

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 94/2021 OF 28TH JUNE 2021

BETWEEN

RHOMBUS CONSTRUCTION COMPANY LIMITED.....APPLICANT

AND

ACCOUNTING OFFICER,

KENYA PORTS AUTHORITY.....1ST RESPONDENT

KENYA PORTS AUTHORITY.....2ND RESPONDENT

Review against the decision of the Accounting Officer of Kenya Ports Authority in relation to Tender No. KPA/095/2020-21/TE, DESIGN, MANUFACTURE, DELIVER, TEST AND COMMISSION FOUR (4) NEW SHIP TO SHORE GANTRY CRANES.

BOARD MEMBERS

- | | |
|-------------------------|------------------|
| 1. Mrs Njeri Onyango | -Member in chair |
| 3. Eng Mbiu Kimani | -Member |
| 4. Mr. Alfred Keriolale | -Member |
| 5. Arch Nicholas Mruttu | -Member |

IN ATTENDANCE

Mr. Philip Okumu

- Acting Board Secretary

BACKGROUND TO THE DECISION

Rhombus Construction Company Limited (hereinafter referred to as “the Applicant”) lodged a Request for Review 33 of 2021 with respect to Tender No. KPA/095/2020-21/TE, DESIGN, MANUFACTURE, DELIVER, TEST AND COMMISSION FOUR (4) NEW SHIP TO SHORE GANTRY CRANES (hereinafter referred to as “the subject tender”) dated 8th March, 2021 and was filed/lodged with the Board on the 9th March, 2021 accompanied by the Applicant’s “SUPPORTING AFFIDAVIT” sworn by the Evans Kinyanjui, Chief Executive Officer of Rhombus Construction Company Limited, dated 8th March, 2021. The 1st and 2nd Respondents (hereinafter referred to as collectively “Respondents”) on 17th March, 2021 filed with the Board a Notice of Appointment of Advocate, Response To The Request for Review, and Supporting Affidavit To The Response To The Request For Review, sworn by one Cosmas Makori, the Head of Procurement & Supplies of the Kenya Ports Authority, all dated 16th March, 2021. There was also filed a Replying Affidavit by one DUAN JUANJIA, the country Manager of a third party Shangai Zhenhua Heavy Industries Co. Ltd (ZPMC) the same was sworn on 2nd July 2021 and filed on the same day. The Board considered the respective request for review before it, considered each of the parties’ pleadings and confidential documents submitted by the Respondents and delivered its decision on 29th March 2021.

The Respondent's dissatisfaction with the Board's decision of 29th March 2021 triggered their right of appeal under section 175 of the Public Procurement and Asset Disposal Act (hereinafter referred to as "PPAD Act") to the High Court through Judicial Review E017 of 2021. Proceedings at the High Court terminated on 26th May 2021 when the court delivered its decision wherein the Superior Court dismissed the Respondents' motion for review reaffirming the Board's decision of 29th March 2021.

The Respondents did not file a further challenge of the Board's decision to the Court of Appeal and thus embarked on compliance with the Board's decision of 29th March 2021. It is the Respondents' compliance with the Board's of 29th March 2021 that the Applicant subsequently challenged.

The Tendering Process

The Kenya Ports Authority (hereinafter referred to as the "Procuring Entity") invited tenders for Tender No. KPA/095/2020-21/TE, DESIGN, MANUFACTURE, DELIVER, TEST AND COMMISSION FOUR (4) NEW SHIP TO SHORE GANTRY CRANES (hereinafter referred to as "the subject tender") through an advertisement published on the Daily Nation Newspaper on Thursday, 3rd December 2020, on the Procuring Entity's website www.kpa.co.ke through the link (<https://www.kpa.co.ke/procurement/pages.tenders.aspx>), and through the Public Procurement Information Portal (PPIP) Government tender's poerta website (<http://www.tenders.go.ke>).

Tender submission deadline and opening of tenders

The initial deadline for the submission on the tenders was 9th February 2021 which was subsequently extended to 9th March 2021 vide Addendum No. 2 issued on 4th February 2021 and finally extended to 28th June 2021 vide Addendum No. 4 issued on 14th June 2021. The opening of the tenders was then done by the Tender opening Committee at the Procurement Conference Room on 28th June 2021 in the Procuring Entity's office, in the presence of the tenderers' representatives from two firms namely: Shanghai Zhenhua Heavy Industries Limited (ZPMC) and Liebherr Container Cranes Limited.

Evaluation of Tenders

No evaluation has been conducted yet since the Request for Review was filed on the same date when the tenders were opened on 28th June 2021.

THE REQUEST FOR REVIEW

The Applicant lodged a Request for Review 94 of 2021, a Statement in Support of the Request for Review, an Affidavit in Support of the Request for Review sworn by the Chief Executive Officer of Rhombus Construction Company Limited all dated 28th June, 2021 and filed on even date. The application lodged through the firm of SIGANO & OMOLLO LLP ADVOCATES, sought the following orders:

- a) A declaration be and is hereby issued that the Addendum No. 4 dated 14th June 2021 and the entire procurement***

proceedings in Tender No. KPA/095/2020-21/TE – Design, Manufacture, Supply, Test and Commission Four (4) New Ship to Shore Gantry Cranes furtherance of the said Addendum are invalid, null and void by dint of section 175(6) of the Public Procurement and Asset Disposal Act.

- b) The Addendum No. 4 dated 14th June 2021 and published on the 2nd Respondent's website on 25th June 2021 in respect to the Tender No. KPA/095/2020-21/TE – Design, Manufacture, Supply, Test and Commission Four (4) New Ship to Shore Gantry Cranes be and is hereby annulled and set aside.***
- c) The Respondents be and are hereby directed to issue an Addendum in full compliance with the decision of the Review Board in Review Application No. 33 of 2021 and commence the procurement proceedings afresh taking into consideration the findings of the Review Board in these review proceedings.***
- d) Any other relief that the Board may deem fit and just to grant.***
- e) Costs of the Review.***

In response, the 1st and 2nd Respondents filed a Notice of Appointment of Advocate, the Respondents' Response to the Request for Review, Supporting Affidavit to the Response to the Request For Review, sworn by one Cosmas Makori, the Head of Procurement & Supplies of the Kenya Ports Authority, all dated 2nd July, 2021 and filed on 5th July, 2021.

The Respondent's averred that the tendering process for Subject Tender has been carried out in strict compliance with the Public Procurement and Asset

Disposal Act 2015 (hereinafter referred to as "the Act"), the Public Procurement and Asset Disposal Regulations 2020 (hereinafter referred to as the Regulations 2020) and Article 227 of the Constitution of Kenya. The Board was therefore requested to dismiss with cost to the 1st and 2nd Respondent the Application for lacking merit in both law and in fact. Further, the Respondents reaffirmed administration of the Addendum No.4 similar to the general tendering process complied with the above referenced Constitutional and legislative provisions. In the circumstances, according to the Respondents the Application lacked merit in both law and in fact, requesting the Board to dismiss with costs to the Respondents the Application. Subsequently, on Duan Junjian, the country manager of Shanghai Zhenhua Heavy Industries Co. Limited one of the bidders in the Subject Tender, filed a Relying Affidavit in opposition of the instant Request for Review dated 2nd July and filed on even date.

Pursuant to the Board's Circular No. 2/2020 dated 24th March 2020, detailing an administrative and contingency 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. The Applicants filed their Written Submissions dated 9th July 2021 and filed on 12th July 2021.

BOARD'S DECISION

The Board has considered each of the parties' pleadings and confidential documents submitted by the Respondent pursuant to section 67 (3) (e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") and finds that the following issues call for determination: -

- I. Whether the Respondents complied with the Orders of the Board in issuing an Addendum that addressed the issues raised by the Board in Decision No. 33 of 2021 of 29th March 2021;**
 - II. Whether the Respondents complied with the timelines in issuing the Addendum No. 4 as ordered by the Board;**
 - III. Whether the Respondents stipulated extraneous eligibility and qualification criteria;**
-
- I. Whether the Respondents complied with the Orders of the Board in issuing an Addendum that addressed the issues raised by the Board in Decision No. 33 of 2021 of 29th March 2021**

In addressing the first issue, the Board is tasked with evaluating and analyzing the Respondent's compliance with the series of orders issued in its decision of 29th March 2021. In pursuit of this enterprise the Board shall proceed to evaluate compliance with each order sequentially.

Whether the Respondents complied with the first order the Board's decision of 29th March 2021

Order one provided as follows:

The Accounting Officer of the Procuring Entity is hereby directed to issue an Addendum to the Tender Document applicable to the procurement proceedings in Tender No. KPA/095/2020-21/TE for Supply, Installation, Testing and Commissioning of Four (4) New Ship to Shore Cranes within fourteen (14) days from the date of this decision on the following aspects: -

- a) Amendment by removal of the Public Procurement and Disposal Regulations, 2016 in Clause 3.2 of Section II. Instructions to Tenderers of the Tender Document and substituting thereof the Public Procurement and Asset Disposal Regulations, 2020.**
- b) Provide for Preference and Reservation Schemes applicable in law;**
- c) Provide for Participation of Joint Ventures in the subject tender; and**
- d) Deletion of the last paragraph of Addendum No. 1 dated 29th January 2021.**

Order one obliged the Respondents undertake the issuing of an addendum to implement the Board's directions as itemized in sub orders a,b,c, and d to the tender document and secondly that the addendum be issued 14 days from the date of the Boards decision. The Board shall proceed to consider the first element of the order, the second element shall be canvassed below as a separate issue as the second listed issued for determination.

Analysis of the first part of order one required evaluating the two limbs of the order. *Firstly, whether the Respondents issued an addendum?*

The Respondents through Mr. Makori's affidavit at paragraph 14 averred that they issued addendum No. 4 in compliance with the first order of the decision of 29th March 2021. The Applicant's through Mr. Kinyanjui's affidavit confirmed existence of addendum no 4. To this effect, the Applicants provided the Board with a copy of the addendum marked as annexure EGK-5. The document was dated **14th June 2021**, bore the file reference number **PSM/CTC/1/01(095)**, and referenced as **ADDENDUM NO. 4: TENDER NO. KPA/095/2020-21/TE: DESIGN, MANUFACTURE, DELIVER, TEST AND COMMISSION FOUR (4) NEW SHIP TO SHORE (STS) GANTRY CRANES** and signed by Mr. Makori the head of procurement and supplies with the 2nd Respondent. At paragraph one, the document, makes reference to the High Court's and Board's decisions under the file references Miscellaneous Application No. E017 of 2021 and Request for Review No. 33 of 2021 respectively. The Respondents further clarified at paragraph 3 of their response to Applicant's grounds in the Request for Review application, that notification of the addendum to tenderers was through uploading of the document to its website. The Applicant equally confirmed viewing the addendum on the 2nd Respondent's website though they disputed the date of its upload.

From the foregoing and the evidence on record, it is uncontroverted that the Respondents issued Addendum No. 4 regarding Tender No. KPA/095/2020-21/TE as direct by the Board's decision of 29th March 2021.

The Board is equally satisfied that the Addendum was in respect to the subject tender. The issue of compliance as to timelines shall be dealt with below.

In the second part of its analysis of compliance with order 1, the Board proceeded to evaluate whether the substance of Addendum No.4 complied with the Board's directions of 29th March 2021 as provided under order 1 sub order a,b,c and d respectively.

Whether the Respondents complied with order 1.a of the Board's decision of 29th March 2021

Sub order 1.a provided as follows:

Amendment by removal of the Public Procurement and Disposal Regulations, 2006 in Clause 3.2 of Section II. Instructions to Tenderers of the Tender Document and substituting thereof the Public Procurement and Asset Disposal Regulations, 2020.

The Applicant at paragraph 37 of its submissions conceded the Respondent's complied with sub order 1 a. The Board nevertheless interrogated the Respondents' compliance. It is noted subparagraph I of the addendum that reads as follows:

Clause 3.2 of section II of the instruments to tenderers of the Tenderer document is amended to make reference to the Public Procurement and Assets Disposal Regulation, 2020.

From the plain reading of the above paragraph, it is clear that the paragraph amends the right clause and section of the Instructions to Tenderers of the Tender Document in NO. KPA/095/2020-21/TE. The Board further notes that neither party contested the above compliance.

Accordingly, the Board finds that the Respondents complied with order 1 suborder 1.a of its decision of 29th March 2021.

Whether the Respondents complied with order 1.b of the Board's decision of 29th March 2021

The Board proceeds to analyze compliance with suborder b. The order reads as follows:

The Accounting Officer of the Procuring Entity is hereby directed to Provide for Preference and Reservation Schemes applicable in law;

The Applicant in their submissions aver that the Respondents' failed to provide for preference and reservation schemes in addendum no. 4. At paragraph 59 of their submissions, they surmise the Respondents failures as follows: 1) failure to provide for mandatory preliminary evaluation criterion demanding foreign contractors source at least 40% of their supplies to citizen contractors prior to submitting tenders; 2) failure to provide for exclusive preference of citizen contractors and; 3) failure to include provisions for margin of preference in favour of citizen contractors.

In their rebuttal, the Respondents submitted the addendum complied with the Board's directions on preference and reservation schemes. At paragraph 7, the Respondents averred compliance with section 157 of the Act by

providing for margin of preference for citizen contractors in joint ventures and contracting engagements with manufacturers.

The question that follows is what is the applicable law on preference and reservation. Section 74 of the Act, provides:

(1) The accounting officer shall ensure the preparation of an invitation to tender that sets out the following—

(g) applicable preferences and reservations pursuant to this Act;

A plain reading of the above section reveals procuring entities' shoulder a mandatory duty, through the accounting officers, to expressly state when preference and reservations schemes are applicable in a procurement exercise. This obligation under the Act extends to international tenders such as the subject tender as per section 89 of the Act on international tendering and competition:

If there will not be effective competition for a procurement unless foreign tenderers participate, the following shall apply—

(f) where local or citizen contractors participate, they shall be entitled to preferences and reservations as set out in section 155.

Section 155 of the Act stipulates the criterion within which preference and reservations are applicable as follows:

(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.

(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.

The provisions of Section 155 of the Act above are complemented by section 157 (8) of the Act on the implementation of preference and reservation schemes as follows:

(8) In applying the preferences and reservations under this section—

(b) a prescribed margin of preference shall be given—

(i) in the evaluation of tenders to candidates offering goods manufactured, assembled, mined, extracted or grown in Kenya; or

(ii) works, goods and services where a preference may be applied depending on the percentage of shareholding of the locals on a graduating scale as prescribed.

The Board makes reference to its decision in **APPLICATION NO. 65/2019 OF 20TH JUNE 2019 Miranda East Africa Ltd/Td Williamson V The Accounting Officer, Kenya Pipeline Company Limited** wherein it noted,

“It is clear that the intention of the legislature under section 89 (f) of the Act, read together with sections 155 and 157 (9) of the Act was to promote citizen and local contractors even when foreign tenderers participate in international tenders. These provisions support the objectives of the Act under section 3 (i) and (j) which requires public procurement and asset disposal be guided by the principles and values under the Constitution including the principle of promotion of local industry and promotion of citizen contractors.”

Building on the above except and the Board's recognition that a procuring entity ought to effectively communicate the applicability of preference and reservation schemes, regulation 164 of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as “Regulations 2020”) elaborates on the content of the communique. Regulation 164 buttresses the procedural requirements of sections 155 as read with section 157 (8) of the Act providing on the substantive elements of a preference scheme. The regulation prescribes on the margin of preference. Regulation 164 reads:

For purposes of section 157(8) (b) of the Act, the margin of preference for international tendering and competition pursuant to section 89 of the Act shall be—

- (a) twenty percent (20%) margin of preference of the evaluated price of the tender given to candidates offering goods manufactured, mined, extracted, grown, assembled or semi-processed in Kenya and the percentage of shareholding of Kenyan citizens is more than fifty percent (50%);***

- (b) fifteen percent (15%) margin of preference of the evaluated price of the tender given to candidates offering goods manufactured, mined, extracted, grown, assembled or semi-processed in Kenya;***

- (c) ten percent (10%) margin of preference of the evaluated price of the tender, where the percentage of shareholding of Kenyan citizens is more than fifty percent (50%);***

- (d) eight percent (8%) margin of preference of the evaluated price of the tender, where the percentage of shareholding of Kenyan citizens is less than fifty percent (50%) but above twenty percent (20%); and***

- (e) six percent (6%) margin of preference of the evaluated price of the tender, where percentage of shareholding of***

Kenyan citizens is above five percent (5%) and less than twenty percent (20%).

It is the Board's opinion that the rationale in **APPLICATION NO. 65/2019 OF 20TH JUNE 2019** referenced hereinabove, remains valid even within the Act and the regulation therein. Under the subject tender, therefore, the Respondents are mandatorily required to include preference and reservation schemes to accommodate and facilitate participation by local and citizen contractors. To effect citizen contractor participation, the statute burdens the Respondents with a corresponding duty of informing citizen contractors of the applicability of a preference and reservation schemes. It was on the premise of the foregoing legislative rules that the Board directed the Respondents' issue an addendum on preference and reservations. The Board notes that indeed paragraph II of Addendum No.4 sets out that preference and reservation criteria are applicable to the subject tender. The paragraph provides:

ii. A foreign contractor may benefit from a preference and reservation scheme where it enters into a joint venture or subcontracting arrangements, as evidenced by written agreement, with a firm that is registered in Kenya and where Kenyan citizens have majority shares. Where a citizen contractor has entered into contractual arrangements with a foreign contractor, a ten percent (10%) margin of preference in the evaluated price of the tender shall be applied. A citizen

contractor must demonstrate technical capability and competence to perform.

The Board also takes note of the provisions of section 157 (9) of the Act on transparency and promoting the participation of citizen contractors in international tendering exercises under the Act which provides:

For the purpose of ensuring sustainable promotion of local industry, a procuring entity shall have in its tender documents a mandatory requirement as preliminary evaluation criteria for all foreign tenderers participating in international tenders to source at least forty percent of their supplies from citizen contractors prior to submitting a tender.

Considering the import of Section 89 (f) read together with section 157 (9) under the repealed Act whose provisions are a mirror images of the Act under the same sections the Board opines, section 89 (f) read together with section 157 (9) of the Act gives the impression that it is necessary (rather than discretionary) in international tendering and competition for a procuring entity to make provision in its tender document as a mandatory requirement forming part of preliminary evaluation criteria for all foreign tenderers participating in international tenders to source at least forty percent of their supplies from citizen contractors prior to submitting a tender.

The Board notes the addendum is clear on the applicable preference margin applicable to local contractors. The second line of the specific addendum reads:

Where a citizen contractor has entered into contractual arrangements with a foreign contractor, a ten percent (10%) margin of preference in the evaluated price of the tender shall be applied.

It is noteworthy that the amendment mirrors the margin of preference as set out in regulation 164 (b) of Regulations 2020. The Board notes that while clause II may not be elegantly written to the Applicant's fondness it does provide for a preference scheme that benefits local contractors. In fact it is an instance of copy and paste; regulation 148 reads verbatim as clause II. However, the addendum falls short as it does not meet the dictates of sections, 157 (8) (b) (ii), 157 (9) and section 86 (2) of the Act. The latter section provides for what benefits citizen contractors or joint ventures with citizen contractors accrue at the evaluation stage:

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

Section 157 (8) (b) (ii) reads:

In applying the preferences and reservations under this section—

- (b) a prescribed margin of preference shall be given—***
(ii) works, goods and services where a preference may be applied depending on the percentage of shareholding of the locals on a graduating scale as prescribed.

The rules of construction of statute implore the wholistic interpretation of statute and not piecemeal application of sections. The import of sections 157 (9) and section 86 (2) comes to the fore when read together with sections 74, 79 and 80 of the Act. These sections of the Act elevate the status of sections 89 (f) and 157 (9), 157 (8) to that of **mandatory requirements forming part of preliminary evaluation criteria**. As such, provisions of a tender document on preference and reservation schemes constitute part of the evaluation framework the evaluation committee shall rely on, in their evaluation of tenders and ought to be communicated clearly under the tender document. It is noteworthy that subject to section 80 of the Act, the evaluation committee's exercise is *stricto sensu* limited to the procedures and criteria set out in the tender documents and the provisions of this Act and statutory instruments.

The Board has carefully perused Addendum no. 4 and notes none of the itemized amendments include compliance with section 157 (9), an express provision designating a mandatory requirement as a preliminary evaluation criterion for all foreign tenderers participating in the subject tender to source at least forty percent of their supplies from citizen contractors prior to submitting a tender; compliance with section 86 (2) on citizens contractors

entitlement to 20% of their total score in the evaluation, provided the entities or contractors have attained the minimum technical score; and compliance with section 157 (8) (b) (ii) on a graduating scale for preference margin depending on the percentage of local citizenship shareholding.

Accordingly, the Board finds that the Respondents failed to comply with the applicable law on preference and reservation schemes as provided by the law.

The Applicant submitted at paragraph 59 that the Respondents failed to provide for exclusive preference for citizen contractors. The same is not applicable under the subject tender. Justice Odunga in **Republic v Public Procurement Administrative Review Board & another Ex parte: Athi Water Service Board & another [2017] eKLR** clarifies at paragraph 120, that:

"Section 157 (a) imposes parameters where there would be an exclusive preference for Kenyan citizens. Exclusive preference is conditional on the legislative parameters namely where the Government of Kenya funds 100% of the works and where the tender value is above the prescribed preference threshold of Kshs 500 million but below one billion shillings for procurements in respect of works, construction materials and other materials which are made in Kenya and five hundred million shillings for procurements in respect of goods and services: regulation 163."

On the first parameter, the Applicant concedes the 2nd Respondent is a state corporation established under section 3 of the Kenya Ports Authority Cap 391. Without belabouring the point, the Board notes that the first parameter is not applicable under the subject tender.

On the second parameter regulations 163 of Regulations 2020 sets out the minimum threshold for a tender to qualify for exclusive preference of local contractors: regulation 163:

For the purpose of section 157(8)(a)(ii) and (iii) of the Act, the threshold which exclusive preference shall be given to citizen contractors shall be—

(a) one billion shillings for procurements in respect of works, construction materials and other materials which are made in Kenya; and

(b) five hundred million shillings for procurements in respect of goods and services.

The Board notes that the value of the subject tenderer may be determined by computation of the tender value based on the provided tender security value. Section 61 (2)(c) of the Act limits tender security to no more than 2% of the tender value. On the assumption, under the subject tender, that the tender security sum provided was at the maximum 2% threshold it is possible to ascertain the tender value. From the tender opening minutes dated 28th June 2021 the tenderers presented a tender security of 150,000 dollars. If 150,000 USD represents 2% of the total it follows that 7,500,000 USD is equivalent to 100% of the tender value. This value when converted

to Kenya shillings based on the central bank of Kenya's proposed exchange rate as of 16th July 2021 at a rate of 1 dollar = 108 Ksh, the total tender sum is Ksh 8.1 billion. This sum is more than 1 billion Kenya shilling, the set threshold provided under regulation 163.

The Applicant's claim fails on this ground because the subject tender does not fall within the scope of the section 157 (8) (a) of the Act on exclusive preference.

Whether the Respondents complied with order 1.c of the Board's decision dated 29th March 2021

The Board shall now proceed to evaluate the Respondents' compliance with suborder c *Provide for Participation of Joint Ventures in the subject tender*; The Applicant took issue with the Respondents' compliance with suborder c. They assert that while providing for joint ventures under the subject tender, the Respondents exceeded their mandate and resorted to implementing extraneous considerations. Specifically, the Applicant objected to restrictions on a maximum number of joint venture partners as provided under clause IV of the Addendum.

In response, it was the Respondents' position that it not only provided for joint ventures but equally included eligibility criteria for citizen contractors to ensure only citizen contractors with technical capability and competence formed part of eligible joint ventures.

Upon perusal of the addendum reveals clauses IV, V, VIII and IX provide for, the scope and terms of joint ventures under the subject tender. In so doing, the Respondents exercised their authority under sections 74 and 58 (2) of the Act. Concomitantly, regulation 53 recognizes joint ventures as a valid tenderer. It provides:

Tenderers, suppliers and consultants may register as a single entity, joint venture or association with sub-contractors or sub-consultants in compliance with the Act through an application form provided by the system for registration.

Thus, to the extent that the Respondents provided for joint venture tenderers under the subject tender, the Respondents are compliant.

The Board will proceed to evaluate whether in their compliance the Respondents resorted to unreasonable and unlawful considerations. For the Board, the legal issue for consideration is whether the powers of an accounting officer under section 74 and 58 (2) of the Act to set out the terms of the tender document extend to setting limits on the terms under which tenders who are joint venture partners agree to engage on.

In answer to the above question, the Board shall begin by dissecting the concept of a joint venture. The term Joint Venture has been defined by Thomas Thelford in his book, Construction Law Handbook (2007) as follows:-

"A contractual arrangement between two persons or companies in which resources are combined- be they

equipment, expertise or finance with a view of making profit, but the two companies can remain separate legal entities.”

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

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

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

At this juncture, it is instructive to reiterate the legal position in **Salmon v. Salmon & Co. Limited (1897) AC** had this to say regarding the separate legal status of a company from its members:-

“The company is at law a different person and altogether, from the subscribers of the memorandum and though it may

be that after incorporation the business is precisely the same as it was before, and the same persons are managers and the same hands receive the profits, the company is not in law the agent of the subscribers or trustees for them, neither are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the law..."

The company law principle espoused in the above case is that a company has a separate legal status from its members. Therefore, when two companies enter into a Joint Venture arrangement and opt to form a legal entity, the members of the new Joint Venture company are not accountable for the debts and liabilities of the new Joint Venture company, since such a new Joint Venture Company has a separate legal status from its members. In Thomas Thelford's book, cited hereinbefore, the author continues to explain Joint Ventures in relation to procurement procedures as follows:-

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

the joint venture to spread risk. This would leave one joint venture partner accountable to the client for the entirety of the joint venture, should the other joint venture partner fall away. In looking at joint ventures, it is issues like joint and several liability that require careful assessment of the strengths of a potential joint venture arrangement”

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

Thomas Thelford explains that the liability of joint venture partners may be joint and several. This means that in case of an issue arising, a procuring entity may seek redress by suing the joint venture partners collectively and individually.

It is the Board’s considered view, that the overriding objective of Article 227 of the Constitution and section 3 of the Act behoove public entities and their respective accounting officers with custodial duties to safeguard expenditure of public funds through public procurement according to the dictates of the afore-referenced laws. To this end, there is no doubt in the Board’s mind, a

procuring entity possess an inherent duty to protect itself from the likelihood of having to pursue several defendants born from a joint venture partnership frustrating its ability to oversee the administration of the procurement contract.

Thus, a procuring entity may take reasonable steps to ensure one partner is accountable to it and can easily be accessed in case of any problems in executing the resultant procurement contract. The Board notes that nothing precludes a Procuring Entity from taking steps to ensure joint venture tenderers explicitly identify the Lead Partner in a Joint Venture who shall be personally responsible when issues of arise during the procurement process that needs immediate attention or when the procuring entity seeks to enforce a procurement contract.

From the foregoing, the Board concludes the Respondent's decision to set criteria for eligible joint ventures is lawful. On the substance of the joint venture criteria, the Board notes that the Respondents exercise discretion on the subject. However, such discretion ought to be applied in a rational manner that advances the objectives of public procurement under Kenya's regime. The Constitution prescribes a right to fair administrative action as enshrined under Article 47 that has materialized under the Fair Administrative Actions Act. Section 7 of the Administrative Actions Act provides as follows:

1) Any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to—

(b) a tribunal in exercise of its jurisdiction conferred in that regard under any written law.

(2) A court or tribunal under subsection (1) may review an administrative action or decision, if—

(k) the administrative action or decision is unreasonable;

From the foregoing, the Board as authorized under section 173 of the Act, reserves the right to evaluate the exercise of administrative discretion by procuring entity. Thus the Board may review whether the eligibility criterion for joint venture tenderers as prescribed by the Respondents was reasonable. In pursuit of this enterprise, it is imperative to first consider why the Act provides for joint venture tenderers in public procurement. The Board agrees with Thai on page 305, the formation of joint ventures allows contractors to pool their resources, both their financial and works capabilities, in order to win a tender which is normally of a value much higher than they would be able to tender for individually or technically complex. More contractors are therefore involved which provides for more competition in the tender process. Similarly, the opportunity to form joint ventures increase the joint venture partners chances of winning a tender.

Therefore, the procuring entity, in setting the eligibility criterion for joint venture tenderers seeks to balance between the procuring entity's contract

administration role and right to legal redress under the resultant procurement contract and individual tenderers right to pool together in order to be more competitive. The Applicant submitted the last requirement of clause IV on the maximum number of joint venture partners, "The maximum number of JV members shall be Two (2)" is unreasonable.

In analyzing the test of Wednesbury unreasonableness, **Justice Mativo in Republic v Public Procurement Administrative Review Board & 2 others Exparte Rongo University [2018] eKLR** stated that: -

"the impugned decision must be "objectively so devoid of any plausible justification that no reasonable body of persons could have reached it and that the impugned decision had to be "verging on absurdity" in order for it to be vitiated"

The Board defers to Thomas Thelford definition of a joint venture:

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

From the definition, a contractual arrangement amounting to a joint venture includes *inter alia* a partnership between at least two parties. This element of the definition when juxtaposed with the impugned section of clause II reveals that the maximum number of joint venture partners under the

addendum is equivalent to the minimum number of partners required to meet the criteria of partnerships amounting to a joint venture.

The Board therefore considered whether the cap is reasonable in facilitating the Respondent's duty to secure their administrative role and facilitate the pursuit of legal rights and remedies under the resultant procurement contract. Hypothetically, would a maximum cap of three joint venture partners, one more partner than the minimum partner required to formulate a joint venture partnership, prejudice the Respondent. Regrettably, the Respondents have not favoured the Board with submissions on the subject. That notwithstanding, the Board fails to conceive how an additional one or two joint partners to the minimum number of joint partners prejudices the Respondent's ability to execute their mandate. Moreover, the cap on the number of joint venture partners ought to be analyzed considering its implication on citizen contractors' ability to extract maximum advantage from preference margin schemes premised on percentage of ownership as provided under section 157 (8)(b) of the Act.

To set the maximum number of joint venture partners equivalent to the minimum number of partners required to constitute a joint venture partnership where there is negligible risk if any of prejudice in having more than the minimum number of joint venture partners, within reasons, on the part of the procurement entity is illogical. It is, however, not lost on the board that a continued increase in the number of joint venture partners does increase the prejudicial effect on a procuring entity. The Respondents reserve the right of formulating permutations of eligibility criteria that ensure

their capacity to efficient procurement administration and pursuit of legal rights such as designating a lead joint venture partner and capping the maximum number of joint venture partners.

Accordingly, the Board finds the Respondents failed to comply with suborder (c).

Whether the Respondents' complied with order 1.d of the Board's decision of 29th March 2021

Both parties are in agreement that the Respondents complied with suborder d. The Board erring on the side of caution, reviewed the Respondents' implementation of the suborder d of its decision of 29th March and noted clause VI of addendum no. 4 complies with its orders.

Whether the Respondents' complied with order 2 of the Board's decision of 29th March 2021

Order 2 of the Board's decision of March 2021 directed that the Respondents extend the tender submission deadline for a further period of fourteen (14) days, a day after issuance of the Addendum referred to in Order No. 1 above. The Board having perused the documents notes at tail end of the addendum it provides:

The submission deadline has been extended to before 1000 HOURS on Monday 28th June, 2021.

To the extent of the prima facie evidence of the addendum, based on when the document was dated and the above reference notice the Board finds the Respondents compliant with order 2.

Whether the Respondents' complied with order 3 of the Board's decision of 29th March 2021

The Board now shifts its attention to whether the Respondents complied with order 3 of its decision of 29th March 2021.

Order 3 read:

The Accounting Officer of the Procuring Entity is hereby directed to allow bidders to withdraw their bids (if they wish to do so) pursuant to section 76 (1) of the Act before the tender submission deadline referred to in Order No. 2 and submit new bids, taking into consideration, the amendments that would be made to the Tender Document through an Addendum and/or give bidders the option to elect to be bound by their already submitted bids, which will remain unopened until the tender submission deadline referred to in Order No. 2 above.

The Board notes the Applicant did not take issue with the compliance of the order. Furthermore, clause VII of the addendum is clear that all bidders were at liberty to rescind and resubmit their bids taking into account the amendments under the addendum.

Accordingly, the Board finds the Respondent's compliant with order 3 of its decision of 29th March 2021.

Whether the Respondents' complied with order 4 of the Board's decision of 29th March 2021

The Board is also alive to the fact that the Respondents, having appealed the Board's decision at the High Court and receiving a letter of notification from the Acting Board Secretary consequent to filing of the request for review 94 of 2021 notifying the Respondents of the existence of the Request for Review and suspension of procurement proceedings pursuant to section 168 of the Act, was not in a position to comply with order 4.

II. Whether the Respondents complied with the timelines in issuing the Addendum No. 4 as ordered by the Board.

The Board now proceeds to considered whether the Respondents' complied with its direction on timeframes under order 1 of its decision of 29th March 2021. It was the Board's directive that the Respondents issue an Addendum to the Tender Document applicable to the procurement proceedings in Tender No. KPA/095/2020-21/TE Cranes within fourteen (14) days from the date of this decision. Whether or not the Respondent's complied with the order must be consider accounting for the subject tender's interlude at the High Court. The Respondents being dissatisfied with the Board's decision

exercised their right to judicial review through JR Application No. E017 of 2021 wherein the High Court delivered its ruling on 26th May 2021. From the foregoing therefore, the Respondents' could not logically issue the required addendum as from the 30th March 2021. So when did time start running for issuance of the addendum taking into account the proceedings at the High Court?

The Applicant alleges that the Respondents in total disregard of the binding decision of the Review Board failed to issue an addendum within the stipulated timelines. As per the Applicant, they only became aware of an addendum in compliance with the Board's orders, addendum no. 4 dated 14th June 2021, on 25th June 2021 on the 2nd Respondent's website. The Applicant premised their contention of non-compliance on the reasoning that if the High Court rendered its decision on 26th March 2021, then time start running on the 27th May 2021. Under the circumstances, it was the Applicant's contention that time for leave to appeal to the court of appeal and the Respondent's timeframe for compliance with the Board's decision run concurrently. Therefore, the latest the Respondents could legally issue the addendum was on or before the 9th June 2021.

The Respondents averred they had 21 days to comply with the Board's directive. The period for compliance, therefore lapsed on the 14th of June 2021. According to them, under section 175 (4) of the Act, the Respondents enjoyed a statutory right to appeal the decision of the High Court within Seven days, failure to which then the decision of the Review Board took

effect. Concomitantly, the Board's decision dated 29th March 2021 granted the Respondents Fourteen (14) days to issue an Addendum. It was the Respondents' assertion that these time frames run independent of each other and that the Respondents consequently enjoyed cumulatively twenty-one days to effect the orders of the board. The Respondents aver that it is evident that from the date of the High Court ruling, the Respondents took the equivalent to nineteen calendar days to issue Addendum No 4, and that this issuance was indeed timely and within the statutory timeframes and directions of the Review Board.

The issue of when time starts to run is rather a straightforward question. On the one part, Justice Ogola in his decision of 26th March 2021 writes at paragraphs 56 and 57:

56. In conclusion this Court restates the rule that a judicial review court will not interfere in any way with the exercise of any power or discretion, which has been conferred on a body unless it has been exercised in a way which is not within that body's jurisdiction, or where the decision is unreasonable, irrational, or illegal. In the motion before the Court, it has not been demonstrated instances of unreasonableness, irrationality or illegalities which warrant interference from this Court.

57. The upshot is that the motion before the Court fails for lack of merit. The same is dismissed. Parties to bear own costs.

The upshot of the High Court's decision therefore being that it did not alter any aspect of the Board's decision of 29th March 2021. The legal consequence of the decision being that the Board's decision of 29th March 2021 is binding on the parties and took effect as from the 27th of May 2021.

On the other part, Section 175 (4) of the Act reads:

A person aggrieved by the decision of the High Court may appeal to the Court of Appeal within seven days of such decision and the Court of Appeal shall make a decision within forty-five days which decision shall be final.

On interpretation of the above statute Justice Mativo had this to say,

"There are numerous rules of interpreting a statute, but without demeaning the others, the most important rule is the rule dealing with the statutes plain language. The starting point of interpreting a statute is the language itself. In the absence of an expressed legislative intention to the contrary, the language must ordinarily be taken as conclusive."

Just to bring the point home, Justice Onyego quotes from MN Rao Amita Dhanda 10th Edition on interpretation of statutes and opines,

"in Construction of statutes in the first instance, the grammatical sense of the word is to be adhered to. The words of a statute must prima facie be given the ordinary meaning Where there is no ambiguity in the words, there

is no room for construction.... where the intention is clear, there is no room for construction nor exercise for interpretation or addition.....No single argument has more weight in a statutory interpretation than the plain meaning of the words”.

The plain meaning of section 175 (4) of the Act is to the Board’s mind clear. It provides a time frame for appealing a High Court decision under the Act to the Court of Appeal, capping the allotted period to seven days from the date of the High Court’s decision. In the present instance, the statute is clear, divesting the Board of the need or authority to interpret or add to it. Moreover, the Applicant’s argument that section 175 (4) grants them 7 days stay of order of the High Court’s orders lacks merit. The statute is silent on stay of the High Court orders, were it the intention of the legislature that once a High Court renders its decision an automatic stay applies nothing would have easier than having the same inked in black and white in statute.

The Applicant’s assertion that there is an automatic stay of a court order peg on statute is an alien concept in legal custom and practice in the country. Within the civil judicial system framework, within which adjudication of public procurement subsist, granting of stay orders is exclusively the purview the court and is issued through direct and express orders by the court and not through statute. In any event, the Respondents did not exercise their right of appeal to the Court of Appeal, they therefore could not profit from any benefit existing within section 175 (4) without exercising the right of appeal.

Accordingly, the Board finds that the Respondents did not comply with the time limits set under order 1 of its decision of 29th March 2021 of issuing an addendum within 14 days of the Board's decision. Compliance with the court's order therefore ought to have commenced on 27th May 2021 and lapsed on 9th June 2021.

The Respondents further decried the Respondents' implementation of order 1 on timelines noting that under the Respondents' erroneous computation the Respondents in fact availed the addendum on the 2nd Respondent's website on 25th June 2021. The Respondents on their part averred the addendum was availed through its website on 14th June 2021. In support of their claim, they presented annexure CM-7. Before evaluating the evidence further, it is imperative that the Board ascertains who bears the burden of proof.

On the subject, the Board refers to the Evidence Act, section 107 reads:

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

The import of section 107 being, he who alleges must prove. A preview of the Supreme Court's decision in **Raila Amolo Odinga & Another vs. IEBC**

& 2 Others (2017) eKLR on the subject sheds light on the application of section 107. At paragraph 132 the Superior Court writes:

"Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and "remains constant through a trial with the plaintiff, however, "depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.

It follows therefore that once the Court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the Respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the petitioner bears an evidentiary burden to adduce 'factual' evidence to prove his/her allegations of breach, then the burden shifts and it behooves the Respondent to adduce evidence to prove compliance with the law...."

The Supreme Court's *ratio decidendi* on the issue of burden of proof settles the subject. For avoidance of doubt, the legal burden of proof in a case is

always static and rests on the Claimant throughout the trial. It is only the evidential burden of proof which may shift to the Defendant depending on the nature and effect of evidence adduced by the Claimant.

In the present case, the Applicants sworn an affidavit through Mr. Kinyanjui to the effect that the Applicant only came across addendum no. 4 on the 2nd Respondents' website on 14th June 2021. To the board's mind the sworn statement is sufficient to swing the pendulum of the evidential burden of proof towards the respondents, on the presupposition that the Applicant being a reasonable and diligent tenderer remained vigilant and regularly explored the 2nd Respondent's website for updates on the subject tender. After all, it was within the Applicant's knowledge that the Respondents were scheduled to delivered an addendum as per the Board's decision of 29th March 2021. The evidential burden of proof shifts to the Respondents.

In response the Respondents averred complying with the Board's timeframe though under their erroneous computation of time and issued the addendum on 14th June 2021. In support of their averment, they presented annexure M7; a screenshot of an email by Levin K Masis to Ann Jerono on 30th June 2021 at 11:41 Am. The content of the email reads:

"Hi,

Name: Addendum No4.pdf

Title

Document ID: NJ7RDX44JN7U-36-2231

VERSION 1.0

CREATED AT 6/14/2021 5:46 PM BY ABDIRAHMAN H. ABID

**LAST MODIFIED AT 6/14/2021 5:46 PM BY ABDIRAHMAN H.
ABID
KIND REGARDS
LEVIN K. MASIS"**

From the Respondents' annexure the following is discernable: email correspondence between Levin K Masis to Ann Jerono on 30th June 2021 at 11:41, the content of email correspondence as captured above and the party signing off. The evidence is not a digital record of the upload process or direct evidence of the person who uploaded the addendum, it thus has no bearing on when Addendum No.4 was uploaded to the 2nd Respondent's website. Furthermore, the parties in the email correspondence are strangers to this proceedings, the Respondents have not attempt to appraise the Board on who the parties are, if they are in the 2nd Respondents employment. The substance of the email is equally incomprehensible beyond plaining meaning of the words.

The Board would like to point out, the mode of communicating the contents of Addendum No.4 was the Respondents' choice, information of when the document was uploaded is exclusively within the knowledge and access of the Respondents. Such a conclusion is not beyond peradventure, as evidence by the Respondents adducing CM-7. Under the circumstances, the evidential burden of proof on when the addendum was uploaded can only be discharged by the Respondents. To shift the burden onto Applicants would

be to require the Applicant perform the impossible; to access the Respondents' serves and prove when a digital upload was made.

The Board finds the Respondents' evidence of when Addendum No.4 was uploaded insufficient consequently the Respondents failed to prove that the addendum was indeed uploaded on the 14th June 2021.

Accordingly, the Respondents failed to upload an addendum in 14 days directed per order 1 of its decision of 29th March 2021.

III. Whether the Respondents stipulated extraneous eligibility and qualification criteria

On the third and final issue of contention, the Applicants averred that the Respondents through addendum no. 4 introduced extraneous eligibility and qualification criteria. The crux of the Applicant's request for review was not on whether or not the 1st Respondent is authorized to exercise such authority as per section 75 of the Act but rather whether in exercise of its discretion under section 55 of the Act, the Respondents misdirect themselves. Particularly, the Respondent singles out the provision in Annexure 1 of the addendum.

To establish whether or not the Respondents introduced extraneous eligibility and qualification criteria the Board studied the Eligibility and Evaluation Criteria Requirements as explained in the said Addendum and under Annexure. The Board then proceed to juxtapose the eligibility criteria set forth under the above referenced documents with the Act stipulations on

eligibility. Section 60 of the Act provides specific requirements under a tender document, providing:

(1) An accounting officer of a procuring entity shall prepare specific requirements relating to the goods, works or services being procured that are clear, that give a correct and complete description of what is to be procured and that allow for fair and open competition among those who may wish to participate in the procurement proceedings.

(2) The specific requirements shall include all the procuring entity's technical requirements with respect to the goods, works or services being procured.

(3) The technical requirements shall, where appropriate—

(a) conform to design, specification, functionality and performance;

(b) be based on national or international standards whichever is superior;

(c) factor in the life of the item;

(d) factor in the socio-economic impact of the item;

(e) be environment-friendly;

(f) factor in the cost disposing the item; and

(g) factor in the cost of servicing and maintaining the item.

(4) The technical requirements shall not refer to a particular trademark, name, patent, design, type, producer or service provider or to a specific origin unless—

(a) there is no other sufficiently precise or intelligible way of describing the requirements; and

(b) the requirements allow equivalents to what is referred to.

It would be beneficial to consider the provisions of section 70 of the Act as they are relevant to the effective implementation of section 60. Section 70 states as follows: -

(1) The Authority shall issue standard procurement and asset disposal documents and formats as prescribed for use by procuring entities.

(2) A procuring entity shall use standard procurement and asset disposal documents prescribed under subsection (1), in all procurement and asset disposal proceedings.

(3) The tender documents used by a procuring entity pursuant to subsection (2) shall contain sufficient information to allow fair competition among those who may wish to submit tenders

Sections 60 and 70 of the Act grants the accounting officer of a procuring entity the discretion to prepare specific requirements relating to goods, works or services being procured by such procuring entity. According to the

said provisions, such requirements must be clear, give a correct and complete description of what is to be procured and allow fair and open competition among those who may wish to participate in the procurement proceedings.

In determining whether a procuring entity failed to comply with the requirement of Section 60 of the Act, the Board must bear in mind that a procuring entity is better placed to know the goods and/or services required from potential suppliers. Therefore, the obligation of coming up with specific requirements including technical specifications of a tender should be left to the procuring entity, so long as the procuring entity ensures the specifications comply with section 60 of the Act and the principles set out in Article 227 (1) of the Constitution which states as follows: -

"Whenever a State organ or public entity contracts for goods and services, it must do so in a system that is fair, equitable, transparent, competitive and cost-effective"

The Board having considered submissions by parties on this aspect, observes that the Respondents in Annexure 1 identified an eligibility, historical contract, non -performance and litigation, financial and capability and experience criteria. Under each of these benchmarks the Respondents identify the nature of information required, the tenderers expected compliance; both for individual tenders and joint ventures, and identifies the form and nature of evidence required.

This Board observes that it ought not dictate what the Procuring Entity requires so long as the requirements in the Tender Document promote open and fair competition as specified in section 60 and 70 of the Act, which were cited hereinbefore. Accordingly, the Board finds the Applicant's claim of inclusion of extraneous eligibility and qualification criteria under Addendum No.4 unmerited.

In determining the appropriate orders to issue in the circumstances, the Board has established that the Respondent partly complied with its orders of 29th March 2021. The non-compliant aspects being that through addendum number 4 the Respondents failed to:

- 1) comply with the applicable law on preference and reservation schemes as provided by the law as per sections 86 (2) and 175 (9);
- 2) comply with sub order c to provide for participation of joint ventures in the subject tender by including a stringent cap on the number of maximum joint venture partners;
- 3) comply with the time limits set under order 1 of its decision of 29th March 2021 of issuing an addendum within 14 days of the Board decision by allegedly issuing the addendum on 14th June 2021; and
- 4) failed to upload an addendum within 14 days as directed per order 1 of its decision of 29th March 2021.

It is therefore appropriate to direct the 1st Respondent to issue an Addendum addressing the issues addressed hereinbefore and to fully comply with the orders set out in the Boards Decision in Application No 33 of 2021, and to extend the tender submission deadline so that bidders can take such changes into account. The 1st Respondent ought to allow bidders to withdraw their bids (if they wish to do so) in accordance with section 76 (1) of the Act before the new tender submission deadline and submit new bids, taking into consideration, the amendments that would be made to the Tender Document through an Addendum. Alternatively, the 1st Respondent ought to give bidders the option to elect to be bound by their already submitted bids, which will remain unopened until the new tender submission deadline.

In totality of the foregoing, the Board issues the following orders: -

FINAL ORDERS

In exercise of the powers conferred upon it by Section 173 of the Act, the Board issues the following orders:

- 1. The Accounting Officer of the Procuring Entity is hereby directed to issue an Addendum to the Tender Document applicable to the procurement proceedings in Tender No. KPA/095/2020-21/TE for Supply, Installation, Testing and Commissioning of Four (4) New Ship to Shore Cranes within Fourteen (14) days from the date of this decision on the following aspects: -**

- a. Provide for Preference and Reservation Schemes applicable in law and the Board's directions;**
 - b. Provide for Participation of Joint Ventures in the Subject Tender with a reasonable capped maximum number of joint venture partners; and**
 - c. Deletion of the last paragraph of Addendum No. 1 dated 29th January 2021.**

- 2. The Accounting Officer is hereby directed to extend the tender submission deadline in Tender No. KPA/095/2020-21/TE for Supply, Installation, Testing and Commissioning of Four (4) New Ship to Shore Cranes for a further period of fourteen (14) days, a day after issuance of the Addendum referred to in Order No. 1 above.**

- 3. The Accounting Officer of the Procuring Entity is hereby directed to allow bidders to withdraw their bids (if they wish to do so) pursuant to section 76 (1) of the Act before the tender submission deadline referred to in Order No. 2 and submit new bids, taking into consideration, the amendments that would be made to the Tender Document through an Addendum and/or give bidders the option to elect to be bound by their already submitted bids, which will remain unopened until the tender submission deadline referred to in Order No. 2 above.**

4. Further to Order No. 1, 2 and 3 above, the Accounting Officer of the Procuring Entity is hereby directed to proceed with the procurement proceedings in Tender No. KPA/095/2020-21/TE for Supply, Installation, Testing and Commissioning of Four (4) New Ship to Shore Cranes to its logical conclusion, including the making of an award, taking into consideration, the Board's findings in this Review.

5. Given that the subject procurement process has not been concluded, each party shall bear its own costs in the instant Request for Review.

Dated at Nairobi this 19th day of July 2021

CHAIRPERSON

PPARB

SECRETARY

PPARB