

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 64/2021 OF 3RD MAY 2021

BETWEEN

ENERGY SECTOR CONTRACTORS ASSOCIATION.....APPLICANT

AND

THE ACCOUNTING OFFICER,

KENYA ELECTRICITY TRANSMISSION

COMPANY LIMITED.....RESPONDENT

Review against the decision of the Accounting Officer of Kenya Electricity Transmission Company Limited in issuing a Bidding Document relating to ICB No. KETRACO/PT/009/2021 for Procurement of 132kV Underground Cable Nanyuki-Rumuruti Transmission Line, Volume 1 and 2.

BOARD MEMBERS

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|---------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Dr. Joseph Gitari | -Member |
| 3. Mr. Nicholas Mruttu | -Member |
| 4. Ms. Phyllis Chepkemboi | -Member |
| 5. Ms. Rahab Chacha | -Member |

IN ATTENDANCE

Mr. Stanley Miheso	-Holding brief for the Acting Board Secretary
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BACKGROUND TO THE DECISION

Introduction

The Government of Kenya received a Supplementary Finance loan from the African Development Bank in respect of the Ethiopia-Kenya Electricity Highway Project pursuant to a Multinational Loan Agreement executed on 19th June 2019 between the Republic of Kenya and the African Development Bank (hereinafter referred to as 'AfDB'). Subsequently thereafter, the Government of Kenya executed a Subsidiary Grant Agreement on 18th August 2020 with Kenya Electrical Transmission Company Limited (hereinafter referred to as "the Procuring Entity") as the Project Executing Agency to the effect that proceeds of the loan would be used for the Construction of the 132kV Nanyuki-Rumuruti Underground Cable.

The Bidding Process

A General Procurement Notice regarding Procurement of 132kV Underground Cable Nanyuki-Rumuruti Transmission Line Volume 1 and 2 to be undertaken by the Procuring Entity was published on the AfDB's website (www.afdb.org) on 15th July 2019. Further, the Procuring Entity published a Specific Procurement Notice dated 3rd February 2021 on its Website (www.ketraco.co.ke) inviting sealed tenders for ICB No. KETRACO/PT/009/2021 for Procurement of 132kV Underground Cable Nanyuki-Rumuruti Transmission Line Volume 1 and 2 (hereinafter referred to as "the subject tender"). The Specific Procurement Notice made reference to the General Procurement Notice published on AfDB's Website. Prospective

Bidders were instructed that a complete set of bidding documents is available on the Procuring Entity's website.

Pre-Bid Site Visit

The Procuring Entity carried out a pre-bid site visit on 3rd March 2021 at the 132kV Nanyuki Sub-Station/Line Route attended by the representative of the Procuring Entity and forty-one prospective bidders.

Issuance of Addenda

The Procuring Entity issued Addendum No. 1 and 2 in response to queries made by prospective bidders. Thereafter, the tender submission deadline was extended to 4th May 2021.

THE REQUEST FOR REVIEW

M/s Energy Sector Contractors Association (hereinafter referred to as "the Applicant") lodged a Request for Review dated 3rd May 2021 and filed on even date together with a Statement in Support of the Request for Review sworn on 3rd May 2021 and filed on even date through the firm of Kinoti & Kibe Company Advocates, seeking the following orders:

- a) An order annulling the Bidding Document for Procurement of Plant, Design, Supply and Installation; Procurement of 132kV Underground Cable Nanyuki-Rumuruti Transmission Line***

Volume 1 And 2 ICB No: KETRACO/PT/009/2021 and the entire procurement process in relation thereto;

- b) An order directing the Procuring Entity to prepare a new Tender Document that is devoid of discrimination and one that allows for fair competition;***
- c) An order directing the Procuring Entity to comply with the law on preference and reservations as set out in the Constitution, the Public Procurement and Asset Disposal Act, 2015 and the Public Procurement and Asset Disposal Regulations, 2020;***
- d) An order directing the Procuring Entity to unbundle the subject procurement to allow for wider participation by Kenyan firms;***
- e) An order awarding costs of and incidental to these proceedings; and***
- f) Such further or other orders as the Honourable Board may deem just.***

In response, the Respondent lodged a Notice of Preliminary Objection dated 7th May 2021 and filed on 10th May 2021 together with a Response to the Request for Review dated 10th May 2021 and filed on even date through the firm of Sagana, Biriq & Company Advocates.

Pursuant to the Board's Circular No. 2/2020 dated 24th March 2020 detailing the Board's administrative and contingency management plan to mitigate the effects of Covid-19 pandemic, the Board dispensed with physical hearings and directed that all request for review applications would be

canvassed by way of written submissions. Clause 1 at page 2 of the said Circular further specified that pleadings and documents would be deemed as properly filed if they bear the official stamp of the Board. Accordingly, the Applicant lodged Written Submissions dated 19th May 2021 and filed on 20th May 2021 while the Respondent lodged Written Submissions dated 20th May 2021 and filed on 21st May 2021.

BOARD'S DECISION

The Board has considered each of the parties' pleadings together with the confidential documents submitted to it 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: -

1. Whether the Board has jurisdiction to entertain the Request for Review;

In order to address the above issue number 1, the Board will make a determination with respect to the following two sub-issues:

1.1. Whether the subject procurement process meets the conditions set out in section 4 (2) (f) of the Act read together with Regulation 5 of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as 'Regulations 2020'), thus ousting the jurisdiction of the Board; and

- 1.2. Whether the subject procurement process meets the conditions set out in section 6 (1) of the Act read together with Article 2(5) and (6) of the Constitution, thus ousting the jurisdiction of this Board.**

Depending on the outcome of the above issue:

- 2. Whether the provisions of the Procuring Entity's Bidding Document in the subject tender contravene Article 227 of the Constitution; Section 3 (a), (i) and (j); 70(6)(e)(vi) and (k); 86(2); 89(f); 155 and 157 of the Act read together with Regulations 143, 144, 148 and 165 of Regulations 2020 in respect of the following;**
 - 2.1. Exclusion of Preference and Reservation Schemes under ITB Clause 31.2 of Section II. Bid Data Sheet of the Bidding Document;**
 - 2.2. Unbundling of the tender into practicable quantities;**
 - 2.3. Cash Flow Requirements under Clause 2.3.3 of Section III. Evaluation and Qualification of the Bidding Document;**
 - 2.4. Average Annual Turnover under Clause 3.2 of Section III. Evaluation and Qualification Criteria of the Bidding Document;**
 - 2.5. Specific Experience under Clause 2.4.2 of Section III. Evaluation and Qualification Criteria of the Bidding Document;**

2.6. Criteria of Providing Certificate in Project Management pursuant to Clause 2.5 (3) of Section III. Evaluation and Qualification Criteria of the Bidding Document; and

2.7. Requirements for Sub-Contractors/Manufacturers outlined in Clause 2.7 of Section III. Evaluation and Qualification Criteria of the Bidding Document

The Respondent lodged a Notice of Preliminary Objection dated 7th May 2021 and filed on 10th May 2021 on the following grounds:

"The Public Procurement Administrative Review Board does not have jurisdiction to hear and determine the application for the reasons that:

a) The tender forming part of the subject procurement proceedings is wholly financed by the African Development Bank on the borrowing of the Government of Kenya and is thus exempt from the jurisdiction of the Public Procurement Administrative Review Board (PPARB) pursuant to section 4 (2) (f) of the Public Procurement and Asset Disposal Act, 2015.

b) The subject tender to which the instant procurement proceedings herein relates to is financed by a Bilateral Agreement between the Government of Kenya and the African Development Bank through Kenya Transmission Company Limited (Procuring Entity). The Bilateral

contract excludes the jurisdiction of the Public Procurement Administrative Review Board by dint of section 6 (1) of the Public Procurement and Asset Disposal Act, 2015 as read with Article 2 (5), (6) of the Constitution of Kenya, 2010."

In **Civil Appeal Application No. 4 of 2019, Charles Onchari Ogoti v Safaricom Limited & another [2020] eKLR**, the court cited the famous decision in **Mukisa Biscuit Manufacturing Co. Ltd –vs- West End Distributors Ltd (1969) EA 696** which explains the nature of a preliminary objection as follows:

What constitutes a Preliminary Objection is set out in the case of Mukisa Biscuit Manufacturing Co. Ltd –vs- West End Distributors Ltd (1969) EA 696, where it was held that:

"a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration"

The Preliminary Objection raised by the Respondent opposes the jurisdiction of the Board to entertain the Request for Review. It is trite law that courts and decision making bodies can only act in cases where they have jurisdiction. In the Court of Appeal case of **The Owners of Motor Vessel**

"Lillian S" v. Caltex Oil Kenya Limited (1989) KLR 1, it was held that jurisdiction is everything and without it, a court or any *other decision making body* has no power to make one more step the moment it holds that it has no jurisdiction.

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

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

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

"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with Counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality;

it goes to the very heart of the matter for without jurisdiction the Court cannot entertain any proceedings."

The decision of the Supreme Court in *Samuel Kamau Macharia Case* is very critical in determining where the jurisdiction of this Board flows from.

This Board is a creature of statute owing to the provision of section 27 (1) of the Act which provides that: -

"27. Establishment of the Public Procurement Administrative Review Board

(1) There shall be a central independent procurement appeals review board to be known as the Public Procurement Administrative Review Board as an unincorporated Board."

Further, Section 28 of the Act provides as follows: -

"28. Functions and powers of the Review Board

(1) The functions of the Review Board shall be—

- (a) reviewing, hearing and determining tendering and asset disposal disputes; and***
- (b) to perform any other function conferred to the Review Board by this Act, Regulations or any other written law."***

The above provisions demonstrate that the Board is a specialized, central independent procurement appeals review board with its main function being reviewing, hearing and determining tendering and asset disposal disputes. The jurisdiction of the Board is provided in section 167 (1) of the Act, which provides that: -

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

Section 4 (1) of the Act provides that the Act applies to all State organs and public entities with respect to:

- a) Procurement planning;
- b) Procurement processing;
- c) Inventory and asset management;
- d) Disposal of assets; and
- e) Contract management.

However, section 4 (2) of the Act provides the procurements and asset disposals to which the Act is not applicable. Specifically, section 4 (2) (f) of the Act provides that:

4 (1)

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

(a)

(b)

(c)

(d)

(e)

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

Having established the Board is a creature of the Act, it means the jurisdiction of the Board emanates from the Act. However, if a procurement and disposal of assets satisfies the conditions set out in section 4 (2) (f) of the Act, application of the Act is ousted. Consequently, the jurisdiction of the Board would be ousted in a case where application of the Act is ousted, because jurisdiction of the Board is anchored in the Act.

Before addressing its mind on the import of section 4 (2) (f) of the Act, the Board considered parties' rival arguments in their respective pleadings and written submissions and notes that at paragraph 37 to 41 of the Respondent's Response to the Request for Review, the Respondent avers that the subject procurement process is funded by a negotiated loan between the Government of Kenya and the AfDB. According to the Respondent, pursuant to a Multinational Loan Agreement dated 19th June 2019 (hereinafter referred to as the 'Multinational Loan Agreement', the AfDB provided Supplementary Financing to the Government of Kenya in the sum of Twenty-Six Million, Five Hundred and Ten Thousand Euros (EUR 26,510,000.00) in respect of the Ethiopia-Kenya Electricity Highway Project. Pursuant to Clause 5.6 of the said Multinational Loan Agreement, the Government of Kenya executed a Subsidiary Grant Agreement with the Procuring Entity on 18th August 2020 (hereinafter referred to as the 'Subsidiary Grant Agreement'). It is by this Subsidiary Grant Agreement that the Government of Kenya would make the proceeds of the loan from AfDB available to the Procuring Entity as a grant to facilitate implementation of the project that is geared towards integration of the power systems of Eastern Africa Power Pool (EAPP) member countries to promote power trade and regional integration whilst creating a backbone power transmission network that will connect the EAPP and the Southern African Power Pool.

According to the Respondent, AfDB published a General Procurement Notice on 15th July 2019 in respect of the subject tender. Further, on 3rd February 2021, the Procuring Entity published a Specific Procurement Notice, making reference to the General Procurement Notice published on the website of

AfDB and inviting sealed tenders from eligible bidders for the execution of works under the subject tender. The Respondent referred to Clause 4 of the General Procurement Notice to support its submission that procurement of goods and works in the subject tender would be undertaken in accordance with the Bank's Rules of Procedure for Procurement of Goods and Works and that acquisition of the services of Consultants will apply the AfDB's Rules of Procedure for the Use of Consultants (May 2008 Edition, Revised July 2012). The Respondent further avers that a Specific Procurement Notice was also published on the Procuring Entity's website on 4th February 2021.

In conclusion, the Respondent referred to several provisions of the Multinational Loan Agreement, the Subsidiary Grant Agreement and the Bidding Document to support his submissions that the jurisdiction of the Board to entertain the Request for Review is ousted by dint of section 4 (2) (f) and 6 (1) of the Act read together with Article 2(5) and (6) of the Constitution because the Government of Kenya and a foreign agency (AfDB) are parties to the Multinational Loan Agreement.

In paragraphs 15 to 42 of its Written Submissions, the Applicant submitted that the mere fact that donor funds are to be used in financing a particular procurement does not automatically oust the jurisdiction of the Board to determine a dispute relating to a particular procurement neither does it oust the application of the provisions of the Act. In the Applicant's view, the Procuring Entity has an obligation under section 3 of the Act of ensuring a procurement complies with the principles outlined in the Act and the Constitution. Whilst citing previous decisions of the Courts and this Board

regarding the import of section 4 (2) (f) and 6 (1) of the Act, the Applicant submitted that the Respondent failed to demonstrate the existence of any factual basis for relying on section 4 (2) (f) and 6 (1) of the Act to exclude application of the Act and jurisdiction of the Board. Accordingly, the Applicant urged the Board to dismiss the preliminary objection raised by the Respondent and to consider the merits of the Request for Review.

Having considered parties' cases, the Board notes that on 19th June 2019, the Republic of Kenya (represented by Mr. Henry Kiplagat Rotich, the former Cabinet Secretary for the Ministry of National Treasury and Planning) and AfDB (represented by Mr. Gabriel Negatu, Director General for East Africa Regional Development and Business Delivery Office) executed the Multinational Loan Agreement for Supplementary Financing for the Ethiopia-Kenya Electricity Highway Project. The Multinational Loan Agreement was preceded by another Loan Agreement dated 6th December 2012 entered between the Republic of Kenya and the African Development Fund (hereinafter referred to as the 'Loan Agreement'). An overview of the terms of the Loan Agreement is described in Recital Clause (A) of the Multinational Loan Agreement as follows:

"The Borrower [Republic of Kenya] and the African Development Fund ("the Fund") entered into a Loan Agreement dated 6th December 2012, Loan NO. 2100150027845 whereby the Fund provided a loan to the Borrower in an amount not exceeding Seventy-Five Million Units of Account (UA75,000,000) (the "Initial Loan") to

finance part of the Ethiopia-Kenya Electricity Highway Project (the "Project") as further described in Schedule 1 of this Agreement"

Recital Clauses (B), (C), (D) and (E) of the Multinational Loan Agreement provide details of the "Supplementary Financing" extended to the Republic of Kenya and identifies the Procuring Entity as the "Executing Agency" of the Project. The aforementioned recital clauses state as follows:

- "(B) The Borrower has requested the Bank [African Development Bank] to provide a loan out of its resources as supplementary financing to assist in financing the Project;***
- (C) The Kenya Electricity Transmission Company Limited ("KETRACO") shall be the Executing Agency for the Project;***
- (D) The Borrower has declared its commitment to the execution of the Project; and***
- (E) The Bank has agreed on the basis, inter alia, of the foregoing to extend to the Borrower as a loan to the amount specified in Section 2.01 (Amount) of this Agreement on the terms and conditions set forth or referred to in this Agreement."***

Section 2.01 referred to in the foregoing excerpt is found in Article II of the Multinational Loan Agreement. The said provision states as follows:

"The Bank agrees to lend to the Borrower, on the terms and conditions set forth or referred to in this Agreement, a loan of an amount not exceeding Twenty Six Million Five Hundred and Ten Thousand Euros (EUR 26,510,000) which amount may be converted from time to time through a currency conversion in accordance with the provisions of Article IV of this Agreement and the Conversion Guidelines (the Loan) to assist in financing the Ethiopia-Kenya Electricity Highway Project as further described in Schedule 1 (Project Description) to this Agreement (the Project)"

Schedule 1 of the Multinational Loan Agreement deals with Allocation of the Loan in two categories identified as; Consulting Services and Works. The Project Description is provided at page 15 of the Multinational Loan Agreement as follows:

"The objective of the Project is to support the integration of the power systems of Eastern Africa Power Pool (EAPP) member countries to promote power trade and regional integration and further create a backbone power transmission network that interconnects the EAPP and Southern African Power Pool"

Further, the Project is divided into five components described on page 15 of the Multinational Loan Agreement as follows:

"Component A: Construction of Interconnector

- i. Sub-Component A1 finances the construction of about 1,045 km of bipolar 500kV HVDC overhead transmission line to interconnect the electricity network of Ethiopia at the Wolayta Sodo converter station with the Kenya network at the Suswa converter station.*
- ii. Sub-Component A2 finances the engineering design, construction and commissioning of one converter sub-station on each end of the 500kV HVDC transmission line-one in Ethiopia and one in Kenya*

Component B *finances the construction of network reinforcements in Kenya of the sub-stations and other parts of the network necessary to integrate regional interconnections.*

Component C *finances the strengthening of the Project management and implementation arrangements through provision of training for Joint Project Coordination Unit and the National Project Implementation Units of procurement and financial management, environmental and social management*

Component D *is financing the engagement of a Supervision Consultant to supervise construction of the project*

Component E *is financing the implementation of the Environmental and Social Management*

The Loan will provide supplementary financing for the construction of (i) 400/220kV Mariakani substation to

improve the power transfer capacity, adequacy and security to the Kenya Coastal Region and (ii) the 16.5 km of 132kV underground cable to interconnect Nanyuki and Rumuruti substations

Since the Procuring Entity was identified as an "Executing Agency" of the Project, it entered into a Subsidiary Grant Agreement with the Government of Kenya. Page 2 of the Subsidiary Grant Agreement makes reference to both the Loan Agreement and the Subsidiary Grant Agreement as follows:

- "(a) By a Loan Agreement (hereinafter "LA"), the Government and the African Development Fund (the Fund) entered into a Loan Agreement dated 6th December 2012, Loan No. 2100150027845 whereby the Fund provided a loan to the Borrower in the amount not exceeding Seventy-Five Million Units of Account (UA75,000,000) (the Initial Loan) to finance part of the Ethiopia-Kenya Electricity Highway Project (the Project);***
- (b) By a Financing Agreement (hereinafter "Supplementary Financing Agreement") made on the 19th day of June 2019, between the Government and the African Development Bank (hereinafter referred to as "ADB" or the "Lender"), ADB agreed to make available to the Government, a loan of an amount not exceeding Twenty-Six Million Five***

Hundred and Ten Thousand Euros (EUR 26,510,00), (the Loan), as supplementary financing for the Ethiopia-Kenya Electricity Highway Project as further described in Article 2 below.

- (c) The objective of the Project is to support the integration of the power systems of Eastern Africa Power Pool (EAPP) member countries to promote power trade and regional integration and further create a backbone power transmission network that interconnect the EAPP and Southern African Power Pool.***
- (d) The Government has agreed to extend to Kenya Electricity Transmission Company Limited the proceeds of the Loan in the form of a Grant for the implementation of the Project.***
- (e) KETRACO confirms that it has the necessary capacity to undertake the implementation responsibilities required under the Project;***
- (f) KETRACO has agreed to accept the proceeds of the Loan in form of a Grant from the Government upon the terms and conditions hereinafter set forth.”***

It is evident from the foregoing that vide the Loan Agreement, the African Development Fund provided a loan of Seventy-Five Million Units of Account

(UA75,000,000) (the Initial Loan) to the Republic of Kenya to finance part of the Ethiopia-Kenya Electricity Highway Project.

Further, pursuant to a Multinational Loan Agreement, AfDB provided a loan of Twenty-Six Million Five Hundred and Ten Thousand Euros (EUR 26,510,00), (the Loan), as supplementary financing for the Ethiopia-Kenya Electricity Highway Project. Subsequently vide the Subsidiary Grant Agreement, the Government of Kenya through the Ministry of National Treasury and Planning extended a grant to the Procuring Entity, as the Executing Agency, for construction of (i) 400/220kV Mariakani substation to improve the power transfer capacity, adequacy and security to the Kenya Coastal Region and (ii) the 16.5 km of 132kV underground cable to interconnect Nanyuki and Rumuruti substations (the subject tender).

In order to understand the import of section 4 (2) (f) of the Act, the Board interrogated the parties named under the said provision. Justice Odunga in **Miscellaneous Application No 402 of 2016 (Consolidated with Misc. Application No. 405 Of 2016), Republic v. Public Procurement Administrative Review Board & another Ex parte Athi Water Service Board & Another [2017] eKLR** (hereinafter referred to as "the Athi Water Case") at paragraphs 152 to 154 thereof pronounced himself on the import of section 4 (2) (f) of the Act as follows: -

[152] The issue for determination was whether the instant procurement was a Procurement and disposal of assets under bilateral or multilateral agreement between the government

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

[153] In this case, the Procuring Entity, Athi Water Services Board, is a Parastatal created under section 51 of the Water Act 2002 with perpetual succession and a common seal, with power, in and by its corporate name, to sue and be sued. It's not the Government of Kenya. In the instant procurement, the Government of Kenya was not a party to the procurement and accordingly the Procurement is not exempted under section 4(2) (f).

154. Again the other party in the procurement must be either a Foreign Government, foreign government Agency, foreign government Entity or Multi-lateral Agency. Neither the second applicant nor the interested parties, who were the bidders before the Board were either a Foreign Government, foreign

government Agency, foreign government Entity or Multi-lateral Agency. On this limb also the procurement is not exempted.

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

"61. It is notable that the determinant factor that was found relevant by the Respondent in assuming jurisdiction in this case was that the subject tender involved the use of donor funds which were to be repaid back by the Kenya public at the end of the day. It however did not engage in any determination of the nature of the ouster clause that was provided for by section 4 (2) (f), and in particular abdicated its discretion and duty to make a finding as to whether the subject procurement process was being undertaken pursuant to a bilateral grant agreement between the Government of Kenya and a foreign international entity, which was what was in issue and was specifically raised and canvassed by the parties as shown in the foregoing.

62. This Court also notes that the Applicant in this regard annexed a copy of the agreement that was entered into

between the Government of Kenya and the Nordic Development Fund that it relied upon. The agreement was annexed to a supplementary affidavit that it filed with the Respondent on 16th April 2018.

- 63. *In my view, a reading of section 4 (2) (f) shows that the operative action is procurement under a bilateral agreement entered into by the Government of Kenya and a foreign government or agency, and not procurement by the Government of Kenya. One of the meanings of the word "under" in the Concise Oxford English Dictionary is "as provided for by the rules of; or in accordance with". The plain and ordinary meaning and contextual interpretation of section 4 (2) (f) of the Act is therefore a procurement that is undertaken as provided for or in accordance with the terms of a bilateral agreement that is entered into between the Government of Kenya and a foreign government, entity or multi-lateral agency is exempted from the provisions of the Act.***
- 64. *It was in this respect incumbent upon the Respondent to satisfy itself that section 4(2) (f) was not applicable before assuming jurisdiction, especially as the said section was an evidential ouster clause that was dependent on a finding that the subject procurement was one that was being undertaken pursuant to a***

bilateral agreement between the Government of Kenya and a foreign Government or entity.

- 65. *The Respondent in its finding equated the requirements of section 4 (2) (f) to the use of funding under a loan or grant where the Government of Kenya is a party, whereas the section specifically states that the Respondent should satisfy itself that the procurement is not being made pursuant to the terms of a bilateral treaty or agreement between the Government of Kenya and a foreign government, entity or multilateral agency.***
[Emphasis by the Board]

Having considered the findings in the above cases, the Board notes, in the KPLC Case, Justice Nyamweya faulted the Board for its failure to consider the applicability of the bilateral agreement which was the subject of proceedings before the Board, in order for the Board to make a determination on the import of section 4 (2) (f) of the Act. This Board cannot therefore ignore the import of the said provision of the Act.

Justice Odunga in the "*Athi Water Case*" took the view that jurisdiction of this Board would be ousted by section 4 (2) (f) of the Act where parties to a procurement are: -

- i. The Government of Kenya; and**

- ii. The other party being either; a Foreign Government, Foreign Government Agency, Foreign Government Entity or Multi-lateral Agency.

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

- i. The Government of Kenya; and
- ii. The other party being either; a foreign government, agency, entity or multilateral agency (termed as foreign international entities at paragraph 61 of the judgement by Justice Nyamweya).

In the Athi Water Case, the parties to the bilateral agreement were the International Development Association and the Government of Kenya whereas the procuring entity was identified as Athi Water Services Board and the procuring entity applied national competitive bidding procedures. In the KPLC Case, the parties to the bilateral agreement were Nordic Development Fund and the Government of Kenya while the implementing agency was identified as Kenya Power and Lighting Company to undertake the procurement on behalf of the Government of Kenya, as its agent and the procuring entity applied international competitive bidding procedures. Secondly, the Guidelines applicable to the Athi Water Case and the KPLCE Case was the World Bank Guidelines: Procurement of Goods, Works and Non-Consulting Services under IBRD credits and grants by World Bank

Borrowers, (Revised on 1st July 2014) and specifically noted in the procuring entity's advertisement notice in both cases.

It is also worth pointing out that apart from interrogating the parties to the bilateral agreement, the Court in the KPLC Case also established whether the procurement was undertaken under a bilateral agreement or multilateral agreement between the Government of Kenya and any other foreign government, agency, entity or multilateral agency

In the KPLC Case, Justice Nyamweya adopted the definition of the word "under" as provided in the Concise English Dictionary and held as follows at paragraph 63 of the judgement:

"In my view, a reading of section 4(2)(f) shows that the operative action is procurement under a bilateral agreement entered into by the Government of Kenya and a foreign government or agency, and not procurement by the Government of Kenya. One of the meanings of the word "under" in the Concise Oxford English Dictionary is "as provided or by the rules of; or in accordance with". The plain and ordinary meaning and contextual interpretation of section 4(2)(f) of the Act is therefore a procurement that is undertaken as provided for or in accordance with the terms of a bilateral agreement that is entered into between the Government of Kenya and a foreign government, entity or multi-lateral agency is exempted from the provisions of the Act"

It therefore follows that apart from interrogating the parties to the bilateral agreement relied upon by the Respondent herein, the Board must also establish whether the subject procurement is being undertaken in accordance with the terms and conditions of the said bilateral agreement.

The Multinational Loan Agreement names the Republic of Kenya as the Borrower and the AfDB as the Lender. AfDB's Official Website (www.afdb.org) describes the Bank as follows:

"The African Development Bank (the "Bank") is an 'AAA' rated regional multilateral development finance institution, established in 1963, with a mandate to further economic development and social progress of African countries, individually and collectively. 80 member countries including all the 54 African countries and 26 non-African countries in the Americas, Europe and Asia own the Bank.

The Bank's principal functions include: (i) using its resources for the financing of investment projects and programs relating to the economic and social development of its Regional Member Countries (RMCs); (ii) the provision of technical assistance for the preparation and execution of development projects and programs; (iii) promoting investment in Africa of public and private capital for development purposes; and (iv) to respond to requests for assistance in coordinating development policies and plans of RMCs"

The above excerpts support the view that AfDB is a multilateral development finance institution (multilateral agency), that supports economic development and social progress of African countries, individually and collectively. It therefore follows that the parties to the Multinational Loan Agreement are the Republic of Kenya and a multilateral agency known as AfDB.

The Procuring Entity's Website (www.ketraco.co.ke) describes the Procuring Entity in the following terms:

"KETRACO was incorporated on 2nd December 2008 and registered under the Companies Act, Cap 486 pursuant to Sessional Paper No. 4 of 2004 on Energy. We are a 100% Government owned state corporation, regulated under the State Corporations Act, Cap 446.

Our mandate is to plan, design, construct, own, operate and maintain the high voltage electricity transmission grid and regional power interconnectors that form the backbone of the National Transmission Grid"

In order to understand what the Government of Kenya means, the Board considered the meaning provided in the Black's Law Dictionary (8th Edition) as: -

- "1. The structure of principles and rules determining how a State or organization is regulated;***
- 2. The sovereign power in a Nation or State;***

- 3. *An organization through which a body of people exercises political authority; the machinery by which sovereign power is expressed...***

Section 2 of the Interpretation and General Provisions Act, defines the term 'government' as: -

"the Government of Kenya"

The Board notes that Article 1 of the Constitution begins by stating that: -

- "1 (1) *All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with the Constitution***
- (2) *.....***
- (3) *Sovereign power under this Constitution is delegated to the following State organs which shall perform their functions in accordance with this Constitution—***
- (a) *Parliament and the legislative assemblies in the county governments;***
- (b) *the national executive and the executive structures in the county governments; and***
- (c) *the Judiciary and independent tribunals.***
- (4) *The sovereign power of the people is exercised at—***

(a) the national level; and

(b) the county level"

According to Article 131 (1) (a), the President is ***"the Head of State and Government"***. On its part, Article 189 (1) (a) of the Constitution of Kenya, 2010, provides that: -

"Government at either level (national and county government) shall perform its functions, and exercise its powers, in a manner that respects the functional and institutional integrity of government at the other level, in the case of county government, within the county level. "

In order for the sovereign power of the People of Kenya to be exercised, the Constitution provided structures in the form of Government at the National level and County level within which such sovereign power is exercised. At the National level of Government, the Constitution identifies three arms of government under which such sovereign power is exercised that is, the Executive, Legislature and the Judiciary. Chapter Nine of the Constitution further explains how executive authority may be exercised, in particular, Article 129 (1) of the Constitution states that: -

"Executive authority derives from the people of Kenya and shall be exercised in accordance with the Constitution"

Further, Article 130 (1) states that: -

"The National Executive of the Republic of Kenya comprises the President, the Deputy President and the rest of the Cabinet"

The Constitution of Kenya donates sovereign power to the People of Kenya. However, such sovereign power is to be exercised in accordance with the Constitution through delegation to various state organs identified in Article 1 (3) (a), (b) and (c) of the Constitution. Simply put, delegation of powers to various state organs is provided in the Constitution to ensure that power is not vested in the hands of few, but is clearly donated to the three arms of government so that none should have excessive powers. Justice Ojwang' (Rtd) in his book, **"The Constitutional development in Kenya: Institutional adaptation and social change (1990) (Revised Edition, 2013)"**, at page 41 thereof stated as follows: -

"With the promulgation of the Constitution of Kenya in 2010 it became clearer, the separation of powers from the previous more powerful constitutional dispensation that had a President with unfettered powers to influence the Legislature and Judiciary. It was also augmented that Kenya had presidential absolutism. The people of Kenya delegated their sovereign power under the Constitution to the Legislature, Executive and the Judiciary at both national and county levels."

It is the Board's considered view that, the Government of Kenya is headed by a President who is the Head of State and Head of Government. In order

to give full effect to the exercise of executive authority on behalf of the People of Kenya, the President as the Head of Government, has the obligation to define executive structures that would undertake functions of the executive. To that end, Ministries, Departments, Agencies and other Institutions undertake functions which fall under the executive arm of government. This is not to say that Heads of such Ministries, Departments, Agencies and other Institutions are the Head of Government of Kenya, noting that some of the said departments, agencies and institutions have their own establishing laws and management structures, but may undertake certain functions that help achieve government policies in their capacity as implementing institutions or agencies. Institutions and agencies implement government functions for the simple reason that it is impracticable to expect that the Head of State would carry out all government policies when elected President single handedly without the help of other institutions and agencies.

The Official Website of the Procuring Entity describes it as 100% Government owned state corporation, regulated under the State Corporations Act, Chapter 446, Laws of Kenya. The Procuring Entity has a Board of Directors headed by a Chairman and a Management Team led by a Managing Director/CEO. However, this does not mean that the Chairman of the Board of Directors is Head of Government because the Procuring Entity has its own establishing laws (State Corporations Act, Chapter 446 of the Laws of Kenya) and management structures. To that end, the Procuring Entity's key mandate is to plan, design, construct, own, operate and maintain the high voltage electricity transmission grid and regional power interconnectors that form

the backbone of the National Transmission Grid in its capacity as an implementing institution of the Government of Kenya.

Accordingly, parties to the Subsidiary Grant Agreement are the Government of Kenya and the Procuring Entity (as an implementing or executing agency). The Procuring Entity is not the Government of Kenya neither is it a foreign agency.

Clause 4 of the General Procurement Notice provides that:

"Procurement of goods and works will be in accordance with the Bank's Rules of Procedure for the Procurement of Goods and Works, Acquisition of the services of Consultants will follow the Bank's Rules of Procedure for the Use of Consultants (May 2008 Edition, Revised July 2012)."

The General Procurement Notice mentions that procurement of goods and works would be undertaken in accordance with the **"Bank's Rules of Procedure for the Procurement of Goods and Works."** On the other hand, Acquisition of services of Consultants would be undertaken in accordance with the **"Bank's Rules of Procedure for the Use of Consultants (May 2008 Edition, Revised July 2012)."**

The Respondent did not furnish the Board with the **"Bank's Rules of Procedure for the Procurement of Goods and Works"** referred to in Clause 4 of the General Procurement Notice for the Board to interrogate its provisions to ascertain whether the said **"Bank's Rules of Procedure for**

the Procurement of Goods and Works provided the terms and conditions for undertaking the subject procurement process.

Furthermore, the Respondent did not provide the **"Bank's Rules of Procedure for the Use of Consultants (May 2008 Edition, Revised July 2012)"** which is stated to be applicable to Acquisition of services of Consultants.

The Board studied provisions of the Multinational Loan Agreement and notes that Section 7.01 and 7.03 of Article VII found on page 9 of thereof provides as follows:

- "7.01. All Goods, Works, Non-Consulting Services and Consulting Services required for the Project and to be financed out of the proceeds of the Loan shall be procured in accordance with the requirements set forth or referred to in the Procurement Framework and the Borrower's Procurement Plan for the Project set forth in Schedule III (Procurement Plan) of this Agreement which may be amended from time to time in accordance with Section 7.03 (Procurement Plan) of this Agreement.**
- 7.02. Unless the context otherwise requires, the capitalized terms used in this Article including those describing particular procurement methods or methods of review by the Bank of particular**

contracts, have the meanings ascribed to them in the Procurement Framework

7.03. Before the Date of the Loan Agreement, the Borrower shall submit to the Bank for its approval, an updated Procurement Plan in form and substance satisfactory to the Bank, covering the entire Project implementation period. Any subsequent revisions or updates to the Procurement Plan shall be made in writing with the Bank's prior approval"

The Respondent did not furnish to the Board, the Procurement Framework referred to in Clause 7.01 of the Multinational Loan Agreement in its confidential file submitted to the Board or among the documents attached to its Response to the Request for Review. According to Section 7.01 outlined hereinbefore, the said Procurement Framework ought to have set out the requirements for the procurement of Goods, Works, Non-Consulting Services and Consulting Services.

The Board observes that the Procurement Plan referred to in Section 7.01 set out hereinbefore is found in Schedule II (and not Schedule III as referenced in Section 7.01) at page 17 of the Multinational Loan Agreement. The said Procurement Plan appears as follows:

Procurement Plan for Works

Package Description	Contract Amount in EUR	Procurement Method	Pre- or Post- Qualification	Prior or Post Review	SPN Publication Date	Contract Start Date	Comments
Mariakani 400kV Substation EPC Contractor Contract	25,733,450,88	Open Competitive Bidding (OCB) International	Post	Prior	06-Jan-15	25-Jan-16	Procured
Nanyuki-Rumuruti 132kV underground s Cable EPC Contractor Contract	12,866,725.44	OCB International	Post	Prior	04-Jul-19	08-Nov-19	

Procurement Plan for Consultancy Services

Description	Contract Amount in EUR	Selection Method	Prior/Post Review	EOI Publication Date	Contract Start Date	Comments
Consultancy Contract Project Management & Supervision	1,887,119.73	SSS	Prior	04-Jan-19	14-Mar-2019	

The Board observes that the Procurement Plan provided the contract amount to be used in implementing the subject tender, use of the International Open Competitive Bidding and tentative dates for some activities in the subject tender. However, the said procurement plan does not provide terms and conditions for implementation of the subject tender in terms of applicable laws for the procurement and the appropriate forum for bidders in resolving disputes arising during the procurement process.

Further, the Subsidiary Grant Agreement provides under Article 7 and 8 as follows:

"Article 7: Amendments, Settlement of Disputes and Applicable law

- 7.1. KETRACO shall refrain from any act or omission that may prejudice the obligations of the Government under this Subsidiary Grant Agreement.***
- 7.2. Amendments or additions to this Subsidiary Grant Agreement shall be made in writing supplemental hereto and duly executed by the parties to this Subsidiary Grant Agreement.***
- 7.3. No undue delay in exercising or the non-exercising by the Government of any of its rights as provided for by the Subsidiary Grant Agreement shall be regarded as a waiver of such rights.***
- 7.4. Except as ADB shall otherwise agree, the Government shall not assign, amend, abrogate or waive the Subsidiary Grant Agreement or any of its provisions.***
- 7.5. Notwithstanding the foregoing, in the event of a conflict between the provisions of the Supplementary Financing Agreement and this Supplementary Grant Agreement, the provisions of the Supplementary Financing Agreement shall prevail.***

7.6. Any dispute, controversy or claim between the Parties as to matter arising out of or in connection to this Agreement that cannot be settled amicably within thirty (3) days of the commencement of such negotiations shall be settled by arbitration in accordance with the Nairobi Centre for International Arbitration (NCIA) Rules.

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

Article 8: Procurement of Works and Services

8.1. KETRACO will undertake the procurement of works and services and award of contracts relating to the implementation of the Project in accordance with the ADB's Procurement Rules and as further set out in the Procurement Plan provided in Annex II"

It is worth pointing out that the Subsidiary Grant Agreement mentions the AfDB's Procurement Rules which were not furnished to the Board. Further, the Procurement Plan referred to in Clause 8.1 of the Subsidiary Grant Agreement is the same one outlined hereinbefore, which we found does not provide terms and conditions for implementation of the subject tender in terms of applicable laws for the procurement and the appropriate forum for bidders in resolving disputes arising during the procurement process.

Further, reference to dispute resolution via arbitration in accordance with the Nairobi Centre for International Arbitration Rules relates to obligations of the Government of Kenya vis-à-vis those of the Procuring Entity in so far as use of the grant to implement the subject tender is concerned. We say so because parties to Subsidiary Grant Agreement are the Government of Kenya and the Procuring Entity and Article 3 of the Subsidiary Grant Agreement provides that:

"Government

- (i) The Government declares its commitment to the objective of the Project, to this end, the Recipient shall cause Component A, B, C, D and E (as relevant) to be carried out through KETRACO***
- (ii) The Government shall exercise its rights and perform its obligations under this Subsidiary Grant Agreement in such a manner as to protect its interests and the interests of ADB and to accomplish the purposes of the Loan***

KETRACO

- (i);***
- (ii) KETRACO shall conduct its affairs in such manner as to protect the interest of the Government and to accomplish the purposes of the Loan"***

It therefore follows, should any of the parties to the Subsidiary Grant Agreement fail to fulfill their respective obligations, they shall have recourse through arbitration as against the other party. In such an instance, the Subsidiary Grant Agreement provides that the Laws of the Republic of Kenya are applicable.

On the other hand, bidders would not invoke any of the provisions in the Subsidiary Grant Agreement if they want to exercise any right or remedy arising from the subject procurement process.

The Bidding Document applicable to the subject tender provides at Clause 1.2 of Section I. Instructions to Bidders on page 8 that:

"Unless otherwise stated, throughout this Bidding Document definitions and interpretations shall be as prescribed in Section VII, General Conditions."

The Board studied the provisions of the General Conditions to Contract of and notes that Clause 1.2.1 found on page 137 of the Bidding Document deals with Law and Language of the Contract (which we note applies to the procurement pursuant to Clause 1.2 of Section I. Instructions to Bidders). The said Clause provides as follows:

"The Contract shall be governed by the law of the country or other jurisdiction stated in the Particular Conditions."

Lastly, Clause 1.4 of Section VIII. Particular Conditions of the Bidding Document provides that the Governing Law is that of the **"Republic of**

Kenya.” These provisions would be invoked by bidders in exercise of their rights and remedies in the procurement process as opposed to the provisions in the Subsidiary Grant Agreement.

It is evident from the foregoing that the General Procurement Notice, the Multinational Loan Agreement and the Subsidiary Grant Agreement do not provide the terms and conditions relating to the manner in which the subject procurement process would be undertaken in terms of applicable laws for the procurement other than the Laws of Kenya and the appropriate forum for bidders in resolving disputes arising during the procurement process. Furthermore, the Procurement Plan furnished to the Board does not oust application of the Act. Lastly, the Procurement Framework and the Bank's Rules of Procedure for the Procurement of Goods and Works referred to in Clause 4 of the General Procurement Notice were not furnished to the Board for the Board to interrogate whether the two provided the terms and conditions for undertaking the subject procurement process. The Bidding Document confirms the Board's position that the Laws of Kenya are applicable to the subject procurement process.

It is the Board's considered view that, it was never the intention of Parliament that, all procurements and disposal of assets under bilateral or multilateral agreements between the Government of Kenya and any other foreign government, agency, entity or multilateral agency, would be exempted from application of the 2015 Act. It therefore follows that the import of section 4 (2) (f) of the Act must not be construed narrowly, in

order to give effect to Article 227 of the Constitution which guides procurement of goods and services by a State organ or public entity. We say so because Regulation 5 (1) of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as "Regulations 2020") state that:

"Where any bilateral or multilateral agreements are financed through negotiated loans for the procurement of goods, works or services, the Act shall not apply where the agreement specifies the procurement and asset disposal procedures to be followed"

In the instant Review, the Respondent has failed to substantiate its allegation that the Multinational Loan Agreement specifies the procurement and asset disposal procedures to be followed other than the ones outlined in the Act so as to oust application of the Act and jurisdiction of the Board. We say so because the Multinational Loan Agreement made reference to AfDB's Rules of Procedure for the Procurement of Goods and Works and a Procurement Framework which were never provided to the Board, for the Board to interrogate their contents.

In summary, having studied the documents filed before it and authorities cited by parties, the Board finds that the Multinational Loan Agreement and the Subsidiary Grant Agreement fail to satisfy the threshold of section 4 (2) (f) of the Act so as to oust application of the Act and consequently, to oust the jurisdiction of the Board because the Respondent failed to provide the AfDB's Rules of Procedure for the Procurement of Goods and Works and the

Procurement Framework for the Board to interrogate their contents in determining whether they settle the manner in which the subject procurement would be undertaken.

As regards the second limb of the first issue framed for determination, the issue of conflict with any obligations of the Republic of Kenya arising from a treaty, agreement or other convention ratified by Kenya, and to which Kenya is a party, section 6 (1) of the Act provides as follows: -

"Subject to the Constitution, where any provision of this Act conflicts with any obligations of the Republic of Kenya arising from a treaty, agreement or other convention ratified by Kenya and to which Kenya is party, the terms of the treaty or agreement shall prevail"

The Board observes that section 6 (1) of the Act takes cognizance of the application of treaties, agreements and conventions ratified by Kenya by dint of Article 2 (5) and (6) of the Constitution which provides as follows: -

"2 (5) The general rules of international law shall form part of the law of Kenya.

(6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution"

This provision supports the view that the Republic of Kenya cannot rely on its procurement law where there is a conflict with any obligations of the Republic of Kenya arising from a treaty, agreement or other convention ratified by Kenya and to which Kenya is a party. In case of a conflict, such a procurement should be governed by the terms of the treaty, agreement or other convention ratified by Kenya and to which Kenya is a party, forms part of the laws of Kenya by virtue of Article 2 (6) of the Constitution. This position was reiterated by Justice Nyamweya in the *KPLC Case* cited hereinbefore at paragraphs 55-57 as follows: -

"[55] *In addition, section 6 resolves any conflict between the Act and the terms of any treaty, agreement or convention to which the Government of Kenya is a party, by providing that the terms of the treaty and agreement shall supersede and apply, subject to the provisions of the Constitution.*

[56] *This exemption is in line with the legal position that the enforcement of international agreements is governed by international law, and in particular the law relating to treaties, and even though many of the functions of such agreements may be analogous to those of domestic law, their efficacy is not judged in the same manner as domestic law because they operate between parties on an international level and are more likely to result in difficulties of interpretation and enforcement. The main purpose*

of the section is to avoid subjecting foreign countries and agencies to domestic law, and to facilitate international comity and co-operation with such foreign countries and agencies

[57] It is also expressly provided for by Article 2(5) and (6) of the Constitution that the general rules of international law shall form part of the law of Kenya, and that any treaty or convention ratified by Kenya shall form part of the law of Kenya under the Constitution.” [Emphasis by the Board]

The High Court in **Miscellaneous Application 116 of 2016 Republic v Public Procurement Administrative Review Board & 2 others Ex-parte Coast Water Services Board & another [2016] eKLR** while considering section 6 (1) of the Repealed Act held that: -

“...It is in this light that in my view Parliament enacted section 6 (1) of the repealed Act which provides as follows-

.....

In other words, the provisions of the Act (that is, the Repealed Act) applied to all obligations of the Country whether arising from treaties or other agreements to which the Country is a party and would supersede any provisions contained in the said treaties or agreement save that they would not apply to negotiated grants and loans.

The question however, is whether there was a conflict between the provisions of the Act and the conditions imposed by the donors. In my view, even assuming there was such a conflict, section 6 (1) does not deprive the Board of the jurisdiction to entertain a matter that falls within its jurisdiction. What section 6 (1) provides is that where there is a conflict between the provisions of the Act and the terms and conditions of the donor in instances of negotiated grants or loans the Board in determining the dispute ought to take into account the fact that those terms and conditions supersede the provisions of the Act. In my view the Board's jurisdiction would only be ousted if the terms and conditions of the agreement expressly excluded the application of the repealed Act.

Having considered the findings of the court in the above case, the Board observes that the provision of section 6 (1) of the Repealed Act is not similar to section 6 (1) of the 2015 Act. According to section 6 (1) of the Repealed Act, provisions of the said Repealed Act would not prevail where they conflict with any obligations of the Republic of Kenya arising from a treaty or other agreement to which Kenya is a party in instances of negotiated grant or loans. In the absence of negotiated grants or loans, the provisions of the Repealed Act would prevail. On the other hand, where any provision of the 2015 Act, conflicts with any obligations of the Republic of Kenya arising from a treaty, agreement or other convention ratified by Kenya and to which

Kenya is party, the terms of the treaty or agreement shall prevail as stated in section 6 (1) thereof. It is therefore immaterial whether or not there are negotiated grants or loans under section 6 (1) of the Act. In essence, the import of section 6 (1) of the Act is as follows:

- i.** The main purpose of section 6 (1) of the Act is to avoid subjecting foreign countries and agencies to domestic law, and to facilitate international comity and co-operation with such foreign countries and agencies;
- ii.** Section 6 (1) of the Act does not automatically oust the jurisdiction of the Board by virtue of a mere existence of obligations of the Republic of Kenya arising from a treaty, agreement or other convention ratified by Kenya and in which Kenya is a party;
- iii.** The Board must have due regard to the terms and conditions of the treaty, agreement or other convention to establish whether or not a conflict exists; and
- iv.** The Board's jurisdiction would only be ousted if the terms and conditions of the treaty, agreement or other convention expressly exclude application of the Act.

Turning to the circumstances in the instant review, the Board observes that the Respondent did not point out any provision of the Act that is in conflict with the Multinational Loan Agreement. As already observed hereinbefore, the Respondent did not furnish the Board with the Bank's Rules of Procedure for the Procurement of Goods and Works referred to in Clause 4 of the General Procurement Notice and the Procurement Framework for the Board

to interrogate their provisions vis-à-vis the provisions of the Multinational Loan Agreement and the Act. The Bidding Document confirms the Board's position that the Laws of Kenya are applicable to the subject procurement process and the Board has not been referred to any existing conflict.

In the circumstances, the Board finds that the Respondent did not point out the specific provisions of the Act that are in conflict with the Multinational Loan Agreement, the Subsidiary Grant Agreement and the Bidding Document, so as to exclude application of the Act in order for the jurisdiction of the Board to be ousted.

Accordingly, the Board finds that the threshold of section 6 (1) of the Act has not been satisfied because, the Respondent did not point out the specific provisions of the Act that are in conflict with the Multinational Loan Agreement, the Subsidiary Grant Agreement and the Bidding Document, so as to exclude application of the Act in order for the jurisdiction of the Board to be ousted.

In totality of the first issue framed for determination, the Board finds that it has jurisdiction to entertain the Request for Review and shall now address the substantive issues framed for determination.

On the first limb of the second issue framed for determination, the Applicant averred at paragraph 1.12 of its Request for Review that ITB Clause 31.2 of Section II. Bid Data Sheet of the Bidding Document excludes application of domestic or regional preference in contravention of the Act. According to the Applicant, this exclusion is discriminatory to citizen contractors. In response,

the Respondent avers at paragraph 48 to 50 of his Response to the Request for Review that the Applicant made a blanket allegation of discrimination without adducing evidence to substantiate such allegation. At paragraph 70 of his Response, the Respondent states that the preference provided in section 155 of the Act limits application of the same to Kshs. 1,000,000,000.00 which is below the contract sum of the subject tender.

Before addressing our mind on the import of ITB Clause 31.2 of Section II. Bid Data Sheet of the Bidding Document, the Board would like to make an observation that the Applicant stated that the said provision is discriminatory to citizen contractors. Despite this allegation, the Board takes cognizance that the subject tender is an open tender that applies International Competitive Bidding Procedures otherwise known as an international open tender.

ITB Clause 31.2 of Section II. Bid Data Sheet of the Bidding Document states that: -

"A margin of domestic or regional preference shall not apply"

Having found that the 2015 Act applies to the subject tender, it is worth noting that the Act provides for several preference and reservation schemes where a procuring entity applies international competitive bidding procedures, to give effect to the guiding principles under section 3 (i) and (j) of the Act which state that: -

"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) the national values and principles provided for under Article 10;***
- (b) the equality and freedom from discrimination provided for under Article 27 (c);***
- (d);***
- (e);***
- (f);***
- (g);***
- (h);***
- (i) promotion of local industry, sustainable development and protection of the environment; and***
- (j) promotion of citizen contractors."***

These principles would serve no purpose if the same are excluded by a procuring entity in its procurement process despite express provisions of the Act requiring application of preference and reservations under section 155 of the Act. Therefore, provisions of the Procuring Entity's Bidding Document must be in conformity with the Act whenever it procures for goods and services in order to ensure the guiding principles under section 3 (i) and (j) of the Act can be achieved.

In so far as international tenders are concerned, Section 89 (f) of the Act provides that: -

"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

It is worth noting that section 89 (f) of the Act expressly states that the provisions of section 155 of the Act will apply where international tendering and competition is used in order to afford local and citizen contractors the preferences and reservations set out in section 155 of the Act.

Section 155 of the Act provides that: -

"155. Requirement for preferences and reservations

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

(2) Subject to availability and realization of the applicable international or local standards, only such manufactured articles, materials or supplies wholly mined and

produced in Kenya shall be subject to preferential procurement.

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

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

(b) *firms where Kenyans are shareholders.*

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

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

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

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

Further, section 86 (2) of the Act states that: -

"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”

On its part, section 157 of the Act provides that: -

"157 (1);

(2);

(3);

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

(a) candidates such as disadvantaged groups;

(b) micro, small and medium enterprises;

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

(d) identified regions; and

(e) such other categories as may be prescribed

(5);

(6);

(7)

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

(a) exclusive preferences shall be given to citizens of Kenya where: -

(i) the funding is 100% from the national government or county government or a Kenyan body; and

(ii) the amounts are below the prescribed threshold;

(iii) the prescribed threshold for exclusive preference shall be above five hundred million shillings

(9) 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

Section 89 (f) read together with section 155 and 157 (9) of the Act cited hereinbefore makes it mandatory (rather than discretionary) in international competitive bidding 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 and for the preferences set out in section 155 of the Act to be applied during evaluation.

The Respondent stated that the preference provided in section 155 of the Act limits application of the same to Kshs. 1,000,000,000.00 which is below the contract sum of the subject tender. In addressing this allegation, the Board notes that the threshold cited by the Procuring Entity as Kshs. 1,000,000,000.00 applies to exclusive preference under section 157 (8) of the Act. Pursuant to section 2 of the Act "exclusive preference" is a reservation in procurement and asset disposal procedures. The term reservation is defined in section 2 as follows:

"reservations" means exclusive preference to procure goods, works, and services set aside to a defined target group of tenderers within a specified threshold or region"

Regulation 163 of Regulations 2020 provides that:

"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 above provisions support the view that exclusive preference is given to citizens of Kenya where the value of the tender does not exceed Kenya Shillings One Billion for procurements in respect of road works, construction materials and other materials used in transmission and conduction of electricity of which the material is made in Kenya as stated in Regulation 163 of Regulations 2020.

That notwithstanding, the Act already provides other types of preference and reservations schemes applicable when a procuring entity applies international competitive bidding procedures. As already observed by the Board, section 89 (f) read together with section 157 (9) of the Act cited hereinbefore makes it mandatory (rather than discretionary) in international competitive bidding 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.

Accordingly, the Board finds that ITB Clause 31.2 of Section II. Bid Data Sheet of the Bidding Document contravenes the provisions of Section 3 (i) and (j); 89 (f) and 157 (9) of the Act for ousting application of a margin of domestic preference in the subject tender.

On the second limb of the second issue framed for determination, the Applicant averred at paragraph 1.6 (vi) of the Request for Review that the Procuring Entity's failure to unbundle the project under the subject tender is an attempt to favour foreign firms (contractors). In response, the Respondent avers at paragraph 69 of his Response that the nature and scope of the project to be implemented under the subject tender cannot be unbundled due to the complexity of the design, manufacture, laying and commissioning of the project. To support this assertion, the Respondent referred to Regulation 154 of Regulations 2020 to support his view that unbundling of a tender into smaller lots is discretionary and not mandatory. It is the Respondent's position that the subject tender is a complex and demanding project requiring quality assurance and consistency. To that end, it is practically impossible to have one underground cable divided and implemented by different contractors. Furthermore, the risks associated with negligence in underground cabling requires the highest standards of quality assurance and precautionary measures.

In addressing the third issue, the Board considered the meaning of **"unbundling"** and notes that George Ofori in the book, ***Contemporary Issues in Construction in Developing Countries (Routledge, 2012)*** explained the importance of unbundling of works in construction projects in the following terms: -

"Contractors are often unable to bid for work because the contracts are too large for them. There are strong pressures from donors and businesses to combine requirements into larger and fewer contracts in order to derive benefits from

economies of scale and lower administration costs. Letting projects in smaller contracts (unbundled) increases competition and give lower prices, as it allows a greater number of local contractors to bid for the work. Unbundling is allowed by the World Bank and many country procurement regulations as long as it can be shown that the objective is to increase local content” [Emphasis by the Board]

From the above excerpt, the Board observes that unbundling of procurement works helps to promote competition, in that local contractors (and citizen contractors) would have an opportunity to participate in the tendering process, since the contracts would be divided into smaller contracts and would therefore encourage participation by local contractors. This would serve as a way of promoting the local industry as required by section 3 (i) and (j) of the Act.

At paragraph 69 (ii) of his Response to the Request for Review, the Respondent referred to section 54 of the Act and stated the same is not applicable in the instant review but nonetheless, the provision bars splitting of contracts. Section 54 of the Act states as follows:

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

The above provision states that splitting of contracts is when a procuring entity structures two or more procurements in order to avoid the use of a

procurement procedure. Regulations 2020 provides the threshold matrix for the methods of procurement that a procuring entity is supposed to take into account when choosing the appropriate method of procurement. Therefore, a procuring entity should not split contracts in order to avoid a method specified in the Act.

This is different from unbundling of procurements whose intention is to spread a tender through smaller contracts known as lots in order to encourage participation by local contractors. Regulation 154 of Regulations 2020 provides that:

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

(2) For greater certainty a procuring entity in unbundling procurements in paragraph (1) may lot goods works or services in quantities that are affordable to specific target groups participating in public procurement proceedings"

It is evident from the foregoing that unbundling of a tender into lots is discretionary. The main purpose of unbundling of a tender into practical

quantities is to ensure maximum participation of citizen contractors disadvantaged groups small micro and medium enterprises in public procurement.

According to Clause 1.6.1 found on page 14 of Volume 2 of the Bidding Document, the works to be implemented in the subject tender are described as follows:

"The overall underground cable system shall include;

- ***1.5km of double circuit underground cable system with single pilot fibre in concrete trench installation***
- ***11.5 km of double circuit underground cable system with single pilot fibre in directly buried installation***
- ***3.8km of triple circuit underground cable system with two pilot fibre in directly buried installation***
- ***0.4 km of single circuit system with single pilot fibre system in directly buried installation***
- ***Three class "B" road crossings via micro tunneling***
- ***Three access entrance (gate) crossings via micro tunneling***

The Board observes that the Applicant did not provide any evidence of a previous project that is similar in complexity and nature with the subject tender. The Applicant did not adduce evidence of a similar project that was unbundled into smaller lots and successfully implemented after the unbundling. The Board would like to distinguish the circumstances of the instant case to those in **PPARB Application No. 2 of 2020, Energy**

Sector Contractors Association v. The Accounting Officer, Kenya Power and Lighting Company Limited & Another (hereinafter referred to as "Review No. 2 of 2020") wherein the applicant adduced evidence of its members having undertaken a similar project in previous phases of the project being implemented by Kenya Power and Lighting Company Limited in relation to the tender in dispute in **Review No. 2 of 2020**. In that case, the Board held as follows:

"The Applicant and the Procuring Entity referred the Board to the List of Contractors who were the successful bidders in the 10 Lots advertised in Phase 1 of the Last Mile Connectivity Project and the Bidding Document used for that purpose. Both parties confirmed that these were public documents published in the Procuring Entity's and MyGov Publication Website (i.e. www.kplc.co.ke and www.mygov.go.ke respectively), pursuant to Executive Order No. 2 of 2018, which requires all public procurement contracts awarded by a procuring entity to be published.

In line with the theory enunciated by Jeremy Bentham, the Board observes that it would produce the greatest amount of good for the greatest number of people for the Procuring Entity to unbundle the procurement of design, supply, installation and commissioning of extensions of MV Lines, LV Single Phase Lines and Service Cables for the Last Mile Connectivity Project into smaller contracts otherwise known

as lots, to encourage maximum participation of local and citizen contractors.”

In **Review No. 2 of 2020**, the applicant provided evidence of its member's participation in previous phases of the Last Mile Connectivity Project implemented by Kenya Power and Lighting Company Limited to support its allegation that the Last Mile Connectivity Project could be unbundled into smaller lots. However, in the instant case, the Applicant has not provided evidence of successful implementation of 132kV Underground Cabling in smaller lots but merely made an allegation that failure to unbundle the subject tender is discriminatory to citizen contractors without proof to substantiate its case.

In the absence of proof to the contrary, the Board finds that Applicants allegation that the Procuring Entity failed to unbundle the subject tender so as to favour foreign contractors, has not been substantiated to the satisfaction of the Board.

On the third limb of the second issue framed for determination, the Board notes that the Applicant challenged the Cash Flow requirements provided in the Bidding Document by alleging that the said requirements are discriminatory. In response, the Respondent alleged that the Applicant has not proposed any other Cash Flow requirement for the Board to interrogate the same against the Cash flow requirements provided in the Bidding Document.

The Board notes that Clause 2.3.3 of Section III. Evaluation and Qualification Criteria of the Bidding Document deals with Cash Flow requirements under the heading "Financial Resources". The said provisions state that:

"2.3.3. Financial Resources

The Bidder must demonstrate access to, or availability of, financial resources such as liquid assets, unencumbered real assets, lines of credit, and other financial means, other than any contractual advance payments to meet:

(i) the following cash-flow requirement:

Not less than six (6) months of the project maximum cash requirements (8.0MUSD) and

(ii) the overall cash flow requirements for this contract and its current commitments."

It is worth noting that section 60 (1) of the Act provides that: -

"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 proceedings"

Section 60 of the Act requires an accounting officer of a procuring entity to specify requirements that are clear, give a correct and complete description

of what is to be procured and allow for fair and open competition. It is the Board's considered view that such requirements include cash flow requirements.

The Board would like to distinguish the circumstances of this case to the circumstances in Review No. 2 of 2020 where it held as follows: -

"The Procuring Entity and the Applicant referred the Board to the Cash Flow requirements in the previous Phase 1-A40 undertaken by the Procuring Entity. It is worth noting that the Average Annual Turnover and Cash Flow Requirements for Phase 1-A 40 Last Mile Connectivity Project are much lower than the Average Annual Turnover and Cash Flow Requirements in the subject tender. It is worth noting that 6 Kenyan companies out of 10 companies were awarded contracts in Phase 1 perhaps because the Annual Construction Turnover and Cash Flow Requirements in Phase 1 were much lower than those required in the subject tender.

The Board already made a determination that the Procuring Entity ought to consider the provisions of the Act with respect to unbundling of the subject tender to enable participation of local and citizen contractors. Such unbundling in the Board's view, would provide a more realistic cash flow and annual turnover requirements, as opposed to larger contracts (which are

not unbundled) that may not give local and citizen contractors the incentive to bid for the project to be implemented in the subject tender and emerge successful bidders for the same.

The Board finds that the Procuring Entity ought to consider unbundling of the subject tender to enable participation of local and citizen contractors whose resultant effect would be to lower cash flow requirements and annual construction turnover requirements to arrive at a more realistic and reasonable amounts in the subject tender.”

In Review No. 2 of 2020, the Board was furnished with the Tender Document used in Phase 1 of the Last Mile Connectivity Project and details of the estimated value of the tender under consideration in Review No. 2 of 2020 for the Board to arrive at a conclusion whether or not the Cash Flow Requirements provided by the procuring entity in that case were unreasonable.

In the instant review, the Applicant provided no evidence in the form of statistical data comparing the subject tender to another tendering process of a similar nature conducted by the same Procuring Entity wherein the cash flow requirements might have been much lower. Such evidence would have provided a realistic comparison for the Board to draw a conclusion that the Procuring Entity has provided unreasonably high cash flow requirements in the subject tender. The Procuring Entity has the duty to specify requirements

that allow for open and fair competition. A bidder alleging that such a threshold has not been met ought to provide proof to the satisfaction of the Board, which the Applicant has failed to do in the instant review.

Accordingly, the Board finds that the Applicant's contention that the Cash Flow Requirements specified in Clause 2.3.3 of Section III. Evaluation and Qualification Criteria of the Bidding Document are discriminatory lacks basis given the Applicant's failure to substantiate the same.

On the fourth limb of the second issue framed for determination, the Applicant contends that the Procuring Entity specified unrealistic and discriminatory criteria on Average Annual Turnover that cannot be attained by citizen contractors. In response, the Respondent alleged that it held a pre-bid site visit which attracted over 42 different companies with full knowledge of the requirements of Average Annual Turnover provided in the Bidding Document. In the Respondent's view, the requirements of Average Annual Turnover are premised on the complexity and costs of the subject tender vis-à-vis the risks involved in implementing the subject tender. Thus the requirements on Average Annual Turnover are not discriminatory or unrealistic as alleged by the Applicant.

The requirement on Average Annual Turnover is provided for in Clause 2.3.2 of Section III. Evaluation and Qualification Criteria of the Bidding Document as follows: -

"Minimum Average Annual Turnover of Thirty Million USD (30 MUSD) calculated as total certified payments received for

contracts in progress and/or completed within the last five years, divided by five years

-Must meet Requirement"

The Applicant took the view that this requirement is unrealistic and discriminatory to citizen contractors. Having considered the Applicant's allegation vis-à-vis the requirement of Average Annual Turnover, the Board would like to reiterate that a procuring entity has discretion to provide requirements relating to works in a tender, provided those requirements promote open and fair competition.

In Review No. 2 of 2020, the Board was referred to the Requirement of Average Annual Turnover in previous phases (Phase 1 Last Mile Connectivity Project issued on 24th April 2015 for KP1/12A-2/PT/2/15/A40) where the applicant in that case had participated as can be seen from the following excerpt:

"Further, the Bidding Document used for Phase 1 Last Mile Connectivity Project issued on 24th April 2015 for KP1/12A-2/PT/2/15/A40 provided as follows at clause 2.3.2 of Section I. Instruction to Bidders with respect to the requirement of Average Annual construction turnover: -

"Average Annual Turnover

Minimum average annual turnover of:

USD 11,500,000 for Lot 1

USD 13,000,000 for Lot 2

***USD 8,700,000 for Lot 3
USD 8,800,000 for Lot 4
USD 4,700,000 for Lot 5
USD 1,500,000 for Lot 6
USD 8,900,000 for Lot 7
USD 5,800,000 for Lot 8
USD 2,900,000 for Lot 9
USD 2,700,000 for Lot 10”***

On the other hand, the Minimum Average Annual Construction Turnover Requirements at Clause 3.2 of Section III. Evaluation and Qualification Criteria of the Bidding Document used in the subject tender are as follows:-

***“Lot 1-EUR 12,300,000
Lot 2-EUR 12,600,000
Lot 3-EUR 14,600,000
Lot 4-EUR 9,400,000
Lot 5-EUR 9,600,000
Lot 6-EUR 14,100,000”***

In Review No. 2 of 2020, the Board was referred to the requirements of Annual Average Turnover for Phase 1 (Last Mile Connectivity Project) vis-à-vis the requirements on Annual Average Turnover in the procurement in

Review No. 2 of 2020. The Board concluded that unbundling of the tender would have provided a more realistic estimate on the requirements on Annual Average Turnover. In the instant review, the Applicant contends that the requirement of Average Annual Turnover prevents participation of citizen contractors without adducing evidence demonstrating that citizen contractors are unable to meet this requirement. Such evidence would have assisted the Board in drawing a conclusion whether or not the said requirement fails to promote open and fair competition among all tenderers (including citizen contractors) who may wish to participate.

Accordingly, the Board finds that the Applicant's allegation that the requirement of Average Annual Turnover as specified in Sub- Clause 2.3.2 of Section III. Evaluation and Qualification Criteria of the Bidding Document, lacks basis as the said allegation has not been substantiated.

On the fifth limb of the second issue framed for determination, the Applicant challenged the Specific Requirements provided in Clause 2.4.2 of Section III. Evaluation and Qualification Criteria of the Bidding Document. In the Applicant's view, those requirements are unrealistic and discriminatory to citizen contractors. According to paragraph 1.6 (iii) of the Applicant's Request for Review, the scope of work specified by the Procuring Entity when providing for Specific Requirements is too high because in the Applicant's view, no such value of works of similar scope have been awarded to citizen contractors.

In response, the Respondent alleged at paragraph 66 of his Response that the Specific Experience provided was based on the magnitude of the project in line with the Guidelines provided by AfDB and the Project Description provided in the Subsidiary Grant Agreement. In the Respondent's view, the Specific Requirements under Clause 2.4.2 of Section III. Evaluation and Qualification Criteria of the Bidding Document are a realistic view of the scope of work to be implemented in the subject tender.

The Board notes that Clause 2.4.2 of Section III. Evaluation and Qualification Criteria of the Bidding Document which deals with Specific Experience provides as follows:

"2.4.2. Specific Experience

- (a) Participation as contractor, management contractor, or subcontractor, in at least three (3) contracts within the last ten (10) years, each with a value of at least US\$ 12 Million, that have been successfully and substantially completed and that are similar to the proposed Works. The similarity shall be based on the physical size, complexity, methods/technology or other characteristics as described in Section IV, Bidding Forms.***
- b) For the above or other contracts executed during the period stipulated in 2.4.2 (a) above, a minimum experience in the following key activities:***

Design, supply, installation and commissioning of at least 30 km underground cable Transmission lines

of voltages 132kV or above based on the physical size, complexity, methods, technology or other characteristics as described in Section VI, Employer's Requirements."

Having studied the above requirement, the Board notes that the Procuring Entity requires bidders to provide evidence of their participation as contractor, management contractor, or subcontractor, in at least three (3) contracts within the last ten (10) years, each with a value of at least Twelve Million United States Dollars Million. Such projects should be successfully and substantially completed and similar to the proposed Works in the subject tender. In the Board's view, the Procuring Entity has leeway to specify the minimum level of experience required of bidders that the Procuring Entity feels would suit its needs.

At page 115 of the decision in Review No. 2 of 2020, the Board found that:

"Applicant's allegation that the technical requirements under clause 4.2 (b) of Section III. Evaluation and Qualification Criteria of the Bidding Document lack merit, as the said allegations were not supported by evidence to the satisfaction of the Board."

A party challenging the requirements provided by a procuring entity on the grounds that no citizen contractor has the specific experience stated in the Bidding Document would therefore be required to demonstrate to the Board through evidence or data to support its allegation. In the absence of such

proof, this Board cannot dictate the level of experience with respect to technical requirement that a procuring entity ought to specify in its tender documents.

Accordingly, the Board finds that the Applicant's allegation that the Specific Experience provided in Clause 2.4.2 of Section III. Evaluation and Qualification Criteria of the Bidding Document are unrealistic and discriminatory to citizen contractors, has not been supported by evidence to the satisfaction of the Board.

On the sixth limb of the second issue framed for determination, the Applicant contends that the requirement of providing Certification in Project Management is ambiguous. According to the Applicant, each of the positions outlined in Clause 2.5 of Section III. Evaluation and Qualification Criteria of the Bidding Document (that is, Resident Project Manager, Cable Design Engineer, Construction Site Manager, Construction Engineer-Civil and Construction Engineer – Electrical) have an aspect of project management, thus the Procuring Entity is limiting participation by requesting for a further Certification in Project Management. According to the Applicant, this is a new concept in Kenya with only three or four individuals with the said Certification.

In response, the Respondent avers at paragraph 67 of his Response that the scope and demands of underground cabling is extremely complex and highly specialized and more demanding and costly compared to laying overhead

cables. As such, demands for highly specialized persons with the requisite experience is critical in the subject tender. The Respondent further avers that Certification is a basic requirement in Project Management, thus the Applicant has not laid any basis for concluding the said requirement is unrealistic. In conclusion, the Respondent submits that Certification in Project Management is universally accepted and the requirement in the Bidding Document is achievable.

Clause 2.5 of Section III. Evaluation and Qualification Criteria of the Bidding Document provides as follows:

No	Position	Minimum Academic Qualification
1	Resident Project Manager (Contractor's Representative)	<i>Bachelor of Science in Civil Engineering/ Electrical Engineering and <u>Certification in Project Management</u></i>
2	Cable Design Engineer	<i>Bachelor of Science in Electrical Engineering</i>
3	Construction (Site) Manager	<i>Bachelor of Science in Civil Engineering/ Electrical Engineering and <u>Certification in Project Management</u></i>
5	Construction Engineer – Civil	<i>Bachelor of Science in Civil Engineering and <u>Certification in Project Management</u></i>
6	Construction Engineer – Electrical	<i>Bachelor of Science in Civil Engineering and <u>Certification in Project Management</u></i>
7	Project Engineer-Electrical	<i>Bachelor of Science in Electrical Engineering</i>
8	Communication Engineer	<i>Bachelor of Science in Electrical Engineering</i>
9	Geo-technical Engineer	<i>Bachelor of Science in Survey, Geo-spatial Engineering</i>
10	Senior Surveyor	<i>Bachelor of Science in Survey, Geo-spatial Engineering</i>
11	Safety, Health and Environment Manager	<i>Bachelor Degree in Civil/Electrical/Survey/Geospatial/Mechanical Engineering and Certification in Occupational Health and Safety</i>

It is worth pointing out that the requirement of Certification in Project Management applies to Resident Project Manager, Cable Design Engineer, Construction Site Manager, Construction Engineer-Civil and Construction Engineer – Electrical.

The Board would like to simply reiterate that the Procuring Entity has leeway to specify the minimum certification requirements for the personnel that would implement the subject tender in accordance with what the Procuring Entity deems would suit its needs.

A party challenging the Certification Requirements provided by a procuring entity on the grounds that no citizen contractor has the specific experience stated in the Bidding Document would therefore be required to demonstrate to the Board through evidence or data to support its allegation. In the absence of such proof, this Board cannot dictate the level of experience with respect to Certification Requirements that a procuring entity ought to specify in its tender documents.

Accordingly, the Board finds that the Applicant's allegation that the requirement of Certification in Project Management provided in Clause 2.5 of Section III. Evaluation and Qualification Criteria of the Bidding Document is unrealistic and discriminatory to citizen contractors, has not been supported by evidence to the satisfaction of the Board.

The seventh limb of the second issue framed for determination relates to the Applicant's allegation at paragraph 1.7 of the Request for Review that the

Bidding Document provided unrealistic and discriminatory requirements that cannot be attained by Kenyan contractors/suppliers/manufacturers. While making reference to Clause 2.7 of Section III. Evaluation and Qualification Criteria of the Bidding Document, the Applicant termed the criterion for Sub-contractors/Manufacturers as punitive. In the Applicant's view, the criterion for subcontractors/manufacturers goes against the government principle "Buy Kenya Build Kenya" whose primary objective is to contribute to growth of the manufacturing sector.

In response, the Respondent avers at paragraph 70 of his Response to the Request for Review that any supplier or contractor knowledgeable of the requirements for transmission of 115MVA of power at 132kV using underground cables is alive to the requirements of quality and experience demanded of them as either contractors, sub-contractors or manufacturers. In the Respondent's view, the Applicant has not pleaded any minimum requirements that ought to be considered by the Board against the requirements provided in the Bidding Document for Sub-Contractors and Manufacturers.

Clause 2.7 of Section III. Evaluation and Qualification of the Bidding Document provides requirements for Sub-Contractors/Manufacturers running through pages 63 to 66 of the Bidding Document. The Applicant made reference to the requirements outlined on page 63 of the Bidding Document as follows:

Sub-Contractors/Manufacturers for the following major items of supply or installation services must meet the following minimum criteria, herein listed for that item

No	Description of Item	Minimum Criteria to be used
1	Supplier for conductor, OPGW, fittings and accessories	The vendors must have successfully manufactured and supplied similar items (132kV and above) for the last fifteen (15) years in conditions to those prevailing on site and the items shall have at least ten (10) years of successful field operations outside the country or origin in conditions similar to those at site
2	Supplier for underground cable, fibre optic cable, earthing and accessories	The vendors must have successful manufactured and supplied similar items (132kV and above) for the last fifteen (15) years in conditions to those prevailing on site and the items shall have at least ten (10) years of successful field operations outside the country or origin in conditions similar to those at site
3	Sub-contractors for the cable installations	Shall have six (6) years of experience in line underground cable installations of 132kV and above. Shall have completed at least two (2) line projects of similar size and complexity and similar conditions
4	Supplier for accessories	The vendors must have successful manufactured and supplied similar items (132kV and above) for the last fifteen (15) years in conditions to those prevailing on site and the items shall have at least ten (10) years of successful field operations outside the country or origin in conditions similar to those at site

Having considered the criterion on Sub-Contractors/Manufacturers, the Board observes that the Applicant made an allegation without any evidence to substantiate its view that the requirement set out hereinbefore is punitive, unrealistic and discriminatory to citizen contractors.

The Board would like to simply reiterated that a party challenging the criteria applicable to Sub-Contractors/Manufacturers provided by a procuring entity on the grounds that the requirement is punitive, unrealistic and discriminatory to citizen contractors must demonstrate to the Board through evidence or data to support its allegation. In the absence of such proof, this

Board cannot dictate the requirements for Sub-Contractors/Manufacturers that a procuring entity ought to specify in its tender documents.

Accordingly, the Board finds that the Applicant's allegation that the requirements for Sub-Contractors/Manufacturers provided in Clause 2.7 of Section III. Evaluation and Qualification of the Bidding Document is punitive, unrealistic and discriminatory to citizen contractors has not been supported by evidence to the satisfaction of the Board.

In totality of the issues raised in the substantive Request for Review, the Board finds ITB Clause 31.2 of Section II. Bid Data Sheet of the Bidding Document contravenes the provisions of Section 3 (i) and (j); 89 (f) and 157 (9) of the Act for ousting application of domestic preference in the subject tender.

In considering the appropriate orders to issue in the circumstances, the Board observes that since ITB Clause 31.2 of Section II. Bid Data Sheet of the Bidding Document contravenes the provisions of the Act as considered hereinbefore, the resultant finding is that the said clause of the Bidding Document is null and void. This therefore means, the Board has leeway to direct the Respondent to issue an Addendum that cures the provisions of the Bidding Document in respect of the provisions that the Board has found to be in contravention of the Act.

Accordingly, the Request for Review succeeds with respect to the following specific orders: -

FINAL ORDERS

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

- 1. The Accounting Officer of the Procuring Entity is hereby directed to issue an Addendum to the Bidding Document for ICB No. KETRACO/PT/009/2021 for Procurement of 132kV Underground Cable Nanyuki-Rumuruti Transmission Line, Volume 1 and 2 within seven (7) days from the date of this decision to ensure the Bidding Document complies with the provisions of the Act and the Constitution in so far as preference and reservation schemes are concerned, taking into consideration the Board's findings in this Review.**
- 2. The Accounting Officer of the Procuring Entity is hereby directed to extend the deadline for submission of tenders specified as 4th May 2021 for a further thirty (30) days from the date of issuance of an Addendum to the Bidding Document pursuant to Order No. 1 above.**
- 3. The Accounting Officer of the Procuring Entity is hereby directed to allow bidders to withdraw their bids that were submitted before the tender submission deadline of 4th May 2021 (if they wish to do so) and submit new bids by the new**

submission deadline referred to in Order No. 2 above, or to choose to be bound by their already submitted bids.

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

Dated at Nairobi, this 24th day of May 2021



CHAIRPERSON

PPARB



SECRETARY

PPARB