

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**  
**APPLICATION NO. 46/2021 OF 6<sup>TH</sup> APRIL 2021**

**BETWEEN**

**N.K. BROTHERS LIMITED.....APPLICANT**

**AND**

**THE ACCOUNTING OFFICER,**

**THE SPORTS, ARTS AND SOCIAL**

**DEVELOPMENT.....1<sup>ST</sup>RESPONDENT**

**THE SPORTS, ARTS AND SOCIAL DEVELOPMENT...2<sup>nd</sup> RESPONDENT**

**MILICON'S LIMITED.....INTERESTED PARTY**

Review against the decision of the Accounting Officer of Sports, Arts and Social Development Fund with respect to Tender No. SASDEF/T/PROC/002/2020-2021 for the Proposed Completion of Office Block (SASDEF Plaza) on L.R. No. 209/12386 for Sports, Arts and Social Development Fund at Upper Hill-Nairobi.

**BOARD MEMBERS**

- |                          |              |
|--------------------------|--------------|
| 1. Ms. Faith Waigwa      | -Chairperson |
| 2. Dr. Paul Jilani       | -Member      |
| 3. Mr. Jackson Awele     | -Member      |
| 4. Ms. Rahab Chacha      | -Member      |
| 5. Eng. Mbiu Kimani, OGW | -Member      |

## **IN ATTENDANCE**

1. Mr. Stanley Miheso

-Holding brief for the Acting Board Secretary

## **The Bidding Process**

Sports, Arts and Social Development Fund (hereinafter referred to as the "Procuring Entity") invited sealed tenders for Tender No. SASDEF/T/PROC/002/2020-2021 for the Proposed Completion of Office Block (SASDEF Plaza) on L.R. No. 209/12386 for Sports, Arts and Social Development Fund at Upper Hill-Nairobi (hereinafter referred to as "the subject tender") through an advertisement published in the Daily Nation Newspaper on 8<sup>th</sup> December 2020 with an initial bid submission deadline of 22<sup>nd</sup> December 2020.

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

The Procuring Entity issued an Addendum on 16<sup>th</sup> December 2020 extending the bid submission deadline to 5<sup>th</sup> January 2021. The Procuring Entity received a total of 18 bids by the bid submission deadline of 5<sup>th</sup> January 2021. The same were opened shortly thereafter in the presence of bidders' representatives by a Tender Opening Committee and recorded as follows: -

<b>Bid No.</b>	<b>Name of Firm</b>
1.	M/S China State Construction Eng. Corp. Ltd
2.	M/S Modern Precast (K) Ltd
3.	M/S Parbat Siyani Construction Ltd
4.	M/S N.K Brothers Ltd
5.	M/S Landmark Holdings Limited
6.	M/S Tulsi Construction Ltd
7.	M/S Blue Valley Enterprises Ltd
8.	M/S Milicon's Limited
9.	M/S Dinesh Construction Ltd
10.	M/S China Railway No. 10 Engineering Group Co., Ltd

<b>Bid No.</b>	<b>Name of Firm</b>
11.	M/S Epco Builders Ltd
12.	M/S Kuverji Govind Patel & Sons Ltd (K.G. Patel & Sons Ltd)
13.	M/S Vaghjiyani Enterprises Ltd
14.	M/S Nightigale Enterprises Ltd
15.	M/S Vee Enterprises Ltd
16.	M/S Lexis International Limited
17.	M/S Trax Kenya Ltd
18.	M/S Quest Civil Engineers Limited

## **Evaluation of Bids**

Section III. Evaluation Criteria of the Tender Document stipulated that evaluation would be carried out in the following stages: -

- i.** Mandatory Requirements/Preliminary Examination;
- ii.** Technical Evaluation; and
- iii.** Financial Evaluation.

The Evaluation Committee undertook evaluation as follows: -

### **1. Mandatory Requirements/Preliminary Examination**

At this stage, the Evaluation Committee applied the criterion under Stage 1. Preliminary Evaluation of Section III. Tender Evaluation Criteria of the Tender Document, divided in two categories as follows: -

- Stage (i) -Mandatory Requirements for Main Contractor
- Stage (ii) -Mandatory Requirements for Domestic Sub-Contractor

According to the Tender Document, any non-responsive main contractor under Stage (i). Mandatory Requirements for Main Contractor, would not be evaluated further, including their sub-contractor. Further, any bidder (main

contractor) whose sub-contractor is found non-responsive under Stage (ii). Mandatory Requirements for Domestic Sub-contractor, would not proceed to Technical Evaluation.

Having subjected bidders to evaluation in the two categories of Preliminary Evaluation, the Evaluation Committee found only one bidder, M/s Milicon's Limited responsive, thus eligible to proceed to the next stage of evaluation.

## 2. Error Check Analysis

Having found that Bidder No. 8 (M/s Milicon's Limited) was responsive at the end of Preliminary Evaluation, the Evaluation Committee subjected the said bidder to an error check analysis and recorded the results of the same as follows: -

Item	Bid Amount	Corrected Amount	Variance (Bid Amount – Corrected Amount)
Preliminaries	97,580,596.75	97,580,596.75	Nil
Volume 1 of 7	511,618,306.25	511,575,106.25	43,200.00
Volume 2 of 7	64,925,981.00	64,925,981.00	Nil
Volume 3 of 7	45,582,640.00	45,882,640.00	(300,000.00 )
Volume 4 of 7	7,571,083.00	7,571,083.00	Nil
Volume 5 of 7	25,860,816.00	25,725,816.00	135,000.00
Volume 6 of 7	89,442,301.00	89,442,301.00	Nil
Volume 7 of 7	22,791,549.00	22,791,549.00	Nil
Provisional Sums	405,900,000.00	408,400,000.00	(2,500,000.00)
<b>Total</b>	<b>1,271,273,273.00</b>	<b>1,273,895,073.00</b>	<b>2,621,800.00</b>

The Evaluation Committee observed that the bid of M/s Milicon's Limited had an arithmetic error totaling to Kshs. 2,621,800.00 and thus, considered the

same to be a major deviation. Subsequently, the Evaluation Committee found the said bidder non-responsive and thus, did not subject the said bidder to Technical Evaluation.

### **Recommendation**

The Evaluation Committee recommended that the subject procurement proceedings be terminated pursuant to section 63 (1) (f) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as “the Act”) because all evaluated tenders were non-responsive.

### **Professional Opinion**

In a professional opinion dated 3<sup>rd</sup> February 2021, the Procuring Entity’s Manager, Supply Chain Management Services reviewed the manner in which the subject procurement process was undertaken including evaluation of bids as outlined in the Evaluation Report dated 2<sup>nd</sup> February 2021. He advised the Procuring Entity’s Accounting Officer to approve termination of the subject procurement proceedings as recommended by the Evaluation Committee because all evaluated tenders were non-responsive and to consider re-tendering. The Accounting Officer approved the said professional opinion on 3<sup>rd</sup> February 2021.

### **Notification to Bidders**

The Procuring Entity prepared letters of notification of results dated 3<sup>rd</sup> February 2020 stating that the submission by the tenderers were not successful and thus, the Evaluation Committee recommended a re-tender

because none of the bidders met the condition during evaluation at the mandatory stage. Further, in letters dated 12<sup>th</sup> February 2021, the Procuring Entity notified bidders of the reasons why their bids were non-responsive and further informed bidders that the subject procurement proceedings were terminated pursuant to section 63 (1) (f) of the Act because all evaluated tenders were non-responsive.

### **REQUEST FOR REVIEW NO. 24 OF 2021**

M/s Milicon's Limited lodged a Request for Review dated 15<sup>th</sup> February 2021 and filed on even date together with a Supporting Affidavit sworn on 15<sup>th</sup> February 2021 and filed on even date and a Supplementary Affidavit sworn on 16<sup>th</sup> February 2021 and filed on even date, through the firm of Muthomi & Karanja Advocates, seeking the following orders: -

- i. ***An order annulling the Respondent's decision purporting to adjudge the Applicant's Tender non-responsive, communicated through the Notification Letter (back) dated 3<sup>d</sup> February 2020;***
- ii. ***An order directing the Respondent to re-evaluate the Tender in strict compliance with the law and the criteria set out in the Tender Documents;***
- iii. ***In the alternative to (b) above, an order directing the Respondent to award the Tender to Milicon's Limited (i.e. the Applicant herein);***
- iv. ***An order directing the Respondent to reimburse the Applicant the costs of and incidental to this Request for Review; and***

- v. ***Such other, further, alternative and/or incidental Order(s) as the Honourable Board may deem just and expedient.***

The Board considered each of the parties' cases and confidential documents submitted to it pursuant to section 67 (3) (e) of the Act and issued the following orders in **PPARB Application No. 24 of 2021, Milicon's Limited v. The Accounting Officer, The Sports, Arts and Social Development Fund** (hereinafter referred to as "Review No. 24/2021"): -

- 1. The Accounting Officer of the Procuring Entity's letters of Notification of Results of the procurement proceedings in Tender No. SASDEF/T/PROC/002/2020-2021 for the Proposed Completion of Office Block (SASDEF Plaza) on L.R. No. 209/12386 for Sports, Arts and Social Development Fund at Upper Hill-Nairobi dated 3<sup>rd</sup> February 2020 addressed to all tenderers including the Applicant herein, be and are hereby cancelled and set aside.**
- 2. The Accounting Officer of the Procuring Entity's letters of Notification of Termination of the procurement proceedings in Tender No. SASDEF/T/PROC/002/2020-2021 for the Proposed Completion of Office Block (SASDEF Plaza) on L.R. No. 209/12386 for Sports, Arts and Social Development Fund at Upper Hill-Nairobi, dated 12<sup>th</sup> February 2021 addressed to all tenderers including the Applicant herein, be and are hereby cancelled and set aside.**

- 3. The Accounting Officer of the Procuring Entity is hereby ordered to direct the Evaluation Committee to reinstate the Applicant's tender at the Technical Evaluation Stage and conduct an evaluation at the Technical Evaluation Stage in accordance with Stage 2. Technical Evaluation of Section III. Tender Evaluation Criteria of the Tender Document read together with section 80 (2) of the Act.**
- 4. Further to Order No. 3 above, the Accounting Officer is hereby ordered to ensure the subject procurement proceedings in Tender No. SASDEF/T/PROC/002/2020-2021 for the Proposed Completion of Office Block (SASDEF Plaza) on L.R. No. 209/12386 for Sports, Arts and Social Development Fund at Upper Hill-Nairobi proceeds to its logical conclusion, including the making of an award within fourteen (14) days from the date of this decision, taking into consideration the Board's findings in this Review.**
- 5. Given that the subject procurement proceedings have not been completed, each party shall bear their own costs in the Request for Review.**

## **RE-EVALUATION OF BIDS**

### **Technical Evaluation**

According to the Evaluation Report dated 17<sup>th</sup> March 2021, the Evaluation Committee re-instated the bid of M/s Milicon's Limited at the Technical



Evaluation stage and re-evaluated the same based on the following parameters: -

<b>Item</b>	<b>Parameter</b>	<b>Maximum Points</b>
1	Key Personnel	12
2	Contracts completed in the last five years	20
3	Schedules of on-going projects	3.5
4	Schedule of contractor's equipment and transport	12
5	Technical Proposal Checklist	15
6	Audited Financial Report for the last five years	15
7	Evidence of financial resources	20
8	Name, Address and telephone of banks	1
9	Litigation History	1.5
	<b>TOTAL</b>	<b>100</b>

The results of re-evaluation of the bid of M/s Milicon's Limited at the Technical Evaluation Stage was recorded as follows: -

<b>Item</b>	<b>Parameter</b>	<b>Maximum Points</b>
1	Key Personnel	6.3
2	Contracts completed in the last five years	17
3	Schedules of on-going projects	1.5
4	Schedule of contractor's equipment and transport	12
5	Technical Proposal Checklist	15
6	Audited Financial Report for the last five years	3
7	Evidence of financial resources	20
8	Name, Address and telephone of banks	1
9	Litigation History	1.5
	<b>TOTAL</b>	<b>77.3</b>

Having noted M/s Milicon's Limited achieved the minimum technical score of 75 points, the Evaluation Committee found this bidder responsive, thus eligible to proceed to Financial Evaluation.

## **Financial Evaluation**

At this stage, the Evaluation Committee compared the rates on major items proposed by M/s Milicon's Limited against the rates provided by the State

Department for Public Works on costs of those items and observed that the pricing by M/s Milicon's Limited on the items were generally consistent with the rate of the State Department for Public Works. The Evaluation Committee further observed that M/s Milicon's Limited submitted the lowest evaluated tender price of Kshs. 1,271,273,273.00

### **Recommendation**

The Evaluation Committee recommended award of the subject tender to M/s Milicon's Limited at its tender price of Kshs. 1,271,273,273.00 having submitted the lowest evaluated tender.

### **Professional Opinion**

In a professional opinion dated 19<sup>th</sup> March 2021, the Procuring Entity's Manager, Supply Chain Management reviewed the Evaluation Report dated 17<sup>th</sup> March 2021 and concurred with the Evaluation Committee's recommendation of award of the subject tender to M/s Milicon's Limited at its tender price of Kshs. 1,271,273,273.00. She advised the Accounting Officer to award the subject tender to the said bidder. This professional opinion was approved on 22<sup>nd</sup> March 2021.

### **Notification to Bidders**

In letters dated 22<sup>nd</sup> March 2021, the Accounting Officer notified unsuccessful bidders of the outcome of their bids. The successful bidder was notified of the outcome of its bid in a letter of notification of award dated 19<sup>th</sup> March 2021.

## **REQUEST FOR REVIEW NO. 46 OF 2021**

M/s N.K. Brothers Limited (hereinafter referred to as "the Applicant"), acting in person lodged a Request for Review dated 6<sup>th</sup> April 2021 and filed on even date together with a Supporting Statement sworn by Pravichandra Mavji Khoda, the Applicant's Managing Director on 6<sup>th</sup> April 2021 and filed on even date seeking the following orders: -

- a) An order annulling and setting aside the decision of the Respondent/Procuring Entity contained in their letter to the Applicant dated 22<sup>nd</sup> March 2020 and the Applicant be deemed as responsive and allowed to proceed to financial evaluation.***
- b) An order setting aside the Procuring Entity's decision awarding the tender to M/s MILICON'S LIMITED;***
- c) An order awarding costs to the Applicants herein; and***
- d) Any other order that the Review Board may deem fit and just to grant.***

The Applicant also filed a Response to the Respondent's Replying Affidavit sworn on 19<sup>th</sup> April 2021 and filed on 20<sup>th</sup> April 2021, through the firm of Mbugwa, Atudo & Macharia Advocates.

In response, the Respondents lodged a Memorandum of Response to the Request for Review, dated 9<sup>th</sup> April 2021 and filed on 13<sup>th</sup> April 2021 together with a Replying Affidavit sworn on 9<sup>th</sup> April 2021 and filed on 13<sup>th</sup> April 2021 through M/s Lorin N. Chitubi, Senior State Counsel.

The Interested Party did not file a response to the request for review despite having been served by the Board via email of 15<sup>th</sup> April 2021 attaching the Applicant's Request for Review, notification letter of the Board Secretary on existence of the Request for Review, the Respondent's Memorandum of Response and Circular No. 2/2020 dated 24<sup>th</sup> March 2020, detailing the Board's administrative and contingency management plan to mitigate Covid-19 pandemic. To this date, the Interested Party did not file a response to the Request for Review.

Pursuant to the Board's Circular No. 2/2020 dated 24<sup>th</sup> March 2020 detailing the Board's administrative and contingency management plan to mitigate Covid-19 pandemic, the Board dispensed with physical hearings and directed that all request for review applications be canvassed by way of written submissions. Clause 1 at page 2 of the said Circular further specified that pleadings and documents would be deemed as properly filed if they bear the official stamp of the Board. However, none of the parties filed written submissions.

### **BOARD'S DECISION**

The Board has considered each of the parties' pleadings, including the confidential documents submitted by the Respondents pursuant to section 67 (3) (e) of the Act and finds that the following legal issues call for determination: -

- I. Whether the issues raised in the Applicant's Request for Review are res judicata, thus ousting the jurisdiction of the Board.**

Depending on the outcome of the above issue: -

- II. Whether the Procuring Entity fairly evaluated the Applicant's bid at the Mandatory Requirements/Preliminary Examination Stage in accordance with section 80 (2) of the Act read together with Article 227 (1) of the Constitution in the following areas: -**

- a) Format of Submission of bids under Criteria MR 5 of Stage 1. Preliminary Examination under Section III. Tender Evaluation Criteria of the Tender Document;**
- b) Duly filled, signed and stamped Form of Tender under Criteria MR 7 of Stage 1. Preliminary Examination of Section III. Tender Evaluation Criteria of the Tender Document;**
- c) Duly filled, signed and stamped Confidential Business Questionnaire Form Criteria under MR 10 of Stage 1. Preliminary Examination of Section III. Tender Evaluation Criteria of the Tender Document;**
- d) Pre-Contract Agreements under Criteria MR 12 of Stage 1. Preliminary Examination of Section III. Tender Evaluation Criteria of the Tender Document;**

**e) Format of blank Tender Document under Criteria MR 17 of Stage 1. Preliminary Examination of Section III. Tender Evaluation Criteria of the Tender Document.**

**f) Written Power of Attorney under Clause 1.5 (a) of the Instructions to Tenderers of the Tender Document.**

A brief background to the instant Request for Review is that the Procuring Entity invited interested bidders to bid for the subject tender through an advertisement published in the Daily Nation Newspaper on 8<sup>th</sup> December 2020. The Procuring Entity received a total of 18 bids by the bid submission deadline of 5<sup>th</sup> January 2021. Upon opening bids and conducting an evaluation exercise, the Procuring Entity terminated the subject procurement process because according to it, all tenders were non-responsive.

The Procuring Entity addressed Letters of Notification of Results dated 3<sup>rd</sup> February 2020 to all bidders informing them of the following: -

***"Reference is made to the aforementioned subject matter***

***This is to notify you that your submission for the above tender was not successful. The recommendation by the Evaluation Committee is for Re-Tender as none of the bidders met the conditions during evaluation at the mandatory stage.***

***You may make arrangements to collect your tender security from the Supply Chain Management Services, 7<sup>th</sup> Floor Flamingo House, during normal working hours.***

***On behalf of SASDEF, I wish to convey our appreciation for your interest in this activity and look forward to your participation in future opportunities”***

Shortly thereafter, the Procuring Entity sent another set of letters of Notification on Termination of the subject tender, dated 12<sup>th</sup> February 2021 informing bidders that the subject procurement proceedings were terminated pursuant to section 63 (1) (f) of the Act because all the evaluated tenders were non-responsive. Further, in the same notification on termination, the Procuring Entity notified bidders of the specific reasons why their respective bids were non-responsive.

The Interested Party was aggrieved by this decision, thus filing Review No. 24/2021 challenging termination of the subject procurement proceedings and the Procuring Entity's action of conducting an **“Error Check Analysis”** on the Interested Party's bid immediately after the Mandatory Requirements/Preliminary Examination Stage (that is, Preliminary Evaluation).

The Board considered each of the parties' cases, the confidential documents filed before it pursuant to section 67 (3) (e) of the Act and issued the following orders on 8<sup>th</sup> March 2021 in Review No. 24/2021: -

- 1. The Accounting Officer of the Procuring Entity's letters of Notification of Results of the procurement proceedings in Tender No. SASDEF/T/PROC/002/2020-2021 for the Proposed Completion of Office Block (SASDEF Plaza) on L.R. No. 209/12386 for Sports, Arts and Social Development Fund**

**at Upper Hill-Nairobi dated 3<sup>rd</sup> February 2020 addressed to all tenderers including the Applicant herein, be and are hereby cancelled and set aside.**

- 2. The Accounting Officer of the Procuring Entity's letters of Notification of Termination of the procurement proceedings in Tender No. SASDEF/T/PROC/002/2020-2021 for the Proposed Completion of Office Block (SASDEF Plaza) on L.R. No. 209/12386 for Sports, Arts and Social Development Fund at Upper Hill-Nairobi, dated 12<sup>th</sup> February 2021 addressed to all tenderers including the Applicant herein, be and are hereby cancelled and set aside.**
- 3. The Accounting Officer of the Procuring Entity is hereby ordered to direct the Evaluation Committee to reinstate the Applicant's tender at the Technical Evaluation Stage and conduct an evaluation at the Technical Evaluation Stage in accordance with Stage 2. Technical Evaluation of Section III. Tender Evaluation Criteria of the Tender Document read together with section 80 (2) of the Act.**
- 4. Further to Order No. 3 above, the Accounting Officer is hereby ordered to ensure the subject procurement proceedings in Tender No. SASDEF/T/PROC/002/2020-2021 for the Proposed Completion of Office Block (SASDEF Plaza) on L.R. No. 209/12386 for Sports, Arts and Social Development Fund at Upper Hill-Nairobi proceeds to its logical conclusion, including the making of an award within fourteen (14) days**



**from the date of this decision, taking into consideration the Board's findings in this Review.**

**5. Given that the subject procurement proceedings have not been completed, each party shall bear their own costs in the Request for Review.**

In compliance with the Board's orders of 8<sup>th</sup> March 2021 in Review No. 24/2021 the Procuring Entity's Evaluation Committee reinstated and evaluated the Interested Party's bid at the Technical evaluation stage. Upon finding the Interested Party's bid responsive at the Technical evaluation stage, the Procuring Entity's Evaluation Committee evaluated the Interested Party's bid at the Financial Evaluation stage and recommended the Interested Party for award as the lowest evaluated bidder.

The instant Request for Review necessitates this Board to address the import of Order No. 1 and 2 of the decision in Review No. 24/2021 wherein the Board; nullified the letters of notification of results of the subject tender dated 3<sup>rd</sup> February 2020 which were addressed to all bidders and letters of notification of termination of the subject tender dated 12<sup>th</sup> February 2021 addressed to all bidders. The effect of this is that any communication by the Procuring Entity regarding termination of the subject tender and reasons for non-responsiveness of all bids were nullified.

Consequently, the Board ordered that the Interested Party's bid be reinstated and evaluated at the Technical evaluation stage because the evaluation committee had indicated that the Interested Party had been found responsive at the Mandatory evaluation stage.

Having established all letters of notification were nullified by the Board in Review No. 24/2021, it therefore follows that any reasons for non-responsiveness communicated to the Applicant herein before the filing of Review No. 24/2021 (by the Interested Party herein), ceased to have any legal effect on 8<sup>th</sup> March 2021. Therefore, in determining whether the issues raised by the Applicant in the instant Request for Review are res judicata, the circumstances of Review No. 24/2021 ought to be taken into account.

In the case of **The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others, Nairobi CA Civil Appeal No. 105 of 2017 ([2017] eKLR)**, (hereinafter referred to as "Maina Kiai Case") the Court of Appeal held that:

***"For the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;***

- a) The suit or issue was directly and substantially in issue in the former suit.***
- b) That former suit was between the same parties or parties under whom they or any of them claim.***
- c) Those parties were litigating under the same title.***
- d) The issue was heard and finally determined in the former suit.***

- e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."***

Having considered the finding in the foregoing case, the Board notes that the Applicant in the instant Request for Review is challenging the outcome of evaluation of its bid as communicated by the Procuring Entity vide a letter dated 22<sup>nd</sup> March 2021 based on the following reasons: -

- "i. Pages 45-49 of the bid document submitted were missing contrary to requirements as per the invitation to tender notice which required submission of a complete bid document with all the pages;***
- ii. The form of tender was not duly filled, signed and stamped as per the requirements in the invitation to tender;***
- iii. The Confidential Business Questionnaire was not duly filled, signed and stamped as per the requirements in the invitation to tender;***
- iv. Pre-contract agreements with Domestic Sub-Contractors were not provided as required in the invitation to tender;***
- v. The Tender documents were altered contrary to the instructions in the Invitation to tender; and***
- vi. The Invitation to Tender required that a Power of attorney be provided, signed witnessed and or stamped***

***by a Commissioner for Oaths, the Power of Attorney was not witnessed or commissioned by a Commissioner for Oaths”***

These issues were not directly or substantially in issue in Review No. 24/2021. Further, parties to Review No. 24/2021 were the Interested Party herein (as an applicant) and the 1<sup>st</sup> Respondent (as a Respondent) in Review No. 24/2021. The Applicant herein was not a party to Review No. 24/2021. The issue of responsiveness of the Applicant in the instant Request for Review was never heard and determined by the Board in Review No. 24/2021. Even though it is likely the Board would have had jurisdiction to determine issues to do with responsiveness of the Applicant since it was a tenderer, the Board’s jurisdiction to determine such issues was not invoked.

Furthermore, cancellation of all letters of notification to all bidders pursuant to Order No. 1 and 2 of Review No. 24/2021 in effect created a new course of action available to bidders after evaluation was undertaken by the Procuring Entity pursuant to Order No. 3 in Review No. 24/2021.

The Court in the Maina Kiai case cited hereinbefore held that the elements of the doctrine of res judicata are conjunctive and not disjunctive. This means that if one or more elements is not satisfied, then the doctrine of res judicata would not be applicable.

Having interrogated each of the elements of the doctrine of res judicata, the Board finds that the doctrine of res judicata does not apply in the instant circumstances.

Accordingly, the Board finds that the issues raised by the Applicant in the instant Request for Review are not barred by the doctrine of res judicata, thus the Board has jurisdiction to address the same.

On the second issue for determination, the Board observes that the Applicant challenged the reasons provided in its letter of notification of unsuccessful bid dated 22<sup>nd</sup> March 2021 which was outlined hereinbefore. Having considered each of the parties' pleadings on the question whether the Applicant's bid was fairly evaluated, the Board observes that Article 227 (1) of the Constitution cites fairness as one of the principles that guide public procurement and asset disposal procedures by State organs and public entities in Kenya. The said provision of the Constitution states that: -

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

Further section 80 (2) of the Act requires an evaluation committee to undertake evaluation and comparison of tenders using the procedures and criteria set out in the tender documents. Thus, to ensure fairness to bidders during evaluation of bids, a procuring entity must stick to the procedures and criteria in the Tender Document treat bidders the same way during such evaluation. It therefore behooves upon this Board to establish whether the Procuring Entity fairly evaluated the Applicant's bid vis-à-vis evaluation of the Interested Party's bid on the criteria challenged by the Applicant.

Having considered parties' cases, the Board proceeds to make the following findings: -

**a) Format of Submission of Bids**

Criteria MR 5 of Stage 1. Preliminary Examination under Section III. Tender Evaluation Criteria of the Tender Document provided that: -

***"Bid MUST be submitted in the format required by the procuring entity-all the tender document (all volumes) to be TAPE/BOOK BOUND and returned in the order and pages provided in the advertisement to tender and paginated in the format of 1,2,3, 4....including attachments (Spiral Binding and use of Spring or box files will not be accepted and will lead to automatic disqualification)"***

The Applicant was notified that pages 45 to 49 were missing from its original bid because in the Procuring Entity's view, the Invitation to Tender required submission of a bid with all the pages. However, the Respondents state at paragraph 3 (a) of their Memorandum of Response that the Applicant's bid did not have pages STD/49 to STD/54.

In addressing the criterion under consideration, the Board observes that Section IX. Standard Forms of the Tender Document, listed standard forms applicable in the subject tender and allocated numbers at the foot of those standard forms as follows: -

- i.** Form of Invitation for Tender (STD/47);
- ii.** Form of Tender (STD/48);

- iii.** Letter of Acceptance (STD/49);
- iv.** Form of Agreement (STD/50 and STD/51);
- v.** Form of Tender Security (STD/52);
- vi.** Performance Bank Guarantee (STD/53);
- vii.** Bank Guarantee for Advance Payment (STD/54 and STD/55);
- viii.** Qualification Information (STD/56, STD/57 and STD/58);
- ix.** Tender Questionnaire (STD/59);
- x.** Confidential Business Questionnaire (STD/60 and STD/61);
- xi.** Statement of Foreign Currency Requirement (STD/62);
- xii.** Details of Sub-Contractors (STD/63);
- xiii.** Letter of Notification of Award (STD/64); and
- xiv.** Statement of Compliance (STD/65).

The Respondents referred to **"STD/49 to STD/54"** in their Memorandum of Response because, in the blank Tender Document, some Standard Forms were allocated page numbers as; STD/49-Letter of Acceptance, STD/50 & STD 51-Form of Agreement, STD/52-Form of Tender Security, STD/53-Performance Guarantee, STD-54-Bank Guarantee for Advance Payment.

Having considered the criterion under consideration, the Board notes that the orders and pages for submitting tender documents were to be provided in the tender advertisement. The method of pagination was provided as "1,2,3,4..." for all pages in a tender including attachments.

The Board studied the Tender Advertisement dated 8<sup>th</sup> December 2020 and notes that the tender advertisement did not provide for the order and pages for submitting tender documents, but merely stated: -

***"bids submitted in the required format by the procuring entity. The bids/submissions must be serialized i.e. with sequential page numbers"***

In essence, the Tender Advertisement did not specify any other required format other than serialization/pagination of bids in a sequential manner with page numbers.

Criteria MR 5 of Stage 1. Preliminary Examination under Section III. Tender Evaluation Criteria of the Tender Document read together with the Tender Advertisement did not mention the standard forms in the blank Tender Document neither did it direct bidders to adopt the method of pagination given to each of the standard forms. It is also not rational for bidders in a given scenario to provide tender security from a financial institution and still attach the Blank Form of Tender Security (without completing the same), yet they have already provided a bid bond/tender security from a financial institution.

The Applicant's tender was paginated as "1" being the first page and used this method of pagination sequentially up to the last page. The pages of **"STD/49 to STD/54"** are page numbers given to some of the Standard Forms of the Tender Document and ought not to be the basis of disqualifying the Applicant's tender who in any case paginated its tender document as observed by the Board.

On its part, the Interested Party used the numerical form of pagination and paginated its bid as "1,2,3,4..." up to the last page. Whereas the Interested



Party attached Standard Forms of the Tender Document, it did not follow the sequence provided in the Tender Document for STD/56 to STD/58 (Qualification Information), STD 59 (Tender Questionnaire) and STD/60 to STD/61 (Confidential Business Questionnaire).

Given that both bidders paginated their respective bids, the Board finds that the Procuring Entity unfairly evaluated the Applicant's bid under this criterion noting that the tender advertisement did not provide for the order and pages for submitting tender documents save that tenders were to be paginated in a sequential manner.

#### **b) Duly filled, signed and stamped Form of Tender**

Criteria MR 7 of Stage 1. Preliminary Examination under Section III. Tender Evaluation Criteria of the Tender Document required bidders to provide: -

#### ***"Dully filled, signed and stamped Form of Tender"***

One of the Standard Forms found in Section IX of the Tender Document include a Form of Tender to be completed by bidders. In response to this criterion, the Applicant provided a duly filled, signed and stamped Form of Tender at page 000043 of its original bid, which we note took the same format as provided in Section IX of the Tender Document.

The Interested Party on the other hand attached a dully filled, signed and stamped Form of Tender at page 61 of its original bid in the same format as provided in Section IX of the Tender Document.

Having noted the Applicant provided a duly filled, signed and stamped Form of Tender similar to the one provided by the Interested Party and as required in the Tender Document but was found non-responsive, it is the Board's considered finding that the Procuring Entity unfairly evaluated the Applicant on this criterion.

Accordingly, the Board finds that the Procuring Entity unfairly evaluated the Applicant's bid on Criteria MR 7 of Stage 1. Preliminary Examination under Section III. Tender Evaluation Criteria of the Tender Document.

**c) Duly filled, signed and stamped Confidential Business Questionnaire Form**

According to Criteria MR 10 of Stage 1. Preliminary Examination under Section III. Tender Evaluation Criteria of the Tender Document, bidders were required to provide: -

***"Duly filled, signed and stamped Confidential Business Questionnaire"***

The Procuring Entity also provided a Standard form of the Confidential Business Questionnaire Form under Clause (xi) of Section IX of the Tender Document outlining the areas to be completed by bidders.

In response to this criterion, the Applicant attached a Confidential Business Questionnaire Form at page 000050 to page 000052 of its bid which was completed but was not signed, neither was the same stamped. At the foot of the Confidential Business Questionnaire Form, bidders were directed to

**“attach proof of citizenship”** of the directors or partners listed in their respective Confidential Business Questionnaire Form.

The Board observes that the Applicant listed two of its directors as **Ramesh Khoda** and **Pravin Khoda** both of Kenyan Nationality. With respect to proof of their citizenship, the Applicant attached the following: -

- At page 000053 of its original bid, the National Identity Card of Pravin Khoda, ID Number 679291 showing he is a Kenyan citizen;
- At page 000328 of its original bid, the National Identity Card of Ramesh Khoda, ID Number 0975556 showing he is a Kenyan citizen.

On its part, the Interested Party attached a dully filled, signed and stamped Confidential Business Questionnaire Form at pages 83 to 84 of its original bid with details of its directors as: **Sai Prasad Parchuri, Karuna Parchuri, G.R.B Rao** and **Karsan Patel**. However, the Interested Party did not attach any proof of citizenship for any of its aforementioned 4 directors.

From the foregoing, the Board observes that the Applicant failed to sign and stamp its Confidential Business Questionnaire Form and was found non-responsive whereas the Interested Party who failed to provide evidence of citizenship for its directors was given favourable treatment and was found responsive on this criterion. The principles of fairness under Article 227 (1) of the Constitution requires that all bidders are treated fairly during evaluation, an aspect that was not taken into account by the Procuring Entity while evaluating this criterion.

Accordingly, the Board finds that the Procuring Entity unfairly evaluated the Applicant's bid under Criteria MR 10 of Stage 1. Preliminary Examination under Section III. Tender Evaluation Criteria of the Tender Document.

**d) Pre-Contract Agreements with Domestic Sub-Contractors**

Criteria MR 12 of Stage 1. Preliminary Examination under Section III. Tender Evaluation Criteria of the Tender Document specified the requirement of pre-contract agreements as follows: -

***"Main Contractor shall attach duly signed and stamped pre-contract agreement to work together (NOTE: Not Joint Venture) with the Domestic Sub-contractors on award of the tender to implementation (where applicable). This MUST be signed by both parties and witnessed by an Attorney or Commissioner for Oaths and MUST be legally enforceable"***

The Board observes that at paragraph 3 (d) of their Memorandum of Response, the Respondents allege that the agreements provided by the Applicant, were Joint Venture Agreements and were thus contrary to Criteria MR 12 of Stage 1. Preliminary Examination under Section III. Tender Evaluation Criteria of the Tender Document which excluded joint ventures. In response to this allegation, the Applicant stated at paragraph 6 of its Response to the Respondent's Replying Affidavit that it submitted sub-contracting agreements which cannot be construed to be Joint Venture Agreements.

Having considered parties' rival positions on this criterion, the Board observes that Black's Law Dictionary, 9<sup>th</sup> Edition at page 915 thereof describes a **"joint venture"** as: -

***"A business undertaking by two or more persons engaged in a single defined project. The necessary elements are: (1) an express or implied agreement; (2) a common purpose that the group intends to carry out; (3) shared profits and losses; and (4) each member's equal voice in controlling the project"***

Further, the United States Defence Contract Agency in its Article known as **"Joint Ventures and Teaming Arrangements"**, published in 2015, describes joint ventures as follows: -

***"An enterprise owned and operated by two or more businesses or individuals as a separate entity (not a subsidiary) for the mutual benefit of the members of the group. Joint ventures possess the characteristics of joint control. The right of each joint venture party to control and manage all of the property to be used in the joint venture is clearly stated in the joint venture agreement.***

***Parties may have Equal control, influence, and power over the project or transaction. However, the contract can give one party complete control. Parties to a joint venture have equal ownership of the project.***

Sub-contract agreements are described in the same Article as: -

***"A subcontractor agreement is the equivalent of a contract of employment between an employer and an employee. The big difference is that the former will have a limited scope of work that the subcontractor is responsible for both in terms of time as well as job functions. The idea behind such an agreement is to detail what work is being subcontracted as well as what is not.***

***It should also list any materials that the subcontractor will be expected to supply and those which will be provided by the main contractor. For example, a subcontractor agreement between a training firm and an outsourced trainer may detail when and where the training is to take place. It would also outline how many people will be trained. But also who is responsible for providing the training room and the other training materials that might be needed."***

***In the case of the construction industry, a main contractor may subcontract electrical installation works to a firm of electricians. A subcontractor agreement between these two parties would usually include how many sockets and light fittings are to be installed and where.***

***It may also specify that cabling is to be supplied by the subcontracted firm. But that fittings will be supplied from the main contractor's stock".***

From the above excerpts, the Board observes that even though Joint Venture agreements and sub-contractor agreements give rise to partnerships, the two have some unique characteristics that differentiate them. A unique characteristic of joint ventures is the element of joint control by both joint venture partners or complete control given to one joint venture partner who may be appointed as the lead partner. Nonetheless, joint venture partners have equal ownership of the project. On the other hand, sub-contracting agreements have employer-employee relationship because the main contractor employs a sub-contractor to undertake a portion of a project but the sub-contractor does not have any control or ownership of the project. The sub-contractor is paid by the main contractor to the extent of the sub-contracted works.

The Applicant attached several agreements between it and proposed sub-contractors in its original bid as follows: -

- At pages 59-63, a Sub-Contractor Agreement dated 22<sup>nd</sup> December 2020 between M/s MasterPower Systems Ltd (as the **Electrical Installations Subcontractor**) and the Applicant (as the Main Contractor), duly signed by the two parties and attested by S.K Kivuva and Company Advocates who affixed their Advocate and Commissioner for Oaths stamp;
- At pages 64-68, a Sub-Contractor Agreement dated 22<sup>nd</sup> December 2020 between M/s Manpower Systems Ltd as the **CCTV & Structured Cabling Installations Subcontractor** and the Applicant (as the Main Contractor), duly signed by the two parties

- and attested by S.K Kivuva and Company Advocates who affixed their Advocate and Commissioner for Oaths stamp;
- At pages 69-73, a Sub-Contractor Agreement dated 22<sup>nd</sup> December 2020 between M/s Manpower Systems Ltd as the **Generator Installations Subcontractor** and the Applicant (as the Main Contractor), duly signed by the two parties and attested by S.K Kivuva and Company Advocates who affixed their Advocate and Commissioner for Oaths stamp;
  - At pages 75-83, a Sub-Contractor Agreement dated 22<sup>nd</sup> December 2020 between M/s Trident Plumbers Ltd as the **Mechanical Ventilation Subcontractor** and the Applicant (as the Main Contractor) duly signed by the two parties and attested by S.K Kivuva and Company Advocates who affixed their Advocate and Commissioner for Oaths stamp; and
  - At pages 85-93, a Sub-Contractor Agreement dated 22<sup>nd</sup> December 2020 between M/s Trident Plumbers Ltd (**as the Plumbing and Drainage Subcontractor**) and the Applicant (as the Main Contractor) duly signed by the two parties and attested by S.K Kivuva and Company Advocates who affixed their Advocate and Commissioner for Oaths stamp.

Having studied the said agreements, the Board notes that the Applicant entered into sub-contracting agreements with the aforementioned companies to sub-contract the works listed hereinbefore. There is no clause in the said agreements that demonstrate any evidence of a joint venture partnership.



On its part, the Interested Party provided the following in response to this criterion: -

- At pages 328 to 331 of its original bid, a Sub-Contracting Agreement dated 19<sup>th</sup> December 2020 between the Interested Party (as Main Contractor) and M/s Trident Plumbers Limited (as **Domestic Sub-Contractor for Plumbing, Drainage, Fire Protection and Mechanical Ventilation Works**), duly signed by the two parties and attested by Oscar O. Odindo Advocates who affixed their Advocate's stamp;
- At pages 332 to 335 of its original bid, a Sub-Contracting Agreement dated 31<sup>st</sup> December 2020 between the Interested Party (as Main Contractor) and M/s Compedge Solutions Limited (as **Domestic Sub-Contractor for CCTV, MATV & Structured Cabling Works**), duly signed by the two parties and attested by Oscar O. Odindo Advocates who affixed their Advocate's stamp;
- At pages 336 to 339 of its original bid, a Sub-Contracting Agreement dated 31<sup>st</sup> December 2020 between the Interested Party (as Main Contractor) and M/s Konark Electricals Limited (as **Domestic Sub-Contractor for Electrical Installation and Generator Installation Works**), duly signed by the two parties and attested by Oscar O. Odindo Advocates who affixed their Advocate's stamp; and
- At pages 340 to 343 of its original bid, a Sub-Contracting Agreement dated 2<sup>nd</sup> January 2021 between the Interested Party (as Main Contractor) and M/s Elevonic Lift Services Limited (as **Domestic**

**Sub-Contractor Lift Installation Works**), duly signed by the two parties and attested by Oscar O. Odindo Advocates who affixed their Advocate's stamp.

Having noted the Applicant provided Pre-Contract Agreements with Domestic Sub-Contractors as required in the Tender Document but was found non-responsive, it is the Board's considered finding that the Procuring Entity unfairly evaluated the Applicant on this criterion without giving the Interested Party the same treatment given to the Applicant.

#### **e) Format of blank Tender Document**

Criteria MR 17 of Stage 1. Preliminary Examination under Section III. Tender Evaluation Criteria of the Tender Document specified the requirement of submission of tender documents as follows: -

***"Tender Documents to be downloaded as issued and submitted filled in INK. Altering the format will lead to automatic disqualification"***

The Board already established that the format of "STD" was a creation of Standard Forms only, but bidders were informed to paginate their tenders using format of "1,2,3,4...".

The Applicant's tender was paginated as "1" being the first page and used this method of pagination sequentially up to the last page. The pages of **"STD/49 to STD/54"** which are page numbers given to some of the

Standard Forms of the Tender Document were not sequentially placed in the Applicant's bid.

On its part, the Interested Party used the numerical form of pagination and paginated its bid as "1,2,3,4..." up to the last page. Whereas the Interested Party attached Standard Forms of the Tender Document, it did not follow the sequence provided in the Tender Document for STD/56 to STD/58 (Qualification Information), STD 59 (Tender Questionnaire) and STD/60 to STD/61 (Confidential Business Questionnaire) but was given favourable treatment during evaluation.

Given that both bidders did not sequentially follow the format of Blank Tender Document, the Board finds that the Procuring Entity unfairly evaluated the Applicant's bid under this criterion whilst giving the Interested Party favourable treatment.

#### **f) Written Power of Attorney**

Clause 1.5 (a) of Section II. Instructions to Tenderers of the Tender Document provided that: -

***"1. General/ Eligibility/ Qualifications/ Joint venture/ Cost of tendering***

***1.5. Where no pre-qualification of potential tenderers has been done, all tenderers shall include the following information and documents with their tenders, unless otherwise stated:***

***(a) copies of original documents defining the constitution or legal status, place of registration, and principal place of business; written power of attorney of the signatory of the tender to commit the tenderer***

The Board studied the Tender Document and notes that this was not a criterion for evaluation because the criteria for evaluation was outlined in Section III. Evaluation Criteria of the Tender Document containing 17 mandatory requirements for Main Contractors and 37 separate mandatory requirements for Domestic Sub-Contractors to be evaluated at the Preliminary Evaluation Stage. The Technical Evaluation Criteria under Section III. Evaluation Criteria of the Tender Document also did not have any requirement on Power of Attorney whereas Financial Evaluation was confined to comparison of the prices quoted by bidders.

The requirement of **“written power of attorney of the signatory of the tender to commit the tenderer”** is mentioned in the Instructions to Tenderers but was not adopted as part of the evaluation criteria under Section III. Evaluation Criteria of the Tender Document. It is worth noting that section 80 (2) of the Act provides that: -

***“The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents”***

The procedures and criteria for evaluation was provided in Section III. Evaluation Criteria of the Tender Document and if the Procuring Entity

wished to evaluate bidders on “written power of attorney”, the same ought to have been provided as part of the criteria under Section III. Evaluation Criteria of the Tender Document.

Having established “**written power of attorney of the signatory of the tender to commit the tenderer**” does not form part of the criteria for evaluation under Section III. Evaluation Criteria of the Tender Document, the Board finds that the same ought not to have been used to disqualify the Applicant’s bid.

The Board has established that the Procuring Entity unfairly evaluated the Applicant in some of the criteria considered during Preliminary Evaluation whilst giving the Interested Party favourable treatment during evaluation, contrary to the principle of fairness under Article 227 (1) of the Constitution and further disqualified the Applicant’s bid on failure to provide for a “Written Power of Attorney” which did not form part of the criteria for evaluation under Section III. Evaluation Criteria of the Tender Document. It is the Board’s considered finding that the Accounting Officer of the Procuring Entity ought to reinstate the Applicant’s bid at the Preliminary Evaluation Stage and re-evaluate the Applicant’s bid together with all other bids at the Preliminary Evaluation Stage in the following areas: -

- a) Format of submission of bids;*
- b) Duly filled, signed and stamped Form of Tender;*
- c) Duly filled, signed and stamped Confidential Business Questionnaire Form;*
- d) Pre-Contract Agreements;*

*e) Format of blank Tender Document*

The Board observes that Section 87 (3) of the Act provides that: -

***"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"***

Further, Regulations 82 of Regulations 2020 provides that: -

***The notification to the unsuccessful bidder under section 87(3) of the Act shall be in writing and shall be made at the same time the successful bidder is notified***

***(2) For greater certainty the reason to be disclosed to the unsuccessful bidder shall only relate to their respective bids***

***(3) The notification in this regulation shall include the name of the successful bidder, the tender price and the reason why the bid was successful in accordance with section 86 (1) of the Act"***

The above provisions state that notification to the unsuccessful and successful bidders is done at the same time. In the instant case, notification to the Interested Party (as the successful bidder) was prepared on 19<sup>th</sup> March 2021 whereas notification to the Applicant was prepared on 22<sup>nd</sup> March 2021 which shows that these notifications were not prepared at the same time.

In totality of the foregoing, the Request for Review succeeds in terms of the following specific orders: -

### **FINAL ORDERS**

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

- 1. The Accounting Officer of the Procuring Entity's Letters of Notification of Results on Tender No. SASDEF/T/PROC/002/2020-2021 for the Proposed Completion of Office Block (SASDEF Plaza) on L.R. No. 209/12386 for Sports, Arts and Social Development Fund at Upper Hill-Nairobi dated 22<sup>nd</sup> March 2021 addressed to the Applicant and all other unsuccessful bidders, be and are hereby cancelled and set aside.**
- 2. The Accounting Officer of the Procuring Entity's Letter of Notification of Award of Tender No. SASDEF/T/PROC/002/2020-2021 for the Proposed Completion of Office Block (SASDEF Plaza) on L.R. No. 209/12386 for Sports, Arts and Social Development Fund at Upper Hill-Nairobi dated 19<sup>th</sup> March 2021 addressed to the Interested Party and, be and is hereby cancelled and set aside.**
- 3. The Accounting Officer of the Procuring Entity is hereby ordered to direct the Evaluation Committee to re-instate the Applicant's and all other bidders' bids at the Mandatory**

**Requirements/Preliminary Examination Stage and conduct a re-evaluation of all bidders' bids at the Mandatory Requirements/Preliminary Examination Stage in the following areas: -**

- a) Format of Submission of bids under Criteria MR 5 of Stage 1. Preliminary Examination under Section III. Tender Evaluation Criteria of the Tender Document;**
- b) Duly filled, signed and stamped Form of Tender under Criteria MR 7 of Stage 1. Preliminary Examination of Section III. Tender Evaluation Criteria of the Tender Document;**
- c) Duly filled, signed and stamped Confidential Business Questionnaire Form Criteria under MR 10 of Stage 1. Preliminary Examination of Section III. Tender Evaluation Criteria of the Tender Document;**
- d) Pre-Contract Agreements under Criteria MR 12 of Stage 1. Preliminary Examination of Section III. Tender Evaluation Criteria of the Tender Document;**
- e) Form of blank Tender Document under Criteria MR 17 of Stage 1. Preliminary Examination of Section III. Tender Evaluation Criteria of the Tender Document.**

**4. Further to Order No. 3 above, the Accounting Officer of the Procuring Entity is hereby directed to complete the procurement proceedings in Tender No. SASDEF/T/PROC/002/2020-2021 for the Proposed**



**Completion of Office Block (SASDEF Plaza) on L.R. No. 209/12386 for Sports, Arts and Social Development Fund at Upper Hill-Nairobi to its logical conclusion within fourteen (14) days from the date of this decision, taking into consideration the Board's findings in this Review.**

- 5. Given that the subject procurement proceedings have not been concluded, each party shall bear its own costs in the Request for Review.**

**Dated at Nairobi this 26<sup>th</sup> day of April 2021**

**CHAIRPERSON**

**SECRETARY**

**PPARB**

**PPARB**