

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 76/2022 OF 22ND AUGUST 2022

BETWEEN

SMART PEOPLE AFRICA LIMITED.....APPLICANT

AND

TANA WATER WORKS,

DEVELOPMENT AGENCY.....1ST RESPONDENT

THE ACCOUNTING OFFICER,

TANA WATER WORKS DEVELOPMENT AGENCY....2ND RESPONDENT

AND

VISION FOUR AFRICA LIMITED..... INTERESTED PARTY

Request for Review of the decision of the Tana Water Works Development Agency as set out in the letter dated 22nd July 2022 in the matter of Tender No. TWWDA/ADB/003/2021-2022 for Supply and Delivery of Billing Software

BOARD MEMBERS

1. Mrs. Njeri Onyango - Vice- Chairperson (Panel chair)
2. Dr. Paul Jilani - Member
3. Mr. Steven Oundo - Member
4. Ms. Isabel Juma - Member
5. Ms. Phyllis Chepkemboi - Member

IN ATTENDANCE

1. Mr. Philemon Kiprop - Holding Brief for Board Secretary

BACKGROUND TO THE DECISION

The Tendering Process

Tana Water Works Development Agency, (hereinafter referred to as, "the Procuring Entity"), issued a Specific Procurement Notice dated 16th November 2022 and made a Public Invitation for Bids for the Supply and Delivery of Billing Software, IFB No. TWWDA/ADB/003/2021-2022 by way of One-Envelope Bidding Process in MyGov Newspaper (www.mygoc.go.ke) and on the Agency's Website (www.twwda.go.ke). Thereafter the Agency issued Addendum No. 1/2021/2022 dated 7th December, 2021 extending the Bid dates from Thursday 9th December 2021 10:00a.m. to Wednesday 29th December 2021 at 10:00 a.m. By a Further Addendum No. 2/2021/2022 the Bid dates were extended from 29th December 2021 at 10:00 a.m. to Wednesday 12th January 2022 at 10:00 a.m.

Bid Submission Deadline and Opening of Bids

At the tender closing date of 12th January 2022, Six (6) firms submitted their bids. An evaluation Committee was appointed from the Technical, ICT and Finance Departments to evaluate the received bids.

Bid No	Name of Bidding Firm	Bid Bond Amount (Kshs) and Bank	Tender Sum	Number of Bid Documents Submitted	Address of the Bid	Email address of bidders
1	Wonderkid Multimedia Limited (Kenya)	750,000 SBM Bank	KES 4,237,390	1Original 2Copies	12037-00100 NAIROBI	info@wonderkid.co.ke
2	Wonderkid Multimedia Limited (Kenya)	750,000 SBM Bank	KES 5,522,390	1Original 2Copies	12037-00100 NAIROBI	info@wonderkid.co.ke
3	Wonderkid Multimedia Limited (Kenya)	750,000 SBM Bank	KES 7,399,890	1Original 2Copies	12037-00100 NAIROBI	info@wonderkid.co.ke
4	Vision four Africa Limited	750,000 SBM Bank	USD 505,144	3Copies	43496-00100 NAIROBI	info@visionfourafrica.co.ke
5	Smart people Africa Limited	750,000 Family Bank	KES 53,799,562	1Original 3Copies	9401-00200 NAIROBI	info@spa-limited.com
6	Kenya Airports Parking Services Limited	750,000 Equity	KES 19,009,520.88	1Original 3Copies	3002-00506 NAIROBI	kaps@kaps.co.ke

The Accounting Officer appointed a Tender Evaluation Committee which comprised of the following persons

1. Arthur Mamo - Chair
2. Ezekiel Mengo – Member
3. Joseph Githinji – Member
4. Abdi Sadiq – Member
5. Connie Gakii – Member

6. Timothy Gitonga – member
7. James Ribiru – Member
8. Martin Gitonga – Secretariat
9. Irene Mutahi – Secretariat
10. Anne Nyaga – Secretariat

Evaluation of Tender Bids

The evaluation of the subject tender was conducted in four stages, namely:

- i. Preliminary Evaluation Stage
- ii. Technical Evaluation
- iii. Financial Evaluation Stage

Mandatory Requirements Evaluation- Commercial Responsiveness

In the preliminary evaluation, the following was checked:

1. Verification

- Form of Bid properly filled and signed by an authorized signatory
- Joint Venture Agreement
- Power of Attorney
- Submitted an original and 3No. copies of the bid documents
- Manufacturer's Authorization Certificate if a Bidder is an Agent/Supplier

2. Eligibility

- The program is co-financed by the ADB and ADF therefore eligibility is universal

3. Bid Security

- Consistency with Bid Security Form \provided in the bidding documents (ITB)

- Original Bank Guarantee
- Bid bond Amount KES 750,000 (One Million Shillings) or equivalent convertible currency
- Validity period 148 days from closing date i.e., 12th January 2022 to 8th June 2022.
- Joint Venture Bid Security (whether in the Name of all the Partners in the Joint Venture)

4. Completeness of Bid

- Letter of bid properly filled and signed by authorized signatory
- Schedule of the Prices adequately filled.
- Initialization of erasures, interlineations, additions or cancellation of items in schedule of Prices in accordance to clause 1.3.1 of the SBEG and 20.4 of ITB.

5. Substantial Commercial Responsiveness

- Price adjustment proposed
- Alternative bids offered
- Audited Accounts/Financial Statements provided for the last three years
- Registration Certificate/Incorporation
- Valid tax compliance certificate
- Proof of directorship (CR12)

TABLE 3A - 1st Preliminary Evaluation Commercial Responsiveness

BIDDER NO	VERIFICATION	ELIGIBILITY	BID VALIDITY	BID SECURITY PERIOD 148 DAYS (8 TH JUNE 2022)	COMPLETENESS OF BID	SUBSTANTIAL COMMERCIAL RESPONSIVENESS	ACCEPTED FOR TECHNICAL EXAMINATION

1	YES	YES	YES	YES	NO ¹	YES	NO
2	YES	YES	YES	YES	NO ²	YES	NO
3	YES	YES	YES	YES	YES	YES	YES
4	YES	YES	YES	NO ³	YES	YES	NO

Bidder No.1

Note 1: Schedule of prices not adequately filled. Some goods not included.

Bidder No.2

Note 2: Schedule of prices not adequately filled. Some goods not included.

Bidder No. 4

Note 3: Bid security provided expired on 9th May 2022 contrary to ITB 19.1 provided.

At the end of this stage, the Evaluation Committee found three bidders as non-responsive as per the reasons indicated in the evaluation report and only bidder No.3 was found responsive and qualified to next evaluation stage.

Preliminary Evaluation Stage- Technical Responsiveness

At this stage, the Committee was required to evaluate the bids by applying the criteria set out in the ITB 30.3 and ITB 30.4 page 44 (Section IV and VII on the schedule of Requirements). At the end of this stage, Bidder No. 3. Smart People Africa Limited ("The Applicant" herein) was the only responsive bidder and hence proceeded to the final stage of financial evaluation.

Financial Evaluation Stage

At this stage a detailed evaluation was conducted and the committee checked on the following:

- a. The readout prices i.e. the currency and the amount
- b. Corrections on the computation and provisional
- c. If the bid required any corrections
- d. Unconditional discounts
- e. Corrected/discounted bid prices

At the end of evaluation at this stage, the Committee found Bidder No.3 responsive and declared the bidder the lowest evaluated compliant bidder at a cost of Ksh. 53,799,562.00

The Evaluation Committee's Recommendation

The Evaluation Committee recommended that Bidder No. 3 be awarded the contract for Supply and Delivery of Billing Software at a cost not exceeding Kenya Shillings Fifty-Three Million Seven Hundred and Ninety-Nine Thousand, Five Hundred and Sixty-Two Shillings Only (Ksh. 53,799,562.00). The Evaluation Report was duly signed by members.

Professional Opinion

Through a Professional Opinion dated 17th March, 2022 issued pursuant to Section 84 of the Act, the Head of Procurement function reviewed the Evaluation Committee's report and noted that the evaluation process was to a large extent in tandem with the process in Article 227(1) of the Constitution of Kenya, 2010. He however noted that at the area on 'schedule of prices not being adequately filed' in the case of bidders 1 & 2 needs to be qualified by the Evaluation Committee. The Accounting Officer of the Procuring Entity concurred with the professional opinion and instructed the Chair of the Evaluation Committee to undertake a review of the Evaluation Report dated January 2022 and submit another report, addressing the raised concerns.

Owing to the Professional Opinion dated 17th March 2022, the Accounting Officer appointed a six member team as the re-evaluation committee in line with the PPAD and the AFDB guide for Procurement of Goods. The following were the members of the committee

1. Arthur Mamo - Chair
2. Ezekiel Mengo – Member
3. Joseph Githinji – Member
4. Abdi Sadiq – Member
5. Connie Gakii – Member
6. Timothy Gitonga – member
7. James Ribiru – Member
8. Martin Gitonga – Secretariat
9. Irene Mutahi – Secretariat
10. Anne Nyaga – Secretariat

The committee held sittings on the 30th and 31st March 2022. All bids were readmitted and taken through the Re-evaluation following the same three (3) steps as set out in the Evaluation. At the end of it, the committee found bidder 1 and 4 as non –responsive and therefore the bids by bidder number 2 (The “Interested Party”) and 3 (“The Applicant”) proceeded to the Technical Stage of Evaluation. The Technical Evaluation was conducted in line with the Tender document as above specified.

Both bids were found to be responsive to the technical requirements and therefore proceeded to Financial Evaluation. During this stage the Committee established an error in the Financial Bid of the Interested Party herein Bidder No. 2 which was corrected upon seeking clarification from the said bidder.

In the end of the Re-evaluation exercise the Committee in a Re-evaluation Report dated 31st March 2022, found and recommended bidder No. 2, Vision

Four Africa Limited, as the responsive and lowest evaluated bidder using the correct computation and conversion rate of 113.3118 and therefore using the corrected tender sum of \$446,577.72 which amounted to Ksh. 50,600,259.10.

Through a Professional Opinion dated 3rd June 2022, the head of procurement concurred with the Recommendations contained in the Re-evaluation report. In a Professional Opinion of the same date the Head of Procurement recommended the award of the subject tender. The Accounting Officer of the Procuring Entity consequently concurred with the Professional Opinion.

Notification

In letter dated 3rd June 2022 the Chief Executive of the Procuring Entity notified the Interested Party of the intention to award the subject tender to the Interested Party herein. However, Regret Letters to the Applicant herein and other non-responsive bidders dated 22nd July 2022 but remitted to the Applicant on 12th August, 2022.

THE REQUEST FOR REVIEW

The Request for Review was lodged by M/s **SMART PEOPLE AFRICA LIMITED** under Application No76/2022 on 22nd August, 2022 in the matter of tender No. TWWDA/ADB/003/2021-2022; Supply and Delivery of Billing Software.

The Applicant seeks for the following orders:

- a) The Respondent's decision notifying the Applicant that it had not been successful in TENDER NO. TWWDA/ADB/003/2021-2022 by way of the letter dated the 22nd July, 2022 be and is hereby set aside and nullified.*
- b) The Respondent's decision awarding TENDER NO. TWWDA/ADB/003/2021-2022 to the Interested Party be and is hereby set aside and nullified.*
- c) A declaration that the Respondent failed to evaluate the Applicant's bid in accordance with the tender document, the act and the regulations.*
- d) Consequent to (c) above, the Board be pleased to review all records of the procurement process relating to TENDER NO.TWWDA/ADB/003/2021-2022 and do direct the Respondent's Evaluation Committee to submit its Report of the Evaluation process indicating how the Evaluation was*

done and which bidder was recommended for Award of the above Tender.

e) The Respondent be and is hereby ordered to pay the costs of and incidental to these proceedings; and

f) Such other or further relief or reliefs as this board shall deem just and expedient

Board Notification to the Respondents of filed Request for Review

In a Notification of Appeal and a letter dated 22nd August 2022, 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 suspension of procurement proceedings for the subject tender pursuant to section 168 of the Act. The Acting Board Secretary forwarded a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of Covid-19 pandemic. Further, the Respondent was requested to submit any information and arguments in relation to the subject tender within three days pursuant to the Board's Circular.

The Respondents filed a 1st and 2nd Respondents' Memorandum of Response dated 29th August 2022 and received on 30th August 2022 by the Board, in response to the Request for Review.

THE APPLICANT'S CASE

The Applicant in its Request for Review raises a number of grounds that are reproduced and analyzed herein below:

Breach of Section 3 and 80(2) of the Public Procurement and Assets Disposal Act and violation of Article 10 of the Constitution of Kenya.

The Applicant states that it submitted its bid within the set timelines, that is to say the 12th January, 2022, and deputized its representative to attend the tender opening meeting.

The Applicant states that during the tender opening, the Respondent read out the prices of the bidders as follows-

- a. Bidder No. 1 – Wonderkid Multimedia Limited -Kshs 17, 242, 780;
- b. Bidder No.2-Vision Four Africa Limited-USD 505, 144 translating to Kshs 57, 238,775.9;
- c. Bidder No. 3- Smartpeople Africa- Kshs 53, 799, 562; and
- d. Kenya Airports Parking Services – Kshs 19, 009, 520.88

The Applicant states that the tender document was designed to consist of three parts namely- the Preliminary/Mandatory Evaluation stage (determination of responsiveness) which entailed checking of all mandatory documents as specified in the tender document, the Technical Evaluation stage and the Financial Evaluation stage.

It was further an expectation of the Applicant, that the tender Evaluation process would be carried out within a maximum period of thirty (30) days from the date of tender opening.

The Applicant, did not receive any communication on the outcome of the evaluation 7 months after tender opening and necessitating it to write to the Respondent severally, vide letters dated the 28th of July and 10th August, 2022 enquiring on the results of the process. On the 12th August, 2022, the Respondent sent an email to the Applicant containing the notification of regret dated 22nd July 2022 the said letter similarly indicated that the Interested Party was the successful bidder.

The Applicant avers that the letter of regret indicates that the Interested Party was evaluated to have been the lowest bidder, a position the Applicant strongly opposes for the reason that, at the time of the tender opening, the Applicant's bid price of USD 505, 144 exclusive of taxes which if converted at the CBK USD mean rate of 113.3118 as at 12th January, 2022 which translates to kshs 57, 999, 562.00

The Applicant further states that from the figures indicated during the tender opening, the Interested Party submitted a bid of United States Dollars Five Hundred and Five Thousand, One Hundred and Forty- Four only (USD 505, 144.00) and as such, the sum indicated in the letter of regret being United States Dollars Four Hundred and Forty-Six Thousand, Five Hundred and Fifty-Seven and Cents Seventy-Two only (USD. 446,557.72) is inaccurate, illegitimate and misrepresentation of the interested party's bid.

In view of the position, the Applicant states that the Respondent illegally changed the bid price of the Interested Party between the tender opening and tender award so as to confer collateral advantage on the Interested Party.

The Applicant avers that, under the Tender Data Sheet, Clause 25.5 set out the procedure to be followed during Bid opening, wherein the Respondent herein was required to open each bid at a time reading out, amongst others;

- a) The name of the bidder and whether there is a modification
- b) The total Bid prices, per item, and/or per lot (contract) as applicable, including any discount and alternative bids;

- c)
- d)

The Applicant states the above process was duly followed and all parties that had submitted their Bids were read out with the above details provided to all those who attended the Bid Opening.

Further, Clause 25.8 of the Tender Data Sheet, required the Respondent herein, to prepare a record of the Bid Opening, that shall include as a minimum; the name of the Bidder and whether there was withdrawal, substitution or modification and the Bid price, per item, and/or per lot (contract) as applicable including any discounts. It is the Applicant's contention that when this record is reviewed, the above indicated bid prices will be confirmed as accurate and a true reflection of what was submitted by the Parties.

The Applicant states that in any event and for the purposes of the award of a tender under the Public Procurement and Disposals Act, it is a requirement that the same is awarded to the lowest Bidder. This position is reflected under Clause 37.1 of the Tender Document wherein it is provided that a qualified bidder will be the one who has submitted the lowest bid that

substantially complies with the requirements set out in the Tender document.

Further, the letter of regret as served upon the Applicant is substantially defective to the extent that it does not comply with the requirements set out under Clause 40 of the Tender Document, to the extent that it does not comply with the set-out notification of award requirements, to wit, the letter does not indicate:-

- a) The names of all Bidders who submitted Bids, and their Bid prices as read out, and as evaluated;
- b) A statement of the reason(s) the Bid (of the unsuccessful Bidder to whom the notification is addressed) was unsuccessful, unless the price information in c) above already reveals the reason;
- c) The expiry date of the Standstill Period;
- d) Instructions on how to request a debriefing and/or submit a complaint during the standstill period.

It is the Applicant's contention that by the failure of the Respondent to notify it as per Clause 40 and 43 of the Tender Document, it has denied it an opportunity to debrief and subsequently raise any concerns during the standstill period upon being notified and that the notification as it were, is aimed at defeating any challenge to the procurement process, which process

is demonstrably tainted with want of procedure and violation of the existing laws on public procurement.

THE RESPONDENTS' CASE

In response, the Procuring Entity avers that at the Bid submission deadline being on 12th January, 2022 at 10:00am, the 1st Respondent received Six (6) Bids. Shortly thereafter, the Bid Opening Committee opened the Bids in the presence of the Bidders/representative of the Bidders and the following Bidders were recorded to have submitted their respective Bids;

Bid No	Name of Biding Firm	Bid Bond Amount (Kshs) and Bank	Tender Sum	Number of Bid Documents Submitted	Address of the Bid	Email address of bidders
1	Wonderkid Multimedia Limited (Kenya)	750,000 SBM Bank	KES 4,237,390	1Original 2Copies	12037-00100 NAIROBI	info@wonderkid.co.ke
2	Wonderkid Multimedia Limited (Kenya)	750,000 SBM Bank	KES 5,522,390	1Original 2Copies	12037-00100 NAIROBI	info@wonderkid.co.ke
3	Wonderkid Multimedia Limited (Kenya)	750,000 SBM Bank	KES 7,399,890	1Original 2Copies	12037-00100 NAIROBI	info@wonderkid.co.ke
4	Vision four Africa Limited	750,000 SBM Bank	USD 505,144	3Copies	43496-00100 NAIROBI	info@visionfourafrica.co.ke
5	Smart people Africa Limited	750,000 Family Bank	KES 53,799,562	1Original 3Copies	9401-00200 NAIROBI	info@spa-limited.com
6	Kenya Airports Parking Services Limited	750,000 Equity	KES 19,009,520.88	1Original 3Copies	3002-00506 NAIROBI	kaps@kaps.co.ke

The Procuring Entity avers that The Evaluation Committee Evaluated the Six (6) Bids in Three (3) stages as provided for under Section III of the Evaluation and Bidding Criteria of the Standard bidding document (herein after referred to as "SBD"). 9. That as per the appointment letter, the Committee undertook its mandate from the 24th to the 28th January, 2022 at Nanyuki and prepared a Bid Evaluation Report dated 28th January, 2022.

The Procuring Entity avers that at the end of this stage, the Evaluation Committee found Three bidders to be non-responsive as per the reasons indicated in the Evaluation Report and only bidder No. 3 the Applicant herein qualified to move to the next stage of the evaluation. Bidder No. 3, who was the only bidder in this stage, met all the requirements of this stage and hence proceeded to the final stage of evaluation.

At this stage, a detailed evaluation was conducted and the committee checked on the following items;

- i. The readout prices i.e the currency and the amount
- ii. Corrections on the computation and provisional
- iii. If the bid required any corrections
- iv. Unconditional discounts
- v. Corrected/ discounted Bid prices

At the end of evaluation of this stage, the Committee found Bidder No. 3 responsive and declared Bidder No. 3 the lowest evaluated compliant Bidder at a cost of KES 53,799,562.00 and 17. The Committee recommended award of the subject bid to Smart People Africa Limited the Applicant herein.

The Committee forwarded the signed Evaluation report to the Manager, Supply Chain Management who in turn forwarded a statement of Professional Opinion on the Evaluation Report to the 2nd Respondent dated

17th March, 2022 who in the aforementioned professional opinion, the Manager Supply Chain Management faulted the elimination of Bidder No. 1 and 2 (i. Wonderkid Multimedia Limited (Kenya)- 3 separate bids and ii. Vision Four Africa Limited- 1) bid at the Preliminary Stage as the reasons given, being "schedule of prices not being adequately filled" was not clear after examination of the bid documents.

The Accounting Officer, on receipt of the Professional Opinion by the Manager Supply Chain Management, concurred with the same and re-appointed the Evaluation Committee as a re-evaluation committee and instructed the Chairperson of the Re- evaluation Committee (hereafter Evaluation Committee) , to undertake a review of the exercise to look into the concerns raised by the Manager Supply Chain Management. The Evaluation Committee undertook a review and re-evaluation of the bids from 30th March to 31st March, 2022 at the TWWDA Boardroom as per the requirements of the PPAD Act, PPRA Guidelines, AfDB Procurement guidelines and in the spirit of the Constitution of Kenya.

At the end of the Preliminary Stage, Bidder No. 2 was found to be responsive while Bidder No. 1 was non-responsive for the reason that the schedule of prices had not been adequately filled (Item No. 3.0.4.2- LCD KVM had not been included). The Responsive Bidder then qualified for the next stage of evaluation on Technical Responsiveness.

At the Technical Responsiveness stage, there were now 2 Bidders, Bidder No.3 who had already been declared responsive and Bidder No. 2 who the Evaluation Committee after re-evaluation determined to be responsive, both were found to be responsive at Technical evaluation, hence qualified for the Financial Evaluation Stage.

At the Financial Evaluation, the Evaluation Committee reviewed the two bid documents in detail and per item. There was a computational error on item No. 17 of Bidder No.2's Tender Document at page no. 000008 on the Proposal and Budgetary Prices Lot 1,2 and 3. The identified error was for the Unit price for 30 No. units which were indicated as 4,600 against a total amount of USD 196,586.38. The proper amount should have been USD 138,000 and not USD 196,586.38 as indicated therein. Therefore, the difference in the amount was USD 58,586.38. The Respondent argues that the Evaluation Committee was entitled to correct such error, which they state was guided by the provisions of the AfDB Procurement Guidelines at Clause 1.4.4 at page 20 and Based on the above, the Evaluation Committee corrected the computational error as shown in Table 4 at page 28 of the Re-Evaluation Report.

The Evaluation Committee communicated this error to the concerned Bidder vide a letter dated 30th August, 2022 and the Bidder acknowledged the same vide a response dated 31st August, 2022. At the end of the, Re-Evaluation, the Committee forwarded its recommendations to the Manager Supply Chain

Management, who in turn forwarded a statement of Professional Opinion to the 2nd Respondent dated 3rd June, 2022. The professional opinion agreed with the recommendations made by the Evaluation Committee in the Re-evaluation report which was to award the tender to the Interested Party at the corrected price.

The 2nd Respondent approved the award of the subject tender as per the recommendations of the professional opinion and on 3rd June, 2022 sent an Intention to award contract to Vision Four Africa Limited, the Interested Party herein for the evaluated bid price not exceeding USD 446,557.72

The Manager Supply Chain Management, on the other hand sent out regret letters dated 22nd July, 2022 to the other 3 unsuccessful bidders and to this end, the Respondents herein stated that the conduct of the Evaluation leading to the decision to award the subject Tender to the Interested Party was undertaken in good faith and in strict compliance with all Laws governing Public Procurement, the AfDB guidelines and the Constitution of Kenya.

On the 9th September 2022 well after 2.00pm the Respondents vide a notice dated 9th September 2022 appointed the firm of Messrs. Gerivia Advocates LLP to be on record for them. Together with the said Notice of Appointment, the Respondents filed two fresh Supporting Affidavits both deponed by Engineer Philip Gichuki the Chief Executive Officer of the 2nd Respondent. On the same date the Respondent also filed the Respondents' Submissions in addition to those they had earlier filed on 30th August 2022 dated 29th August

2022 and drawn by Tana Water Works Development Agency, in this letter response the Respondents raised two issues for determination. Namely:

- a. Whether the Board has jurisdiction to hear and determine this matter?
- b. Whether the Applicant's bid contained computational errors capable of correction pursuant to the provisions of AfDB procurement guidelines at clause 1.4.4. at page 20 of the Guidelines?

It is the averment of the Respondents that the subject procurement proceedings are being undertaken pursuant to the Loan Agreement between the Republic of Kenya and the African Development Bank (Kenya Towns Sustainable Water Supply and Sanitation Program) entered into on 9th January 2017. Clause 2 of the said agreement at the preamble states that the Ministry of Water and irrigation of the Borrower (the Republic of Kenya) shall be the executing agency for the project. Article VII, Clause 7.01 and 7.02 of the Loan Agreement stipulates that procurement of works and goods shall be carried out in accordance with the Procurement Policy for Bank Group Funded Operations (October 2015).

They aver that the Government of the Republic of Kenya entered into a subsidiary Loan Agreement dated September 29th 2017 with Tana Water Services Board (now Tana Water Works Development Agency) wherein the Government of Kenya agreed to reassign the resources from the Loan Agreement dated 9th January 2017 to Tana Water Works Development Agency. The said subsidiary agreement dictates at Annex 3 that the procurement works and goods shall be carried out in accordance with the

Procurement policy for Bank Group Funded Operations (October 2015) as may be amended from time to time. The first Respondent avers that it is under this framework that the implementation of Kerugoya, Kutus, Chuka, Chogoria, Muranga Urban, Othaya Sewerage and Muranga South Water and Sanitation projects and Meru Sewerage Projects were based.

The Respondents rely on the further Affidavit(s) deponed by one Engineer Philip Gichuki, sworn on 9th September 2022 and filed on even date and have attached thereto the exhibits of the aforementioned Loan Agreements.

INTERESTED PARTY'S CASE

On its part, the Interested Party filed their Response to Appeal that is undated but filed on 7th September 2022. They aver that having participated in the subject tender, on 30th March 2022 they received a letter from a representative of the 2nd Respondent indicating that there was a computational error on the Company's Bid document and the Company needed to check, correct and confirm the same. They aver that they responded to the said letter vide a letter dated 31st March 2022 confirming the computational error at item no. 17 thus affecting the bid amount hence bringing it down to USD 446,557.72. They aver that they received a letter of intention to award contract at the contract price not exceeding USD 446,557.72. That is all that they wished to state and indeed stated. They attached exhibits of the said letters.

APPLICANT'S REJOINDER

In reaction to the documents filed on 9th September, 2021 by the Respondents, the Applicant through its Counsel filed Grounds of Opposition dated 9th September, 2022 and written submissions dated 10th September, 2022. essentially the Applicant raises objection to the documents filed by the Respondent at the 11th hour which they submit have been filed out of time based on the directions of the Court and provisions of the Act and in the Applicant's view the said documents should not be admitted and it is submitted that those documents should be struck off on account of late filing.

BOARD'S DECISION

The Board has considered the Applicant's case, pleadings and documents filed in furtherance of their Request for Review, the Respondent's Response(s) and documents in opposition to the Request for Review and objection of the Board's jurisdiction and the Interested Party's Response.

The Board finds that the following issues crystalize for determination: -

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

Based on the determination of issue (1) above

2. Whether the Evaluation of the subject tender was conducted within the time specified in the Act?

Based on the response to issue (2) above

- 3. Whether the evaluation was undertaken in terms of the Act and the criteria set out in the Tender Document and;**
- 4. Whether the format of notification of award and/or regret complied with the requirements of the Act and the Tender Document?**

Depending on the outcome of the above issues:-

- 5. What orders should the Board grant in the circumstances.**

The Board now proceeds to address the above issues conclusively as follows:

Issue 1: Whether the Board has jurisdiction to entertain the instant Request for Review?

As part of establishing our jurisdiction to entertain the instant Request for Review we have noted an objection to our jurisdiction that is contained in the Affidavit of the Respondents dated 9th September 2022. This response and objection has been characterized as a Preliminary Objection by the Applicant and therefore prompted grounds of opposition dated 9th September and Written Submissions dated 10th September, seeking to urge this Board to strike out the Affidavit and accompanying exhibits sworn by Engineer Philip Gichuki, the Respondents' Accounting Officer dated 9th September.

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, this is what the Court had to say with regards to what entails and/or should entail a preliminary objection:

" 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 at the eleventh hour. 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 and grounds of opposition dated 9th September 2022 that the preliminary objection is camouflaged as an affidavit. They contend that Regulation 209 of the Public Procurement and Asset Disposal Regulations, 2020 provides that a party wishing to file a Preliminary Objection should do so within 3 days of being notified of the filing of the Request for Review by the Secretary to the Board. It is their take that the same ought to have been

filed not later than 27th August 2022. They urge this Board therefore to strike out the preliminary objection to the jurisdiction of this Board since it has been filed way out of time without leave of this Board. They urge that it is a matter of trite law that jurisdiction should be raised at the earliest opportunity possible and failure to do so and the Respondents having filed their Memorandum of Response dated 29th August 2022 they expressly admitted the jurisdiction of the Board and as such they cannot be allowed to blow both hot and cold.

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. We note that the Respondents have in one of the Supporting Affidavits of Engineer Gichuki have given an explanation as to why there was a delay in raising an objection on the Board's lack of jurisdiction. It can be noted that the

Respondent were self-representing and filed the initial documents herein in their name. Eng Gichuki has deponed that they have thereafter taken steps to seek legal advice after the filing of initial documents and after such action that the Advocates on record brought to their attention the question in regard to the jurisdiction of the Board. To that extent, it can be stated that this issue has now been raised pursuant to legal advice and to that extent it can be stated to have been taken at the earliest opportunity. The same is based on the provisions of Section 4 (2) (f) and 6 (1) of the Act. It is therefore a matter of law concerning Jurisdiction which the Board could have taken *suo moto*. That said, we shall determine whether we are clothed with jurisdiction to entertain this matter as follows.

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. Nyarangi, 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 **Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 others [2013] eKLR** the Court of Appeal emphasized on the centrality of the issue of jurisdiction and 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....” [Emphasis ours].

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].

The Respondents in the instant Request for Review have questioned the jurisdiction of this Board, we thus proceed and determine whether this Board is clothed with jurisdiction to entertain the instant Request for Review. The objection by the Respondents is pegged on the averment that the subject tender is being carried out under a bilateral agreement between the Government of Kenya on the one hand and the African Development Bank (AfDB) on the other hand. In this arrangement, there is a Loan Agreement dated 9th January, 2017 in which the AfDB and the Ministry of Water and Irrigation (on behalf of the Government of Kenya) is the executing agency. Further, there is a reassignment of implementation to the Tana Water Works Development Agency under a subsidiary Agreement dated 29th September, 2017.

Section 4 (2) (f) of the Act ousts the application of the Act for public procurement proceedings under a bilateral or multilateral agreement between the Government of Kenya 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—

(a)

(b).....

(c).....

(d).....

(e).....

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

The Respondents rely on the Loan Agreement dated 9th January 2017 entered into between the Republic of Kenya and African Development Bank

AfDB (Kenya Towns Sustainable Water Supply and Sanitation Program) (hereinafter referred to as the 'Loan Agreement'), and a further subsidiary Loan Agreement dated 29th September 2017 between the Government Of Kenya and Tana Water Services Board (now Tana Water Works Development Agency), the Respondents herein. The documents referred to by the Respondents have been submitted to the Board by the Respondents as exhibits to their Response dated 9th September 2022.

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.

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 Respondent, 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—"

(a)

(b)

(c)

(d)

(e)

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

To understand the import of Section 4 (2) (f) of the Act, the Board will interrogate a number of decided cases. 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 Ex parte 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 16th April 2018.

63. In my view, a reading of section 4(2)(f) shows that the operative action is procurement under a bilateral agreement entered into by the Government of Kenya and a foreign government or agency, and not procurement by

the Government of Kenya. One of the meanings of the word "under" in the Concise Oxford English Dictionary is "as provided for by the rules of; or in accordance with". The plain and ordinary meaning and contextual interpretation of section 4(2)(f) of the Act is therefore a procurement that is undertaken as provided for or in accordance with the terms of a bilateral agreement that is entered into between the Government of Kenya and a foreign government, entity or multi-lateral agency is exempted from the provisions of the Act...

64. *It was in this respect incumbent upon the Respondent to satisfy itself that section 4(2) (f) was not applicable before assuming jurisdiction, especially as the said section was an evidential ouster clause that was 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 Loan Agreement for purposes of making a determination on the import of Section 4(2)(f) of the Act.

In light of the decisions herein above, 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.

In the instant case, the Ministry of Water of Water and Irrigation is identified under Clause 2 of the Preamble as the executing agency of the Loan Agreement. Further in the subsidiary Loan Agreement, the Respondents herein is reassigned with implementation of the Loan Agreement dated 9th January 2017. The subject tender is to be carried out in accordance with the Procurement Policy for Bank Group Funded operations (October 2015) as may be amended from time to time.

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 AfDB and do those terms point to the applicable law in so far as the procurement is concerned?

First, the parties to the Loan Agreement are Republic of Kenya and AfDB. 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, 7th 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 that , "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 Loan Agreement is the Government of Kenya. The other party to the Loan Agreement is the AfDB. In implementing the project, the Government of Kenya submitted the

Ministry of Water and Irrigation as the executing agency and the ministry reassigned the implementation task to the Respondents herein.

Having found that parties to the Loan Agreement is the Government of Kenya and a multilateral agency-AfDB, the Loan 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 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.

As a consequence, we make the following observation;

- i. The Loan Agreement is a bilateral agreement between the Republic of Kenya as the Government of Kenya and AfDB.

- ii. The 2nd Respondent is the agent of the Republic of Kenya as the implementing entity of the project described in the Loan 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, of Tender No. TWWDA/ADB/003/2021-2022 for Supply and Delivery of Billing Software being part of the project described in the Loan Agreement and which is being financed out of the proceeds of the credit AfDB is extending to the Republic of Kenya, is a procurement under a bilateral agreement.
- iv. The subsidiary Loan Agreement requires the subject tender to be undertaken in accordance with the AfDB Procurement Policy for Bank Group Founded Operations (October 2015).

Section 6 (1) of the Act provides as follows:- "

6. (1) 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 has looked at the principal Loan Agreement Article 7 of the said Loan Agreement is expressed in a manner that makes the Procurement Regulations of the lending entity AFDB as the Principal regulations in the Procurement of any services on the funds advanced under the said loan. It is provided as follows:-

Section 7.01. Procurement of Works. Procurement of works shall be carried out in accordance with the Procurement Policy for Bank Group Funded Operations (October 2015) as may be amended from time to time, and further set out below:

- i) Civil works UA 2 million per contract will be procured under open competitive Bidding (OCB) procedures with international advertising under the Bank's Group's Procurement Methods and Procedures. Works to be procured under this method would include Water Supply Works and Sewerage Works.***
- ii) Civil works valued at less than UA 2 million and above UA 100,000 per contract will be procured under Open Competitive Bidding (OCB) with national advertising under the Bank Group's Procurement Methods and Procedures. Works to be procured under this method would include sewerage works, Laboratory, Office Building, Construction of Biogas Domes and Construction of Pilot Anaerobic Bioreactor Landfill Cell.***
- iii) Civil works valued at less than UA 100,000 per contract will be procured under Shopping, utilizing available National Standard Bidding Documents (NSBDs). Works to be procured under this method would include Package Wastewater Treatment Plant.***

Section 7.02. Procurement of Goods. Procurement of Goods shall be carried out in accordance with the Procurement Policy for Bank Group Funded Operations (October 2015) as may be amended from time to time and as further set out below:

- i)***
- ii) Contracts for Goods valued at below UA 300,000 per contract will be procured under Open Competitive Bidding (OCB) with national advertising under the Bank Group's Procurement Methods and Procedures. Contracts to be procured under this method would include Laboratory Equipment, Equipment for Non – Revenue Water Management, Billing Software and Hardware, Equipment for Sewer Maintenance, Vehicles and Enterprise Resource Planning Package.***

Section 7.05. Review Procedures. Except as the Bank shall otherwise determine by notice to the Borrower, the following documents shall be subject to prior review and approval by the Bank before promulgation: (i) General Procurement Notices; (ii) Specific Procurement Notices; (iii) Bidding Documents and Requests for Proposals from consultants (iv) Bid Evaluation Reports or Reports on Evaluation of Consultants' Proposals, including shortlists and recommendations for contract awards; (v) drafts contracts, if these have been amended and differ from

the drafts included in the bid/tender documents; and (vi) modification of signed contracts.

The Board has also noted the contents of the Tender documents particularly TDS II Bid ITB 1.1, ITB 2.2 and ITB 47.1 which refer to the substantive procedure in the specific procurement to be that of the Lending agency

ITB REFERENCE	A. GENERAL
ITB 1.1	The reference number of the Invitation for Bids (IFB) is: TWWDA/ADB/003/2021-2022 The Purchaser is: Tana Water Works Development Agency The name of the IFB is: Supply and Delivery of Billing Software The number and identification of items, lots or combination of lots (packages)comprising this IFB is: 3 No. Lots Lot 1- Supply and Delivery Billing Software for Marsabit Water and Sanitation Company

	<p>Lot 2- Supply and Delivery Billing Software for Kirinyaga Water and Sanitation Company</p> <p>Lot 3- Supply and Delivery Billing Software for Nithi Water and Sanitation Company</p>
ITB 2.1	<p>ITB 2.1 The Borrower is: Government of Kenya</p> <p>Loan or Financing Agreement amount:</p> <hr/> <p>The Specific Bank financing institution is: ADB</p> <p>The name of the Project is: Kenya Towns Sustainable Water Supply and Sanitation Program (KTWSSP)</p>
ITB 47.1	<p>The procedures for making a Procurement-related Complaint are detailed in the Part B of the Operations Procurement Manual under the Procurement Framework of the African Development Bank. If a Bidder wishes to make a Procurement-related Complaint, the Bidder</p>

	<p>shall submit its complaint following these procedures to the Purchaser, in writing (by the quickest means available, such as by email in accordance with the following: For the attention: Eng.Philip Gichuki Title/position: Chief Executive Officer Purchaser: Tana Water Works Development Agency Email address: tanawaterboard@yahoo.com Fax number: N/A</p> <p>In summary, a Procurement-related Complaint may challenge any of the following:</p> <ol style="list-style-type: none">1. the terms of the Bidding Documents;2. the purchaser's decision to exclude a bidder from the procurement process prior to the award of contract; and3. the Purchaser's decision to award the contract. <p>The Bank's Procurement Framework stipulates that bidders may send copies of their communications with the Borrowers to the Bank or write to the Bank directly when, Borrowers do not respond promptly,</p>
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	<p>any questions on any issues regarding the implementation of Bank funded projects, or when the communication is a complaint against the Borrower. In this regard, if a bidder wishes to protest against a decision made by a Borrower or the Bank with regards to the procurement process or wishes to inform the Bank that the Bank's procurement rules and/or provisions of the bidding documents have not been complied with, an email can be sent to the following address: Email: procurementcomplaints@afdb.org</p>
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Our view is that in getting in to this tender process which contain the above provisions, the Applicant was well aware of the effect of the ouster of the Procurement Act 2015 by the said provisions. The Applicant did not seek a clarification from the Respondent and proceeded to submit the tender based on the contents of the Tender Documents. For that reason, it would be safe to determine that the Applicant was willing to be bound by the provisions of

the Tender document which included the specific Application of the AfDB procurement Guidelines.

Having observed as we have, we note that there have been other cases where this Board has been faulted and its decisions faulted for conferring on itself jurisdiction in instances where bilateral agreements had been entered between the Government of Kenya and either a foreign agency, foreign entity or foreign multilateral 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).

In regard to the present Procurement process it is notable that the Tender document did provide for a dispute/complaint resolution mechanism within the Tender Document therefore creating an avenue for any dissatisfied bidder to ventilate its concern. The said process is set out under Article 5 as read together with sections of the Tender document set out above. It cannot be said therefore, that a bidder would be left without an avenue for recourse which would ordinarily trigger this Board to wish to take up jurisdiction in order to avail a bidder an avenue to ventilate its grievances.

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

Having established that the subject tender is a procurement under a bilateral agreement between the Republic of Kenya and AfDB and the Ministry of Water and Irrigation as the implementing entity of the project described under the bilateral agreement as an agent of the Government of Kenya, and also finding that there was alternative avenue for recourse provided under the tender document, 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 read together with Section 6 (1) of the Act.

Having already established that the procurement of the subject tender falls within Section 4(2) (f) of the Act, this means that 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 hereinabove. The upshot of our finding is that the instant Request for Review is struck out for want of jurisdiction.

However, as we conclude and having carefully studied all the documents forwarded to the Board by the Respondents on 9th September 2022, we note these documents have been filed later than the set timelines within which the Respondents should submit their response. We do not hesitate for the umpteenth time to advice parties that appear before this Board to cease and desist from this practice. Parties should take note that the proceedings of this Board are time bound by Statute and are therefore encouraged to file their documents within time to afford other parties time to Respond if need be and also to grant the Board to prepare an issue well-reasoned decisions.

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 22nd August 2022: -

- 1. The Request for Review dated 22nd August 2022 and filed on even date 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 12th day of SEPTEMBER, 2022



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VICE –CHAIRPERSON (Panel Chair)
PPARB



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SECRETARY
PPARB

