

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NUMBER 2/2020 OF 15TH JANUARY 2020

BETWEEN

ENERGY SECTOR CONTRACTORS

ASSOCIATION.....APPLICANT

AND

THE ACCOUNTING OFFICER,

THE KENYA POWER AND LIGHTING COMPANY

LIMITED.....RESPONDENT

Review against the decision of Kenya Power and Lighting Company Limited in respect of the Tender Document issued on 3rd December 2019 in relation to Tender for Procurement of Design, Supply, Installation, Commissioning of Extensions of MV Lines, LV Single Phase Lines and Service Cables for the Last Mile Connectivity Project (AFD/EU), IPC No: KP1/6E.3/PT/1/19/A70.

BOARD MEMBERS

- | | |
|--------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Dr. Joseph Gitari | -Member |
| 3. Mr. Steven Oundo, OGW | -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. Ms. Irene Walala | -Advocate |
| 2. Mr. Robert Njoroge | -Engineer |
| 3. Mr. Peter Kioko | -Engineer |
| 4. Ms. Stella Mucheke | -Engineer |
| 5. Ms. Ashene Eshitubi | -CSCO-PS&A |

INTERESTED PARTY

-ZOEK-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

The Bidding Process

Kenya Power and Lighting Company Limited (hereinafter referred to as “the Procuring Entity”) advertised Tender for Procurement of Design, Supply, Installation, Commissioning of Extensions of MV Lines, LV Single Phase Lines and Service Cables for the Last Mile Connectivity Project (AFD/EU), IPC No: KP1/6E.3/PT/1/19/A70 (hereinafter referred to as “the subject tender”) on its website (www.kplc.co.ke) and MyGov Publication Website

(www.mygov.go.ke.) inviting sealed bids from eligible bidders on 3rd December 2019.

Bid Submission Deadline

The Procuring Entity's advertisement notice indicated the tender closing date as 11th February 2020. On 15th January 2020, a Request for Review application was lodged with the Public Procurement Administrative Review Board (hereinafter referred to as "the Board") in respect of the subject tender. Accordingly, the Secretary of the Board addressed a letter dated 15th January 2020 to the Procuring Entity notifying it of the pending review application and the requirement to suspend the procurement process pursuant to section 168 of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act").

THE REQUEST FOR REVIEW

M/s Energy Sector Contractors Association (hereinafter referred to as "the Applicant") lodged a Request for Review dated and filed on 15th January 2020 together with a Statement in Support of the Request for Review sworn and filed on the same date.

The Applicant sought for the following orders in the Request for Review:-

- a) An order annulling the Tender Document in respect of Tender for Procurement of Design, Supply, Installation, Commissioning of Extensions of MV Lines, LV Single Phase Lines and Service Cables for the Last Mile Connectivity Project (AFD/EU), IPC No: KP1/6E.3/PT/1/19/A70 and the entire procurement process in relation thereto;***
- b) An order directing the Procuring Entity to prepare a new Tender Document that is devoid of discrimination and one that allows for fair competition;***
- c) An order directing the Procuring Entity to comply with the law in preference and reservations set out in the Constitution and the Public Procurement and Asset Disposal Act;***
- d) An order awarding costs of and incidental to these proceedings; and***
- e) Such further or other orders as the Honourable Board may deem fit to issue.***

First time the matter came up for hearing

The Request for Review first came up for hearing on 28th January 2020 wherein the Applicant was represented by Mr. Kibe Mungai on behalf of the firm of Kinoti & Kibe Company Advocates while the Procuring Entity was represented by its in-house Counsel, Ms. Irene Walala holding brief for Mr. Jude Ochieng’.

Ms. Walala made an application for adjournment of the hearing for the reason that Mr. Ochieng' was out of Nairobi town and was the Advocate on record, seized with the matter on behalf of the Procuring Entity. She therefore urged the Board to postpone the hearing to 31st January 2020 or a day and time convenient to the Board.

In response, Mr. Mungai submitted that he received a letter from the Procuring Entity, notifying him of the intention to make the said application for adjournment, hence undertook not to oppose the said application. He further submitted that the issues raised in the Request for Review are similar to the issues raised in **PPARB Application No. 1 of 2020, Energy Contractors Association v. The Accounting Officer, Kenya Power and Lighting Company Limited & Another** and undertook to file written submissions if the Board allows it, so that on the new date of hearing, parties would highlight their written submissions.

The Board having considered parties' submissions on the Procuring Entity's application for adjournment allowed the same and directed each party to file and serve their written submissions by Thursday, the 30th day of January 2020. Further, the Procuring Entity was ordered to pay the adjournment fees amounting to Kshs. 10,000/- and the hearing was stood over to Friday, the 31st day of January 2020.

Second time matter came up for hearing

The matter came up for hearing a second time on 31st January 2020 wherein the Applicant and the Procuring Entity were represented by their respective advocates mentioned hereinbefore. In addition to this, Mr. Ochieng' was present and made oral submissions on behalf of the Procuring Entity. Even though the Board notified all other bidders who participated in the subject tender of the date scheduled for hearing of the Request for Review, they chose not to address the Board on the hearing date. Subsequently, the hearing proceeded by way of highlighting of written submissions by the Applicant and the Procuring Entity.

PARTIES' SUBMISSIONS

Applicant's Submissions

In his submissions, Counsel for the Applicant, Mr. Mungai, fully relied on the Request for Review, Written Submissions and List of Authorities.

Mr. Mungai pointed out that the issues raised in the Request for Review were also raised in **PPARB Application No. 1 of 2020, Energy Contractors Association v. The Accounting Officer, Kenya Power and Lighting Company Limited & Another**. He then submitted that the Applicant relies on the decision made by the Board in respect of the said issues save for new issues that may be raised in the instance application which were not raised in the previous application heard and determined by

the Board (i.e. **PPARB Application No. 1 of 2020, Energy Contractors Association v. The Accounting Officer, Kenya Power and Lighting Company Limited & Another**).

Counsel then submitted that the Last Mile Connectivity Project being undertaken by the Procuring Entity involves connection of poles and wires from a main line to individual homes and companies and is a type of project that has always been implemented by Kenyans and stated that the same is commonly known locally as "*kuvutiwa stima*". Hence, the said project has no technical aspects which members of the Applicant have undertaken most of the time as sub-contractors, since the main contractors previously awarded the said works have been non-Kenyans.

According to Counsel, the Applicant was aggrieved by the manner in which the Procuring Entity structured the said works; in that the same is not unbundled for example by requiring 6 or 7 counties as a single procurement, rather than to unbundled the said works for a single county to be implemented by a single company. In Counsel's view, this kind of structure increases the cash flow requirements and therefore making the procurement process non-competitive. To support his submission, Counsel made reference to the guiding principles enumerated in section 3 of the Act and the national values and principles of governance stated in Article 10 of the Constitution and submitted that the said provisions support Kenya's economic independence in public procurement processes, such

that works than can be implemented by local contractors are not awarded to foreign contractors.

While making reference to paragraphs 51 to 68 of the Applicant's Written Submissions, Mr. Mungai the Bidding Document used in the subject tender is defective and that the Board should direct the Procuring Entity to issue a new Bidding Document that promotes fair competition. In Counsel's view, the Procuring Entity's provision of excluding preference and reservations in the subject procurement process offends the guiding principles in section 3 (i) and (j) of the Act that seek to promote the local industry.

As regards the jurisdictional issues raised by the Procuring Entity, Counsel submitted as follows:-

As to whether the Request for Review was filed within the statutory period under section 167 (1) of the Act, Counsel submitted that the tender closing date is yet to lapse on 11th February 2020. Given that the Applicant has raised issues regarding the contents of the Bidding Document before the tender closing date, the said Request for Review application has been filed within the statutory period under section 167 (1) of the Act.

On the issue of *locus standi* required to file a Request for Review, Counsel relied on the submissions made in **PPARB Application No. 1 of 2020**,

Energy Contractors Association v. The Accounting Officer, Kenya Power and Lighting Company Limited & Another and the ruling made by the Board on the said issue.

On the third issue raised by the Procuring Entity in opposing the jurisdiction of the Board, Mr. Mungai submitted that the subject procurement has not been initiated pursuant to a Government to Government financing agreement. He submitted that the Applicant, having perused the Procuring Entity's Response, believes that the parties to the financing agreement are the Procuring Entity herein, the Government of Kenya and Agence Française de Développement (AFD). He then referred the Board to paragraphs 28 to 50 of the Applicant's Written Submissions and took the view that irrespective of the parties to the said financing agreement, the Laws of Kenya apply in so far as there is use of public funds to be repaid by Kenyans.

According to Mr. Mungai, the mere fact that parties to a financing agreement are the Government of Kenya and a foreign agency does not oust the jurisdiction of the Board, since the Board must satisfy itself of the use of the funds and the fact that Kenyans will be burdened as tax payers for the repayment of the loan or funds. To buttress this point, Counsel urged the Board to consider how the Standard Gauge Railway and Express Way procurements were undertaken where there was complete ouster of the use of public procurement through open tendering method to arrive at

the contractors for the two respective projects, which was not the case with the procurement being undertaken by the Procuring Entity herein who used open tendering method.

To further support this view, Counsel submitted that the Procuring Entity herein is the one undertaking the procurement and not the Government of Kenya, using a method recognized under the 2015 Act.

As regards section 6 (1) of the Act, Counsel submitted that no conflict has arisen to warranty that the provisions of the bilateral agreement between the Government of Kenya and AFD would supersede the provisions of the Act.

He therefore urged the Board to find that it has the jurisdiction to entertain the Request for Review and allow it in terms of the prayers sought therein.

Procuring Entity's Submissions

In his submissions, Counsel for the Procuring Entity, Mr. Ochieng', fully relied on the Procuring Entity's Response and Written Submissions. In terms of the instant Request for Review, Counsel further submitted that he would rely on the Credit Facility Agreement dated 27th March 2017 between the Government of Kenya and AFD, the Finance Agreement dated 27th March 2017 between the Government of Kenya and AFD, the Subsidiary

Agreement dated 16th April 2018 between the Government of Kenya and the Procuring Entity (for the grant) and the other Subsidiary Agreement dated 16th April 2018 between the Government of Kenya and the Procuring Entity (for a finance). He also relied on the AFD Guidelines: Procurement Guidelines for AFD-Financed Contracts in Foreign Countries published by AFD in February 2017, a List of Last Mile Connectivity Projects for Phase 1, 2 and 3, a List of contractors and the Procuring Entity's procurement plan for the financial year 2019/2020.

In respect of Request for Review Application No. 3 of 2020, Mr. Ochieng relied on the Procuring Entity's Response, Written Submissions, the Finance Contract dated 27th March 2017 between the Government of Kenya and European Investment Bank (EIB) dated 27th March 2017, the Project Agreement dated 27th March 2017 between EIB and the Procuring Entity and the Subsidiary Agreement between the Government of Kenya and the Procuring Entity dated 4th February 2019. Counsel further relied on EIB Guide to Procurement for Projects financed by the European Investment Bank, published in June 2011, a List of contractors and the Procuring Entity's procurement plan for the financial year 2019/2020.

As regards Review No. 2 of 2020, Counsel submitted as follows:-

Counsel submitted that the tender was advertised on 3rd December 2019 despite the Applicant's Request for Review having indicated the date as

20th August 2019. He further submitted that the tender closing date of the subject tender will be on 11th February 2020.

While giving a brief background to the procurement process, Counsel submitted that the subject tender was initiated by the Procuring Entity pursuant to a bilateral agreement between the Government of Kenya and AFD (for Review No. 2 of 2020) and that the Government saw it fit to engage the Procuring Entity for purposes of implementing the Last Mile Connectivity Project, hence executed a subsidiary agreement for credit and for finance. He then referred the Board to section 4 (2) (f) of the Act and submitted that the said agreement between the Government of Kenya and AFD falls within the purview of the said provision and that the subject procurement is not a procurement within the meaning of the Act, since it contains financing on one end, and a grant on the other end.

To support his view, Counsel referred the Board to Clause 10.12 at page 19 of the Credit Facility Agreement between the Government of Kenya and AFD wherein the Government was contractually bound to apply the AFD Guidelines which were incorporated by reference to the said agreement. He then made reference to Clause 11.5 at page 21 of the said agreement to support his view wherein the Government of Kenya undertook to ensure the Procuring Entity will comply with and implement the AFD guidelines.

Counsel then made reference to the Financing Agreement between the Government of Kenya and AFD and urged the Board to find that the subject procurement rests within the provision of section 4 (2) (f) of the Act, thus ousting the jurisdiction of the Board.

Mr. Ochieng' then referred the Board to section 89 (d) of the Act and submitted that the technical requirements in the subject tender meet international standards and standards widely used in international trade. Hence, the assertion made by the Applicant that the technical requirements in the Bidding Document discriminate against it lacks merit. In so far as participation of local contractors is concerned, Mr. Ochieng' referred the Board to the List of Contractors in the previous phases of the Last Mile Connectivity Project and submitted that Kenyan-owned firms have been awarded the said project in the past and that the Applicant is only crying foul because it does not meet the technical requirements in the subject tender.

Upon enquiry by the Board as to what the cash flow requirements in the previous phases were, Counsel made reference to the Bidding Document used in Phase 1 and further submitted that the same is a public document accessible in MyGov Website and the Procuring Entity's Official Website by virtue of Executive Order No. 2 of 2018. He further referred the Board to the Pre-Bid Site Visit and Attendance Register for the subject tender, wherein Kenyan-owned firms demonstrated their intention to participate in

the subject tender. Therefore, no evidence has been adduced by the Applicant to demonstrate that no Kenyan contractor can attain the financial and technical requirements in the Bidding Document. On the issue of preference, Counsel submitted that both the AFD and EIB Guidelines exclude application of domestic preference. Since the same is allowed in the 2015 Act, Counsel took the view that there exists a conflict between the said guidelines and the 2015 Act, hence section 6 (1) excludes application of the 2015 Act.

On further enquiry by the Board, Counsel submitted that AFD permitted domestic preference subject to the conditions provided in the AFD Guidelines. He however reiterated his earlier submission that at the first instance domestic preference is excluded in the Bidding Document and that AFD gave a no objection to the terms of the Bidding Document. This in his view makes section 6 (1) of the Act applicable to the circumstances of the instant Request for Review application (and Review No. 3 of 2020), thereby ousting the jurisdiction of the Board.

As regards unbundling of procurements, Counsel submitted that the Applicant would like the Procuring Entity to split the subject tender whereas such action is prohibited by section 54 read together with section 176 of the Act. He then made reference to Regulation 19 and 20 of the Public Procurement and Disposal (Amendment) Preference and Reservation Regulations, 2013 which upon being prompted by the Board, he confirmed

that citizen contractors are among the persons who ought to benefit from unbundling of procurements. He however maintained his submissions that the Applicant does not seek unbundling of the subject procurement, but splitting of the same, which he urged the Board to find is impermissible in the 2015 Act. In Counsel's view, the costs required to execute the subject tender would be much higher since more project managers would be required if the lots in the subject tender are to be divided further into smaller lots.

On the issue of locus standi, Counsel relied on his oral submissions in **PPARB Application No. 1 of 2020, Energy Contractors Association v. The Accounting Officer, Kenya Power and Lighting Company Limited & Another**. He further took the view that the Applicant is a union that did not obtain the Bidding Document, since the Procuring Entity did not understand how the Applicant would participate in the subject tender as an enterprise.

Counsel then made reference to section 9, 27, 28, and 167 of the Act and took the view that the Applicant ought to have lodged its complaint with the Public Procurement Regulatory Authority and not the Board, since in his view, the Applicant is incapable of meeting the cash flow requirements in the Bidding Document as it is an enterprise. He further submitted that the Procuring Entity presumed that it was only those who attended the Pre-Bid Meeting and Site Visits that downloaded the said Bidding Document.

According to Mr. Ochieng' an association of contractors is incapable of meeting the locus standi required in section 2 of the Act to file a Request for Review

On the question whether the Request for Review was filed within the statutory period under the Act, Mr. Ochieng' submitted that the Procuring Entity published the Bidding Document on 3rd December 2019 and the Applicant only approached the Board on 15th January 2020. From the Applicant's Request for Review, which indicates that the Applicant's members obtained the said Bidding Document and raised issues on 20th December 2019. He therefore took the view that if the dates of 3rd and 20th December 2019 are taken into account, the Request for Review is time barred on both dates. According to Mr. Ochieng', the Applicant had knowledge of the alleged breaches by the Procuring Entity at least by 20th December 2019.

On further enquiry by the Board, Mr. Ochieng' confirmed that the tender closing date of the subject tender is 11th February 2020 and any prospective bidder is still capable of downloading the said Bidding Document, but that there is no way of determining the persons who have downloaded the same. He further submitted that the Applicant downloaded the said document by 20th December 2019 and ought to have filed its Request for Review application within 14 days from that date.

In conclusion, and while adopting his submissions for Review No. 3 of 2020, Counsel urged the Board to find that it lacks jurisdiction to entertain the Request for Review.

Applicant's Rejoinder

In a rejoinder, Mr. Mungai referred the Board to the definition of a procurement contract under section 2 of the Act and submitted that the end product of the subject procurement process, is a procurement contract between the Procuring Entity and a contractor (s) therefore making the subject procurement amenable to application of the 2015 Act. He made reference to his earlier example of the SGR Railway, wherein the resultant contract was between the Government of Kenya and the Government of China, hence the same was not under the provisions of the 2015 Act irrespective of the contents of the financing agreement entered into between the two Governments.

As regards AFD, Mr. Mungai took the view that the same is a financing company not affiliated to the French Government. Counsel then made reference to Particular Conditions Clause 72 of the Bidding Document and submitted that the applicable law cited therein is the Laws of Kenya and this in his view settles the issue of the law applicable to the subject procurement process.

On the issue of splitting of tenders, Counsel submitted that the subject tender is already divided into lots, hence dividing the lots into smaller parts does not amount to splitting of the tender, but unbundling the works to allow participation of local contractors.

As regards, the question whether the Applicant has locus standi to approach the Board, Counsel submitted that the Constitution has broadened the scope of the persons who may approach a judicial tribunal to raise constitutional issues. He therefore took the view that the Applicant being an association has the required locus standi to raise issues faced by citizen contractors in public procurement processes undertaken by the Procuring Entity herein.

In conclusion and while adopting his submissions for Review No. 3 of 2020, Counsel urged the Board to allow the Request for Review as prayed by 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:-

- i. 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:-

- ii. 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:-

- iii. Whether the subject procurement process meets the conditions set out in section 4 (2) (f) and 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), (i) and (j); 60 (1) and (3) (d); 70 (6) (e) (vi) and (k); 86 (2), 89 (f), 155 and 157 of the Act 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.

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" vs. 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 vs. 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.*

The Board observes that the second option available to an aggrieved candidate or tenderer under section 167 (1) of the Act, that is, to approach the Board within fourteen days from 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, is the option applicable to these proceedings. This is because, notification of award has not been made in this procurement process since the subject procurement process is at its early stages, noting that by the time the Applicant filed the instant Request for Review, the tender closing date of 11th February 2020 had not lapsed.

It is important at this stage to note that at paragraph 1.3 of the Request for Review, the Applicant avers as follows:-

"1.3 The Applicant, Energy Sector Contractors Association is registered, under the laws of Kenya and as such responded to the invitation, and obtained the tender document in August 2019 which document upon perusal is outrightly discriminatory towards Kenyan owned companies and instead favours foreign companies"

The Applicant further avers at paragraph 1.4 of the Request for Review that:-

"1.4 The Applicant members through several clarifications requested for amendments of the tender document to rid it of the offending clauses to no avail. However, on 24th December 2019, the respondent issued a clarification no. 2 that did not cure the offending clauses"

During oral submissions, the Board asked the Procuring Entity to clarify on the dates when the Bidding Document and the Addendum applicable to the subject procurement process were issued. In response, Counsel for the Procuring Entity submitted that the Bidding Document was issued on 3rd December 2019 and not August 2019 as averred in paragraph 1.3 of the Request for Review. Counsel for the Procuring Entity also confirmed that Addendum No. 1 was issued on 20th December 2019 and not 24th December 2019.

In response, the Applicant confirmed that the dates submitted by the Procuring Entity were true and that the dates appearing at paragraphs 1.3 and 1.4 of the Request for Review were erroneously stated. The Board being in possession of the confidential documents submitted to it by the Procuring Entity also confirmed that the dates stated by the Procuring Entity were indeed the correct dates when the Bidding Document and the Addendum applicable herein were issued. Notably, the dates indicated at paragraphs 1.3 and 1.4 of the Request for Review are dates which belong to the dates when the Bidding Document and Last Addendum in **PPARB**

Application No. 1 of 2020, Energy Sector Contractors Association v. The Accounting Officer, Kenya Power & Lighting Company Limited & Another, previously heard and determined by this Board on 27th January 2020, were issued in respect of the procurement proceedings in Tender for Procurement of Design, Supply, Installation, Commissioning of Transmission Lines and Substations (AFD), Project IPC No: KP1/6A.1/PT/3/19/A72, which is different from the subject tender.

Given that the Applicant and the Procuring Entity both agree that paragraphs 1.3 and 1.4 of the Request for Review are erroneous, this Board is guided by Article 159 (2) (d) of the Constitution which provides as follows:-

"159 (1)

(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles

(a)

(b)

(c)

(d) justice shall be administered without undue regard to procedural technicalities"

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** when faced with a similar issue held that:-

"I have considered the pleadings, submissions and arguments made by the parties herein, and in this regard noted that while the Applicant in its prayers in the Notice of Motion referred to a decision delivered on 19th April 2018 in Request for Review No. 98 of 2018, its supporting grounds and submissions refer to the decision delivered on the same date in Request for Review No. 42 of 2018, which is the decision the Applicant also annexed in support of its application. The Respondents, 1st Interested Party and 2nd Interested Party also all refer to the to the decision delivered on 19th April 2018 in Request for Review No 42 of 2018, and the Request for Review stated in the Notice of Motion was therefore clearly a typographical error, which is one that is amenable to correction by this Court pursuant to Article 159 of the Constitution." [Emphasis by the Board]

It is therefore the Board's considered view that the typographical error at paragraphs 1.3 and 1.4 of the Request for Review can be cured by Article 159 (2) (d) of the Constitution, noting that all parties to the Request for Review have confirmed the correct dates when the Bidding Document and Addendum No. 1 in respect of the subject tender were issued as 3rd December 2019 and 20th December 2019 respectively.

The Board further notes that at paragraph 1.4 of the Request for Review that was reproduced hereinbefore, the Applicant avers that its members sought several clarifications requesting for amendments of the tender document to cure the alleged offending clauses. In response to this assertion, the Procuring Entity submitted that the Applicant did not seek clarification from it with respect to the provisions in the Bidding Document, but that it was the Applicant's members who sought clarification.

In a rejoinder, Counsel for the Applicant confirmed that indeed, its members sought clarification from the Procuring Entity. Upon further enquiry by the Board, the Applicant submitted that it was uncertain of when it downloaded the Bidding Document and could not therefore point out the exact date when it learnt of the alleged breach of duty by the Procuring Entity herein.

Having considered parties' submissions on the second option available to the Applicant under section 167 (1) of the Act, the Board observes that from the oral submissions before it, no certain date is known to the Applicant nor the Procuring Entity regarding the date when the Applicant learnt of the alleged breach of duty by the Procuring Entity. This therefore means that the Board cannot compute the 14-day period under section 167 (1) of the Act based on an unknown date, since it is not clear when such time for approaching this Board started running.

However, all parties to the Request for Review confirmed that the tender closing date of the subject tender has not lapsed and any prospective bidder can still download the Bidding Document from the Procuring Entity until the tender closing date of 11th February 2020 at 10.00am specified in ITB 22.1 of Section II. Bid Data Sheet of the Bidding Document.

Given that there is no known date as to when the Applicant obtained the Bidding Document and that the Bidding Document is still available for downloading by prospective bidders, the Board is of the considered view that the Applicant was well within its right to approach this Board before subjecting itself to the terms of the Bidding Document, which in its view, contain discriminatory provisions. In this instance, any bidder may download the Bidding Document even on the tender closing date of 11th February 2020 before 10.00am.

In the circumstances, the Board is inclined to find that the Request for Review was filed within the statutory period specified in section 167 (1) of the Act, since any bidder can still download the Bidding Document until 11th February 2020 and would still be entitled to approach this Board by way of a Request for Review.

On the second sub-issue of the first issue framed for 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. According to the Applicant, it attached the same to its Request for Review upon downloading it, therefore meeting the definition of a candidate under section 2 of the Act.

On its part, the Procuring Entity advanced the following three arguments to support its view that the Applicant does not meet the definition of a candidate under section 2 of the Act:-

- i. It is only those who attended the Pre-Bid Meeting and Site Visit that obtained the Bidding Document issued by the Procuring Entity;*
- ii. The Applicant's Legal Personality is not known to the Procuring Entity therefore, the mere fact that the Applicant is an association of contractors demonstrates that it cannot meet technical requirements in the Bidding Document, such as cash flow requirements, and is therefore not a candidate within the meaning of section 2 of the Act; and*
- iii. The proper avenue wherein the Applicant could have raised its complaint against the Procuring Entity is with the Public Procurement Regulatory Authority.*

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"

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.

Turning to the first argument advanced by the Procuring Entity, the Board notes that 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 order to give effect to section 98 of the Act, clause 5 of the Procuring Entity's Invitation Notice published on *MyGov* website (i.e. www.mygov.go.ke) on 3rd December 2019 provided as follows:-

"A complete set of bidding documents in English shall be downloaded without any fee by interested bidders at www.kplc.co.ke or purchased at the address below upon payment of a non-refundable fee of KES 1000 or equivalent amount in a freely convertible currency. The method of payment will be cash or banker's cheque, payable at the Chief Accountant's Office, KPLC, Stima Plaza, 1st Floor and receipt obtained"

Further, ITB Clause 9 of Section II. Bid Data Sheet of the Bidding Document states as follows:-

"Bid document detailing the requirements shall be obtained by downloading from the KPLC website (www.kplc.co.ke). No bid documents will be issued from any KPLC office"

The Procuring Entity instructed bidders to download a copy of the Bidding Document applicable to the subject tender from its Official Website. Even though ITB Clause 9 states that no bid documents would be issued from the Procuring Entity's office, any person who saw the Procuring Entity's Invitation Notice at the first instance, would have visited the Procuring Entity's office in order to purchase the Bidding Document as instructed. These two methods facilitate the act of obtaining the Bidding Document from the Procuring Entity. Hence, such person would qualify as a candidate within the meaning of section 2 of the Act.

On the second limb of its argument, the Procuring Entity submitted 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:-

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.

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.

The Procuring Entity further submitted that the Applicant has no legal personality and therefore cannot meet technical requirements of the subject tender such as cash flow requirements.

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.

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

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

On its part, the Black's Law Dictionary, 6th Edition defines an unincorporated association as follows:-

"This term is applied to a group of people who act together in a common enterprise and for a common purpose"

Hence, an unincorporated association may be a group of people who act together in a common enterprise for a common purpose. 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.

The Board makes an observation that the Applicant attached to its Request for Review, a copy of its Registration Certificate issued by the Registrar of Societies, upon registration under Rule 4 of the Societies Rules,

1968(hereinafter referred to as "the Society Rules") made pursuant to section 53 of the Societies Act, Chapter 108, Laws of Kenya (hereinafter referred to as "the Societies Act"). Therefore, the Applicant is an association registered under the laws of Kenya, even though this is not the determinant factor required to establish whether or not the Applicant is a candidate within the meaning of section 2 of the Act.

Having established that the Applicant is an association of contractors registered under Rule 4 of the Societies Rules, made pursuant to section 53 of the Societies Act, the Board would like to note that the question whether or not the Applicant can meet technical requirements such as cash flow requirements of the Bidding Document, is also immaterial for purposes of establishing whether or not it is a candidate within the meaning of section 2 of the Act.

It is the Board's considered view that cash flow requirements relate to eligibility and mandatory requirements that are imposed in a Bidding Document for purposes of establishing whether or not a bidder may perform the works required by a procuring entity, during an evaluation process. Notably, Form FIN-3.1 of Section IV. Bidding Forms of the Bidding Document required bidders to indicate their Financial Situation and Performance, including the Cash Flow from Operating Activities as can be seen in the table below:-

1. Financial Data

Type of Financial Information (currency)	Historic information for previous [insert number] years [insert in words] Amount in currency, currency, exchange rate*, EUR equivalent				
	Year 1	Year 2	Year 3	Year 4	Year 5
Statement of Financial Position (Information from Balance Sheet)					
Total assets					
Total liabilities					
Total Equity/Net Worth (NW)					
Current Assets (CA)					
Current Liabilities (CL)					
Working Capital (WC)					
Information from income statement					
Total Revenue (TR)					
Profits Before Taxes (PBT)					
Cash Flow Information					
Cash Flow from Operating Activities					

This requirement is further outlined in Clause 3 of Section III. Evaluation and Qualification Criteria of the Bidding Document as follows:-

- (i) The bidder shall demonstrate that it has access to, or has available liquid assets, unencumbered real assets, line of credit and other financial means (independent of any contractual advance payment) sufficient to meet the construction cash flow requirements estimated as follows for the subject contract (s) net of the Bidder’s other commitments;***

LOT	CASH FLOW (EUR)
1	1,400,000
2	1,500,000
3	1,400,000
4	1,300,000

From the foregoing, the Board observes that the question whether bidders can meet the cash flow requirements in the Bidding Document formed part of the Evaluation and Qualification Criteria which would be considered during an evaluation process, and would not be applied to establish whether a bidder is a candidate within the meaning of section 2 of the Act.

Accordingly, the Procuring Entity's argument that the Applicant, being an association of contractors is not a candidate, based on the question whether it can meet cash flow requirements, lacks merit.

On its third argument, 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").

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 procuring entities, tenderers, contractors or the general public 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 a 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 standi* as a candidate to file a Request for Review before this Board as required in 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 27th March 2017, the Government of Kenya and *Agence Française de Développement (AFD)*, entered into a Credit Facility Agreement following a request made by the Government of Kenya, for AFD to make a facility available for purposes of financing the "Last Mile Connectivity Project" described in Schedule 2 of the said Credit Facility Agreement as follows:-

"The Project is part of the Kenyan National "Last Mile Connectivity Program". This program aims to reach universal access to electricity for the Kenyan population by 2020, by connecting every household and customer within 600 m of the distribution transformers and a connection fee paid by the customer of 15000 Kenyan Shillings. The target is 5 Million new customers within 5 years

Within this program, the project will ensure connections close to the electricity network in 33 counties (out of 47) spread in rural areas of the country, in coherence with the previous financings of AFD in rural electrification. The number of connections will be as high as possible with the available financing”

On the same date, the Government of Kenya and AFD executed a Financing Agreement which specified an Investment grant made available for purposes of the Last Mile Connectivity Project at clause 2.1 of the said Financing Agreement which states as follows:-

“Subject to the terms of this Agreement, the Agency makes available to the Beneficiary a Grant in a maximum aggregate amount of thirty million Euros (EUR 30,000,000)”

Consequently, on 16th April 2018, the Government of Kenya and the Procuring Entity executed Subsidiary Agreements pursuant to the Credit Facility Agreement and the Financing Agreement both dated 27th March 2017 previously made between the Government of Kenya and AFD. These agreements paved way for the Procuring Entity’s Invitation Notice dated 3rd

December 2019 inviting eligible bidders to participate in the subject tender.
The Invitation Notice is reproduced herein as follows:-

- 1. *The Government of the Republic of Kenya has received credit from the Agence Française De Développement (AFD) and a grant from the European Union (EU) towards the cost of the Kenya Power Distribution Last Mile Connectivity Project. It is intended that part of the proceeds of this credit will be applied to eligible payments under the contracts as listed below;***

Contract Title: Procurement of Design, Supply, Installation and Commissioning of Extensions of MV Lines, LV Single Phase Lines and Service Cables for the Last Mile Connectivity Project...

- 2. *The Kenya Power and Lighting Company Plc now invites sealed bids from eligible bidders for the above...***
- 3. *Bidding will be conducted through International Competitive Bidding Procedures as specified in the Agence Française De Développement (AFD)'s 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.***

4.

5.

6. Qualification requirements refer to Section III of the Bidding Document.

7.

8.

9.”

The Procuring Entity contended that the subject procurement process is subject to donor funds received pursuant to a Bilateral Agreement between the Government of Kenya and a foreign agency, and that by virtue of section 4 (2) (f) and (6) (1) of the Act, the Board lacks jurisdiction to entertain the Request for Review.

These submissions were refuted by Counsel for the Applicant who took the view that when a procuring entity undertakes a procurement where public funds are to be utilized to pay a credit facility, the jurisdiction of the Board cannot be ousted. To support this view, Counsel submitted that all public procurements fall within the ambit of Article 227 (1) of the Constitution and are subject to provisions of the Act.

The Board having considered parties’ submissions 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"

To understand the import of section 4 (2) (f) of the Act, the Board considered the decisions cited by parties to this Request for Review. In **Miscellaneous Application No 402 of 2016 (Consolidated with Miscellaneous Application No. 405 of 2016), Republic v. Public Procurement Administrative Review Board & Another Ex parte Athi Water Services Board & Another [2017] eKLR** (hereinafter

referred to as “the Athi Water Case”), Justice Odunga 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 the KPLC Case, Justice Nyamweya faulted the Board (as it then was) 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.

To begin with, the Board deems it fit to interrogate the circumstances of the KPLC Case and the Athi Water Case as they both dealt with section 4 (2) (f) of the Act.

In light of the foregoing decisions, the Board observes that Justice Odunga at paragraph 152 of the "*Athi Water Case*" took the view that jurisdiction of this Board would be ousted by section 4 (2) (f) of the Act in a procurement or asset disposal under a bilateral or multilateral agreement where parties 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 at paragraph 61 of 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, foreign agency, foreign entity or multilateral agency.

In essence, 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. 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.

Secondly, the Guidelines applicable to the Athi Water 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 1st July 2014) (hereinafter referred to as “the 2014 World Bank Guidelines”). The Board studied the provisions of the 2014 World Bank Guidelines and observes as follows:-

Clause 1.5 of the 2014 World Bank Guidelines states as follows:-

"The principles, rules, and procedures outlined in these Guidelines apply to all contracts for goods, works, and non-consulting services financed in whole or in part from Bank loans. The provisions described under this Section I apply to all other Sections of the Guidelines. For the procurement of those contracts for goods, works, and non-consulting services not financed in whole or in part from a Bank loan, but included in the project scope of the loan agreement, the Borrower may adopt other rules and procedures. In such cases, the Bank shall be satisfied that the procedures to be used will fulfill the Borrower's obligations to cause the project to be carried out diligently and efficiently, and that the goods, works, and non-consulting services to be procured:-"

- (a) are of satisfactory quality and are compatible with the balance of the project;***
- (b) will be delivered or completed in timely fashion; and***
- (c) are priced so as not to affect adversely the economic and financial viability of the project”***

From the above clause, the 2014 World Bank Guidelines expressly state their applicability to all contracts for goods, works and non-consulting services financed in whole or in part from the World Bank loans. It however provided circumstances when a Borrower would adopt other rules and procedures but only after the World Bank is satisfied that the procedures to be used will fulfill the Borrower’s obligations to cause the project to be carried out diligently and efficiently in accordance with the conditions listed hereinbefore.

Further, Clause 1.1 of the 2014 World Bank Guidelines provide as follows:-

“The purpose of these Guidelines is to inform those carrying out a project that is financed in whole or in part by a loan from the International Bank for Reconstruction and Development (IBRD), a credit or grant from the International Development Association (IDA), a project preparation advance (PPA), a grant from the Bank, or a trust fund administered by the Bank and executed by the recipient, of the policies that govern the procurement of goods, works, and non-consulting services required for the

project. The Loan Agreement governs the legal relationships between the Borrower and the Bank, and the Guidelines are made applicable to procurement of goods, works, and non-consulting services for the project, as provided in the agreement. The rights and obligations of the Borrower and the providers of goods, works, and non-consulting services for the project are governed by the bidding documents, and by the contracts signed by the Borrower with the providers of goods, works, and non-consulting services, and not by these Guidelines or the Loan Agreements.

From the above provisions, the Board notes that the 2014 World Bank Guidelines applied to the procurement process being undertaken in the Athi Water Case. However, the rights and obligations of the Government of Kenya (being the borrower) and the providers of the goods, works, consulting and non-consulting services (i.e. successful bidders) were not governed by the 2014 World Bank Guidelines. The Board having studied the Athi Water Case observes that the Procuring Entity in that case was not identified as an implementing agency of the Government of Kenya as was held by Justice Nyamweya in the KPLC Case, which Justice Odunga and Justice Nyamweya found to be the point of departure in so far as application of section 4 (2) (f) of the Act is concerned.

On its part, the Guidelines applicable in the KPLC Case as stated by Justice Nyamweya were the World Bank Rules and Procedures for Procurement of Goods and Works. The Board studied the KPLC Case and **PPARB Application No. 42 of 2018, AstonField Solesa Solar Kenya Ltd/Clean Water Industries Ltd v. Kenya Power and Lighting Company Limited**(hereinafter referred to as "Review No. 42 of 2018") (which became JR No. 181 of 2018, i.e. the KPLC Case that was heard and determined by Justice Nyamweya) and notes that the year of the World Bank Guidelines referred to in both cases is not specified.

However, the Board being in possession of the original Board Registry File No. 42 of 2018 (which was the case file number allocated to Review No. 42 of 2018)verified that the Guidelines that were the subject of review proceedings before the Board in Review No. 42 of 2018, were the World Bank Guidelines for Procurement of Goods, Works and Non-Consulting Services under IBRD Loans and IDA Credits & Grants by World Bank Borrowers, January 2011 (Revised July 2014). These are the same Guidelines (which have already been cited hereinbefore as the 2014 World Bank Guidelines) that were the subject of proceedings before Justice Odunga in the Athi Water Case.

It is therefore clear that the 2014 World Bank Guidelinesrequire that the procurement emanating from projects financed by it, be governed by the bilateral agreement it has entered into with a Borrower, save that, the

2014 World Bank Guidelines provides circumstances when a Borrower would adopt other rules and procedures but only after the World Bank is satisfied that the procedures to be used will fulfill the Borrower's obligations to cause the project to be carried out diligently and efficiently in accordance with the conditions listed hereinbefore.

The distinguishing factor between the Athi Water Case and the KPLC Case, is that, in the Athi Water Case, the Procuring Entity was not named as an implementing agency, hence was not acting as an agent of the Government.

Turning to the circumstances in the instant case, the Board observes that section 2 of the Act defines a procurement as:-

"the acquisition by purchase, rental, lease, hire purchase, license, tenancy, franchise, or by any other contractual means of any type of works, assets, services or goods including livestock or any combination and includes advisory, planning and processing in the supply chain system"

Hence, in examining the bilateral agreement between the parties to the procurement in the instant case, the Board must address its mind to the operative words in section 4 (2) (f) of the Act being "procurement under" bilateral agreement between the Government of Kenya and AFD.

The Board agrees with Justice Nyamweya on the definition of the word “under” and following the definition of procurement in section 2 of the Act, the literal and purposive meaning of procurement under a bilateral agreement between the Government of Kenya and AFD, would mean acquisition by purchase of design, supply, installation and commissioning of MV Lines, LV Single Phase Lines and Service Cables for the Last Mile Connectivity Project undertaken as provided for or in accordance with the terms of a bilateral agreement entered into by the Government of Kenya and AFD.

It is clear that the Board has to interrogate the terms of the bilateral agreement entered into between the Government of Kenya and AFD to establish whether the instant procurement is to be undertaken in accordance with such bilateral agreement.

The parties to the bilateral agreement (i.e. the Credit Facility Agreement) dated 27th March 2017 is the Government of Kenya and AFD and the implementing agency is named as the Procuring Entity herein. Furthermore, Section II of the Bid Data Sheet identified the Procuring Entity herein as the Employer, such that, the resultant procurement contract would be entered into by the Procuring Entity (as the Employer) and a successful bidder (as the service provider) to be determined from

open tendering which was the method of procurement applied in the subject tender.

Clause 11.1 of the Credit Facility Agreement provides as follows:-

"The Borrower shall comply and procure that the implementing agency complies:-

(a) in all respects with all laws and regulations to which it and/or the Project is subject, particularly to all applicable environmental protection, safety and labour laws; and

(b) with all laws of its obligations under the Project Documents"

On its part, the Financing Agreement dated 27th March 2017 between the Government of Kenya and AFD provides as follows:-

"Clause 5.6. The Beneficiary is contractually bound by the Procurement Guidelines as if such Procurement Guidelines were incorporated by reference into the Agreement"

Clause 5.6 above explains the applicability of the AFD Guidelines: Procurement Guidelines for AFD-Financed Contracts in Foreign Countries

(February 2017) (hereinafter referred to as “the AFD Guidelines”). This prompted the Board to study the provisions of the said guidelines which state as follows:-

"Clause 1.2 "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 (drafting of Procurement Documents, award, administration and performance of the contracts) AFD shall only intervene to verify that the terms and conditions of its financing are fully met"

From the above excerpt, the Board observes that AFD required the Government of Kenya to comply with its own laws and regulations concerning all aspects of the procurement procedure (that is, drafting of

Procurement Documents, award, administration and performance of the contracts). AFD then specifies that its only concern was that the terms and conditions of its financing are fully met. Therefore, in so far as the procurement is carried out by the Government of Kenya, it had to resort to the Laws of Kenya that guide all aspects of public procurement, whilst financing of the project was to be governed by the terms and conditions of the Credit Facility Agreement.

In other words, the Credit Facility Agreement addressed the financing perspective of the project and not the drafting of procurement documents, award, administration and performance of the contract. For emphasis, the Board notes that AFD under the Credit Facility Agreement and the Finance Agreement was only concerned with its moneys being lent to the Government of Kenya and how such moneys will be repaid, and not necessarily the procurement process (that is, drafting of procurement documents, award administration and performance of the contract).

This Board therefore wishes to distinguish the circumstances in the KPLC Case, in that the 2014 World Bank Guidelines expressly assert their application to the procurement process therein, whereas the AFD Guidelines require the Government of Kenya and the Procuring Entity to comply with their own laws and regulations in so far as all aspects of the procurement procedure (that is, drafting of Procurement Documents, award, administration and performance of the contracts) is concerned. AFD

would only intervene to ensure that the terms and conditions of the financing extended for the Last Mile Connectivity Project are fully met.

This explains why at Clause 17 of the Credit Facility Agreement dated 27th March 2017, a dispute resolution clause is provided therein so that the Government of Kenya and AFD can amicably resolve a dispute arising from the terms and conditions of the financing extended to the Government of Kenya with respect to the Last Mile Connectivity Project. In order to amicably resolve disputes related to the said financing, the Credit Facility Agreement specified the governing law as French Law and that the Rules of Conciliation and Arbitration of the International Chamber of Commerce would apply. This, in the Board's view, would facilitate the principle of international comity and cooperation so that, no party is subjected to the law of a particular country that is likely to jeopardize that party's interest therefore giving parties the autonomy to choose a law that would apply in so far as the terms and conditions of the financing is concerned.

As a result, the Employer who was identified as the Procuring Entity herein (under Section II. Bid Data Sheet of the Bidding Document) and the service providers (i.e. successful bidders) would never invoke Clause 17 of the Credit Facility Agreement for purposes of dispute resolution arising from a procurement undertaken in accordance with the Credit Facility Agreement, which as already observed, assert the applicability of Kenyan Laws in so far as all aspects of the subject procurement process is concerned.

The Applicant cited the decision of Justice Lenaola in **Petition No. 58 of 2014, Okiya Omtatah Okoiti & 2 others v. Attorney General & 3 others [2014] eKLR** (hereinafter referred to as “the Okiya Omtata Case”) where the Court 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"

From the above case, the parties to the bilateral agreement, that is the Government of Kenya and the Government of China already settled how the procurement therein would be undertaken by specifying that the procurement contract would be awarded to the 4th Respondent (i.e. China Road and Bridge Corporation), hence, open tendering method was not used to arrive at a successful bidder.

In this instance, the Credit Facility Agreement and the Financing Agreement between the Government of Kenya and AFD read together with the AFD Guidelines did not settle how the subject procurement process would be undertaken but instead the same was left to the Procuring Entity to choose the appropriate procurement method in order to arrive at a successful bidder within the Kenyan Laws. As a result, the Procuring Entity applied the open method of tendering 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).

Justice Lenaola never dealt with section 4 (2) (f) of the Act, as alleged by the Applicant herein, since the aforementioned provision never existed in the Repealed Public Procurement and Disposal Act (hereinafter referred to as "the Repealed Act"). Section 4 of the Repealed Act provided as follows:-

"4. Application of Act

(1) This Act applies with respect to—

(a) procurement by a public entity;

(b) contract management;

(c) supply chain management, including inventory and distribution; and

- (d) disposal by a public entity of stores and equipment that are unserviceable, obsolete or surplus.***
- (2) For greater certainty, the following are not procurements with respect to which this Act applies—***
- (a) the retaining of the services of an individual for a limited term if, in providing those services, the individual works primarily as though he were an employee;***
- (b) the acquiring of stores or equipment if the stores or equipment are being disposed of by a public entity in accordance with the procedure described in section 129(3)(a);***
- (c) the acquiring of services provided by the Government or a department of the Government.***
- (3) For greater certainty, the following are procurements with respect to which this Act applies—***
- (a) the renting of premises, except as described under subsection (2)(c);***
- (b) the appointing, other than under the authority of an Act, of an individual to a committee, task force or other body if the individual will be paid an amount other than for expenses;***
- (c) the acquiring of real property.”***

Section 4 (2) (f) of the 2015 Act was only included upon enactment of the 2015 Act which came into force on 7th January 2016. Having considered the arguments and authorities cited by parties, specifically the decisions of Justice Nyamweya and Justice Odunga that dealt with section 4 (2) (f) of the Act, the Board observes that the intention of Parliament in providing for section 4 (2) (f) of the Act was never to exclude the import of Article 227 (1) of the Constitution which states as follows:-

227 (1) When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective”

(2) 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;

(c) sanctions against contractors that have not performed according to professionally

regulated procedures, contractual agreements or legislation; and

(d) sanctions against persons who have defaulted on their tax obligations, or have been guilty of corrupt practices or serious violations of fair employment laws and practices.

The intention of Parliament in providing section 4 (2) (f) of the Act was that Regulations would be enacted pursuant to the 2015 Act in order to specify 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, with respect to which the 2015 Act applies.

Unfortunately, no Regulations have been enacted pursuant to the 2015 Act and the Repealed Act did not have the provision of section 4 (2) (f). If at all such a provision existed at that time, perhaps the Public Procurement and Disposal Regulations, 2006 would have specified the procurements and disposal of assets with respect to which the 2015 Act applies, since section 4 (2) (f) envisions that such circumstances exist. In addition to this, the Public Procurement and Disposal (Amendment) Regulations, 2013 were enacted on 18th June 2013, way before the 2015 Act and therefore could not have specified the procurements and disposal of assets with respect to which the 2015 Act applies, since section 4 (2) (f) did not exist at that time.

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.

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.

The Black's Law Dictionary, 6th Edition, defines "Comity of Nations" as:-

"The most appropriate phrase to express the true foundation and extent of the obligation of the laws of one nation within the territories of another. It is derived altogether from the voluntary consent of the latter; and it is inadmissible when it is contrary to its known policy, or prejudicial to its interests."

From the above definition, it can be said that international comity is exercised when parties to bilateral or multilateral agreements voluntarily agree on a law applicable to their agreement so that one nation is not subjected to the law of another nation provided that the law agreed to by such parties is not contrary to the policy of the other's country or prejudicial to their interests.

In line with the principle of international comity and cooperation, the Government of Kenya and AFD bound themselves to the French Law in so far as financing of the project was concerned under the Credit Facility Agreement and the Financing Agreement but never settled on the issue of the subject procurement (drafting of Procurement Documents, award, administration and performance of the contract) as the same was left to Kenyan Laws. It therefore follows, that the subject procurement is not being undertaken in accordance with the terms and conditions of the Credit Facility Agreement and Financing Agreement because the terms and conditions therein did not settle on the subject procurement and left the same to be undertaken in accordance with the laws and regulations applicable to the Government of Kenya, which laws and regulations are the Laws of Kenya.

For the foregoing reasons, the Board finds that the subject procurement process (that is, drafting of Procurement Documents, award, administration and performance of the contracts) is not being undertaken in accordance

with terms and conditions of the Credit Facility Agreement and Financing Agreement both dated 27th March 2017 read together with the AFD Guidelines, but instead is being undertaken in accordance with the Laws of Kenya as intended by the Government of Kenya and AFD, hence fails to meet the threshold of section 4 (2) (f) of the Act.

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. This is why the introductory sentence states that the provision of section 6 (1) of the Act is subject to the Constitution. Parliament in its Hansard Report of 19th February 2015 while considering this provision in its debate on the Public Procurement and Asset Disposal Bill, 2015 (as it then was) had this to say:-

"Hon (Eng) Gumbo: This Bill talks about conflict in international agreements. We will need to look at this; you know that this country, and others in the Third World in general, have had very many issues with economic partnership agreements, yet this clause says that:

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

Hon. Speaker, I honestly have a problem with this provision because some of these provisions take account of the interests of those who are outside our borders and not the people of Kenya. Provisions under Part II, which define the bodies involved and the role of the National Treasury, are good. What we have to avoid, however, is letting the National Treasury to micro-manage procurement processes, as has happened before in so many cases...

Hon. Oyugi: Thank you, Hon. Temporary Deputy Speaker. My point of order was in reference to what my colleague was saying with regard to Clause 6. Is it in order to say that, that

clause in his understanding, is ultra vires? If you read Article 2(6) and 2(5) of the Constitution, international obligations and international rules form part of Kenya's laws. Therefore, Clause 6 is actually giving reference to Article 2 (5) and 2 (6) of the Constitution.

Hon. Temporary Deputy Speaker, I really think that Clause 6 is sufficiently very express. It reads, "Subject to the Constitution---". The drafter of the Bill is trying to ensure that there is a direct concurrence and a reference to the Constitution in terms of how then you have the law superior or not superior. In my understanding and interpretation, there is nothing out of order with Clause 6 of this particular law."

From the foregoing extract of the debate in Parliament as contained in the Hansard Report dated 19th February 2015, the Board observes that Parliament was alive to section 6 (1) of the Act, being subject to provisions of the Constitution. Article 2 (5) and (6) of the Constitution referenced in the said Hansard Report 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 Kenya cannot rely on its procurement law where there is a conflict with any obligations 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]

The Board was referred to the decision by Justice Lenaola in the Okiya Omtata Case, which was cited hereinbefore. Upon perusal of the same, and as earlier noted, the Board established that the court was dealing with section 6 (1) of the Repealed Act.

Further, the contract in the Okiya Omtata 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 provisions of section 6 (1) of the Repealed Act are not similar to section 6 (1) of the 2015 Act. Section 6 (1) of the 2015 Act, provides that when 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 party, the terms of the treaty or agreement shall prevail. It is therefore immaterial whether or not there are negotiated grants or loans.

Accordingly, the import of section 6 (1) of the 2015 Act is as follows:-

- 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; and
- 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.

From the documentation before the Board, the parties to the bilateral agreement expressly allowed application of the laws of Kenya and did not expressly exclude application of the 2015 Act as has been observed by the Board hereinbefore. In essence, the Government of Kenya and AFD intended that the Laws of Kenya apply in so far the subject procurement process is concerned and expressly stated this, as was observed hereinbefore. Furthermore, no provision of the Credit Facility Agreement and the Financing Agreement both dated 27th March 2017 were raised by parties before this Board that are in conflict with the provisions of the Act.

In summary, having studied the documents filed before it, 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 and the Financing Agreement read together with the AFD Guidelines 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) and (b) of the Constitution provides that:-

"227 (1)

- (2) 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 33.1 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, not permitted"

Even though the Procuring Entity's Bidding Document excluded 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 from their application in the subject procurement process.

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 above case 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. Even if 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 exclusion clauses 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 supersede the 2015 Act especially when parties acknowledged applicability of the said Act.

The provisions on preference 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 conform to 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 ensure that local and citizen contractors are encouraged to participate and their capacity is built to participate international tenders in which foreign contractors are likely to have higher technical expertise.

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 its Invitation for Bids dated 3rd December 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.

As regards international tenders, 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.

Justice Odunga has had occasion to address the types of margins of preference that may be available to local and citizen contractors 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."

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"

On its part, 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

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 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 contravene the provisions of Articles 227 (2) (a) and (b) of the Constitution; Section 3 (a), (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. Unbundling of Transmission Lines and Sub-Stations

On the second sub-issue of the second issue framed for determination, the Applicant contended that the Procuring Entity ought to have unbundled the Transmission Lines and Sub-Stations in the subject tender in order to facilitate participation by local contractors. The Procuring Entity took the view that the Applicant required the Procuring Entity to split the subject tender, and such action is an offence prohibited under the Act.

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, since the contracts would be divided into smaller contracts and would therefore encourage participation by local contractors. This would serve as a way of promoting the local industry as required by section 3 (i) and (j) of the Act.

As regards splitting of contracts, section 54 (1) of the Act states as follows:-

“No procuring entity may structure procurement as two or more procurements for the purpose of avoiding the use of a procurement procedure except where prescribed”

The above provision states that splitting of contracts is when a procuring entity structures two or more procurements in order to avoid the use of a procurement procedure. From the foregoing, the Board notes that the First Schedule to the 2006 Regulations provides the threshold matrix for the methods of procurement that a procuring entity is supposed to take into account when choosing the appropriate method of procurement. Therefore, a procuring entity should not split contracts in order to avoid a method specified in the Act.

This is different from unbundling of procurements whose intention is to spread a tender through smaller contracts known as lots in order to encourage participation by local contractors.

At the end of the day, the Procuring Entity herein desires to ensure all Kenyans benefit from the Last Mile Connectivity Project and such a procurement process must be undertaken within the confines of the law. Jeremy Bentham while describing his "*greatest happiness theory*" in ***Introduction to the Principles of Morals and Legislation, (1789)*** stated as follows:-

"Nature has placed mankind under the governance of two sovereign masters, pain and pleasure. It is for them alone to point out what we ought to do, as well as to determine what we shall do. On the one hand, the standard of right and wrong, on the other, the chain of causes and effects, are

fastened to their throne. We ought to maximize the good, that is, bring about 'the greatest amount of good for the greatest number'. When one maximizes the good, it is the good impartially considered. "

In line with the theory enunciated by Jeremy Bentham, the Board observes that it would produce the greatest amount of good for the greatest number of people for the Procuring Entity to unbundle the procurement of design, supply, installation and commissioning of extensions of MV Lines, LV Single Phase Lines and Service Cables for the Last Mile Connectivity Project into smaller contracts otherwise known as lots, to encourage maximum participation of local and citizen contractors.

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 into account with a view of encouraging participation of citizen and local contractors in order to promote the local industry.

C. Cash Flow Requirements and Annual Construction Turnover

On this issue, the Applicant averred as follows in its written submissions:-

"64. The tender prescribed the minimum annual construction turnover for bidding companies, for the 6 lots, at an average of Kshs. 1.36Billion or 12.1 Million Euros. The Kenyan economy does not have companies in electrical construction that have the said turnover consistently for the last 5 years. This provision in the tender document has clearly been made to lock out companies in favour of foreign ones.

65.....;

66. On the issue of cash flow, the tender requires an average of 1.98M euros or Kshs. 222,750,000/-. This cash flow requirement is too high because the lots are unbundled. PC clause 14.2 on page 608 states that the procuring entity will pay advance payment within 60 days. One therefore has to have Kshs. 222M monthly which is too high thus locking out the locals"

To support its view, Counsel for the Applicant, argued that the failure by the Procuring Entity to unbundle the Transmission Lines and Sub-Stations increased the cash flow requirements in the subject tender and will in turn affect the annual construction turnover of bidders. Subsequently, the minimum annual construction turnover required in the Bidding Document is also too high and unreasonable.

The Applicant and the Procuring Entity referred the Board to the List of Contractors who were the successful bidders in the 10 Lots advertised in

Phase 1 of the Last Mile Connectivity Project and the Bidding Document used for that purpose. Both parties confirmed that these were public documents published in the Procuring Entity's and MyGov Publication Website (i.e. www.kplc.co.ke and www.mygov.go.ke respectively), pursuant to Executive Order No. 2 of 2018, which requires all public procurement contracts awarded by a procuring entity to be published.

The Board studied the Last Mile Connectivity Project, Phase 1-List of Contractors which is reproduced hereinbelow as follows:-

Lot No.	Contractor's name	Nationality	Contract Amount	
			USD	KES
1	Gammon India Limited	India	9,314,826.98	1,619,076,883.79
2	AEE Power	Spain	7,979,613.54	1,609,258,256.16
3	Rwathia Distributors Ltd Kiewa Group Ltd viatech services Ltd Consortium	Kenya	4,430,767.26	1,280,506,312.49
4	AEE Power	Spain	6,129,351.14	984,925,732.10
5	Etrade Company Limited	Kenya	2,539,039.19	888,580,215.12
6	Polyface Services Limited	Kenya	464,790.50	361,462,976.00
7	Neo Electric Company Limited	Kenya	7,585,548.90	991,133,967.00
8	Metsec Cables Ltd & Empower Installation Contractors Ltd	Kenya	106,351.56	1,395,045,260.56
9	Angelique International Ltd	India	4,472,942.16	305,368,950.00
10	Etrade Company Ltd	Kenya	1,724,999.91	616,046,269.95

Further, the Bidding Document used for Phase 1 Last Mile Connectivity Project issued on 24th April 2015 for KP1/12A-2/PT/2/15/A40 provided as

follows at clause 2.3.2 of Section I. Instruction to Bidders with respect to the requirement of Average Annual construction turnover:-

"Average Annual Turnover

Minimum average annual turnover of:

USD 11,500,000 for Lot 1

USD 13,000,000 for Lot 2

USD 8,700,000 for Lot 3

USD 8,800,000 for Lot 4

USD 4,700,000 for Lot 5

USD 1,500,000 for Lot 6

USD 8,900,000 for Lot 7

USD 5,800,000 for Lot 8

USD 2,900,000 for Lot 9

USD 2,700,000 for Lot 10"

On the other hand, the Minimum Average Annual Construction Turnover Requirements at Clause 3.2 of Section III. Evaluation and Qualification Criteria of the Bidding Document used in the subject tender are as follows:-

"Lot 1-EUR 12,300,000

Lot 2-EUR 12,600,000

Lot 3-EUR 14,600,000

Lot 4-EUR 9,400,000

Lot 5-EUR 9,600,000

Lot 6-EUR 14,100,000"

On its part, the Financial Resources requirement in clause 2.3.3 of Section I. Instruction to Bidders of the Bidding Document used for Phase 1 of the Last Mile Connectivity Project provided as follows:-

"The Bidder must demonstrate access to, or availability of, financial resources such as liquid assets, unencumbered real asset, line of credit and other financial means, other than any contractual advance payment to meet:

(i) the following cash flow requirements:

USD 1,250,000 for Lot 1

USD 1,400,000 for Lot 2

USD 950,000 for Lot 3

USD 970,000 for Lot 4

USD 500,000 for Lot 5

USD 150,000 for Lot 6

USD 950,000 for Lot 7

USD 640,000 for Lot 8

USD 320,000 for Lot 9

USD 300,000 for Lot 10"

Further, Cash Flow Requirements in the subject tender, as outlined in Clause 3 of Section III. Evaluation and Qualification Criteria of the Bidding Document for the subject tender are as follows:-

“Lot 1-EUR 2,000,000

Lot 2- EUR 2,100,000

Lot 3-EUR 2,400,000

Lot 4-EUR 1,500,000

Lot 5-EUR 1,600,000

Lot 6-EUR 2,300,000”

From the foregoing, it is worth noting that the Average Annual Turnover and Cash Flow Requirements for Phase 1-A 40 Last Mile Connectivity Project are much lower than the Average Annual Turnover and Cash Flow Requirements in the subject tender. It is worth noting that 6 Kenyan companies out of 10 companies were awarded contracts in Phase 1 perhaps because the Annual Construction Turnover and Cash Flow Requirements in Phase 1 were much lower than those required in the subject tender.

The Board already made a determination that the Procuring Entity ought to consider the provisions of the Act with respect to unbundling of the subject tender to enable participation of local and citizen contractors. Such unbundling in the Board’s view, would provide a more realistic cash flow and annual turnover requirements, as opposed to larger contracts (which are not unbundled) that may not give local and citizen contractors the

incentive to bid for the project to be implemented in the subject tender and emerge successful bidders for the same.

The Board finds that the Procuring Entity ought to consider unbundling of the subject tender to enable participation of local and citizen contractors whose resultant effect would be to lower cash flow requirements and annual construction turnover requirements to arrive at a more realistic and reasonable amounts in the subject tender.

D. Construction Management Experience

At paragraph 67 of the Applicant's Written Submissions, the Applicant averred as follows:-

"The tender also requires specific and construction management experience of an average of Kshs. 1,212,750,000 or Euro 10,780,000. This figure is just above Kshs. 1 Billion mark. This has been intentionally set to lock out local contractors as the preference threshold is Kshs. 1 Billion"

The requirement of Construction and Management Experience is stipulated in Clause 4 of Section III. Evaluation and Qualification Criteria of the Bidding Document as follows:-

"4. Experience

4.1	General Construction Experience	Experience under construction contracts in the role of prime contractor, JV member, sub-contractor, or
-----	---------------------------------	--

		contractor, or management contractor for at least the last 10 years starting 1 st January 2010
4.2 (a)	Specific Construction & Contract Management Experience	(i) A minimum number of similar contracts specified below that have been satisfactorily and substantially completed as a prime contractor, joint venture member, management contractor or sub-contractor between 1 st January 2010 and application submission deadline: one or two contracts of minimum total value of:- Lot 1- 8,100,000 EUR Lot 2- 8,400,000 EUR Lot 3- 8,300,000 EUR Lot 4- 7,400,000 EUR
4.2 (b)		For the above and any other contracts completed and under implementation as prime contractor, joint venture member, management contractor or sub-contractor on or after the first day of the calendar year during the period stipulated in 4.2 (a) above, a minimum construction experience in the key activities successfully completed in any one year

The Accounting Officer of the Procuring Entity has the obligation under section 60 of the Act to undertake the following:-

"1 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.

- (2) The specific requirements shall include all the procuring entity's technical requirements with respect to the goods, works or services being procured.***
- (3) The technical requirements shall, where appropriate—***
- a) conform to design, specification, functionality and performance;***
 - (b) be based on national or international standards whichever is superior;***
 - (c) factor in the life of the item;***
 - (d) factor in the socio-economic impact of the item;***
 - (e) be environment-friendly;***
 - (f) factor in the cost disposing the item; and***
 - (g) factor in the cost of servicing and maintaining the item.”***

From the above provision, the Board notes that the accounting officer of a procuring entity is required to prepare specific requirements relating to the goods, works or services being procured that are clear and 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.

In this instance where the Procuring Entity applied International Competitive Bidding Procedures, section 89 (d) of the Act further states 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"

A party challenging the technical requirements provided by a procuring entity on the grounds that no local or citizen 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.

The Applicant further based its arguments on the fact that exclusive preference threshold under the Act is 1 Billion Kenya Shillings and that bidders would not be afforded preferential treatment since the requirements for construction management experience in one or two contracts range between EUR 7,400,000 to EUR 8,400,000.

However, the Board has already established that the Act provides for other margins of preference that citizen contractors may benefit from, in addition to the exclusive preference scheme available to citizen contractors 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 as stated in Regulation 13 (a) of the 2011 Regulations as amended by Regulation 5 of the 2013 Amendment Regulations, addressed hereinbefore.

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 lack merit, as the said allegations were not supported by evidence to the satisfaction of the Board.

E. Mileage in Kilometres

On the fifth sub-issue of the second issue framed for determination, the Applicant, at paragraph 68 of its Written Submissions averred as follows:-

"Clause 4.2B of the tender also specified the mileage in Km that a company ought to have done to be able to be awarded this tender. The mileage in kilometers is completely excessive mostly due to the fact that the 6 lots were not unbundled, this was intentionally done to lock out local contractors"

During oral submissions, the Applicant's Engineer, Eng. Vincent Komu referred the Board to the requirements of "Mileage in Kilometers" required in Lot 1 under Phase 1, and submitted that the Procuring Entity previously required bidders to cover 1000 Kilometers in 2 years (that is, 500 Kilometers in 1 year) in commissioning the electricity transmission lines, unlike the subject tender where bidders are required to have had experience of having commissioned at least 630 Kilometers in 1 year (for Lot 1) and 645 Kilometers in 1 year (for Lot 2).

The Board observes that this requirement is stated in Clause 4.2 (b) of Section III. Evaluation and Qualification Criteria of the Bidding Document as follows:-

"...a minimum construction experience in the following key activities successfully completed in any one (1) year

For Award of Lot 1

The contractor must have been involved in design, supply, installation and commissioning of at least 630 Kilometers of Medium Voltage (11kV or 33kV) and/or Low Voltage (240V & 415V) lines in multiple sites and that were in different geographical locations being executed concurrently.

For Award of Lot 2

The contractor must have been involved in design, supply, installation and commissioning of at least 645 Kilometers of Medium Voltage (11kV or 33kV) and/or Low Voltage (240V & 415V) lines in multiple sites and that were in different geographical locations being executed concurrently.

For Award of Lot 3

The contractor must have been involved in design, supply, installation and commissioning of at least 640 Kilometers of Medium Voltage (11kV or 33kV) and/or

Low Voltage (240V & 415V) lines in multiple sites and that were in different geographical locations being executed concurrently.”

For Award of Lot 4

The contractor must have been involved in design, supply, installation and commissioning of at least 570 Kilometers of Medium Voltage (11kV or 33kV) and/or Low Voltage (240V & 415V) lines in multiple sites and that were in different geographical locations being executed concurrently”

The Board studied the Bidding Document (available on www.mygov.co.ke and www.kplc.co.ke) used in Phase 1, Last Mile Connectivity Project and notes that, clause 2.4.2 of Section 1. Instructions to Bidders provided as follows:-

"For Award of one or two lots.

...for the above or other contracts executed during the period stipulated in 2.4.2 (a) a minimum experience in the following key activities:-

1. The contracts must have involved design and construction of Medium voltage (11kV or 33kV) and/or Low Voltage (240V and 415V) lines in multiple sites and

that were in different geographical locations being executed concurrently”

For Award of 3 Lots

Construction of 20,000km of low voltage line in the last 3 years

For Award of 4 lots

Construction of 30,000km of low voltage line in the last 3 years

For Award of 5 lots

Construction of 40,000km of low voltage line in the last 3 years

For Award of 6 lots

Construction of 50,000km of low voltage line in the last 3 years

For award of 7 lots

Construction of 60,000km of low voltage line in the last 3 years

For award of 8 lots

Construction of 70,000km of low voltage line in the last 3 years

For award of 9 lots

Construction of 80,000km of low voltage line in the last 3 years

For award of 10 lots

Construction of 90,000km of low voltage line in the last 3 years

From the foregoing, the Board observes that in Phase 1 of the Last Mile Connectivity Project, there was no limitation provided in terms of the number of kilometres and years of medium and/or low voltage line with respect to award of one or two lots. This only became relevant for the award of 3 to 10 lots and was with respect to Low Voltage Lines. This shows that there was a likelihood for bidders to at least succeed in the award of any of the lots in so far as the award was not more than 2 lots in

Phase 1, especially if such bidders were citizen and local contractors who may not have the capacity for award of 3 or more lots.

However, in the respective lots of the subject tender, bidders are required to supply, install and commission at least 570 Kilometers of Medium and/or Low Voltage line in one year. This means that local and citizen contractors have no leeway in the subject tender, as was the case in Phase 1 where there were no requirements for experience with respect to Kilometers to award of one or two lots. This means, without the minimum experience of 1 year, local and citizen contractors may not have the incentive to participate in the subject tender since they would not be awarded 1 or 2 lots.

The Board finds that the Procuring Entity ought to reconsider the minimum experience of one year required of a bidder to have supplied, installed and commissioned of at least 570 Kilometers, 640 Kilometers, 645 Kilometers and 630 Kilometers of Medium and/or Low Voltage in Lots 4, 3, 2 and 1 respectively in one year, and perhaps to adopt the model used in Phase 1 with necessary changes.

In totality of the issues raised in the substantive Request for Review, the Board finds that the Procuring Entity contravened the provisions of Articles 227 (2) (a) and (b) of the Constitution, Section 3 (a), (i) & (j), 86 (2), 89 (f), 155, 157 (8) & (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 following sub-issues of the second issue for determination are concerned:-

- **Preference Schemes;**
- **Unbundling of Transmission Lines and Sub-Stations;**
- **Cash Flow Requirements and Average Annual Construction Turnover; and**
- **Mileage in Kilometers.**

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 and the Tender Document is faulty. This therefore means any processes undertaken under a faulty Tender Document will result to a nullity.

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, 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 Extension of MV Lines, LV Single Phase Lines and Service Cables for the Last Mile Connectivity Project (AFD/EU) 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 Tender for Procurement of Design, Supply, Installation, Commissioning of Extensions of MV Lines, LV Single Phase Lines and Service Cables for the Last Mile Connectivity Project (AFD/EU), IPC No: KP1/6E.3/PT/1/19/A70 issued on 3rd December 2019, be and is hereby nullified and set aside.**

- 2. The Procuring Entity is hereby directed to prepare a fresh Bidding Document for Tender for Procurement of Design, Supply, Installation, Commissioning of Extensions of MV Lines, LV Single Phase Lines and Service Cables for the Last Mile Connectivity Project (AFD/EU), within thirty (30) days from the date of this decision, taking into consideration the findings of the Board in this case**

- 3. Further to Order No. 2 above, the Procuring Entity is hereby directed to re-tender for Procurement of Design, Supply, Installation, Commissioning of Extensions of MV Lines, LV Single Phase Lines and Service Cables for the Last Mile Connectivity Project (AFD/EU) 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 5th day of February 2020

CHAIRPERSON

SECRETARY

PPARB

PPARB

Delivered in the presence of:-

- i.** Mr. Miano holding brief for Mr. Mungai for the Applicant; and
- ii.** Ms. Walala holding brief for Mr. Ochieng' for the Respondent.