

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**  
**APPLICATION NO. 121/2020 OF 26<sup>TH</sup> AUGUST 2020**

**BETWEEN**

**CHINA COMMUNICATIONS SERVICES INT LTD.....APPLICANT**

**AND**

**KENYA NATIONAL HIGHWAYS AUTHORITY.....1<sup>ST</sup> RESPONDENT**

**THE ACCOUNTING OFFICER, KENYA NATIONAL**

**HIGHWAYS AUTHORITY.....2<sup>ND</sup> RESPONDENT**

**AND**

**SOLUTION TELMEC LIMITED.....1<sup>ST</sup>INTERESTED PARTY**

**WHITESPACE TECHNOLOGIES LIMITED.....2<sup>ND</sup> INTERESTED PARTY**

Review against the decision of Kenya National Highways Authority with respect to Tender No. KeNHA/2297/2020- Civil Works for the Main Build of Optic Fiber Cable for Eldoret-Lokichar-Nakodok Corridor, Lot 5: Eldoret-Lokichar Section (285KM).

**BOARD MEMBERS**

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

**IN ATTENDANCE**

1. Mr. Stanley Miheso -Holding brief for the Secretary

## **BACKGROUND TO THE DECISION**

### **The Bidding Process**

Kenya National Highways Authority (hereinafter referred to as “the Procuring Entity”) invited sealed bids from interested eligible bidders with respect to Tender No. KeNHA/2297/2020- Civil Works for the Main Build of Optic Fiber Cable for Eldoret-Lokichar-Nakodok Corridor, Lot 5: Eldoret-Lokichar Section (285KM) (hereinafter referred to as “the subject tender”) by publishing an advertisement notice on MyGov Publication Website on 28<sup>th</sup> April 2020 and the United Nations Development Business Issue dated 28<sup>th</sup> April 2020.

### **Bid Submission Deadline and Opening of Bids**

The Procuring Entity received a total of ten (10) bids by the bid submission deadline of 17<sup>th</sup> June 2020. The same were opened shortly thereafter by a Tender Opening Committee in the presence of bidders’ representatives and recorded as follows: -

<b>Bidder No.</b>	<b>Bidder Name</b>	<b>Read out Bid Prices (Kshs)</b>
1	M/s China Communication Services International Limited	478,594,026.51
2	M/s NEC Africa Pty Ltd in Joint Venture with M/s Quavatel Limited	589,585,512.44
3	M/s CAMUSAT Kenya Limited	859,158,782.79
4	M/s Adrian Kenya Limited	467,439,615.00
5	M/s White Space Technologies Limited	491,441,018.25

6	M/s Soliton Telmec Limited	516,686,606.10
7	M/s Geonet Technologies Limited in Joint Venture with M/s Vindhya Telelinks Limited of India	433,875,806.25
8	M/s Turbi Energy and Logistic	317,259,293.95
9	M/s Sagemcim Energy & Telecom SAS	808,903,318.00
10	M/s Barize Construction Limited in Joint Venture with M/s Cobra Gestion De Infraestructuras, S.A.U (Grupo Cobra)	1,526,525,755.20

## Evaluation of Bids

Having appointed an Evaluation Committee, evaluation of bids in the subject tender was undertaken in the following stages: -

- i. Preliminary Examination and Determination of Responsiveness;
- ii. Detailed Evaluation;
- iii. Post Qualification; and
- iv. Comparison of Bid Prices.

### 1. Preliminary Examination and Determination of Responsiveness

At this stage, the Evaluation Committee evaluated the ten bids received against the criteria found in Section I. Instructions to Bidders of the Bidding Document and outlined the outcome of evaluation as follows: -

Bidder No	Name of Bidder	Substantial Responsiveness	Acceptance for Detailed Examination
1	M/s China Communication Services International Limited	Yes	Yes
2	M/s NEC Africa Pty Ltd in Joint	No	No

	Venture with M/s Quavatel Limited		
3	M/s CAMUSAT Kenya Limited	No	No
4	M/s Adrian Kenya Limited	Yes	Yes
5	M/s White Space Technologies Limited	Yes	Yes
6	M/s Soliton Telmec Limited	Yes	Yes
7	M/s Geonet Technologies Limited in Joint Venture with M/s Vindhya Telelinks Limited of India	Yes	Yes
8	M/s Turbi Energy and Logistic	No	No
9	M/s Sagemcim Energy & Telecom SAS	Yes	Yes
10	M/s Barize Construction Limited in Joint Venture with M/s Cobra Gestion De Infraestructuras, S.A.U (Grupo Cobra)	No	No

## 2. Detailed Evaluation

At this stage, the Evaluation Committee applied the criterion under ITB Clause 14 of Section I. Instructions to Bidders of the Bidding Document and outlined the outcome of evaluation as follows: -

Bidder No	Name of Bidder	Modifications or Comments
1	M/s China Communication Services International Limited	No Discounts
2	M/s NEC Africa Pty Ltd in Joint Venture with M/s Quavatel Limited	No Discounts
3	M/s CAMUSAT Kenya Limited	No Discounts
4	M/s Adrian Kenya Limited	No Discounts
5	M/s White Space Technologies Limited	No Discounts
6	M/s Soliton Telmec Limited	No Discounts
7	M/s Geonet Technologies Limited in Joint Venture with M/s Vindhya Telelinks Limited of India	No Discounts
8	M/s Turbi Energy and Logistic	No Discounts
9	M/s Sagemcim Energy & Telecom SAS	No Discounts
10	M/s Barize Construction Limited in Joint Venture with M/s Cobra Gestion De Infraestructuras, S.A.U (Grupo Cobra)	No Discounts

### 3. Post-Qualification

At this stage, the Evaluation Committee applied the criterion under Clause 3.2. Qualification for Multiple Lots of Section III. Evaluation and Qualification Criteria of the Bidding Document but referred to as Post-Qualification in the Evaluation Report dated 27<sup>th</sup> July 2020. The Evaluation Committee observed that Bidder No. 6, M/s Soliton Telmec Limited met the requirements under Clause 3.2. Qualification for Multiple Lots of Section III. Evaluation and Qualification Criteria of the Bidding Document.

### 4. Comparison of Bid Prices

At this stage, the Evaluation Committee subjected six bids to the evaluation criterion under ITB Clause 35 and ITB Clause 36 of Section I. Instructions to Bidders of the Bidding Document and recorded the outcome of evaluation as follows: -

Bidder No	Name	Sub A	PC Sums	VAT 14%	Contingency	Total	Sub A less PC Sums	Ranking
6	M/s Soliton Telmec Limited	365,587,09 2.00	20,000,00 0.00	51,182,19 2.88	36,558,70 9.20	453,327,99 4.08	345,587,09 2.00	1
1	M/s China Communication Services International Limited	383,017,56 5.00	20,000,00 0.00	53,622,45 9.10	38,301,75 6.50	474,941,78 0.60	363,017,56 5.00	2
5	M/s White Space Technologies Limited	393,262,37 5.00	20,000,00 0.00	55,056,73 2.50	39,326,23 7.50	487,645,34 5.00	373,262,37 5.00	3
4	M/s Adrian Kenya Limited	465,034,75 0.00	20,000,00 0.00	65,104,86 5.00	46,503,47 5.00	576,643,09 0.00	445,034,75 0.00	4

9	M/s Sagemcim Energy & Telecom SAS	646,422,10 4.26	20,000,00 0.00	90,499,09 4.60	64,642,21 0.43	801,563,40 9.28	626,422,10 4.26	5
3	M/s CAMUSAT Kenya Limited	700,134,59 5.53	20,000,00 0.00	98,018,84 3.37	70,013,45 9.55	868,166,89 8.46	680,134,59 5.53	6

## Recommendation

According to the Evaluation Report dated 27<sup>th</sup> July 2020, the Evaluation Committee recommended award of the subject tender to M/s Soliton Telmec Limited having submitted the lowest evaluated bid at the sum of Kshs. 516,686,606.10

## Due Diligence

The Evaluation Committee carried out a due diligence exercise to the confirm the authenticity of the documents and information of the lowest evaluated bidder (i.e. M/s Soliton Telmec Limited) based on the parameters and information obtained from the institutions mentioned hereinbelow: -

S/No	Parameters	Result (Yes/No)
1	Firms' Experience (Safaricom)	Yes
2	National Transport & Safety Authority (Authenticity of the Log books for the Equipments submitted by the bidder)	Yes
3	Line of Credit (Authenticity of the Bid Security submitted by the Bidder)	Yes

4	Bid Security	Yes
<b>Overall Remarks (Pass/Fail)</b>		<b>Pass</b>

From the foregoing, the Evaluation Committee noted that M/s Soliton Telmec Limited satisfied the requirements of the due diligence exercise conducted on it.

### **Professional Opinion**

In a Professional Opinion dated 29<sup>th</sup> July 2020, the Procuring Entity's Deputy Director, Supply Chain Management reviewed the Evaluation Report dated 27<sup>th</sup> July 2020 whilst outlining the background to the procurement process. She requested the Procuring Entity's Director General to consider and approve award of the subject tender to M/s Soliton Telmec Limited at the price of Kshs. 516,686,606.10 for being the lowest evaluated bidder. The said professional opinion was approved by the Procuring Entity's Director-General on 30<sup>th</sup> July 2020.

### **Notification to Bidders**

In letters dated 11<sup>th</sup> August 2020, the Procuring Entity's Director General notified the successful bidder and unsuccessful bidders of the outcome of their bids.

### **THE REQUEST FOR REVIEW**

M/s China Communications Services International Ltd (hereinafter referred to as "the Applicant") lodged a Request for Review dated 26<sup>th</sup> August 2020 and filed on 26<sup>th</sup> August 2020 together with a Statement in Support of the Request for Review sworn on 25<sup>th</sup> August 2020 and filed on even date and a Further Affidavit sworn on 7<sup>th</sup> September and filed on even date, through the firm of Onyango, Ndolo & Company Advocates, seeking the following orders: -

- 1. An order setting aside the Respondents' decision dated 11<sup>th</sup> August 2020 declaring the Applicant's bid unsuccessful and substituting thereof an order declaring the Applicant's bid successful;***
- 2. An order directing the Respondents to produce the original copy minutes of the Tender Opening Committee and Tender Evaluation Committee (Financial Evaluation precisely);***
- 3. An order directing the Respondents to re-evaluate the financial bids submitted by the two finalists being the Applicant and the Interested Party herein with respect to Tender No. KeNHA/2297/2020 in Lot 5;***
- 4. An order directing the Procuring Entity to award the tender to the Applicant herein who had the lowest responsive bid as to price/cost;***
- 5. An order directing the Respondents to bear the cost of the Request for Review; and***
- 6. Such order orders as the Review Board may deem fit to issue.***



In response, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents lodged a Notice of Preliminary Objection dated 1<sup>st</sup> September 2020 and filed on even date together with a Replying Affidavit sworn on 1<sup>st</sup> September 2020 and filed on even date through Jessica Mbae Advocate while the Interested Party lodged a Replying Affidavit sworn on 31<sup>st</sup> August 2020 and filed on even date together with a Further Affidavit sworn on 2<sup>nd</sup> September 2020 and filed on 3<sup>rd</sup> September 2020 through the firm of Garane & Somane Advocates. The 2<sup>nd</sup> Interested Party lodged an Affidavit in Support of the Request for Review sworn on 7<sup>th</sup> September 2020 and filed on 8<sup>th</sup> September 2020 through James Rimui Advocate.

On 16<sup>th</sup> March 2020, the Board issued Circular No. 1/2020 and the same was published on the Public Procurement Regulatory Authority's website ([www.ppra.go.ke](http://www.ppra.go.ke)) in recognition of the challenges posed by the Covid-19 pandemic. Through the said Circular, the Board instituted certain measures to restrict the number of representatives of parties that may appear before the Board during administrative review proceedings in line with the presidential directives on containment and treatment protocols to mitigate against the potential risks of the virus.

On 24<sup>th</sup> March 2020, the Board issued Circular No. 2/2020 further detailing the Board's administrative and contingency management plan to mitigate the Covid-19 pandemic. Through this circular, the Board dispensed with physical hearings and directed that all request for review applications shall be canvassed by way of written submissions. Clause 1 at page 2 of the said

Circular further specified that pleadings and documents shall be deemed as properly filed if they bear the official stamp of the Board.

Accordingly, the Applicant lodged Written Submissions dated 8<sup>th</sup> September 2020 and filed on even date while the Interested Party lodged Written Submissions, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents lodged Written Submission dated 11<sup>th</sup> September 2020 and filed on even date while the 1<sup>st</sup> Interested Party lodged Written Submissions dated 4<sup>th</sup> September 2020 and filed on even date. The 2<sup>nd</sup> Interested Party did not lodge Written Submissions.

## **BOARD'S DECISION**

The Board has considered all the pleadings and written submissions filed before it, including the confidential documents submitted to it pursuant to section 67 (3) (e) of the Act and finds that the following issues calls for determination: -

- I. Whether the subject procurement process meets the conditions set out in section 4 (2) (f) of the Act, thus ousting the jurisdiction of this Board***

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

- II. Whether the Procuring Entity awarded the subject tender in accordance with section 86 of the Act and***

***Regulation 77 of the Public Procurement and Asset Disposal Regulations, 2020***

Before addressing the above issues, the Board would like to dispense with two preliminary issues arising from the pleadings filed by parties. M/s Geonet Technologies Ltd addressed a letter dated 10<sup>th</sup> September 2020 and filed on even date to the Board Secretary stating that it only received a notification of the existence of the Request for Review on 9<sup>th</sup> September 2020 and requested for additional three (3) days to file a response to the Request for Review. M/s Geonet Technologies Ltd lodged a Memorandum of Response dated 14<sup>th</sup> September 2020 and filed on even date wherein it outlined **“Objections to the reasons attached to the alleged Non-Responsive bid”** at paragraphs 1 to 7 thereof and **“Response to the Applicant’s Request for Review”** at paragraph 7 to 13 of the said Memorandum of Response.

Having considered the Memorandum of Response filed by M/s Geonet Technologies Ltd, the Board observes that M/s Geonet Technologies Ltd challenged the Procuring Entity’s decision on its bid in addition to supporting the Applicant’s Request for Review alleging that the Procuring Entity failed to award the subject tender in accordance with Article 227 of the Constitution. It is worth noting that section 167 (1) of the Act is instructive on the manner in which a tenderer may challenge the decision of a procuring entity on its bid. The said provision 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"***

A party seeking to challenge a procuring entity's decision on its bid can only do so by way of a Request for Review lodged in accordance with section 167 (1) of the Act upon payment of the requisite fees and not through a Memorandum of Response filed in response to an existing Request for Review application. The notification of the existence of a Request for Review and suspension of a procurement process pursuant to section 168 of the Act sent to all tenderers by the Board Secretary requires such tenderers to file pleadings (if they wish to do so) in support of the Applicant's case or the Procuring Entity's case but not to file a Request for Review, through the backdoor, disguised as a Memorandum of Response. In essence, the Memorandum of Response filed by M/s Geonet Technologies Ltd ought to have confined itself to supporting the Applicant's case (as it did in paragraphs 7 to 13 of the said Memorandum of Response) or the Procuring Entity's case, but not challenging the Procuring Entity's decision on its own bid.

M/s Geonet Technologies Ltd ought to have lodged a Request for Review within the timelines specified in section 167 (1) of the Act upon payment of the requisite fees and not through a Memorandum of Response filed in response to an existing Request for Review application, if it wished to challenge the outcome of its bid. The **“Objections to the reasons attached to the alleged Non-Responsive bid”** contained in paragraphs 1 to 6 of the Memorandum of Response filed by M/s Geonet Technologies Ltd are not properly filed before the Board. Accordingly, the **“Objections to the reasons attached to the alleged Non-Responsive bid”** contained in paragraphs 1 to 6 of the Memorandum of Response filed by M/s Geonet Technologies are hereby expunged and shall not form part of the record of these proceedings. For avoidance of doubt, the Board shall consider the **Response to the Applicant’s Request for Review** at paragraph 7 to 13 of the said Memorandum of Response.

On the second preliminary issue, the Board observes that the Applicant avers that it addressed a letter to the Procuring Entity requesting for information on the subject tender. The said letter, which is undated but received at the Procuring Entity’s Office on 24<sup>th</sup> August 2020 is attached to the Applicant’s Request for Review, and the same provides as follows: -

***“We China Communications Services International Limited... who participated in the above mentioned tender number KeNHA/2297/2020- Civil Works for the Main Build of Optic***

***Fiber Cable for Eldoret-Lokichar-Nakodok Corridor, Lot 5: Eldoret-Lokichar Section (285KM) would like to request for the following information on the said tender for our review:***

- 1. Bid opening minutes;***
- 2. Bid opening attendance register;***
- 3. Bid Evaluation Report.”***

Having considered the contents of the Applicant’s letter addressed to the Procuring Entity, the Board observes that section 67 of the Act provides as follows: -

- "67 (1) During or after procurement proceedings and subject to subsection (3), no procuring entity and no employee or agent of the procuring entity or member of a board, commission or committee of the procuring entity shall disclose the following—***
- (a) .....***
  - (b) .....***
  - (c) information relating to the evaluation, comparison or clarification of tenders, proposals or quotations”***
- (2) .....***

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

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

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

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

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

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

**(4) Notwithstanding the provisions of subsection (3), the disclosure to an applicant seeking a review under Part XV shall constitute only the summary referred to in section 67(2)(d)(iii) [i.e. section 68 (2) (d) (iii) of the Act] [Emphasis by the Board]**

On its part, section 68 (2) (d) (iii) of the Act

**68 (1) .....**

- (2) The records for a procurement shall include—**
- (a) .....**;
  - (b) .....**;
  - (c) .....**;
  - (d) for each tender, proposal or quotation that was submitted—**
    - (i) .....**;
    - (ii) .....**;
    - (ii) a summary of the proceedings of the opening of tenders, evaluation and comparison of the tenders, proposals or quotations, including the evaluation criteria used as prescribed”**

Having considered the foregoing provisions, the Board notes that an applicant seeking a review is entitled to a summary of the proceedings of the opening of tenders, evaluation and comparison of the tenders, proposals or quotations, including the evaluation criteria used as prescribed pursuant to section 67 (4) read together with section 68 (2) (d) (iii) of the Act. The Board further takes cognizance of section 78 (8) of the Act provides as follows: -



***"The accounting officer of a procuring entity shall, on request, provide a copy of the tender opening register to a person submitting a tender"***

Having considered the foregoing submissions, the Board observes that at the time the Procuring Entity received the Applicant's letter on 24<sup>th</sup> August 2020, the Applicant was an unsuccessful tenderer and not an applicant seeking a review, since it had not filed a Request for Review application before this Board. This means that the Applicant was entitled to a copy of the tender opening register pursuant to section 78 (8) of the Act and the specific reasons why its bid was found non-responsive pursuant to section 87 (3) of the Act. Given that the letter of notification of unsuccessful bid dated 11<sup>th</sup> August 2020 already informed the Applicant that its bid was unsuccessful because it was the "second lowest evaluated bid", the Applicant could only be furnished with a copy of the tender opening register pursuant to section 78 (8) of the Act and not the Bid Opening Minutes and Bid Evaluation Report.

It is worth noting that, all the confidential documents pertaining to the subject procurement process were furnished to the Board pursuant to section 67 (3) (e) of the Act including the Tender Opening Attendance Register dated 17<sup>th</sup> June 2020. Accordingly, the Board finds that the Applicant suffered no prejudice despite the Procuring Entity's failure to provide the Applicant with a copy of the Tender Opening Attendance

Register dated 17<sup>th</sup> June 2020 which the Board studied in its determination of the Applicant's Request for Review.

Having dispensed with the above preliminary issues, the Board shall now address the first issue for determination 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** further 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 Board observes that the issue under consideration before it relates to applicability of Section 4 (2) (f) of the Act and the conditions to be satisfied under that provision in ousting, the application of the Act and the jurisdiction of this Board. The Board having considered parties' submissions, observes that, section 4 (2) (f) of the Act provides as follows:

-

***"4 (1) This Act applies to all State organs and public entities with respect to—***

***(a) procurement planning;***

***(b) procurement processing;***

***(c) inventory and asset management;***

***(d) disposal of assets; and***

***(e) contract management.***

***(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. 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”) at paragraphs 152 to 154 thereof 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.**

However, 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") 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 16<sup>th</sup> 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 dependent 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]

Having considered the findings in the above cases, the Board notes, in the KPLC Case, Justice Nyamweya faulted the Board for its failure to consider the applicability of the bilateral agreement which was subject of proceedings before the Board, in order for the Board to make a determination on the import of section 4 (2) (f) of the Act. This Board cannot therefore ignore the import of the said provision of the Act. Further, 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* further 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).

Both Justice Odunga and Justice Nyamweya are clear that one of the parties to a procurement under a bilateral agreement or multilateral agreement must be the Government of Kenya. In the Athi Water Case, the parties to the bilateral agreement were the International Development Association and the Government of Kenya whereas the procuring entity was identified as Athi Water Services Board and the procuring entity applied national competitive bidding procedures. In the KPLC Case, the parties to the bilateral agreement were Nordic Development Fund and the Government of Kenya while the implementing agency was identified as Kenya Power and Lighting Company to undertake the procurement on behalf of the Government of Kenya, as its agent and the procuring entity applied international competitive bidding procedures. Secondly, the Guidelines applicable to the Athi Water Case and the KPLCE Case was the World Bank Guidelines: Procurement of Goods, Works and Non-Consulting Services under IBRD credits and grants by World Bank Borrowers, (Revised on 1<sup>st</sup> July 2014) and specifically noted in the procuring entity's advertisement notice in both cases.

The Board having considered the findings made in the Athi Water Case and those made in the KPLC Case now proceeds to address the circumstances of the instant Request for Review application.

The Procuring Entity referred the Board to a Financing Agreement dated 20<sup>th</sup> July 2015 between the Republic of Kenya and the International Development Association. This prompted the Board to first establish the relationship between the Republic of Kenya and the International Development Association. International Development Association (IDA) is described in the Official Website of the World Bank ([www.worldbank.org](http://www.worldbank.org).) as follows:-

***"The International Development Association (IDA) is the part of the World Bank that helps the world's poorest countries. Overseen by 173 shareholder nations, IDA aims to reduce poverty by providing loans (called "credits") and grants for programs that boost economic growth, reduce inequalities, and improve people's living conditions.***

***IDA complements the World Bank's original lending arm—the International Bank for Reconstruction and Development (IBRD). IBRD was established to function as a self-sustaining business and provides loans and advice to middle-income and credit-worthy poor countries. IDA lends money on concessional terms and also provides grants to countries***

***at risk of debt distress. In addition to concessional loans and grants, IDA provides significant levels of debt relief through the Heavily Indebted Poor Countries (HIPC) Initiative and the Multilateral Debt Relief Initiative (MDRI)."***

Further, The Official Website of the World Bank describes the International Bank for Reconstruction and Development (IBRD) as follows: -

***"The International Bank for Reconstruction and Development (IBRD) is a global development cooperative owned by 189 member countries. As the largest development bank in the world, it supports the World Bank Group's mission by providing loans, guarantees, risk management products, and advisory services to middle-income and creditworthy low-income countries, as well as by coordinating responses to regional and global challenges.***

***Created in 1944 to help Europe rebuild after World War II, IBRD joins with IDA, our fund for the poorest countries, to form the World Bank. They work closely with all institutions of the World Bank Group and the public and private sectors in developing countries to reduce poverty and build shared prosperity"***

From the above description, the Board observes that IBRD (World Bank's original lending arm) and IDA (as a complimentary to World Bank's original lending arm) joined to form the World Bank in providing loans (called "credits") and grants for programs that boost economic growth, reduce inequalities, and improve people's living conditions in least developed countries. In order for a country to benefit from loans and grant provided by the World Bank through IDA, a country must become a member of IDA and the obligations of the said country would be specified in an agreement between such country and IDA. The International Development Association Act, Chapter 465, Laws of Kenya provides in its Preamble as follows: -

***"WHEREAS on the 26<sup>th</sup> January 1960, the executive directors of the International Bank for Reconstruction and Development approved Articles of Agreement (hereafter in this Act referred to as the Agreement) providing for the establishment and operation of an international body to be called the International Development Association (hereafter in this Act referred to as the Association):***

***AND WHEREAS copies of the text of the Agreement have been laid before the National Assembly:***

***AND WHEREAS it is expedient that Kenya should become a member of the Association and that provision should be***

***made for acceptance by Kenya of the Agreement and for carrying out the obligations of Kenya thereunder”***

Following the enactment of the International Development Association Act, Kenya became a member of IDA and would as a result of this membership benefit from financing advanced by the World Bank through either the IBRD or IDA subject to a Financing Agreement detailing the manner in which the funds would be used.

The Board studied provisions of the Financing Agreement dated 20<sup>th</sup> July 2015 and notes that Clause 2.01 of Article II of the said Financing Agreement provides as follows: -

***“The Association [International Development Association] agrees to extend to the Recipient [The Republic of Kenya] on the terms and conditions set forth or referred to in this Agreement, a credit in an amount equivalent to three hundred sixty-two million, five hundred thousand Special Drawing Rights (SDR 362,500,000) (variously, “Credit” and “Financing”), to assist in financing the project described in Schedule 1 to this Agreement (“Project”)”***

Clause 3.01 of Article III of the Finance Agreement specifies parts of the Project to be implement by the Procuring Entity as follows: -

***"The Recipient declares its commitment to the objectives of the Project and the Program. To this end, the Recipient shall:***

***(a) .....***

***(b) cause Parts 1, 2 (b), 3 (a)i, 3 (c)ii and 3 (d) of the Project to be carried out by Kenya National Highways Authority (KeNHA)"***

Further, Schedule 1. Project Description of the Finance Agreement describes the project to be undertaken by the Procuring Entity as an implementing entity as follows: -

***"The objective of the Project is to improve the movement of goods and people along Lokichar-Nadapal/Nakodok part of the Eldoret-Nadapal road in the north western part of Kenya, in particular and to enhance connectivity between Kenya and South Sudan in general***

***The Project constitutes the second phase of the Program, and consists of the following parts:***

***Part 1: Upgrading Selected Critical Road Infrastructure...***

***Part 2: Facilitation of Regional Transport, Trade and Development***

***(a) .....***

***(b) Carry out a program of activities designed to support KeNHA to implement transport, trade and development facilitation measures...***

**(c) .....**;

**Part 3: Institutional Development and Program Management**

**(a) Carrying out a program of activities designed to strengthen the institutional capacities of entities involved in Project Implementation including (i) strengthening the capacity of KeNHA in road design review as well as contract management, value engineering, road maintenance, safeguards and procurement management**

**(b) .....**;

**(c) .....**;

**(d) Provision of technical assistance to carry out preparatory studies to support the preparation of the next phase of the Program and develop follow-on regional transport and trade facilitations projects as well as bidding documents for long term performance-based road maintenance contracting”**

It is worth noting that Clause A (1) of Section III. Procurement of the Financing Agreement provides that: -

**"Goods, Works and Non-Consulting Services**



***All goods, works and non-consulting services required for the Project and to be financed out of the proceeds of the Financing shall be procured in accordance with the requirements set forth or referred to in Section I of the Procurement Guidelines and with the provisions of this Section”***

On its part, Clause 29 of Section I. of the Appendix to the Financing Agreement provides as follows: -

***“Procurement Guidelines means the “Guidelines: Procurement of Goods, Works and Non-Consulting Services under IBRD Loans and IDA Credits and Grants by World Bank Borrowers” dated January 2011 (revised July 2014)”***

The Board observes that the Procuring Entity relied on the Financing Agreement which makes reference to the Guidelines for Procurement of Goods, Works and Non-Consulting Services under IBRD Loans and IDA Credits and Grants by World Bank Borrowers” dated January 2011 (revised July 2014) (hereinafter referred to as the “World Bank Guidelines”) to support its view that the subject procurement process is being undertaken pursuant to a bilateral agreement between the Republic of Kenya and the International Development Association. As a result, the Procuring Entity avers that by dint of section 4 (2) (f) of the Act, the World Bank Guidelines

are applicable to the subject procurement process and not the Act, thereby ousting the jurisdiction of the Board.

Having considered the Procuring Entity's averments, the Board observes that whereas the Financing Agreement signed on **20<sup>th</sup> July 2015** makes reference to applicability of World Bank 2014 Guidelines to procurement of goods, works and non-consulting services, the Procuring Entity initiated the subject procurement process through a Specific Procurement Notice dated **28<sup>th</sup> April 2020**. Clause 4 of the Procuring Entity's Specific Procurement Notice states as follows: -

***"The procurement will be conducted through national competitive procurement using Request for Bids (RFB) as specified in the World Bank Regulations for IPF Borrowers, July 2016 Revised November 2017 and August 2018 ("Procurement Regulations") and is open to all eligible bidders as defined in the Procurement Regulations."***

From the foregoing, the Board observes that the Financing Agreement dated 20<sup>th</sup> July 2015 states that the World Bank Guidelines are applicable to procurement of goods, works and non-consulting services required for the project (described in Schedule 1. Project Description of the Finance Agreement which is referenced hereinbefore). However, Clause 4 of the Procuring Entity's Specific Procurement Notice dated 28<sup>th</sup> April 2020 states that the subject procurement process will be conducted through national

competitive procurement (i.e. referred to as National Competitive Bidding under Clause B (2) of Schedule 2 of the Financing Agreement) using Request for Bids as specified in the World Bank Regulations for IPF Borrowers, July 2016 Revised November 2017 and August 2018(hereinafter referred to as "the World Bank Procurement Regulations"). This prompted the Board to interrogate applicability of the World Bank Guidelines issued in January 2011 and Revised in July 2014 vis-à-vis the World Bank Procurement Regulations issued in July 2016 and Revised in November 2017 and August 2018.

Jędrzej Górski in his Article **"The World Bank's New Procurement Regulations (European Review of Private Law, December 2016)"** provides a background of how the World Bank has influenced regulation and international liberalization of public procurement markets. Further, at page 302 of the said Article, the author states as follows: -

***"Since its inception, the World Bank has been required by the Articles of Agreement [i.e. the US Department of Treasury, 'Articles of Agreement- International Bank for Reconstruction and Development' (Bretton Woods 1 to 22 July 1944, as last amended 27 June 2012) and World Bank, 'Articles of Agreement-International Development Association, 1960] to 'make arrangements to ensure that the proceeds of any loan are used only for the purposes for which the loan was granted, with due attention to***

*considerations of economy and efficiency and without regard to political or other non-economic influences or considerations'. However, the procurement process remained unregulated until 1951 when the International Competitive Bidding ('ICB') was introduced in order to (i) break up previous de facto monopoly of the US suppliers, and (ii) prevent the IBRD from financing projects coming from circles with vested interests in providing equipment, services or construction works for specific projects. More regulation came in 1964 with the Guidelines on the Procurement of Goods, Works and Non-consulting Services ('General Guidelines' also known as the 'red book') regulating the ICB, followed by the separate Guidelines on Selection and Employment of Consultants ('Consultant Guidelines' also known as the 'green book') first issued in 1966. Yet in 1956, the World Bank 'tied' granted loans by limiting eligible bidders to nationals of the IBRD (plus Switzerland) and continued to finance mostly large projects subjected to the ICB throughout the 1970s. Suppliers and contractors from Western Europe, the United States, Canada and Japan accounted for 62% IBRD's disbursement between 1966 and 1970, and for 80% of IDA's disbursement in 1971. However, since 1966, the World Bank has allowed some forms of domestic procurement in the case of smaller contracts and even preferences for domestic suppliers and contractors.*

***This led, in the 1980s, to the development of alternative procurement methods like the National Competitive Bidding ('NCB') or 'shopping'***

At page 304 of the said Article, the author notes the following: -

***"The Procurement Regulations [i.e. World Bank Regulations for IPF Borrowers, July 2016, Revised November 2017 and August 2018] have replaced both General Guidelines [i.e. Guidelines for Procurement of Goods, Works and Non-Consulting Services under IBRD Loans and IDA Credits and Grants by World Bank Borrowers" dated January 2011 (revised July 2014)] and Consultant Guidelines....***

***The absolute highlight of the New Regulations is that, unlike previous guidelines, they widely facilitate the use of alternative procurement arrangements ('APA'). Subject to the World Bank's consent, APAs may include procurement rules of (i) borrowers' agencies or entities, replacing the piloting program on the use of country systems, or (ii) other MDBs or bilateral aid agencies, which was not possible under the previous system"***

From the foregoing, the Board observes that the World Bank Procurement Regulations replaced the World Bank Guidelines whilst introducing alternative procurement arrangements which may include the use of

procurement rules of a borrower to a procurement process. The World Bank introduced this in the World Bank Procurement Regulations after development of alternative procurement methods like National Competitive Bidding in the year 1980. The Board studied provisions of the World Bank Procurement Regulations and notes that Clause 2.4 thereof provides guidance on how Alternative Procurement Arrangements are undertaken. The said provision states as follows: -

***"At the Borrower's request, the Bank (subject to its policies and rules, and applicable fiduciary and operational requirements), may agree to:***

- a. rely on and apply the procurement rules and procedures of another multilateral or bilateral agency or organization, and may agree to such a party taking a leading role in providing the implementation support and monitoring of procurement activities; and***
- b. rely on and apply the procurement rules and procedures of an agency or entity of the Borrower.***

On its part, Clause 5.3 of Section V. Procurement Provisions of the World Bank Procurement Regulations provides as follows: -

***"When approaching the national market, as agreed in the Procurement Plan, the country's own procurement procedures may be used. These procurement procedures***

***shall be consistent with the Bank's Core Procurement Principles and ensure that the Bank's Anti-Corruption Guidelines and Sanctions Framework and contractual remedies set out in its Legal Agreement apply."***

Further, Clause 5.25 of Section V. Procurement Provisions of the World Bank Procurement Regulations on Standard Procurement Documents states as follows: -

***"For international competitive procurement, the Borrower shall use the Bank's Standard Procurement Documents (SPDs), available on its external website at [www.worldbank.org/procurement/standarddocuments](http://www.worldbank.org/procurement/standarddocuments).***

***For Procurement involving national competitive Procurement, the Borrower may use its own Procurement Documents, acceptable to the Bank."***

Having considered the foregoing provisions, the Board observes that the World Bank Procurement Regulations allow borrowers (such as the Republic of Kenya in this instance) to use their own procurement procedures and their own Procurement Documents that are acceptable to the World Bank where National Competitive Bidding procedures are used. Having noted that the Republic of Kenya executed a Financing Agreement with the International Development Association in the year 2015, way before the World Bank Procurement Regulations were issued, this explains

why the Financing Agreement dated 20<sup>th</sup> July 2015 makes reference to the World Bank Guidelines which were issued in January 2011 and later revised in July 2014 way before the World Bank Procurement Regulations of July 2016 were issued and later revised in November 2017 and August 2018.

From its own Specific Procurement Notice dated 28<sup>th</sup> April 2020, the Procuring Entity confirms that it applied National Competitive Bidding Procedures in accordance with the World Bank Procurement Regulations to the subject procurement process. This Board takes cognizance that the High Court in the KPLC Case and the Athi Water Case specifically cited the procuring entity's advertisement notice which made reference to the World Bank Guidelines applicable to the procurement process. The Court in the KPLC Case faulted the Board (as was then constituted) for its failure to note that the World Bank Guidelines were specified in the advertisement notice and were applicable to the procurement process undertaken by KPLC as the implementing agency on behalf of the Government of Kenya. As a result, this Board has to take into account the fact that the Procuring Entity's Specific Procurement Notice states that the Procuring Entity applied National Competitive Bidding Procedures in accordance with the World Bank Procurement Regulations and is an implementing agency of the Republic of Kenya.



The Board further studied the Procuring Entity's Replying Affidavit and notes that at paragraph 18 thereof, the Procuring Entity depones as follows: -

***"That a Tender Evaluation Committee was appointed on 19<sup>th</sup> June 2020 to attend to the evaluation in accordance with the requirements of Section 46 of the PPADA, 2015 since the World Bank Guidelines: Procurement of Goods, Works and Non-Consulting Services under IBRD Loans and IDA Credits & Grants by World Bank Borrowers issued in January 2011 and revised in July 2014 do not expressly provide guidelines on appointment of tender evaluation committee"***

From the foregoing, the Procuring Entity depones that it applied the provisions of section 46 of the Act on appointment of an evaluation committee because in its view, the World Bank Guidelines do not provide guidelines on how such appointment ought to be done. In the professional opinion dated 29<sup>th</sup> July 2020, the Procuring Entity's Deputy Director, Supply Chain Management confirms that the said professional opinion fulfilled the requirements of section 84 of the Act and that requirements of the Act were adopted in instances where the Procuring Entity was of the view that there was no conflict between the Act and the World Bank Guidelines.

This in the Board's view is an admission that the Procuring Entity applied provisions of the Act to the subject procurement process. Having

established that the World Bank Procurement Regulations allow use of procurement procedures of a borrower's country and use of the Procuring Entity's Bidding Document subject to the World Bank's consent, it is the Board's considered opinion that, the Procuring Entity applied provisions of the Act where it deemed fit because the World Bank Procurement Regulations gives the Procuring Entity leeway to apply procurement laws of Kenya to the subject procurement process and to use its own Bidding Documents (i.e. standard tender documents prepared by the Public Procurement Regulatory Authority) subject to the World Bank's consent. As a result, the Procuring Entity incorporated open method of tendering recognized in section 96 of the Act given that it was at liberty to apply national competitive bidding procedures such that the resultant procurement contract would be between the Procuring Entity (as the Employer) and a successful bidder determined from those who would participate in the open tendering process (as the service providers).

It is the Board's considered view that, it was never the intention of Parliament that, all procurements and disposal of assets under bilateral or multilateral agreements between the Government of Kenya and any other foreign government, agency, entity or multilateral agency, would be exempted from application of the 2015 Act. It therefore follows that the import of section 4 (2) (f) of the Act must not be construed narrowly, in order to give effect to Article 227 of the Constitution which guides procurement of goods and services by a State organ or public entity.

We say so because Regulation 5 (1) of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as "Regulations 2020") state that: -

***"Where any bilateral or multilateral agreements are financed through negotiated loans for the procurement of goods, works or services, the Act shall not apply where the agreement specifies the procurement and asset disposal procedures to be followed"***

Having considered the provisions of the Financing Agreement dated 20<sup>th</sup> July 2015, the Board observes that the same specified the manner in which funds for implementation of the subject tender would be allocated to the Procuring Entity herein. The same did not settle the manner in which the subject procurement would be undertaken. The Board has also considered the provisions of the World Bank Procurement Regulations and established that the same supersede the World Bank Guidelines. The World Bank Procurement Regulations gave the Procuring Entity leeway to apply procurement laws of Kenya and since national competitive bidding procedures were used, the Procuring Entity prepared its own Bidding Document subject to World Bank's consent and incorporated open method of tendering in accordance with section 96 of the Act, appointment of an evaluation committee pursuant to section 46 of the Act and issuance of a professional opinion in accordance with section 84 of the Act.

A blanket application of section 4 (2) (f) of the Act, has the potential of interfering with the national values and principles of governance as outlined in the Constitution. Article 10 (2) (c) of the Constitution provides that: -

***"(1) .....***

***(2) The national values and principles of governance include—***

***(a) .....***

***(b) .....***

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

On its part, Article 201 (d) of the Constitution states as follows: -

***"The following principles shall guide all aspects of public finance in the Republic—"***

***(a) .....***

***(b) .....***

***(c) .....***

***(d) public money shall be used in a prudent and responsible way***

Section 2 of the Public Finance Management Act, 2012 (hereinafter referred to as "the PFM Act") defines public money to include: -

- "(a) all money that comes into possession of, or is distributed by, a national government entity and money raised by a private body where it is doing so under statutory authority***
- (b) money held by national government entities in trust for third parties and any money that can generate liability for the Government***

Further, one of the objectives of the PFM Act as described in section 3 thereof is to ensure: -

***"public finances are managed at both the national and the county levels of government in accordance with the principles set out in the Constitution"***

The above principles guide public procurement processes undertaken in our country and this Board cannot allow a procuring entity to ignore such provisions when undertaking its procurement process and more so, having a procurement process shrouded in mystery contrary to the principles of transparency and accountability.

One can confidently assume that Parliament intends its legislation to be interpreted in a meaningful and purposive way giving effect to the basic objectives of the legislation as was appreciated by Justice Mativo in **Judicial Review Miscellaneous Application No. 284 of 2019, Republic v. The Public Procurement Administrative Review Board & 2 Others ex parte CMC Motors Group Limited** when he cited Court of Appeal decision in **Kimutai v. Lenyongopeta & 2 others, Civil Appeal No. 273 of 2003 [2005] 2 KLR 317; [2008] 3 KLR (EP) 72** wherein an excerpt of Lord Denning's finding was cited with approval as follows: -

***"the grammatical meaning of the words alone, however is a strict construction which no longer finds favour with true construction of statutes. The literal method is now completely out of date and has been replaced by the approach described as the purposive approach. In all cases now, in the interpretation of statutes such a construction as will (promote the general legislative purpose) underlying the provision is to be adopted. It is no longer necessary for the judges to wring their hands and say, "There is nothing we can do about it". Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use their good sense to remedy it-by reading words in, if necessary-so as to do what Parliament would have done, had they had the situation in mind"***

Parliament did not enact section 4 (2) (f) of the Act to the effect that such a provision would scuttle the national values and principles of governance provided for in the Constitution. To enact such a law would defeat the letter and spirit of Article 10 (2) (c), 201 (d), 227 of the Constitution read together with sections 2 and 3 of the PFM Act.

For the foregoing reasons, the Board finds that the subject procurement process applied National Competitive Bidding Procedures in accordance with the World Bank Procurement Regulations which allowed the Procuring Entity to apply the Laws of Kenya to the subject procurement process and to prepare its own Bidding Document as opposed to relying on World Bank's procurement documents, hence fails to meet the threshold of section 4 (2) (f) of the Act.

Accordingly, the Board finds that it has jurisdiction to entertain the Request for Review and shall now address the substantive issue framed for determination.

On the second issue, the Board observes that at paragraph 3 of its Request for Review, the Applicant contends that the 1<sup>st</sup> Interested Party quoted a bid price of Kshs. 516,686,606.10 against the Applicant's bid price of Kshs. 478,594,026.51, According to the Applicant it ought to have been declared the lowest evaluated bidder in the subject tender and not the 1<sup>st</sup> Interested Party. At paragraph 24 of its Further Affidavit, the Applicant depones that

the Activity Schedule for Lot 5 provided in Addendum 1 dated 9<sup>th</sup> June 2020 included 10% contingency amount and that despite this, the Procuring Entity failed to apply uniform criterion when considering the Activity Schedule for Lot 5 submitted by bidders in arriving at the lowest evaluated price.

According to paragraph 23 of its Replying Affidavit, the Procuring Entity depones that evaluation of bids was done in accordance with Clause 35.2 (a) of Section II. Instructions to Bidders of the Bidding Document wherein the Procuring Entity considered the bid price, excluding provisional sums and provisions for contingencies. The Procuring Entity further depones that the Applicant's bid price of Kshs. 478,594,026.51 at tender opening, was lower than that of the 1<sup>st</sup> Interested Party whose bid price was Kshs. 516,686,606.10. According to the Procuring Entity, it applied the requirement under Clause 35.2 (a) of Section II. Instructions to Bidders of the Bidding Document to determine the Applicant's net bid price after evaluation as Kshs. 474,941,780.00 and the 1<sup>st</sup> Interested Party's net bid price of Kshs. 453,327,994.08 thereby making the 1<sup>st</sup> Interested Party the lowest evaluated bidder. On its part, the 1<sup>st</sup> Interested Party depones at paragraph 26 of its Replying Affidavit that the Procuring Entity applied the criteria under Clause 35.2 (a) of Section II. Instructions to Bidders of the Bidding Document in its determination that the 1<sup>st</sup> Interested Party submitted the lowest evaluated bid.



Having considered parties' submissions, the Board observes that Clause 35 of Section II. Instructions to Bidders of the Bidding Document provides as follows: -

**"35.1. The Employer shall use the criteria and methodologies listed in this Clause. No other evaluation criteria and methodologies shall be permitted.**

**35.2 To evaluate a bid, the Employer shall consider the following:**

- (a) the bid price, excluding Provisional Sums and the provision if any, for contingencies in the Summary Bill of Quantities for admeasurement contract, but including Daywork items, where priced competitively;**
- (b) price adjustment for correction of arithmetic errors in accordance with ITB 31.1;**
- (c) price adjustment due to discounts offered in accordance with ITB 14.4;**
- (d) converting the amount resulting from applying (a) to (c) above, if relevant, to a single currency in accordance with ITB 32;**
- (e) price adjustment for non-conformities in accordance with ITB 30.3;**

***(f) the additional evaluation factors specified in Section III. Evaluation and Qualification Criteria”***

Further, Clause 36 of Section I. Instructions to Bidders of the Bidding Document provides as follows: -

***“The Employer shall compare the evaluated prices of all substantially responsive bids established in accordance with ITB 35.2 to determine the lowest evaluated bid”***

The Board studied the Evaluation Report dated 27<sup>th</sup> July 2020 to determine the manner in which the Procuring Entity arrived at the lowest evaluated bidder and notes that Table 4 at page 4 of the said Evaluation Report outlined the prices quoted by the Applicant and the 1<sup>st</sup> Interested Party as follows: -

<b>Bidder No</b>		<b>Currency</b>	<b>Read out price</b>
1	M/s China Communication Services International Limited	Ksh	478,594,026.51
6	M/s Soliton Telmec Limited	Ksh	516,686,606.10

The Board observes that the Procuring Entity provided a Summary of Activity Schedule in Section IV. Bidding Forms at page 64 of the Bidding Document, wherein bidders were to complete the same giving a breakdown of their bid price against activities to be undertaken in the subject tender. However, through Addendum No. 1 dated 9<sup>th</sup> June 2020, the Procuring Entity amended the Summary of Activity Schedule as follows:

-

No	Query	Response
1	Are there provisions for contingencies and price adjustments	1. Lot 5: The Activity Schedule on page 64 has been amended to include 10% physical contingencies (See Annex 1 (a))

Annex 1 (a). Activity Schedule for Lot 5 which is referenced by the Procuring Entity in Addendum No. 1 dated 9<sup>th</sup> June 2020 provides as follows: -

Item No.	Description	Unit	Amount (Kshs)
1.01	Provision of Design Services including relevant documentation as directed by Project Manager	Lump Sum	
1.02	Trenching laying of HDPE duct, backfilling and installation of warning tape including construction of man-holes/hand-holes in soft/firm ground as directed by Project Manager (approx. 75% of the Section)	Lump Sum	
1.03	Trenching, laying of HDPE duct and backfilling and installation of warning tape including construction of man-holes/hand-holes in rocky ground as directed by	Lump Sum	

	Project Manager (approx. 25% of the Section)		
1.04	Bore drilling on major road crossings, driveways and as directed by the Project Manager	Lump Sum	
1.05	Provision of Gabion Mesh, Installation and rock filling in dry river bed crossings and erosion-prone soils as directed by the Project Manager	Lump Sum	
1.06	Provision of Project Manager's facilities including furnished office, stationery, accommodation and vehicles as directed by the Project Manager	Lump Sum	35,000,000.00
<b>1.07</b>	<b>Provisional sums for additional ES outcomes including HIV/AIDS and Road Safety</b>	<b>Prov. Sum</b>	<b>15,000,000.00</b>
<b>1.08</b>	<b>Provisional sums for the Employer's portion (50%) of DAAB fees and expenses</b>	<b>Prov. Sum</b>	<b>5,000,000.00</b>
A	SUB-TOTAL A		
B	Provisional Sums specified in the Schedule		15,000,000.00

C	Sub-Total of Bills (A) Less Provisional Sums specified in Schedule (B)		
<b>D</b>	<b>Add 10% of (C) for Physical Contingencies to be expended in part or deleted by the Project Manager pursuant to Clause 41 of the Conditions of Contract</b>		
E	Sub-Total E = A+C+D		
F	Add 14% of E for VAT		
G	GRAND-TOTAL CARRIED FORWAD TO FORM OF BID (E+F)		

Having considered the contents of Annex 1 (a). Activity Schedule for Lot 5 as amended by Addendum No. 1 dated 9<sup>th</sup> June 2020, the Board studied the Applicant's original bid and that of the 1<sup>st</sup> Interested Party and notes that both bidders provided their respective duly completed Activity Schedules for each of the Activities outlined hereinbefore. According to the Evaluation Report dated 27<sup>th</sup> July 2020, the Procuring Entity undertook a comparison of bid prices of all bidders and recorded the said comparison with respect to the Applicant and the Interested Party as follows: -

Bidder No	Name	Sub A	PC Sums	VAT 14%	Contingency	Total	Sub A less PC Sums	Ranking
6	M/s Soliton	365,587,09	20,000,00	51,182,19	36,558,70	453,327,99	345,587,09	1

	Telmec Limited	2.00	0.00	2.88	9.20	4.08	2.00	
1	M/s China Communication Services International Limited	383,017,56 5.00	20,000,00 0.00	53,622,45 9.10	38,301,75 6.50	474,941,78 0.60	363,017,56 5.00	2

Having considered the manner in which the Procuring Entity arrived at the lowest evaluated bidder and having established that the Procuring Entity applied the provisions of the Act to the subject procurement process, the Board must determine whether the Procuring Entity complied with the provisions of the Act and Regulations 2020 in arriving at the lowest evaluated bidder. It is worth noting that section 86 (1) (a) of the Act provides as follows: -

***"(1) The successful tender shall be the one who meets any one of the following as specified in the tender document—***

***(a) the tender with the lowest evaluated price"***

On its part, Regulation 77 of Regulations 2020 provide as follows: -

***77 (1) Upon completion of the technical evaluation under regulation 76 of these Regulations the evaluation committee shall conduct a financial evaluation and comparison to determine the evaluated price of each tender***

- (2) The evaluated price for each bid shall be determined by—**
- (a) taking the bid price in the tender form**
  - (b) taking into account any minor deviation from the requirements accepted by a procuring entity under section 79 (2) (a) of the Act**
  - (c) where applicable converting all tenders to the same currency using the Central Bank of Kenya exchange rate prevailing at the tender opening date**
  - (d) applying any margin of preference indicated in the tender document**
- (3) Tenders shall be ranked according to their evaluated price and the successful tender shall be in accordance with the provisions of section 86 of the Act.**

Having considered the provisions of section 86 (1) (a) of the Act read together with Regulation 77 of Regulations 2020, the Board observes that to arrive at the evaluated price of a tender, a procuring entity; (i) considers the price at tender opening, (ii) considers any minor deviation from the requirements accepted by a procuring entity under section 79 (2) (a) of the Act, (iii) where applicable, converts all tenders to the same currency using the Central Bank of Kenya exchange rate prevailing at the tender opening

date and (iv) applies any margin of preference indicated in the tender document. Pursuant to Regulation 77 (2) of Regulations 2020, the Procuring Entity is then required to rank tenders in accordance with their evaluated price and make a determination of the successful tender in accordance with the award criterion applicable to the procurement process by dint of section 86 of the Act. In this instance where the Procuring Entity used open tendering method, the successful tender would be the tender with the lowest evaluated price in accordance with section 86 (1) (a) of the Act.

With that in mind, the Board considered the meaning of Provisional Sum and Contingency and notes that K. Zan in his Article, **“Contract Practice, Measurements & Costing, Quantity Surveying Practice (December 2018)”** defines the term “Provisional Sum” as follows: -

***“The Term “Provisional sum” can be defined as an amount or a sum given for the works that cannot be predicted, defined, or described in detail at the time the tender documents are issued.***

***For example, there may be so many unpredictable items in site clearance. Consider an infrastructure project involving flyover, roads etc. wherein the regular items of clearance include asphalt road, paving blocks, signal poles, crash barriers, guard rails, sign boards, storm water drainage pipe lines, sewerage pipe lines, manholes, catch pits, gullies,***



***trees, bushes, shrubs, buildings, fencing, compound walls, sculptures and monuments, concrete structures etc. In addition, there will be items specific to the site as well. Many items will be measurable at the time of tender but some of the turn out to be uncertain. For example, quantum of work involved in removal of a site specific item like sculpture or monument may become difficult to ascertain. One way to overcome this difficulty is to allocate these as a separate provisional sum item in the Bill of Quantities”***

The Official Website of LexisNexis ([www.lexisnexis.co.uk](http://www.lexisnexis.co.uk).) also gives an interpretation of the term provisional sum and its application as follows: -

***There is no precise standard definition of provisional sum but it is generally understood to refer to an amount inserted in a bill of quantities, or contract sum analysis, to cover certain items of work which cannot be accurately defined, detailed or valued at the time that the tendering documents are issued by the employer. This could be because the item of work may not be required or the extent/scope of it, is undefined—for example, if the contract works include excavation or underground work that cannot be properly investigated until the project has commenced. It is called a ‘provisional’ sum because neither party is held to the figure—***

***the actual figure may be higher or lower than the provisional sum stated.”***

On the other hand, the term “Contingencies” is defined by J. R. Murdoch and Will Hughes in their book **“Construction Contracts: Law and Management (Taylor & Francis, 2000)”** at page 136 thereof as follows: -

***“Contingencies are downside risk estimates that make allowance for the unknown risks associated with a project. Typically, contingencies refer to costs, and are amounts that are held in reserve to deal with unforeseen circumstances. However, they may also refer to other aspects of the project, for example, the programme may include a contingency where it is important that a specific completion date is achieved.”***

Having considered the meaning of the term **“provisional sum”** and **“contingencies”**, the Board observes that a procuring entity may require bidders to insert a provisional sum in their Bill of Quantities to cover certain items of work which cannot be accurately defined, detailed or valued at the time that the tender documents are issued by the procuring entity. On the other hand, a contingency is an amount that is held in reserve to deal with unforeseeable circumstances. For example, if certain items of work were not accurately defined, detailed or valued at the time of issuance of tender

documents, the contingency amount is useful in catering for any excess costs incurred when the item or activity is undertaken when implementing a tender.

It is the Board's considered view that the Procuring Entity is better placed to know its needs in so far as implementation of the subject tender is concerned and nothing stops the Procuring Entity from directing bidders to specify provisional sums and contingencies in their respective Bill of Quantities to cater for unforeseeable circumstances during implementation of the subject tender. That notwithstanding, if such amounts are to be provided by bidders, the Procuring Entity must provide the same percentage of contingency or the same amount for provisional sums, so that bidders compete on an equal footing when the Procuring Entity interrogates whether or not bidders took provisional sums and contingencies into account in their respective Bills of Quantities.

From the Evaluation Report dated 27<sup>th</sup> July 2020, the Procuring Entity applied Clause 35 of Section I. Instructions to Bidders of the Bidding Document by excluding the provisional sums and contingency amounts to arrive at the lowest evaluated bidder. However, Regulation 77 (2) of Regulations 2020 do not recognize provisional sums and contingency amounts as part of the components used when arriving at the lowest evaluated bidder but that the Procuring Entity ought to have considered (i) the price at tender opening, (ii) any minor deviation from the requirements

accepted by the procuring entity under section 79 (2) (a) of the Act, (iii) where applicable, conversion of all tenders to the same currency using the Central Bank of Kenya exchange rate prevailing at the tender opening date and (iv) application of any margin of preference indicated in the tender document.

It is the Board's considered view that the Procuring Entity ought to have confirmed whether bidders have accounted for provisional sums and contingencies in their respective Bill of Quantities that would cater for unforeseeable circumstances during implementation of the subject tender. However, for purposes of arriving at the evaluated price, the Procuring Entity ought to have taken the provisions of Regulation 77 of Regulations 2020 and section 86 (1) (a) of the Act, into account. This Board would like to make an observation that the Procuring Entity applied open method of tendering since it had leeway to apply national competitive bidding procedures specified in the procurement laws of Kenya. As a result, Clause 35.2 of Section I. Instructions to Bidders of the Bidding Document does not conform to the manner in which a procuring entity ought to arrive at the lowest evaluated price. Where such conflict exists between the Bidding Document prepared in a tender that applied national competitive bidding procedures, the Act must prevail.

Accordingly, the Board finds that the Procuring Entity failed to award the subject tender in accordance with Regulation 77 of Regulations 2020 and section 86 (1) (a) of the Act.

In totality, the Request for Review succeeds in terms of 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 in the Request for Review: -

- 1. The Procuring Entity's Letter of Notification of Award of Tender No. KeNHA/2297/2020- Civil Works for the Main Build of Optic Fiber Cable for Eldoret-Lokichar-Nakodok Corridor, Lot 5: Eldoret-Lokichar Section (285KM) dated 11<sup>th</sup> August 2020 addressed to M/s Soliton Telmec Ltd, the 1<sup>st</sup> Interested Party herein, be and is hereby cancelled and set aside.**
- 2. The Procuring Entity's Letter of Notification of Unsuccessful bid dated 11<sup>th</sup> August 2020 with respect to Tender No. KeNHA/2297/2020- Civil Works for the Main Build of Optic Fiber Cable for Eldoret-Lokichar-Nakodok Corridor, Lot 5: Eldoret-Lokichar Section (285KM) addressed to the Applicant, be and is hereby cancelled and set aside.**
- 3. The Procuring Entity is hereby directed to reinstate the Applicant's tender and the 1<sup>st</sup> Interested Party's tender together with all other bidders that made it to Financial Evaluation, at the Financial Evaluation Stage, and conduct a**

**re-evaluation at the Financial Evaluation Stage in accordance with section 86 (1) (a) of the Public Procurement and Asset Disposal Act, 2015 and Regulation 77 of the Public Procurement and Asset Disposal Regulations, 2020, whilst taking into consideration the Board's findings in this Review.**

- 4. Further to Order No. 3 above, the Procuring Entity is hereby directed to conclude the procurement process in Tender No. KeNHA/2297/2020- Civil Works for the Main Build of Optic Fiber Cable for Eldoret-Lokichar-Nakodok Corridor, Lot 5: Eldoret-Lokichar Section (285KM) including the making of an award within fourteen (14) days from the date of this decision.**
- 5. Given that the subject procurement process has not been concluded, each party shall bear its own costs in the Request for Review.**

**Dated at Nairobi this 15<sup>th</sup> day of September 2020**

**CHAIRPERSON**

**SECRETARY**

**PPARB**

**PPARB**