillings	449,722,886.00
6	Euros	6,336,202.00
	Shillings	287,162,510.00
7	Euros	7,428,536.45
	Shillings	643,092,445.37
8	Euros	6,672,270.63
	Shillings	308,634,446.87
9	Euros	7,367,526.00
	Shillings	316,708,871.00
10	Euros	8,173,251.00
	Shillings	136,784,308.00
11	Euros	8,969,483.00
	Shillings	191,246,708.00
12	Euros	6,632,392.00
	Shillings	289,578,077.00
13	Euros	5,324,252.00

Lot 1		
Bidder No.	Currency	Bid Price
	Shillings	587,576,666.00
14	Euros	5,405,912.00
	Shillings	179,629,907.00
15	Euros	13,866,753.16

Table 2

Lot 2		
Bidder No.	Currency	Bid Price
1	Euros	17,962,526.62
2	Euros	9,260,370.00
	Shillings	619,500,619.00
3	Euros	8,040,696.12
	Shillings	243,522,220.97
4	Euros	12, 218,637.00
	Shillings	282,483,589.00
5	Euros	13,782,684.90
6	Euros	10,874,773.87
	Shillings	420,920,321.13
7	Euros	16,115,465.00
	Shillings	475,283,545.00
8	Shillings	1,854,669,700.58
	Euros Shillings	9,054,432.95 838,155,710.07
9	Euros	14,656,050.00
	Shillings	262,025,631

Lot 2		
Bidder No.	Currency	Bid Price
10	Euros	14,974,868.47
11	Euros	9,761,557.07
	Shillings	226,413,095.20
12	Euros	15,510,522.80
13	Euros	11,581,935.33
	Shillings	357,128,529.00
14	Euros	10,573,902.00
	Shillings	144,960,080.00
15	Euros	10,869,841.50
	Shillings	296,083,110.30
16	Euros	11,220,379.00
	Shillings	478,393,622.00

The Board wonders why all 15 bidders in Lot 1 and 16 bidders in Lot 2's bid prices are way below the Procuring Entity's estimated value of the project. The only logical conclusion to be made is that the Procuring Entity over-estimated the value of the project to be implemented in the subject tender.

C. Cash Flow Requirement

On the third sub-issue of the second issue framed for determination, the Applicant contended that the Evaluation Criteria under clause 3.1 of Section III. Evaluation and Qualification Criteria of the Bidding Document on cash flow requirement is unreasonable. According to the Applicant, the

amount of cash flow specified as 1.4 Million Euros for Lot 1 and 1.3 Million Euros for Lot 2 could not be met by bidders in the respective Lots.

At paragraph 66 of the Applicant's Submissions, the Applicant avers as follows: -

"Evaluation Criteria 3.1 on page 39 of the Tender Document regarding cash requirements are clearly unreasonable as per the Particular Conditions of Contract (PCC) (Clause 14.7), the payment terms are 60 days with an advance payment of 10 percent as stipulated under Clause 14. 1 of the PCC. As per clause 1.1.3.1 of the PCC, the contract duration is 24 months. Based on the foregoing, the logical monthly expenditure on straight line is as follows per lot: -

Lot 1- 42 Million Kenya Shillings, Lot 2- 50 Million Kenya Shillings

Therefore, it follows that the cash cover required is for 60 days, i.e. 2 months"

The Board observes that Clause 1.1.3.3 of Section IX. Particular Conditions of the Bidding Document provides for time for completion of the works in the subject tender as 24 months. Further, Clause 14.2 of Section IX. Particular Conditions of the Bidding Document provides that an "advance payment of 10% (Percentage) of the Accepted Contract amount payable in

the currencies and proportions in which the Accepted Contract Amount is payable”.

From the foregoing, the Procuring Entity has the obligation to provide cash flow requirements based on the work, the contract period and the turnover expected in the works to be executed in the subject tender. A procuring entity cannot therefore provide a cash flow requirement which might be unrealistic for bidders to achieve given the period specified for completing works in the subject tender.

This Board makes an observation that section 89 (d) of the Act provides that:-

“If there will not be effective competition for a procurement unless foreign tenderers participate, the following shall apply:-

(a);

(b);

(c);

(d) the technical requirements shall, to the extent compatible with requirements under Kenyan law, be based on international standards or standards widely used in international trade”

Further, section 60 (1) of the Act states as follows:-

An accounting officer of a procuring entity shall prepare specific requirements relating to the goods, works or services being procured that are clear, that give a correct and complete description of what is to be procured and that allow for fair and open competition among those who may wish to participate in the procurement proceedings

The above provisions require a procuring entity to provide specific requirements that promote open and fair competition and in this case where international competitive bidding procedures were used, be compatible with requirements under Kenyan law, be based on international standards or standards widely used in international trade.

Having established that the Procuring Entity over-estimated the value of the project to be implemented in the subject tender, it follows then that the cash flow requirements in clause 3.1 of Section III. Evaluation and Qualification Criteria of the Bidding Document, were based on an over-estimated value of the project.

The Board finds that in providing cash flow requirements of the subject tender, the Procuring Entity ought to have taken the provisions of section

60 (1) and 89 (d) of the Act and such cash flow requirements ought to reflect the expected turnover within the 24-month period required to complete works in the subject tender.

D. Technical Requirements of the Bidding Document

On the fourth sub-issue of the second issue framed for determination, the Applicant contended that the technical requirements under clause 4.2 (b) of Section III. Evaluation and Qualification Criteria of the Bidding Document were unreasonable and unrealistic, in the sense that, the said technical requirements can only be met by foreign contractors and not local contractors. According to the Applicant, a contractor who has technical expertise in undertaking Air Installation Sub-Station Switch Gear (AIS Switch Gear) can also undertake Gas Installation Sub-Station Switch Gear (GIS Switch Gear) and the Procuring Entity ought not to have limited the technical requirements under clause 4.2 (b) of Section III. Evaluation and Qualification Criteria of the Bidding Document which provides as follows:-

"For Award of Lot 1

The contractor must have successfully completed construction of 3Nos 132kv sub-station extension/new including protection and control and SAS commissioning. The contractor must have successfully completed at least 50 km of 132kv double circuit line including OPGW in any two (2) year

For Award of Lot 2

Should have successful installed

(i) 132kv GIS (or higher voltage) of at least 3 bays in any two (2) years

(i) 33kv GIS (or higher voltage) of at least 6 bays in any two (2) years

and

Should have completed installation of 33kv cable feed outs in a substation of more than 6 cable feed outs in any two (2) year

Should have successfully completed 132/33kv substation of 45 MVA and above in any two (2) year"

To support this view, the Applicant submitted that the Accounting Officer of the Procuring Entity has the obligation under section 60 (1) and 3 (d) of the Act to undertake the following:-

"1)

(2)

(3) The technical requirements shall, where appropriate—

(a)

(b)

(c)

(d) factor in the socio-economic impact of the item;

From the above provision, the Board notes that the Accounting Officer of the Procuring Entity is required to prepare specific requirements relating to the goods, works or services being procured that are clear, that give a correct and complete description of what is to be procured. This discretion is vested on the Procuring Entity provided that it ensures such requirements allow for fair and open competition and factors in the socio-economic impact of the item. These requirements are fortified by section 89 (d) of the Act cited hereinbefore that applies to international competitive bidding procedures, which requires technical requirements to be compatible with requirements under Kenyan law, be based on international standards or standards widely used in international trade.

A party challenging the technical requirements provided by a procuring entity on the grounds that no local contractor has the technical expertise to meet such requirements would therefore be required to demonstrate to the Board through empirical evidence or data to support its allegation. In the absence of such proof, this Board cannot dictate the technical requirements that a procuring entity ought to specify in its tender documents, save that such procuring entity must bear in mind the need to promote open and fair competition among all bidders who may wish to participate in the procurement process.

Accordingly, the Board finds that the Applicant's allegation that the technical requirements under clause 4.2 (b) of Section III. Evaluation and Qualification Criteria of the Bidding Document have not been supported by evidence to the satisfaction of the Board.

E. Unbundling of Transmission Lines and Sub-Stations

On the fifth sub-issue of the second issue framed for determination, the Applicant contended that the Procuring Entity ought to have unbundled the Sub-Station Works in the subject tender. As regards unbundling of procurements, Regulation 19 of the 2011 Regulations previously provided that:-

"For the purpose of ensuring maximum participation of disadvantaged groups, small and micro-enterprises in public procurement, procuring entities may unbundle goods, works and services in practicable quantities pursuant to Section 31 (7) of the Act."

However, this provision was amended by Regulation 6 of the 2013 Amendment Regulations as follows:-

"6. The principal Regulations are amended by deleting regulation 19 and substituting therefor the following new regulation

19. (1) For the purpose of ensuring maximum participation of citizen contractors, disadvantaged groups, small and micro-enterprises in public procurement, procuring entities may unbundle goods works and services in practicable quantities pursuant to section 31(7) of the Act.

(2) For greater certainty, a procuring entity in unbundling procurements in paragraph (1), may be lot goods, works or services in quantities that are affordable to specific target groups participating in public procurement proceedings”

Pursuant to the provision of Regulation 19 (1) of the 2011 Regulations as amended by Regulation 6 of the 2013 Amendment Regulations, citizen contractors were included in the list of persons who ought to benefit from unbundling of goods, works and services in practicable quantities to ensure maximum participation of citizen contractors.

George Ofori in the book, ***Contemporary Issues in Construction in Developing Countries***(Routledge, 2012)while considering the importance of unbundling of works in construction projects stated that:-

"Contractors are often unable to bid for work because the contracts are too large for them. There are strong pressures from donors and businesses to combine requirements into larger and fewer contracts in order to derive benefits from economies of scale and lower administration costs. Letting projects in smaller contracts (unbundled) increases competition and give lower prices, as it allows a greater number of local contractors to bid for the work. Unbundling is allowed by the World Bank and many country procurement regulations as long as it can be shown that the objective is to increase local content" [Emphasis by the Board]

From the above excerpt, the Board observes that unbundling of procurement works helps promote competition, in that local contractors (and citizen contractors) would have an opportunity to participate in the tendering process, especially in this case where International Competitive Bidding Procedures was used and that the Act requires the Procuring Entity to promote the local industry in such a tendering process. This would serve as a way of promoting the local industry as required by section 3 (i) and (j) of the Act.

Accordingly, the Board finds that the Procuring Entity ought to take the provisions of Regulation 19 (1) of the 2011 Regulations as amended by Regulation 6 of the 2013 Amendment Regulations read together with

section 3 (i) and (j) of the Act in order to unbundle the Sub-Station works in the subject tender with a view of encouraging participation of citizen contractors (and local contractors) in order to promote the local industry.

In totality of the issues raised in the substantive Request for Review, the Board finds that the Procuring Entity contravened the provisions of Articles 27 and 227 (2) (a) of the Constitution, Section 3 (a), (b) (i) (j), 89 (f), 155, 157 (9) read together with Regulation 28 of the 2006 Regulations, and the provisions of the 2011 Regulations and 2013 Amendment Regulations in so far as the issue of preference is concerned, and further failed to take Regulation 19 (1) of the 2011 Regulations as amended by Regulation 6 of the 2013 Amendment Regulations read together with section 3 (i) and (j) of the Act into account to unbundle the Sub-Station works in the subject tender with a view of promoting the local industry.

In considering the appropriate orders to issue in the circumstances, the Board observes that since the Tender Document contravenes the provisions of the Act considered hereinbefore, the resultant finding is that the said provisions are null and void. This therefore means, that the Board has leeway to direct the Procuring Entity to issue an Addendum that cures the provisions of the Tender Document that the Board finds to be unfair, discriminatory and of an uncompetitive nature.

However, by the time the Procuring Entity received a notice from the Board Secretariat of the existence of the Request for Review application, all the tenders received in response to the Procuring Entity's advertisement had already been opened and the bid prices read out in the presence of bidders.

Article 227 (1) of the Constitution cites competition as one of the principles that guide public procurement processes. It would therefore serve no purpose to direct the Procuring Entity to issue an Addendum and extend time for bidders to submit tenders pursuant to the modifications made to the Procuring Entity's Bidding Document, since such an order would not promote fair competition in the subject procurement process.

In the circumstances, the Board observes that issuance of a new Bidding Document that complies with the Act would ensure the subject procurement is undertaken in a fair, equitable, transparent, competitive and cost-effective manner. In order to achieve this, section 58 of the Act states that:-

- "1) An accounting officer of a procuring entity shall use standard procurement and asset disposal documents issued by the Authority in all procurement and asset disposal proceedings.***
- (2) The tender documents used by a procuring entity under subsection (1) shall contain sufficient information to***

allow fairness, equitability, transparency, cost-effectiveness and competition among those who may wish to submit their applications.”

Pursuant to the above provision, the Procuring Entity herein ought to seek guidance from the Authority regarding a tender document that would contain sufficient information to allow fairness, equitability, transparency, cost-effectiveness and competition among those who may wish to submit their bids, taking into consideration, the findings of the Board in this case.

Once Procuring Entity seeks guidance from the Authority on the applicable tender document and having noted that bids in the subject tender were already opened, the Board finds that the appropriate step that the Procuring Entity ought to take is to re-tender for Procurement of Design, Supply, Installation, Commissioning of Transmission Lines and Substations (AFD) using the fresh Bidding Document prepared in accordance with the provisions of the Act, taking into consideration, the findings of the Board in this Request for Review application.

As regards the issue of costs, the Supreme Court in **Jasbir Singh Rai & 3 Others v Tavlochan Singh Rai & 4 others (2014) eKLR** set out the following jurisprudential guidelines on the exercise of the discretionary power to award costs when it held as follows:-

"It emerges that the award of costs would normally be guided by the principle that costs follow the event; the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously exercised discretion of the court, accommodation of the special circumstances of the case, while being guided by the ends of justice."

The Board observes that the court in the above case found that even though costs should follow the event, a decision maker should exercise its discretion on whether or not to award costs by accommodating the special circumstances of the case. In the circumstances of the Request for Review, the Applicant herein will have an opportunity to participate in the re-tender having found that such an order is appropriate in this instance. Hence, the Board shall refrain from awarding costs.

Accordingly, the Request for Review succeeds and the Board proceeds to make the following specific orders:-

FINAL ORDERS

In exercise of the powers conferred upon it by section 173 of the Act, the Board makes the following orders:-

- 1. The Procuring Entity's Bidding Document for Procurement of Design, Supply, Installation, Commissioning of Transmission Lines and Substations (AFD), Project IPC No: KP1/6A.1/PT/3/19/A72 issued on 20th August 2019, be and is hereby nullified and set aside.**
- 2. The Procuring Entity is hereby directed to prepare a fresh Bidding Document for Procurement of Design, Supply, Installation, Commissioning of Transmission Lines and Substations (AFD) within thirty (30) days from the date of this decision, taking into consideration, the Board's findings in this case.**
- 3. The Procuring Entity is hereby directed to re-tender for Procurement of Design, Supply, Installation, Commissioning of Transmission Lines and Substations (AFD) within forty-five (45) days from the date of this decision.**
- 4. Each party shall bear its own costs in the Request for Review.**

Dated at Nairobi this 27th day of January 2020

CHAIRPERSON

SECRETARY

PPARB

PPARB

Delivered in the presence of:-

- i.** Mr. Kibe Mungai for the Applicant;
- ii.** Ms. Irene Walala holding brief for Mr. Jude Ochieng' for the Respondent;
- iii.** No appearance made for the Interested Party.