

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 51/2022 OF 17<sup>TH</sup> JUNE 2022**

**BETWEEN**

**INHEMETER AFRICA COMPANY LIMITED**

**SMART METERS TECHNOLOGY LIMITED**

**YOCEAN GROUP LIMITED**

**SHENZHEN STAR INSTRUMENTS COMPANY LIMITED**

**MAGNATE VENTURES LIMITED..... APPLICANTS**

**AND**

**THE ACCOUNTING OFFICER,**

**KENYA POWER & LIGHTING COMPANY PLC.....1<sup>ST</sup> RESPONDENT**

**KENYA POWER & LIGHTING COMPANY PLC.....2<sup>ND</sup> RESPONDENT**

Review against the decision of Kenya Power and Lighting Company PLC in respect to Tender No. KP1/6A.1/OT/5/22/A97 for the Procurement of Single & Three Phase Smart Meters (Manufacturers Only).

**BOARD MEMBERS**

- |                       |                    |
|-----------------------|--------------------|
| 1. Faith Waigwa       | - Chairperson      |
| 2. Mrs. Njeri Onyango | - Vice Chairperson |

3. Mr. Steven Oundo, OGW - Member
4. Ms. Isabel Mghoi - Member
5. Mr. Hussein Were - Member

### **IN ATTENDANCE**

Mr. Philemon Kiprop - Holding brief for the Acting Board Secretary

### **BACKGROUND TO THE DECISION**

#### **The Tendering Process**

Kenya Power & Lighting Company PLC, the Procuring Entity and the 2<sup>nd</sup> Respondent herein, invited sealed tenders from eligible candidates as defined in the World Bank's Guidelines: Procurement of Goods, Works and Non-Consulting Services under IBRD Loans and IDA Credits & Grants by World Bank Borrowers published by the Bank in January 2011 (Revised July 2014) (hereinafter referred to as the 'World Bank Procurement Guidelines, 2011 revised in 2014') for Tender No. KP1/6A.1/OT/5/22/A97 for the Procurement of Single & Three Phase Smart Meters (Manufacturers Only) (hereinafter referred to as the 'subject tender') by way of Open International Competitive Tendering method through an advertisement in The Standard Newspaper, on the 2<sup>nd</sup> Respondent's website ([www.kplc.co.ke](http://www.kplc.co.ke)) and on the DG Market (the largest portal for tenders with official tenders from World Bank, European Union, AFD ..etc) on 10<sup>th</sup> May 2022.

The Invitation for Bids (IFB) published on 10<sup>th</sup> May 2022 as aforesaid (hereinafter referred to as the 'invitation for tenders') informed eligible prospective tenderers that the Government of Kenya had received credit from the International Development Association (IDA) towards the cost of the Kenya Electricity Modernization Project (KEMP) and that part of the proceeds of the credit was intended to be applied to eligible payments under the contract. Further, eligible prospective tenderers were informed that tendering in the subject tender would be conducted through the International Competitive Bidding procedures as specified in the World Bank Procurement Guidelines, 2011 revised in 2014.

### **Addendum**

The 2<sup>nd</sup> Respondent issued Addendum No. 1 dated 3<sup>rd</sup> June 2022 (hereinafter referred to as the 'Addendum') amending the provisions of the blank tender document of the subject tender issued to prospective tenderers by the 2<sup>nd</sup> Respondent (hereinafter referred to as the 'Tender Document') by changing the time for opening tenders from 10.30 a.m. East African Time to 10:00 a.m. East African Time on 21<sup>st</sup> June 2022. Further, the Addendum also amended the Price Schedule Forms by replacing it with a Price Schedule attached thereto as Appendix I.

### **Clarification**

The 2<sup>nd</sup> Respondent issued Clarification No.1 dated 9<sup>th</sup> June 2022 responding to clarifications sought on various issues in the Tender Document by prospective tenderers.

## **REQUEST FOR REVIEW**

Inhemeter Africa Company Limited, Smart Meters Technology Limited, Yocean Group Limited, Shenzhen Star Instruments Company Limited and Magnate Ventures Limited, the Applicants herein, lodged a Request for Review dated 16<sup>th</sup> June 2022 and filed on 17<sup>th</sup> June 2022 together with an Affidavit/Statement sworn on 16<sup>th</sup> June 2022 by William Gathecha Kabinga, a director of Inhemeter Africa Company Limited on behalf of all Applicants and another Affidavit/Statement sworn on 29<sup>th</sup> June 2022 by William Gatheca Kabinga through the firm of Dennis Anyoka Moturi & Co Advocates, seeking the following orders: -

- a) The 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Tender No. KP1/6A.1/OT/5/22/A97 for Procurement of Single and Three Phase Smart Meters – Manufacturers only dated 10<sup>th</sup> May 2022 together with all addendums and clarifications be set aside, annulled and quashed.***
- b) The Board be pleased, to direct the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to remove all offending conditions/requirements in the Tender No. KP1/6A.1/OT/5/22/A97 for Procurement of Single and Three Phase Smart Meters – Manufacturers only***

***dated 10<sup>th</sup> May 2022, all addendums and clarifications as determined by the Board.***

- c) The Board be pleased to direct the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to unbundle/break down the Tender No. KP1/6A.1/OT/5/22/A97 for Procurement of Single and Three Phase Smart Meters – Manufacturers only dated 10<sup>th</sup> May 2022, all addendums and clarifications into categories/lots.***
- d) The Board be pleased to direct the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to retender and advertise a new Tender for Procurement of Single and Three Phase Smart Meters upon removing all offending conditions/requirements as determined by the Board and/or complying with the Board's decision.***
- e) Such other or further relief or reliefs as this board shall deem just and expedient.***
- f) The Respondents shall bear the costs of this application for review.***

In a Notification of Appeal and a letter dated 17<sup>th</sup> June 2022, Mr. P. J. Okumu, the Acting Board Secretary of the Public Procurement Administrative Review Board (hereinafter referred to as the 'Board'), notified the Respondents of the existence of the Request for Review and the suspension of procurement proceedings for the subject tender while forwarding to the Respondents a copy of the Request for Review together

with the Board's Circular No.02/2020 dated 24<sup>th</sup> March 2020, detailing administrative and contingency measures to mitigate the spread of Covid-19. Further, the Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within 5 days from 17<sup>th</sup> June 2022.

On 24<sup>th</sup> June 2022, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed a Response to the Request for Review dated 23<sup>rd</sup> June 2022 through the 2<sup>nd</sup> Respondent's in-house counsel, Irene Walala, Advocate. Further, the 2<sup>nd</sup> Respondent submitted to the Board confidential information and documents with respect to the subject tender pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act').

Vide a Notice to Bidders posted on the 2<sup>nd</sup> Respondent's website, the 2<sup>nd</sup> Respondent notified prospective tenderers that local assemblers had filed the instant Request for Review necessitating the suspension of tender opening scheduled for 21<sup>st</sup> June 2022.

Pursuant to the Board's Circular No.2/2020 dated 24<sup>th</sup> March 2020, the Board dispensed with physical hearings and directed all request for review applications be canvassed by way of written submissions. Clause 1 on page 2 of the said Circular directed that pleadings and documents would be deemed properly filed if they bore the Board's official stamp.

On 30<sup>th</sup> June 2022, the Applicants filed their Written Submission dated 29<sup>th</sup> June 2022 together with their List & Bundle of Authorities dated 29<sup>th</sup> June 2022 and on 1<sup>st</sup> July 2022. The Respondents filed their Written Submissions dated 1<sup>st</sup> July 2022 on even date with their authorities attached to the said written submissions.

### **THE APPLICANTS' CASE**

The Applicants aver that they are candidates, having obtained the Tender Document by downloading the same from the 2<sup>nd</sup> Respondent's website on 9<sup>th</sup> June 2022 as per instructions of the tender notice, and that the tender notice indicated the tendering process would be conducted by the Respondents in accordance with international competitive bidding procedures set down in the World Bank Procurement Guidelines, 2011 revised in 2014.

Upon perusal of the Tender Document, it is the Applicants' allegations that the same contained unreasonable, discriminatory and skewed conditions meant to edge out eligible Kenyan and/or local providers, suppliers, assemblers and manufacturers, who have in the past supplied the Respondents with energy meters, in favour of foreign original equipment manufacturers without any just cause and in breach of the procurement principles of fairness, equality, non-discriminatory, competitive and in breach of the Constitution of Kenya 2010 (hereinafter referred to as the

'Constitution'), the Act, the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as 'Regulations 2020'), the Energy Act, 2019 (hereinafter referred to as the 'Energy Act') as well as the World Bank Procurement Guidelines, 2011 revised in 2014.

Aggrieved with various provisions of the Tender Document, the Applicants have filed the instant Request for Review challenging specific provisions therein for allegedly (a) excluding domestic preference and reservations for local contractors, (b) failing to unbundle the tender for procurement of single and three phase meters into several categories/lots, (c) providing unrealistic and discriminatory financial requirements, (d) providing discriminatory technical specifications and (e) providing unrealistic and discriminatory tender security requirements.

#### Exclusion of domestic preference and reservations for local contractors.

On this, the Applicants allege that Clause 1. Margin of Preference (ITB 33) of Section III. Evaluation and Qualification Criteria at page 38 of the Tender Document read with ITB 33.1 of Section II. Bid Data Sheet (BDS) at page 34 of the Tender Document expressly and in unambiguous terms excludes the application of preference and reservations schemes for local and citizen contractors by providing that '*a margin of domestic preference SHALL NOT apply*'. According to the Applicants, this is in breach of (a) Article 227(2)(a) of the Constitution requiring the 2<sup>nd</sup> Respondent to apply principles of fairness, equity, non-discrimination and local preference and

reservations, (b) Paragraph 2.55 of the World Bank Procurement Guidelines, 2011 revised in 2014 requiring the 2<sup>nd</sup> Respondent to exercise discretion for purposes of applying a margin of preference for domestically manufactured goods or for domestic contractors, (c) Sections 155 and 157 of the Act read with Regulations 144, 145 and 147 of Regulations 2020 requiring preferential treatment to manufactured articles, materials or supplies wholly or partially mined or produced in Kenya or where applicable have been assembled in Kenya and (d) Section 2 and 206 of the Energy Act requiring the 2<sup>nd</sup> Respondent to promote local content by ensuring that procurement of its products adds value to the Kenyan economy from energy related activities through procuring of locally available work force, services and supplies.

Further, the Applicants allege that Clause 3.1(a) Bidder Must Be A Manufacturer of Section III. Evaluation and Qualification Criteria at page 38 of the Tender Document provides for a skewed meaning of '*manufacturer*' limiting tenderers to original equipment manufacturers only, while locking out local contractors including the Applicants by providing that '*a Meter manufacturer is an establishment or a company that does research, design and manufacture of the entire smart meter ecosystem. Offering complete end-to-end manufacturing solutions; provides hardware, firmware and mechanical design in addition to prototyping, testing, validation, and verification for meters.*'

The Applicants also allege that Item 5 and 6 of Clarification No.1 dated 9<sup>th</sup> June 2022, locks out participation of eligible local contractors who are capable to supply both single and three phase smart meters without necessary being the ones doing research, or design or manufacturing the entire smart meter by providing that *'Only manufacturers can enter into a JV. Non manufacturers are not eligible. .... Manufacturers can make private arrangements with local agents, however, only Manufacturers are allowed to bid.'* According to the Applicants, by not allowing local tenderers (non-manufacturer) to enter into joint venture agreement with manufacturers in ITB4.1 and Item 5 of Clarification No.1 dated 9<sup>th</sup> June 2022, the Respondents are limiting technology and knowledge transfer by training and mentoring of the Applicants (Kenyan companies) by foreign companies.

Given the foregoing, the Applicant alleges that by failing to provide for domestic preference and reservations for Kenyan local contractors and goods locally mined, produced and/or assembled, the Tender Document is illegal, irrational, in violation of all procurement laws, null and void and should be quashed to protect the sanctity of procurement process and laws of Kenya.

Failure to unbundle the tender for procurement of single and three phase meters into several categories/lots.

On this, the Applicants allege that ITB 1.1 read with ITB 34.2(a) of Section II. Bid Data Sheet (BDS) at page 29 and 35 of the Tender Document respectively, locks out tenderers who have capacity to procure and supply only one category of meters i.e. either single phase meters or three phase meters and not both by providing that *'.....There are no lots in this ICB, and as per ITB 34.2(a), Bids will be evaluated for the entire bid as one contract.* According to the Applicants, the scope of work as well as technical specifications for single phase smart meters ought to be separated from those required for three phase smart meters, as has been the case in the past, to create different bundles in form of lots so as to increase competition and provide lower prices for a greater number of local contractors to tender for the same. The Applicants aver that even though the Tender Document provides for separate and distinct technical specifications for single phase smart meters and three phase smart meters, the same Tender Document provides for tenders to be evaluated as one contract.

Given the foregoing, the Applicants aver that in order to allow participation of Kenyan citizen contractors, disadvantaged groups, small, micro and medium enterprises, the Respondents ought to unbundle the subject tender into practical lots as permitted under Regulations 43 and 154 of Regulations 2020.

#### Unrealistic and discriminatory financial requirements

On this, the Applicants allege that Clause 3.1 (a) (i) Financial Capability of Section III. Evaluation and Qualification Criteria at page 39 of the Tender Document is unreasonable, unrealistic and discriminatory, intended to lock out local contractors and favour joint venture tenderers against independent tenderers for requiring tenderers to mandatorily provide the last 5 years' audited financial statements with a minimum annual turnover of USD3,000,000 Million equivalent to Kshs.351,802,716.00 at the current Central Bank of Kenya Exchange rates and in the event of a joint venture tenderer, all parties combined must meet the said requirement. According to the Applicants, by combining the annual turnover of tenderers in joint venture instead of requiring each tenderer to submit independent annual turnover, gives a competitive advantage to joint venture tenderers compared to those submitting individual tenders, thus such a requirement is illegal, null and void.

#### Discriminatory technical specifications

On this, the Applicants allege that Condition 8.2.1 of the Document No.KP1/13D/4/7/TSP/14/11-05 (Single-Phase Smart Meter) and No.KP1/13D/4/7/TSP/14/11-04 (Three-Phase Smart Meter) is discriminatory to the extent that it locks out all Kenyan meter manufacturers, including the Applicants, who have only been in production for at most 7 years for requiring tenderers (manufacturers) to have manufacturing experience of at least 15 years. Further, that this requirement contradicts the experience and technical capacity requirements for tenderers to provide proof that they have been

undertaking at least 1 or 2 contracts to supply similar products (meters) in the last five (5) years provided in Clause ITB 11.1 (j)(d) of Section II. Bid Data Sheet (BDS) at page 30 of the Tender Document and Clause 3.1 (a)(ii)(b) of Section III. Evaluation and Qualification Criteria at page 41 of the Tender Document.

The Applicants allege that Condition 8.2.2 of the Document No.KP1/13D/4/7/TSP/14/11-05 (Single-Phase Smart Meter) and No.KP1/13D/4/7/TSP/14/11-04 (Three-Phase Smart Meter) is discriminatory to the extent that it stifles and locks out the Applicants and other local contractors from participating in the subject tender for requiring manufacturers to provide documentary proof that they have provided reliable services for a minimum period of 8 years in at least 2 power utilities in at least 3 of the following continents/region, (a) Europe, (b) North America, (c) Africa, (d) Asia or South America and Oceanic (Australia).Further, that this requirement contradicts the experience and technical capacity requirements for tenderers to provide proof that they have been undertaking at least 1 or 2 contracts to supply similar products (meters) in the last five (5) years provided in Clause ITB 11.1 (j)(d) of Section II. Bid Data Sheet (BDS) at page 30 of the Tender Document and Clause 3.1 (a)(ii)(b) of Section III. Evaluation and Qualification Criteria at page 41 of the Tender Document.According to the Applicants, this condition is impractical to meet because most African, European and part of American markets uses DIN Rail Meters while majority of American and Australian power utility companies uses ANSI meters. In essence, technical

specifications for smart meters are designed and manufactured differently for different markets depending on regional or country standards.

The Applicants allege that Condition 4.2.1.25 and 4.2.1.27 of the Document No.KP1/13D/4/7/TSP/14/11-05 (Single-Phase Smart Meter) and No.KP1/13D/4/7/TSP/14/11-04 (Three-Phase Smart Meter) requiring meters to have non-volatile memory capable of data storage and with a long term retention period of not less than 10 years or for the certified life of the meter or whichever is greater is unreasonable, impractical, discriminatory to the Applicants and other local manufacturers for reasons that it is impractical to obtain meter Accelerated Life Test (ALT) report from recognized laboratories within the tendering time. According to the Applicants, this technical specification only favours manufacturers who already have reports and restricts the participation of local manufacturers who have to secure meter Accelerated Life Test (ALT) report from recognized laboratories for the brand new designs of smart meters required by the Respondents.

Given the foregoing, the Applicants submit that these technical specifications are discriminatory, unreasonable, restrictive, unrealistic, irrational and are designed by the Respondents to specifically lock out the Applicants and other local manufacturers and assemblers from participating from the tendering process.

### Unrealistic and discriminatory Tender Security Requirements

On this, the Applicants allege that Clause ITB 19.1 of Section II. Bid Data Sheet (BDS) at page 32 of the Tender Document read with Clause 19.1 of Section I. Instructions to Bidders at page 16 of the Tender Document requiring tenderers to provide a tender security of USD 152,000.00 or Kshs.17,000,000.00 is high, unrealistic and discriminatory, fails to encourage the participation of Kenyan citizen and local contractors (Applicants), fails to promote local industry and is in breach of Section 61(2)(c) of the Act requiring the tender security not to be an amount more than 2% of the tender as valued by the 2<sup>nd</sup> Respondent.

Finally, the Applicants allege that the Respondents' Tender Document together with all the addendum and clarification are in breach of Articles 10, 27, 227 of the Constitution, Sections 3(i) and (j), 61(2)(c), 89, 155, 156, 157 of the Act read with Regulations 5, 43, 144, 145, 147 and 154 of Regulations 2020 and Section 5 of the Energy Act and prays for the Board to invoke its jurisdiction under the Section 167 of the Act and exercise its powers under Section 173 of the Act in allowing the instant Request for Review.

### **RESPONDENTS' RESPONSE**

As a background, the Respondents contend that the subject tender arises from a Kenya Electricity Modernization Project (hereinafter referred to as 'KEMP'), a programme initiated by the Government of Kenya whose

intention is to incorporate the Advanced Metering Infrastructure (AMI) project. KEMP's ultimate goal is to assist the 2<sup>nd</sup> Respondent improve its performance by reducing technical and commercial electricity losses by establishing end to end smart metering infrastructure to cover additional small and medium enterprises (SMEs) as a way of improving revenue assurance.

According to the Respondents, this programme is funded by the Government of Kenya (hereinafter referred to as 'GoK') and the International Development Association (hereinafter referred to as 'IDA') who is the financier of the subject tender and that IDA forms part of the World Bank that helps the world's poorest countries.

The Respondents contend that GoK and IDA entered into a bilateral agreement dated 29<sup>th</sup> June 2015 towards the cost of the KEMP and that pursuant to the terms of the bilateral agreement, procurement of goods, works and non-consulting services required for KEMP, and to be financed out of the proceeds of the financing, are to be procured in accordance with the requirements set forth in the World Bank Procurement Guidelines and with the provisions of the Financing Agreement.

Upon receiving a no objection from World Bank to proceed with advertisement/publication of the procurement of 75,000 pieces of single and three phase meters-manufacturers only, the Respondents, on 10<sup>th</sup> May

2022, advertised in the local dailies, published on the 2<sup>nd</sup> Respondent's website and the DG Market, the subject tender requiring tenderers to submit their tenders on or before 21<sup>st</sup> June 2022 at 10:00a.m accompanied by tender security (in a separate envelope). Subsequently, the Respondent issued clarification on various issues and advised prospective tenderers that only manufacturers could enter into a joint venture which meant even local manufacturers were permitted to tender. Further, the Respondent issued an addendum indicating that save where expressly amended by the addendum, the Tender Document continued to be in full force and effect.

In response to the grounds for review in the instant Request for Review, the Respondents contend that the 2<sup>nd</sup> Respondent is a state corporation with its majority shareholding held by GoK and that the 2<sup>nd</sup> Respondent's operations are in the energy sector whose core business is that of bulk purchase, transmission, distribution and supply of electricity across the entire Republic of Kenya to its over 7 million customers.

It is the Respondents contention that the subject tender is subject to the aforementioned bilateral agreement in which GoK through the Ministry of Energy is mandated to ensure that the project is implemented and that the 2<sup>nd</sup> Respondent, Ministry of Energy and Rural Electrification Authority are stipulated therein as implementing agencies. Further, that a subsidiary financing and grant agreements were signed between GoK and the 2<sup>nd</sup> Respondent and additionally, a project agreement was signed between IDA and the 2<sup>nd</sup> Respondent. The Respondents contend that as a term of the financing agreement, procurement of goods, works and non-consulting

services required for the project and to be financed out of the proceeds of the financing agreement would be procured in accordance with the requirements set forth in The World Bank Procurement Regulations for IPF Borrowers: Procurement in Investment Project Financing – Goods, Works, Non-Consulting and Consulting Services, July 2016 (Fourth Edition Revised November 2020) (hereinafter referred to as the 'World Bank Procurement Regulations, 2016 revised in 2020') and with the provisions of the Financing Agreement. Consequently, the Respondents contend that the World Bank Procurement Regulations, 2016 revised in 2020 was used in compliance with the Financing Agreement. Further, that the World Bank's standard bidding document – for goods which contained standard requirements to be applied across the board to ensure that contracts are awarded only to firms, or joint ventures that are suitably experienced in the supply of goods involved, that are financially and managerially sound and that can provide all the meters required in a timely manner.

Given the foregoing, the Respondents contend that a procurement under the aforesaid arrangement is excluded from the application of the Act under Section 4 (2) (f) of the Act effectively ousting the jurisdiction of this Board. The Respondents also contend that the Applicants have failed to demonstrate compliance with Section 167(2) of the Act read with Regulation 204(1) of Regulations 2020 thus lack the *locus standi* to institute the instant Request for Review.

Consequently, the Respondents contend that the instant Request for Review is bad in law, improper before this Board and raise a preliminary objection to the competence of the instant Request for Review on the following grounds, (a) that this Board lacks jurisdiction to entertain the instant Request for Review pursuant to Section 4(2)(f) of the Act, (b) that the Applicants lack the *locus standi* to file the instant Request for Review pursuant to Section 167(2) of the Act read with Regulations 204(1) of Regulations 2020 rendering the proceedings herein a nullity *ab initio*, and (c) that the Applicant lacks *locus standi* pursuant to Section 167(1) of the Act read with Section 2 of the Act. Further, the Respondents contend that pursuant to the provisions of Section 6(1) of the Act, in the event of conflict between the Act and the terms of the bilateral agreement between GoK and IDA, the terms of the bilateral agreement will prevail.

Without prejudice to the foregoing, the Respondents deny that the terms of the Tender Document are discriminatory, unreasonable, restrictive, unrealistic, irrational and meant to lock out the Kenyan Local Manufacturers and Assemblers from participating in the subject tender.

Exclusion of domestic preference and reservations for local contractors.

On this, the Respondents contend that preference and reservations are not applicable to the subject tender and that Paragraphs 5.51, 5.52 and 5.53 of the World Bank Procurement Regulations, 2016 revised in 2020 provide for domestic preference but with specific restrictions. Further, that the

Applicants have failed to show how the description of 'meter *manufacturer*' is skewed against the Applicants and the Applicants have failed to justify their own definition of meter manufacturers.

Failure to unbundle the tender for procurement of single and three phase meters into several categories/lots.

On this, the Respondents contend that the subject tender is subject to the terms of the Financing Agreement and the World Bank Procurement Regulations, 2016 revised in 2020 and that any procurement process for the subject tender must be approved by the World Bank via issuance of a no objection before proceeding to the next process.

The Respondents also contend that having more lots does not promote competition but rather exposes the subject tender to risks. Further, that splitting the subject tender into a number of separate contract packages/lots is complex, usually taking considerable experience and in-house capacity to coordinate their implementation. This according to the Respondents causes difficulty of technical interface between the various components being undertaken by several suppliers, risks of delays, costs overruns and poor overall technical performance. Further, that unbundling sought by the Applicants is tantamount to splitting of procurements which is prohibited by Section 54 of the Act read with Regulation 43 of Regulations 2020, an offence under Section 176(1) (b) of the Act and such

unbundling will translate to lower financial requirements for the project which will cause the credit to be withdrawn by IDA.

Lastly on this, the Respondents contend that if the Applicants are basing their allegation on the basis of the procurement procedure adopted, then this Board lacks jurisdiction to hear the instant Request for Review pursuant to Section 167(4) of the Act which provides that choice of a procurement method will not be subject to the review of procurement proceedings under Section 167(1) of the Act thus the Board has no jurisdiction to hear the instant Request for Review.

#### Unrealistic and discriminatory financial requirements

On this, the Respondents contend that they are required to evaluate tenderers financial and experience capacities to ensure a qualified contractor is selected to mitigate the risk of failed projects and to ensure quality in the project delivery.

#### Discriminatory technical specifications

On this, the Respondents contend that tenderers have to demonstrate previous similar experience otherwise projects/contracts will be awarded to firms that have no experience to do the work that will lead to failed projects and misuse of public funds and that it is the responsibility of the Respondents to ensure that all funds are put into proper use, that benefits Kenyans in compliance with the Public Finance Management Act, 2012 (hereinafter referred to as the 'PFM Act').

The Respondents contend that tenderers are not restricted to submit only the experience earned within the Respondent's projects or locally but are at liberty to submit experiences either individually or through joint ventures from any part of the world, otherwise there is a danger to award tenderers that have no experience to do the work which will lead to failed projects and misuse of public funds.

The Respondents contend that they are cognizant that the smart meter technology has not been available for more than 12 years thus the 5 years request as provided in the specifications and there is no contradiction under Condition 8.2.1 of the Document No.KP1/13D/4/7/TSP/14/11-05 (Single-Phase Smart Meter) and No.KP1/13D/4/7/TSP/14/11-04 (Three-Phase Smart Meter).

The Respondents contend that the Accelerated Life Test improves on the quality of meters produced thus promoting their longevity hence the Respondents are able to get value for money spent on the meters. Further, that the Reference Spec ALT is an open international Standard provided for in IEC Standard 62039-31 and which has been in existence with the last revision being in 2008 and that the justification on the specifications criteria is informed by the requirement of standards of efficiency, reliability, security of supply and quality of service for its customers and that the Respondents wish to source for the best value from the best suppliers.

The Respondents further contend that the Tender Document allows tenderers, such like the Applicants, to tender as a joint venture to complement each other and meet the requirements and that the subject tender is associated with AMI-Technology-smart metering technology that might not have many qualified individual experts in the market and for better results, it is recommended that it be confined to reputable experts with track records of similar assignment.

#### Unrealistic and discriminatory tender security requirements

The Respondents contend that they are required to evaluate tenderers financial and experience capacities to ensure a qualified contractor is selected to mitigate the risk of failed projects and to ensure quality in the project delivery.

The Respondents contend that Section 89 of the Act permits International Tenders such like the subject tender and that the credit period for the Financing Agreement is time constrained and as such limited market approach would take a shorter period and within the credit period. Further, that the Applicants are fully aware of the procurement guidelines for the subject tender and as such, they are maliciously trying to frustrate the 2<sup>nd</sup> Respondent's core mandate being, retail supply of electricity to its customers, that entails installing quality and well functioning meters at its

customers premises for purposes of measuring the consumption of electrical energy and for billing functions.

The Respondents contend that the World Bank Procurement Guidelines, 2011 revised in 2014 have long been overtaken by events and not currently in operation and the award of the subject tender and release of funds for the project of the subject tender is at the sole discretion of IDA.

Given the foregoing, the Respondents pray for dismissal of the instant Request for Review with costs to the Respondents and a declaration issued that the procurement process is lawful and ought to progress.

### **APPLICANTS' REJOINDER**

In response to the Respondents' response, the Applicants contend that they are strangers to the aforesaid bilateral agreement, financing agreement and the project agreement are extrinsic documents and not part of the subject tender but are subject to constitutional provisions on public procurement as espoused in Article 2 read with Article 10 and 227 of the Constitution thus the Board should not consider the same. Further, that the said documents are superior to the provisions of the Act and Regulations 2020 and they must be interpreted and applied, and if found to be contradictory to the constitutional and statutory provisions, they should be declared to be null and void and not applicable to the subject tender.

The Applicants contend that the Board should not consider the World Bank Procurement Regulations, 2016 revised in 2020 because they are not confidential but are part of public records which should have been shared with the Applicants as required under Section 67(3) (b) (c) and (4) of the Act for the Applicants perusal in order to adequately respond and that tenderers were advised to download World Bank Procurement Guidelines, 2011 revised in 2014. The Applicants contend that they have been denied their right to be heard by disclosing the said documents for perusal in order to substantively review the same and objects to the production of the said documents as well as consideration and referral by the Board while making its determination as they were not part of the Tender Document.

The Applicants contend that the Board has requisite jurisdiction since the tendering process herein is governed by the Constitution, the Act and Regulations 2020.

### **BOARD'S DECISION**

The Board has considered each of the parties' case, pleadings, documents, written submissions, list and bundle of authorities together with confidential documents submitted to the Board pursuant to Section 67 (3) (e) of the Act and finds the following issues crystalize for determination: -

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

In order to address the first issue, the Board will make a determination in respect of the following four sub-issues:-

*a) Whether the procurement proceedings of the subject tender meets the conditions set out in Section 4 (2) (f) of the Act, for which the Act does not apply, thus ousting the jurisdiction of this Board;*

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

*b) Whether the Applicants have the locus standi to lodge a Request for Review within the meaning of Section 2 read with Section 167 (1) of the Act;*

Depending on the determination of the second sub-issue of the first issue:-

*c) Whether the Applicants' Request for Review was accompanied by a refundable deposit valued at fifteen percent (15%) of the Applicants' tender as required under Section 167(2) of the Act read with Regulation 204(1) of Regulations 2020 to invoke the jurisdiction of this Board;*

Depending on the determination of the third sub-issue of the first issue:-

*d) Whether the procurement proceedings herein are with respect to the choice of procurement method, thus ousting the jurisdiction of this Board pursuant to Section 167(4)(a) of the Act read with Section 167(1) of the Act;*

Depending on the determination of the first issue:-

***2. Whether the provisions of the 2<sup>nd</sup> Respondent's Tender Document contravenes Articles 2, 10, 27 and 227 (1) and (2)(a) of the Constitution; Sections 3 (i) and (j); 61(2)(c), 89, 155, 156 and 157 of the Act read with Regulations 5, 43, 144, 145, 147 and 154 of Regulations 2020 with respect to allegations of:***

- a) Exclusion of domestic preference and reservations for local contractors;*
- b) Failure to unbundle the tender for procurement of single and three phase meters into several categories/lots;*
- c) Unrealistic and discriminatory financial requirements;*
- d) Discriminatory technical specifications; and*
- e) Unrealistic and discriminatory tender security requirements.*

In the locus classicus case of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA**(hereinafter referred to as the 'Mukisa Biscuit case') as per law JA,

*" .... so far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises out of clear implication out of pleadings and which if argued as 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 refer the dispute to arbitration ....."*

Sir Charles Newbold P in the Mukisa Biscuit case defined a preliminary objection as follows:-,

*"a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact is to be ascertained or what is sought is the exercise of judicial discretion"*

The question of what constitutes a proper preliminary objection was further addressed in **Attorney General of Tanzania v. African Network for Animal Welfare (ANAW) EACJ Appeal No. 3 of 2011** (hereinafter referred to as the 'A.G. of Tanzania case') where the Appellate Division of the East African Court of Justice held that: -

***"a preliminary objection could only be properly taken where what was involved was a pure point of law but that where there was any clash of facts, the production of evidence and assessment of testimony it should not be treated as a preliminary point. Rather, it becomes a substantive adjudication of the litigation on merits with evidence adduced, facts shifted, testimony weighed, witnesses called, examined and cross examined and a finding of fact made by the Court."***

In both the Mukisa Biscuit case and the A.G. of Tanzania case, courts emphasize that a preliminary objection ought to be based on a pure point of law and should not be based on factual questions requiring evidence to prove the grounds raised in the preliminary objection. This means, for a preliminary objection to be said to be of pure point of law, facts must be agreed by both the proponent of the preliminary objection and the one opposing the preliminary objection. Simply put, where there are any contested factual details, such a preliminary objection is not based on pure points of law and should therefore be adjudicated substantively on its merit and not as a preliminary point.

Going by the Mukisa Biscuit case, an example of a point of law which arises out of clear implication out of pleadings and if argued as preliminary point may dispose of the instant Request for Review is an objection to the jurisdiction of this Board.

Turning to the circumstances of the instant Request for Review, the Respondents have objected to the jurisdiction of this Board to entertain the instant Request for Review. Such objection has not been raised as a preliminary objection but has been raised as part of the response of the Respondents to the Applicants' instant Request for Review.

Nonetheless, the Applicants have challenged the same arguing, in its written submissions in support of the Applicant's Request for Review, that the grounds contained in what the Applicant refers to as preliminary objection are not based on pure points of law because the Respondents produced the Bilateral Agreement between GoK and IDA dated 29<sup>th</sup> June 2016, Financing Agreement dated 29<sup>th</sup> June 2015, the Subsidiary Financing Agreement dated 29<sup>th</sup> June 2015 as well as Project Agreement for Board's examination, to support the Respondents objection to the Board's jurisdiction to entertain the instant Request for Review pursuant to Section 4(2)(f) and 6(1) of the Act.

According to the Applicants, for the Board to ascertain whether the subject tender falls under a bilateral or multilateral agreement between GoK and any other foreign government, agency, entity or multilateral agency as per Section 4(2)(f) of the Act, the Board has to examine the above contested documents. Further, for the Board to ascertain whether there is any conflict between the conditions of the disputed tender, the provisions of

the Act and obligations arising from a treaty, agreement or other convention ratified, the Board must examine the Bilateral Agreement, the Financing Agreement, the Subsidiary Financing Agreement as well as Project Agreement.

It is the Applicants submission that a preliminary objection must be on a pure point of law and cannot be raised if facts are to be ascertained or if what is sought is the exercise of judicial discretion. The Applicants rely on judicial authorities in the locus classicus case of **Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd [1969] EA 696** as cited by Lady Justice Kasango in **Civil Suit No.88 of 2016; Kenya Breweries Limited & another v Keroche Breweries Limited [2020]eKLR**and **PPARB Application No.40 of 2022**.

We have carefully studied **Civil Suit No.88 of 2016; Kenya Breweries Limited & another v Keroche Breweries Limited [2020] eKLR** and note that the 4<sup>th</sup> and 5<sup>th</sup> Defendants therein raised a preliminary objection via a Notice of Preliminary Objection seeking to have the suit therein dismissed with costs to the defendants on grounds that the 4<sup>th</sup> and 5<sup>th</sup> Defendants were improperly joined to the suit. At paragraph 6 of her ruling dated 10<sup>th</sup> March 2020, Lady Justice Kasango held that, "*... The movers want this court to determine that they are wrongly sued and that the court do strike them out of this case. If one considers what has been discussed in the case J.N. & 5 Others v Board*

*Management St. G. School Nairobi (supra) one will realise that what the movers of the preliminary objection seek from this court is out of limb of what is a proper preliminary objection.”* Further, at paragraph 9 of her aforesaid ruling, Justice Kasango held that, .... *“The argument that they were wrongly joint can only be raised in a defence.”* Consequently and after citing the locus classicus case of **Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd [1969] EA 696** Lady Justice Kasango dismissed with costs the preliminary objection raised by the 4<sup>th</sup> and 5<sup>th</sup> Defendants in a Notice of Preliminary Objection which sought to have the suit dismissed with costs to the defendants on grounds that the 4<sup>th</sup> and 5<sup>th</sup> Defendants were improperly joined.

The grounds of objection raised by the Respondents in the instant Request for Review are distinguishable from the preliminary objections raised by the 4<sup>th</sup> and 5<sup>th</sup> Defendants in **Civil Suit No.88 of 2016; Kenya Breweries Limited & another v Keroche Breweries Limited [2020] eKLR**. First, in the former, the objection is to the jurisdiction of this Board to entertain the instant Request for Review while in the latter, the preliminary objection is to the alleged improper joinder of the 4<sup>th</sup> and 5<sup>th</sup> Defendants to the suit therein. Second, in the former, the objection was raised by the Respondents not as a preliminary objection in a Notice of Preliminary Objection but as a response to the instant Request for Review in the Respondents response whilst in the latter; the preliminary objection was raised as a preliminary objection in a Notice of Preliminary Objection.

We have equally considered this Board's decision dated 25<sup>th</sup> May 2022 in **PPARB Application No.40 of 2022 Medivision Equipments Limited v Accounting Officer, Kenya Medical Supplies Authority & 2 Others** and note at page 10 read with page 15 thereof, the Respondents therein raised a preliminary objection in a Notice of Preliminary Objection seeking for the review therein to be determined *in limine* for being grounded on foreign and extrinsic evidence not submitted as part of the Applicant's tender contrary to Section 76(2) of the Act. At page 25 and 26 of the aforesaid decision, this Board observed that, .....***However, vide the letter dated 20<sup>th</sup> April 2022, the Applicant requested the 2<sup>nd</sup> Respondent to re-evaluate its tender based on the following new and foreign documents, which were not part of the Applicant's tender; (i) .....*** ).

At page 32 and 33 of its aforesaid decision, this Board while relying on the ratio decidendi in **Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd [1969] EA 696** and in **Attorney General of Tanzania v African Network for Animal Welfare (ANAW) EACJ Appeal No.3 of 2011** observed that, .....***a preliminary objection ought to be based on a pure point of law and should not be based on factual questions requiring evidence to prove the grounds raised in the preliminary objection. This means, for a preliminary objection to be said to be of pure point of law, facts must be***

***agreed by both the proponent of the preliminary objection and the one opposing the preliminary objection. Simply put, where there are any contested factual details, such a preliminary objection is not based on pure points of law and should therefore be adjudicated substantively on its merits and not as a preliminary point.”***

Consequently, at page 34 of its aforesaid decision the Board held that,....***On the third and last ground of the preliminary objection founded on an allegation that the instant Request for Review is grounded on foreign and extrinsic evidence not submitted as part of the Applicant’s tender requires examination of the Applicant’s original tender submitted to the 2<sup>nd</sup> Respondent with respect to the subject tender to enable us establish the veracity of these allegations. To this end, this third and last ground of the preliminary objection is not founded on a pure point of law and requires to be adjudicated on merit upon examining the evidence availed by parties.”***

Once again, the grounds of objection by the Respondents in the instant Request for Review are distinguishable from the preliminary objections raised by the Respondents in PPARB Application No.40 of 2022 Medivision Equipments Limited v Accounting Officer, Kenya Medical Supplies Authority & 2 others. First, in the former, the objection is to the jurisdiction of this Board to entertain the instant Request for Review for allegedly satisfying

the conditions under Section 4(2)(f) of the Act while in the latter, the preliminary objection was to a misconceived, fatally defective, incompetent, bad in law, mischievous, frivolous, vexatious review for being grounded on alleged extrinsic evidence not submitted as part of the Applicant's tender contrary to Section 76(2) of the Act. Second, in the former, the objection was raised by the Respondents not as a preliminary objection in a Notice of Preliminary Objection but as a response to the instant Request for Review in the Respondents' response whilst in the latter; the preliminary objection was raised as a preliminary objection in a Notice of Preliminary Objection. Third, in the former, the objection is grounded on alleged confidential documents submitted to the Board by the Respondents under Section 67(3) (e) of the Act while in the latter, the preliminary objection is grounded on documents produced by the Applicant in support of its review but which documents, did not form part of the Applicant's original tender submitted to the Respondent as a tenderer pursuant to an invitation to tender by the Respondents therein.

It is not in dispute that GoK has received credit from IDA towards the cost of KEMP and the intention is for part of the proceeds of this credit to be applied to payments in the subject tender as communicated to prospective eligible tenderers in an Invitation to Bid (IFB) on 10<sup>th</sup> May 2022. Further, it is not in dispute that tendering for the subject tender was by way of an international competitive bidding process and is to be conducted through the World Bank Procurement Guidelines, 2011 revised in 2014 as

communicated to prospective eligible tenderers in an Invitation to Bid (IFB) on 10<sup>th</sup> May 2022. In fact, the Applicants have acknowledged this at paragraphs 8 and 4 of the instant Request for Review respectively.

It is also not in dispute that the bilateral agreement, financial agreement, subsidiary financial agreement and the project agreements were submitted to the Board by the Respondents pursuant to Section 67(3) (e) of the Act. What the Applicant has an issue with, is the Board examining the aforementioned documents and which issue has not been contested by the Respondents.

In the circumstances, and noting that the objection raised by the Respondents challenges the jurisdiction of this Board to entertain the instant Request for Review, and further noting that the objection has been raised as part of the response of the Respondents to the instant Request for Review, we find the same would have been a proper preliminary point of objection had it been raised as such in a Notice of Preliminary Objection. Even assuming we are wrong in finding that the jurisdictional issue raised by the Respondents would be a proper preliminary point of objection, we still have to address the jurisdictional issue as a first issue. We say so because, if we proceed with the substantive Request for Review and later find we have no jurisdiction, all that we would have done would be null and void.

Accordingly, we will now proceed to determine the issue for determination.

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

- (a) *Whether the procurement proceedings of the subject tender meets the conditions set out in Section 4 (2) (f) of the Act, for which the Act does not apply, thus ousting the jurisdiction of this Board;*

Jurisdiction is defined in Halsbury's Laws of England (4 th Ed.) Vol. 9 as

***"...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision."***

It is trite law that courts and decision-making bodies such as the Board can only act in cases where they have jurisdiction. Nyaragi, JA stated as follows in the *locus classicus* case of **The Owners of Motor Vessel "Lillian S" vs. Caltex Oil Kenya Limited (1989) eKLR:**

***"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized***

*of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.*" [Emphasis is ours]

Similarly, in the case of **KakutaMaimaiHamisi v Peris Pesi Tobiko & 2 others [2013] eKLR** the Court of Appeal emphasized on the centrality of the issue of jurisdiction and held that:

*".....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. It is definitive and determinative and prompt pronouncement on it, once it appears to be in issue, is a desideratum imposed on courts out of a decent respect for economy and efficiency and a necessary eschewing of a polite but ultimately futile undertaking of proceedings that will end in barren cul de sac. Courts, like nature, must not act and must not sit in vain...."*

Such is the centrality of jurisdiction that the Court of Appeal has held in **Isaak Aliaza v Samuel Kisiavuki [2021] eKLR**, (hereinafter referred to

as the 'Isaak Aliaza case') that "***whether it is raised either by parties themselves or the Court suo moto, it has to be addressed first before delving into the interrogation of the merits of issues that may be in controversy in a matter.***" (Emphasis ours).

Going by the Isaak Aliaza case, the Board would on its own motion/accord, without any request by the parties herein, determine whether it is clothed with jurisdiction to entertain the instant Request for Review.

The Respondents in their written submissions argue that Section 4 (2) (f) of the Act ousts the application of the Act for public procurement proceedings under a bilateral or multilateral agreement between GoK and any other foreign government, agency, entity or multilateral agency.

Section 4 (2) (f) of the Act reads as follows: -

**"4. Application of the Act**

***(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."***

The Respondents rely on a Financing Agreement dated 29<sup>th</sup> June 2022 entered into between the Republic of Kenya and IDA (hereinafter referred to as the 'Financing Agreement'), a Project Agreement dated 29<sup>th</sup> June 2015 entered into between IDA and Kenya Power and Lighting Company Ltd (hereinafter referred to as 'the Project Agreement'), a Subsidiary Loan Agreement dated 29<sup>th</sup> June 2015 entered into between The Government of the Republic of Kenya and The Kenya Power & Lighting Company Limited (hereinafter referred to as the 'Subsidiary Loan Agreement'), The World Bank Procurement Regulations, 2016 revised in 2020 and the Bidding Document (hereinafter referred to as the 'Tender Document') for the subject tender issued on 10<sup>th</sup> May 2022. These documents were submitted to the Board by the Respondents pursuant to Section 67(3) (e) of the Act after the Respondents received a Notification of Appeal and a Letter dated 17<sup>th</sup> June 2022 issued by the Acting Board Secretary pursuant to Section 168 of the Act.

Section 67 of the Act reads as follows:

***" 67. Confidentiality***

***(1) During or after procurement proceedings and subject to subsection (3), no procuring entity and no employee or agent of the procuring entity or member of a board, commission or committee of the procuring entity shall disclose the following—***

***(a) information relating to a procurement whose disclosure would impede law enforcement or whose disclosure would not be in the public interest;***

***(b) information relating to a procurement whose disclosure would prejudice legitimate commercial interests, intellectual property rights or inhibit fair competition;***

***(c) information relating to the evaluation, comparison or clarification of tenders, proposals or quotations; or***

***(d) the contents of tenders, proposals or quotations.***

***(2) For the purposes of subsection (1) an employee or agent or member of a board, commission or committee of the procuring entity shall sign a confidentiality declaration form as prescribed.***

***(3) This section does not prevent the disclosure of information if any of the following apply—***

***(a) the disclosure is to an authorized employee or agent of the procuring entity or a member of a board or committee of the procuring entity involved in the procurement proceedings;***

***(b) the disclosure is for the purpose of law enforcement;***

***(c) the disclosure is for the purpose of a review under Part XV or requirements under Part IV of this Act;***

***(d) the disclosure is pursuant to a court order; or***

***(e) the disclosure is made to the Authority or Review Board under this Act.***

***(4) Notwithstanding the provisions of subsection (3), the disclosure to an applicant seeking a review under Part XV shall constitute only the summary referred to in section 67(2)(d)(iii).***

***(5) Any person who contravenes the provisions of this section commits an offence as stipulated in section 176(1)(f) and shall be debarred and prohibited to work for a government entity or where the government holds shares, for a period of ten years."***

The aforesaid Notification of Appeal dated 17<sup>th</sup> June 2022 issued to the Respondents by the Acting Board Secretary, notified the Respondents of the existence of the instant Request for Review and suspended the procurement proceedings of the subject tender pursuant to Section 168 of the Act. The aforesaid Letter dated 17<sup>th</sup> June 2022, issued to the Respondents by the Acting Board Secretary, requested the Respondents to submit, *inter alia*, their response to the instant Request for Review together with all documentation in respect to the subject tender. Further, the Respondents were notified that their response was required to be filed separately from confidential documents which ought not to be availed to other parties in the instant Request for Review except where as guided by Section 67 of the Act.

The Applicants have objected to the examination of the Financing Agreement, the Project Agreement, the Subsidiary Loan Agreement and the World Bank Procurement Regulations, 2016 revised in 2020 by the Board on grounds that the same were not disclosed to the Applicants by the Respondents to enable the Applicants to adequately respond to the same. To this end, the Applicants allege that their right to fair hearing under Article 50(1)(c)(k) of the Constitution cannot be limited under Article 25 of the Constitution and that Article 35(1) (b) of the Constitution gives the Applicants the right of access to information held by the Respondents for purposes of exercising their right of review by the Board. Further, that Section 4(1) and (2)(g) of the Fair Administrative Action Act No.4 of 2015 underpins the importance of expeditious, efficient, lawful, reasonable and procedurally fair administrative process by requiring all parties to be supplied with all the information, materials and evidence to be relied upon in making the decision or taking the administrative action.

On this, the Applicants cited **Republic v Public Procurement Administrative Review Board; Nairobi City Water & Sewerage Company Limited & another (Interested Parties) Ex-Parte Fourway Construction Company Ltd [2018] eKLR** where Justice Odunga while citing the **European Court of Justice in Varec v Belgian State, Case C-450/06** in the context of European procurement law, laid down three principles on disclosure of documents relevant to litigation in procurement proceedings. First is that review bodies must have access to

relevant information to determine a case. Second is that information that the review body has, must not automatically be disclosed to others, including a tenderer who challenges an award decision, since a review body is under a duty to ensure confidentiality of business information. Third is that the decision whether to disclose particular information must be considered by a Review Board on a case-by-case basis, by balancing tenderers' interests in having access to information to ensure a fair hearing, with interests of commercial confidentiality.

The Applicants argue that the doctrine of transparency of procurement proceedings has clearly been articulated in Article 227(1) of the Constitution providing for procurement of goods to be conducted in a transparent manner and that the national values and governance in Article 10(2)(a) and (c) of the Constitution, include transparency and accountability. Similarly, that Section 3 read with Section 58 of the Act requires procuring entities to supply sufficient information to allow for transparency.

On this, the Applicants cited **Blue Sea Service Ltd v Public Procurement Administrative Review Board (2016) eKLR** and **Republic v Independent Electoral and Boundaries Commission (I.E.B.C) Ex parte National Super Alliance (NASA) Kenya & 6 others [2017] eKLR** cited with approval of Court of Appeal in **Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 others [2017] eKLR**.

We note the Respondents have not indicated under what category of confidential documents the Financing Agreement, the Project Agreement, the Subsidiary Loan Agreement and the World Bank Procurement Regulations, 2016 revised in 2020 fall under Section 67(1) of the Act. We also noted the Applicants made no attempt to seek these documents directly from the Respondents yet they were well informed through the Invitation to Bid advertised on 10<sup>th</sup> May 2022, that the subject tender was funded by IDA and the procurement proceedings on the same were to be conducted under the World Bank Procurement Guidelines, 2011 revised in 2014. The Applicants also failed to request for the said documents to be availed to them through an order of this Board during the pendency of the instant Request for Review. Had the Applicants applied to the Board seeking to be furnished with the said documents, during the pendency of the instant Request for Review, the Board would have considered the three principles on disclosure of documents relevant to litigation in procurement proceedings enumerated herein before and perhaps in exercise of its discretion, ordered the Respondents to furnish the Applicants with the said documents.

In the circumstances and noting that these documents are relevant and key to informing the Board's decision as to whether it is clothed with jurisdiction to entertain the instant Request for Review, we shall proceed to examine these same. We say so bearing in mind that jurisdiction is everything and anything done without jurisdiction, will be a nullity and an exercise in futility.

We have carefully studied all the documents forwarded to the Board by the Respondents under the cover of confidential documents and note on 29<sup>th</sup> June 2015, the Republic of Kenya and IDA, entered into an agreement in which IDA agreed to extend to the Republic of Kenya credit to assist in, *inter alia*, the financing of the 2<sup>nd</sup> Respondent, for purposes of improving service delivery and reliability, revenue protection, electrification and technical assistance and capacity building to achieve increase access to electricity, improve reliability of electricity services and strengthen the 2<sup>nd</sup> Respondent's financial situation (hereinafter referred to as 'KEMP'). This agreement is what we hereinbefore referred to as the Financing Agreement.

On the same day, IDA and the 2<sup>nd</sup> Respondent entered into an agreement specifying the specific terms and conditions under which KEMP was to be implemented. This agreement is what we hereinbefore referred to as the Project Agreement.

Consequently, on same day of 29<sup>th</sup> June 2015, the Government of Kenya and the 2<sup>nd</sup> Respondent entered into an agreement for the Government of Kenya to on lend the 2<sup>nd</sup> Respondent, part of the proceeds of credit in respect of funds made available by IDA in the Financing Agreement for purposes of improving the 2<sup>nd</sup> Respondent's service delivery and reliability, revenue protection, electrification and technical assistance and capacity

building to achieve increase access to electricity, improve reliability of electricity services and strengthen the 2<sup>nd</sup> Respondent's financial situation (hereinafter referred to as 'KEMP'). This agreement is what we hereinbefore referred to as the Subsidiary Financing Agreement.

These agreements and following a no objection obtained by the 2<sup>nd</sup> Respondent from the World Bank on 10<sup>th</sup> May 2022, paved way for the 2<sup>nd</sup> Respondent's Invitation for Bids (IFB) dated 10<sup>th</sup> May 2022 inviting eligible candidates to participate in the subject tender. The Invitation for Bids contained, *inter alia*, the following:-

- 1. *The Government of Kenya has received credit from the International Development Association (IDA) towards the cost of the Kenya Electricity Modernization Project (KEMP). It is intended that part of the proceeds of this credit will be applied to eligible payments under the contracts.***
- 2. *The Kenya Power and Lighting Company PLC now invites sealed bids from eligible bidders for the above...***
- 3. *Bidding will be conducted through the International Competitive Bidding procedures as specified in the World Bank's Guidelines: Procurement of Goods, Works and Non-Consulting Services under IBRD Loans and IDA Credits & Grants by World Bank Borrowers published by the Bank in January 2011 (Revised July 2014)***

*(‘Procurement Guidelines’) and is open to all eligible bidders as defined in the Procurement Guidelines.*

.....

- 4. Interested eligible bidders may obtain further information from The Kenya Power and Lighting Company PLC and inspect the Bidding Documents at the address given below from 0900 to 1600 hours, Monday to Friday excluding public holidays**

.....

**5. ....**

**6. ....**

- 7. Qualification requirements refer to Section III of the Bidding Document.**

**8. ....**

**9. ....**

**9. ....**

**10 .....”**

The Respondents contend that the subject procurement process is subject to donor funds received pursuant to the Financial Agreement which they consider is a bilateral agreement. The Respondents contend that IDA is one of the institutions under the World Bank Group and the World Bank is

a multilateral agency. For this reason, the Respondents submitted that by virtue of Section 4 (2) (f) and (6) (1) of the Act, the application of the Act to the procurement proceedings of the subject tender is ousted, thus divesting the Board of jurisdiction to entertain the instant Request for Review. Further, the Respondents submitted that Section II. Bid Data Sheet (BDS) in the Tender Document indicates that the Government of Kenya is the Borrower.

To support this argument, the Respondents cited Lady Justice P. Nyamweya's decision in **Republic v Public Procurement Administrative Review Board & 2 others Ex parte Kenya Power & Lighting Company [2019] eKLR** where the Board was faulted for *'failure to take into consideration the provisions of the tender advertisement, that clearly stated that the world Bank Guidelines on Procurement for Goods and Services would apply to the tender'* and on the issue of conflict of laws.

These submissions were refuted by the Applicants who view that the procurement proceedings of the subject tender was not under a bilateral agreement as contemplated under Section 4(2)(f) of the Act because the 2<sup>nd</sup> Respondent was the Procuring Entity and the 2<sup>nd</sup> Respondent is not Government of Kenya. According to the Applicants, the Government of Kenya was not a party to the current tendering proceedings and as such

Section 4(2) (f) and 6(1) of the Act is not applicable and the Board has jurisdiction to entertain the instant Request for Review.

To support this argument, the Applicants cited **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 Services Board & Another [2017] eKLR** and this Board's decision in **PPARB Application No.1 of 2020: Energy Sector Contractors Association v The Accounting Officer, Kenya Power & Lighting Company & Another** which Board's decision was endorsed by Mativo J in **Republic v Public Procurement Administrative Review Board Ex parte Kenya Power & Lighting Company Limited; Energy Sectors Contractors Association & another (Interested Parties) [2020] eKLR.**

Further, the Applicants submitted that the supremacy of the Constitution in Article 2(4), (5) and (6) of the Constitution underpins that all treaties, international laws and customary international norms including any bilateral treaties between Kenyan Government and international agencies are subservient to the Constitution and any inconsistency shall be declared null and void to its inconsistency. Accordingly, the Applicants submitted that the bilateral agreement, financial and project agreements, and the World Bank Procurement Regulations, 2016 revised in 2020 must be interpreted and applied in a manner that is subservient and subordinate to the

Constitutional principles in Article 10 and 227 and if they are in conflict with constitutional doctrines, they must be declared null and void to the extent of their inconsistency. To support this argument, the Applicants relied on **Beatrice Wanjiku & Another v the Attorney General & others, High Court Petition No.190 of 2011 [2012] eKLR.**

The Board having considered parties' submission on the interpretation of Section 4 (2) (f) and 6 (1) of the Act and the judicial authorities cited by parties, deems it fit to first interrogate the aforementioned statutory provisions. Section 4 (2) (f) of the Act provides as follows:-

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

***.....;***

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

To understand the import of Section 4 (2) (f) of the Act, the Board interrogated the parties named under the said provision. The Applicants

cited the decision of 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") where the Learned Judge at paragraphs 152 to 154 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.**

On her part, Justice Nyamweya in **Judicial Review Application No. 181 of 2018, Republic v Public Procurement Administrative Review Board & 2 others Exparte Kenya Power & Lighting Company [2019] eKLR** (hereinafter referred to as "the KPLC Case") cited by the Respondents, 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 16<sup>th</sup> April 2018.**

**63. In my view, a reading of section 4(2)(f) shows that the operative action is procurement under abilateral**

*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 dependant 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]***

In the KPLC Case, Justice Nyamweya faulted the Board for failure to consider the applicability of the bilateral agreement which was 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 interrogation of the Financing Agreement for purposes of making a determination on the import of Section 4(2)(f) of the Act.

To begin with, the Board deems it fit to interrogate the circumstances of the KPLC Case and the Athi Water Case as they both dealt with Section 4 (2) (f) of the Act.

In light of the foregoing decisions, the Board observes that 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; a Foreign Government, Foreign Government Agency, Foreign Government Entity or Multi-lateral Agency.

However, Justice Nyamweya in the *KPLC Case* took the view 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; a foreign government, agency, entity or multilateral agency (which she termed as foreign international entities at paragraph 61 of her judgement).

In essence, for Section 4 (2) (f) of the Act to apply, one of the parties to a procurement (as per Justice Odunga's decision in the *Athi Water Case*) or a procurement undertaken as provided for or in accordance with the terms of a bilateral or multilateral agreement (as per Justice Nyamweya in the *KPLC Case*) *must be* the Government of Kenya.

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. In the KPLC Case, the parties to the bilateral agreement were Nordic Development Fund and the Government of Kenya while an implementing agency was identified as Kenya Power and Lighting Company to undertake the procurement on behalf of the Government of Kenya, as its agent.

Secondly, the procurement guideline applicable to the Athi Water Case was the World Bank Procurement Guidelines, 2011 revised in 2014. The Board studied the provisions of the World Bank Procurement Guidelines, 2011 revised in 2014 and observes as follows:-

Clause 1.5 of the 2014 World Bank Guidelines states as follows:-

***"The principles, rules, and procedures outlined in these Guidelines apply to all contracts for goods, works, and non-consulting services financed in whole or in part from Bank loans. The provisions described under this Section I apply to all other Sections of the Guidelines. For the procurement of those contracts for goods, works, and non-consulting services not financed in whole or in part from a Bank loan, but included in the project scope of the loan agreement, the Borrower may adopt other rules and procedures. In such cases, the Bank shall be satisfied that the procedures to be used will fulfill the Borrower's obligations to cause the project to be carried out diligently and efficiently, and that***

***the goods, works, and non-consulting services to be procured:-***

- (a) are of satisfactory quality and are compatible with the balance of the project;***
- (b) will be delivered or completed in timely fashion; and***
- (c) are priced so as not to affect adversely the economic and financial viability of the project”***

From the above clause, the World Bank Procurement Guidelines, 2011 revised in 2014 expressly stated their applicability to all contracts for goods, works and non-consulting services financed in whole or in part from the World Bank loans. It however provided circumstances when a Borrower would adopt other rules and procedures but only after the World Bank is satisfied that the procedures to be used will fulfill the Borrower's obligations to cause the project to be carried out diligently and efficiently in accordance with the conditions listed hereinbefore.

Further, Clause 1.1 of the World Bank Procurement Guidelines, 2011 revised in 2014 provide as follows:-

***"The purpose of these Guidelines is to inform those carrying out a project that is financed in whole or in part by a loan from the International Bank for Reconstruction and Development (IBRD), a credit or grant from the***

***International Development Association (IDA), a project preparation advance (PPA), a grant from the Bank, or a trust fund administered by the Bank and executed by the recipient, of the policies that govern the procurement of goods, works, and non-consulting services required for the project. The Loan Agreement governs the legal relationships between the Borrower and the Bank, and the Guidelines are made applicable to procurement of goods, works, and non-consulting services for the project, as provided in the agreement. The rights and obligations of the Borrower and the providers of goods, works, and non-consulting services for the project are governed by the bidding documents, and by the contracts signed by the Borrower with the providers of goods, works, and non-consulting services, and not by these Guidelines or the Loan Agreements.***

From the above provisions, the Board notes that the World Bank Procurement Guidelines, 2011 revised 2014 applied to the procurement process being undertaken in the Athi Water Case. However, the rights and obligations of the Government of Kenya (being the borrower) and the providers of the goods, works, consulting and non-consulting services (i.e. successful tenderers) were not governed by the World Bank Procurement Guidelines, 2011 revised 2014. The Board having studied the Athi Water Case observes that the procuring entity in that case was not identified as an implementing agency of the Government of Kenya or as an agent of the

Government of Kenya as was held by Justice Nyamweya in the KPLC Case, which she found to be the point of departure from the Athi Water case in so far as application of Section 4 (2) (f) of the Act is concerned.

The Board studied the KPLC Case and **PPARB Application No. 42 of 2018, Aston Field Solesa Solar Kenya Ltd/Clean Water Industries Ltd v. Kenya Power and Lighting Company Limited** (which became JR No. 181 of 2018, i.e. the KPLC Case that was heard and determined by Justice Nyamweya) and notes that the year of the World Bank Guidelines referred to in both cases is not specified. However, what was in use at that time was the World Bank Procurement Regulations for IPF Borrowers: Procurement in Investment Project Financing Goods, Works, Non-Consulting and Consulting Services July, 2016 (Revised in November 2017 and in August 2018), (hereinafter referred to as "the World Bank Procurement Regulations, 2016 revised 2018") for procurement of goods, works, consulting and non-consulting services.

Paragraph 3.2 of Section III of the World Bank Procurement Regulations, 2016 revised 2018 provided as follows:-

***"Roles and Responsibilities Borrower***

***3.2 The Borrower is responsible for carrying out procurement activities financed by the Bank in***

***accordance with these Procurement Regulations. This includes planning, strategizing, seeking and evaluating Applications/Quotations/Bids/Proposals, and awarding and managing contracts. The Borrower shall retain all Procurement Documents and records of procurements financed by the Bank, as required in the Legal Agreement"***

Further, Paragraph 2.1 of Section III of the World Bank Procurement Regulations, 2016 revised in 2018 provided as follows:-

***"The Legal Agreement governs the legal relationship between the Borrower and the Bank. The Procurement Regulations are applicable to the procurement of Goods, Works, Non-consulting Services and Consulting Services in IPF operations, as provided for in the Legal Agreement. The rights and obligations of the Borrower and the providers of Goods, Works, Non-consulting Services and Consulting Services for IPF operations are governed by the relevant request for bids/request for proposals document and by the contracts signed by the Borrower and the providers of Goods, Works, Non-consulting Services, and Consulting Services, and not by these Procurement Regulations or the Legal Agreement"***

Again, the World Bank Procurement Regulations, 2016 revised in 2018 supported the view that World Bank financed projects apply World Bank rules and procedures save that the rights and obligations of the Borrower and the providers of the goods, works, consulting and non-consulting services (i.e. successful tenderers) are not governed by the World Bank Procurement Regulations, 2016 revised in 2018.

It is however clear that the World Bank Procurement Guidelines, 2011 revised in 2014 and the World Bank Procurement Regulations, 2016 revised in 2018 required procurements emanating from projects financed by the World Bank, be governed by the bilateral agreement entered into with a Borrower (i.e. Government of Kenya), save that in the Athi Water Case, the procuring entity was not named as an implementing agency, hence was not acting as an agent of the Government.

Turning to the circumstances in the instant Request for Review, the Board observes that Section 2 of the Act defines a procurement as:-

***"the acquisition by purchase, rental, lease, hire purchase, license, tenancy, franchise, or by any other contractual means of any type of works, assets, services or goods including livestock or any combination and includes advisory, planning and processing in the supply chain system"***

Hence, in examining the bilateral agreement between the parties to the procurement proceedings in the instant Request for Review, the Board must address its mind to the questions; who were the parties to the bilateral agreement?, what did the bilateral agreement provide in terms of procurements undertaken as provided for by it or in accordance with its terms? Was the procurement proceedings for the subject tender being undertaken as provided for or in accordance with the terms of the bilateral agreement?. In other words, was the procurement in the subject tender to be undertaken as provided for, or in accordance with the terms of the bilateral agreement between the Government of Kenya and IDA and do those terms point to the applicable law in so far as the procurement is concerned?

First, the parties to the Financing Agreement are Republic of Kenya and International Development Association. It is therefore important to understand the meaning of Republic of Kenya with a view to determining who represents it serves the same purpose as the Government of Kenya in Section 4 (2) (f) of the Act.

According to the Black's Law Dictionary, 7<sup>th</sup> Edition, Republic means:-

***"a form of government which derives all its powers directly or indirectly from the general body of citizens, and in which the executive power is lodged in officers chosen by and representing the people, and holding office for a limited***

***period, or at most during good behavior or at the pleasure of the people”***

Further, Article 4 of the Constitution states that:-

***“(1) Kenya is a sovereign Republic.***

***(2) The Republic of Kenya shall be a multi-party democratic State founded on the national values and principles of governance referred to in Article 10”***

From the foregoing, we note, “a Republic” is a form of government which derives all its powers directly or indirectly from the general body of citizens, and in which the executive power is lodged in officers chosen by and representing the people.

Kenya is a sovereign Republic, headed by a President who is referred to as the Head of Government. The President derives his powers directly or indirectly from the general body of citizens during an election, and in which the executive power is given to officers chosen by and representing the people. Hence, the Republic of Kenya is for all intents and purposes represented by the Government of Kenya headed by a President. Having defined a republic as a form of government as per the Black’s Law Dictionary we do understand the words Republic of Kenya and Government of Kenya can be interchangeably be used to mean one and the same.

For this reason then one of the parties to the Financing Agreement in the Government of Kenya. The other party to the Financing is the International Development Association.

The Official Website of the International Development Association ([www.ida.worldbank.org](http://www.ida.worldbank.org)) describes the International Development Association as:-

***"part of the World Bank that helps the world's poorest countries.....complements the World Bank's original lending arm-the International Bank for Reconstruction and Development (IBRD)"***

The Official Website of the World Bank ([www.worldbank.org](http://www.worldbank.org)) describes the World Bank Group as:-

***"as one of the world's largest sources of funding and knowledge for developing countries. Its five institutions (IDA being one of them) share a commitment to reducing poverty, increasing shared prosperity, and promoting sustainable development."***

The Respondents submitted that IDA being part of World Bank is considered a multilateral agency. We do agree with the Respondents

noting that there was no contest on this. For this reason the other party to the Financing Agreement is a multilateral agency.

Having found that parties to the Financing is the Government of Kenya and a multilateral agency, the Financing Agreement is a bilateral agreement within the meaning of Section 4(2) of the Act in so far as parties to it are concerned.

This Financing Agreement was executed by the authorized representative of the Republic of Kenya, the Cabinet Secretary, The National Treasury, Henry Rotich and the authorized representative of IDA, Country Director, Diarieton Gaye. The Republic of Kenya in the Financing Agreement is referred to as the Recipient of the credit and IDA is referred to as the Association extending the credit to the Republic of Kenya.

The Republic of Kenya at Clause 3.01 of Article III at page 2 of the Financing Agreement is under an obligation to carry out the project described in the Financing Agreement through, *inter alia*, the 2<sup>nd</sup> Respondent. The 2<sup>nd</sup> Respondent at Clause 22 of Section I of the Appendix to the Financing Agreement at page 17 of the Financing Agreement is referred to as the project implementing entity.

The project under the Financing Agreement that is to be carried out by the Republic of Kenya through the 2<sup>nd</sup> Respondent as an implementing entity is

enumerated in detail as whole of Part A: Improvement in Service Delivery and Reliability; whole of Part B: Revenue Protection Program, part of Part C: Electrification Program and part of Part D: Technical Assistance and Capacity Building of Schedule 1 at page 5 and 6 of the Financing Agreement.

Given the foregoing, under the Financing Agreement, the Republic of Kenya is required to carry out the part of the project described therein through the 2<sup>nd</sup> Respondent as the implementing agency. To this end, the 2<sup>nd</sup> Respondent is an agent of the Republic of Kenya and recognized as such in the Financing Agreement when referred to as the implementing agent of part of the project the Republic of Kenya is required to carry out as described in the Financing Agreement.

This then places the circumstances of the instant Request for Review to be similar with those in the KPLC case (Justice Nyamweya) where Kenya Power and Lighting Company was found to be an agent of the Government of Kenya having been referred to as the implementing agency in a bilateral agreement and is distinguishable from the circumstances in the Athi Water case (Justice Odunga) where Athi Water Services Board was not referred to as the implementing agency in a bilateral agreement in so far as parties to a bilateral agreement is concerned.

The subject tender is for procurement of single & three phase smart meters by the 2<sup>nd</sup> Respondent. The Invitation for Bids (IFB) advertised by the 2<sup>nd</sup> Respondent on 10<sup>th</sup> May 2022 notified prospective tenderers that the Government of Kenya had received credit for IDA towards the cost of the Kenya Electricity Modernization Project (KEMP) and part of such credit would be applied to eligible payments under the contract. The 2<sup>nd</sup> Respondent submits in the Respondents written submissions that KEMP is *'a programme initiated by the Government of Kenya intended to incorporate the Advanced Metering Infrastructure (AMI) project whose ultimate goal is to assist the 2<sup>nd</sup> Respondent to improve its performance by reducing technical and commercial electricity losses by establishing end to end smart metering infrastructure to cover additional small and medium enterprises as a way of improving revenue assurance'*.

The subject tender in our view fits the description of the project to be carried out by the Republic of Kenya through the 2<sup>nd</sup> Respondent as the implementing entity under Part A: Improvement in Service Delivery and Reliability, Part B: Revenue Protection Program, Part C: Electrification Program of Schedule 1 of the Financing Agreement. Infact, the subject tender, once undertaken, will to a large extent satisfy two of the three objectives of the project outlined in Schedule 1 of the Financing Agreement being; to (a) increase access to electricity and (b) improve reliability of electricity service.

Given the foregoing, we are of the considered view that the subject tender is under the Financing Agreement. What this means as per Justice Nyamweya in the KPLC case is that the subject tender is being undertaken as provided for or in accordance with the terms of the Financing Agreement.

The Republic of Kenya at Clause 3.02 of Article III at page 2 of the Financing Agreement is under an obligation to ensure that the project described in the Financing Agreement is carried out (partly through the 2<sup>nd</sup> Respondent as the implementing entity) in accordance with the provisions of Schedule 2 of the Financing Agreement. Schedule 2 of the Financing Agreement is on project execution. Clause 1 of Part A of Section III. Procurement of Schedule 2 at page 10 of the Financing Agreement provides that, *'all goods, works and non-consulting services required for the Project and to be financed out of the proceeds of the Financing shall be procured in accordance with the requirements set forth or referred to in Section I of the Procurement Guidelines, and with the provisions of this Section.* Clause 20 of the Appendix at page 17 of the Financing Agreement defines Procurement Guidelines as *'Guidelines: Procurement of Goods, Works and Non-consulting Services under IBRD Loans and IDA Credits and Grants by World Bank Borrowers, dated January 2011 (revised July 2014)'*

Given the foregoing, it is our understanding that when the Republic of Kenya is carrying out part of the project described in the Financial Agreement, through the 2<sup>nd</sup> Respondent as its agent and the implementing

entity, and a need to procure goods, works and non-consulting services to be financed out of the proceeds of the Financing Agreement arises, such procurement must adhere to Section I of the World Bank Procurement Guidelines 2011, revised in 2014.

To effect the implementation of the project as described in the Financing Agreement, the Financing Agreement provided for and acknowledges a subsidiary financing agreement dated 29<sup>th</sup> June 2015 between the Government and the 2<sup>nd</sup> Respondent at Clause 5.01(a) at page 2 of the Financing Agreement (hereinafter referred to as the Subsidiary Financing Agreement).

Further, on the same day of 29<sup>th</sup> June 2015, IDA and the 2<sup>nd</sup> Respondent entered into an agreement in connection with the Financing Agreement on the carrying out of the project as described in the Financing Agreement by the 2<sup>nd</sup> Respondent as the implementing entity (hereinafter referred to as the 'Project Agreement').

We note that both the Subsidiary Financing Agreement at Clause I of Annex I thereof and the Project Agreement at Section III thereof provide for procurement of goods, works and services required for the project described in the Financing Agreement and to be financed out of the financing to be procured in accordance with the provisions of Section III of Schedule 2 to the Financing Agreement which requires the same to be

conducted in accordance with Section I of the World Bank Procurement Guidelines, 2011 revised in 2014.

Having established that the subject tender is being undertaken as provided for or in accordance with the terms of the Financing Agreement and that the Financing Agreement requires procurement of goods, works and non-consulting services (like is the case of with the subject tender) to be procured in accordance with Section I of the World Bank Procurement Guidelines, 2011 revised in 2014, it then follows that the subject tender is to be undertaken in accordance with the requirements set forth or referred to in Section I of the World Bank Procurement Guidelines, 2011 revised in 2014.

Clause 1.5 of the World Bank Procurement Guidelines, 2011 revised 2014 provided as follows:-

***"The principles, rules, and procedures outlined in these Guidelines apply to all contracts for goods, works, and non-consulting services financed in whole or in part from Bank loans. The provisions described under this Section I apply to all other Sections of the Guidelines. For the procurement of those contracts for goods, works, and non-consulting services not financed in whole or in part from a Bank loan, but included in the project scope of the loan agreement, the Borrower may adopt other rules and procedures. In such***

***cases, the Bank shall be satisfied that the procedures to be used will fulfill the Borrower's obligations to cause the project to be carried out diligently and efficiently, and that the goods, works, and non-consulting services to be procured:-***

- (a) are of satisfactory quality and are compatible with the balance of the project;***
- (b) will be delivered or completed in timely fashion; and***
- (c) are priced so as not to affect adversely the economic and financial viability of the project"***

Our understanding is that the World Bank Procurement Guidelines, 2011 revised in 2014 would be applicable to all contracts for goods, works and non-consulting services financed in whole or in part from the World Bank loans before 1<sup>st</sup> July 2016.

Further, Clause 1.1 of the World Bank Procurement Guidelines, 2011 revised in 2014 provided as follows:-

***"The purpose of these Guidelines is to inform those carrying out a project that is financed in whole or in part by a loan from the International Bank for Reconstruction and Development (IBRD), a credit or grant from the International Development Association (IDA), a project***

***preparation advance (PPA), a grant from the Bank, or a trust fund administered by the Bank and executed by the recipient, of the policies that govern the procurement of goods, works, and non-consulting services required for the project. The Loan Agreement governs the legal relationships between the Borrower and the Bank, and the Guidelines are made applicable to procurement of goods, works, and non-consulting services for the project, as provided in the agreement. The rights and obligations of the Borrower and the providers of goods, works, and non-consulting services for the project are governed by the bidding documents, and by the contracts signed by the Borrower with the providers of goods, works, and non-consulting services, and not by these Guidelines or the Loan Agreements. No party other than the parties to the Loan Agreement shall derive any rights therefrom or have any claim to loan proceeds.***

Our understanding is that only a borrower and a lender who are parties to a loan agreement financed by World Bank can derive rights or have a claim to loan proceeds because the loan agreement governs such parties. However, the relationship between a borrower and providers of goods, works, and non-consulting services (i.e. successful tenderer) is not governed by the World Bank Procurement Guidelines, 2011 revised in 2014 but rather by a bidding document and a contract signed by a borrower and such supplier.

The Board is alive to the fact that the World Bank Procurement Regulations, 2016 (revised 2020) were first published in 2016 taking over and replacing the World Bank Procurement Guidelines, 2011 revised in 2014 with respect to all projects after 1<sup>st</sup> July 2016. Subsequently, the World Bank Procurement Regulations, 2016 underwent revision in 2017, 2018 and 2019. This information is publicly available on the World Bank's website [www.worldbank.org](http://www.worldbank.org) . This is the reason the Respondents are relying on the World Bank Procurement Regulations 2016, revised in 2020 as opposed to the World Bank Procurement Regulations 2011 revised in 2014.

Paragraph 1.3 of Section I of the World Bank Procurement Regulations, 2016 revised in 2020 reads as follows:-

***"While in practice the specific procurement rules and procedures to be followed in the implementation of a project depend on the circumstances of the particular case, the following Bank's Core Procurement Principles generally guide Bank decisions under these Procurement Regulations: value for money, economy, integrity, fit for purpose, efficiency, transparency and fairness."***

The World Bank's procurement principles outlined above are similar to and not necessarily the same to the constitutional procurement principles of a

system that is fair, equitable, transparent, competitive and cost-effective as provided for in Article 227(1) of the Constitution.

Paragraph 2.1 of Section III of the World Bank Procurement Regulations, 2016 revised in 2020 reads as follows:-

***"The Legal Agreement governs the legal relationship between the Borrower and the Bank. The Procurement Regulations are applicable to the procurement of Goods, Works, Non-consulting Services and Consulting Services in IPF operations, as provided for in the Legal Agreement. The rights and obligations of the Borrower and the providers of Goods, Works, Non-consulting Services and Consulting Services for IPF operations are governed by the relevant request for bids/request for proposals document and by the contracts signed by the Borrower and the providers of Goods, Works, Non-consulting Services, and Consulting Services, and not by these Procurement Regulations or the Legal Agreement. No party other than the parties to the Legal Agreement shall derive any rights from, or have any claim to, financing proceeds."***

Legal Agreement in the World Bank Procurement Regulations, 2016 revised in 2020 is defined as, *"Each agreement with the Bank providing for a loan for a project, including Procurement Plan and all documents incorporated*

*by reference. If the Bank enters into a project agreement with an entity implementing the project, the term includes the project agreement”.*

Our understanding is that only a borrower and a lender who are parties to a legal agreement financed by World Bank can derive rights or have a claim to financing proceeds because their legal relationship is governed by the legal agreement. However, the relationship between a borrower and providers of goods, works, and non-consulting services (i.e. suppliers or successful tenderer) is not governed by the legal agreement or by the World Bank Procurement Guidelines, 2016 revised in 2020 but rather, by a bidding document and a contract signed by a borrower and such supplier.

It therefore follows that the rights and obligations of the Borrower (i.e. the Government/Republic of Kenya) vis-à-vis the rights of successful tenderers (such as the Applicants if they were to emerge the successful tenderers and a contract entered into) for works, goods and services under the subject tender are governed by (a) the Tender Document and (b) the procurement contract as a product of the subject tender which is to be signed by the 2<sup>nd</sup> Respondent being an agent of the Government/Republic of Kenya and the implementing entity for the project being undertaken by the Republic of Kenya as described in the Financing Agreement.

Paragraph 3.2 of Section III of the World Bank Procurement Regulations, 2016 revised 2020 provides as follows:-

***"Roles and Responsibilities Borrower***

***3.2 The Borrower is responsible for carrying out procurement activities financed by the Bank in accordance with these Procurement Regulations. This includes planning, strategizing, seeking and evaluating Applications/Quotations/Bids/Proposals, and awarding and managing contracts. The Borrower shall retain all Procurement Documents and records of procurements financed by the Bank, as required in the Legal Agreement”***

The World Bank Procurement Regulations, 2016 revised in 2018 imposes an obligation on a borrower to apply the World Bank Procurement Regulations, 2016 revised in 2020 in all the processes or steps undertaken for procurement activities financed by World Bank.

Clause 3.5 and 3.6 of Section III of the World Bank Procurement Regulations 2016 revised 2020 provides as follows:-

***“3.5 The Bank carries out prior reviews of procurement activities that are of high value and/or high risk to determine whether the procurement is carried out in accordance with the requirements of the Legal Agreement.***

***3.6 The Bank also carries out post reviews of procurement activities undertaken by the Borrower to determine whether they comply with the requirements of the Legal Agreement. ....”***

The involvement of World Bank in the procurement process of the subject tender is confined to verifying whether or not the conditions attached to the Financing Agreement are met.

To effect the implementation of the project as described in the Financing Agreement, the Financing Agreement provided for and acknowledge a subsidiary financing agreement dated 29<sup>th</sup> June 2015 between the Government and the 2<sup>nd</sup> Respondent at Clause 5.01(a) at page 2 of the Financing Agreement (hereinafter referred to as the Subsidiary Financing Agreement).

Further, on the same day of 29<sup>th</sup> June 2015, IDA and the 2<sup>nd</sup> Respondent entered into an agreement in connection with the Financing Agreement on the carrying out of the project as described in the Financing Agreement by the 2<sup>nd</sup> Respondent as the implementing entity (hereinafter referred to as the 'Project Agreement').

We note that both the Subsidiary Financing Agreement at Clause I of Annex I thereof and the Project Agreement at Section III thereof provide for procurement of goods, works and services required for the project described in the Financing Agreement and to be financed out of the financing to be procured in accordance with the provisions of Section III of Schedule 2 to the Financing Agreement which requires the same to be conducted in accordance with Section I of the World Bank Procurement Guidelines, 2011 revised in 2014. In other words, there was no reference

to the applicability of the laws of Kenya in either the Subsidiary Financing Agreement or the Project Agreement in relation to procurement process with respect to the subject tender. The Financing Agreement too had no reference to the applicability of Kenyan laws in relation to procurement process with respect to the subject tender.

Given the foregoing, the Board makes an observation that the Government/Republic of Kenya in the Financing Agreement agreed that the procurement proceedings of the subject tender would be in accordance with the World Bank Procurement Guidelines, 2011 revised 2014 which was repealed by the current World Bank Regulations 2016, revised 2020 for projects after 1<sup>st</sup> July 2016. We have also established that prospective tenderers vide the Invitation for Bids were notified that the procurement process for the subject tender would be conducted in accordance with the World Bank Procurement Guidelines, 2011 revised in 2014. We also note that Clause 1 and 2 of Section I. Instructions to Bidders at page 5 and ITTB 1.1 1.2 of Section II. Bid Data Sheet at page 29 of the Tender Document communicates to prospective tenderers that the subject tender is financed by IDA and the Government of Kenya is the Borrower.

Paragraph 3.27 to 3.32 of Section III and Annex III of the World Bank Procurement Regulations, 2016 revised in 2020 provides an elaborate process for Procurement-related Complaints which was lacking in the World Bank Procurement Guidelines, 2011 revised 2014 that only provided for

debriefing. The procurement related complaint may challenge a Borrower's selection of documents e.g. prequalification, request for bids, request for proposals etc or a Borrower's decision to exclude a tenderer from a procurement process prior to award and/or a Borrower's decision to award a contract following transmission of unsuccessful tender in the notification of intention to award as provided in Paragraph 2.1 of Annex III at page 61 of the World Bank Procurement Regulations, 2016 revised in 2020.

It is worth noting that the World Bank Procurement Regulations, 2016 revised in 2020 have defined a Borrower as, '*a borrower or recipient of Investment Project Financing (IPF) and any other entity involved in the implementation of a project financed by IPF*'. IPF is the abbreviation of Investment Project Financing and has been defined as the World Bank's, '*financing of investment projects that aims to promote poverty reduction and sustainable development....*'.

From the foregoing, we make the following observation;

- i. The Financing agreement is a bilateral agreement between the Republic of Kenya as the Government of Kenya and International Development Association (and being part of the World Bank Group) as a foreign multilateral agency.
- ii. The 2<sup>nd</sup> Respondent is the agent of the Republic of Kenya as the implementing entity of the project described in the Financing

- Agreement on behalf of the Republic of Kenya because the Republic of Kenya is ideally required to carry out the said project.
- iii. The subject tender, a procurement for single & three phase smart meters, being part of the project described in the Financing Agreement and for which is being financed out of the proceeds of the credit IDA is extending to the Republic of Kenya, is a procurement under a bilateral agreement.
  - iv. The Financing Agreement, the Subsidiary Financing Agreement and the Project Agreement requires the subject tender to be undertaken in accordance with the World Bank Procurement Regulations, 2016 revised 2020 having replaced and taken over the World Bank Procurement Guidelines, 2011 revised 2014.
  - v. The World Bank Procurement Regulations 2016, revised in 2020 provide for a mechanism for lodging and determining procurement related complaints between the 2<sup>nd</sup> Respondent, prospective tenderers and tenderers.
  - vi. The World Bank Procurement Regulations 2016, revised in 2020, require the relationship between the 2<sup>nd</sup> Respondent and successful tenderers who have signed a procurement contract to be governed by the provisions of the Tender Document and the terms and conditions of the procurement contract.
  - vii. The Financing Agreement, the Subsidiary Financing Agreement and the Project Agreement do not make reference to Kenyan laws with respect to procurements conducted through International Competitive Bidding, such like the subject tender.

We observe that the circumstances of the subject tender can be distinguished from those of the Athi Water case (Justice Odunga). In the subject tender, the 2<sup>nd</sup> Respondent, who is the Procuring Entity, as the implementing entity of the project described in the Financing Agreement is the agent of the Government/Republic of Kenya while in the Athi Water case, Athi Water Services Board, who was equally the procuring entity, was not referred to as an implementing agency so was not an agent of Government of Kenya.

The circumstances of the subject tender are also distinguishable from those of PPARB Application No.1 of 2020: Energy Sector Contractors Association v The Accounting Officer, Kenya Power & Lighting Company & Another (hereinafter referred to as the KPLC2 case) which was endorsed by Justice Mativo in Republic v Public Procurement Administrative Review Board Ex parte Kenya Power & Lighting Company Limited; Energy Sectors Contractors Association & another (Interested Parties) [2020] eKLR. In the subject tender, the Republic of Kenya which is the Government of Kenya entered into a bilateral agreement with a foreign multilateral agency while in the KPLC2 case, Kenya Power and Lighting Company Limited as a borrower (and not the Government of Kenya) entered into a bilateral agreement with Francaise De Development (AFD) as a lender as can be noted at pages 52, 54, 61 and 73 to 89 of this Board's Decision in KPLC2 case.

Justice Ngaah and Justice Ndungu have separately faulted the Board and quashed Boards' previous decisions for conferring jurisdiction on itself in instances where bilateral agreements had been entered between the Government of Kenya and either a foreign agency, foreign entity or foreign multilateral agency on the basis that either (a) a subsidiary agreement provided for the laws of Kenya to apply with respect to a procurement or (b) that a bilateral agreement failed to provide for mechanism to deal with disputes between tenderers and a procuring entity and (c) that a procuring entity as an implementing agency for a project in a bilateral agreement was not Government of Kenya. The judicial authorities by Justice Ngaah are **Judicial Review Application No.E071 of 2021 Republic v Public Procurement Administrative Review Board & another Ex parte the Accounting Officer, Kenya Electricity Transmission Company Limited** and **Judicial Review Miscellaneous Civil Application No.E101 of 2021 Republic v Public Procurement Administrative Review Board & another Ex parte Kenya Power and Lighting Company PLC**. The judicial authority by Justice Ndungu in **Judicial Review Miscellaneous Application E162 & 146 OF 2021 (consolidated) Republic v Public Procurement Administrative Review Board; Consortium of Tsk Electronica Y Electricdad S A and Ansaldoenergia & another (Interested Parties) Ex parte Ex parte Kenya Electricity Generating Company Plc (KenGen)**.

We are bound by the precedents in the aforementioned judicial authorities as they were made by the High Court which have supervisory powers over the Board.

Having established that the subject tender is a procurement under a bilateral agreement between the Republic of Kenya and International Development Association with Kenya Power and Lighting Company PLC as the implementing entity of the project described under the bilateral agreement as an agent of the Government of Kenya, we find that the procurement of the subject tender falls in all fours under the provisions of Section 4(2) (f) of the Act.

As regards, 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. This is why the introductory sentence states that the provision of Section 6 (1) of the Act is subject to the Constitution. Parliament in its Hansard Report of 19<sup>th</sup> February 2015 while considering this provision in its debate on the Public Procurement and Asset Disposal Bill, 2015 (as it then was) had this to say:-

***"Hon (Eng) Gumbo: This Bill talks about conflict in international agreements. We will need to look at this; you know that this country, and others in the Third World in general, have had very many issues with economic partnership agreements, yet this clause says that:***

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

***Hon. Speaker, I honestly have a problem with this provision because some of these provisions take account of the interests of those who are outside our borders and not the people of Kenya. Provisions under Part II, which define the bodies involved and the role of the National Treasury, are good. What we have to avoid, however, is letting the National Treasury to micro-manage procurement processes, as has happened before in so many cases...***

***Hon. Oyugi: Thank you, Hon. Temporary Deputy Speaker. My point of order was in reference to what my colleague was saying with regard to Clause 6. Is it in order to say that, that clause in his understanding, is ultra vires? If you read Article 2(6) and 2(5) of the Constitution, international obligations and international rules form part of Kenya's laws. Therefore, Clause 6 is actually giving reference to Article 2 (5) and 2 (6) of the Constitution.***

***Hon. Temporary Deputy Speaker, I really think that Clause 6 is sufficiently very express. It reads, "Subject to the Constitution---". The drafter of the Bill is trying to ensure that there is a direct concurrence and a reference to the Constitution in terms of how then you have the law superior or not superior. In my understanding and interpretation, there is nothing out of order with Clause 6 of this particular law."***

Article 2 (5) and (6) of the Constitution 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. Such procurement in case of a conflict, should be governed by the terms of the treaty, agreement or other convention ratified by Kenya and to which Kenya is a party, which form part of the law of Kenya by virtue of Article 2 (6) of the Constitution. This position was reiterated by Justice Nyamweya in the *KPLC Case* cited herein before 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 re 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]**

Accordingly, the import of Section 6 (1) of the 2015 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 application of the Act 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; It is only after the Board has established such conflict that the application of the Act will be ousted to the extent of such conflict.

We have already established that the procurement of the subject tender falls within Section 4(2) (f) of the Act. This means the Act does not apply to the procurement of the subject tender. Since the Board is a creature of the Act and exercises its powers as provided under Section 173 of the Act, the ousting of the Act to the procurement of the subject tender effectively divests the Board of jurisdiction to entertain the instant Request for Review. With this finding, we down our tools at this stage and shall not proceed to address the other issues as framed hereinbefore.

The upshot of our finding is that the instant Request for Review is dismissed for want of jurisdiction.

### **FINAL ORDERS**

In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, 2015, the Board makes the following orders in the Request for Review dated 16<sup>th</sup> June 2022: -

In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, 2015, the Board makes the following orders in the Request for Review dated 16<sup>th</sup> June 2022: -

- 1. The Request for Review dated 16<sup>th</sup> June 2022 and filed on 17<sup>th</sup> June 2022 be and is hereby struck out for want of jurisdiction.**
- 2. Given the findings herein, each party shall bear its own costs in the Request for Review.**

**Dated at Nairobi this 8<sup>th</sup> day of July 2022**

  
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**CHAIRPERSON**

**PPARB**

  
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**SECRETARY**

**PPARB**

