

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 90 OF 2022 OF 14TH OCTOBER 2022

BETWEEN

EARTHVIEW MANAGEMENT LIMITED..... APPLICANT

AND

THE ACCOUNTING OFFICER,

CENTRAL RIFT VALLEY WATER WORKS

DEVELOPMENT AGENCY..... 1ST RESPONDENT

THE PROCURING ENTITY,

CENTRAL RIFT VALLEY WATER WORKS

DEVELOPMENT AGENCY.....2ND RESPONDENT

SMART PEOPLE AFRICA

LIMITED..... INTERESTED PARTY

Review against the decision of the Accounting Officer of the Central Rift Valley Water Works Development Agency in relation to Tender No. CRVWWDA/AfDB/KTSWSSP/G/1A/BNG/2021-2022-LOT 1 for the Supply, Delivery and Installation of Billing Software and Hardware for Central Rift Valley Water Works Development Agency.

BOARD MEMBERS PRESENT

- | | |
|--------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Eng. Mbiu Kimani, OGW | - Member |
| 3. Mr. Jackson Awele | - Member |

IN ATTENDANCE

Mr. Philemon Kiprop -Holding brief for Board Secretary

BACKGROUND OF THE DECISION

The Tendering Process

The Central Rift Valley Water Works Development Agency, the Procuring Entity and the 2nd Respondent herein, invited eligible tenderers to submit sealed tenders in response to Tender No. CRVWWDA/AfDB/KTSWSSP/G/1A/BNG/2021-2022-LOT 1 for the Supply, Delivery and Installation of Billing Software and Hardware for Central Rift Valley Water Works Development Agency (hereinafter referred to as the 'subject tender') using an open national method of tendering and by way of an advertisement at page 20 in the Daily Nation newspaper on 3rd July 2022.

Submission of Tender and Tender Opening

A total of four (4) tenderers submitted their tenders in response to the subject tender within the tender submission deadline of 19th July 2022 at 12:00 noon. The said four (4) tenders were opened shortly thereafter in the presence of the tenderers' representatives present and recorded in the Minutes of Opening of Tender dated 19th July 2022 (hereinafter referred to as the 'Tender Opening Minutes') as follows: -:

TendererNo.	Tenderer
1.	Earthview Management Limited
2.	Backup International Kenya Limited
3.	Smart People Africa Limited
4.	Vision Four Africa Limited

Evaluation of Tenders

A Tender Evaluation Committee (hereinafter referred to as the 'Evaluation Committee') comprising of four officers from the 2nd Respondent, undertook evaluation of the four (4) tenders between 30th August 2022 and 1st September 2022 in the following two stages and as captured in an Evaluation Report signed by all members of the Evaluation Committee on 28th September 2022 (hereinafter referred to as the 'Evaluation Report'):

- i. Preliminary Examination of Bids;
- ii. Technical Specifications Evaluation;
- iii. Detailed Examination of Responsiveness.

Preliminary Examination of Bids

At this stage of evaluation, two (2) tenders were determined non-responsive. The tenders of both the Applicant and the Interested Party were determined responsive at this stage of evaluation and proceeded for Technical Specifications Evaluation.

Technical Specifications Evaluation

At this stage of evaluation, the Applicant's tender was determined non-responsive for not complying with key specifications of the server, desktop and laptop which were considered key components and the alternatives provided by the Applicant in its tender were found not to offer substantial equivalence in critical performance parameters. The Interested Party's tender was determined responsive and proceeded for Detailed Examination.

Detailed Examination of Responsive Bids

The Interested Party's tender was the only one that made it to this stage of evaluation and was determined responsive as the lowest evaluated tender at Kshs.22, 824,160.00 inclusive of taxes.

Evaluation Committee's Recommendation

The Evaluation Committee recommended that a 'no objection' be sought from African Development Bank (hereinafter referred to as 'AfDB') to enable the subject tender to be awarded to the Interested Party at a tender price of Kshs.22,824,160.00 inclusive of taxes (Kshs.19,976,000.00 exclusive of taxes).

Professional Opinion

The 2nd Respondent's Manager, Supply Chain, William Sakuda, in a professional opinion dated 29th September 2022, by way of an internal memo to the 1st Respondent, recommended the subject tender be awarded to the Interested Party Kshs.22, 824,160.00 inclusive of taxes for having submitted the lowest evaluated and responsive tender.

Letters of Notification

Vide letters dated 29th September 2022, the 1st Respondent notified tenderers of the outcome of evaluation of the subject tender.

REQUEST FOR REVIEW

On 14th October 2022, the Applicant filed a Request for Review dated 14th October 2022 together with the Applicant's Statement in Support of the Request for Review signed by Charles Kaloki, the Applicant's Managing Director, on 14th October 2022 through the firm of CK Advocates seeking the following orders, verbatim:

(a) The Respondents' decision in the tender as communicated to the Applicant in the letter dated 29th September, 2022 and received by the Applicant on 3rd October, 2022 in the matter of Tender for Supply and Delivery of Billing Software and Hardware for Central Rift Valley Water Works Development Agency Tender No. CRVWWDA/AfDB/KTSWSSP/G/1A/BNG/2021-2022 be annulled.

(b) The procurement proceedings leading to the decision by the Respondents to award the Interested Party the Tender in the matter of Tender for Supply and Delivery of Billing Software and Hardware for Central Rift Valley Water Works Development Agency Tender No. CRVWWDA/AfDB/KTSWSSP/G/1A/BNG/2021-2022 be reviewed and this Honorable Board be pleased to direct the Respondents to readmit and reevaluate the Applicants' bid and proceed to make an award in a manner that strictly complies with the provisions of the public procurement laws.

(c) The Respondents be ordered to pay the costs of and incidental to these proceedings.

(d) Any other relief that the Honorable Board deems fit to grant, having regard to the circumstances of this case in order to give effect to the Board's orders.

In a Notification of Appeal and a letter dated 14th October 2022, the Acting Board Secretary of the Public Procurement Administrative Review Board (hereinafter referred to as the "Board"), Mr. James Kilaka, notified the Respondents of the filing of the Request for Review and the suspension of the 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. 02/20 dated 24th 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 five days from 14th October 2022.

On 26th October 2022 and in opposition to the Request for Review, the 1st and 2nd Respondents filed a Notice of Preliminary Objection and a Memorandum of Response both dated 24th October 2022 through the 1st Respondent.

Vide letters dated 26th October 2022, the Acting Board Secretary notified all tenderers in the subject tender, of the existence of the subject Request for Review while forwarding to all tenderers a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020. All tenderers in the subject tender were invited to submit to the Board any information and arguments about the subject tender within 3 days from 26th October 2022.

On 1st November 2022, the Applicant filed an Applicant's Response to the Respondent's Memorandum of Response dated 24th October 2022.

On 24th March 2020, the Board issued Circular No. 2/2020 detailing the Board's administrative and contingency management plan to mitigate COVID-19 pandemic. Through this circular, the Board dispensed with physical hearings and directed that all requests for review applications be canvassed by way of written submissions. The Board further cautioned all parties to adhere to the strict timelines as specified in its directive as the Board would strictly rely on documentation filed before it within the timelines specified to render its decision within twenty-one days of filing of the request for review in accordance with Section 171 of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act'). 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 1st November 2022, the Applicant filed an Applicant's Written Submissions and Applicant's List and Bundle of Authorities both dated 28th October 2022. On 3rd November 2022, the 1st Respondent representing himself filed Submissions dated 3rd November 2022.

APPLICANT'S CASE

The Applicant avers that the Respondents' tender decision in the Regret Letter dated 29th September, 2022 addressed to it, fails the test of adherence to the tenets and purposes of Article 10(2), 227 & 232 of the Constitution, Section 79, 80, 86, 87 & 167(1) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act') and Regulations 30, 31, 32, 75, 76 & 203(1, 2 & 3) of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as 'Regulations 2020') and the evaluation criteria stipulated in the blank tender document issued to prospective tenderers by the 2nd Respondent (hereinafter referred to as the 'Tender Document') thus warranting righting by Board.

It is thus the Applicant's allegations that the Respondents acted in breach of the Constitution, the Act, Regulations 2020, and the Fair Administrative Action Act in that; (a) Section VI of the Tender Document provided for technical specification requirements criteria of evaluating tender and that all grounds relied upon by the Respondents to determine the Applicant's non responsive at the technical evaluation stage were unfounded and flimsy grounds meant to unjustly disqualify the Applicant; (b) the Respondents failed to evaluate and award the subject tender in accordance with the Act to the detriment of the Applicant and in contravention of Section 3 of the Act, as well as the principles set out in Articles 10, 35, 27 and 227 of the Constitution; (c) the Respondents acted in breach of Section 80(2) and (3) of the Act by evaluating tenders in a manner contrary to the objectives

and intent of the law and by adopting a procedure and criterion contrary to the express requirements of the law and criteria provided in the Tender Document thus in the process, unfairly eliminated the Applicant's tender from further substantial evaluation; consequently, awarding the subject tender to the Interested Party; (d) the Respondents acted on extraneous considerations tainting its tender decision with procedural impropriety, unreasonableness, irrationality, illegality and a total lack of compliance with the law; (e) the Respondents failed to promote competition and ensure all tenderers get treated fairly and equally to promote the integrity and fairness of the procedures of the public procurement; (f) the Respondents are in breach of Section 79 and 86 of the Act by failing to declare the Applicant's tender of **Ksh.9,254,016** substantially responsive and the lowest evaluated tender; (g) the 1st Respondent's Regret letter dated 29th September 2022 is in breach of Section 87 (3) of the Act for failure to indicate the tender sum of the Interested Party awarded as the lowest evaluated tenderer.

The Applicant alleges that the tender process initiated and carried out by the Respondents is devoid of the rule of law, fairness, equitability, transparency, competitiveness and is discriminatory contrary to Article 10, 47, 227 and 232 of the Constitution and Section 3 of the Act. Further, the Applicant alleges that it has been denied an equal opportunity of being fairly evaluated in the subject tender and thus denied a commercial opportunity to secure an award of the subject tender. Finally, the Applicant avers that the Request for Review is merited.

RESPONDENTS' CASE

In response, the Respondents raised a preliminary objection to the entire Request for Review on grounds that the Board has no jurisdiction to entertain the Request for Review because the same offends Section 4(2)(f) and Section 6 of the Act. To buttress their objection, the Respondents contend that the procurement process was under the African Development Bank procurement policies for bank group funded operations of October 2015. Further, that the Request for Review offends the provisions of Rule 15 of the African Development Bank Rules and Procedures for Procurement of Goods and Works. Accordingly, the Respondents pray for dismissal with costs of the Request for Review.

The Respondents in their Memorandum of Response contend that the Government of Kenya received financing from AfDB to support Kenya Sustainable Towns Water Supply and Sanitation Program that aims at contributing to the quality health of life and reducing poverty levels of the population of Kenya through the provision of water and sanitation services on a sustainable basis. Further, that a loan agreement signed between the Republic of Kenya and AfDB was tied with clustering of institutions hence the Rift Valley cluster comprised of the Central Rift Valley Water Works Development Agency, Lake Victoria North Water Works Development Agency and Lake Victoria South Water Works Development Agency with the 2nd Respondent being its own implementing agency with the intention

of using part of the loan to carry out the responsibility to tender and procure the subject tender.

The Respondents contend that the subject tender was being processed under a Subsidiary Loan Agreement which provided that the procurement process under this program would be undertaken under the procurement policy for bank group funded operations of October 2015.

The Respondents contend that the averments in the Request for Review have no basis but are an emotional response to losing out on award of the subject tender.

The Respondents contend that a clear evaluation criterion was developed and was part of the Tender Document which was well within the knowledge of the Applicant who was aware of the evaluation criterion the 2nd Respondent was to use.

It is the Respondents contention that the 2nd Respondent evaluated tenders within the evaluation criteria and the Applicant's tender was found to be commercially responsive and qualified for technical responsiveness but found non-responsive at the technical responsiveness evaluation stage.

The Respondents contend that Rule 15 of the AfDB Rules and Procedures for Procurement of Goods and Works entrenches a mechanism through which an aggrieved tenderer may seek redress. The rule states, "...as

stated in paragraph 2.65 if, after notification of award, a bidder wishes to ascertain the grounds on which its bid was not selected, it should address its request to the Borrower. If the bidder is not satisfied with the explanation given and wishes to seek a meeting with the Bank it may do so by addressing the Director of the Procurement and Financial Services Department, who will arrange a meeting at the appropriate level with the relevant staff. In this discussion, only the bidder's bid can be discussed and not the bids of competitors."

The Respondents therefore contend that the Applicant is aware of this mechanism and is simply engaged in a fishing expedition and forum shopping. They term the Request for Review as a malicious intention to delay the procurement process. The Respondents contend that they followed the laid out procedure and criteria in the Tender Document which were objective, quantifiable and fair and are not in breach of any provisions of the Act or the Constitution.

In the end, the Respondents contend that the Request for Review is frivolous, vexatious and a total abuse of the process hence it should be dismissed in its entirety as provided under Section 172 of the Act and for want of jurisdiction with costs to the Respondents.

APPLICANT'S REJOINDER

In a rejoinder to the Respondents' Response, save for repeating its allegations as contained in its Request for Review, the Applicant

vehemently opposed and termed itself as a stranger to all averments in the Respondents' response to its Request for Review.

The Applicant alleges that the Respondents filed their Preliminary Objection contrary to Regulation 209 of the Public Procurement and Asset Disposal Act Regulations 2020 by filing the same outside the three days from the date of notification.

The Applicant avers that the instant Request for Review does not offend Section 4(2)(f) and Section 6 (1) of the Act and that the Respondent's assertion that the procurement was under the AfDB framework is an afterthought and an attempt to mislead the Board. The Applicant avers that the 2nd Respondent is the Procuring Entity and nowhere in the Tender Document is any foreign government, foreign government agency, foreign government entity or multilateral agency as a procuring entity stated therein. The Applicant avers that Section VII-General Conditions of Contract 1.4.1 stipulates that the contract shall be governed by the law of the country or other jurisdictions stated in the Particular Conditions. The Applicant avers that the Respondents have introduced extraneous grounds upon which they declared the Applicant's tender non-responsive, therefore, breaching and violating the provisions of the Constitution and the Act.

The Applicant avers that the Respondents failed to meet the threshold set in Section 87(3) of the Act as read with Regulation 82(3) of the Regulations

2020 in dispatching their letter of regret to the Applicants. In the end the Applicant seeks to establish that its request for review is properly before the Board.

BOARD'S DECISION

The Board has considered each of the parties' cases, documents, pleadings, written submissions, authorities together with confidential documents submitted to the Board by the Respondents pursuant to Section 67(3)(e) of the Act and finds the issues that arise for determination are:

- 1. Whether the subject tender's procurement is one under a bilateral or multilateral agreement between the Government of Kenya and any other foreign government, agency, entity or multilateral agency so as to oust the application of the Act by dint of Section 4(2) (f) of the Act and effectively divest the Board of jurisdiction.**

Depending on the determination of the first issue;

- 2. Whether the 2nd Respondent's Evaluation Committee evaluated the Applicant's tender in accordance with the procedures and criteria for evaluation set out in the**

Tender Document in accordance with Section 80(2) of the Act;

- 3. Whether the Regret Letter dated 29th September 2022 by the 1st Respondent and addressed to the Applicant was issued in accordance with Section 87 of the Act;**
- 4. What orders should the Board grant in the circumstances?**

We now proceed to address and make a determination on the aforesaid issues.

Whether the subject tender's procurement is one under a bilateral or multilateral agreement between the Government of Kenya and any other foreign government, agency, entity or multilateral agency so as to oust the application of the Act by dint of Section 4(2) (f) of the Act and effectively divest the Board of jurisdiction.

The Applicant in opposing the preliminary objection raised by the Respondents', argues that the same was filed outside the required period of 3 days from notification of the filing of the Request for Review provided under Regulation 209 of Regulations 2020. On the other hand, the Respondents in their written submissions argue that the preliminary objection was filed within the required period via email and was acknowledged by the Board and that the emphasis on time procedural

technicality is to be ignored given the spirit of Article 159 of the Constitution requiring exercise of judicial authority to be guided by justice being administered without undue regard to procedural technicalities.

We note the preliminary objection raises an issue on whether the Board has jurisdiction to hear the Request for Review. An issue of jurisdiction is one that is core for any determination made by this Board for in cases where the Board lacks jurisdiction, a determination lacking in jurisdiction would be null and void. Courts, and by extension this Board, on their own volition may raise and make a determination to satisfy itself on an issue of its jurisdiction as was held by the Court of Appeal in **Isaak Aliaza v Samuel Kisiavuki [2021] eKLR**.

We note that the Applicant was served and was able to oppose the preliminary objection by filing a rejoinder and submissions on the issue of jurisdiction. To this end, the Applicant suffered no prejudice because it was able to respond to the preliminary objection.

Given the foregoing we are inclined to proceed to consider and make a determination on the preliminary objection because of the centrality of the issue of jurisdiction bearing in mind that the Applicant was able to oppose the said preliminary objection.

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."***

In his book, "Words and Phrases Legally Defined", Vol. 3, John Beecroft Saunders defines jurisdiction as follows: -

"By jurisdiction is meant 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 its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court [or other decision-making body] is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics. Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given." [Emphasis by the Board]

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]

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...."

Such is the centrality of jurisdiction that the Court of Appeal has held in **Isaak Aliaza v Samuel Kisiavuki [2021] eKLR**, 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 Supreme Court in the case of **Samuel Kamau Macharia and Another v Kenya Commercial Bank Ltd and 2 Others [2012] eKLR** pronounced itself regarding the source of jurisdiction of a court or any other decision making body as follows:

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

without jurisdiction the Court cannot entertain any proceedings.”

The jurisdiction of a court, tribunal, quasi-judicial body or an adjudicating body can only flow from either the Constitution or a Statute (Act of Parliament) or both.

This Board is a creature of statute owing to the provisions of Section 27 (1) of the Act which provides as follows:

27. Establishment of the Public Procurement Administrative Review Board

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

Further, Section 28 of the Act provides for the functions and powers of the Board as follows:

28. Functions and powers of the Review Board

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

(a) reviewing, hearing and determining tendering and asset disposal disputes; and

(b) to perform any other function conferred to the Review Board by this Act, Regulations or any other written law.

The above provisions demonstrate that the Board is a specialized, central independent procurement appeals review board with its main function being reviewing, hearing and determining tendering and asset disposal disputes.

The jurisdiction of the Board is provided for and also limited under Part XV – Administrative Review of Procurement and Disposal Proceedings and specifically in Section 167 of the Act which provides for what can and cannot be subject to proceedings before the Board and Section 172 and 173 of the Act which provides for the Powers of the Board as follows:

PART XV — ADMINISTRATIVE REVIEW OF PROCUREMENT AND DISPOSAL PROCEEDINGS

167. Request for a review

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

process, or disposal process as in such manner as may be prescribed.

(2)

(3)

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

(a) the choice of a procurement method;

(b) a termination of a procurement or asset disposal proceedings in accordance with section 62 [i.e. Section 63 of the Act] of this Act; and

(c) where a contract is signed in accordance with section 135 of this Act.

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172. Dismissal of frivolous appeals

Review Board may dismiss with costs a request if it is of the opinion that the request is frivolous or vexatious or was solely for the purpose of delaying the procurement proceedings or

performance of a contract and the applicant shall forfeit the deposit paid.

173. Powers of Review Board

Upon completing a review, the Review Board may do any one or more of the following—

(a) annul anything the accounting officer of a procuring entity has done in the procurement proceedings, including annulling the procurement or disposal proceedings in their entirety;

(b) give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings;

(c) substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings;

(d) order the payment of costs as between parties to the review in accordance with the scale as prescribed; and

(e) order termination of the procurement process and commencement of a new procurement process.

Given the forgoing provisions of the Act, the Board is a creature of the Act and its jurisdiction flows from Section 167 (1) of the Act, limited under Section 167(4) of the Act and exercises its powers under Section 172 and 173 of the Act which donates powers to the Board with respect to an administrative review of procurement proceedings before it. Put differently, if the Act does not apply, then the Board will not have jurisdiction where the Act does not apply because the Board is only established by the Act, its jurisdiction only flows from the Act and it can only exercise powers as granted under the Act.

It therefore follows, for one to invoke the jurisdiction of the Board, they need to ascertain that the Act applies (because the Board is a creature of the Act and its jurisdiction flows from the Act) then approach the Board as provided under Section 167 (1) of the Act read with Regulation 203 of Regulations 2020 while seeking remedies that the Board has powers to grant under Section 172 and 173 of the Act.

Turning to the circumstances of the instant Request for Review, the Respondents have objected to the hearing and determination of the Request for Review by the Board on grounds that the Act does not apply by dint of Section 4(2)(f) and Section 6(1) of the Act which then effectively divests the Board of jurisdiction. To buttress this objection, the Respondents have furnished the Board as part of confidential documents pursuant to Section 67(3)(e) of the Act copies of (a) Specific Procurement

Notice (SPN) that was advertised in the Daily Nation Newspaper on 3rd June 2022; (b) Loan Agreement between The Republic of Kenya and The African Development Bank dated 9th January 2017, (c) Subsidiary Grant Agreement between The Government of the Republic of Kenya and Rift Valley Water Services Board (currently known as the Central Rift Valley Water Works Development Agency), (d) Procurement Policy For Bank Group Funded Operations, August 2015, (e) Standard Bid Evaluation Guide for Procurement of Goods and Works by African Development Bank November 2010, and (f) African Development Bank Rules and Procedures for Procurement of Goods and Works, May 2008 Edition Revised 2012.

On its part, the Applicant opposed the objection to the hearing of the Request for Review by the Board on the basis that the procuring entity in the subject tender is the 2nd Respondent who is not the Government of Kenya nor is the 2nd Respondent represented by the Attorney General and that no other party was listed as part of the procuring entity either as Government of Kenya, a Foreign Government, Foreign Government Agency, Foreign Government Entity or Multi-lateral Agency in the Tender Document. Further, that the Tender Document stipulates that the contract in the subject tender would be governed by the law of the country or other jurisdictions stated in particular conditions which according to the Applicant the law of Kenya is applicable. Finally, the Applicant avers that the subject tender is subject to the public procurement laws of Kenya.

The Board having considered parties' submission on the interpretation of Section 4 (2) (f) 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 will consider 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 the subject of proceedings before the Board, in order for the Board to make a determination on the import of Section 4 (2) (f) of the Act. This Board cannot therefore ignore the 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.

The distinguishing factor between the Athi Water Case and the KPLC Case is that the procuring entity in the former was Athi Water Services Board in its own capacity (because there was no evidence of it being an implementing agency of the Government of Kenya) while in the latter was Kenya Power and Lighting Company was identified as an implementing agency of the Government of Kenya.

Increasingly, the High Court in judicial review matters emanating from the decisions of this Board on interpretation of Section 4(2)(f) and 6(1) of the Act have been in consonance with the holding of Lady Justice Nyamweya in the KPLC Case. Two such High Court judicial review decisions are as follows:

Judicial Review Application No.E071, Republic v Public Procurement Administrative Review Board & Another, ex parte The Accounting Officer, Kenya Electricity Transmission Company Limited (hereinafter referred to as the 'Ketraco Case') where Justice Ngaah held as follows:

"..... it follows that when those clauses relating to procurement in the multinational loan agreement between the Republic of Kenya and the African Development Bank are read together with Section 4(2)(f) and 6(1) of the Public Procurement and Asset Disposal Act and Article 2(5) of the Constitution, the inevitable conclusion that one is bound to come is that the procurement process for the subject tender was not subject to the Act."

Republic v Public Procurement Administrative Review Board; Consortium of Tsk Electronica Y Electricdad S A and Ansaldo energia& another (Interested Parties) Ex parte Kenya Electricity Generating Company Plc (KenGen)[2021]eKLR(hereinafter referred to as the 'KenGen Case') where Justice Ndungu held as follows:

"It was not open to the Respondent to re write the agreement for the parties on the assumption that the same was unconscionable or even unconstitutional. The agreement provided redress avenue for an aggrieved party. All the parties, including the tenderers were aware all the way from the stage of advertisement for the tender to making of the bids that the procurement was in accordance with the Guidelines for procurement under the Japanese ODA loans. This was a bilateral agreement between the Government of Kenya and JICA, a foreign entity and was thus exempt from the application of Section 4(2)(f) of the Act."

This Board is bound by the aforementioned decisions of the High Court by virtue of hierarchy of courts and shall therefore be guided by the authorities outlined hereinbefore.

Turning to the circumstances of this Request for Review, the Board has carefully studied the (a) Tender Document, (b) Specific Procurement Notice (SPN) that was advertised in the Daily Nation Newspaper on 3rd June 2022; (c) Loan Agreement between The Republic of Kenya and The African Development Bank dated 9th January 2017, (d) Subsidiary Grant Agreement between The Government of the Republic of Kenya and Rift Valley Water Services Board (currently known as the Central Rift Valley Water Works Development Agency), (e) Procurement Policy For Bank Group Funded

Operations, August 2015, and (f) African Development Bank Rules and Procedures for Procurement of Goods and Works, May 2008 Edition Revised 2012 and note the following:

The Specific Procurement Notice (SPN) advertised in the Daily Nation Newspaper on 3rd June 2022 calling for eligible tenderers to submit their respective sealed tenders for the subject tender informed prospective tenderers at paragraph 2, 3 and 6 thereof as follows:

"2. The Government of Kenya has received financing from the African Development Bank in various currencies towards the cost of Kenya Towns Sustainable Water Supply and Sanitation Programme. It is intended that part of the proceeds of this loan will be applied to eligible payments under the contracts for Supply and Delivery of Billing Software and Hardware for Central Rift Valley, Lake Victoria South, Lake Victoria North Water Works Development Agencies in 3 Lots:

i. Lot 1: Supply and Delivery of Billing Software and Hardware for Central Rift Valley Water Works Development Agency, CRVWWDA/AfDB/KTSWSSP/G/1A/BNG/2021-2022

ii. Lot 2: Supply and Delivery of Billing Software and Hardware for Lake Victoria North Water Works Development Agency, CRVWWDA/AfDB/KTSWSSP/G/1B/BNG/2021-2022

iii. Lot 3: Supply and Delivery of Billing Software and Hardware for Lake Victoria South Water Works Development Agency, CRVWWDA/AfDB/KTSWSSP/G/1C/BNG/2021-2022

3. Central Rift Valley Water Works Development Agency, formerly Rift Valley Water Works Development Agency, one of the executing agencies of the program, now invites sealed Bids from eligible Bidders for the Supply and Delivery of Billing Software [hereinafter called 'the Goods']. National Competitive Bidding will be conducted in accordance with the Bank's 'Procurement Policy for Bank Group Funded Operations' dated October 2015.

4.....

5.....

6. The provisions in the Instructions to Bidders and in the general Conditions are those of the Bank's Standard Bidding Document for Procurement of Goods."

From the above provisions of the Special Procurement Notice, prospective tenderers were informed that the subject tender would be conducted in

accordance with AfDB's Procurement Policy for Bank Group Funded Operations of October 2015.

The Tender Document on its part provided as follows in its preface:

"Preface- This Bidding Document for Procurement of Goods has been prepared by Central Rift Valley Water Works Development Agency (CRVWWDA) and is based on the Standard Bidding Document for Procurement of Goods issued by the African Development Bank, dated June 2010

The Standard Bidding Document for Procurement of Goods reflects the structure and the provisions of the Master Document for Procurement of Goods, prepared by Multilateral Development Banks and International Financing Institutions, except where specific considerations within the African Development Bank have required a change."

Clause 2 of Section I. Instructions to Bidders read with ITB 2.1 of Section II. Bid Data Sheet of the Tender Document provides that the source of funds for the subject tender was from the African Development Bank to the Government of Kenya

Clause 36 of Section I. Instructions to Bidders of the Tender Document provides as follows:

“..... After publication of the award, unsuccessful bidders may request in writing to the Purchaser for a debriefing seeking explanations on the grounds on which their bids were not selected. The Purchaser shall promptly respond. In writing to any unsuccessful Bidder who, after Publication of contract award, requests a debriefing”

The aforementioned provisions of the Tender Document clearly informed prospective tenderers that the source of funds for the subject tender was from AfDB financing the Republic of Kenya and also provided a debriefing mechanism for unsuccessful tenderers.

In examining the Loan Agreement between the Republic of Kenya and AfDB dated 9th January 2017, the Board must address its mind to the questions; who are the parties to the loan agreement? what did the loan 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 loan 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 loan agreement between the Republic of Kenya and AfDB

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

First, the parties to the Loan Agreement are Republic of Kenya and AfDB. The then Cabinet Secretary, The National Treasury, Henry Kiplagat Rotich, signed the Loan Agreement for the Republic of Kenya, while the Director, East Africa Regional Resource Center, Gabriel Negatu, signed for AfDB.

It is therefore important to understand the meaning of Republic of Kenya with a view to determining who represents it and whether 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, the 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 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 AfDB. AfDB as we know it and this is also published in AfDB's website, www.afdb.org, is a multilateral

development finance institution headquartered in Abidjan in Ivory Coast. AfDB was founded by the Organisation of African Unity, the predecessor of the African Union, as a financial provider to African governments and private companies investing in the regional members countries. This therefore makes AfDB a foreign multilateral agency.

To this extend, the Loan Agreement dated 9th January 2017 made between the Republic of Kenya as the Borrower and AfDB as the Bank fits the bill of a bilateral agreement under Section 4(2)(f) of the Act for purposes of financing the implementation of the Kenya Towns Sustainable Water Supply and Sanitation Program (hereinafter referred to as the 'project') under clause 1 of the Loan Agreement.

In implementing the Kenya Towns Sustainable Water Supply and Sanitation Program, the Government of Kenya submitted the Ministry of Water and Irrigation as the executing agency and subsequently reassigned the implementation task to the 2nd Respondent vide a Subsidiary Grant Agreement between the Government of the Republic of Kenya and Rift Valley Water Services Board (currently the 2nd Respondent). The Subsidiary Grant Agreement was signed by the Cabinet Secretary, The National Treasury Henry K. Rotich, EGH, for and on behalf of The Government of the Republic of Kenya in the presence of the Cabinet Secretary, Ministry of Water and Irrigation, Hon. Eugene L. Wamalwa, EGH and Chief Executive

Officer, Eng Japheth Mutai for and on behalf of Rift Valley Water Services Board in the presence of Legal Officer, Bernard O. Akang'o.

Section 7.02 of Article VII. Procurement the Loan Agreement provides as follows:

“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:

.....”

From the foregoing provisions of the Loan Agreement, it is clear that any procurement of goods to be carried out for purposes of implementing the Kenya Towns Sustainable Water Supply and Sanitation Program was to be carried out in accordance with the Procurement Policy for Bank Group Funded Operations (October 2015) and not the laws of Kenya.

This then places the circumstances of this Request for Review similar to those in the KPLC case by Lady Justice Nyamweya where Kenya Power and Lighting Company was 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 by 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 are concerned.

As a consequence, we make the following observation;

- i. The Loan Agreement dated 9th January 2017 made between the Republic of Kenya and AfDB is a bilateral agreement under Section 4(2)(f) of the Act.
- ii. The 2nd Respondent is the agent of the Republic of Kenya (having been assigned to implement on behalf of the Ministry of Water and Irrigation) as the implementing entity of the Kenya Towns Sustainable Water Supply and Sanitation Program 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 program.
- iii. The subject tender being part of the Kenya Towns Sustainable Water Supply and Sanitation Program described in the Loan Agreement and for 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 Loan Agreement dated 9th January 2017 made between the Republic of Kenya and AfDB requires the subject tender to be undertaken in accordance with the AfDB Procurement Policy for Bank Group Founded Operations (October 2015).

Having observed as we have, we note that there have been other cases where this Board has been faulted and its decisions quashed 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 in **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** and 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)** are the ones that faulted the Board's previous decisions on the issue of Section 4(2)(f) of the Act.

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.

We note that we have in the recent past addressed our minds on the interpretation of Section 4(2)(f) of the Act with respect to the same Loan Agreement dated 9th January 2017 and made between the Republic of Kenya and AfDB. The said matter is PPARB Application No. **76/2022 of 22nd August 2022; Smart People Africa Limited v Tana Water Works Development Agency, The Accounting Officer, Tana Water Works Development Agency and another** where we held as follows:

"...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 "....."

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."

We find no reason to depart from this holding in the instant Request for Review while bearing in mind we are bound by the High Court decisions in the Ketraco Case and KenGen Case as hereinbefore alluded to.

Having established that the subject tender is a procurement under a bilateral agreement between the Republic of Kenya and AfDB and the 2nd Respondent as the implementing entity of the Kenya Towns Sustainable Water Supply and Sanitation Program 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.

In the circumstances, the application of the Act in conducting the subject tender is ousted by didn't of Section 4(2) (f) of the Act. Simply put, the Act does not apply to the procurement of the subject tender.

Since the Board is a creature of the Act, its jurisdiction flows from the Act and it exercises its powers as provided under Section 172 and 173 of the Act, the ousting of the application of the Act to the procurement of the

subject tender effectively divests the Board of jurisdiction to entertain the instant Request for Review.

In the circumstances, we find the subject tender's procurement is one under a bilateral or multilateral agreement between the Government of Kenya and a foreign multilateral agency which then ousts the application of the Act by dint of Section 4(2) (f) of the Act and effectively divest the Board of jurisdiction.

We therefore have no option but to down our tools at this stage and shall not proceed to address the other issues framed for determination.

The upshot of our finding is that the Respondents' Preliminary Objection dated 24th October 2022 succeeds and the instant Request for Review is ripe for striking out 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 14th October 2022: -

- 1. The Respondents' Preliminary Objection dated 24th October 2022 be and is hereby upheld.**

2. The Applicant's Request for Review dated 14th October 2022be and is hereby struck out for want of jurisdiction.

3. Given the findings herein, each party shall bear its own costs in the Request for Review.

Dated at NAIROBI, this 4th day of NOVEMBER, 2022



.....
CHAIRPERSON
PPARB



.....
SECRETARY
PPARB

