REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 141/2020 OF 19TH NOVEMBER 2020

BETWEEN

RIANG INTERNATIONAL GROUP LIMITED.....APPLICANT

AND

THE ACCOUNTING OFFICER,

CENTRAL RIFT VALLEY

WATER WORKS DEVELOPMENT AGENCY.....1ST RESPONDENT

CENTRAL RIFT VALLEY

WATER WORKS DEVELOPMENT AGENCY.....2ND RESPONDENT

Review against the decision of Central Rift Valley Water Works Development Agency with respect to Tender No. RVWWDA/LVN/AfDB/KTSWSSP/W/KAKAMEGA/2019-2020 Last Mile Connectivity Works for Eldoret and Kakamega Towns Lot II: Kakamega Town

BOARD MEMBERS

1. Ms. Faith Waigwa -Chairperson
2. Mr. Ambrose Ngare -Member
3. Ms. Rahab Chacha -Member

IN ATTENDANCE

1. Mr. Stanley Miheso -Holding brief for Secretary

BACKGROUND TO THE DECISION

The Bidding Process

Central Rift Valley Water Works Development Agency (hereinafter referred to as "the Procuring Entity") invited interested and eligible bidders to submit bids in response to Tender No. RVWWDA/LVN/AfDB/KTSWSSP/W/KAKAMEGA/2019-2020 Last Mile Connectivity Works for Eldoret and Kakamega Towns Lot II: Kakamega Town (hereinafter referred to as "the subject tender") via an advertisement on the United Nations Development Business (UNDB) website www.devbusiness.un.org on 24th February 2020 and in the local Daily Nation Newspaper on 26th February 2020.

Pre-Bid Meeting/Conference

Bidders were invited for a Pre-Bid Conference which was held at the Kakamega County Water and Sanitation Company (KACWASCO) Offices in Kakamega Town on 10th March 2020 at 10.00 am followed by site visits to the project areas on the same day.

Bid Submission Deadline and Opening of bids

A total of three (3) bidders/firms submitted bids in response to the subject tender which were opened in the presence of bidders and their

representatives who chose to attend and which bids were recorded as follows: -

Bidder No.	Firm
1.	Northern Green Developers Ltd.
2.	Phenix Logistiques Centre Ltd.
3.	Riang International Group Ltd.

Evaluation of Proposals

The evaluation process was to be conducted in four stages:

1. Preliminary Evaluation;
2. Technical Responsiveness Evaluation;
3. Detailed Evaluation;
4. Financial Evaluation.

1. Mandatory Evaluation

At this stage of evaluation, bids were examined to ascertain if all the required documentation had been submitted and if they were in compliance with the mandatory requirements of the Tender Document.

The purpose of this stage of evaluation was to identify and reject bids that were incomplete, invalid, or substantially non-responsive to the Tender Document and therefore were not to be considered further. It entailed the following:

- Verification
- Eligibility
- Bid Security
- Completeness of Bid

- Substantial Responsiveness

Bids were evaluated against the Preliminary Evaluation Criteria as follows: -

Item		**Description**	**Reference BDS or SBEG**
Verification		Letter of Bid Duly signed	Letter of Bid
		Joint Venture Agreement duly signed	ITB 4.1 Pg. 1-26 / Pg. 1-6
		Power of Attorney	ITB 20.2 Page 1-26
		Bid validity (Should be valid for **120 days** 6th August 2020	Letter of Bid
Eligibility	Nationality	Nationality in accordance with ITB 4.2.	ELI 1.1 and 1.2
	Conflict of Interest	No- conflicts of interests as described in ITB 4.3.	Letter of Bid
	Bank Ineligibility	Not having been declared ineligible by the Bank as described in ITB 4.4.	Letter of Bid
	Government Owned Entity	Compliance with conditions of ITB 4.5	ELI 1.1 and 1.2
	Ineligibility based on a United Nations resolution or Borrower's country law	Not having been excluded as a result of the Borrower's country laws or official regulations, or by an act of compliance with UN Security Council resolution, in accordance with ITB 4.8	Letter of Bid
Bid Security (Original		Consistency of the wording with the Bid Security Form provided in the	Page 1-14 / Page 1-62

Item		Description	Reference BDS or SBEG
Bank Guarantee)		Bidding document section IV Bidding Forms	
		The amount - **KES.500,000**	Page 1-26 (ITB 19.1)
		Validity 120 days i.e. Bid validity deadline i.e. **6th August 2020**	Page 1-14 (ITB 18.1 / ITB 19)
		Joint Venture Bid Security should be in the name of all the partners in the Joint Venture as per clause 19.8	ITB 19.3 (Correspondent Financial Institution in Kenya), Page 1-15
Completeness of Bid		Completeness of Bid Forms as in Schedule IV	Page 1-12
		Letter of Bid	
		Bills of Quantities	
		Schedule of Adjustment Data	
		Summary of payment currencies	
		Form of Bid Security (Bank Guarantee)	
		Technical Proposal Forms	
		Site Organization	
		Method Statement	
		Mobilization Schedule	
		Construction Schedule	
		Contractors Equipment	
		Proposed Personnel	
		Bidders Qualification	
		ELI -1.1 and 1.2	
		• Registration certificate / Incorporation of Bidder (which year?)	
		• JV agreement	
		• In case of Government Entity document proofing Autonomy	
		All plus attachments	

Item		Description	Reference BDS or SBEG
		Initialization of erasures, Interlineations, additions or cancellation of items in Bill of Quantity as per clause 1.3.1 and 20.4 of ITB.	Page 1-16
		Completeness of the Bill of Quantities - Adequately filled	Page 1-12 (ITB 14.3) SBEF(5d) Page 1-22
		Completeness of Bid Forms as in Schedule IV	ITB 11.1(c)
		Form CON 2	
		Form CCC	
		Form FIN 3.1 (AAT for the last 3 years)	
		Form FIN 3.2	
		Form FIN 3.3 (AAT for the last 3 years)	
		Form Exp 2.4.1	
		Form Exp 2.4.2(a)	
		Form Exp 2.4.2(b)	
		Other documents	Page 1-15 / Page 1-26
		• Tax Compliance Certificates	
		• Registration with relevant Authorities	
		(To be verified at post Qualification)	

The results of this stage of evaluation were as follows: -

B. No.	Name of The Bidder	Verification	Eligibility	Bid Security	Completeness of Bid	Substantial Technical / Financial Responsiveness	Accepted for Second Technical Evaluation
1	Northern Green Developers Ltd.	No	Yes	No	No	Yes	No
2	Phenix Logistiques Centre Ltd.	Yes	Yes	Yes	Yes	Yes	Yes
3	Riang	Yes	Yes	Yes	Yes	Yes	Yes

B. No.	Name of The Bidder	Verification	Eligibility	Bid Security	Completeness of Bid	Substantial Technical / Financial Responsiveness	Accepted for Second Technical Evaluation
	International Group Ltd.						

Bidder No. 1 was found non-responsive whereas Bidder No. 2 and Bidder No. 3 were found responsive at this stage of evaluation and thus qualified to proceed for Technical Responsiveness Evaluation.

2. Technical Responsiveness Evaluation

At this stage of evaluation, bids were examined on their technical aspects, to confirm that all the requirements outlined under Section III of the Tender Document were met without any material deviation, reservation, or omission.

Bids were evaluated against the following technical criteria: -

Item	Description	Reference BD or SBEF
Site Organization	Analyse for practicability and compliance with works requirement.	Page 1-61
Method Statement	• General – Setting up and Mobilization • Pipework- Water Distribution pipelines, HDPE • Pipework – Sewer lines, uPVC • Ancillaries – chambers, valves, washouts, meters • Rehabilitation works for Wastewater Treatment Works and sewers • EHS • Quality Control • Electromechanical Works	Page 1-62

Item	Description	Reference BD or SBEF
	• Capacity Building • Operation and maintenance during DLP	
Construction schedule (to comply with 12 months construction and 12 months DLP timeline)	Analyse for compliance with the stipulated timeframe	Page 1-64
Mobilization Schedule (Work plan)	Analyse for practicability and compliance to the stipulated timeframe	Page 1-63

The results were as follows: -

No.	Criteria	Bidder No	
		2	**3**
(a)	Method statement	No	Yes
(b)	Mobilization Schedule	Yes	Yes
	Construction Schedule	Yes	Yes
(c)	Equipment	No	Yes
(d)	Personnel	No	No
(e)	Site Organization	Yes	Yes
		NR	**NR**

Upon conclusion of Technical Responsiveness Evaluation, Bidder No. 2 and Bidder No. 3 were found non-responsive and therefore did not qualify to proceed to the next stage of evaluation.

The Evaluation Committee's Recommendation

In view of the evaluation process, the Evaluation Committee recommended that the subject works be re-tendered and a reasonable amount of time be allowed for submission of new bids to ensure that

more competitive and responsive bids were received by the Procuring Entity.

Professional Opinion

The Supply Chain Manager reviewed the Evaluation Report and concurred with the Evaluation Committee's recommendation vide a Professional Opinion dated 2nd November 2020.

The Managing Director of the Procuring Entity approved the Evaluation Committee's recommendation on 2nd November 2020.

REQUEST FOR REVIEW NO. 141 OF 2020

Riang International Group Limited (hereinafter referred to as "the Applicant"), lodged a Request for Review dated and filed on 19th November 2020 together with a Statement (hereinafter referred to as "the Applicant's Statement") sworn and filed on even date through the firm of SESLaw Advocates LLP. The Applicant also lodged a Further Statement sworn and filed on 1st December 2020 (hereinafter referred to as "the Applicant's Further Statement").

In response, the Procuring Entity, acting in person, lodged a Memorandum of Response dated and filed on 26th November 2020 (hereinafter referred to as "the Procuring Entity's Response"). Further, the Procuring Entity lodged a Notice of Preliminary Objection dated and filed on 26th November 2020.

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

a. ***An order declaring that the Procuring Entity breached the provisions of the Public Procurement and Asset Disposal Act;***
b. ***An order cancelling and/or setting aside the Respondent's advertisement and invitation to tender issued via the Daily Nation on 6th November 2020 following the termination of the tender and an order barring the Respondent from receiving and evaluating any bids arising therefrom;***
c. ***An order annulling and setting aside the Respondent's decision dated 2nd November 2020 as regards Tender No RVWWDA/LVN/AfDB/KTSWSSP/W/KAKAMEGA/2019-2020 Last Mile Connectivity Works for Eldoret and Kakamega Towns Lot II: Kakamega Town;***
d. ***In the alternative, an order directing the Respondent to re-evaluate Tender No RVWWDA/LVN/AfDB/KTSWSSP/W/KAKAMEGA/2019-2020 Last Mile Connectivity Works for Eldoret and Kakamega Towns Lot II: Kakamega Town in strict adherence of the Act and Regulations made thereunder and award the party qualifying the said tender;***
e. ***An order awarding costs to the Applicant herein.***

On 16th March 2020, the Board issued Circular No. 1/2020 and the same was published on the Public Procurement Regulatory Authority (hereinafter referred to as "the PPRA") website (www.ppra.go.ke) in recognition of the challenges posed by COVID-19 pandemic and instituted certain measures to restrict the number of representatives of parties that may appear before the Board during administrative review proceedings in line with the presidential directives on containment and treatment protocols to mitigate against the potential risks of the virus.

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

The Board further cautioned all parties to adhere to the strict timelines as specified in its directive as the Board would strictly rely on documentation filed before it within the timelines specified to render its decision within twenty-one days of filing of the request for review in accordance with section 171 of the Public Procurement and Asset Disposal Act, No. 33 of 2015 (hereinafter referred to as "the Act").

The Applicant lodged Written Submissions dated 1st December 2020 on even date whereas the Procuring Entity filed Written Submissions dated 7th December 2020 on even date.

BOARD'S DECISION

The Board has considered each of the parties' cases, the documents filed before it, confidential documents filed in accordance with section 67 (3) (e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") including the parties' Written Submissions.

The issues that arise for determination are as follows: -

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

Depending on the outcome of the first issue: -

II. **Whether the Procuring Entity terminated the subject procurement process in accordance with section 63 of the Act, thus ousting the jurisdiction of this Board**

The nature of a preliminary objection, was explained in **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd [1969] E.A. 696** as follows: -

> ***"A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out***

of pleadings, and which if argued as a preliminary point may dispose of the suit."

The Board observes that the Procuring Entity lodged a Notice of Preliminary Objection on 26th November 2020 challenging the jurisdiction of this Board to entertain the Request for Review on the following grounds: -

"1. THAT the Board lacks jurisdiction to entertain the application for review herein as it offends the provisions of section 4 (2) (f) and section 6 of the Public Procurement and Asset Disposal Act.

2. THAT the procurement process herein was under the African Development Bank procurement policies for bank group funded operations of October 2015."

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

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

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

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

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

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

"Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed." [Emphasis by the Board]

According to the Procuring Entity, the Government of Kenya received financing from the African Development Fund to support the Kenya Sustainable Towns Water Supply and Sanitation Programme, which aims at contributing to the quality of health of life and reducing poverty levels of the population of Kenya through provision of water and sanitation services on a sustainable basis.

As pleaded by the Procuring Entity in paragraph 2 of its response, the Procuring Entity being the implementing agency on behalf of Lake Victoria North Water Works Development Agency, intended to use part of the loan to carry out the subject works.

On 29th September 2017, the Government of Kenya and the Procuring Entity entered into a subsidiary loan agreement which specified as follows on page 2 of the said agreement: -

"(a) By a loan agreement (hereinafter referred to as the "Agreement") dated 9th January 2017 between the Republic of Kenya and the African Development Bank (herein referred to as the Bank), the Bank agreed to lend the Government a loan of a maximum amount of UA 5,134,564 equivalent to USD 7,203,280 (United States Dollars Seven Million, Two Hundred and Three Thousand, Two Hundred and Eighty) to finance implementation of Kenya Towns Sustainable Water Supply and Sanitation Programme (hereinafter referred to as the "Programme") on terms and conditions set forth in the Agreement.

(b) The Government has agreed to re-assign as a loan, a portion of the resources to Rift Valley Water Services Board (RVWSB) to partly finance implementation of the sub-project as described in Annex I

c) An amount not exceeding UA 767,349 (Equivalent of USD 1,067,514) has been earmarked for on-lending to Rift Valley Water Services Board (RVWSB) on terms and conditions defined in this Subsidiary Agreement for purposes of implementing the Programme as appropriate.

d).....;

e) The RVWSB has accepted the proceeds of the loan from the government and commits to utilize the same for implementation of the sub-project as provided in this agreement"

This then paved way for the Procuring Entity's Tender Advertisement Notice of 20th February 2020, wherein it stated as follows: -

> ***"The Government of Kenya has received financing from the African Development Bank in various currencies towards financing the Kenya Towns Sustainable Water Supply and Sanitation Programme. It is intended that part of the proceeds of this loan will be applied to eligible payments under the contract for Last Mile Connectivity Works for Eldoret and Kakamega Towns: Lot II – Kakamega Town.***
>
> ***Rift Valley Water Works Development Agency, one of the executing agencies of the programme, now invites on behalf of Lake Victoria North Water Works Development Agency, sealed Bids from eligible Bidders for the execution of the above project under one lot."***

It was therefore the Procuring Entity's contention that the subject procurement process was undertaken under the African Development Bank Procurement Policy for Bank Group Funded Operations of October 2015, as duly indicated in the Subsidiary Loan Agreement and the Procuring Entity's Invitation to Tender, and thus the Board lacks the jurisdiction to entertain the Request for Review by virtue of section 4 (2) (f) and section 6 of the Act.

The Applicant refuted the Procuring Entity's submissions in this regard and contended that for the Board to be bereft of jurisdiction, the procurement in question ought to be between the Government of Kenya and another foreign agency, foreign government or multi-lateral agency. The Applicant argued that this was not the case in the subject procurement process which was conducted by the Procuring Entity, a statutory body, on behalf of the Lake Victoria North Waterworks Agency, a body under the Ministry of Water and Irrigation.

The Applicant in its Written Submissions lodged on 1st December 2020, cited several High Court decisions in support of its view that, the subject procurement proceedings were not between the Government of Kenya, and another foreign entity and thus the Board is not stripped of jurisdiction in the Request for Review. The Applicant argued that the Procuring Entity had failed to avail to the Board the policy alleged to be in conflict with Kenyan law, that is the African Development Bank Procurement Policy for Bank Group Funded Operations of October 2015 and more so failed to demonstrate the conflict arising from the said policy, hence failed to meet the threshold required for section 4 (2) (f) and 6 (1) of the Act to apply.

It was therefore the Applicant's submission that the Procuring Entity's Preliminary Objection must fail and that ultimately, the Board has jurisdiction in the instant Request for Review.

The Board having considered parties' written submissions 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"*** **[Emphasis by the Board]**

To understand the import of section 4 (2) (f) of the Act, the Board considered one of the decisions cited by the Applicant, that is **Miscellaneous Application 71 & 72 of 2017 (Consolidated) Republic v Public Procurement Administrative Review Board Ex-Parte Geothermal Development Company Limited & another [2017] eKLR** (hereinafter referred to as "the Geothermal Case"), where

the Honourable Justice Odunga at paragraphs 51 to 52 opined as follows: -

> ***"....It is therefore my view that only in exceptional circumstances should a provision of an enactment be interpreted in a manner that excludes public scrutiny since Article 227 of the Constitution embraces all instances where a State organ or any other public entity is contracting for goods or services. To hold that Parliament can through its delegated power enact a law whose effect would be to decide which entities are subject to Article 227 of the Constitution without justification from the Constitution would amount to scuttling the letter and spirit of the said Article.***
>
> ***In my view a purposeful reading of section 4(2)(f) of the PPAAD Act must necessarily lead to the conclusion that for a procurement to be exempted thereunder, one of the parties must be the Government of Kenya while the other party must be either a Foreign Government, foreign government Agency, foreign government Entity or Multi-lateral Agency. I also agree at the rationale for such provision is clear must be to avoid the imposition of Kenyan law on another Government and that such procurement can only be governed by the terms of their bilateral or multilateral agreement, which agreements are of course subject to Parliamentary scrutiny. This exception would be justified under Article 2(5) of the Constitution***

which provides that the general rules of international law shall form part of the law of Kenya."

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

"….***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.***

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.***

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…*

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.

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.

Further, the Board observes that Justice Odunga in the *Geothermal Case* took the view that jurisdiction of this Board would be ousted by section 4 (2) (f) of the Act in procurement or asset disposal proceedings under a bilateral or multilateral agreement 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.

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

i. The Government of Kenya; and

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

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 *Geothermal Case,* the parties to the bilateral agreement were the Government of Kenya and African Development Bank whereas the Procuring Entity was identified as Geothermal Development Company Limited. 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.

It is therefore clear that the Board has to interrogate the terms of the bilateral agreement to establish whether the procurement in question is to be undertaken in accordance with the bilateral agreement in question.

In view of the foregoing, the Board 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 Rift Valley Water Works Development Agency (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 applied for or received financing (hereinafter called "funds") from the African Development Bank (hereinafter called "the Bank") towards the cost of 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, in accordance with the terms and***

conditions of the financing agreement between the Borrower and the Bank (hereinafter called the Loan Agreement) and will be subject in all respects to the terms and conditions of that Loan Agreement. No party other than the Borrower shall derive any rights from the Loan Agreement or have any claim to the funds."

The Official Website of the African Development Bank Group (www.afdb.org.) describes the African Development Bank Group as follows:-

"The African Development Bank (AfDB) Group is a regional multilateral development finance institution established to contribute to the economic development and social progress of African countries that are the institution's Regional Member Countries (RMCs). The AfDB was founded following an agreement signed by member states on August 14, 1963, in Khartoum, Sudan, which became effective on September 10, 1964. The AfDB comprises three entities: the African Development Bank (ADB), the African Development Fund (ADF) and the Nigeria Trust Fund (NTF). As the premier development finance institution on the continent, the AfDB's mission is to help reduce poverty, improve living conditions for Africans and mobilize resources for the continent's economic and social development. The AfDB headquarters is officially in Abidjan, Côte d'Ivoire."

From the foregoing excerpt, the Board observes that the African Development Bank is one of the three entities that comprise the African Development Bank Group which is described as a regional, multilateral development finance institution established to contribute to the economic development and social progress of its member countries. Further, its mission is to is to help reduce poverty, improve living conditions for Africans and mobilize resources for the continent's economic and social development.

The website further describes the African Development Bank as follows:

> ***"The African Development Bank is the Group's parent organization. The Agreement establishing the African Development Bank was adopted and opened for signature at the Khartoum, Sudan, conference on August 4, 1963.***
>
> ***This agreement entered into force on September 10, 1964. The Bank began effective operations on July 1, 1966. Its major role is to contribute to the economic and social progress of its regional member countries - individually and collectively.***
>
> ***As of 31 December 2018, the African Development Bank's authorized capital is subscribed to by 80 member countries made up of 54 independent African countries (regional members) and 26 non-African countries (non-regional members)."***

Article 2 (1) of the Agreement Establishing the African Development Bank, explains one of the functions of the African Development Bank as follows: -

> ***"To implement its purpose, the Bank shall have the following functions:***
>
> > ***a. To use the resources at its disposal for the financing of investment projects and programmes relating to the economic and social development of its regional members, giving special priority to:***
> >
> > > ***i. Projects or programmes which by their nature or scope concern several members; and***
> > >
> > > ***ii. Projects or programmes designed to make the economies of its members increasingly complementary and to bring about an orderly expansion of their foreign trade"***

In view of the foregoing, in order for a country to benefit from financing provided by the African Development Bank, a country must be a member of the African Development Bank.

The African Development Bank, Chapter 492 of the Laws of Kenya, (hereinafter referred to as "the ADB Act") states as follows in its preamble: -

> ***"An Act of Parliament to provide for the carrying out of the obligations of Kenya arising under the Articles of***

Agreement establishing the African Development Bank, and to provide for matters related thereto

WHEREAS at the Conference of Finance Ministers held at Khartoum in Sudan in July and August 1963. There were drawn up Articles of an agreement (hereinafter in this Act referred to as the Bank Agreement) for the establishment and operation of the African Development Bank (hereinafter in this Act referred to as the Bank):

AND WHEREAS the Minister for Finance and Economic Planning has, on behalf of the Government, signed the Articles of the Bank Agreement deposited with the Secretary-General of the United Nations:

AND WHEREAS the Governor-General of Kenya has by instrument of ratification ratified the Bank Agreement on behalf of the Government"

Following the enactment of the African Development Bank Act, Kenya as a regional member of the African Development Bank would benefit from financing advanced by the African Development Bank subject to a financing agreement detailing the manner in which the funds/financing would be used.

In essence therefore, as pertaining to a procurement process, Justice Nyamweya in the *KPLC Case* held that it is absolutely necessary for this Board to interrogate the bilateral agreement in issue in order to establish whether a procurement ought to be undertaken in accordance with the terms of the bilateral agreement.

The Board examined the Procuring Entity's original and confidential file submitted to the Board in accordance with section 67 (3) (e) of the Act and observes that the Procuring Entity did not furnish the Board with any bilateral agreement between the Government of Kenya and the African Development Bank.

Further, the Procuring Entity herein did not furnish the Board with a Bilateral Agreement between the Government of Kenya and the African Development Bank for this Board to interrogate whether the same specified that the subject procurement would be undertaken in accordance with the Laws or Kenya or in accordance with other laws governing the creditor, African Development Bank.

The Procuring Entity only furnished the Board with a copy of the Subsidiary Loan Agreement executed on 29th September 2017, between the Government of the Republic of Kenya and Rift Valley Water Services Board (RVWSB), the Procuring Entity herein, which makes reference to a Loan Agreement signed between the Republic of Kenya and the African Development Bank dated 9th January 2017.

According to the provisions of the Subsidiary Loan Agreement, the African Development Bank agreed to lend the Government of Kenya a loan of a maximum amount of UA 5,134,564 equivalent to USD 7,203,280 to finance implementation of Kenya Towns Sustainable Water Supply and Sanitation Programme on terms and conditions set forth in the Agreement.

Clause (c) on page 2 of the Subsidiary Agreement provides as follows: -

> ***"An amount not exceeding UA 767,349 (equivalent of USD 1,076,514) has been earmarked for on-lending to Rift Valley Water Services Board (RVWSB) <u>on terms and conditions defined in this Subsidiary Agreement</u> for purposes of implementing the Programme as appropriate."***

Clause 3.1 Article II The Subsidiary Loan on page 4 of the Subsidiary Agreement states as follows: -

> ***"The Government agrees to provide to the Board and the Board agrees to receive as a Loan the proceeds of the Facility upon terms and conditions set forth herein an amount of United States Dollars One Million, Seventy-Six Thousand, Five Hundred and Fourteen USD 1,076,514 (approximately Ksh. 110 million) (hereinafter called "the Subsidiary Loan)"***

Accordingly, the Government of Kenya entered into a subsidiary agreement with the Procuring Entity whereby the Government of Kenya would lend the Procuring Entity an amount of United States Dollars One Million, Seventy-Six Thousand, Five Hundred and Fourteen USD 1,076,514 (approximately Ksh. 110 million), upon the terms and conditions set forth in the subsidiary agreement.

Clause 12.1 Procurement Article XII on page 10 of the Subsidiary Agreement provides as follows: -

> ***"Except as the government shall otherwise agree and subject to the approval of the Fund, the Board undertakes to purchase good, procure services and order works for the subproject, so far as appropriate and to the satisfaction of the government and the Bank as specified in Annex 3."***

Noting that the subsidiary loan is of an amount not exceeding UA 767,349 (equivalent of USD 1,076,514), the Board observes that the applicable clause under Annex III Procurement on page 19 of the Tender Document provides as follows: -

> ***"A. Procurement of Works: Procurement of works shall be carried out in accordance with the Procurement Policy for Bank Group Funded Operations" (October 2015) as may be amended from time to time, and as further set out below: -***
>
> ***(i).....;***

(ii) <u>Civil works valued at less than UA 2 million and above UA 100,000 per contract will be procured under Open Competitive Bidding (OCB) with national advertising under the Bank Group's Procurement Methods and Procedures</u>. Works to be procured under this method would include Sewerage Works, Laboratory, Office building, Construction of Biogas Domes and Construction of Pilot Anaerobic Bioreactor Landfill Cell."

In view of the foregoing provisions, procurement of the subject works would be undertaken in accordance with the Procurement Policy for Bank Group Funded Operations" (October 2015), under Open Competitive Bidding (OCB) with national advertising under the Bank Group's Procurement Methods and Procedures, so far as appropriate, and to the satisfaction of the Government of Kenya and the African Development Bank.

However, the Board observes Clause 14.4 Article XIV Settlement of Disputes and Applicable Law on page 12 of the Subsidiary Agreement which reads as follows: -

"This Subsidiary Agreement shall be governed by and construed in all respect in accordance with the Laws of Kenya."

In light of the foregoing, it is important to note that the Subsidiary Agreement in itself, is not a Bilateral Agreement between the Government of Kenya and the African Development Bank, which is the

legal instrument that would govern the legal relationship between the Government of Kenya (as the Borrower) and the African Development Bank (as the Bank). Such a Bilateral Agreement would outline the terms of the financing and the applicable guidelines/policy with respect to the procurement referred to in the said bilateral agreement. In most cases, the financing aspect of a bilateral agreement is governed by the laws governing the Creditor whereas procurement under such a bilateral agreement would either be governed by laws governing the Creditor or the Laws of the Borrower depending on the terms of the bilateral agreement. However, in this instance, the Board does not have the benefit of interrogating the provisions of the bilateral agreement in question in order to establish what it provides therein because the Board was not furnished with such a bilateral agreement.

Further, the Procuring Entity did not furnish the Board with the Procurement Policy for Bank Group Funded Operations (October 2015), which is referred to in Clause 12.1 Procurement of Article XII on page 10 of the Subsidiary Agreement read together with Annex III on page 19 of the Subsidiary Agreement in order for the Board to establish from its provisions therein, whether or not the subject procurement would be governed by the Laws of Kenya or whether the said policy ousts or excludes the applicability of the Laws of Kenya with respect to the subject procurement.

However, it is the Board's considered view that although the Subsidiary Agreement under Clause 12.1 Procurement of Article XII read together

with Annex III on page 19 of the Subsidiary Agreement provides that the subject works were to be procured in accordance with the Procurement Policy for Bank Group Funded Operations" (October 2015), this provision did not oust or exclude the application of Kenyan law, noting that all provisions of the subsidiary agreement were to be governed by and construed in all respect in accordance with the laws of Kenya, to the satisfaction of the Government of Kenya and the African Development Bank in accordance with Clause 14.4 Article XIV Settlement of Disputes and Applicable Law on page 12 of the Subsidiary Agreement.

It is important to note 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. With this in mind, the import of section 4 (2) (f) of the Act must therefore 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) <u>good governance, integrity, transparency and accountability</u>"

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 <u>any money that can generate liability for the Government</u>"

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"***

In the absence of proof of a Bilateral Agreement between the Government of Kenya and the World Bank for the Board to interrogate its provisions thereof, 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.

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.

Article 2 (5) and (6) of the Constitution 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 obligation 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 <u>to which the</u>***

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 are 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]**

This Board has previously had an opportunity to pronounce itself on the import of section 6 (1) of the 2015 Act in the case of **PPARB Application No. 2 of 2020 Energy Sector Contractors Association vs. The Accounting Officer, Kenya Power and Lighting Company Limited** where it stated 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."***

As mentioned hereinbefore, the Procuring Entity failed to furnish the Board with the Bilateral Agreement between the Government of Kenya and the African Development Bank. In this regard therefore the Board is not able to examine its provisions in order to ascertain whether or not

the parties to the bilateral agreement expressly allowed or excluded application of the laws of Kenya with respect to the subject procurement process within the terms and conditions of the said agreement.

Further, despite the Procuring Entity's assertions that the subject procurement process was to be undertaken in accordance with the Procurement Policy for Bank Group Funded Operations" (October 2015), the Procuring Entity did not avail the said policy to the Board and more so failed to demonstrate the conflict between the said policy and the Laws of Kenya, specifically the Act and its attendant regulations. Moreover, no provision of the Bilateral Agreement or the Subsidiary Agreement was raised by the Procuring Entity before this Board which is in conflict with the provisions of the Act and its attendant regulations.

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 bilateral agreement, to prevail over the provisions of the Act.

Accordingly, the Notice of Preliminary Objection lodged by the Procuring Entity on 26th November 2020 is hereby dismissed.

Termination of procurement and asset disposal proceedings is governed by section 63 of the Act. Further, if such termination meets the

requirements of section 63 of the Act, the jurisdiction of this Board is ousted pursuant to section 167 (4) (b) of the Act which provides as follows:

> ***(1) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review <u>within fourteen days of notification of award</u> or <u>date of occurrence of the alleged breach at any stage of the procurement process, or disposal process</u> as in such manner as may be prescribed…***
>
> ***(2)……;***
>
> ***(3)……;***
>
> ***(4) The following matters shall not be subject to the review of procurement proceedings under subsection (1)—***
>
> > ***(a) ……;***
> >
> > ***(b) <u>a termination of a procurement or asset disposal proceedings in accordance with section 62 of this Act (i.e. section 63 of the Act)</u>; and***
> >
> > ***(c……."*** **[Emphasis by the Board]**

In **Miscellaneous Civil Application No. 1260 of 2007, Republic v. Public Procurement Administrative Review Board & Another Ex parte Selex Sistemi Integrati (2008) eKLR** (hereinafter referred to as "the Selex Sistemi Integrati Case"), the High Court while determining

the legality of sections 36 (6) and 100 (4) of the repealed Public Procurement and Disposal Act, 2005 (hereinafter referred to as "the Repealed Act") that dealt with termination of procurement proceedings held as follows: -

> ***"I now wish to examine the issues for determination. The first issue is whether the Public Procurement and Disposal Act, 2005, section 100 (4) ousts the jurisdiction of the court in judicial review and to what extent the same ousts the jurisdiction of the Review Board. That question can be answered by a close scrutiny of section 36 (6) of the said Act which provides: -***
>
> ***"A termination under this section shall not be reviewed by the Review Board or a court."***
>
> ***In the literal sense, section 36 (6) quoted above purports to oust the jurisdiction of the court and the Review Board. The Court has to look into the ouster clause as well as the challenged decision to ensure that justice is not defeated. In our jurisdiction, the principle of proportionality is now part of our jurisprudence. In the case of Smith v. East Elloe Rural District Council [1965] AC 736 Lord Viscount Simonds stated as follows: -***
>
> ***"Anyone bred in the tradition of the law is likely to regard with little sympathy legislative provisions for ousting the jurisdiction of the court, whether in order that the subject***

may be deprived altogether of remedy or in order that his grievance may be remitted to some other tribunal."

It is a well settled principle of law that statutory provisions tending to oust the jurisdiction of the Court should be construed strictly and narrowly... The court must look at the intention of Parliament in section 2 of the said Act which is inter alia, to promote the integrity and fairness as well as to increase transparency and accountability in Public Procurement Procedures.

To illustrate the point, the failure by the 2nd Respondent [i.e. the Procuring Entity] to render reasons for the decision to terminate the Applicant's tender makes the decision amenable to review by the Court since the giving of reasons is one of the fundamental tenets of the principle of natural justice. Secondly, the Review Board ought to have addressed its mind to the question whether the termination met the threshold under the Act, before finding that it lacks jurisdiction to entertain the case before it on the basis of a mere letter of termination furnished before it."

The High Court in the Selex Sistemi Integrati Case held that this Board (as was constituted then) had the duty to question whether a decision by a procuring entity terminating a tender met the threshold of section

100 (4) of the Repealed Act, and that the Board's jurisdiction was not ousted by mere existence of a letter of termination furnished before it.

Further, in **Judicial Review Miscellaneous Application No. 142 of 2018, Republic v. Public Procurement and Administrative Review Board & Another ex parte Kenya Veterinary Vaccines Production Institute (2018) eKLR** (hereinafter referred to as "JR No. 142 of 2018") it was held as follows: -

> ***"The main question to be answered is whether the Respondent [Review Board] erred in finding it had jurisdiction to entertain the Interested Party's Request for Review of the Applicant's decision to terminate the subject procurement…***
>
> ***A plain reading of section 167 (4) (b) is to the effect that a termination that is in accordance with section 63 of the Act is not subject to review. Therefore, there is a statutory pre-condition that first needs to be satisfied in the said sub-section namely that the termination proceedings are conducted in accordance with the provisions of section 63 of the Act, and that the circumstances set out in section 63 were satisfied, before the jurisdiction of the Respondent can be ousted.***
>
> ***As has previously been held by this Court in Republic v Kenya National Highways Authority Ex Parte Adopt –A-***

Light Ltd [2018] eKLR and Republic v. Secretary of the Firearms Licensing Board & 2 others Ex parte Senator Johnson Muthama [2018] eKLR, it is for the public body which is the primary decision maker, [in this instance the Applicant as the procuring entity] to determine if the statutory pre-conditions and circumstances in section 63 exists before a procurement is to be terminated...

However, the Respondent [Review Board] and this Court as review courts have jurisdiction where there is a challenge as to whether or not the statutory precondition was satisfied, and/or that there was a wrong finding made by the Applicant in this regard...

The Respondent [Review Board] was therefore within its jurisdiction and review powers, and was not in error, to interrogate the Applicant's Accounting Officer's conclusion as to the existence or otherwise of the conditions set out in section 63 of the Act, and particularly the reason given that there was no budgetary allocation for the procurement. This was also the holding by this Court (Mativo J.) in R v. Public Procurement Administrative Review Board & 2 Others Ex-parte Selex Sistemi Integrati which detailed the evidence that the Respondent would be required to consider while determining the propriety of a

termination of a procurement process under the provisions of section 63 of the Act"

The High Court in JR No. 142 of 2018 affirmed the decision of the Court in the *Selex Sistemi Integrati Case* that this Board has the obligation to first determine whether the statutory pre-conditions of section 63 of the Act have been satisfied to warrant termination of a procurement process, in order to make a determination whether the Board's jurisdiction is ousted by section 167 (4) (b) of the Act.

It is therefore important for this Board to determine whether the Procuring Entity terminated the subject tender in accordance with the provisions of section 63 of the Act, which determination can only be made by interrogating the reason(s) cited by the Procuring Entity and whether or not the Procuring Entity satisfied the statutory pre-conditions for termination outlined in section 63 of the Act.

Section 63 (1) (f) of the Act states as follows: -

"(1) An accounting officer of a procuring entity, may, at any time, prior to notification of tender award, terminate or cancel procurement or asset disposal proceedings without entering into a contract where any of the following applies—

(a) ……;

(b) ……;

(c) ……;

(d) ……;

(e) ……;

(f) all evaluated tenders are non-responsive;

(g) ……;

(h) ……;

(i) ……;

(2) ……;

(3) ……;

(4) ……;"

The Procuring Entity cited section 63 (1) (f) of the Act as the reason for termination of the subject tender, since in its view all evaluated tenders were non-responsive.

On its part, the Applicant contended that it submitted a responsive tender that fully complied with the eligibility criteria and mandatory requirements of the subject tender.

Moreover, the Applicant contended in paragraph 11 of its Statement that vide a Regret Letter dated 2nd November 2020 and received by the Applicant on 5th November 2020, the Procuring Entity notified the Applicant of the outcome of the subject tender which letter read as follows: -

"Reference is made to the bid that you submitted in respect to the above-mentioned tender.

The evaluation process is now finalized and we regret to inform you that your bid was unsuccessful, having not met the technical requirements.

We further wish to inform you that the mentioned tender has been terminated owing to lack of responsiveness of the bids submitted and is bound to be re-advertised.

We appreciate your participation and wish you all the best in the future undertakings about related matters."

Thereafter, the Applicant vide a letter addressed to the Procuring Entity dated 11th November 2020, sought to be furnished with the reasons why its bid was unsuccessful, which letter the Applicant contended was not responded to by the Procuring Entity.

However, in its Further Statement lodged on 1st December 2020, the Applicant contended that it received a response from the Procuring Entity outlining the reasons why its bid was unsuccessful vide a letter dated 18th November 2020 which the Applicant received on 20th November 2020. It was therefore the Applicant's submission that the said response from the Procuring Entity had been overtaken by events as the Applicant received the said letter after it had already filed the instant Request for Review Application.

Having considered parties' written submissions and the documentation before it, the Board observes that even though an accounting officer may exercise its discretion under section 63 (1) of the Act to terminate a procurement process, such discretion must be exercised in accordance with the substantive and procedural requirements for termination of procurement proceedings.

In **Republic v. Public Procurement Administrative Review Board & another ex parte Kenya Veterinary Vaccines Production Institute (2018) eKLR**, the Court held that: -

> ***"In a nutshell therefore, the procuring entity is under duty to place sufficient reasons and evidence to justify and support the ground of termination of the procurement process under challenge. The Procuring Entity must in addition to providing sufficient evidence also demonstrate that it has complied with the substantive and procedural requirements set out under the provisions of section 63 of the Public Procurement and Asset Disposal Act, 2015"***

Having considered the finding in the foregoing case, the Board notes that, for one, section 63 (1) of the Act provides that a procuring entity may terminate procurement or asset disposal proceedings at any time, prior to notification of tender award. Further, a procuring entity may only terminate procurement proceedings where any of the reasons cited in section 63 (1) of the Act applies, as cited hereinbefore.

In addition to citing any of the reasons listed in section 63 (1) of the Act, a procuring entity must also comply with the procedural requirements for termination of a tender specified in section 63 (2), (3) and (4) of the Act. Section 63 (2) and (3) of the Act gives the Procuring Entity an obligation to submit a written report on the termination to the Public Procurement Regulatory Authority (hereinafter referred to as "the Authority") within fourteen days.

It is also worth noting that, section 63 (4) of the Act requires the accounting officer of a procuring entity to notify all tenderers of the termination within fourteen days of termination with reasons for the said termination.

Turning to the instant case, the Board observes from the Procuring Entity's original and confidential file submitted to the Board in accordance with section 67 (3) (e) of the Act that there is no copy of a report on the termination of the subject procurement proceedings therein addressed to the Director General of the Authority in compliance with section 63 (2) and (3) of the Act.

Further, the Board observes that the Procuring Entity issued regret letters dated 2nd November 2020 to all bidders who participated in the subject procurement process, informing bidders of its decision to terminate the subject tender due to lack of responsiveness of bids

received by the Procuring Entity under the subject tender and further informed bidders of its intention to re-advertise the subject works.

However, the Board examined the contents of the Procuring Entity's regret letter addressed to the Applicant dated 2nd November 2020 and observes that the Procuring Entity did not provide specific reasons why the Applicant's bid was unsuccessful.

The Board is cognizant of section 87 of the Act which states as follows: -

"(1) Before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity shall notify in writing the person submitting the successful tender that his tender has been accepted.

(2) The successful bidder shall signify in writing the acceptance of the award within the time frame specified in the notification of award.

(3) When a person submitting the successful tender is notified under subsection (1), the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof.

(4) For greater certainty, a notification under subsection (1) does not form a contract nor reduce the validity period for a tender or tender security." **[Emphasis by Board]**

Accordingly, a procuring entity must notify, in writing, the bidder who submitted the successful tender, that its tender was successful before the expiry of the tender validity period. This section further requires that in the same breath, a Procuring Entity must also notify other bidders who participated in the subject tender that their respective bids were not successful.

Moreover, a procuring entity's notification of unsuccessful bid to a bidder should disclose the reasons why its bid was unsuccessful and further disclose the successful bidder in the procurement process therein, who is determined at the conclusion of an evaluation process.

Section 87 (3) of the Act imposes a mandatory obligation on a procuring entity to outline the reasons why a bidder's bid was unsuccessful. These reasons ought to be specific and not general, such that if a bidder is found non-responsive at the Technical Evaluation Stage, the letter of notification ought to specifically state: -

a. Whether there was a failure by the bidder to achieve the minimum technical score; and

b. Whether there was a failure to submit information and/or any documents evidencing compliance to technical specifications and the specific information and/or documents in question that the bidder failed to attach in order to meet the requisite experience.

The Board is cognisant that providing a bidder with reasons why its bid was found unsuccessful is an issue that goes to the root of the rules of natural justice, one of them being, "the right to a fair hearing" including the right to have adequate time and facilities to prepare a defense as stated under Article 50 (2) (c) of the Constitution. A bidder cannot adequately exercise this right when specific reasons are not afforded to it by a procuring entity. In contrast, providing a bidder with specific reasons why its bid was unsuccessful enables such bidder to have clear grounds that form its request for review lodged before this Board, if it wishes to do so.

The Board notes from an examination of all the letters of regret issued to bidders under the subject tender that the Procuring Entity did not provide reasons why their respective bids were unsuccessful.

Accordingly, the Board finds that the letters of notification of unsuccessful bid issued to all unsuccessful bidders, including the Applicant dated 2nd November 2020 did not meet the threshold of section 87 (3) of the Act since the Procuring Entity failed to disclose the reasons why their bids were unsuccessful.

However, despite the Procuring Entity's failure to disclose the reasons why the Applicant's bid was unsuccessful prior to the Applicant's filing of the Request for Review, the Applicant was able to approach this Board within the statutory period imposed under section 167 (1) of the Act to challenge the Procuring Entity's decision and in the course of the proceedings was furnished by the Procuring Entity with the reasons why its bid was found unsuccessful. Moreover, the Applicant was able to challenge and respond to the reasons why its bid was found unsuccessful via its Further Statement lodged on 1st December 2020 and thus the Applicant suffered no prejudice from the Procuring Entity's omission in this regard.

The Board notes that the Applicant in its Further Statement contended that on 20th November 2020 it received a letter from the Procuring Entity outlining the reasons why its bid was found unsuccessful as follows: -

"

Key personnel	***Requirement***	***Deficiency***
Key Personnel		
Project Manager/Team Leader	***Degree in BSc. Civil, Registered with EBK or similar with 12 years of general experience and 7 years of specific experience***	***The proposed Project Manager/Team Leader has 4 years' specific experience against a requirement of 7 years' specific experience in sewerage works hence the proposed staff is***

		considered non-compliant. ***It should be noted that specific experience in sewerage works could not be substituted for the irrigation works experience presented by the bidder. Therefore, the threshold for sewerage works experience was NOT adequately met, thus non-responsive.***
Site Agent	***BSc. Civil, Registered with EBK or similar with 10 years of general experience and 5 years of specific experience.***	***The proposed Site Agent has 3 years' specific experience against the 5 years' specific experience in sewerage works. The proposed staff is considered non-compliant.*** ***It should be noted that specific experience in sewerage works could NOT be substituted for the irrigation works***

		experience presented by the bidder. Therefore, the threshold for sewerage works experience was NOT adequately met, thus non-responsive.
Occupational Safety and Health Officer	***Diploma in Public Health or similar with 10 years of general experience and 5 years of specific experience***	***The proposed Occupational Safety and Health Officer has a diploma in social work and in all projects she has handled are in the role of sociologist NOT as an Occupational safety and health officer non-compliant.***
Quality Assurance Manager	***Diploma in Civil Engineering with 10 years of general experience and 5 years of specific experience.***	***The proposed Quality Assurance Manager has no prior experience in water supply and sewerage works, thus non-compliant.***
Electrical Engineer	***Diploma in Electrical Engineering with 10 years of general experience and 5 years of specific experience***	***The proposed Electrical Engineer has no prior experience in water supply and sewerage works thus non-compliant.***

The Board observes from the Applicant's Further Statement that the Applicant is challenging the reasons why its bid was found unsuccessful and in turn submits that its bid was unfairly disqualified from the evaluation process.

In determining whether the Procuring Entity fairly evaluated the Applicant's bid at the Technical Evaluation Stage, the Board examined Clause 2.5 Personnel of Section III Evaluation and Qualification on page 44 of the Procuring Entity's Tender Document which provides as follows: -

"The Bidder <u>must</u> demonstrate that it has the personnel for the key positions that meet the following requirements:"

No	***Position***	***Minimum Requirements***		
		Relevant academic qualifications	***Total Work Experience (years)***	***In Similar Works Experience (years)***
1	***Project Manager/ Team Leader***	***BSc. Civil, Registered with EBK or similar***	***12***	***7***
2	***Site Agent***	***BSc. Civil, Registered with EBK or similar***	***10***	***5***
3	***Engineering Surveyor***	***Higher National Diploma or equivalent***	***10***	***5***
4	***General Excavation/Pipeline Foreman***	***Diploma in Civil Engineering or equivalent***	***10***	***5***
5	***General Concrete Foreman***	***Diploma in Civil Engineering or equivalent***	***10***	***5***
6	***Occupational Safety and Health Officer***	***Diploma in Public Health or similar***	***10***	***5***
7	***Quality Assurance Manager***	***Diploma in Civil Engineering***	***10***	***5***
8	***Electrical Engineer***	***Diploma in Electrical Engineering***	***10***	***5***

The Bidder shall provide details of the proposed personnel and their experience records using Forms PER-1 and PER-2 included in Section IV Bidding Form.

Personnel for the listed positions should either:

- ***Be fluent in written and spoken English or***
- ***At least one interpreter who is fluent in written and spoken English shall be provided by the contractor for every four personnel who are themselves not fluent in written and spoken English"***

Accordingly, bidders were required to demonstrate that their proposed personnel for the key positions outlined hereinabove met the minimum requirements outlined in the foregoing clause by providing their details and experience records using Forms PER – 1 and PER – 2 as provided in the Tender Document.

Notably, the technical requirements with respect to personnel as captured in Clause 2.5 Personnel of Section III Evaluation and Qualification on page 44 of the Procuring Entity's Tender Document were mandatory technical requirements and thus failure by a bidder to comply with any of the said requirements would result in disqualification of its bid from further evaluation.

In essence, whereas the technical requirements with respect to personnel as captured in Clause 2.5 Personnel of Section III Evaluation

and Qualification on page 44 of the Procuring Entity's Tender Document speak of similar work experience, the Applicant was notified that the experience provided for five of its key personnel as enumerated hereinbefore had no prior experience in sewerage and water works among others.

The Tender Document does not provide the meaning of the word "similar work", hence, the Board considered the ordinary meaning of the word "similar" as defined in the dictionary, and the meaning of the word "work" as defined under the Act and the Tender Document.

The Collins Dictionary of English, 7th Edition, defines the word "similar" as ***"alike to another, but not necessarily identical".***

The interpretation section of the Act defines the term 'work' to mean: -

> ***"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."***

Taking the definition of "similar and "works" into account, it can be said that "similar works" means works to be provided by a tenderer, that are alike but not necessarily identical to the works of the Procuring Entity, which refers to a combination of goods and services for the construction, repair, renovation, extension, alteration, dismantling or demolition of buildings, roads or other structures

Section VI Scope of Works describes 'works' under the subject tender to comprise the following: -

> ***"1. Extension/Augmentation of water distribution network involving laying HDPE pipelines, total length 15,689m, diameters ranging from 90 – 160mm;***
>
> ***2. Rehabilitation of sewers total length 1,798m, diameters ranging from 160 – 315mm;***
>
> ***3. Rehabilitation of Shirere Wastewater Treatment Plant involving Installation of flow measurement device;***
>
> ***4. Rehabilitation of Masinde Muliro University (MMUST) Wastewater Treatment Plant involving:***
>
> ***i. Installation of flow measurement device;***
>
> ***ii. Fencing of the ponds;***
>
> ***iii. Installation of power line to the office building."***

It is the interpretation of this Board that 'similar works' will include works that are alike but not necessarily identical to the scope of works as outlined by the Procuring Entity under the subject tender.

In this regard therefore, "similar work experience" as pertains to the technical requirements with respect to personnel as captured in Clause 2.5 Personnel of Section III Evaluation and Qualification on page 44 of the Procuring Entity's Tender Document refers to works experience that is alike to the scope of works as outlined in Section VI Scope of Works, but not necessarily identical to the said scope of works.

Applying this interpretation, it is evident that it was not necessary for bidders to provide similar work experience only in sewerage works, but bidders could provide technical and managerial experience in works alike but not necessarily identical to the scope of works outlined under Section VI of the Tender Document.

The Board examined the Applicant's original bid which forms part of the Procuring Entity's confidential file submitted to the Board in accordance with section 67 (3) (e) of the Act, and observes that the Applicant provided the following in response to this criterion: -

No	Position			
		Relevant academic qualifications	**Total Work Experience (years)**	**In Similar Works Experience (years)**
1	**Project Manager/ Team Leader** Eng. Tom Osewe Ogalo (On page 178 – 183)	• A copy of a Certificate of Membership (The Institution of Engineers of Kenya) dated 9th January 2007, Member No. M-998;	20	1. Aug 2012 – June 2013 - Riang Int. Grp. Ltd – Ololoitikosh Community Water Project 2. April 2015 – Oct 2016 - Riang Int. Grp. Ltd –

No	Position	Relevant academic qualifications	Total Work Experience (years)	In Similar Works Experience (years)
		• A copy of a Certificate of Registration (Engineers Registration Board) dated 12th October, 2006; Certificate No. A2322; • A copy of a Bachelor of Science (In Civil Engineering) Degree Certificate (University of Nairobi) dated 17th December 1982.		Chemase Irrigation Scheme Development 3. March 2018 – May 2020 - Riang Int. Grp. Ltd – Lower Sabor Irrigation Scheme, Uasin Gishu County
2	**Site Agent** Eng. Benjamin Esilliah Ongong'o On page 184 - 191	• A copy of a Certificate of Registration (The Engineers of Kenya) dated 12th March, 2014, Member No. A2837 • A copy of a Certificate of Membership (Institution of Engineers of Kenya) dated 9th January 2014, Corporate Membership No. M-4730; • A copy of a Bachelor of Science (In Civil Engineering) Degree Certificate (University of	14	1. Nov 2009 – Sept 2010 – Howard Humphreys (EA) Ltd – Othaya and Mukurweini Water Supply Project 2. April 2015 – Oct 2016 - Riang Int. Grp. Ltd – Chemase Irrigation Scheme Development 3. March 2018 – May 2020 - Riang Int. Grp. Ltd – Lower Sabor Irrigation Scheme, Uasin Gishu County

No	Position	Relevant academic qualifications	Total Work Experience (years)	In Similar Works Experience (years)
		Nairobi) dated 7th September 2007		
6	**Occupational Safety and Health Officer** Esther Amati Amuli	• A copy of a Diploma Certificate in Social Work and Social Development (University of Nairobi) dated 7th December 2007. • A copy of a Bachelor of Arts Degree Certificate (University of Nairobi) dated 6th December 2013	13	1. Oct 2014 – March 2016 – Coast Water Services Board WaSIP projects 2. April 2015 – Oct 2016 - Riang Int. Grp. Ltd – Chemase Irrigation Scheme Development 3. March 2018 – May 2020 - Riang Int. Grp. Ltd – Lower Sabor Irrigation Scheme, Uasin Gishu County
7	**Quality Assurance Manager** Charles Kiiru	• A copy of a Diploma in Civil Engineering Certificate (The Kenya Polytechnic) dated 20th December 2007	10	1. Aug 2012 – June 2013 - Riang Int. Grp. Ltd – Ololoitikosh Community Water Project 2. April 2015 – Oct 2016 - Riang Int. Grp. Ltd – Chemase Irrigation Scheme Development 3. March 2018 – May 2020 - Riang Int. Grp. Ltd – Lower Sabor Irrigation Scheme, Uasin Gishu County
8	**Electrical Engineer** Fredrick Maundu	• A copy of a Certificate of Registration –	20	1. Aug 2012 – June 2013 - Riang Int. Grp. Ltd –

No	Position			
		Relevant academic qualifications	**Total Work Experience (years)**	**In Similar Works Experience (years)**
	Mutinda	Graduate Engineer (Engineers Registration Board) dated 24th October 2007; Serial No. B4672; • A copy of a Bachelor of Science – In Electrical and Electronic Engineering Degree Certificate (University of Nairobi) dated 3rd November 1998		Ololoitikosh Community Water Project 2. April 2015 – Oct 2016 - Riang Int. Grp. Ltd – Chemase Irrigation Scheme Development 3. March 2018 – May 2020 - Riang Int. Grp. Ltd – Lower Sabor Irrigation Scheme, Uasin Gishu County

From the foregoing summary and analysis, the Board observes, the Applicant provided similar work experience which was alike but not necessarily identical to the scope of works as outlined in Section VI Scope of Works on page 91 of Volume I of the Tender Document with respect to its proposed Project Manager, Site Agent, Quality Assurance Manager and Electrical Engineer.

Notably, the Procuring Entity found the Applicant's bid non-responsive on the basis that it did not provide similar work experience in sewerage and water works among others with respect to its proposed personnel for Project Manager/Team Leader, Site Agent, Quality Assurance Manager and Electrical Engineer, which in the Board's view constitutes a

narrow interpretation of what similar work experience entails, as explained by the Board hereinbefore.

The Board takes cognizance of section 173 (b) of the Act, which states that: -

> "***Upon completing a review, the Review Board may do any one or more of the following-***
>
> ***(a)……;***
>
> ***(b) give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings…"***

The Board has established that the Procuring Entity did not submit a report on the termination of the subject procurement proceedings addressed to the Director General of the Authority in compliance with section 63 (2) and (3) of the Act. Accordingly, the Board finds, the Procuring Entity failed to terminate the subject tender in accordance with section 63 of the Act, which provides a procedure for termination, rendering the said termination null and void.

Further, the Board has established that that the letters of notification of unsuccessful bid issued to all unsuccessful bidders, including the Applicant dated 2nd November 2020 did not meet the threshold of section 87 (3) of the Act since the Procuring Entity failed to disclose the reasons why their bids were unsuccessful.

Noting the Procuring Entity's narrow interpretation of what constitutes 'Similar Works' as pertains to Clause 2.5 Personnel of Section III Evaluation and Qualification on page 44 of the Procuring Entity's Tender Document, the Board hereby directs the Procuring Entity to re-instate the Applicant's bid together with all other bidders who made it to the Technical Evaluation Stage and conduct a re-evaluation at the Technical Evaluation Stage with respect to Clause 2.5 Personnel of Section III Evaluation and Qualification on page 44 of the Procuring Entity's Tender Document, whilst taking into consideration the Board's findings herein, in accordance with the provisions of the Act and the Constitution.

FINAL ORDERS

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

1. **The Decision of the Accounting Officer of the Procuring Entity terminating the procurement proceedings with respect to Tender No. RVWWDA/LVN/AfDB/KTSWSSP/W/KAKAMEGA/2019-2020 Last Mile Connectivity Works for Eldoret and Kakamega Towns Lot II: Kakamega Town be and is hereby nullified.**

2. **The Accounting Officer of the Procuring Entity's Regret Letters dated 2nd November 2020 with respect to Tender No. RVWWDA/LVN/AfDB/KTSWSSP/W/KAKAMEGA/2019-2020 Last Mile Connectivity Works for Eldoret and Kakamega Towns Lot II: Kakamega Town addressed to all bidders, be and are hereby cancelled and set aside.**

3. **The Accounting Officer of the Procuring Entity's Regret Letter dated 18th November 2020 with respect to Tender No. RVWWDA/LVN/AfDB/KTSWSSP/W/KAKAMEGA/2019-2020 Last Mile Connectivity Works for Eldoret and Kakamega Towns Lot II: Kakamega Town addressed to the Applicant, be and is hereby cancelled and set aside.**

4. **The Accounting Officer of the Procuring Entity is hereby directed to re-instate the Applicant's bid together with all other bidders who made it to Technical Evaluation, at the Technical Evaluation Stage and conduct a re-evaluation at the Technical Evaluation Stage with respect to Clause 2.5 Personnel of Section III Evaluation and Qualification at page 44 of the Tender Document, in accordance with the provisions of the Act and the Constitution, taking into consideration the Board's findings in this Review.**

5. **Further to Order No. 3 above, the Accounting Officer of the Procuring Entity is hereby directed to proceed with the**

procurement process to its logical conclusion, including issuance of letters of notification of the outcome of evaluation to all bidders in accordance with section 87 (3) of the Act, within fourteen (14) days from the date of this decision.

6. **Each party shall bear its own costs in the Request for Review.**

Dated at Nairobi this 10th Day of December 2020

CHAIRPERSON **SECRETARY**

PPARB **PPARB**