

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 157/2021 OF 21ST DECEMBER, 2021

BETWEEN

CHINA CAMC ENGINEERING CO. LTD 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 the matter of Tender No. KETRACO/PT/009/2021 for Procurement of 132kV Underground Cable Nanyuki-Rumuruti Transmission Line, Volume 1 and 2.

BOARD MEMBERS

- | | |
|------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Qs. Hussein Were | -Member |
| 3. Dr. Joseph Gitari | -Member |
| 4. Mr. Nicholas Mruttu | -Member |

5. Mr. Ambrose Ogeto -Member

IN ATTENDANCE

Mr. Stanley Miheso -Holding brief for the Acting Board Secretary

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 (hereinafter referred to as the 'Multilateral Loan Agreement') 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 (hereinafter referred to as the 'Subsidiary Grant Agreement') 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 Tendering 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). Further, the Procuring Entity published a General Procurement Notice on 3rd February 2021 on its Website (www.ketraco.co.ke) and a Specific Procurement Notice on 16th February 2021 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").

Pre-Tender Site Visit

The Procuring Entity carried out a pre-tender site visit on 2nd and 3rd March 2021 at the 132kV Nanyuki Sub-Station/Line Route attended by the representative of the Procuring Entity and forty-one prospective tenderers.

Tender Submission Deadlines

The tender submission deadline was extended from the original date of 5th April 2021 to 19th April 2021 and 4th May 2021 through Addenda 1 and 2 issued by the Procuring Entity in response to queries made by prospective teenderers.

Request for Review No. 64/2021

M/s Energy Sector Contractors Association lodged a Request for Review on 3rd May 2021 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.

The Board, after hearing the matter, rendered a Decision dated 24th May, 2021 allowing the Request for Review with the following specific orders:

- 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.*

Nairobi High Court Judicial Review Miscellaneous Application E071 of 2021

The Procuring Entity, applied for Judicial Review at the High Court in Nairobi challenging the decision of the Board rendered on 24th May 2021. In Nairobi

Judicial Review **Miscellaneous Application E071 of 2021 Republic v Public Procurement Administrative Review Board & Energy Sector Contractors Association, *ex-parte* The Accounting Officer Kenya Electricity Transmission Company**, the High Court held as follows:

"...The respondent's decision is not only ultra vires the provisions of Section 4 and Section 6 of the Act but it also goes beyond the powers with which the respondent is endowed under section 173 of the Public Procurement and Asset Disposal Act..."

The High Court's ruling in the Nairobi Judicial Review Miscellaneous Application E071 of 2021 dated 9th July 2021 allowed the procurement process to proceed from where it had stopped when the Request for Review No.64 of 2021 was filed at the Board.

Tender Submission and Evaluation

The tender closed on 10th September 2021 at 10.00 am and tenders were opened immediately. Fourteen tenderers submitted proposals as listed below:

1. DEC – Hanhe Consortium;
2. TBEA Company Limited;
3. Jiangxi Hjiusheng International Electric Power Engineering Co. Ltd;

4. JV of China CAMC Engineering Co. Ltd and China National Cable Engineering Corporation;
5. Egytech Cables;
6. JV of Shyama Power India Ltd and Universal Cables Ltd
7. HDEC – Hengton Consortium;
8. National Contracting Company Ltd (NCC);
9. Larsen & Toubro Ltd;
10. Civil & Electrical Projects Contracting Co. (CEPCO);
11. Jiangsu Zongtian Technology Co. Ltd (ZTI);
12. Consortium Giza Cables Industries/Ducab High Voltage;
13. Consortium Giza Systems S.A.E & Saudi Modern Company for Metals, Cables and Plastic Industry (Riyadh Cables & Cables & Cables); and
14. Consortium of KEC International Ltd & Taihan Cable and Solutions Co. Ltd

The tenders were evaluated through four stages of:

- Preliminary Evaluation
- Detailed Technical Evaluation
- Detailed Financial and Commercial Evaluation
- Post qualification

Four tenderers were disqualified at the preliminary evaluation stage and ten passed.

Ten tenderers proceeded to be evaluated at detailed technical evaluation stage where nine passed and were subjected to detailed financial evaluation. Three tenderers met the qualification criteria for Bidders Financial Soundness (Part A) and thus proceeded to Part B of the detailed Commercial and Financial evaluation. The three tenders were also subjected to Post qualification examination. Messrs **DEC – HANNE Consortium** emerged the lowest evaluated and compliant tenderer and was recommended for award at a price of USD 17,776,814.00 (United States Dollars Only) equivalent to KES 1,942,954,217.44 (Kenya Shillings Only), exclusive of import duties and local VAT sales tax and adjustment for evaluation purposes of the functional guarantees for equipment.

Professional Opinion

The Head of Procurement function, in a Professional Opinion dated 26th October, 2021 to the Managing Director, concurred with the recommendation of the Evaluation Committee and advised the MD to approve the recommendation to award the tender to Messrs DEC – HANNE Consortium.

Notification of Award

Messrs China CAMCE JV China National Cable Engineering Corporation, the Applicant herein, was disqualified at the preliminary evaluation stage. In a

letter of notification dated 9th December, 2021 the Applicant was notified that its tender was unsuccessful. The letter read in part as follows:

"We regret to inform you that after evaluation of your bid was not technically responsive in the preliminary evaluation stage.

- ***In the requirement for Specific Experience in construction contracts as indicated in form 2.4.2(b), you indicated 2 projects only that are similar in technology to this project. The third project involves an oil filled cable and not of XPLE technology as required. This was contrary to evaluation criteria 2.4 on experience.***

We take this earliest opportunity to thank you for your interest in our tenders and wish you all the best in our future tenders."

Following the letter of notification dated 9th December, 2021 the Applicant filed this Request for Review.

REQUEST FOR REVIEW NO. 157/2021

The Request for Review was lodged by M/s China CAMC Engineering Co. Ltd, on 21st December, 2021 in the matter of Tender No. KETRACO/PT/009/2021 for Procurement of Plant, Design, Supply and Installation; Procurement of: 132kv Underground Cable Nanyuk i- Rumuruti Transmission Line Volume 1 and 2.

The Applicant, through the firm of A.E. Kiprono & Associates, sought for the following orders from the Board:

- a) An order annulling the award of the tender to the 'successful tenderer'.*
- b) An order quashing the Respondent's decision contained in the letter dated 9th December 2021 declaring the Applicant's bid unsuccessful.*
- c) An order directing the Respondent to reinstate and re-evaluate the Applicant's bid taking into consideration the Board's directions.*
- d) An order awarding costs of the request for review to the Applicant.*
- e) Any other relief that the Review Board deems fit to grant under the circumstances.*

On its part the Respondent prays that the Request for Review be dismissed with costs and that the Respondent be at liberty to proceed with the procurement process.

In response, the Respondent lodged a Notice of Preliminary Objection dated 29th December 2021 and filed on 30th December 2021 together with a Response to the Request for Review dated 29th December 2021 and filed on 30th December 2021 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.

No party lodged written submissions in this Request for Review.

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 sub-issues:

1.1. Whether the Review Board is bound by the decision of the High Court in Judicial Review No. E071 of 2021 in which the High Court set aside the decision of the Review Board in Request for Review No. 64 of 2021 with respect to the subject tender holding that the Board lacked jurisdiction to determine any issues arising from the subject procurement by dint of Section 4 (2) (f) as read with Section 6 (1) of the Act, 2015.

Depending on the determination of the first sub-issue of the first issue;

1.2. 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;

Depending on the determination of the first sub-issue of the first issue;

1.3. 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 Procuring Entity applied the criteria outside of the Tender Document in evaluating the Applicant's tender in breach of the Provisions of Section 80(2) of the Act.

Together with its response, the Respondent lodged a Notice of Preliminary Objection dated 29th December 2021 and filed on 30th December 2021. The Preliminary Objection was based on the following grounds:

- a) The Public Procurement Administrative Review Board ("Review Board") lacks jurisdiction to hear and determine the Request for Review by virtue of Section 4 (2) (f) as read together with Section 6 (1) of the Public Procurement and Asset Disposal Act, 2015.
- b) The tender the subject of the Request for Review is exempt from application of the provisions of the Public Procurement and Asset Disposal Act, 2015 as it relates to a bilateral agreement between the Government of the Republic of Kenya and the African Development Bank.
- c) The Review Board is bound by the decision of the High Court in J.R Number E071 of 2021 in which the High Court set aside the decision of the Review Board in Request for Review No. 64 of 2021 in respect of Tender No KETRACO/PT/009/2021 for the procurement of design, supply and erection of 132KV underground cable Nanyuki-Rumuruti transmission line (the subject tender) and held that the tender was not subject to the

Public Procurement and Asset Disposal Act, 2015 and that the Review Board lacked jurisdiction to determine any issues arising from the subject procurement by dint of Section 4 (2) (f) as read together with Section 6 (1) of the Public Procurement and Asset Disposal Act, 2015 and Article 2 (5) (6) of the Constitution of Kenya, 2010.

The Preliminary Objection filed by the Respondent touches on the jurisdiction of the Board by virtue of Sections 4 (2) f as read with Section 6 (1) of the Act and a judgment of the High Court. The Board is duty bound to dispense with the issue of jurisdiction before delving into the merits of 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..."

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

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

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

.....;

(f) procurement and disposal of assets under bilateral or multilateral agreements between the Government of Kenya and any other foreign government, agency, entity

or multilateral agency unless as otherwise prescribed in the Regulations

Having established that 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 the application of the Act is ousted, because jurisdiction of the Board is anchored in the Act.

The Board notes that the subject tender is the same tender that was subject to Request for Review Application No.64 of 2021 (hereinafter referred to as Application No.64 of 2021) between Energy Sector Contractors Association as the Applicant and The Accounting Officer, Kenya Electricity Transmission Company Limited as the Respondent, also the Respondent in this review, that was filed before the Board on 3rd May 2021. The Respondent herein while a respondent in Application No.64 of 2021 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."

Arising from the Respondent's preliminary objection in Application No.64 of 2021, we formulated the following issues 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 (hereinafter referred to as the '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.**

In our decision in Application No.64 of 2021 dated 24th May 2021, we held as follows with respect to the issues framed for determination with respect to the preliminary objection raised by the Respondent in Application No.64 of 2021 at page 43 and 44 of our decision;

"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 the 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. "

Further, the Board held as follows at page 49 of our decision in Application No.64 of 2021;

"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 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.”

The Board in Application No.64 of 2021, found the Multilateral Loan Agreement and the Subsidiary Grant Agreement therein, which are the same agreements in issue herein, did not meet the threshold under section 4(2)(f) of the Act of a bilateral or a multilateral agreement between the Government of Kenya and any other foreign government, agency, entity or multilateral agency that would oust the application of the Act and as a result oust the jurisdiction of the Board which jurisdiction flows from Section 27, 28 and 167 of the Act. Further, the Board in Application No.64 of 2021, found there was no evidence that any provisions of the Multilateral Loan Agreement and that the Subsidiary Grant Agreement therein were in conflict with this Act for the terms of the Multilateral Loan Agreement and the Subsidiary Grant Agreement to apply over the provisions of the Act. The Board therefore

proceeded to hear and determine the substantive issues in Application No.64 of the Act and ordered the Procuring Entity therein, which is the same Procuring Entity herein, to issue an addendum to the Bidding Document, which is the same Bidding Document herein, 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 among other orders.

However the Respondent was aggrieved with the Decision of the Board in Application No.64 of 2021 and proceeded to seek judicial review at the High Court in Nairobi Judicial Review **Miscellaneous Application E071 of 2021 - Republic v Public Procurement Administrative Review Board & Energy Sector Contractors Association, ex-parte The Accounting Officer Kenya Electricity Transmission Company** where Justice Jairus Ngaa in his decision dated and delivered on 9th July 2021 held as follows:

"It follows that when those clauses relating to procurement in the Multinational Loan Agreement between the Republic of Kenya and the African Development Bank are read together with sections 4(2)(f) and 6(1) of the Public Procurement and Asset Disposal Act, and Article 2(5) and (6) of the Constitution, the inevitable conclusion that one is bound to come to is that the procurement process for the subject tender was not subject to the Act and to the extent that the respondent (the Board) reached a contrary decision its decision is want of legality.

.....

The respondent's decision is not only ultra vires the provisions of Section 4 and Section 6 of the Act but it also goes beyond the powers with which the respondent is endowed under section 173 of the Public Procurement and Asset Disposal Act.

The respondent (the Board) misconstrued the facts and the law and arrived at a wrong decision.

.....

Apart from the ground of illegality, it may as well be argued, rightly so, that the respondent's (the Board's) decision was also tainted with procedural impropriety. This to the extent that the respondent (the Board) considered matters which it ought not to have considered and disregards those matters which it ought to have considered.

In the ultimate, I am satisfied and persuaded that the application before the Court meets the threshold for grant of the orders of

judicial review of certiorari and declaration. The motion dated 8th June 2021 is therefore allowed in terms of prayers A and B.”

In essence, Justice Jairus Ngaa quashed the decision of the Board in Application No.64 of 2021 while holding that the tender in issue therein, which is the same tender in issue herein referred to as the subject tender, is not a procurement with respect to which the Act applies and consequently, the Board has no jurisdiction to hear and determine issues raised with respect to the subject tender.

The High Court being a body of higher jurisdiction than the Board, which we consider is a quasi-judicial body, its decisions are binding to the Board unless such decisions are distinguished or it can be shown there are conflicting previous decisions, or the previous decision is inconsistent with a decision of another court binding on the High Court or such decisions were made *per incuriam*.

In the absence of any of the reasons hereinbefore outlined, we find Justice Ngaa’s decision dated 9th July 2021 in Miscellaneous Application E071 of 2021 - Republic v Public Procurement Administrative Review Board & Energy Sector Contractors Association, *ex-parte* The Accounting Officer Kenya Electricity Transmission Company is binding on the Board to the extent of the circumstances of this review, with respect to the subject tender and it naturally follows that the jurisdiction of the Board in this review is ousted on

account of non-applicability of the Act in the subject tender as held by the Justice Ngaa in Miscellaneous Application E071 of 2021 - Republic v Public Procurement Administrative Review Board & Energy Sector Contractors Association, *ex-parte* The Accounting Officer Kenya Electricity Transmission Company.

It should however not be lost to parties herein that Section 174 of the Act provides that the right to request for review is in addition to any other legal remedy a person may have and we dare add, the request for review should not be taken as the only exclusive avenue an aggrieved tenderer may seek redress if there are other constitutional means acceptable in our legal framework.

Given the foregoing and in the circumstances, we proceed to down our tools and shall not address the other issues framed for determination.

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 Request for Review dated and filed on 21st December 2021 in respect to Tender No. KETRACO/PT/009/2021 for Procurement of 132kV Underground Cable Nanyuki -**

Rumuruti Transmission Line, Volume 1 and 2 be and is hereby struck out for want of jurisdiction.

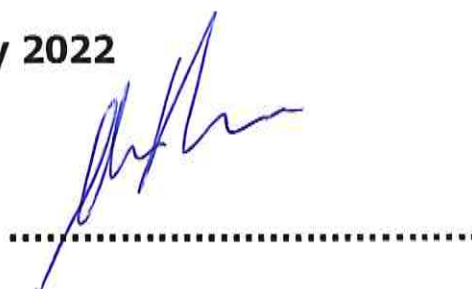
2. Each Party shall bear its own costs in the Request for Review

Dated at Nairobi, this 11th day of January 2022

A handwritten signature in green ink, appearing to be "H. Mwangi", written over a horizontal dotted line.

CHAIRPERSON

PPARB

A handwritten signature in blue ink, appearing to be "J. N. Njoroge", written over a horizontal dotted line.

SECRETARY

PPARB