

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 93/2021 OF 28TH JUNE, 2021

BETWEEN
POWER TRANSMISSION LINE CONTRACTORS
ASSOCIATION APPLICANT
AND
THE ACCOUNTING OFFICER, KENYA POWER
AND LIGHTING COMPANY LIMITED RESPONDENT

**REQUEST FOR REVIEW AGAINST THE ACCOUNTING OFFICER,
KENYA POWER AND LIGHTING COMPANY LIMITED IN TENDER
NO: KP1/6E.1/PT/1/21/A89 IN RESPECT OF PROCUREMENT OF
PLANT, SUPPLY & EXTENSION OF LOW VOLTAGE LINES-LAST
MILE CONNECTIVITY.**

BOARD MEMBERS

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|-------------------------|-------------------|
| 1. Mr. Jackson Awele | - Member in Chair |
| 2. Ms. Isabelle Juma | - Member |
| 3. Dr. Paul A. Jilani | - Member |
| 4. Mr. Alfred Keriolale | - Member |

IN ATTENDANCE

Mr. Philemon Kiprop	-Holding brief for the Acting Board Secretary
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BACKGROUND TO THE DECISION

On 18th May 2021, the Procuring Entity, Kenya Power and Lighting Company Limited issued a Specific Procurement Notice for the procurement of Plant, Supply and Extension of Low Voltage Lines – Last Mile Connectivity Project IFB No. KP1/6E.1/PT/1/21/A89 and invited bids from eligible bidders for the works as follows;

No.	Lot No.	Description	Minimum Bid Security in USD/KES
1.	LOT A	KP1/6E.1/PT/1/21/A89 Lot 1- Supply and Extension of LV single phase lines and service cables in Homabay, Kisii, Migori, Nyamira, Kericho&Bomet Counties	USD 83,500,000 or Kes 9,200,000.00
2.	LOT B	KP1/6E.1/PT/1/21/A89 Lot 1- Supply and Extension of LV single phase lines and service cables in Kisumu, Siaya, Vihiga, Busia,	USD 67,100.00 or Kes 7,400,000.00

		Bungoma&Kakamega Counties	
3.	LOT C	KP1/6E.1/PT/1/21/A8 9 Lot 1- Supply and Extension of LV single phase lines and service cables in Embu, Muranga, Meru &Tharaka Nithi Counties	USD 30,300.00 or Kes 3,300,000.00

The tender was to close on 23rd July 2021.

REQUEST FOR REVIEW NO. 93/2021

Before the close of the tender, **Power Transmission Line Contractors Association (The Applicant)** filed a Request for Review dated 24th June, 2021 and lodged on 28th June, 2021 seeking the following orders:

- 1. An order annulling the Tender Document in respect of Tender for Procurement of Plant, Supply & Extension of Low Voltage Lines- Last Mile Connectivity Project I (LMCP-I) referenced IFB N°: KP1/6E.1/PT/1/21/A89 and the entire procurement process in relation thereto;***
- 2. An Order Compelling the Respondent to withdraw the Tender Notice and re-advertise the same via a fresh notice that unbundles the supply and extension works and***

prescribes fair, proportional and reasonable bidding requirements in terms of annual turnover, cash flow and experience;

3. An Order Compelling the Respondent to withdraw the Tender Notice and re-advertise the same via a fresh notice that unbundles the specific procurement notice and lists the same into small lots with specific works reserved for Kenyan Citizen contractors;

4. An order directing the Respondent to comply with the law in preference and reservations set out in the Constitution and the Public Procurement and Asset Disposal Act;

5. An order awarding costs of and incidental to these proceedings; and

6. Such further or other orders as the Honorable Board may deem fit to issue.

In Response to the Request for Review the Respondent filed a memorandum of response dated 5th July 2021 and filed with the Board on even date.

On 6th July 2021, the Procuring Entity further filed a Notice of Preliminary Objection dated 5th July 2021.

On 9th July 2021, the Respondent filed written submissions in support of its Memorandum of Response to the Request for Review. The Applicant did not file submissions in the matter.

Pursuant to the Board's Circular No. 2/2020 dated 24th March 2020 detailing the Board's administrative and contingency management plan to mitigate the effects of Covid-19 pandemic, the Board dispensed with physical hearings and directed that all request for review applications would be canvassed by way of written submissions. Clause 1 at page 2 of the said Circular further specifies that pleadings and documents would be deemed as properly filed if they bear the official stamp of the Board.

BOARD'S DECISION

After careful consideration of the preliminary objection, parties' pleadings, submissions and confidential documents submitted pursuant to section 67 (3) (e) of the Act, the Board has identified the following three main issues for determination;

- (i) Whether the Board has or lacks jurisdiction to entertain the Request for review.***
- (ii) Subject to issue i) above, whether the Respondent's terms set out in the Tender Notice and the Bid Document***

are unreasonable, discriminative, and hinder fair competition in the tendering process for individual Kenyan Citizens.

(iii) Subject to issue i) above, whether the tender documents are in violation of the Public Procurement and Asset Disposal Act No. 33 of 2015 that entitles citizen contractors to preferences and reservations when participating in an international competitive bid.

(iv) Who should bear the costs of this Application

The Board determines the framed issues in turn as follows;

Whether the Board has or lacks jurisdiction to entertain the Request for review.

The Respondent have raised a jurisdictional objection to the Request for Review on three main grounds to wit;

- a. That the Board lacks jurisdiction to entertain the Request for Review by virtue of the provisions of Section 4(2)(f) of the Public Procurement Asset and Disposal Act, 2015 (hereinafter referred to as the "Act");
- b. That the Board lacks jurisdiction to entertain this Appeal pursuant to the provisions of Section 167 (4) of the Act; and

- c. That the Applicant lacks the *locus standi* to file this Appeal pursuant to Section 167 (2) of the Act as read together with Regulation 204 (1) of the Public Procurement Asset and Disposal Regulations, 2020 (hereinafter referred to as the "Regulations 2020") thus, rendering these proceedings a nullity *ab initio*.

It is trite that whenever a jurisdictional challenge is raised, the same must be dealt with first at the onset as a threshold matter.

In the locus classicus case of **The Owners of Motor Vessel "Lillian S" vs. Caltex Oil Kenya Limited (1989) KLR 1**, the court of Appeal 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.

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** fortified the above decision 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."

To address the above issue, the Board shall make a determination in respect of the following three sub-issues: -

a) Whether the Applicant lacks the locus standi to file this Appeal pursuant to Section 167 (2) of the Act as read together with Regulation 204 (1) of Regulations 2020

Subject to the findings in the above sub-issue:-

b) Whether the subject procurement process meets the conditions set out in section 4 (2) (f) and 6 (1) of the Act, thus ousting the jurisdiction of this Board

Subject to the findings in the above sub-issue:-

c) That the Board lacks jurisdiction to entertain this Appeal pursuant to the provisions of Section 167 (4) of Act

a) **Whether the Applicant lacks the locus standi to file this Appeal pursuant to Section 167 (2) of the Act as read together with Regulation 204 (1) of the Regulations 2020,**

The Applicant has challenged the jurisdiction of the Board to hear and determine the Request for review on the basis inter-alia that the request for review is not accompanied by the refundable deposit prescribed in the regulations.

Section 167(2) of the Public Procurement and Assets Disposal Act No. 33 of 2015 (Hereinafter **the Act**) provides in this regard as follows;

"A request for review shall be accompanied by such refundable deposit as may be prescribed in the regulations, and such deposit shall not be less than ten per cent of the cost of the contract."

Regulation 204 (1) of the Regulations 2020 provides;

(1) Pursuant to section 167(2) of the Act, the filing of a request for review shall be accompanied by a refundable deposit valued at fifteen percent (15%) of the applicant's tender sum which shall be paid into a deposit account.

(2)

(3)

It is pursuant to the above provisions that the Respondent contends that the Applicant is not entitled to audience before the Board as it has not paid the requisite refundable deposit as prescribed by the aforesaid provisions.

Whereas the said requirement would ordinarily be a mandatory pre-requisite for a party seeking audience before the Board, the Board takes judicial notice that the same is currently the subject of a dispute before the High Court in Petition E226 of 2020 wherein Hon. Justice Weldon Korir issued a Conservatory order dated 27th July 2020 suspending the requirement for the payment of the refundable deposit pending the hearing and determination of the main Petition. The relevant order states;

"THAT a Conservatory Order is Issued staying the implementation and or operation of any regulation of the Public Procurement and Asset Disposal Regulations 2020, requiring the deposit of 15% of the Applicant's tender sum or 3% of the Applicant tender sum before the commencement of the judicial review proceedings in respect of the public procurement."

As at the date of this decision, the said conservatory order still subsists and is binding on this Board. We accordingly find no merit in this ground of the preliminary objection and dismiss it.

b) Whether the subject procurement process meets the conditions set out in section 4 (2) (f) and 6 (1) of the Act, thus ousting the jurisdiction of this Board

On this sub-issue the Respondent contends that Section 4 (2)(f) of the Act ousts the application of the Act on procurements undertaken pursuant to bilateral or multilateral agreements between the Government of Kenya and any other foreign government, agency, entity or multilateral agency. He submits that the Loan Agreement submitted to the Board shows that the same is between the Government of Kenya as the Borrower on the one part and the African Development Fund as the Financier on the other. Under the said Agreement, the Ministry of Energy has been stipulated as the Executing Agency while Kenya Power and Lighting Company (KPLC) has been stipulated to be the Implementing Agency. He contends that for this reason, this Board's decision in **Application No.1 of 2020 Energy Sector Contractors Association v The Accounting officer, Kenya Power and Lighting Company Limited & Zoec-zhepedc-nginu** (hereinafter Decision No. 1 of 2020) is distinguishable. In the said Application, this Board held that the Agreement between the Parties was not a Bilateral Agreement by virtue of the fact that none of the Parties was the Government of Kenya and that the agreement expressly provided that the applicable procurement would be in accordance with the Laws of Kenya. The Honourable Board stated thus;

"Having studied the provisions of the Credit Facility Agreement, the Board observes that the said Agreement specifies French Law as the law governing the Credit Facility Agreement in so far as the relationship of the parties (the Procuring Entity and AFD) and dispute resolution is concerned. However, in so far as procurement procedure arising from the term loan granted to the

Procuring Entity is concerned (i.e. drafting of Procurement Documents, tendering, award, administration and performance of the contracts), the said Agreement states that the laws and regulations applicable to the Borrower shall be applied, and as already established, such laws are the Laws of Kenya."

This Board accordingly declined to cede its jurisdiction in the said case.

The Respondent further contends that in the instant case, the counterparty to the Bilateral agreement is the African Development Fund - a constituent Institution of the African Development Bank established pursuant to Clause 8 of the Agreement Establishing the African Development Bank which provides as follows;

"The Bank may establish, or be entrusted with the administration of, Special Funds which are designed to serve its purpose and come within its functions. It may receive, hold, use, commit or otherwise dispose of resources appertaining to such Special Funds."

The Respondent submits that the ADF is a fund created and administered by the African Development Bank (Hereinafter **AFDB**) which is a regional multilateral development finance institution founded vide an agreement signed by member states on 14th August 1963 and which became effective on 10th September 1964. He submits that Kenya is a member of the

Bilateral agreement by dint of Article 3 as read with paragraph 1 or paragraph 2 of article 64 of the Agreement. The Respondent thus submits that AFDB is a Multi-Lateral Agency as envisioned under the provisions of Section 4(2)(f) of the Act hence ousting the application of the provisions of the Act to any procurement done under the loan agreement.

As regards, the issue of conflict with the obligations of the Republic of Kenya arising from the agreement, the Respondent submits that under section 6 (1) of the Act, ***Subject to the Constitution, where any provision of the 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 a party, the terms of the treaty or agreement shall prevail.*** The Respondent relies on the decision of the High Court in **Judicial Review Application No. 318 of 2018, Republic v. Public Procurement Administrative Review Board & 2 others ex parte Ministry of Defence (2018) eKLR** where Hon. Justice P. Nyamweya held as follows;

"In addition, Section 6 resolves any conflict between the Act and the terms of any treaty, agreement or convention to which the Government of Kenya is a party, by providing that the terms of the treaty and agreement shall supersede and apply, subject to the provisions of the Constitution. 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 cooperation with such foreign countries and agencies. 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.

The Applicant further relied on the decision of this Board in **Decision No. 1 of 2020 (Supra)** in which this Board held as follows;

"Accordingly, the Board proceeds to make the following observations with respect to section 6 (1) of the Act:-

- 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."

The Respondent further cites Clause VII of the Loan Agreement which provides;

a. The Procurement of Works shall be carried out in accordance with the Fund's Rules and Procedures for Procurement of Goods and Works (May, 2008 Revised July, 2012)

b. Supply and erection of the distribution system will be carried out under International Competitive Bidding Procedures with single stage bidding procedure and using the Bank's Standard Bidding Documents

He accordingly contends that the requirement that the procurement of works shall be carried out in accordance with the Fund's Rules and Procedures for Procurement of Goods and Works (May, 2008 Revised July, 2012) (Hereinafter **the AFDB Rules**) is expressed in mandatory terms

and the Respondent is not permitted to deviate from the same. Further, that all acquisitions under the Project are subject to prior review terms by the Fund and a letter of no objection would be required from the Fund in order to proceed with any procurement for works and/or services.

In addition the Respondent contends that the AFDB Rules at Clause 1.5 provide as follows;

The procedures outlined in these Rules apply to all contracts for goods and works financed in whole or in part by the Bank. For the procurement of those contracts for goods and works not financed by the Bank, the Borrower may adopt other procedures. In such cases. The Bank shall be satisfied that the Procedures to be used will fulfill the Borrower's obligations to cause the project to be carried out diligently and efficiently and that the goods and works to be procured;

- a. Are of satisfactory quality and are compatible with the balance of the project;***
- b. Will be delivered or completed in timely fashion;***
- c. Are priced so as not affect adversely the economic and financial viability of the Project.***

He further relied on the decision of this Board **In Application No. 3/2020 Energy Sector Contractors Association v The Accounting**

Officer, Kenya Power and Lighting Company PLC (hereinafter Decision No. 3 of 2020), wherein the Agreement giving rise to the impugned Tender was a Bilateral Agreement made between the Government of Kenya and European Investment Bank. He contends that upon interrogating the specific terms of the Agreement, the Board found that the same does not oust the Application of the Act and consequently the jurisdiction of the Board for distinguishable reasons. The Board held thus;

***"Clause 6.04 of the Finance Contract states as follows:-
"The Borrower undertakes to ensure that the Implementing Agency purchases equipment, secures services and orders works for the Project by acceptable procurement procedures complying to the Bank's satisfaction with its policy as described in its Guide to Procurement" At clause 6.08, it is stated as follows:- "The Borrower [described as the Government of the Republic of Kenya] shall comply and shall ensure the implementing agency [described as Kenya Power and Lighting Company] complies in all respect with all laws and regulations to which they or the Project are subject.....From the above extract, the Board observes the following:-The involvement of EIB in the subject procurement process is confined to verifying whether or not the conditions attached to its financing are met; The rights and obligations of the Promoters (i.e. the Government of Kenya) vis-à-vis the rights of tenderers (such as the Applicant herein) for works, goods and services under the***

subject tender are governed by local legislation and tender documents published by the Procuring Entity herein and not the EIB Guidelines;and EIB instructs the Government of Kenya to ensure that review procedures for effective remedies are available to any party having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement. The Board makes an observation that the Finance Contract referred this Board to the EIB Guidelines to interrogate the applicable law (agreed upon by parties to the bilateral agreement) in so far as the procurement is concerned. Upon doing so, the Board notes that the Government of Kenya and EIB agreed that the law applicable to the procurement would be local legislation and tender documents published by the Procuring Entity, and not the EIB Guidelines. Therefore, in so far as the procurement is carried out by the Government of Kenya, it had to resort to the Laws of Kenya that guide all aspects of public procurement, whilst financing of the project was to be governed by the terms and conditions of the Finance Contract.....For the foregoing reasons, the Board finds that the subject procurement process is not being undertaken in accordance with terms and conditions of the Finance Contract and Project Agreement both dated 27th March 2017 read together with the EIB Guidelines, but instead is being undertaken in accordance with the Laws of Kenya as

intended by the Government of Kenya and EIB, hence fails to meet the threshold of section 4 (2) (f) of the Act.

Consequently, the Respondent submits that the Jurisdiction of the Board is indeed ousted and it ought to down its tools.

The Applicant did not respond to this objection. Nonetheless, the Board is under obligation to interrogate the same and to determine its merits or otherwise under the applicable law.

That said, section 4(2)(f) of the Act states as follows:-

"4(2) For avoidance of doubt, the following are not procurements or asset disposals with respect to which this Act applies—

...

(f) procurement and disposal of assets under bilateral or multilateral agreements between the Government of Kenya and any other foreign government, agency, entity or multilateral agency unless as otherwise prescribed in the Regulations.

In **Decision No. 1 of 2020 (Supra)**, this Board, upon a detailed analysis of the decisions of Hon. Odunga J. in **Miscellaneous Application No 402 Of 2016 (Consolidated with Misc. Application No. 405 Of 552016), Republic v. Public Procurement Administrative Review Board & another Ex parte Athi Water Service Board & Another [2017] eKLR** (hereinafter referred to as "**the Athi Water Case**") and

that of Hon. P. Nyamweya JA in **Judicial Review Application No. 181 of 2018, Republic v Public Procurement Administrative Review Board & 2 others Exparte Kenya Power & Lighting Company [2019] eKLR** (hereinafter referred to as “the KPLC Case”) concluded that ***‘in order for section 4 (2) (f) of the Act to apply, one of the parties to a procurement (as per Justice Odunga’s decision in the Athi Water Case) or a procurement undertaken as provided for or in accordance with the terms of a bilateral or multilateral agreement (as per Justice Nyamweya in the KPLC Case) must be the Government of Kenya.’*** (Emphasis added)

The Board has interrogated the parties to the bilateral agreement that is subject of this procurement process. The Board observes that on the face of it, the parties to the agreement dated 18th December 2014 are named as the **Republic of Kenya** as Borrower and the **African Development Fund (ADF)** as lender in respect of Project ID No. P-KE-FA0-010 Loan No. 2100150032195 for the last mile connectivity project (**hereinafter the Bilateral Agreement**).

For the avoidance of doubt, **In Decision No. 1 of 2020 (Supra)**, this Board held that **“the Republic of Kenya is for all intents and purposes represented by the Government of Kenya headed by a President.”**

The Board notes however that though the Government of Kenya is the party to the bilateral agreement, it is not the **procuring entity** for

purposes of the procurement notice currently under review. The Procuring Entity is stated as **Kenya Power and Lighting Company Limited (KPLC)**. In **Decision No. 1 of 2020 (Supra)**, this Board held as follows in respect of the Respondent's status vis-à-vis the Government of Kenya, ***"According to its official website (i.e. www.kplc.co.ke), the Procuring Entity has its own managing structure in the form of 12 Board of Directors inclusive of a Chairperson and a Senior Management Team and may undertake certain functions that help achieve government policies in their capacity as implementing institutions or agencies. It is accordingly not the Government of Kenya."*** The Board cited **Miscellaneous Civil Appeal No. 413 of 2004, Samuel Kimuchu Gichuru v. Hon. Ochilo Ayako & 6 others [2005] eKLR** wherein the court held as follows on the same issue:-

"Our understanding is that the Government owns 40% of the shares of the KPLC, and is thus the majority shareholder in Interested Party in this case, being represented on its Board of Directors by two Permanent Secretaries – namely Energy and the Treasury. In our view, KPLC was exempted from the State Corporations Act purely for the purposes of getting round the Government bureaucracy in management that bog down State Corporations Act. Further, KPLC is an important policy body for the growth and the promotion of the energy sector within the country's economy."

It is therefore beyond per-adventure that the Respondent and the Government of Kenya are two different entities in law. The fact that the

Ministry of Energy has been stipulated as the Executing Agency while KPLC has been stipulated to be the Implementing Agency is therefore relevant only to the extent that it confirms that the Government of Kenya is indeed not a party to the procurement process under review. According to Justice Odunga in the Athi Water Case, at Para 152,

"[152] The issue for determination was whether the instant procurement was a Procurement and disposal of assets under bilateral or multilateral agreement between the government of Kenya and any other foreign government, agency, entity or multilateral agency. In making this determination the sole consideration is who the parties to the procurement are. A literal reading of this section clearly shows that for a procurement to be exempted under section 4(2)(f), one of the parties must be the Government of Kenya. The other party must be either a Foreign Government, foreign government Agency, foreign government Entity or Multi-lateral Agency. The rationale for such provision is clear; the Government of Kenya cannot rely on its procurement Law as against another Government. Such procurement can only be governed by the terms of their bilateral or multilateral agreement."

Going by the foregoing holding in the Athi Water Case, not only should the Government of Kenya be a party to the bilateral agreement under which the procurement is undertaken, the actual procuring entity must equally be the Government of Kenya.

On the other hand, according to the decision in the KPLC case, in addition to requiring that the Government of Kenya be a party to the bilateral

agreement under which the procurement is undertaken emphasis is placed on strict compliance with the terms of the bilateral agreement in order for this Board's jurisdiction to be ousted. In essence, even where the Government of Kenya is not the actual procuring entity, the Jurisdiction of the Board would only be ousted if the Government of Kenya is a party to the Bilateral agreement ***and*** the procurement process is undertaken as provided for or in accordance with the terms of the said bilateral agreement.

For emphasis, even assuming the actual procuring entity in this case was the Government of Kenya (as per the Athi Water case) a careful appreciation and application of the findings in the KPLC case yields the conclusion that before the board downs its tools in a matter of this nature, it is under a solemn duty to satisfy itself that indeed the procurement process has been conducted in strict compliance with the Bilateral agreement and by extension the applicable rules and guidelines of procurement for the subject tender.

Indeed, it could not have been the intention of the parties to the Bilateral agreement that the jurisdiction of the Board or Kenyan courts be ousted irrespective of whether or not the designated rules and guidelines applicable to the procurement process are flouted.

It is a trite rule of law that ouster clauses must be narrowly and strictly construed. A party seeking to oust the jurisdiction of the court and other decision makers must inter-alia demonstrate strict compliance with the ouster clause and the Constitution of Kenya.

In **Republic v Public Procurement Administrative Review Board Ex parte Kenya Ports Authority Limited & 2 others [2017] eKLR at Paragraph 85**, the Court stated the general principles thus;

As rightly pointed out in the ***Selex Sistemi Case*** (supra):

"As observed from the Constitution, any law that is in conflict with it is void to the extent of the inconsistency. However, it is interesting to note that section 100 of the Public Procurement and Disposal Act, 2005 again submits the decisions of the Review Board to judicial review by the High Court but imposes a time bar. The Courts guard their jurisdiction jealously, but recognize that it may be precluded or restricted by either legislative mandate or certain special contexts. Legislative provisions which suggest a curtailment of the Courts' power of review give rise to a tension between the principle of legislative mandate and the judicial fundamental of access to courts. Judges must search for critical balance and deploy various techniques in trying to find it. 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. 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. It is a well established principle that a provision ousting the ordinary jurisdiction of the Court must be construed strictly meaning, I think, that, if such a provision is reasonably capable of having two meanings, that meaning shall be taken which preserves the ordinary jurisdiction of the Court.

In the event, even assuming the Board were to find that the impugned procurement notice accords with the Bilateral agreement, it must go further and satisfy itself that the same is also in accord with the Constitution of Kenya and as against the challenged decision. Moreover, under section 6(1) of the Act, the ouster of the Board's jurisdiction in interpreting the terms of the Bilateral agreement is **subject to the provisions of the Constitution.**

The Board thus turns to examine whether the impugned procurement notice is in accord with the terms of the bilateral loan agreement and the Constitution of Kenya as to oust its jurisdiction in the matter.

As a determination of this sub-issue necessarily requires the Board to interrogate the terms of the procurement notice in order to ascertain that they accord with the Bilateral agreement, the AFDB rules and the Constitution of Kenya, the Board considers that for logical flow, the same be determined together with the 2nd substantive issue framed for determination as follows.

ii) Whether the Respondent's terms set out in the Tender Notice and the Bid Document are unreasonable, discriminative, and hinder fair competition in the tendering process for individual Kenyan Citizens

The Board shall consider this issue under the various grounds on the same as set out in the Request for Review.

a) Grounds 1(a)-(c) & (e) and 2 of the Request for review

The Applicant contends that The Respondent's terms set out in the Tender Notice and the Bid Document are unreasonable, discriminative, and hinder fair competition in the tendering process for the following reasons; -

- (a)** The Applicant member (Kenyan Citizens) contractors have the capacity to undertake the project works but are technically barred from bidding by the restrictive requirements imposed without due considerations to the scope and nature of work.
- (b)** The minimum average annual turnover requirements are extremely high and unlikely to be met by any Kenyan Citizen Contractor including members of the Applicant. In addition, the minimum average annual turnover requirements are not proportional to the value of the project.
- (c)** The cash-flow requirements are excessively high and unrealistic for the local contractors, thus hindering fair and open

competition among those who may wish to participate in the procurement proceedings to their detriment.

- (d)** The experience thresholds are impracticable and lock out majority of the local contractors thus hindering fair and open competition among those who may wish to participate in the procurement process.
- (e)** The Respondent has subdivided the Bank-financed project without considering the aspect of fostering widespread competition contrary to rules of procedure for procurement of goods and works.

It further contends in ground 2) that the terms imposed on the Bid Document do not allow fairness, equitability, transparency, cost-effectiveness and competition among individual Kenyan Citizens who may wish to submit their bids. Accordingly, the Applicant's Members who are Kenya Citizen contractors have a zero or remote chance of succeeding in the tender process. In essence the Applicant is aggrieved that the terms of the tender documents are too onerous as to enable local contractors to fairly, equitably, transparently, cost-effectively and competitively take part in the procurement process. The Applicant thus prays inter-alia that the same be unbundled into reasonably smaller lots with lesser stringent technical requirements to foster local citizen participation.

In response to these allegations, the Respondent contends that the impugned tender document is a standard document and that its

requirements are realistic, attainable and competitive. It submits that the tender is an open tender and does not discriminate on any person. It adds that all bidders from all eligible nationalities are equal and deserve equal opportunity. The Respondent relies on Section 91 of the Act which provides inter-alia that;

- i. Open tendering shall be the preferred procurement method for procurement of goods, works and services;***
- ii. The procuring entity may use an alternative procurement procedure only if that procedure is allowed and satisfies the conditions under this Act for use of that method.***
- iii. Despite sub-sections (1) and (2) open tendering shall be adopted for procurement of goods, works and services for the threshold prescribed in the respective national and county Regulations***

The Respondent thus submits that having opted for the open tender, it has provided an opportunity to all eligible contractors to participate in the Tender in any manner prescribed under the Bid Document. In response to the specific issues raised by the Applicant under the above grounds, the Respondent contends as follows;

- a) That a tenderer may individually or in combination with other entities supported by a letter of intent to enter into an agreement or under an existing agreement in the form of a joint venture, consortium or association (JVCA) participate.
- b) That the Respondent has rolled out several phases of the Last Mile Connectivity Programme with similar terms and conditions and local contractors have been previously awarded contracts under the said Tenders. The Respondent referred the Board to a list of Bidders previously awarded Contracts under the previous Last Mile Connectivity Phases wherein it is shown that at least six local contractors have been awarded contracts under the last mile connectivity project.
- c) That the scope of the project is calculated based on the Engineers estimates of each lot. Consequently, the stipulated annual turnover and cash flow requirements are based on the engineer's estimates of each lot and are therefore reasonable and proportional to the value of the Tender. The Respondent is obligated to evaluate the bidders' financial capacities to ensure that qualified contractors are selected in order to mitigate the risk of failed projects and to ensure quality in project delivery. This obligation is in line with the Respondent's responsibility to ensure that all funds are put into proper use in compliance with the AfDB Standard Rules & Procedures Manual, the principles of public finance stipulated in the Constitution and the Public Finance Management Act, 2012.

- d) That pursuant to the provisions of section 60 (1), 60 (2) and 70 (4) of the Act, the terms and conditions of the Tender Document are determined by the Procuring Entity and cannot be dictated by any other person. The Respondent relied on this Board's decision in **Application NO. 1/2020 Energy Sector Contractors Association supra** where the Board held;

"A party challenging the technical requirements provided by a procuring entity on the grounds that no local contractor has the technical expertise to meet such requirements would therefore be required to demonstrate to the Board through empirical evidence or data to support its allegation. In the absence of such proof, this Board cannot dictate the technical requirements that a procuring entity ought to specify in its tender documents, save that such procuring entity must bear in mind the need to promote open and fair competition among all bidders who may wish to participate in the procurement process.'

The Respondent supplied a copy of the qualification evaluation criteria to be applied under the impugned tender document. The Board notes that paragraph 2.3.2, 2.3.3 and 2.4.2 instructions to bidders states as follows;

i. International Competitive Bidding (ICB) Method with "single stage" bidding procedures will be followed in

accordance with the Bank's Rules and Procedures on procurement of works;

- ii. The minimum average turnover of eligible bidders calculated as total certified payments received for contracts in progress or completed within the last five (5) years would be Kshs. 720,000,000, Kshs.580,000,000 and Kshs. 400,000,000 for lots A, B & C respectively; Individual bidders must meet all these requirements. Bidders who bid as Consortiums and joint ventures are required to meet at least 25% of the requirements and at least one partner must meet 75% of the said requirements.***

- iii. The bidder must demonstrate access to, or availability of financial resources such as liquid assets, unencumbered real assets, lines of credit and other financial means, other than any contractual advance payments to meet cash flow requirement of Kshs.120,000,000, Kshs. 96,000,000 and Kshs. 60,000,000 for lots A, B and C respectively. Individual bidders must meet all these requirements. Bidders who bid as Consortiums and joint ventures are required to meet at least 25% of the requirements and at least one partner must meet 80% of the said requirements.***

- iv. The bidders must possess general experience germane to contracts in the role of contractor, subcontractor or management contractor for at least the last five (5) years prior to the bid submission deadline and with activity in at least nine (9) months in each year;***
- v. The bidders must possess specific experience germane to contracts in participation as contractor, management contractor or subcontractor in at least two (2) contracts within the last five (5) years each with a value of at least Kshs. 390,000,00, Kshs.300,000,000 and Kshs.214,000,000. Further the contracts should have been successfully and satisfactorily completed. Individual bidders must meet all these requirements. Bidders who bid as Consortiums and joint ventures are required to meet at least a requirement for one characteristic.***
- vi. If a bidder has a running works contract in the power sector in the country (Kenya), the contract must be fifty percent or more completed in terms of disbursements;***
- vii. The criteria "outside the country of origin" do not apply to local bidders.***

The Board has carefully considered the parties' rival submissions and observes from the outset that Under part VII, Section 7.02 of the Bilateral Agreement, the parties to the said agreement agreed as follows:-

"The Procurement of Works shall be carried out in accordance with the Fund's Rules and Procedures for Procurement of Goods and Works (May, 2008 Revised July, 2012) (AFDB Rules) supply and erection of distribution system will be carried out under International competitive bidding procedures with single stage bidding procedure and using the Banks standard bidding documents."

Under clause 1.3 of the AFDB Rules, as a matter of policy, the Bank requires that there should be open international competitive bidding for the procurement of goods and works needed for the implementation of projects financed with loans from the Bank, except where the Board of Directors decides otherwise. The said Clause 1.3 states;

Open competition is the basis for efficient public procurement. Borrowers shall select the most appropriate method for the specific procurement. In most cases, International Competitive Bidding (ICB), properly administered, and with the allowance for preferences for domestically or regionally manufactured goods and, where appropriate, for domestic or regional contractors for works under prescribed conditions is the most appropriate method. In most cases, therefore, the Bank requires its Borrowers to obtain goods, works and services through ICB open to eligible suppliers and contractors. Section II of these Rules describes the procedures for ICB.

It is thus immediately evident to the Board that the Respondent rightly applied the preferred Bidding process advocated for by the fund's rules i.e. open international competitive bidding (ICB).

However and more importantly, the AFDB rules further add that where open ICB is used, allowance ought to be made for preferences for domestically or regionally manufactured goods and, where appropriate, for domestic or regional contractors.

The Board considers that the AFDB Rules must be read as a whole and purposively with each provision giving effect to the other and not undermining each other. Strictly and selectively construed, the requirement for international competitive Bidding for example would on its own be inimical to the aforestated policy of promotion of domestic and regional contractors and vice versa. This is because international competitive bidding opens up the tender to the world and absent any protectionist benefits, all bidders would be subjected to the same rules irrespective of their size or domicile contrary to policies and principles stipulated under the Bilateral agreement itself.

As if to further effect promotion of local contractors, the AFDB rules advocates for the division of projects into parts and sections depending on the magnitude, nature and location of the works or goods to be procured. It states inter-alia;

"2.3 The size and scope of individual contracts will depend on the magnitude, nature, and location of the project. For projects requiring a variety of goods and works, separate contracts

generally are awarded for the supply and/or installation of different items of equipment and plant and for the works.

2.4 For a project requiring similar but separate items of equipment or works, bids may be invited under alternative contract options that would attract the interest of both small and large firms, which could be allowed, at their option, to bid for individual contracts (slices) or for a group of similar contracts (package). All bids and combinations of bids shall be received by the same deadline and opened and evaluated simultaneously so as to determine the bid or combination of bids offering the lowest evaluated cost to the Borrower..."

It is quite evident to the Board that contrary to the Respondent's contentions for open non-discriminative tendering, under the AFDB Rules, the preferred choice of open international competitive bidding is expressly complemented by fairly permissive provisions for promotion of both small and big local and regional contractors in equal measure.

Are these intentions captured in the impugned procurement notice? To ascertain this, the Board has carefully considered the procurement notice and the tender evaluation criteria supplied by the Respondent and in particular the criteria flagged by the Applicant as unfair and onerous as follows;

- i. The minimum average turnover of eligible bidders calculated as total certified payments received for contracts in progress or completed within the last five (5) years would be Kshs. 720,000,000, Kshs.580,000,000 and Kshs. 400,000,000 for lots A, B***

& C respectively; Individual bidders must meet all these requirements. Bidders who bid as Consortiums and joint ventures are required to meet at least 25% of the requirements and at least one partner must meet 75% of the said requirements.

ii. The bidder must demonstrate access to, or availability of financial resources such as liquid assets, unencumbered real assets, lines of credit and other financial means, other than any contractual advance payments to meet cash flow requirement of Kshs.120,000,000, Kshs. 96,000,000 and Kshs. 60,000,000 for lots A, B and C respectively. Individual bidders must meet all these requirements. Bidders who bid as Consortiums and joint ventures are required to meet at least 25% of the requirements and at least one partner must meet 80% of the said requirements.

iii. The bidders must possess specific experience germane to contracts in participation as contractor, management contractor or subcontractor in at least two (2) contracts within the last five (5) years each with a value of at least Kshs. 390,000,00, Kshs.300,000,000 and Kshs.214,000,000. Further the contracts should have been successfully and satisfactorily completed. Individual bidders must meet

all these requirements. Bidders who bid as Consortiums and joint ventures are required to meet at least a requirement for one characteristic.

The Applicant submits inter-alia that **i)** the minimum average annual turnover requirements are extremely high and unlikely to be met by any Kenyan Citizen Contractor including members of the Applicant; that **ii)** the minimum average annual turnover requirements are not proportional to the value of the project and **iii)** that the cash-flow requirements are excessively high and unrealistic for the local contractors thus hindering fair and open competition among those who may wish to participate in the procurement proceedings to their detriment. The Respondent considers the same attainable and open to all bidders in equal measure.

The Board notes that pursuant to the evaluation criteria stipulated above, where a bidder seeks to tender individually it must meet **all** the requirements imposed above. Where a bidder bids as part of a consortium, each bidder must meet

a) at least 25% of the requirement of lots A, B or C **and** one of the bidders **MUST** meet 75% of the requirements in each lot in respect of certified payments received for contracts in progress or completed within the last five (5) years;

b) *at least 25% of the requirement of lots A, B or C **and** one of the bidders **MUST** meet 80% of the requirements in each lot in respect of availability of financial resources; and*

c) specific experience germane to contracts in participation as contractor, management contractor or subcontractor in at least two (2) contracts within the last five (5) years each with a value of at least Kshs. 390,000,00, Kshs. 300,000,000 or Kshs. 214,000,000

In essence a small contractor who is unable to bid for an entire lot would still be hamstrung by the need to look for a bidder capable of meeting;

a) at least Kshs 540 Million, Kshs 435Million or Kshs 300Million being 75% of the requirement for certified payments in the last 5 years in lots A, B or C respectively; and

b) Kshs 96 Million, Kshs 76.8 Million or Kshs 48Million being 80% of the requirement for availability of financial resources to meet cash flow requirements in lots A, B or C respectively; and

c) At least 2 contracts worth the full sums of Kshs 390,000,00, Kshs. 300,000,000 or Kshs. 214,000,000 in which the bidder has participated as contractor, management contractor or subcontractor in the last 5 years in lots A, B or C respectively.

The aforestated figures are by no means small amounts within the reach of many a local contractor whether individually or as a consortium. A small contractor would still require the partnership of a reasonably larger and better endowed bidder to meet the requirements to qualify in a consortium. It is a matter of public notoriety, which the Board takes

judicial notice of pursuant to section 59 and 60 (1)(o) of the Evidence Act, that local and citizen contractors in a country like Kenya and indeed Africa, whom the Bank was principally formed to serve, form the bulk of these small, micro and disadvantaged groups that can hardly meet the above evaluation criteria. It is highly probable therefore that even as a consortium, local contractors would still have to be subordinated to their larger and better endowed counterparts mostly from developed countries.

It is accordingly evident to the Board that the Respondent ascribed unduly disproportionate weight to the fact that the tender was **open to all and sundry** relative to the need to inter-alia promote the participation of local and citizen contractors in the procurement process. Had it given due consideration to the latter requirement as advocated for by the AFDB rules, the Board is of the view that it (the Respondent) would have made deliberate efforts to unbundle the tender into reasonably smaller value lots accessible to both large and small, micro and disadvantaged groups whether bidding individually or as a consortium/joint venture.

Contrary to the Respondent's assertions, the unbundling of the tender into smaller lots would not necessarily be incompatible with the choice of an open international competitive bid under a one stage bidding process. Indeed, no averment or submission was made to even remotely suggest that the nature of the goods or works sought cannot be procured vide reasonably smaller unbundled lots. Ironically, the very tender as advertised is in three lots, albeit beyond the reach of many a local contractor. This fortifies the position that it is in fact possible to unbundle the tender further.

The argument that unbundling of tenders will result in 'lower financial requirements' for the Project and jeopardize the Bilateral agreement equally finds no basis in the agreement itself. The bare statement that the scope of the lots were based on the Engineers' estimates for each lot cannot in the circumstances suffice. At the very least, the Respondent was duty bound to demonstrate that the scope of works are such that cannot be unbundled or offered under smaller separate contracts such as in lots.

The AFDB rules applicable under the Agreement advocate for inter-alia procurement **either separately or in groups in order to attract the interest of both smaller and larger bidders in order to maximize competition.** Ultimately, the key considerations should be to ensure that the purpose of the agreement is met in an open, fair and transparent manner, that the procurement of goods and services is awarded to a bidder with the requisite technical expertise to undertake the works sought and more importantly that to the greatest extent possible local contractors are given a fair chance at participating in the tenders.

The Board further finds that the list of local contractors who have allegedly benefited from the last mile connectivity project does not offer sufficient justification to excuse unbundling of the tender. The Board has not had sight of the nature of the tenders that the said contractors were awarded as to enable it make an objective comparison with the current tender. For example, were they of the same value and was the same evaluation criteria as in the current case applied to the said tenders?

The Board accordingly finds, as regards the 2nd sub issue under issue Number 1, that the procurement notice and/or tender was not done *in*

accordance with the Bilateral agreement and the AFDB Rules with the consequence that section 4(2)(f) of the Act does not apply to this Request for review.

That said, the Board finds that the third sub issue under issue Number 1 of the preliminary objection to wit section 167(4) has not been made out. Contrary to the Respondent's submissions, the Applicant has not, in the Board's understanding, challenged the decision to offer the tender vide a one stage open international competitive tendering. Its contention is that even an international competitive tender under a one stage bidding process can be unbundled into smaller lots. We Consequently find no merit in the objection that the Request for review challenges the Respondent's choice of procurement as contended by the Respondent.

In the circumstances, the Board is satisfied that the Applicant's grievances as regards the fairness of the terms of the tender document, specifically under paragraph 1(a)-(c) & (e) and paragraph 2 are merited. The same are legitimate concerns that go to the root of the AFDB rules to foster and encourage the participation and development of domestic contractors in international tenders and which ought to have been complied with.

b) Grounds 1(f) & (g) of the Request for review

Under these grounds the Applicant contends as follows;

- (f)** The Respondents have imposed large geographical areas including lumping together many counties which directly locks out members of the Applicant who operate at County and constituency level.

- (g) By lumping together several counties, the Respondent abandoned its business model where it operates and contracts at Feeder Based Business Units level to wit regions and counties to the disadvantage of the Applicant and its members.

In this sub-issue, the Board is of the considered opinion that it cannot dictate the minutiae of *how* the unbundling of a tender is to be effected should the procuring entity choose to unbundle the same. The Applicant's contention that the Respondents have imposed large geographical areas including lumping together many counties in a manner that directly locks out its members who operate at County and constituency level and that in doing so it has abandoned its business model where it operates and contracts at Feeder Based Business Units level is in the circumstances without merit. The Board reiterates that the ultimate objective of unbundling is to ensure any person but in particular domestic and regional contractors with the technical capacity to undertake the works tendered should get a fair chance to do so wherever they may be located.

c) Ground 1(d) of the Request for review

Under this ground, the Applicant remonstrates as follows;

- (d) The experience thresholds are impracticable and lock out majority of the local contractors thus hindering fair and open competition among those who may wish to participate in the procurement process.

As in the previous ground, we are in agreement with the Respondent that section 60 as read with 89(d) of the Act obligates the Respondent's Accounting officer to ensure that the technical requirements of the tender allow for fair and open competition and that in particular tenders for international competitive bidding are based on international standards or standards widely used in international trade.

As this Board held in **Decision No. 2 of 2020 (Supra)**, ***"A party challenging the technical requirements provided by a procuring entity on the grounds that no local contractor has the technical expertise to meet such requirements would therefore be required to demonstrate to the Board through empirical evidence or data to support its allegation. In the absence of such proof, this Board cannot dictate the technical requirements that a procuring entity ought to specify in its tender documents, save that such procuring entity must bear in mind the need to promote open and fair competition among all bidders who may wish to participate in the procurement process."***

Moreover, the purpose of public procurement is not merely to accrue financial or other gain for tenderers. Public procurement must achieve value for tax payer funds in terms of delivery of quality goods and services to the public. Satisfactory expertise to undertake works tendered for is therefore a function of open public procurement and ensures achievement of the principle of value for public funds.

Accordingly, the Board finds that the Applicant's allegation that the technical/experience thresholds are impracticable and lock out majority of local contractors thus hindering fair and open competition among those

who may wish to participate in the procurement process is not merited and is dismissed.

The totality of the above reasoning is in tandem with the provisions of section 6(1) of the Act as read with Article 227(2)(b) of the Constitution. Under section 6(1) of the Act;

(1) 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 considers therefore that even assuming the Respondent had complied with the Bilateral agreement, the Board is still under the solemn duty to satisfy itself that the said agreement and the impugned procurement notice are compliant with the Constitution. In this regard, Article 227(2) (b) provides: -

"An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for all or any of the following—

....

(b) the protection or advancement of persons, categories of persons or groups previously disadvantaged by unfair competition or discrimination"

Even though the use of the word *may* gives Parliament the discretion to enact an enabling law to give effect to the above provision, where Parliament elects to do so, the said law takes the force of a constitutional edict that must be complied with. In this regard, Section 54 of the Act provides

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

The above provision proscribes splitting of contracts into two or more procurements in order to avoid the use of a procurement procedure. Therefore, a procuring entity should not split contracts in order to avoid a method specified in the Act.

This is different from unbundling of procurements whose intention is to spread a tender through smaller contracts known as lots in order to encourage participation by local contractors. If there was any doubt, regulation 154(1) of the Act clarifies the purpose of unbundling as follows;

"Despite the provisions of section 54(1) of the Act, a procuring entity may for the purpose of ensuring maximum participation of citizen contractors, disadvantaged groups, small, micro and medium enterprises in public procurement, unbundle a category of goods, works and services in practicable quantities."

There being no conflict between the Act and the AFDB Rules and more importantly there being no express clause in the Bilateral agreement or the AFDB Rules excluding the application of the Act to the extent that they are not inconsistent with the provisions of the agreement and the rules and further noting that the above statutory provisions are normative derivatives of the principles of public procurement in our Constitution, this Board holds the firm view that 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 must comply with the Constitution and the 2015 Act. In other words, failure to comply with either law amounts to an outright abrogation of the said agreement for which this Board cannot shirk from remedying.

It therefore follows that, 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 the import of section 4 (2) (f) of the Act must be construed narrowly. A blanket application of section 4 (2) (f) of the Act would undermine the national values and principles of governance, public finance and public procurement as outlined in Article 10 (2) (c) of the Constitution, Article 201 (d) and Article 227(1) of the Constitution.

The above principles guide public procurement processes undertaken in Kenya and this Board would be abdicating its duties by allowing a procuring entity to ignore them when undertaking its procurement processes. As this Board held in **Decision No. 2 of 2020 (Supra)**, Parliament did not enact section 4 (2) (f) of the Act to scuttle the national values and principles of governance provided for in the Constitution. To

enact such a law would defeat the letter and spirit of Article 10 (2) (c), 201 (d) and 227 of the Constitution read together with sections 2 and 3 of the PFM Act.

The Board accordingly finds that the tender document was not done *in accordance with* the Bilateral agreement and the AFDB Rules, and was also not in accord with the Constitution of Kenya 2010 with the consequence that this Board has jurisdiction to remedy the Applicant's grievances as appropriate and to apply the Act in so doing.

iii) **Whether the tender documents are in violation of the Public Procurement and Asset Disposal Act No. 33 of 2015 that entitles citizen contractors to preferences and reservations when participating in an international competitive bid**

The Applicant contends that the tender documents are in violation of Section 89(f) as read together with section 155(3)(b) of the Public Procurement and Asset Disposal Act No. 33 of 2015 that entitles citizen contractors to preferences and reservations when participating in bids where foreign tenderers participate.

In response the Respondent submits that any Domestic and Regional Preferences ought to have been provided for under the Financing Agreement for the same to apply in the instant case and that a reading of the Financing Agreement discloses no such provision for Domestic and/or Regional Preferences. It relies on the provisions of Clause 2.55 pg 21 of

the AFDB Rules and Procedures for Procurement of Goods and Works which provides as follows;

At the request of the Borrower, and under conditions to be agreed under the Financing Agreement and set forth in the bidding documents, a margin may be provided in the evaluation of bids for;

d. Goods manufactured either in the country of the Borrower(domestic) or in a country which has joined the borrowing country in a regional economic institutional arrangement (regional), when comparing bids offering such goods with those offering goods manufactured abroad; and

e. Contractors either from the country of the Borrower(domestic) or in a country which has joined the borrowing country in a regional economic institutional arrangement (regional), when comparing bids from eligible domestic/regional contractors with those foreign firms.

To begin with, the Board notes that at a Pre-bid meeting held on 4th June 2021 at the Respondent's auditorium, the Respondent in response to a request for clarification was categorical at paragraph 6 of the minutes of the said meeting that margins of preference shall not apply to the tender. No further explanation was given for this decision.

The Board has carefully considered the AFDB rules and notes the following pertinent provisions thereof.

Clause 1.3 provides;

Open competition is the basis for efficient public procurement. Borrowers shall select the most appropriate method for the specific procurement. In most cases, International Competitive Bidding (ICB), properly administered, and with the allowance for preferences for domestically or regionally manufactured goods and, where appropriate, for domestic or regional contractors for works under prescribed conditions is the most appropriate method. In most cases, therefore, the Bank requires its Borrowers to obtain goods, works and services through ICB open to eligible suppliers and contractors .

Clause 2.55 provides;

At the request of the Borrower, and under conditions to be agreed under the Financing Agreement and set forth in the bidding documents, a margin may be provided in the evaluation of bids for;

a. Goods manufactured either in the country of the Borrower(domestic) or in a country which has joined the borrowing country in a regional economic institutional arrangement (regional), when comparing bids offering such goods with those offering goods manufactured abroad; and

b. Contractors either from the country of the Borrower(domestic) or in a country which has joined the borrowing country in a regional economic institutional arrangement (regional), when comparing bids from eligible domestic/regional contractors with those foreign firms.

Clause 2.56 provides

Where preferences for domestic or regional manufactured goods, or for contractors, is allowed, the methods and stages set forth in Appendix 2 to these Rules shall be followed in the evaluation and comparison of bids.

Appendix 2 to the AFDB rules provides as follows

1. Where procurement is made through international competitive bidding, the Borrower may, in agreement with the Bank, grant a margin of preference to domestic manufactured goods and to domestic contractors when evaluating bids and comparing domestic with foreign bids, subject to the conditions specified in these Rules.

2. Similarly, a Borrower may, in agreement with the Bank, grant a margin of preference to goods produced in and services provided by contractors from other regional member countries which have joined the Borrowing country in a regional economic institutional arrangement

when evaluating bids and comparing those bids with other bids, subject to the conditions specified in these Rules.

3. Any preference granted by the Borrower to domestic manufactured goods and for works undertaken by domestic contractors is deemed to be a domestic preference, for the purpose of these Rules. Any preference granted by the Borrower, to goods manufactured in, and for works undertaken by contractors from those regional Eligible Member Countries, which have joined its own country in a regional economic institutional arrangement, is deemed to be a regional preference, for the purpose of these Rules.

4. A Borrower wishing to grant either domestic or regional preference, must seek the agreement of the Bank, including the applicable margin of preference, either at the time of project appraisal, or at loan negotiations. In the case of advance contracting, the Bank's approval should be obtained before any advance contracting takes place.

5. Any preference allowances must be announced in the invitation for bids, and be clearly indicated in the bidding

documents, together with the information required to establish the eligibility of a bid for such preferences, as well as the methods and stages that will be followed in the evaluation and comparison of such bids.

The said Appendix then goes on to provide detailed guidance as to how eligibility for margins of preferences is to be determined and applied including the thresholds therefor for domestic and regional contractors.

From the foregoing, the Board notes that contrary to the Respondent's assertions, a reading of the Bilateral Agreement discloses no proscription for Domestic and/or Regional Preferences. To the contrary, the agreement gives the Borrower the option to merely seek the concurrence of the Bank in order to apply a margin of preference to domestic manufactured goods and to domestic contractors when evaluating bids and comparing domestic bids with foreign bids, subject to the conditions specified in these Rules.

As already observed hereinabove, a holistic reading and application of the Bilateral agreement and the AFDB rules yields the conclusion that they advocate for best practices and policies in public procurement including international competitive bidding, equal, fair and competitive opportunities to bidders and promotion of domestic contractors from member countries. We reiterate that the Borrower and/or the procuring entity bears the solemn obligation to give effect to them in their implementation choices particularly in the knowledge that under our very own laws the same principles form the core foundation of public procurement.

That said perhaps the question for interrogation is whether there is any quantifiable prejudice that would be suffered by the procuring entity and the Borrower in deliberately seeking approval for the application of a margin of preference in this particular procurement. None has been pleaded and the Board cannot imagine any.

It bears emphasis that under Article 3 (1) of the Constitution,

"Every person has an obligation to respect, uphold and defend this Constitution."

Under Article 10 of the Constitution;

1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—

....

(b) enacts, applies or interprets any law; or

(c) makes or implements public policy decisions.

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

.....

(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;

....

The Bilateral agreement forms part of Kenyan law by dint of Article 2(6) of the Constitution which declares any treaty or convention ratified by Kenya shall form part of the law of Kenya.

In the circumstances, the procuring entity and the executing agency of the Bilateral agreement is under obligation to as far as is practicably possible give effect to the above principles. With respect to Public procurement, the Constitution gives effect to the principles of *social justice and inclusivity* in Article 227.

Article 227(1) provides;

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.

With specific respect to preference margins, Article 227(2) (a) provides:-

"An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for all or any of the following—

(a) categories of preference in the allocation of contracts...

...

The law contemplated under Article 227 (2) (b) is the Act, which outlines several preference and reservation schemes under Part XII thereof as

read with section 89(f). Section 155 which falls under Part XII of the Act provides that:-

"(1) Pursuant to Article 227(2) of the Constitution and despite any other provision of this Act or any other legislation, all procuring entities shall comply with the provisions of this Part.

(2) Subject to availability and realization of the applicable international or local standards, only such manufactured articles, materials or supplies wholly mined and produced in Kenya shall be subject to preferential procurement.

(3) Despite the provisions of subsection (1), preference shall be given to—

(a) manufactured articles, materials and supplies partially mined or produced in Kenya or where applicable have been assembled in Kenya; or

(b) firms where Kenyans are shareholders.

(4) The threshold for the provision under subsection (3) (b) shall be above fifty-one percent of Kenyan shareholders.

(5) Where a procuring entity seeks to procure items not wholly or partially manufactured in Kenya—

(a) the accounting officer shall cause a report to be prepared detailing evidence of inability to procure manufactured articles, materials and supplies wholly mined or produced in Kenya; and

(b) the procuring entity shall require successful bidders to cause technological transfer or create employment opportunities as shall be prescribed in the Regulations.”

Section 155 of the Act and Part XII in general, give effect to Article 227 (2) (b) of the Constitution. Considering therefore that the Bilateral agreement offers the option for the application of margins and mindful of its constitutional obligations above, the procuring entity's conduct in a procurement of this nature, where public funds are utilized in the public interest, should not be seen as stifling preference and reservation schemes rather than promoting the same. The finality with which the Respondent had decided at its pre-bid meeting that margins of preference would not apply betrays a rather lackadaisical attitude toward these fundamental procurement norms under the Constitution of Kenya and should not be encouraged or countenanced.

Indeed, to facilitate the application of these provisions in the standard bidding documents, clause 2.12 of the AFDB rules makes provision that standard bid documents may be tweaked with minimum changes to accommodate project specific conditions. The said clause provides;

"Borrowers shall use the appropriate Standard Bidding Documents (SBDs) issued by the Bank with minimum changes, acceptable to the Bank, as necessary to address project-specific conditions. Any such changes shall be introduced only through bid or contract data sheets, or through special conditions of contract, and not by introducing changes in the standard

wording of the Bank's SBDs. Where no relevant standard bidding documents have been issued, the Borrower shall use other internationally recognized standard conditions of contract and contract forms acceptable to the Bank."

In the circumstances, the Board sees no hindrance to the unbundling of the tender and application of preference margins under a one stage international competitive bidding process using the Bank's standard bidding documents.

iv) Who should bear the costs of this Application

As regards the issue of costs, the Supreme Court in **Jasbir Singh Rai & 3 Others v Tavlochan Singh Rai & 4 others (2014) eKLR** set out the following guidelines on the exercise of the discretionary power to award costs when it held as follows:-

"It emerges that the award of costs would normally be guided by the principle that costs follow the event; the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or Respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously exercised discretion of the court, accommodation of the special circumstances of the case, while being guided by the ends of justice."

In the event, even though costs should follow the event, a decision maker should exercise its discretion on whether or not to award costs by accommodating the special circumstances of the case. In light of the final orders below and the fact that the Request for review partly succeeds, the Board shall refrain from awarding costs.

Accordingly, the Board proceeds to make the following specific orders:-

FINAL ORDERS

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

- 1. The Procuring Entity's Bidding Document for Tender No. NO: KP1/6E.1/PT/1/21/A89 in respect to Procurement of Plant, Supply & Extension of Low Voltage Lines-last Mile Connectivity issued on 18th May 2021, be and is hereby nullified and set aside.**
- 2. The Procuring Entity is hereby directed to prepare a fresh Bidding Document for Tender for procurement of plant, supply & extension of low voltage lines for last mile connectivity, within thirty (30) days from the date of this decision, taking into consideration the findings of the Board in this case. For the avoidance of doubt, the Procuring Entity is hereby directed to unbundle the tender into reasonably smaller lots and to apply preference margins in compliance**

with the Bilateral Agreement, AFDB rules for procurement of goods and services 2008(revised in 2012), the Constitution of Kenya, 2010 and the Public Procurement and Asset Disposal Act, 2015.

3. Further to Order No. 2 above, the Procuring Entity is hereby directed to re-tender for procurement of plant, supply & extension of low voltage lines for last mile connectivity within forty-five (45) days from the date of this decision.

4. Each party shall bear its own costs

Dated at Nairobi this 19th day of July 2020

CHAIRPERSON

SECRETARY

PPARB

PPARB