

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 153/2021 OF 16th DECEMBER 2021

BETWEEN

KIPROTICH AMDANY

T/A RUBY SAW MILL..... APPLICANT

AND

THE ACCOUNTING OFFICER,

KENYA FOREST SERVICES RESPONDENT

AND

ELIJAH KOSGEI T/A KAPKOROS

ENTERPRISES 1ST INTERESTED PARTY

PATRICK KURUI T/A TOROITAI SAW

MILLS 2ND INTERESTED PARTY

DAVID K. KUTO T/A KAPKAKO SAW

MILLS 3RD INTERESTED PARTY

EMMANUEL C. KATAM T/A TOROPKET SAW

MILLS 4TH INTERESTED PARTY

RONALD KIMARU T/A NATUR SAW MILLS .. 5TH INTERESTED PARTY

JOHN K. KOYYO T/A BELGOI SAW MILLS ... 6TH INTERESTED PARTY

JOHN K. KIBET T/A KIPKASA SAW MILLS ... 7TH INTERESTED PARTY

JOHN KIMETTO MELLI T/A EMBACOM SAW

MILLS 8TH INTERESTED PARTY

TONJE KIPNGETICH T/A TKIYO SAW

MILLS 9TH INTERESTED PARTY

LUCAS CHEPKITONY T/A HILLWOOD SAW

MILL 10TH INTERESTED PARTY

FRANCIS KWAMBAI T/A KETIT SAW MILL 11TH INTERESTED PARTY

GILBERT KIPRONO T/A KIPSONGOI SAW

MILL 12TH INTERESTED PARTY

STEPHEN CHESIREO T/A NYARU SAW

MILL 13TH INTERESTED PARTY

CAROLINE KORIR T/A KIPSOEN SAW

MILL 14TH INTERESTED PARTY

**MILCAH CHEPCHIENG T/A MILCAH
ENTERPRISES 15TH INTERESTED PARTY**

HARUN KENEY T/A TESSOT INVESTMENT 16TH INTERESTED PARTY

**THOMAS CHERUIYOT T/A STROBUG SAW
MILL 17TH INTERESTED PARTY**

**AMOS KIPSAT T/A AFAMBUS SAW
MILL 18TH INTERESTED PARTY**

**SALOME KIPROP T/A SAVANNA SAW
MILL 19TH INTERESTED PARTY**

CLETI BATOTE T/A BATOTE ENTERPRISES 20TH INTERESTED PARTY

**PHYLIS KIPRONO T/A CHASEBETI SAW
MILL 21ST INTERESTED PARTY**

**JULIANA J. KWAMBAI T/A KOKVVET SAW
MILL 22ND INTERESTED PARTY**

SILAS KORIR T/A YOKOT SAW MILL 23RD INTERESTED PARTY

**SLYVIA SARGUTTA T/A SPREJAM SAW
MILL 24TH INTERESTED PARTY**

**KIPROP CHEMWOLO T/A KESSUP ECO
ENTERPRISE 25TH INTERESTED PARTY**

SIMON AIYABEI T/A SALABIN SAW MILL 26TH INTERESTED PARTY

REUBEN K. TALAM T/A TALAMSON

INVESTMENT 27TH INTERESTED PARTY

DICKSON KOSGEI T/A CHESEREK SAW

MILL 28TH INTERESTED PARTY

SAMMY KIPLAGAT T/A FLAX SAW MILL 29TH INTERESTED PARTY

RODAH KOECH T/A CHERIP SAW MILL 30TH INTERESTED PARTY

CHRISTOPHER TAREI T/A KAPKAIOW SAW

MILL 31ST INTERESTED PARTY

CHRISTOPHER CHEBII T/A SOT MACK

SAW MILLS 32ND INTERESTED PARTY

SAMWEL KARANEI T/A KARANEI SAW

MILL 33RD INTERESTED PARTY

RICHARD KIMUTAI T/A MOSONGO SAW

MILL 34TH INTERESTED PARTY

JAMES KORIR T/A KOISER SAW MILL 35TH INTERESTED PARTY

CHRISTOPHER KIPYEGO T/A KOIMETT

SAO MILL 36TH INTERESTED PARTY

BENSON KIPROP T/A KENUSA SAW MILL . 37TH INTERESTED PARTY

JOSEPH K. KIPTAI T/A HUMAX T.

ENTERPRISES 38TH INTERESTED PARTY

TITUS K. KIPKEMOI T/A BOGOL SAW

MILLERS 39TH INTERESTED PARTY

PHILEMON NGETICH T/A TREE HILLS

SAW MILLS 40TH INTERESTED PARTY

BENJAMIN K. KIPLAGAT T/A CHERIP SAW

MILL 41ST INTERESTED PARTY

BENSON KIMUTAI T/A CHERIP SAW MILL 42ND INTERESTED PARTY

ELIZABETH KIPLIMO T/A CHEPKONYOK

SAW MILL 43RD INTERESTED PARTY

ERNEST K. KIPPKEMOI T/A ERKEM SAW

MILL 44TH INTERESTED PARTY

JAMES SITIENEI T/A MARSITT SAW MILL 45TH INTERESTED PARTY

DUNCAN NECHO T/A KIPCASA SAW

MILLS 46TH INTERESTED PARTY

PETER SAWE T/A KIPGASA SAW MILL 47TH INTERESTED PARTY

CHEPKAITANY T/A CHEPKAITANY SAW

MILL 48TH INTERESTED PARTY

MILKA KIPROP T/A EMso TIMBER 49TH INTERESTED PARTY

PATRICK K. KOSGEY T/AS BUGAR SAW

MILLS 50TH INTERESTED PARTY

ISSAC K. KOSGEI T/A CHERIP SAW MILLS 51ST INTERESTED PARTY

JOHN K. ERAMAS T/A ERAMOS SAW

MILLS 52ND INTERESTED PARTY

Review against the decision of the Accounting Officer, Kenya Forest Services in relation to Tender No: KFS/DISP/05/2021-2022 for Sale of Forest Plantation Materials (AGPO Registered Small Scale Forest Industry Investors).

BOARD MEMBERS

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

IN ATTENDANCE

Mr. Philip Okumu - Acting Board Secretary

BACKGROUND TO THE DECISION

The Tendering Process

Kenya Forest Service (hereinafter referred to as the 'Procuring Entity') invited sealed tenders for Tender No: KFS/DISP/05/2021-2022 for Sale of Forest Plantation Materials (AGPO Registered Small Scale Forest Industry Investors) (hereinafter referred to as the 'subject tender') from qualified and eligible tenderers (only registered forest industry investors) by way of an advertisement in the Daily Nation Newspaper, the Procuring Entity's website (www.kenyaforestservice.org) and the public procurement tender portal (tenders.go.ke) on 30th November 2021 and set to close on 14th December 2021.

Addendum

Through Addendum No. 1 uploaded on the Procuring Entity's website on 8th December 2021, the Procuring Entity amended and issued clarifications on various issues raised by tenderers in relation to the subject tender.

Nakuru Environment and Land Court Petition No.E19 of 2021

Prior to the tender submission deadline of 14th December 2021, Timber Manufacturers Association sought orders against the Procuring Entity, the Principal Secretary, Ministry of Environment and Forestry and the Honourable Attorney General by way of a petition before Hon. J. Mutungi, J.

On the same day, Hon. J. Mutungi, J granted conservatory orders staying and/or halting the further and continued tendering process of the subject tender by the Procuring Entity pending the hearing and determination of a Notice of Motion dated 8th December 2021 filed by Timber Manufacturers Association. This order was issued and served upon the Procuring Entity on 10th December 2021.

In compliance with the orders of Hon. J. Mutungi, J, the Procuring Entity halted any further processing of the subject tender (including the opening of tenders) awaiting the determination of the Notice of Motion Application dated 8th December 2021.

THE REQUEST FOR REVIEW

Kiprotich Amdany t/a Ruby Saw Mill, the Applicant herein, lodged a Request for Review dated 9th December 2021 and filed on 16th December 2021 together with an Affidavit in Support of the Request for Review sworn by Kiprotich Amdany on 9th December 2021 through the firm of Kale Maina & Bundotich Advocates, seeking the following orders:

- a) The procurement proceedings initiated by the Procuring Entity under Tender Numbers KFS/DISP/05/2021-2022 for Sale of Forest Plantation Materials (AGPO Registered Small Scale Forest Industry Investors category) be nullified.**

- b) The Procuring Entity be directed to modify the Tender documents to take into account the submissions by the Applicants.**
- c) The Board gives such further orders or directions as it may deem fit.**

Vide a Notification of Appeal and a letter dated 16th December 2021 the Acting Board Secretary notified the Respondent of the existence of the Request for Review and suspension of procurement proceedings for the subject tender while forwarding to the Respondent a copy of the Request for Review together with the Board's Circular No.2/2020 dated 24th March 2020 detailing administrative and contingency measures to mitigate the spread of Covid-19. Further, the Respondent was requested to submit a response to the Request for Review together with confidential documents within 5 days from 16th December 2021.

Vide a letter dated 30th December 2021, the Acting Board Secretary brought to the attention of the Respondent the provisions of Regulation 205 of the Public Procurement and Asset Disposal Regulations 2020 (hereinafter referred to as 'Regulations 2020') and Section 176(1)(m) and (2) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act') on the responsibility of the Respondent to submit a response to a request for review together with documents requested for by the Acting Board Secretary and the consequences of not supplying the Board with such response and documents.

The Respondent filed his response to the Request for Review on 5th January 2021 and attached to it is the blank tender document for the subject tender (hereinafter referred to as the 'Tender Document'), Addendum No.1 and an Invitation to Tender advertisement notice of 30th November 2021. The Respondent also furnished the Board with a copy of an order of Hon. J. Mutungi, J given in Nakuru Environment and Land Court Petition No.E19 of 2021 on 9th December 2021 and issued to the Respondent on 10th December 2021.

Pursuant to the Board's Circular No. 2/2020 dated 24th March 2020, the Board dispensed with physical hearings and directed all requests 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.

None of the parties filed written submissions.

APPLICANT'S CASE

The Applicant avers that vide an advertisement in the Daily Nation Newspaper dated 30th November, 2021, the Procuring Entity invited interested and eligible forest investors to submit tenders for sale of forest materials in various tenders including the subject tender. Being interested in the subject tender, a resident of Elgeyo Marakwet County, carrying on business as a forest industry investor within Elgeyo Marakwet County under

the small scale category and being registered as an AGPO small scale forest industry investor, the Applicant obtained the Tender Document by downloading the same from the Procurement Entity's website.

It is the Applicant's averment that upon perusal of the Tender Document, it noted that the Tender Document stipulated amongst other terms the following instructions to tenderers: (i) at Clause 1.8 Section IV — Conditions of Tender requires tenderers to remove the materials paid for within six (6) months after signing of the Timber Harvesting License failure to which the materials would revert back to the Procuring Entity, (ii) at Clause 10.2 Section 11 - Tender Data Sheet (TDS) sets the deadline for submission of tenders as Tuesday 12th December at 11.00 am, (iii) at Section III Schedule of Items and Prices provides for Items 1 to 5 to be tendered for by registered forest industry investors in the category of small scale within the Elgeyo Marakwet County while Items 6 to 9 are open for tendering by all forest industry investors registered in the small scale category within or outside Elgeyo Marakwet County, (iv) at Section III Schedule of Items and Prices allocates investors a volume of 2,377.45 in Elgeyo Marakwet County limited to Singore 2s only, (v) materials under Section III- Schedule of Items and Prices are to be sold in volume of cubic materials and (vi) a breakdown of allocation of materials and volumes in Elgeyo Marakwet County as follows; small scale category investors within County (Kshs.169,934,132.50), tenderers outside County (Kshs.119,333.610.80), AGPO tenderers (Kshs. 496,397.30), medium scale category investors within County

(Kshs.388,598,216.40), outside County (Kshs.924,527,421.90) and outside County large category investors (Kshs.1,307,990,575).

The Applicant avers, vide a letter dated 3rd December 2021, together with the Interested Parties, it sought clarification and substantial changes or modification to the Tender Document and which letter was delivered to the Procuring Entity on 4th December 2021. However, the Applicant alleges that the Procuring Entity did not respond to the letter dated 3rd December 2021 but instead, issued Addendum No.1 which the Applicant construed to be a response to the letter dated 3rd December 2021.

According to the Applicant, Addendum 1 was issued to all tenderers stating as follows (i) *No.6: The six (6) months harvesting period is to enable KFS undertake replanting of the harvested area for sustainable fresh management, (ii) No. 11: KFS has put mechanisms in place to protect the paid for and uncollected materials. All forest industry investors should partner with KFS in ensuring the security of uncollected materials, (iii) No. 12: The 14 days period given is within the law, (iv) No. 13: The criteria used for reservations of materials for bidding was applied uniformly across all Counties. The 70% materials reservations are open to forest industry investors within and outside the County within the same respective category (applies to small and medium only), (v) No. 14: The reservation for AGPO was based on the number of registered fresh industry investors in the small scale category with AGPO certificates. This is also sufficient to competition*

among the eligible, (vi) No. 15: The pricing for the forest materials are based on forests (fees and charges) Regulations 2016. The prices are inclusive of 16%VAT and (vii) No. 16: In line with the Section I Clause 9 on instructions to tenderers in the Tender document, the sub-compartments are being sold "AS WHERE IT IS AND THE CONDITION IT IS IN". Bidders are encouraged to visit the sub-compartments and assess the status of materials including counting the number of stems. The forest industry investors are encouraged to enter into Joint Venture Agreements where they are not able to bid individually.

Although the Applicant considers Addendum 1 as a response to the letter dated 3rd December 2021, it nonetheless is aggrieved by the Procuring Entity's failure to respond to the request for clarification and or modification of the Tender Document as contained in the letter dated 3rd December 2021 and alleges the Procuring Entity is in breach of Section 75 of the Act and Regulation 56 of Regulations 2020.

Further, the Applicant is aggrieved with several provisions of the Tender Document which it alleges breach various provisions of the Act and Regulations 2020 as follows:-

- a) Breach of Section 60(3)(d) and (e) of the Act which requires technical requirements, where appropriate, should factor in the socio-economic impact of the item and be environment friendly. To support this allegation, the Applicant alleges that the Tender Document provides

for harvesting of materials to be carried out at the same time within all the sub-compartments which in its view will lead to serious environmental degradation, siltation of dams, reduction of water levels and rainfall.

- b) Breach of Section 53(6) of the Act which requires all procurement and asset disposal planning to reserve a minimum of 30% of the budgetary allocations for enterprises owned by women, youth, persons with disabilities and other disadvantaged groups. To support this allegation, the Applicant alleges that the Tender Document allocates AGPO investors less than 30% of materials.
- c) Breach of Section 58(2) of the Act which requires tender documents to contain sufficient information to allow for fairness, equitability, transparency, cost-effectiveness and competition among those who may wish to submit their applications. To support this allegation, the Applicant alleges that the Tender Document allocates less forest materials to investors within the Elgeyo Marakwet County.
- d) Breach of Section 60(1) of the Act which requires tender documents to provide specific requirements that allow for fair and open competition. To support this allegation, the Applicant alleges that the Tender Document provides for selling materials in cubic materials which in its view is highly disadvantageous to small scale investors or those who wish to enter joint ventures in managing their allocations in the event their tenders are successful and that allocation in volume of cubic instead of the number of trees raise the cost thus prohibitive and locks out majority of the Applicants denying them a right to earn a living.

- e) Breach of Article 227 of the Constitution for failure to draw the Tender Document in a system that is fair, equitable, transparent and competitive and cost effective.
- f) Breach of Section 3(i) and (j) of the Act. To support this allegation, the Applicant alleges, the 14 days allowed for submission of tenders does not consider the fact that a physical visit and inspection of the forests is necessary and also fails to take into account the weather patterns and size of the area.
- g) Breach of Regulation 184 (3) of Regulations 2020 which provides for tenderers to inspect disposal document prior to obtaining the document. To support this, the Applicant alleges that the Procuring Entity did not give tenderers sufficient time to inspect material prior to obtaining the Tender Document.
- h) Breach of Regulation 186 of Regulations 2020 for failure by the Procuring Entity to organize a site visit to enable tenderers to gain access to obsolete assets and make their own assessment of the items.
- i) Breach of Regulation 108 of Regulations 2020 for the Procuring Entity failure to use community participation method because, in the Applicant's view, the asset disposal herein has potential adverse effects on the environment and the local communities.

In totality, the Applicant avers that the Tender Document as drawn contravenes Article 227 of the Constitution of Kenya, 2010 (hereinafter referred to as the 'Constitution') because the same is drawn in a system that

is not fair, equitable, transparent, competitive and cost effective and from the foregoing, the Applicant stands to suffer prejudice.

Consequently, it is the Applicant's view that the tender proceedings commenced by the Procuring Entity should be terminated and the Procuring Entity be directed to consider the Applicant's submission and amend the Tender Document.

RESPONDENT'S RESPONSE

The Respondent confirms the subject tender was advertised on Tuesday 30th November 2021 and was scheduled to close on 14th December 2021 for only registered forest industry investors to tender. According to the Respondent, all tenderers were required to download the Tender Document from the Procuring Entity's website and no hard copy tender documents were issued inline with the Ministry of Health guidelines on curtailing the spread of Covid 19.

However, it is the Respondent's contention that on 10th November 2021, prior to the subject tender's closing date, the tender process was suspended by the High Court sitting in Nakuru in response to a petition filed by Timber Manufacturers Association.

The Respondent contends that in compliance with the court order, no further processing of the tender was done (including the opening of tenders) awaiting the determination of the case and that the matter is still pending in court.

In response to the specific allegations of breach of the provision of the Act, the Regulations and the Constitution raised by the Applicant in the Request for Review, the Respondent contends as follows, THAT:-

- 1) The Procuring Entity issued Addendum 1 amending and clarifying various issues raised by tenderers, had the addendum uploaded on its website on 8th December 2021, promptly responded to all requests for clarification received via email pursuant to Section 5.3 of the Tender Data Sheet and Tender Notice which required amendments to the Tender Document to be done through an addendum to be uploaded on the Procuring Entity's website and all prospective tenderers were required to regularly visit the website for any clarifications/addendum.
- 2) The Procuring Entity has in place an Environmental Impact Assessment (EIA) for each of the plantations earmarked for disposal which addresses all the applicants concerns regarding environmental impact.
- 3) In the Procuring Entity's view, Section 53(6) of the Act refers to 30 % reservation for the AGPO groups during procurement and is not explicit on disposal of assets. Nevertheless, the Procuring Entity has reserved some materials for registered forest industry investors who are also

AGPO registered to compete amongst themselves while noting forest industry is a heavy investment industry requiring AGPO registered forest industry investors to invest in machinery to be registered with the Procuring Entity.

- 4) The Procuring Entity, in line with Section 157 (4)(b) and (c) of the Act devised a reservation formula where forest industry investors irrespective of their location (inside or outside a County where the materials are being sold) are accorded fair treatment in line with Article 227 of the Constitution while noting the registered forest industry investors are distributed across all Counties and forest materials earmarked for disposal in the subject tender are only available in 12 Counties yet forest industry investors are registered under the large, medium, small scale and AGPO categories by the Procuring Entity.
- 5) The Tender Document provides for the unit of disposal as a sub-compartment which sub-compartment contains various types of forest materials required to be tendered for together, and tenderers have been given access to the sub-compartments they wish to tender and are allowed to count the number of trees in each sub-compartment. Further, where tenderers opt to tender as a joint venture and are successful, how the joint venture partners apportion materials amongst themselves is an internal arrangement amongst the joint venture partners and the Procuring Entity has no role to play in the same.

- 6) The Procuring Entity has not contravened any principles outlined in Article 227 of the Constitution.
- 7) The Procuring Entity considered prospective tenderers would visit the site prior to tendering and therefore provided 14 days which is more than the minimum time required of 7 days for preparation of tenders for purposes of Section 97(1) of the Act under Regulation 86 of Regulations 2020.
- 8) Regulation 184 (3) of Regulations 2020 provides for inspection by a potential tenderer to inspect a tender document itself prior to obtaining the document and not inspection of materials before obtaining tender document as mistaken by the Applicant.
- 9) Section 9.1 of the Tender Data Sheet of the Tender Document allowed tenderers to visit the site and assess the materials prior to submitting a tender.
- 10) Community participation being proposed by the Applicant as an ideal method for disposal of forest plantation materials is not one of the methods provided under Regulation 181 of Regulations 2020 which stipulates methods available for use for disposal of assets.

In totality the Respondent contends that the Procuring Entity has not contravened any of the principles outlined in Article 227 of the Constitution and that the Request for Review is filed in bad faith since it does not demonstrate how the Applicant will suffer prejudice because all the conditions of the tender are in line with the Act, Regulations 2020 and the Constitution.

Consequently, it is the Respondent's prayer that the Request for Review be dismissed with costs and allow the tendering process to proceed when the matter is concluded in court.

BOARD'S DECISION

The Board has considered each of the parties' cases, the documentation filed before it, including confidential documents submitted to it pursuant to Section 67 (3) (e) of the Act and finds the following issues crystalize for determination:

- I. Whether the Procuring Entity failed to respond to the clarifications and substantial changes or modification to the Tender Document sought by the Applicant together with the Interested Parties thus breaching Section 75 of the Act and Regulation 56 of Regulations 2020.***

- II. Whether the provisions of the Procuring Entity's Tender Document in the subject tender contravene Article 227 of the Constitution; Sections 3(i) and (j); 53(6); 58(2) and 60 (1), (3)(d) and (e) of the Act read with Regulations 108, 184(3) and 186 of Regulations 2020.***

The Procuring Entity brought to the attention of this Board that a petition was pending before the High Court at Nakuru in ELC Petition No. E19 of 2021 between Timber Manufacturers Association v Kenya Forest Services, the Principal Secretary, Ministry of Environment and Forestry and the Honourable Attorney General and which petition is with respect to the subject tender.

The Board notes from an order furnished to it by the Respondent and given by Hon. J. M. Mutungi, J in ELC Petition No. E19 of 2021 on 9th December 2021, Timber Manufacturers Association petitioned the High Court in Nakuru under certificate of urgency for conservatory orders to be issued staying and/or halting the further and continued tendering process of the subject tender by the Procuring Entity pending the hearing and determination of a Notice of Motion Application dated 8th December 2021. Further, that Hon. J. M. Mutungi, J, granted conservatory orders staying and/or halting the further and continued tendering process of the subject tender by the Procuring Entity pending the hearing and determination of a Notice of Motion Application dated 8th December 2021.

According to the Respondent, the petition is still pending in court and no information has been brought to the attention of the Board on the lifting or setting aside of the said conservatory orders.

We have carefully read the orders of Hon. J. M. Mutungi, J given on 9th December 2021 in ELC Petition No. E19 of 2021 between Timber Manufacturers Association v Kenya Forest Services, the Principal Secretary, Ministry of Environment and Forestry and the Honourable Attorney General and find the same does not bar us from hearing and determining the issues raised in the Request for Review.

We say so because, (i) the said conservatory orders staying and/or halting the further and continued tendering process of the subject tender by the Procuring Entity have the effect of suspending the subject tender's asset and disposal proceedings akin to the suspension that was effected immediately upon filing of the Request for Review under Section 168 of the Act and which conservatory orders do not stay and/or halt the Request for Review proceedings with respect to the subject tender before this Board, (ii) the Board is not a party to the Petition at the High Court in Nakuru and the conservatory orders are not directed to and /or against the Board, (iii) the Petitioner at the High Court in Nakuru is not a party to the Request for Review proceedings before the Board, (iv) most of the issues raised by the Applicant (save for one issue) in the Request for Review before the Board, are issues the Board is clothed with original jurisdiction to determine under Section 167 of the Act at first instance.

Having found that nothing stops us from hearing and determining the issues raised in the Request for Review, we now proceed to address the issues framed for determination.

Whether the Procuring Entity failed to respond to the clarifications and substantial changes or modification to the Tender Document sought by the Applicant together with the Interested Parties thus, breaching Section 75 of the Act and Regulation 56 of Regulations 2020.

The Applicant alleges that it is aggrieved by the Procuring Entity's failure to respond to the clarification and substantial changes or modification to the Tender Document sought by the Applicant together with the Interested Parties as contained in a letter dated 3rd December 2021 addressed to the Procuring Entity.

The letter dated 3rd December 2021 that was signed by the Chairman of Elgeyo Marakwet Industry Investors reads as follows in part:

***"Elgeyo Marakwet
Forest Industry Investors
PO BOX 545-30700
ITEN***

3/12/2021

THE CHIEF CONSERVATOR OF FORESTS

KENYA FOREST SERVICE

PO BOX 30513-00100

KARUNA-OFF KIAMBU RD

Dear Sir,

***RE: APPEAL CONSIDERATION FOR TENDER (BID NO.....
KFS/DISP/05/2021-2022***

We the undersigned forest investors form Elgeyo Marakwet County wish to thank you for lifting the memorandum on logging in state forests.

We have keenly gone through the tender document and came to a conclusion that if implemented as it is then majority of us will not meet the set conditions. And as result of this, we have decided to forward our grievances to you for intervention which are as follows:-

- (a) The allocation of more than 30 plantations to be cleared in one station i.e. Elgeyo within six months is unacceptable as it will lead into massive environmental degradation that will affect our weather pattern. We request for gradual sustainable harvesting preferably 5 plantations per year.***
- (b) The deadline of submission of the tenders is too short and we request for an extension for a period of one month to enable majority of the investors to participate.***
- (c) The two plantations namely 5A and 10H which surround Emsoo dam should not be harvested at the same time because it will cause siltation that will reduce the water levels.***
The dam is the main source of water for our people living down stream (Valley).
- (d) Allocation of plantations was done in such a way that is unfavourable to the local investors but favourable to outsiders. We request that 70% of the allocations be for the locals and 30% outsiders.***
- (e) AGPO investors should be allocated 30% of the materials as per the law.***
- (f) As local investors, we are disadvantaged by the overpricing of the forest materials considering the current economic hardships being experienced country wide due to the effects of the Covid-19 pandemic and we therefore request for the review of the prices of the materials.***

***(g) The materials have been sold in volume of cubic metres and it be very difficulty for investors who wish to work as a joint ventures to manage their allocation of materials among themselves. We therefore wish to ask service to assist to portion the plantations into smaller parts as before which will create harmony in the investors operations.
In conclusion, we will not participate in the tender process until our grievances are heard and determine urgently from your office.***

Yours faithfully

Chairman

. (signature affixed) . Date4/12/2021 . Sign . (signature affixed) .

On his part, the Respondent contends that the Procuring Entity issued Addendum 1 amending and clarifying various issues raised by tenderers by uploading the said addendum on its website on 8th December 2021. Further, that the Procuring Entity promptly responded to all requests for clarification received via email pursuant to Section 5.3 of the Tender Data Sheet and Tender Notice which required amendments to the Tender Document to be done through an addendum to be uploaded on the Procuring Entity's website

and all prospective tenderers were required to regularly visit the website for any clarifications/addendum.

The said Addendum 1 reads as follows in part:

Addendum No.1: Disposal of Forest Plantation Materials: Tender Nos KFS/05/2021-2022,,

<i>S/N</i>	<i>Issue</i>	<i>Response</i>
<i>1</i>	<i>.....</i>	<i>.....</i>
<i>2</i>	<i>.....</i>	<i>.....</i>
<i>3</i>	<i>.....</i>	<i>.....</i>
<i>4</i>	<i>.....</i>	<i>.....</i>
<i>5</i>	<i>.....</i>	<i>.....</i>
<i>6</i>	<i>6) Harvesting period of 6 months be changed to 1 year</i>	<i>The six (6) months harvesting period is to enable KFS undertake re-planting of the harvested area for sustainable forest management.</i>
<i>7</i>	<i>7) Compartment portioning</i>	<i>In line with the Public Procurement and Assets Disposal Act 2015, the sub</i>

		<p><i>compartments are being sold through open tender and the highest bidder above the reserve price will be recommended for award.</i></p> <p><i>The Forest Industry Investors are encouraged to enter into Joint Venture agreements where they are unable to bid individually.</i></p>
8	.....	.....
9	.....	.....
10	10) Allocation the sub-compartments across the various categories was not fairly done	<i>The criteria used for reservation of materials for bidding was applied uniformly across all Counties</i>
11	11) Safety of materials in the forest	<i>KFS has put mechanism in place to protect the paid for and uncollected materials. All forest Industry Investors should partner with KFS in ensuring the security of uncollected materials.</i>
12	The deadline for submission of tenders is too short and	<i>The 14 days period given is within the law</i>

	<i>we request for a period of 1 month</i>	
13	11) We request that 70% of allocations be for locals. Allocation of plantations was done in such a way that it is unfavourable to local investors but favour outsiders.	The criteria used for reservation of materials for bidding was applied uniformly across all Counties. The 70% material reservations are open to Forest Industry Investors within and outside the County within the same respective category (applies to small and medium only)
14	12) AGPO investors should be allocated 30% of the materials as per the law	The reservations for AGPO was based on the number of registered Forest Industry Investors in the small scale category with AGPO certificates. This is also subject to competition among the eligible
15	13) As local investors, we are disadvantaged by the over pricing of forest materials	The pricing for the forest materials are based on Forest (Fees and Charges)

		<i>Regulations, 2016. The prices are inclusive of 16% VAT.</i>
16	14) The materials have been sold in volume of cubic meters and is difficult for investors who wish to work as joint ventures to manage their allocations	<i>In line with the section I clause 9 on instructions to tenders in the tender document, the sub compartments are being sold "AS WHERE IT IS AND THE CONDITION IT IS IN". Bidders are encouraged to visit the sub compartments and assess the status of materials including counting the number of stems.</i> <i>The Forest Industry Investors are encouraged to enter into Joint Venture agreements where they are not able to bid individually.</i>
17	<i>.....</i>	<i>.....</i>
18	<i>.....</i>	<i>.....</i>
19	19) The sub compartments are NOT marked, boundaries not marked, items on sale	<i>Interested forest industry investors are advised to visit Forest Stations to be shown</i>

	<i>have not been separated from other forest material.</i>	<i>by the Forest Station Managers the sub compartments boundaries (forest materials) earmarked for bidding.</i>
20	.....	.....
21	.....	.....
22	.....	.....
23	.....	.....
24	.....	.....
25	.....	.....
26	<i>Unit of measure of volume</i>	<i>Each sub compartment is measured in cubic meters (M³)</i>
27	.....	.....

Clause 5.3 of Section II – Tender Data Sheet of the Tender Document reads as follows:

Any amendment to the tender document will be through addendum to the tender to be uploaded in the KFS website www.kenyaforests-service.org. Investors who wish to submit a bid

should regularly visit the KFS website during the tendering period for any addendum/clarification to the tender.

Having carefully studied the said letter dated 3rd December 2021, Addendum No.1 and Clause 5.3 of Section II- Tender Data Sheet of the Tender Document, we note, the Procuring Entity, through Addendum No.1 addressed several issues raised by prospective tenderers with respect to the subject tender. In particular to issues raised in the said letter of 3rd December 2021, the Procuring Entity through Addendum 1 clarified and/or modified the Tender Documents pursuant to all the clarifications or modifications to the Tender Document (save for the request made with respect to plantations 5A and 10H surrounding Emsoo dam) sought by the Applicant as contained in the said letter of 3rd December 2021.

Despite the Applicant admitting having construed Addendum 1 to be a response to the said letter dated 3rd December 2021, it still alleges the Procuring Entity failed to respond to clarification and substantial changes or modification to the Tender Document sought by the Applicant as contained in the letter dated 3rd December 2021, thus the Procuring Entity is in breach of Section 75 of the Act and Regulation 56 of Regulations 2020.

Section 75 of the Act reads as follows:

75. Modifications to tender documents

(1) A procuring entity may amend the tender documents at any time before the deadline for submitting tenders by issuing an addendum without materially altering the substance of the original tender.

(2) An amendment may be made on the procuring entity's own initiative or in response to an inquiry by a candidate or tenderer.

(3) A procuring entity shall promptly provide a copy of the addendum to each person to whom the procuring entity provided copies of the tender documents.

(4) The addendum shall be deemed to be part of the tender documents.

(5)

Section 75 of the Act is instructive on any permissible amendment to a tender document to be done through issuance of an addendum to all persons who have obtained tender documents from a procuring entity and which addendum, may have been triggered by, and may be issued in response to, inquiries by a candidate (such as the Applicant) within the meaning of Section 2 of the Act.

On the other hand, Regulation 56 of Regulations 2020 provides as follows:

56. Inquiries relating to tender document

(1) Where a candidate or tenderer makes an inquiry relating to the amended tender documents under section 75(2) of the Act, the procuring entity shall promptly respond in writing in both manual and through electronic mail where possible, and such correspondence shall be sent through the official communication address of the procuring entity.

(2) Where the response under paragraph (1) affects the requirements of the tender, the response shall be copied to all candidates and shall include a description of the inquiry but without identifying the source.

(3) A procuring entity shall not be bound to respond to inquiries received after the deadline for submitting inquiries stipulated in the tender document.

We understand Regulation 56 of Regulation 2020 to mean that it is only after a tender document has been amended through issuance of an addendum by a procuring entity and a candidate subsequently makes an inquiry relating to the amended tender document, that a procuring entity is obliged to respond directly to such a candidate albeit promptly and in writing. The

import of Regulation 56 of Regulations 2020 read with Section 75(2) of the Act is to the effect that a procuring entity is obliged to only copy its response to a subsequent inquiry by a candidate, following amendment of a tender document and, to all candidates if such response affects the requirement of an amended tender.

In other words, an inquiry made by a candidate with respect to an initial tender document, that has not been amended pursuant to issuance of an addendum by a procuring entity, is responded to by a procuring entity through an addendum issued to all candidates and which addendum may amend the initial tender document. Any subsequent inquiry by a candidate relating to a tender document that has already been amended by a procuring entity through issuance of an addendum to all candidates, may be responded to, by the procuring entity, directly to the candidate making such inquiry, promptly and in writing and would only be issued to other candidates if such response affects the amended tender document.

We have already noted that the Applicant admitted the Procuring Entity issued Addendum 1 to all tenderers and which addendum, the Applicant admits was a response to the said letter of 3rd December 2021. It is therefore puzzling that the same Applicant claims the Procuring Entity did not respond to the clarification and substantial changes or modification to the Tender Document sought by it. We understand the Applicant to mean that since the

Procuring Entity issued Addendum 1 to all tenderers instead of the Applicant alone, the Procuring Entity is in breach of Regulation 56 of Regulations 2020. This in our view, is a misinterpretation of Regulation 56 of Regulations 2020 by the Applicant because, the clarifications sought by the Applicant as contained in the letter dated 3rd December 2021 was with respect to an initial tender document before the said tender document was amended pursuant to issuance of Addendum 1 by the Procuring Entity uploaded on the Procuring Entity's website on 8th December 2021.

In the circumstances, we find the Procuring Entity did not breach Regulation 56 of Regulations 2020 read with Section 75 of the Act because the Procuring Entity issued Addendum 1 to all candidates by uploading the same on its website on 8th December 2021 and which addendum *inter alia*, the Applicant admits responded to the clarifications sought by it as contained in the letter dated 3rd December 2021.

Whether the provisions of the Procuring Entity's Tender Document in the subject tender contravene Article 227 of the Constitution; Sections 3(i) and (j); 53(6); 58(2) and 60 (1), (3)(d) and (e) of the Act read with Regulations 108 and 186 of Regulations 2020.

On the second issue framed for determination, the Board proceeds to make the following findings:-

1. Breach of Section 3(i) and (j) of the Act

The Applicant alleges that 14 days allowed for submission of tenders does not consider the fact that a physical visit and inspection of the forests is necessary and fails to take into account the weather patterns and size of the area which goes against the spirit of Section 3(i) and (j) of the Act.

Section 3(i) and (j) of the Act provides as follows:

3. Guiding principles

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

(a)

(b)

(c)

(d)

(e)

(f)

(g)

(h)

(i) promotion of local industry, sustainable development and protection of the environment; and

(j) promotion of citizen contractors.

We note, other than making this allegation, the Applicant did not provide any proof to support its allegation on how 14 days period provided for submission of tender interfered with promotion of citizen contractors, local industry, sustainable development and protection of the environment.

In response, the Respondent contends that the Procuring Entity considered prospective tenderers would visit the site prior to tendering and therefore provided 14 days which is more than the minimum time of 7 days provided for preparation of tenders for purposes of Section 97(1) of the Act under Regulation 86 of Regulations 2020.

Regulation 86 of Regulations 2020 provides as follows:

86. Time for preparation of open tenders

The minimum time for preparation of tenders for purposes of section 97(1) of the Act shall be a period of seven days for national and county specific tenders.

Whilst Section 97(1) of the Act provides as follows:-

97. Time for preparing tenders

(1) The time allowed for the preparation of tenders shall not be less than the minimum period of time prescribed for the purpose of this subsection.

(2) For the purpose of this section, the time allowed for the preparation of tenders shall be exclusive of the day of the tender notice.

The subject tender was floated as an open tender and eligible tenderers were registered forest industry investors. Section 97 of the Act falls under Details of Procurement Methods, A – Open Tender under Part IX – Methods of Procurement of Goods, Works and Services of the Act. This means, Section 97 is applicable to open tenders such as the subject tender. It therefore follows, that the time set for submission of tenders in an open tender, such like the subject tender, is a minimum of 7 days exclusive of the day of the tender notice in accordance with Regulation 86 of Regulations 2020 read with Section 97(2) of the Act.

It is common ground among parties herein, that the tender notice for the subject tender was advertised on 30th November 2021 and Clause 10.2 of

Section II - Tender Data Sheet at page 5 of the Tender Document provides for the deadline for submission of tenders as Tuesday 14th December at 11.00a.m. While computing the time given to tenderers for submission of their tenders, 30th November 2021 is excluded and computation of time starts running a day after 30th November 2021 which is 1st December 2021. 1st December 2021 to when the deadline for submission of tenders was scheduled on 14th December 2021 is a total of 14 days. These 14 days are more than the required minimum of 7 days provided in Regulation 86 of Regulations 2020.

We are aware the Respondent has an obligation under Section 74(1)(e) of the Act to undertake the following:-

74. Invitation to tender

(1) The Accounting Officer shall ensure the preparation of an invitation to tender that sets out the following-

(a)

(b)

(c)

(d)

(e) an explanation of where and when the tenders shall be submitted and where and when tenders shall be opened;

(f)

(g)

(h)

(i)

(j)

(2)

From the above provision, the Board notes that the discretion to state when tenders shall be submitted is vested on the Respondent, provided the Respondent ensures such discretion factors in a minimum of 7 days from the date of the advertisement of the tender notice in an open tender, such like the subject tender, in accordance with Regulation 86 of Regulations 2020 read with Section 97(2) of the Act.

The burden of proof on how a timeline of 14 days from the date of advertisement of the tender notice given by the Procuring Entity goes against the spirit of the guiding principles of promotion of citizen contractors, local industry, sustainable development and protection of the environment under Section 3 (i) and (j) of the Act lies with the Applicant. In our considered opinion, the Applicant has not discharged this burden leaving us with no option but to find the allegation unsubstantiated.

In the circumstances, the Board finds the Applicant's allegation that the 14 days provided for submission of tenders in the subject tender is unreasonable and goes against the spirit of the guiding principles of asset disposal under Section 3(i) and (j) of the Act lacks merit, as the said allegation is not supported by evidence to the satisfaction of the Board while noting the time given for submission of tenders for the subject tender was 14 days from the date of advertisement of the tender notice and which time was in excess of the required minimum of 7 days under Regulation 86 of Regulations 2020 read with Section 97(2) of the Act.

2. Breach of Section 53(6) of the Act

The Applicant alleges that the Tender Document allocates AGPO investors (investors registered as enterprises owned by women, youth, persons with disabilities) less than 30% of materials in contravention of Section 53(6) of the Act which requires all procurement and asset disposal planning to reserve a minimum of 30% of the budgetary allocations for enterprises owned by women, youth, persons with disabilities and other disadvantaged groups.

In response, the Procuring Entity interprets Section 53(6) of the Act to mean 30% reservation for the AGPO groups is required during procurement and is not explicit on disposal of assets. The Procuring Entity further contends that it nevertheless reserved some materials for registered forest industry investors who are also AGPO registered to compete amongst themselves while noting forest industry is a heavy investment industry requiring AGPO

registered forest industry investors to invest in machinery to be registered with the Procuring Entity.

Section 53(6) of the Act provides as follows:-

53. Procurement and asset disposal planning

(1)

(2)

(3)

(4) All asset disposals shall be planned by the accounting officer concerned through annual asset disposal plan in a format set out in the Regulations.

(5) A procurement and asset disposal planning shall be based on indicative or approved budgets which shall be integrated with applicable budget processes and in the case of a State Department or County Department, such plans shall be approved by the Cabinet Secretary or the County Executive Committee member responsible for that entity.

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

(7)

(8)

(9)

(10) For greater certainty, the procurement and disposal plans approved under subsection (5) shall include choice of procurement and disposal methods and certain percentages referred to under subsection (6).

(11)

In our considered opinion, Section 53 (4), (5), (6) and (10) of the Act places an obligation on the Respondent to prepare an annual asset disposal plan based on an indicative or approved budget and which plan reserves a minimum of 30% of the budgetary allocations for enterprises owned by women, youth, persons with disabilities and other disadvantaged groups. If an annual plan is based on an indicative or approved budget, such indicative or approved budget would be for a period of 12 months, i.e. an annual budget. It therefore follows that it is this annual asset disposal plan that must reserve at least 30% of the annual indicative or approved budgetary allocation for enterprises owned by women, youth, persons with disabilities and other disadvantaged groups. Put otherwise, reservation of a minimum of 30% of the budgetary allocations for enterprises owned by women, youth, persons with disabilities and other disadvantaged groups need not be

reserved for each specific or isolated asset disposal tender as long as it is achieved in the annual asset disposal plan based on the annual indicative or approved budgets for a procuring entity.

In our considered opinion, both the Applicant and the Respondent misinterpreted Section 53 (6) of the Act with the Applicant alleging less than 30% of materials in the subject tender whether alone or together with materials under Tender No: KFS/DISP/02/2021-2022 for Sale of Forest Plantation Materials (Small Scale Forest Industry Investors), Tender No: KFS/DISP/03/2021-2022 for Sale of Forest Plantation Materials (Medium Scale Forest Industry Investors) and Tender No: KFS/DISP/04/2021-2022 for Sale of Forest Plantation Materials (Large Scale Forest Industry Investors) was allocated to AGPO. On the other hand, the Respondent misinterpreted this provision alleging that it is only applicable for procurements and not explicit for asset disposal.

We note an annual asset disposal plan is prepared by an accounting officer for approval by the policy making organ of a procuring entity such as board members or a board of directors. It is therefore rational to note that the Respondent herein is the custodian of the Procuring Entity's annual asset disposal plan and which plan the Applicant may not have sight of the same unless it is furnished with the plan by the Procuring Entity in accordance with the provisions of the Act. No such annual asset plan of the Procuring Entity has been produced by any of the parties herein to prove or disprove the

Applicant's allegation that less than 30% of the material in the subject tender is allocated to AGPO.

In the absence of any proof that less than 30% of the indicative or approved budgetary allocation in the Procuring Entity's annual asset disposal plan is allocated to AGPO, the same lacks merit for being an allegation that is unsubstantiated.

3. Breach of Section 60 (1), (3)(d) and (e) of the Act

The Applicant alleges the Tender Document provides for selling materials in cubic meters which in its view is highly disadvantageous to small scale investors or those who wish to enter joint ventures in managing their allocations in the event their tenders are successful and that allocation in volume of cubic instead of the number of trees raise the cost thus prohibitive locking out majority of the Applicants and denying them a right to earn a living in breach of Section 60(1) of the Act which requires tender documents to provide specific requirements that allow for fair and open competition. Further, the Applicant alleges that the Tender Document provides for harvesting of materials to be carried out at the same time within all the sub-compartments which in its view will lead to serious environmental degradation, siltation of dams, reduction of water levels and rainfall in breach of Section 60(3)(d) and (e) of the Act which requires technical requirements, where appropriate, should factor in the socio-economic impact of the item being disposed and to be environment friendly.

In response, the Respondent contends that the Tender Document provides for the unit of disposal as a sub-compartment which sub-compartment contains various types of forest materials required to be tendered for together, and tenderers have been given access to the sub-compartments they wish to tender and are allowed to count the number of trees in each sub-compartment. Further, where tenderers opt to tender as a joint venture and are successful, how the joint venture partners apportion materials amongst themselves is an internal arrangement amongst the joint venture partners and the Procuring Entity has no role to play in the same. Finally, the Procuring Entity contends it has in place an Environmental Impact Assessment (EIA) for each of the plantations earmarked for disposal and which EIA addresses all the applicants concerns regarding environmental impact but no such EIA is produced as evidence before the Board.

The Respondent under Section 60 of the Act has the obligation to undertake the following:-

60. Specific Requirements

(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)

From the above provision, the Board notes the Respondent is required to 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. This discretion is vested on the Procuring Entity, provided that it ensures such requirements allow for fair and open competition.

The Applicant while challenging the technical requirements of use of cubic meters when selling materials in the subject tender and harvesting of materials being carried out at the same time provided by the Respondent in the Tender Document, fails to demonstrate by way of evidentiary proof how such requirements in the Tender Document disadvantages small scale investors or those who wish to enter into joint ventures and the likelihood of serious environmental degradation, siltation of dams, reduction of water levels and rainfall.

In the absence of such proof, we cannot dictate the technical requirements that the Respondent ought to specify in the Tender Document, save that the Respondent must bear in mind the need to promote open and fair competition among all tenderers who may wish to participate in the asset disposal process and where appropriate the technical requirements factor in the socio-economic impact of the item being disposed and be environment friendly.

Accordingly, the Board finds that the Applicant's allegations that the use of cubic meters when selling materials in the subject tender is unfair to small scale investors and harvesting of materials being carried out at the same time will result to environmental degradation in breach of Section 60(1), (3) (d) and (e) of the Act lacks merit, as the said allegations are not supported by evidence to the satisfaction of the Board and in any case we do agree with the Respondent that apportioning of materials amongst joint venture

partners is an internal arrangement amongst joint venture partners and the Procuring Entity has no role to play in the same.

4. Breach of Regulation 108 of Regulations 2020

The Applicant alleges that the asset disposal herein has potential adverse effects on the environment and the Procuring Entity ought to have used community participation method under Regulation 108 of Regulations 2020 but the Procuring Entity failed to do so thus breaching Regulation 108 of Regulations 2020.

In response, the Respondent contends that community participation being proposed by the Applicant as an ideal method for disposal of forest plantation materials is not one of the methods provided under Regulation 181 of Regulations 2020 which stipulates methods available for use for disposal of assets.

Regulation 108 of Regulations 2020 provide as follows:

108. Community participation method

(1) Pursuant to section 92 (m) of the Act, a procuring entity may involve a beneficiary community to participate in the delivery of services if it is established that it shall contribute to—

(a) the economy;

(b) value for money;

(c) project sustainability; and

(d) socio-economic objectives such as creation of employment.

(2) Community participation method may involve two approaches, namely—

(a) direct community participation; or

(b) organized community participation through the appointment of community based service providers.

On the other hand, Regulation 181 of Regulations 2020 provides as follows:

181. Methods of disposal

(1) A procuring entity shall ensure that the disposal method is approved by the accounting officer.

(2) Despite the provisions of Section 165(1) of the Act, an accounting officer of a procuring entity may use additional methods of disposal as may be gazetted by the Cabinet Secretary from time to time.

Section 165(1) of the Act provides as follows:

165. Methods of disposal

(1) Subject to prescribed provisions, an accounting officer of a procuring entity may dispose assets by a method which may include any of the following—

(a) transfer to another public entity or part of a public entity, with or without financial adjustment;

(b) sale by public tender;

(c) sale by public auction;

(d) trade-in;

(e) waste disposal management; or

(f) as may be prescribed.

(2) Despite subsection (1) or any other provisions of this Act, radioactive or electronic waste shall be disposed of only to persons licensed to handle the respective waste under section 88 of the Environmental Management and Co- ordination Act, 1999.

However, Section 167 (4) of the Act provides as follows:

167. Request for a review

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

(2)

(3)

(4) The following matters shall not be subject to the review of procurement proceedings under subsection (1)—

(a) the choice of a procurement method;

(b); and

(c)

By dint of Section 167(4)(a) of the Act, we have no jurisdiction to hear and determine a matter on choice of procurement method since such an issue cannot be subject to review of procurement proceedings. In the circumstances, we shall not comment further on this issue.

5. Breach of Regulation 184(3) of Regulations 2020

The Applicant alleges that the Procuring Entity did not give tenderers sufficient time to inspect material prior to obtaining the Tender Document in breach of Regulation 184 (3) of Regulations 2020 which provides for tenderers to inspect disposal document prior to obtaining the document.

In response, the Respondent contends that Regulation 184 (3) of Regulations 2020 provides for a potential tenderer to inspect a tender document itself prior to obtaining the document and not inspection of materials before obtaining tender document as mistaken by the Applicant.

Regulation 184(3) of Regulations 2020 provides as follows:

184. Disposal documents and proceedings

(1)

(2)

(3) In all asset disposal proceedings, a procuring entity—

(a) shall allow a potential bidder to inspect the disposal document prior to obtaining the document;

(b)

(c)

(d)

(4)

(5)

(6)

(7)

From the above provision of Regulation 184(3) of the Act, it is clear that inspection of the disposal document (Tender Document) is what is done prior to obtaining the same and not inspection of the materials/items being disposed in the subject tender. The Procuring Entity has confirmed that no hard copies of the Tender Document were issued to any candidate but candidates were required to download the same from the Procuring Entity's website. The Applicant admits that it obtained the Tender Document by downloading the same from the Procuring Entity. It therefore follows, that the Applicant had an opportunity to inspect the Tender Document online before printing out the same.

We agree with the Respondent that the Applicant misinterpreted Regulation 184(3)(a) of Regulations 2020 to mean inspection of materials being disposed in the subject tender when the correct interpretation is inspection

by a prospective tenderer of the Tender Document itself. In the circumstances, this allegation by the Applicant that tenderers were not given sufficient time to inspect materials lacks merit.

6. Breach of Regulation 186 of Regulations 2020

The Applicant alleges that the Procuring Entity has failed to organize a site visit to enable tenderers to gain access to obsolete assets and make their own assessment of the items in breach of Regulation 186 of Regulations 2020.

In response, the Respondent contends that Section 9.1 of the Tender Data Sheet of the Tender Document allowed tenderers to visit the site and assess the materials prior to submitting a tender.

Regulation 186 of Regulations 2020 provide as follows:

186. Site visit for the public

A procuring entity shall organize a site visit to enable bidders to gain access to the unserviceable stores or surplus or obsolete assets or equipment to make their own assessment of the items.

Clause 9.1 of Section I – Instructions to Tenderers of the Tender Document provides as follows:

Prospective tenderers are advised to view the items to be sold before tendering. This will enable them to arrive at the most reasonable and competitive tenders. Tenders are based on " AS WHERE IT IS AND THE CONDITION IT IS IN" and the conditions of the items are not guaranteed or warranted.

Clause 9.1 of Section II – Tender Data Sheet (TDS) of the Tender Document provides as follows:

Tenderers are required to visit the forest area during normal working hours (8.am to 5pm) before submitting their bids. The condition of the materials is not warranted by KFS.

It is clear that the Procuring Entity provided for site visit in the Tender Document to enable prospective tenderers gain access to the forest area during normal working hours to view the items to be sold and to enable prospective tenderers to arrive at the most reasonable and competitive

tenders before submitting their tenders . In the circumstances this ground for review fails.

6. Breach of Section 58(2)of the Act and Article 227 of the Constitution

The Applicant alleges that the Tender Document allocates less forest materials to investors within Elgeyo Marakwet County in breach of Section 58(2) of the Act which requires tender documents to contain sufficient information to allow for fairness, equitability, transparency, cost-effectiveness and competition among those who may wish to submit their applications. Further, the Applicant alleges that the Tender Document as drawn contravenes Article 227 of the Constitution for failure to draw the same in a system that is fair, equitable, transparent and competitive and cost effective.

In response, the Respondent contends that the Procuring Entity in line with Section 157(4) (b) and (c) of the Act, devised a reservation formula where forest industry investors irrespective of their location (inside or outside a County where the materials are being sold) are accorded fair treatment in line with Article 227 of the Constitution while noting registered forest industry investors are distributed across all Counties and forest materials earmarked for disposal in the subject tender are only available in 12 Counties and forest industry investors are registered by the Procuring Entity under large, medium, small scale and AGPO categories. Further, the Procuring

Entity contends that it has not contravened any principles outlined in Article 227 of the Constitution.

Section 58(2) of the Act provides as follows:-

58. Standard procurement and asset disposal documents

(1) An accounting officer of a procuring entity shall use standard procurement and asset disposal documents issued by the Authority in all procurement and asset disposal proceedings.

(2) The tender documents used by a procuring entity under subsection (1) shall contain sufficient information to allow fairness, equitability, transparency, cost-effectiveness and competition among those who may wish to submit their applications.

Article 227 of the Constitution provides as follows:

227. Procurement of public goods and services

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...

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

The law contemplated under Article 227 (2) (a) and (b) is the Act, which outlines several preference and reservation schemes under Part XII thereof. Section 157(4)(b) and (c) of the Act which falls under Part XII of the Act provides that:-

157. Participation of candidates in preference and reservations

(1)

(2)

(3)

(4) For purpose of protecting and ensuring the advancement of persons, categories of persons or groups previously disadvantaged by unfair competition or discrimination, reservations, preferences shall apply to –

(a)

(b) micro, small and medium enterprises;

(c) works, services and goods, or any combination thereof;

(d)

(e)

.....

.....

We note the Applicant has failed to demonstrate by way of empirical data that the Tender Document provides for less forest materials to investors within Elgeyo Marakwet County noting that forest industry investors are not forbidden from tendering for forest materials within other Counties with respect to items not reserved for registered forest industry investors within a County. This in our opinion accords fair treatment in line with Article 227 of the Constitution. Accordingly, this ground for review fails.

In totality of the second issue framed for determination and in the circumstances outlined hereinbefore, we find the Procuring Entity's Tender Document in the subject tender did not contravene Article 227 of the Constitution; Sections 3(i) and (j); 53(6); 58(2) and 60 (1), (3)(d) and (e) of the Act read with Regulations 108, 184(3) and 186 of Regulations 2020.

Given the forgoing, the Request for Review lacks merit and the same is ripe for dismissal.

FINAL ORDERS

In exercise of the powers conferred upon it by section 173 of the Act, the Board makes the following orders with respect to Request for Review dated 9th December 2021:-

- 1. The Request for Review dated 9th December 2021 with respect to Tender No. Tender No: KFS/DISP/05/2021-2022 for Sale of Forest Plantation Materials (AGPO Registered Small Scale Forest Industry Investors) be and is hereby dismissed.**
- 2. Given the procurement process of Tender No. Tender No: KFS/DISP/05/2021-2022 for Sale of Forest Plantation Materials (AGPO Registered Small Scale Forest Industry Investors) is not complete, each party will bear its own costs of the Request for Review.**

Dated at Nairobi this 6th day of January 2022.



CHAIRPERSON

PPARB



SECRETARY

PPARB