

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 41/2020 OF 20TH MARCH 2020
BETWEEN
ROADS AND CIVIL ENGINEERING CONTRACTORS
ASSOCIATION (RACECA).....APPLICANT
AND
THE ACCOUNTING OFFICER,
KENYA NATIONAL HIGHWAYS AUTHORITY.....1ST
RESPONDENT
KENYA NATIONAL HIGHWAYS AUTHORITY.....2ND
RESPONDENT

Review against the decision of Kenya National Highways Authority with respect to North Eastern Transport Improvement Project (NETIP) Project ID: PKG1: Upgrading of Isiolo-Kulamawe-Modogashe (A10/B84) Road ICB No. KeNHA/2236/2019 Lot 1: Tender No. KeNHA/2267/2020-Isiolo-Kulamawe Road and Lot 2:Tender No. KeNHA/2268/2020-Kulamawe-Modogashe Road and Gar-batula Spur Road.

BOARD MEMBERS

- | | |
|----------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Arch. Steven Oundo, OGW | -Member |
| 3. Dr. Joseph Gitari | -Member |

IN ATTENDANCE

1. Mr. Philip Okumu

-Holding brief for the Secretary

BACKGROUND TO THE DECISION

The Bidding Process

Kenya National Highways Authority (hereinafter referred to as “the Procuring Entity”) issued a Request for Bids on 26th February 2020 for the Upgrading of Isiolo-Kulamawe-Modogashe (A10/B84) Road ICB No. KeNHA/2236/2019 Lot 1: Tender No. KeNHA/2267/2020-Isiolo-Kulamawe Road and Lot 2: Tender No. KeNHA/2268/2020-Kulamawe-Modogashe Road and Gar-batula Spur Road (hereinafter referred to as “the subject tender”) by uploading an advertisement on its official website (www.kenha.co.ke). The Bid submission deadline was specified as 28th April 2020.

THE REQUEST FOR REVIEW

M/s Roads and Civil Engineering Contractors Association (hereinafter referred to as “the Applicant”) lodged a Request for Review dated 19th March 2020 and filed on 20th March 2020 together with a Statement in Support of the Request for Review sworn and filed on even date seeking the following orders:-

a) An order declaring the procurement process herein including the tender document in respect of North Eastern Transport Improvement Project (NETIP) Project ID: PKG1: Upgrading of Isiolo-Kulamawe-Modogashe (A10/B84) Road ICB No.

KeNHA/2236/2019 Lot 1: Tender No. KeNHA/2267/2020-Isiolo-Kulamawe Road and Lot 2: Tender No. KeNHA/2268/2020-Kulamawe-Modogashe Road and Garbatula Spur Road, null and void;

- b) An order directing the Procuring Entity to retender for the subject tender on the basis of a proper tender document that complies with the provisions of the Constitution and all relevant legal provisions;***
- c) An order directing the Procuring Entity to submit a copy of the fresh tender document to the Director General of the Public Procurement Regulatory Authority to confirm that the same complies with the Constitution and law before the same can be used for purposes of the fresh tender process; and***
- d) Any other relief that the Board may deem fit and just to grant.***

Pursuant to Circular No 1/2020 dated 16th March 2020 and further direction issued vide Circular No. 2/2020 dated 24th March 2020 detailing the Board's administrative and contingency management plan to mitigate the Covid-19 disease including the manner in which matters shall be handled by the Board, the Applicant lodged its Written Submissions on 3rd April 2020 while the Procuring Entity lodged its Written Submissions on 7th April 2020. Owing to the timelines provided by the Board pursuant to Circular No. 2/2020 dated 24th March 2020 and specific details provided regarding the

manner in which matters are handled by the Board, the Board relied on the documentation filed by parties in determining this matter.

BOARD'S DECISION

The Board has considered each of the parties' pleadings together with the 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 finds that the following issues call for determination:-

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

Depending on the outcome of the above issue:-

II. Whether the Procuring Entity's Tender Document excludes preference and reservation schemes applicable to the subject tender;

III. Whether the requirement of Litigation History under Clause 2.4 of Section III. Evaluation and Qualification Criteria at page 42 of the Tender Document offends the provision of Article 50 of the Constitution;

- IV. Whether the requirement of Bid Security specified under ITB Clause 19.1 of Section II. Bid Data Sheet of the Tender Document complies with Section 61 (2) (c) of the Act;**
- V. Whether the requirement for Joint Ventures under ITB Clause 4.1 of Section II. Bid Data Sheet of the Tender Document is discriminatory;**
- VI. Whether the requirement of Cash Flow specified under Clause 3.1 of Section III. Evaluation and Qualification of the Tender Document is unreasonably high;**
- VII. Whether the requirement of Annual Construction Turnover provided for in Clause 3.2 of Section III. Evaluation and Qualification Criteria of the Tender Document is unreasonably high; and**
- VIII. Whether the requirement of Construction Experience provided for in Clause 4.1 and 4.2 of Section III. Evaluation and Qualification Criteria of the Tender Document is unreasonable.**

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

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

Similarly, in the case of **Kakuta Maimai Hamisi v. Peris Pesi Tobiko & 2 Others (2013) eKLR** the Court of Appeal emphasized on the centrality of the issue of jurisdiction and stated thus:-

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

The Supreme Court in the case of **Samuel Kamau Macharia and Another vs. Kenya Commercial Bank Ltd and 2 Others, Civil Application No. 2 of 2011** further held as follows:-

"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with Counsel for the first and second respondents in his submission that the

issue as to whether a Court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter for without jurisdiction the Court cannot entertain any proceedings."

The Board observes that the issue under consideration before it relates to applicability of Section 4 (2) (f) of the Act and the conditions to be satisfied under that provision in ousting, the Application of the Act and the jurisdiction of this Board.

The Procuring Entity contended that the World Bank through the International Bank for Reconstruction and Development and/or International Development Association, agreed for the World Bank to issue a loan to the Government of Kenya to be used in implementing the subject tender with the Procuring Entity as the implementing agency.

The Procuring Entity further referred the Board to an email of 21st February 2020 from the World Bank giving a "No Objection" to the Procuring Entity with respect to the Tender Document applicable in the subject tender and allowing the Procuring Entity to undertake an advance procurement process in accordance with Section V, paragraph 5.1 of the World Bank Procurement Regulations for IPF Borrowers (Procurement in Investment Project Financing-Goods, Works, Non-Consulting and Consulting Services),

July 2016 (Revised November 2017 and August 2018) (hereinafter referred to as “the World Bank Procurement Regulations, 2018”) pending the release of funds to be applied in the subject tender.

According to the Procuring Entity, the World Bank authorized an advance procurement, negotiations and that the financing/loan agreement would be completed in the month of April 2020. The Procuring Entity referred the Board to Section V of the World Bank Procurement Regulations, 2018 to advance its argument that the World Bank Procurement Regulations, 2018 provide for advance contracting and retroactive financing.

The Procuring Entity further submitted in its Replying Affidavit that it is undertaking the subject procurement on behalf of the Government of Kenya and that since the procurement process is funded by the World Bank, the World Bank Procurement Regulation, 2018 are applicable and the same supersede the 2015 Act and by dint of section 4 (2) (f) of the Act, the application of the Act is ousted thus the Board lacks jurisdiction to entertain the Request for Review.

In response to the Procuring Entity’s objection to the jurisdiction of this Board, the Applicant in its Written Submissions submits that the Procuring Entity did not avail a copy of the alleged loan agreement. In the Applicant’s view, the mere fact that donor funds are to be used in financing a particular procurement does not automatically oust the jurisdiction of this

Board to hear a dispute relating to a procurement neither does it automatically oust the provisions of the 2015 Act.

The Board having considered parties' submissions, observes that, section 4 (2) (f) of the Act provides as follows:-

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

- (a) procurement planning;***
- (b) procurement processing;***
- (c) inventory and asset management;***
- (d) disposal of assets; and***
- (e) contract management.***

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

- (a);***
- (b);***
- (c);***
- (d);***
- (e);***
- (f) procurement and disposal of assets under bilateral or multilateral***

agreements between the Government of Kenya and any other foreign government, agency, entity or multilateral agency unless as otherwise prescribed in the Regulations

In order to understand the import of section 4 (2) (f) of the Act, the Board interrogated the parties named under the said provision. Justice Odunga in **Miscellaneous Application No 402 Of 2016 (Consolidated with Misc. Application No. 405 Of 2016), Republic v. Public Procurement Administrative Review Board & another Ex parte Athi Water Service Board & Another [2017] eKLR** (hereinafter referred to as “the Athi Water Case”) at paragraphs 152 to 154 thereof pronounced himself on the import of section 4 (2) (f) of the Act as follows:-

[152] The issue for determination was whether the instant procurement was a Procurement and disposal of assets under bilateral or multilateral agreement between the government of Kenya and any other foreign government, agency, entity or multilateral agency. In making this determination the sole consideration is who the parties to the procurement are. A literal reading of this section clearly shows that for a procurement to be exempted under section 4(2)(f), one of the parties must be the Government of Kenya.

The other party must be either a Foreign Government, foreign government Agency, foreign government Entity or Multi-lateral Agency. The rationale for such provision is clear; the Government of Kenya cannot rely on its procurement Law as against another Government. Such procurement can only be governed by the terms of their bilateral or multilateral agreement.

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

154. Again the other party in the procurement must be either a Foreign Government, foreign government Agency, foreign government Entity or Multi-lateral Agency. Neither the second applicant nor the interested parties, who were the bidders before the Board were either a Foreign Government, foreign government Agency, foreign government Entity or

Multi-lateral Agency. On this limb also the procurement is not exempted.

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

"61. It is notable that the determinant factor that was found relevant by the Respondent in assuming jurisdiction in this case was that the subject tender involved the use of donor funds which were to be repaid back by the Kenya public at the end of the day. It however did not engage in any determination of the nature of the ouster clause that was provided for by section 4(2)(f), and in particular abdicated it's 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 dependent on a finding that the subject procurement was one that was being undertaken pursuant to a bilateral agreement between the Government of Kenya and a foreign Government or entity.

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

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

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

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

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

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

Both Justice Odunga and Justice Nyamweya are clear that one of the parties to a procurement under a bilateral agreement or multilateral agreement must be the Government of Kenya. In the Athi Water Case, the parties to the bilateral agreement were the International Development Association and the Government of Kenya whereas the Procuring Entity

was identified as Athi Water Services Board. 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 said 2014 World Bank Guidelines were already cited in the bilateral agreement as being applicable in the procurement process that was under consideration in the Athi Water Case.

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 the case in Justice Nyamweya's KPLC Case, in which Justice Nyamweya found to be the point of departure with Justice Odunga's Athi Water Case 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 Guidelines require that the procurement emanating from projects financed by it whether wholly or partially, 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 Board having considered the findings made in the Athi Water Case and those made in the KPLC Case now proceeds to address the circumstances of the instant Request for Review application.

ITB Clause 2.1 of Section II. Bid Data Sheet of the Tender Document identifies the Government of Republic of Kenya as the Borrower, whereas, ITB Clause 1.1 of Section II. Bid Data Sheet of the Tender Document identifies Kenya National Highways Authority (i.e. the Procuring Entity herein) as the Employer. Further, Clause 2 of Section I. Instructions to

Bidders of the Tender Document on the source of funds for the subject procurement process provides as follows:-

"2.1. *The Borrower or Recipient (hereinafter called "Borrower") specified in the BDS has received or has applied for financing (hereinafter called "funds") from the International Bank for Reconstruction and Development or the International Development Association (hereinafter referred to as "the Bank") in an amount specified in the BDS, toward the project named in the BDS. The Borrower intends to apply a portion of the funds to eligible payments under the contract (s) for which this Bidding document is issued*

2.2. *Payment by the Bank will be made only at the request of the Borrower and upon approval by the Bank, and will be subject, in all respect to the terms and conditions of the loan (or other financing) Agreement. The Loan (or other financing) Agreement prohibits a withdrawal from the loan account for the purpose of any payment to persons or entities or for the purpose of any equipment, plant, or materials, if such payment or import is prohibited by a decision of the United Security Counsel taken under Chapter VII of the*

Charter of the United Nations. No party other than the Borrower shall derive any rights from the Loan (or other financing) Agreement or have any claim to the proceeds of the Loan (or other financing)”

The Official Website of the World Bank (www.worldbank.org.) describes the International Bank for Reconstruction and Development (IBRD) as follows:-

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

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

On the other hand, the International Development Association (IDA) is described in the Official Website of the World Bank as follows:-

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

IDA complements the World Bank's original lending arm—the International Bank for Reconstruction and Development (IBRD). IBRD was established to function as a self-sustaining business and provides loans and advice to middle-income and credit-worthy poor countries. IDA lends money on concessional terms and also provides grants to countries at risk of debt distress. In addition to concessional loans and grants, IDA provides significant levels of debt relief through the Heavily Indebted Poor Countries (HIPC) Initiative and the Multilateral Debt Relief Initiative (MDRI)."

From the above description, the Board observes that IBRD (World Bank's original lending arm) and IDA (as a complimentary to World Bank's original lending arm) joined to form the World Bank in providing loans (called "credits") and grants for programs that boost economic growth, reduce

inequalities, and improve people's living conditions in least developed countries. In order for a country to benefit from loans and grant provided by the World Bank through IDA, a country must become a member of IDA and the obligations of the said country would be specified in an agreement between such country and IDA. The International Development Association Act, Chapter 465, Laws of Kenya provides in its Preamble as follows:-

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

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

AND WHEREAS it is expedient that Kenya should become a member of the Association and that provision should be made for acceptance by Kenya of the Agreement and for carrying out the obligations of Kenya thereunder"

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

With regards to a procurement process, Justice Nyamweya in the KPLC Case held that this Board must interrogate the bilateral or multilateral agreement to establish whether a procurement is undertaken in accordance with the terms of the bilateral or multilateral agreement between the parties to the procurement.

The Procuring Entity herein did not furnish the Board with any Bilateral Agreement between the Government of Kenya and the World Bank for the Board to ascertain the Guidelines that would be applicable, if at all, to the subject tender. Further, no Bilateral Agreement between the Government of Kenya and the World Bank was furnished to the Board to interrogate whether the same specified that the subject procurement would be undertaken in accordance with the terms of the said Bilateral Agreement and the applicability of the World Bank Procurement Guidelines cited by the Procuring Entity in so far as Financing of the subject tender is concerned together with the terms and condition for the repayment of the loan to be advanced to the Procuring Entity.

The Procuring Entity attached the World Bank Procurement Regulations, 2018 and submitted that the same apply to the subject tender. The Board was also referred to an email dated 21st February 2020 wherein the World Bank states the following:-

"Based on the information provided, the Bank has no objection to the Bidding Documents (Request for Bids) and to this advance procurement process, in accordance with Section V paragraph 5.1 of the World Bank Procurement Regulations for IPF Borrowers. You may now proceed with this activity. Please ensure that bidders are given adequate length of time to respond (prepare and submit their bids). This should be not less than eight weeks"

Paragraph 5.1 of Section V of the World Bank Procurement Regulations, 2018 referenced in the said email provides as follows:-

"The Borrower may wish to proceed with the procurement process before signing the Legal Agreement. In such cases, if the eventual contracts are to be eligible for Bank IPF the procurement procedures including advertising, shall be consistent with Sections I, II and III of this Procurement Regulations. A Borrower undertakes such advance procurement at its own risk, and any concurrence by the Bank on the procedures, documentation or proposal for

award of contract, does not commit the Bank to finance the project in question”

From the foregoing, the Board observes that the email of 21st February 2020 is not evidence of the existence of a Bilateral Agreement between the Government of Kenya and World Bank instead it is evident that no such Bilateral Agreement exists because the World Bank is granting a no objection to an advance procurement process. On the other hand, Paragraph 5.1 of Section V of the World Bank Procurement Regulations, 2018 cautions that undertaking an advance procurement process before signing a Legal Agreement is at the Borrower’s risk and does not commit the World Bank to financing the project in question.

The Board further studied Clause 2.1 of Section II. General Considerations of the World Bank Procurement Regulations, 2018 which provides that:-

"The Legal Agreement governs the legal relationship between the Borrower and the Bank. The Procurement Regulations are applicable to the procurement of Goods, Works, Non-consulting Services and Consulting Services in IPF operations, as provided for in the Legal Agreement. The rights and obligations of the Borrower and the providers of Goods, Works, Non-Consulting and Consulting Services for IPF operations are governed by the relevant request for bids/request for proposals document and by the contracts

signed by the Borrower and the providers of Goods, Works, Non-Consulting and Consulting Services, and not by these Procurement Regulations or the Legal Agreement. No party other than the parties to the Legal Agreement shall derive any rights from, or have any claim to, financing proposals”

It is clear from the foregoing provision that a Bilateral Agreement between the Government of Kenya and World Bank (referred to as a Legal Agreement in the World Bank Procurement Regulations, 2018) is the instrument that would govern the legal relationship between the Government of Kenya (as the Borrower) and the World Bank (as the Bank). Such a Bilateral Agreement would outline the terms of the financing and the World Bank Procurement Regulations, 2018 would apply subject to procurement provided in the Bilateral Agreement. This means that it is not automatic for World Bank Procurement Regulations, 2018 to be applicable in a procurement by the mere fact that such procurement is being financed by World Bank. The World Bank Regulations, 2018 are only applicable in so far as parties to a Bilateral Agreement have specified so in the Bilateral Agreement. If parties to a Bilateral Agreement oust the applicability of the World Bank Procurement Regulations, then such regulations will not be applicable. This in our view promotes the principle of international comity that allows parties to a Bilateral Agreement to be bound by the terms and conditions of their agreement.

It is worth noting that Clause 2.1 of Section II. General Considerations of the World Bank Procurement Regulations, 2018 specifies that the rights and obligations of the Borrower (i.e. the Government of the Republic of Kenya) and the providers of Goods, Works, Non-Consulting and Consulting Services (i.e. successful bidders) are not governed by the said World Bank Procurement Guidelines but by the Request for Bids (i.e. Tender Document).

Accordingly, the Government of the Republic of Kenya and successful bidders would never resort to the World Bank Procurement Regulations, 2018 to exercise their rights and obligations in law and would therefore resort to Kenyan Laws. This in the Board's view also applies to the Procuring Entity who was specified as the Employer in ITB Clause 1.1 of Section II. Bid Data Sheet of the Tender Document. The Procuring Entity would not resort to the World Bank Procurement Regulations, 2018 regarding its legal relationship with bidders. In essence, nothing could have been easier than the Procuring Entity providing the Bilateral Agreement between the Government of Kenya and the World Bank applicable in the subject tender for the Board to ascertain whether the subject procurement is being undertaken in accordance with the terms of the said Bilateral Agreement (if at all one exists) in order for section 4 (2) (f) of the Act to apply in ousting, the application of the Act and jurisdiction of the Board.

In the absence of a Bilateral Agreement between the Government of Kenya and the World Bank, this Board finds that the subject procurement fails to meet the threshold of section 4 (2) (f) of the Act in order to oust, the application of the Act and jurisdiction of the Board.

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

II. Preference and Reservation Schemes

On the first sub-issue of the second issue, the Applicant contended that the Tender Document failed to provide in express terms, a requirement for at least 30% of all works to be awarded to citizen contractors, local persons or other local firms.

On its part, the Procuring Entity submitted in its Replying Affidavit that the Tender Document already provided a requirement for Sub-Contracting of up to 40% of the works in the subject tender under Sub-Clause 5.1 (a) of Section IX. Particular Conditions of the Tender Document, which provision is above the minimum requirement of 30% provided in the National Construction Authority Act No. 41 of 2011.

The Board observes that, in order to obtain registration as a contractor with the National Construction Authority (hereinafter referred to as "NCA"), Regulation 12 (1) of the National Construction Authority Regulations, 2014 (hereinafter referred to as "the NCA Regulations") provides that a foreign person or firm is entitled to registration as a Contractor on application to NCA and upon payment of the prescribed fees. Regulation 12 of the NCA Regulations provides as follows:-

"12 (1) Subject to section 18 of the Act, a foreign person or firm shall be eligible for registration as a contractor on application to the Authority and payment of the prescribed fees.

(2);

(3) The application under paragraph (1) shall be accompanied by—

(a);

(b);

(c);

(d) an undertaking in writing that the foreign person or firm-

(i) shall subcontract or enter into a joint venture with a local person or local firm for not less than thirty percent of the

**value of the contract work for which
temporary registration is sought;**

***(ii) shall transfer technical skills not
available locally to a local person or firm
in such manner as the Authority may
determine from time to time”***

Section 29 of the National Construction Authority Act further provides instances when the name of a contractor may be removed from the Register of Contractors as it states as follows:-

Removal from register

***(1) The Authority may remove the name of a
contractor from the register of contractors if the
contractor—***

***(a) has been debarred from participating in a
procurement process under any legislation;***

***(b) has been found guilty of non-compliance with
the Code of Conduct published under the Act;***

***(c) fails to comply with the provisions of
regulation 27 with regard to the payment of
the fees for registration;***

(d) is declared bankrupt; or

(e) is a company which ceases to exist as a legal entity

Further, section 24 of the National Construction Authority Act provides that:- **"24. Rejection of application**

(1) The Authority may reject an application for registration as a contractor under these Regulations if the applicant—

(a) presents false documents for accreditation;

(b) knowingly makes use of any document of accreditation that is false; or

(c) impersonates any other person named in any certificate of accreditation.

(2) A person who presents false documents under the paragraph (1) commits an offence and shall be liable on conviction to a fine not exceeding fifty thousand shillings or imprisonment for two months or to both"

The above provisions demonstrate that NCA has a procedure for application as a foreign contractor and instances when such application

may be rejected. The Board having considered the above provisions notes that the requirement of Regulation 12 (3) (d) (i) of the NCA Regulations is considered at the time an applicant is seeking registration by NCA as a foreign Contractor. Such an applicant is required to give an express undertaking to subcontract or enter into a joint venture with a local person or local firm for not less than thirty percent of the value of the contract work for which temporary registration is sought. This means, without such an undertaking, an applicant would not be registered as a foreign Contractor recognized as such by NCA.

Since this requirement is considered by NCA when it receives applications from persons who wish to be registered as Contractors in the respective NCA Categories, the Procuring Entity need not provide the same in its Tender Document but should request bidders to provide a certificate of registration in the relevant NCA Category commensurate to the works of the subject tender.

As regards a procurement process, 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”

Further, section 2 of the Act defines the term “supplier” as follows:-

“supplier” means a person who enters into a procurement contract with a procuring entity to supply goods, works or services”

On the other hand, “works” is defined under section 2 of the Act as follows:-

“works” means a combination of goods and services for the construction, repair, renovation, extension, alteration, dismantling or demolition of buildings, roads or other structures and includes—

- (a) the designing, building, installation, testing, commissioning and setting up of equipment and plant;***
- (b) site preparation; and***
- (c) other incidental services”***

From the above definitions, the Board infers the definition of supplies to include goods, works or services provided to a procuring entity by a person (supplier) who has entered into a procurement contract with a procuring entity for such purpose. Further, from the Tender Name of the subject

tender, the Board observes that the Procuring Entity requires the services of Contractors for the Upgrading of Isiolo-Kulamawe-Modogashe (A10/B84) Road ICB No. KeNHA/2236/2019 (Lot 1: Tender No. KeNHA/2267/2020-Isiolo-Kulamawe Road and Lot 2: Tender No. KeNHA/2268/2020-Kulamawe-Modogashe Road and Gar-batula Spur Road).

Accordingly, the Procuring Entity ought to have factored in the provisions of section 157 (9) of the Act which requires it to have in its tender documents a mandatory requirement as preliminary evaluation criteria for all foreign tenderers participating in international tenders (like the subject tender) to source at least forty percent of their goods, works or services from citizen contractors prior to submitting a tender. The Board studied the Procuring Entity's Tender Document but did not find this requirement as forming part of the Preliminary Evaluation criteria to be applied during evaluation of bids in the subject tender.

It is not lost to the Board that Sub-Clause 5.1 (a) of Section IX. Particular Conditions of the Tender Document provides as follows:-

"Maximum allowable accumulated value of work subcontracted (as a percentage of the Accepted Contract Amount) -40%"

This requirement first establishes a maximum limit instead of a minimum limit and forms part of the General Conditions of Contract under Section VIII of the Tender Document, which would be considered at the contract stage and not at the tendering and evaluation stages (procurement process) of the subject tender. During the procurement process, Section 157 (9) of the Act makes it mandatory for the Procuring Entity to 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 goods, works or services from citizen contractors prior to submitting a tender, which requirement was not provided in the Procuring Entity's Tender Document.

Accordingly, the Board finds that the Procuring Entity breached the provision of section 157 (9) of the Act when it failed to provide for a mandatory preliminary evaluation criteria requiring all foreign tenderers to source at least forty percent of their supplies from citizen contractors prior to submitting their tenders.

On the second sub-issue of the second issue, the Board notes that Clause 1 of Section III. Evaluation and Qualification Criteria of the Tender Document states that:-

"Margin of Preference: Not applicable"

Having found that the 2015 Act applies to the subject tender, it is worth noting that the Act provides for several preference and reservation schemes where a procuring entity applies international competitive bidding procedures, to give effect to the guiding principles under section 3 (i) and (j) of the Act which state that:-

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

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

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. Therefore, provisions of the Procuring Entity's Tender Document must be in conformity with the 2015 Act whenever it procures for goods and services in order to ensure the guiding principles under section 3 (i) and (j) of the Act can be achieved.

In so far as international tenders are concerned, 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 where international tendering and competition is used 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 cited hereinbefore makes it mandatory (rather than discretionary) in international competitive bidding 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 and for the preferences set out in section 155 of the Act to be applied during evaluation.

Section 155 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 realisation 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 fiftyonepercent of Kenyan shareholders.*
- (5) Where a procuring entity seeks to procure items not wholly or partiallymanufactured in Kenya—*
 - (a) the accounting officer shall cause a report to be prepared detailingevidence 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 causetechnological transfer or create employment opportunities as shall be prescribed in the Regulations.”*

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"

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

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

On its part, Regulation 13 of the Public Procurement and Disposal (Preference and Reservation) Regulations, 2011 (hereinafter referred to as "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 does not exceed Kenya Shillings One Billion 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.

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 also benefit from a margin of preference if they meet the threshold set in the aforesaid Regulations.

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

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

(a) six percent of the evaluated price of the tender, where percentage of shareholding of the Kenyan citizens is less than twenty percent;

(b) eight percent of the evaluated price of the tender, where the percentage of shareholding of Kenyan

citizens is less than fifty-one percent but above twenty percent; and

(c) ten percent of the evaluated price of the tender, where the percentage of shareholding of the Kenyan citizens is more than fifty percent.

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

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

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

Accordingly, the Board finds that Clause 1 of Section III. Evaluation and Qualification Criteria of the Tender Document contravenes the provisions of

Section 3 (i) and (j); 86 (2), 89 (f); 155, 157 (8) and (9) of the Act; read together with the provisions of the 2011 Regulations and 2013 Amendment Regulations outlined hereinbefore for ousting the application of a margin of preference in the subject tender.

On the third sub-issue of the second issue for determination, the Applicant contended that the Procuring Entity's Tender Document failed to make provision for preference and reservation for women, youth and persons with disability.

The Procuring Entity referred the Board to provisions in the Tender Document to support its view that the subject procurement provides protection and advancement of all category of persons without discrimination. These provisions include Sub-Clause 6.25 of Section XI. Particular Conditions of the Tender Document which provides that:-

"The Contractor shall not make decision relating to the employment of treatment of Contractor's Personnel on the basis of personal characteristics unrelated to inherent job requirements. The Contractor shall base the employment of Contractor's Personnel on the principle of equal opportunity and fair treatment and shall not discriminate with respect to any aspects of the employment relationship, including recruitment and hiring, compensation (including wages and benefits) working conditions and terms of employment,

access to training, job assignment, promotion, termination of employment or retirement, and disciplinary practices

Special measures of protection or assistance to remedy past discrimination or selection for a particular job based on the inherent requirements of the job shall not be deemed discrimination. The Contractor shall provide protection and assistance as necessary to ensure non-discrimination and equal opportunity, including for specific groups such as women, people with disabilities, migrant workers and children (of working age in accordance with Sub-Clause 6.22)

Sub Clause 6.22. The Contractor, including sub-contractors, shall not employ or engage a child under the age of 14 unless the national law specifies a higher age (the minimum age).....”

Sub Clause 4.1 of Section IX. Particular Conditions of the Tender Document provides as follows:-

"Sustainable procurement

Add

- ***Not less than 10% of the unskilled labor workforce, as measured in the monthly labor return shall be women***

- ***Contractor shall make available internships for durations approved by the Employer for up to 10No. recent university graduates in the fields of civil engineering, mechanical engineering, surveying, project management or other field approved by the Employer. The interns shall be entitled to an allowance chargeable to the appropriate item in the bill of quantities;***
- ***The Employer will process a maximum of 30No work permits for foreign personnel under this contract. All other staff engaged by the contractor shall be of local citizenship'***

ITB Clause 11.1 (h) of Section II. Bid Data Sheet of the Tender Document further provides that:-

".....

(e) Labor Influx Management Plans (LIMP)

The Bidder shall submit a Labour Influx Management Plan with the following elements:

- ***Plans/proposals for tapping or maximizing use of labour from local workforce;***
- ***Proposals for signing of worker code of conduct as part of employment contracts and including sanctions for non-compliance;***

- ***Plans/proposals for mandatory compliance with environmental, social, health and safety requirements including worker training/awareness on unacceptable conduct toward local community specifically women and national laws that make sexual harassment and gender-based violence a punishable offence that is prosecuted;***
- ***Plans for monitoring and supervision of issues related to labour influx and workers' camps."***

Having considered the above provisions, the Board notes that the same protect the rights of employees of a contractor, participation of women as employees of the contractor and the requirement to enable skill transfer to youths through internships offered by the contractor during implementation of works in the subject tender.

The Board further notes that Section 155 (5) of the Act requires as follows:-

"An accounting officer of a procuring entity shall, when processing procurement, reserve a prescribed percentage of its procurement budget, which shall not be less than thirty per cent, to the disadvantaged group and comply with the

provisions of this Act and the regulations in respect of preferences and reservations”

Section 53 (6) of the Act further provides that:-

"All procurement and asset disposal planning shall reserve a minimum of thirty per cent of the budgetary allocations for enterprises owned by women, youth, persons with disabilities and other disadvantaged groups"

Lastly, Section 2 of the Act defines disadvantaged groups as:-

"persons denied by mainstream society access to resources and tools that are useful for their survival in a way that disadvantages them or individuals who have been subjected to prejudice or cultural bias because of their identities as members of groups or categories of persons without regard to their individual qualities, and includes enterprises in which a majority of the members or shareholders are youth, women, persons with disability or categories as shall be prescribed"

The above requirements make it mandatory for a procuring entity as part of its procurement and asset disposal planning, to set aside 30% of its procurement budgetary allocation for enterprises owned by women, youth,

persons with disabilities and other disadvantaged groups. In practice, a procuring entity specifies the tenders that have been reserved for enterprises owned by women, youth, persons with disabilities and other disadvantaged groups when advertising tenders, having set aside 30% of its procurement budgetary allocation for enterprises owned by women, youth, persons with disabilities and other disadvantaged groups. It should be clearly understood that what is mandatory is for the procuring entity to set aside 30% of its procurement budgetary allocation for tenders that will be reserved for enterprises owned by women, youth, persons with disabilities and other disadvantaged groups. However, in determining which tenders will be reserved for women, youth, persons with disabilities and other disadvantaged groups, that is the sole responsibility of a Procuring Entity and the Board cannot interfere with such discretion.

No evidence was adduced before this Board by the Applicant to demonstrate that the Procuring Entity failed to set aside 30% of its procurement budgetary allocation for enterprises owned by women, youth, persons with disabilities and other disadvantaged group.

Accordingly, the Board finds, the Applicant's allegation that the Procuring Entity failed to make provision for preference and reservation for women, youth and persons with disability has not been substantiated.

In totality of the second issue, the Board finds, the Procuring Entity breached the provisions of Section 157 (9) of the Act when it failed to provide for a mandatory preliminary evaluation criteria requiring all foreign tenderers to source at least forty percent of their supplies from citizen contractors prior to submitting their tenders. Further, the Board finds that Clause 1 of Section III. Evaluation and Qualification Criteria of the Tender Document contravenes the provisions of Section 3 (i) and (j); 86 (2), 89 (f); 155, 157 (8) and (9) of the Act; read together with the provisions of the 2011 Regulations and 2013 Amendment Regulations, for ousting the application of a margin of preference in the subject tender.

III. Litigation History

On the third issue for determination, the Applicant contended that Sub-Clause 2.4 of Clause 3 of Section III. Evaluation and Qualification Criteria at page 42 of the Tender Document offends the provision of Article 50 of the Constitution.

Sub-Clause 2.4 of Clause 3 of Section III. Evaluation and Qualification Criteria at page 42 of the Tender Document provides that:-

"Litigation History

No consistent history of court/arbitral award decisions against the Bidder³ since 1st January 2015

.....

³The Bidder shall provide accurate information on the related Bid Form about any litigation or arbitration resulting from contracts completed or ongoing under its execution over the last five years. A consistent history of award against the Bidder or any members of a joint venture may result in failure of the Bid

The Tender Document also provided Form CON-2 of Section VI. Bidding Forms at pages 84 and 85 thereof specifying the manner in which bidders would indicate their Historical Non-Performance, Pending Litigation and Litigation History.

The Board studied the Standard Tender Document for Procurement of Works (Roads, Bridges, Water and other Civil Engineering Works), 2007 issued by the Public Procurement Regulatory Authority (hereinafter referred to as "the Authority) and notes that Clause 2.2 (f) thereof provides as follows"

2.2. Qualification Requirements

To be qualified for award of Contract, the tenderer shall provide evidence satisfactory to the Employer of their eligibility under Sub clause 2.1. above and of their capability and adequacy of resources to effectively carry out the subject Contract. To this end, the tenderer shall be required

to update the following information already submitted during prequalification:-

(a);

(b);

(c);

(d);

(e);

(f) Details of any current litigation or arbitration proceedings in which the tenderer is involved as one of the parties.

It is evident that the Standard Tender Documents issued by the Authority for Procurement of Works (Roads, Bridges, Water and other Civil Engineering Works) provide a requirement for bidders to provide details of litigation or arbitration proceedings in which such bidder is involved as one of the parties. In the Board's view, the requirement for bidders to provide their Litigation History (including arbitration proceedings) helps a procuring entity assess whether or not such litigation history may affect a bidder's capability to execute works advertised in a tender

It is not lost to the Board that arbitration proceedings are usually confidential in nature therefore precluding parties from making any aspect

of the said proceedings known to the public before the making of an arbitral award. This fact was appreciated by the court in **Supreme Court of Kenya Petition No. 2 of 2017, Synergy vs. Cape Holdings** when it was held as follows:-

"Confidentiality is also important in many commercial transactions. Some parties do not want their business secrets to be divulged to the entire public as is often the case with litigation. In this regard, one of the reasons why Arbitration is preferred as a means of dispute resolution is because it enhances confidentiality and creates a less tense atmosphere of dispute resolution. As Dr. Kariuki Muigua has observed:

"Unless parties agree otherwise in an Arbitration agreement ... all the aspects of the case are confidential... For parties who dread humiliation or condemnation or for those who simply do not want sensitive information to be disclosed, Arbitration allows settlement of disputes without exposure."

Matters of principle, long term relationships of parties, culture and ego also often drive parties to prefer arbitration to litigation."

Article 34 (5) of the United Nations Convention on International Trade Law (Model Law) on Arbitration Rules, 2013 provides that:-

"An award may be made public with the consent of all parties or where and to the extent disclosure is required of a party by legal duty to protect or pursue a legal right or in relation to legal proceedings before a court or other competent authority"

Further, section 35 (1) of the Arbitration Act No. 4 of 1995 provides as follows:-

"35. Application for setting aside arbitral award

(1) Recourse to the High Court against an arbitral award may be made only by an application for setting aside the award under subsections (2) and (3)"

Section 36 of the Arbitration Act provides that:-

"36. Recognition and enforcement of awards

(1) A domestic arbitral award, shall be recognized as binding and, upon application in writing to the High Court, shall be enforced subject to this section and section 37.

(2) An international arbitration award shall be recognized as binding and enforced in accordance to the provisions of the New York Convention or

any other convention to which Kenya is signatory and relating to arbitral awards.”

From the foregoing provisions, an arbitral award can only be made public if parties to the arbitration consent to the same being made public, where disclosure is required of a party by legal duty to protect or pursue a legal right or in relation to legal proceedings before a court or other competent authority. This means, the requirement of confidentiality with respect to arbitral awards is not an absolute right and the same may be waived by parties through their consent.

Further, where a party wishes to make an application pursuant to section 35 (1) of the Arbitration Act for the arbitral award to be set aside and/or for purposes of making an application for recognition and enforcement of the said award, such party may lodge an application at the High Court and would be required to furnish the court with the Arbitral Award that is being challenged, or that is the subject of an application for recognition and enforcement.

Article 50 of the Constitution referred to by the Applicant provides that:-

"Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public

hearing before a court or, if appropriate, another independent and impartial tribunal or body”

Pursuant to the above provision, every person has the right to a fair hearing including the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

The Board is of the view that the requirement of Litigation History does not in any way curtail the right to fair hearing under Article 50 of the Constitution, as the requirement is not used to discriminate upon a bidder from participating in a procurement process. The requirement for bidders to provide their Litigation History and Arbitral Award should relate to similar works to the works bidden for, since a procuring entity would be concerned with any Litigation History and Arbitral awards that would affect a bidder's capability to execute the specific type of works advertised by such procuring entity.

Accordingly, the Board finds that the requirement under Sub-Clause 2.4 of Clause 3 of Section III. Evaluation and Qualification Criteria at page 42 of the Tender Document does not offend the provision of Article 50 of the Constitution provided the Procuring Entity requires Litigation History and Arbitral Awards involving similar works to the works being procured.

IV. Bid Security

On the fourth issue, the Board notes, the Applicant alleged that the requirement of bid security as specified by the Procuring Entity is unreasonably high.

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

- "(1) An accounting officer of a procuring entity may require that tender security be provided with tenders, subject to such requirements or limits as may be prescribed.***
- (2) The form of tender security in subsection (1) shall be—***
- (a) as prescribed in the Regulations;***
 - (b) stated as an absolute value;***
 - (c) an amount of not more than two percent of the tender as valued by the procuring entity"***

Further, Regulation 41 of the Public Procurement and Disposal Regulations, 2006 (hereinafter referred to as "the 2006 Regulations") states as follows:-

- "41. (1) The amount of any tender security under section 57 (2) of the Act [i.e. section 61 (2) of the 2015 Act] shall be expressed either as a fixed amount or as a percentage of the estimated value of the***

contract and shall not in either case exceed two percent of the estimated value of the contract.

(2) In determining the amount of tender security under paragraph (1), a procuring entity shall take into account-

(a) the cost to tenderers of obtaining a tender security;

(b) the estimated value of the contract; and

(c) the risk of tenderers failing to fulfill the conditions of their tenders.”

Section 61 (2) (b) of the Act read together with Regulation 41 (1) of the 2006 Regulations allows a procuring entity to provide an absolute value of tender security that does not exceed two percent of the tender as valued by the procuring entity.

ITB Clause 19.1 of Section II. Bid Data Sheet of the Tender Document specified the value of tender security as follows:-

"Lot 1: One Hundred and Forty Million Kenya Shillings (Kshs. 140,000,000.00) or an equivalent amount in a freely convertible currency

Lot 2: One Hundred and Eighty Million Kenya Shillings (Kshs. 180,000,000.00) or an equivalent amount in a freely convertible currency”

The Procuring Entity submitted that, if the value of the respective lots in the subject tender are taken into account against the value of bid security in the respective lots outlined hereinabove, the percentage of bid security arrived at would be 1% based on an exchange rate of Kshs. 100.00 to 1 US dollar.

The Board having considered this view observes that ITB Clause 2.1 of Section II. Bid Data Sheet of the Tender Document specifies the Loan for the entire **North Eastern Transport Improvement Project** is USD 750,000,000.00. The subject tender only comprises of two Lots (i.e. Lot 1: Tender No. KeNHA/2267/2020-Isiolo-Kulamawe Road and Lot 2: Tender No. KeNHA/2268/2020-Kulamawe-Modogashe Road and Gar-batula Spur Road). According to the Procuring Entity, these two lots comprise of only 204 kilometers whereas the entire **North Eastern Transport Improvement Project** covers 579 Kilometers.

The Procuring Entity submitted that with respect to the two lots in the subject tender, their values are; Lot 1, USD 140,000,000.00 and Lot 2, USD 160,000,000.00. Accordingly, the value of tender security would be:-

- Lot 1, US Dollars $1,400,000.00 / \text{USD } 140,000,000.00 \times 100 = 1.96$

- Lot 2, US Dollars 1,800,000.00/USD
 $160,000,000.00 \times 100 = 1.125$

From the foregoing, it is evident that the Procuring Entity complied with the requirement under section 61 (2) (c) read together with Regulation 41 (1) of the 2006 Regulations, since the value of bid security in the respective lots does not exceed 2% of the estimated value of the tender as valued by the Procuring Entity. Furthermore, the Applicant never adduced evidence to support its contention that the Bid security provided for in the Tender Document was unreasonably high

Accordingly, the Applicant's allegation that the requirement of bid security is unreasonably high fails since the same has not been substantiated.

V. Requirement for Joint Ventures

The Applicant challenged the requirement of ITB Clause 4.1 of Section II. Bid Data Sheet of the Tender Document and termed the said provision to be unreasonable since it limits the maximum number of members in a joint venture to three. In the Applicant's view, the Procuring Entity ought to have allowed unlimited number of joint venture partners to maximize participation of bidders in the subject tender.

In response to this allegation, the Procuring Entity in its Written Submissions submitted that the said requirement is not unreasonable. According to the Procuring Entity, the estimated value of USD 750,000,000.00 is an estimate for 594 kilometers of the entire **North Eastern Transport Improvement Project** whereas, the subject tender in so far as the two lots are concerned is with respect to Road Construction Works of 204 kilometers only and that Joint Venture Partners comprising of 3 members have the capacity to bid for the said works since the value of the lots are; USD 140,000,000.00 for Lot 1 and USD 160,000,000.00 for Lot 2.

Having considered parties' pleadings, the Board observes that Clause 4.1 of Section I. Instructions to Bidders of the Tender Document provides that:-

"4.1. A Bidder may be a firm that is a private entity, a state owned enterprise or institution subject to ITB 4.6 or any combination of such entities in the form of a joint venture under an existing agreement or with the intent to enter into such an agreement supported by a letter of intent. In the case of a joint venture, all members shall be jointly and severally liable for the execution of the entire contract in accordance with the contract terms. The JV shall nominate a Representative who shall have the authority to conduct all business for and

on behalf of any and all the members of the JV during the Bidding process, and in the event the JV is awarded the Contract during contract execution. Unless specified in the BDS, there is no limit on the number of members in a JV

ITB Clause 4.1: Maximum number of members in the JV shall be 3 (Three)”

In addressing this issue, the Board considered the meaning of the term “Joint Venture”, defined by Thomas Thelford in his book, **Construction Law Handbook (2007)** as follows:-

“A contractual arrangement between two or more persons or companies in which resources are combined- be they equipment, expertise or finance with a view of making profit, but the two companies can remain separate legal entities.”

From the above definition, the Board notes, a Joint Venture may involve an arrangement between two or more persons or companies. In the case of companies, despite the two pooling resources together with a view of making profit, the two can opt to remain separate legal entities but enter into a contractual arrangement. This means that a procuring entity would be dealing with two different companies that have entered into a contractual arrangement for the sake of pooling resources together to meet the needs and/or requirements of a procurement process.

In a second scenario, Thomas Thelford, in his book, "*Construction Law Handbook*" explains another form of Joint Venture arrangement as follows:-

"Joint ventures between two or more existing entities may take different shapes. The existing organizations may simply enter into an agreement to work together or pool resources for a specific purpose, or may opt to form a new entity for the purpose of conducting their joint business"

In the book by Thomas Thelford, cited hereinbefore, the author continues to explain Joint Ventures in relation to procurement procedures as follows:-

"While the sharing of liabilities and profits is regulated under a legal arrangement to which only the joint venture partners are parties, there will generally, in addition, be a separate contract with a client. This will regulate the joint venture parties' obligations and rights vis à vis that client, once the tender is successful. The risk and opportunity sharing in these two relationships, that is the joint venture and the client contract has to be matched such that delivery objectives for the joint venture partners are harmonized. For example, a client is often looking for joint and several obligations with the joint venture to spread risk. This would leave one joint venture partner accountable to the client for

the entirety of the joint venture, should the other joint venture partner fall away. In looking at joint ventures, it is issues like joint and several liability that require careful assessment of the strengths of a potential joint venture arrangement”

From the above extract, the Board notes, whatever form a Joint Venture arrangement takes, be it, a contractual arrangement where two or more companies remain separate legal entities, and do not form a new entity, or, in the alternative, two or more persons or companies, forming a new Joint Venture company, liability to a procuring entity needs to be given careful consideration to avoid instances where one or more joint venture partners escape liability.

The above author explains that liability of joint venture partners may be joint and several. This means that in case of an issue arising, a procuring entity may seek redress by suing the joint venture partners jointly and severally.

The Board would like to note that, the rationale behind having a Representative or Lead Partner in the Joint Venture is to avoid instances where a procuring entity may be dealing with several members in a joint venture or several companies in joint venture. When an issue arises, the procuring entity is unable to trace the joint venture members responsible

as they can easily escape liability. Secondly, the persons or companies in joint venture may go into debt to a point where the representative or Lead Partner is unable to meet those debts to the satisfaction of the procuring entity.

In a scenario where the Representative or Lead Partner cannot account for the debts of the joint venture partnership, the Procuring Entity will have the option to sue the Joint Venture Partners jointly and severally for the debts owing to the Procuring Entity.

Article 227 (1) of the Constitution identifies competitiveness as one of the principles that guides public procurement processes in our country. It is the Board's considered view that the Procuring Entity ought to allow joint venture arrangements of whatever form without limitation to the number of partners in the joint venture to enhance maximum participation of local and citizen contractors to promote competition in this procurement process. A bidder has a right to bid for works advertised by a procuring entity so long as such bidder meets the qualifications specified in the Tender Advertisement Notice and may demonstrate this by entering into joint venture arrangements to facilitate their participation.

To safeguard the Procuring Entity from having members of the Joint Venture escaping liability in case of issues arising, the Board observes that the Procuring Entity may provide a requirement in the Tender Document for bidders in the Joint Venture arrangement to be jointly and severally liable

to the Procuring Entity. Secondly, the Procuring Entity may require bidders to submit a draft copy of the Joint Venture agreement when submitting their respective bids. Thirdly, the Procuring Entity, before signing the contract with the successful bidder may direct such successful bidder to submit a signed copy of the Joint Venture arrangement, assuming the successful bidder, submitted a bid in joint venture.

Accordingly, the Board finds that the Procuring Entity breached the principle of competition under Article 227 (1) of the Constitution in providing a limit of Joint Venture membership as 3 under ITB Clause 4.1 of Section II. Bid Data Sheet of the Tender Document.

VI. Cash Flow Requirement

The Applicant challenged the Cash Flow Requirement provided in Sub-Clause 3.1 of Clause 3 of Section III. Evaluation and Qualification Criteria of the Tender Document, alleging that the same is unreasonably high.

This requirement is outlined as follows:-

"The Bidder shall demonstrate that it has access to, or has available liquid assets, unencumbered real assets, lines of credit and other financial means (independent of any contractual advance payment) sufficient to meet the construction cash flow requirements estimated as LOT 1

US\$13 million and LOT 2 US\$17 million for the subject contract net of the bidder's other commitments

-Must meet requirement"

The Procuring Entity submitted that the requirement of Cash Flow for the two respective lots is an estimate of the amount required to sustain the project in the subject tender for a period of about 4 months.

It is worth noting that section 89 (d) of the Act requires 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"

Section 89 (d) of the Act requires a procuring entity to specify technical requirements that are compatible to requirements under Kenyan law and

such requirements must be based on international standards, or standards widely used in international trade. It is the Board's considered view that such technical requirements include the cash flow requirements specified by a procuring entity for an estimated period of time.

The Board would like to distinguish the circumstances of this case to the circumstances in **PPARB Application No. 2 of 2020, Energy Sector Contractors Association v. Kenya Pipeline Company Limited & Another** (hereinafter referred to as "Review No. 2 of 2020") where it was held as follows:-

"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. "

In Review No. 2 of 2020, the Board was furnished with the Tender Document used in Phase 1 of the Last Mile Connectivity Project and details of the estimated value of the tender under consideration in Review No. 2 of 2020 for the Board to arrive at a conclusion whether or not the Cash Flow Requirements provided by the procuring entity in that case were unreasonable.

In this instance, the Applicant provided no evidence in the form of statistical data comparing the subject tender to another tendering process of a similar nature conducted by the same Procuring Entity wherein the cash flow requirements might have been much lower for the Board to draw a conclusion that the Procuring Entity has provided for unreasonably high cash flow requirements in the subject tender. The Procuring Entity has the duty to specify technical requirements that allow for open and fair competition. A bidder alleging that such a threshold has not been met ought to provide proof to the satisfaction of the Board, which the Applicant failed to do in this instance.

Accordingly, the Board finds that the Applicant's contention that the Cash Flow Requirements in the respective lots in the subject tender as specified in Sub-Clause 3.1 of Clause 3 of Section III. Evaluation and Qualification Criteria of the Tender Document, fails as it lacks basis given the Applicant's failure to substantiate the same.

VII. Average Annual Construction Turnover

The requirement on Average Annual Construction Turnover is expressed in Sub-Clause 3.2 of Clause 3 of Section III. Evaluation and Qualification Criteria of the Tender Document as follows:-

"Minimum Average Annual Construction Turnover of Lot 1 US\$ 80 Million and Lot 2 US\$ 100 Million calculated as total certified payments received for contracts in progress and/or

completed within the last five years, divided by five years
-Must meet Requirement"

The Applicant took the view that this requirement is also unreasonably high and is a calculated move to lock out citizen contractors from participating in the subject tender.

Having considered the Applicant's allegation vis a vis the requirement of Average Annual Construction Turnover, the Board would like to reiterate that a procuring entity has discretion to provide technical requirements relating to works in a tender, provided those requirements promote open and fair competition.

The Applicant contends that the requirement of Average Annual Construction Turnover curtails participation of citizen contractors without adducing evidence to demonstrate that citizen contractors are unable to meet this requirement for the Board to draw a conclusion whether or not the said requirement fails to promote open and fair competition among all tenderers (including citizen contractors) who may wish to participate.

Accordingly, the Board finds that the Applicant's allegation that the requirement of Average Annual Construction Turnover in the respective lots in the subject tender as specified in Sub-Clause 3.2 of Clause 3 of Section

III. Evaluation and Qualification Criteria of the Tender Document, to lack basis as the said allegation has not been substantiated.

VIII. Construction and Management Experience

The Applicant challenged the requirement of Construction and Management Experience which is provided in Sub-Clause 4.1 (a) and 4.2 (a) and (b) of Clause 3 of Section III. Evaluation and Qualification Criteria of the Tender Document as follows:-

"4.1 (a) General Construction Experience

Experience under construction contracts in the role of prime contractor, JV member, sub-contractor, or management contractor for at least the last eight years, starting 1st January 2012

–Must meet requirement”

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 1st January 2012 and bid submission deadline:

Lot 1: 2 contracts each of minimum value US\$110 million

Lot 2: 2 contracts, each of minimum value US\$140 million

Note: The bidder shall have prior experience working in infrastructure projects in sub-Saharan African countries

The similarity of the contracts shall be based on the physical size, complexity, methods/technology or other characteristics as described in Section VI. Scope of Works”

4.2 (b) For the above and any other contracts (substantially completed and under implementation) as prime contractor, joint venture member or sub-contractor between 1st January 2012 and application submission deadline, a minimum construction experience in the following key activities successfully completed in any one year

Lot 1:

- ***Earth works Fills -687,000 m³ in a year***
- ***Processing cement improved material -159,000 m³ in a year***
- ***Asphalt Concrete -28,000 m³ in a year***
- ***Concrete Works -7,000 m³ in a year***

Lot 2:

- ***Earthworks Fills -842,000m³ in a year***
- ***Processing cement improved material***

-252,000m3 in a year

- ***Asphalt concrete -43,000m3 in a year***
- ***Concrete Works -2,600m3 in a year***

Having studied the above requirement, the Board notes that the Procuring Entity requires bidders to provide a minimum number of similar contracts that have been satisfactorily and substantially completed as a prime contractor, joint venture member, management contractor or sub-contractor between 1st January 2012 and bid submission deadline as the Construction and Management Experience as specified in the respective lots. In the Board's view, the Procuring Entity has leeway to specify the minimum level of experience required of bidders that the Procuring Entity feels would suit its needs.

A party challenging the technical requirements provided by a procuring entity on the grounds that no contractor has the experience to meet such requirements would therefore be required to demonstrate to the Board through evidence or data to support its allegation. In the absence of such proof, this Board cannot dictate the level of experience with respect to a technical requirement that a procuring entity ought to specify in its tender documents.

Accordingly, the Board finds that the Applicant's allegation that the technical requirements under Clause 4.1 (a) and 4.2 (a) and (b) of Section III. Evaluation and Qualification Criteria of the Tender Document are unreasonable, has not been supported by evidence to the satisfaction of the Board.

The Board would like to make an observation that procuring entities should consider unbundling of projects into smaller lots to enable maximum participation of citizen and local contractors in order to achieve the guiding principles under section 3 (i) and (j) of the Act.

In totality of the foregoing, the Request for Review succeeds with respect to the following specific orders:-

FINAL ORDERS

In exercise of the powers conferred upon it by Section 173 of the Act, the Board makes the following orders in the Request for Review:-

- 1. The Procuring Entity is hereby directed to issue an Addendum to the Tender Document for North Eastern Transport Improvement Project (NETIP) Project ID: PKG1: Upgrading of Isiolo-Kulamawe-Modogashe (A10/B84) Road ICB No. KeNHA/2236/2019 Lot 1: Tender No. KeNHA/2267/2020-Isiolo-Kulamawe Road and Lot 2: Tender**

No. KeNHA/2268/2020-KUlamawe-Modogashe Road and Gar-batula Spur Road within seven (7) days from the date of this decision to ensure the Tender Document complies with the provisions of the Act and the Constitution, taking into consideration the Board's findings in this case.

- 2. The Procuring Entity is hereby directed to extend the deadline for submission of tenders specified as 28th April 2020 for a further thirty (30) days from the date of issuance of an Addendum to the Tender Document pursuant to Order No. 1 above.**
- 3. Given that the subject procurement process has not been concluded, each party shall bear its own costs in the Request for Review.**

Dated at Nairobi, this 14th day of April 2020

CHAIRPERSON

SECRETARY

PPARB

PPARB