

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 68/2023 OF 3rd OCTOBER 2023

BETWEEN

DAMA SERVICES LIMITED APPLICANT

AND

DIRECTOR GENERAL,

KENYA NATIONAL HIGHWAYS AUTHORITY 1ST RESPONDENT

KENYA NATIONAL HIGHWAYS AUTHORITY 2ND RESPONDENT

AAKI CONSULTANTS INTERESTED PARTY

Review against the decision of the Director General, Kenya National Highways Authority in relation to RFP No. KeNHA/2681/2023 for Consulting Services for Design and Supervision of Construction of a Building Complex for the University of Nairobi.

BOARD MEMBERS PRESENT

- | | |
|------------------------------------|---------------|
| 1. Mr. George Murugu | - Chairperson |
| 2. Eng. Mbiu Kimani OGW, HSC, FIEK | - Member |
| 3. Mr. Alexander Musau | - Member |
| 4. Dr. Susan Mambo | - Member |
| 5. Mr. Joshua Kiptoo | - Member |



IN ATTENDANCE

Ms. Sarah Ayoo

- Secretariat

PRESENT BY INVITATION

APPLICANT

DAMA SERVICES LIMITED

Mr. Samuel Kioko

-Advocate, SKM Advocates LLP

RESPONDENTS

DIRECTOR GENERAL, KENYA NATIONAL HIGHWAYS AUTHORITY & KENYA NATIONAL HIGHWAYS AUTHORITY

Mr. Kelvin Mbogo

-Advocate, Robson Harris Advocates LLP

INTERESTED PARTY

AAKI CONSULTANTS

N/A

BACKGROUND OF THE DECISION

The Tendering Process

1. The Government of Kenya (referred to as "the Borrower") received financing from the International Development Association (IDA) (referred to as "the Bank") in the form of a credit towards the cost of the Horn of Africa Gateway Development Project. Part of the financing is to be towards enhancing local capacity in management of social risks in projects, through facilitating partnership between Kenya National





Highways Authority (KeNHA), on the one hand and academic institutions and industry, on the other hand in designing and offering training on social risks, and establishment – construction and equipping - of the Center for Land Acquisition and Resettlement (CELARS) at the University of Nairobi

2. Vide a Request for Expression of Interest (hereinafter referred to as "REoI") for Consulting Services for Design and Supervision of Construction of a Building Complex for the University of Nairobi, Tender No. KeNHA/2624/2022 advertised on 28th September 2022 on the Daily Nation Newspaper, Kenya National Highways Authority, the implementing agency and the 2nd Respondent herein, invited eligible consulting firms (referred to as "Consultants") to indicate their interest in providing Consulting Services which include master planning, design, preparation of bidding documents and works supervision of a building complex to house offices, classrooms, and a hostel (CLEAR Complex Phase 1) plus related external works of landscaping and civil works.
3. Firms were permitted to associate with other firms to enhance their qualifications but were required to indicate clearly whether the association was in the form of a joint venture and/or a sub-consultancy. The REoI submission deadline was on 1st November 2022.
4. Following the REoI, the following Consultants were shortlisted by the 2nd Respondent:



No.	Name
1.	AAKI Consultants in association with M/s Zimali Consult Limited, M/s Empaq Limited, M/s Pleng Limited, M/s Urban, Regional and Environmental Planners, M/s RD Studios Limited and M/s Lariak Landscapes Limited
2.	M/s Scope Design Systems Ltd in association with M/s Shaque Associates, M/s Horicon Engineering Solutions, and M/s Linx Consulting Engineers Ltd
3.	M/s Edon Consultants International Ltd in association with M/s Aegis Development Solutions Limited, M/s Apec Consortium Ltd, M/s Gedox Associates Ltd, M/s Planning Interiors Ltd, M/s Ecoarch Solutions Ltd and M/s Geodev (K) Ltd
4.	M/s Dar Al Omran in association with M/s Grasp Design Ltd and M/s Infra Plus
5.	M/s Dama Services Limited in association with M/s Integra Consulting Limited, M/s Inticom Ltd and M/s Norkun Intakes Limited
6.	M/s Egis Batiments International in Joint Venture with M/s Egis Kenya Limited
7.	M/s Aprim Consultants in association with M/s Kiri Consult Limited, M/s Runji Consulting Group Ltd and M/s Getso Consultants Ltd as Sub Consultants
8.	M/s Precise Architects Limited in association with M/s QuantsConsult Limited, M/s Civil One Consulting Engineers,

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	M/s Gedox Associated Limited, M/s Catalysis Group Limited and M/s Greenersol Limited
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5. Vide a Request for Proposal Letter dated 28th April 2023 the 2nd Respondent invited proposals from the aforementioned shortlisted Consultants in response to RFP No. KeNHA/2681/2023 for Consulting Services for Design and Supervision of Construction of a Building Complex for the University of Nairobi (hereinafter referred to as the "subject tender"). A virtual pre-proposal conference was conducted on Tuesday, 9th May 2023 and clarifications and minutes of the pre-bid conference issued to the Consultants on 25th May 2023. The subject tender's submission deadline was scheduled for 2nd June 2023 at 11.00 local time.

Submission of Tenders and Tender Opening

6. According to the Minutes of the subject tender's opening held on 2nd June 2023 signed by members of the Tender Opening Committee on even date (hereinafter referred to as the 'Tender Opening Minutes') and which Tender Opening Minutes were part of confidential documents furnished to the Public Procurement Administrative Review Board (hereinafter referred to as the 'Board') by the 1st Respondent pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act'), a total of six (6) tenders were submitted in response to the subject tender. The said six




(6) tenders were opened in the presence of tenderers' representatives present at the tender opening session, and were recorded as follows:

No.	Name
1.	AAKI Consultants in association with M/s Zimali Consult Limited, M/s Empaq Limited, M/s Pleng Limited, M/s Urban, Regional and Environmental Planners, M/s RD Studios Limited and M/s Lariak Landscapes Limited
2.	M/s Dama Services Limited in association with M/s Integra Consulting Limited, M/s Inticom Ltd and M/s Norkun Intakes Limited
3.	M/s Scope Design Systems Ltd in association with M/s Shaque Associates, M/s Horicon Engineering Solutions, and M/s Linx Consulting Engineers Ltd
4.	M/s Aprim Consultants in association with M/s Kiri Consult Limited, M/s Runji Consulting Group Ltd and M/s Getso Consultants Ltd as Sub Consultants
5.	M/s Edon Consultants International Ltd in association with M/s Aegis Development Solutions Limited, M/s Apec Consortium Ltd, M/s Gedox Associates Ltd, M/s Planning Interiors Ltd, M/s Ecoarch Solutions Ltd and M/s Geodev (K) Ltd
6.	M/s Precise Architects Limited in association with M/s QuantsConsult Limited, M/s Civil One Consulting Engineers, M/s Gedox Associated Limited, M/s Catalysis Group Limited and M/s Greenersol Limited

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Evaluation of Tenders

7. A Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") appointed by the 1st Respondent undertook evaluation of the six (6) tenders as captured in a Technical Evaluation Report for the subject tender signed by members of the Evaluation Committee on 31st July 2023 and in a Combined Technical and Financial Evaluation Report for the subject tender signed by members of the Evaluation Committee on 6th September 2023 (hereinafter referred to as the "Evaluation Report") in the following stages:

- i Preliminaries;
- ii Technical Evaluation; and
- iii Financial Evaluation.

Preliminaries

8. The Evaluation Committee carried out a Preliminary Evaluation and examined tenders for responsiveness checks using the criteria provided under Section 2- Instructions to Consultants and Data Sheet of the Tender Document prior to a detailed evaluation of the technical proposal. At the end of evaluation at this stage, the six (6) tenders were determined responsive and proceeded to Technical Evaluation.

Technical Evaluation

9. At this stage of evaluation, the Evaluation Committee examined the technical proposals on the basis of their responsiveness to the Terms of Reference and the Request for Proposal, applying the evaluation

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[Signature]

criteria, sub-criteria and point system specified in Instructions To Consultants (referred to as "ICT") 21.1 under Section 2- Instructions to Consultants and Data Sheet of the Tender Document. Tenders were required to attain a pass mark of 75% to proceed to Financial Evaluation.

10. At the end of evaluation at this stage, the six (6) tender met the minimum pass mark and proceeded to Financial Evaluation.

First Professional Opinion

11. In a Professional Opinion dated 3rd August 2023 (hereinafter referred to as the "First Professional Opinion"), the Deputy Director, Supply Chain Management, Levina Wanyonyi, reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders and observed that the procurement process generally complied with World Bank Procurement Regulations for IPF borrowers on consulting services July 2016 Revised November 2017 and August 2018 and as updated in November 2020. The Deputy Director concurred with the recommendations of the Evaluation Committee with respect to opening the financial proposals of tenderers who had attained the minimum pass mark technical score of 75%.
12. Thereafter, the 1st Respondent herein, approved the First Professional Opinion on 3rd August 2023.

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Financial Evaluation

13. The financial proposals of tenderers who passed the Technical Evaluation stage were opened on 24th August 2023 in the presence of representatives who chose to attend the opening as seen from the Public Attendance Register and the Minutes of Financial Proposals opening held on 24th August 2023.
14. The financial proposals were subjected to Financial & Technical Evaluation where the Consultant ranked with the highest evaluated score was identified as M/s Dama Services Limited in association with M/s Integra Consulting Limited, M/s Inticom Ltd and M/s Norkun Intakes Limited. However, the Consultant's financial proposal submission did not have a duly filled Form FIN-3A and 3B – Breakdown of Remuneration rates for all staff as per the requirements of the Tender Document and was considered to be non-responsive.
15. Subsequently, the second highest ranked evaluated tenderer, AAKI Consultants in association with M/s Zimali Consult Limited, M/s Empaq Limited, M/s Pleng Limited, M/s Urban, Regional and Environmental Planners, M/s RD Studios Limited and M/s Lariak Landscapes Limited, the Interested Party herein, was recommended for award of the subject tender.

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Evaluation Committee's Recommendation

16. The Evaluation Committee recommended award of the subject tender to AAKI Consultants in association with M/s Zimali Consult Limited, M/s Empaq Limited, M/s Pleng Limited, M/s Urban, Regional and Environmental Planners, M/s RD Studios Limited and M/s Lariak Landscapes Limited, the Interested Party herein at a price of Kenya Shillings Thirty-Three Million, Four Hundred and Twenty Thousand Only (Kshs. 33,420,000/=) - Design Phase and Kenya Shillings Seventeen Million Five Hundred and Twenty-One Thousand Five Hundred and Forty-Three Only (Kshs. 17,521,543/=) – Supervision Phase (exclusive of local indirect taxes) for a Contract Period of 6.5 Months (Design) and 18 Months (Construction Supervision).

Second Professional Opinion

17. In a Professional Opinion dated 11th September 2023 (hereinafter referred to as the "Second Professional Opinion"), Mr. Isaac Kigen for the Deputy Director, Supply Chain Management reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders and observed that the procurement process generally complied with World Bank Procurement Regulations for IPF borrowers on consulting services July 2016 Revised November 2017 and August 2018 and as updated in November 2020. He concurred with the recommendations of the Evaluation Committee with respect to award of the subject tender.





18. Thereafter, the 1st Respondent herein, approved the Second Professional Opinion on 11th September 2023.

Notification to Tenderers

19. Tenderers were notified of the outcome of evaluation of the subject tender vide letters of Notification of Intention to Award dated 20th September 2023 signed by the 1st Respondent.

REQUEST FOR REVIEW NO. 68 OF 2023

20. On 3rd October 2023, the Applicant filed a Request for Review dated 3rd October 2023 together with a Statement in Support of the Request for Review sworn on 3rd October 2023 by David Kiguongo Kanja, its Managing Director (hereinafter referred to as the 'Request for Review') through the firm of SKM Advocates LLP seeking the following orders from the Board in verbatim:

a) The Honourable Review Board do allow the Request for Review.

b) The Respondent's letter dated 20th September 2023 on Notification of Intention to award Tender No. KENHA/2681/2023 CONSULTING SERVICES FOR DESIGN AND SUPERISION OF CONSTRUCTION OF A BUILDING COMPLEX FOR THE UNIVERSITY OF NAIROBI be annulled in its entirety.

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- c) The Honourable Review Board direct the Respondents to recall the Notification of Intention to award dated 20th September 2023 and immediately issue a Notification of Intention to award naming the Applicant as the successful bidder.***
- d) In the alternative to prayer 3 above, this Honourable Review Board do direct the Respondents to re-evaluate the Financial Proposal of the Applicant in line with the evaluation criteria of Combined Quality and Cost-Based Selection outlined in the Request for Proposal.***
- e) Costs of and/or incidental to this Review be borne by the Respondent.***
- f) Any other orders that the Review Board may deem just and fit in the circumstances.***

21. In a Notification of Appeal and a letter dated 3rd October 2023, Mr. James Kilaka, the Acting Board Secretary of the Board notified the 1st and 2nd Respondents of the filing of the Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said Respondents 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. Further, the Respondents were requested to submit a response to the Request for Review together with confidential

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documents concerning the subject tender within five (5) days from 3rd October 2023.

22. On 5th October 2023, the Respondents filed through Robson Harris Advocates LLP a Notice of Appointment of Advocates dated 5th October 2023.

23. On 6th October 2023, the 1st Respondent filed a letter dated 6th October 2023 together with confidential documents concerning the subject tender pursuant to section 67(3)(e) of the Act.

24. On 9th October 2023, the Respondents filed through their advocates a Notice of Preliminary Objection dated 9th October 2023, a Respondents' Memorandum of Response dated 9th October 2023 and an Affidavit Verifying the Contents of the Memorandum of Response sworn on 9th October 2023 by Eng. Paul Omondi, the 2nd Respondent's Deputy Director, Directorate of Development.

25. Vide letters dated 9th October 2023, the Acting Board Secretary notified all tenderers in the subject tender via email, 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 concerning the subject tender within three (3) days from 9th October 2023.

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26. On 11th October 2023, the Interested Party filed a letter dated 11th October 2023 together with annexures.
27. Vide a Hearing Notice dated 12th October 2023, the Acting Board Secretary, notified parties and all tenderers in the subject tender of an online hearing of the Request for Review slated for 17th October 2023 at 1400 hrs through the link availed in the said Hearing Notice.
28. On 17th October 2023, the Applicant filed through its advocates a Replying Affidavit to the Notice of Preliminary Objection sworn on 16th October 2023 by David Kiguongo Kanja and Written Submissions dated 16th October 2023.
29. On 17th October 2023, the Respondents filed through their advocates a List of Documents dated 16th October 2023, Written Submissions dated 16th October 2023 and a list of Authorities dated 16th October 2023.
30. At the hearing of the instant Request for Review, the Board directed that the hearing of the preliminary objections by the Respondents would be heard as part of the substantive instant Request for Review as amended. This was in accordance with Regulation 209(4) of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as 'Regulations 2020') which also allows the Board to deliver one decision having considered the preliminary objections as part of the substantive instant Request for Review.



31. Accordingly, the Board directed the Respondents would be heard first on their Preliminary Objection, followed by the Applicant who would be heard on its case and respond to the Respondents' Preliminary Objection, thereafter the Respondents would be heard on their case followed by the Interested Party (if present by the time of making submissions) who would be heard on its case and any response to the Respondent's preliminary objection. Thereafter, the Board directed that the Applicant to make its rejoinder.

PARTIES' SUBMISSIONS

Respondents submission on their Preliminary Objection

32. In his submissions, counsel for the Respondents relied on the Respondents' Notice of Preliminary Objection, Memorandum of Response, Verifying Affidavit, List of Documents, Written Submissions, List of Authorities and confidential documents that were filed before the Board.

33. Mr. Mbogo submitted that the Board lacks jurisdiction to hear and entertain the instant Request for Review by dint of Section 4(2)(f) of the Act read with Regulation 5 of Regulations 2020. He further submitted that the jurisdiction of the Board is governed by the Act being a creation of statute and referred the Board to the holdings in the case of *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & others (2012) eKLR*.

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34. Counsel submitted that Section 6 of the Act provides that where provisions of the Act conflict with any obligations of the Republic of Kenya arising from a treaty, the treaty prevails. In the current proceedings, counsel pointed out that the subject tender arises out of a Financing Agreement Credit Number 6768 where the Government of Kenya received financing from the International Development Association (IDA) in the form of a credit toward the cost of the Horn of Africa Gateway Development Project.

35. Mr. Mbogo referred the Board to Section I of the Appendix to the Agreement at page 30 paragraph 37 which defined Procurement Regulations as the World Bank Procurement Regulations for IPF Borrowers dated July 2016, revised November 2017 and August 2018. He further referred the Board to Schedule 2, Section I Clause F at page 21 of the Agreement which provided for the Procurement Regulations and to the Project Appraisal Document dated 19th August 2020 on Procurement Management at page 36 paragraphs 11,120 and 121 which provided that the applicable law to the subject tender is the World Bank Procurement Regulations for borrowers under Investment Project Financing, dated July 2016 revised November 2017 and August 2018.

36. Mr. Mbogo pressed on that from the subject tender's advertisement, it was clear on the face of the advertisement that the applicable laws were the World Bank Procurement Regulations, a fact which the

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Applicant was aware of as demonstrated from its request for debriefing dated 21st September 2023, Complaint letter dated 21st September 2023, letter dated 26th September 2023 and well as the response by the Respondent dated 29th September 2023.

37. Mr. Mbogo submitted that contrary to the Applicant's assertions, the subject tender was subject to the open International Market approach and that the provisions at paragraphs 50 of page 83 and paragraph 57 of page 87 of the Project Appraisal Document were not applicable. Counsel further submitted that the applicable provisions were paragraphs 48 and 49 of page 83 and paragraph 56 of page 86 of the Project Appraisal Document wherein the complaint handling mechanism is a preserve of World Bank Procurement Regulations.

38. In support of his arguments, counsel referred the Board to the holding by Justice P. Nyamweya in *Judicial Review Application No. 181 of 2018 Republic v Public Procurement Administrative Review Board, Astonefield Solesa Solar Kenya Ltd/ Clearwater Industries Ltd and Shenzen Clou Electronics Ltd Ex parte Kenya Power & Lighting Company (2019) eKLR* and urged the Board to uphold the preliminary objection.

Applicant's Response to the Respondents' Preliminary Objection and Submissions on the Request for Review

39. In his submissions, counsel for the Applicant, Mr. Kioko, relied on the Applicant's Request for Review and Statement in Support, Replying

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Affidavit to the Respondents' Preliminary Objection and Written Submissions that were filed before the Board.

40. Mr. Kioko submitted that he was in agreement with the Respondents on the provisions of Section 4(2)(f) of the Act and Regulation 5 of Regulations 2020. He further submitted that the Respondents conveniently failed to bring to the attention of the Board the provisions of the International Development Association Project Appraisal Document for the Horn of Africa Gateway Development Project which specifically gives the procedure and processes for appraisal for the Horn of Africa Gateway Development Project which includes the subject tender.
41. Counsel referred the Board to paragraph 50 of page 83 of the Project Appraisal Document providing for National Competitive Bidding Procedures and paragraph 57 of page 87 providing for the Complaints involving National Market and Using National SPD. He argued that these provisions talk about the use of local legislation available and in particular the Act.
42. Mr. Kioko pressed on that since the tendering process was done locally to local consultants, the subject tender falls within the National Market and thus the complaint raised ought to be subject to the complaints handling mechanism under the Act which gives the Board the authority to hear and determine the instant Request for Review. In support of his argument, counsel referred the Board to the holding in the case of

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Kenya Pipeline Company Ltd v Hyosung Ebara Company Ltd & 2 Others (2012) eKLR and the Board's decision in *Application No. 64 of 2021* and urged the Board to find that it was clothed with proper jurisdiction to entertain the instant Request for Review.

43. On the substantive issues, Mr. Kioko submitted that the process of evaluation provided for in the Tender Document was based on a Combined Quality and Cost Based Selection which meant that the best proposal was one which achieved the highest combined technical and financial score, which emerged to be the Applicant's tender.
44. Counsel referred the Board to the provisions of the Tender Document on the evaluation criteria, the provisions of Section 79 of the Act and submitted that the reason given as to why the Applicant's tender was rendered unresponsive on the ground that the Applicant did not indicate remuneration rates for key and non-key experts in Form FIN 3B and did not cost the support experts and non-key experts in its proposal was irrational since even if the Applicant did not cost the support experts only, such costing of the support experts would not result into any changes in its financial proposal nor affect the substance of its tender. Moreover, the supporting consultants would only be contracted on a need basis and the same rates provided for the mandatory experts would extend to these supporting consultants since there would be no new roles created.

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45. It is the Applicant's case that this was not a fundamental error that would disqualify the Applicant's tender particularly when it is clear that the same rates for the mandatory staff would apply to the staff and not affect the financial quote proposed by the Applicant. Counsel argued that the failure to cost the support staff should be deemed as an oversight that could be corrected without affecting the substance of the Applicant's tender as contemplated under Section 79(2)(b) of the Act.

46. Mr. Kioko relied on the holding in the case of *Republic v Public Procurement Administrative Review Board & another Ex parte Willis Protocol & Concierge Services Limited (2021) eKLR* in support of his argument and submitted that as far as the evaluation criteria was concerned, the Applicant met all the mandatory requirements and scored the highest and ought to have been recommended for award of the subject tender.

Respondents' rejoinder to its Preliminary Objection and Submissions on the Request for Review

47. In his rejoinder of the Respondents' preliminary objection, Mr. Mbogo submitted that the Applicant had conceded that the World Bank Regulations were the appropriate laws governing the subject tender and if the procurement process was to be done by way of open international market approach, Section 4(2)(f) of the Act was applicable which was the correct position.

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48. Counsel reiterated that the nature of market in the subject tender was open international market approach and urged the Board to find that it lacks jurisdiction to entertain the instant Request for Review.
49. On the substantive motion, Mr. Mbogo pointed out that the Applicant had admitted that there was an omission on its part when it came to filing its tender since it failed to fill Forms 3(a) and (b).
50. Mr. Mbogo submitted that the Applicant was wrong to rely on the provisions of the Act as it was not applicable to the subject tender which was governed by the World Bank Procurement Regulations. He further submitted that evaluation of the subject tender was done in accordance to the provisions of the World Bank Procurement Regulations and the Tender Document.
51. Counsel referred the Board to provisions of paragraph 3.13 of the World Bank Procurement Regulations, Sub-clauses 7 & 16.1 of the ITC of the Tender Document, Paragraph 5.50 Evaluation Criteria of the World Bank Procurement Regulations for Borrowers under Investment Project Financing dated July 2016, revised November 2017 and August 2018 and submitted that the Applicant failed to comply with the requirements provided in the Tender Document by failing to fill in the standard forms that were provided in the Request for Proposal as its financial proposal did not indicate remuneration rated for key and non-





key experts in Form FIN 3B and that the support experts and non-key experts were not costed in the Applicant's Financial Proposal.

52. Mr. Mbogo submitted that the Procuring Entity ought to only consider conforming compliant responsive bids to the provisions of the Tender Document and that such requirement to comply has been subject to judicial pronouncement. He referred the Board to the case of *R v Public Procurement Administrative Review Board; Consortium of GBM Projects Limited and ERG InsaatTicaretVeSanai A.S and another Ex parte National Irrigation Board (2020) Eklr* and submitted that transparency and competitiveness are key principles behind procurement and parties are required to compete on equal footing.

53. In conclusion, Mr. Mbogo urged the Board to find that it lacked jurisdiction to entertain the instant Request for Review and in the event it found that it has jurisdiction, to find that evaluation of the subject tender was conducted in accordance with the applicable laws and provisions.

54. Upon enquiry by the Board on whether the Interested Party had filled the forms for support staff, Mr. Mbogo submitted that he was not in possession of the Applicant's and Interested Party's forms save for what had been attached in the Request for Review but the submission by the Applicant was elaborate that it did not adequately fill its forms.

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55. When asked to elaborate to the Board on whether the subject tender had specified the procedure to be followed in case of a dispute, Mr. Mbogo submitted that with respect to the International Market Approach, paragraph 56 at page 86 of the Appraisal document provided for complaints involving international markets and as such, the Board lacked jurisdiction. When asked by the Board to further elaborate on what the Procuring Entity understood to be the procurement process and law applicable in evaluation of tenders in the subject tender, counsel submitted that the advertisement stage of the subject tender categorically stated that the tender was subject to World Bank Regulations and that the Procurement Plan by the World Bank shows at page 2 row 3 column 7 from the left that the market approach would be open international so that the resolution of any conflict has to follow the procedure at paragraph 56 of page 86 and not 57 as alleged.

56. Upon enquiry by the Board on which document would prevail between the Appraisal Document and the Financing Document if there was a conflict, Mr. Mbogo submitted that the Financing Document would prevail but in the current circumstances, there was no conflict. He further referred the Board to the Data Sheet in the Tender Document and pointed out that ITC 35.1 categorically provides for the applicable law and procedure for making a procurement related complaint.

Interested Party's Submissions.

57. The Interested Party was not present during the hearing of the instant Request for Review. It had however filed a letter dated 11th October

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2023 wherein it stated that the Procuring Entity followed due process in its decision to award it the subject tender and that the Tender Document had clearly disclosed that the funding agency was the International Development Authority. It further stated that in its own opinion, the subject tender fell under projects financed through multilateral agreements and Regulation 5 provides for handling of the same.

Applicant's Rejoinder

58. In a rejoinder, Counsel for the Applicant, submitted that contrary to the submissions by the Respondents, Form 3(a) and (b) were partially filled just that the last portion was not filled. He further pointed out that in the spirit of competitiveness alluded to, the Applicant had the most competitive bid and ought to have been awarded the subject tender in line with prudence spending. Counsel argued that it was ridiculous for the Respondent to award the subject tender to a tenderer who had quoted a higher value since there would be no value for money.

59. He reiterated that the Board had jurisdiction to hear the matter and that the Respondents did not comply with the evaluation criteria.

60. When asked by the Board to further elaborate on what the Applicant understood to be the procurement process as per the tender advert and law applicable in evaluation of tenders in the subject tender, counsel submitted he was not in possession of the advert but had been



advised by his client that the Tender Advert had no mention of the use of the World Bank Regulations. He further reiterated that the Applicant in writing its debriefing letter and other attendant letters addressed to the Procuring Entity was not doing so in reliance on the World Bank Regulations but was complying with the provisions provided for in the letter of Notification of Award which had instructed the Applicant to write to the 1st Respondent if interested in challenging the award decision.

61. Counsel submitted that with regard to the procurement documents, Instructions to Consultants, and evaluation, the Applicant did not at no particular time imagine that there would be other rules other than the provisions of the Act and documents provided and having been invited to submit a proposal by the Respondents, the said invitation letter had no provision stating the applicable law or evaluation of tenders' dispute resolution mechanism to be adopted. Mr. Kioko pointed out that ITC 35.1 of the Data Sheet in the Tender Document provided for the procedure of making a complaint and did not address what recourse a tenderer had after the internal mechanisms.

62. Counsel submitted that it was the understanding of the Applicant that there has to be a recourse after the decision of the Procuring Entity if the complainant is not satisfied with the Procuring Entity's decision and this was the reason it had approached the Board.

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63. At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 3rd October 2023 was due to expire on 23rd October 2023 (*meant 24th October 2023*) and that the Board would communicate its decision on or before 23rd October 2023 to all parties to the Request for Review via email.

BOARD'S DECISION

64. The Board has considered each of the parties' cases, documents, pleadings, oral and written submissions, list and bundle of authorities together with confidential documents submitted to the Board by the Respondents pursuant to Section 67(3)(e) of the Act and finds the following issues call for determination.

A. Whether the Board has jurisdiction to hear and determine the instant Request for Review;

In determining the first issue, the Board will make a determination on 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.

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Depending on the determination of Issue 1;

B. 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 and in accordance with the Tender Document, Section 80(2) of the Act read with Article 227(1) of the Constitution.

C. What orders should the Board grant in the circumstances?

Whether the Board has jurisdiction to hear and determine the instant Request for Review.

65. It is trite law that courts and decision-making bodies can only act in cases where they have jurisdiction and when a question on jurisdiction arises, a Court or tribunal seized of a matter must as a matter of prudence enquire into it before doing anything concerning such a matter in respect of which it is raised.

66. Black's Law Dictionary, *8th Edition*, defines jurisdiction as:

"... the power of the court to decide a matter in controversy and presupposes the existence of a duly constituted court with control over the subject matter and the parties ... the power of courts to inquire

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into facts, apply the law, make decisions and declare judgment; The legal rights by which judges exercise their authority."

67. 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."

68. The *locus classicus* case on the question of jurisdiction is the celebrated case of **The Owners of the Motor Vessel "Lillians" -v- Caltex Oil Kenya Ltd (1989) KLR 1** where Nyarangi J.A. held:

"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 continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds that it is without jurisdiction."

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69. 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...."

70. 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."

71. The Supreme Court in the case of **Samuel Kamau Macharia and Another v Kenya Commercial Bank Ltd and 2 Others [2012]**

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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."

72. This Board is a creature of statute owing to its establishment as provided for under Section 27(1) of the Act which provides that:

"(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."

73. Further, Section 28 of the Act provides for the functions of the Board as:

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

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- (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."***

74. The jurisdiction of the Board is provided for under Part XV – Administrative Review of Procurement and Disposal Proceedings and specific at Section 167 of the Act which provides for what can and cannot be subject to review of procurement proceedings before the Board and Section 172 and 173 of the Act which provides for the powers the Board can exercise upon completing a review 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.

See



(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 63 of this Act; and

(c) where a contract is signed in accordance with section 135 of this Act. [Emphasis by the Board]

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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.

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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.

75. Given the forgoing provisions of the Act, the Board is a creature of the Act and the Board's jurisdiction flows from Section 167 (1) of the Act





though limited under the provisions of Section 167(4) of the Act. The Board exercises its powers under Section 172 and 173 of the Act with respect to reviewing an administrative review of procurement proceedings filed before it. It therefore follows that if the Act is not applicable, then the Board is divested of jurisdiction to hear and determine an administrative review presented before since its jurisdiction flows from the Act and it can only exercise powers as granted by the Act.

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;

76. The Respondents objected to the hearing and determination of the instant Request for Review in their Notice of Preliminary Objection dated 9th October 2023 and filed on even date on the grounds that (a) the Board lacks jurisdiction to hear and entertain the instant Request for Review by dint of Section 4(2)(f) of the Act read with Regulation 5 of Regulations 2020, (b) the procurement proceedings are subject to the bilateral agreement entered into between the Government of Kenya and the International Development Authority, and (c) the bilateral agreement, Credit Number 6768 between the Government of Kenya and the International Development Authority specifies the regulations

See



applicable being the *World Bank Procurement Regulations for IPF Borrowers* dated July 2016, revised November 2017 and August 2018.

77. On the other hand, the Applicant in opposing the preliminary objection raised by the Respondents argues that the Board is clothed with sufficient jurisdiction to hear and determine the issues raised in the instant Request for Review. The Applicant contends that the provisions in the International Development Association Project Appraisal Document for the Horn of Africa Gateway Development Project specifically gives the procedure and processes for appraisal of the Horn of Africa Gateway Development Project which includes the subject tender in that the Horn of Africa Gateway Development Project (P161305) Appraisal Document produced by the Respondent provided at page 83, paragraph 50 for national competitive bidding procedures and also provided at page 87, paragraph 58 for complaints involving the national market. It is the Applicant's case that the subject tender falls within the National Market and as such, its complaint is subject to the complaints handling mechanism under the Act.

78. The Board having considered parties' submissions on the interpretation of Section 4(2)(f) of the Act and judicial authorities cited deems it fit to necessary to interrogate the aforementioned statutory provision and its import.

See



79. Section 4(2)(f) of the Act reads:

"(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); and

(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."[Emphasis Board]

80. Further, Regulation 5(1) of Regulations 2020 reads:

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

81. The import of Section 4(2)(f) of the Act read with Regulation 5(1) of Regulations 2020 is that the Act is not applicable in procurement and asset disposals under bilateral or multilateral agreements between the Government of Kenya and any other foreign government agency, entity

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or multilateral agency. Additionally, where any such bilateral or multilateral agreements is financed through negotiated loans for the procurement of goods, works or services, the Act is not applicable where such aforementioned agreements specify the procurement and asset disposal procedures to be followed. It is imperative to note that for Section 4(2)(f) of the Act to apply, one of the parties to a procurement and asset disposals or to a procurement and asset disposals undertaken in accordance with the terms of a bilateral or multilateral agreement must be the Government of Kenya.

82. We are cognizant of the fact that the High Court of Kenya has on numerous occasions while considering judicial review matters emanating from the decisions of the Board spoken on the provisions of Section 4(2)(f) of the Act.

83. Justice Odunga in **Miscellaneous Application No. 402 of 2016 (Consolidated with Misc. Application No. 405 of 2016) Republic v Public Procurement Administrative Review Board & another Ex parte Athi Water Service Board & Another [2017] eKLR** (hereinafter referred to as "the Athi Water Case") at paragraphs 152 to 154 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

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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.

84. 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.

85. Justice Nyamweya took a different approach in addressing the import of Section 4(2)(f) 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, and 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

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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

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is entered into between the Government of Kenya and a foreign government, entity or multi-lateral agency is exempted from the provisions of the Act...

64. It was in this respect incumbent upon the Respondent to satisfy itself that section 4(2) (f) was not applicable before assuming jurisdiction, especially as the said section was an evidential ouster clause that was dependent on a finding that the subject procurement was one that was being undertaken pursuant to a bilateral agreement between the Government of Kenya and a foreign Government or entity.
65. The Respondent in its finding equated the requirements of section 4(2)(f) to the use of funding under a loan or grant where the Government of Kenya is a party, whereas the section specifically states that the Respondent should satisfy itself that the procurement is not being made pursuant to the terms of a bilateral treaty or agreement between the Government of Kenya and a foreign government, entity or multilateral agency."
[Emphasis by the Board]

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86. In her holding in the KPLC Case, Justice Nyamweya faulted the Board for failure to consider the applicability of the bilateral agreement which was the subject of the proceedings before the Board, in order for it to make a determination on the import of Section 4(2)(f) of the Act. The Learned Judge 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.

87. Increasingly, the High Court has been in consonance with the holding of Lady Justice Nyamweya in the KPLC Case on interpretation of Section 4(2)(f) of the Act. In **Judicial Review Application No. E071 of 2021 Republic v Public Procurement Administrative Review Board & Another, Ex parte Accounting Officer, Kenya Electricity Transmission Company Limited [2021] eKLR** (hereinafter referred to as the 'Ketraco Case') Justice Ngaah J 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

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inevitable conclusion that one is bound to come is that the procurement process for the subject tender was not subject to the Act..."

88. In Judicial Review Application No. E162 of 2021 (Consolidated with E146 of 2021) Republic v Public Procurement Administrative Review Board; Consortium of Tsk Electronica Y Electricidad S A and Ansaldoenergia & another (Interested Parties) Ex parte Kenya Electricity Generating Company Plc (KenGen)[2021]eKLR (hereinafter referred to as the 'KenGen Case') Justice Ndungu held as follows:

".....

102. I have carefully considered the loan agreement herein. As correctly submitted by counsel for the applicant, the scenario in the instant case is similar to the facts in Republic v Public Procurement Administrative Review Board & 2 Others ex parte Kenya Power and Lighting Company (2019) eKLR. The project herein is borne out of a bilateral agreement between the Republic of Kenya and JICA. This is the loan agreement NO. KE-P33. The procurement of goods and services was to be financed out of the loan in accordance with the Guidelines for procurement under the Japanese ODA rules. A subsidiary agreement dated 17th April 2020 between JICA and the Republic of Kenya through the ex

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parte applicant as the executing agent was entered into. Notably, the subsidiary agreement provides under Article 10.1 that the procurement shall be under the Japanese ODA loans. Article 12 of the subsidiary agreement provides for the amendments, settlement of disputes and applicable law. Article 42.5 of the Standard Bidding Documents Under Japanese ODA Loans. Provides an unsuccessful bidder with an avenue to raise their grievance.

103. In my considered view, had the intention of the drafters of the agreement been that disputes in the tendering process were subject to the Respondents purview, nothing would have been easier than for the drafters to so state in the agreement. As it turns out, this was a procurement undertaken in the terms of a bilateral agreement that as entered into between the Government of Kenya and a foreign entity, JICA.

104. Nyamweya J (as she then was) in Republic v Public Procurement Administrative Review Board & 2 Others ex parte Kenya Power and Lighting (supra) stated;

"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

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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 that a procurement that is undertaken as provided for or in accordance with the terms of a bilateral agreement that is entered into by the Government of Kenya and a foreign Government, entity or multilateral agency is exempted from the provisions of the Act.

'64. It was in this respect incumbent upon the respondent to satisfy itself that section 4(2)(f) was not applicable before assuming jurisdiction, especially as the said section was an evidential ouster clause that was dependent on a finding 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. Further, the Respondent made an error in its interpretation of the provision of section 4(2) (f) of the Act when it phrased the issue as follows:

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"The main issue that the Board needs to therefore address is whether the mere fact that a particular procurement or procurements are to be undertaken using the proceeds of a grant or a loan where the Government of Kenya is a party can oust the jurisdiction of the Board to hear and determine a dispute relating to the said procurement under the provisions of section 4(2)(f) of the Act indeed under the provisions of the Kenyan Constitution"

"65. The Respondent in its finding equated the requirements of section 4(2)(f) to the use of funding under a loan or a grant where the Government 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"

105. 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

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all the way from the stage of advertisement for the tender to making of the bids that the procurement was in accordance with 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.....

106. In light of the foregoing, I find and hold that the Respondent acted without jurisdiction in entertaining and determining Review Application 120 of 2021. In consonance with the principles set out in Pastoli v Kabale District Local Government Council (supra), the Ex parte Applicant in HC Judicial Review Misc. App no. E162 has ably shown that the process and decision of the Respondent in Review App. No. 120 of 2021 was tainted with illegality. The Respondent acted without jurisdiction ultra vires and contrary to the provisions of a law. This action is amenable for review under judicial review."

89. From the foregoing, the Board in considering the circumstances in the instant Request for Review must address its mind to the operative words in Section 4(2)(f) of the Act read with Regulation 5(1) of Regulations 2020 being (a) "procurement under" a bilateral agreement

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and (b) inapplicability of the Act where the bilateral Agreement is financed through negotiated loans and specifies the procurement procedure to be followed. "

90. Turning to the instant Request for Review, the Board has carefully studied the (a) Tender Notice that was advertised in the Daily Nation Newspaper on 28th September 2023 for Request for Expression of Interest For Consulting Services for Design and Supervision of Construction of a Building Complex for the University of Nairobi, (b) the Request for Proposal Letter dated 28th April 2023, (c) the Tender Document, (d) The Financing Agreement (Horn of Africa Gateway Development Project) Credit Number 6768 between Republic of Kenya and International Development Association (hereinafter referred to as "the Financing Agreement"), (e) the Project Appraisal Document dated 19th August 2020 (hereinafter referred to as "the Project Appraisal Document"), (f) the Approved Procurement Plan, and (g) the World Bank Procurement Regulations for IPF Borrowers Procurement in Investment Project Financing Goods, Works, Non-Consulting and Consulting Services Fourth Edition November 2020 (hereinafter referred to as "the World Bank Procurement Regulations") and note the following:

91. The Project Appraisal Document provided key details on the Horn of Africa Gateway Development Project including its Development Objectives, Beneficiaries, Partners, and Implementation Arrangements. We note that the 2nd Respondent was one of the six implementing



agencies. Procurement Management was provided for under paragraphs 118 to 129 at pages 36 to 38 of the Project Appraisal Document which covered, *inter alia*, the Project Procurement Strategy, Applicable Regulations, Procurement Plans, Procurement Notice, and Training.

92. Paragraphs 119 and 120 at page 36 of the Project Appraisal Document reads as follows:

"119. Procurement for the proposed project will be carried out in accordance with the 'World Bank Procurement Regulations for Borrowers under Investment Project Financing', dated July 1, 2016, and updated November 2017 and August 2018, hereafter referred to as 'Procurement Regulations' and the provisions stipulated in the project financing agreement. The project will be subject to the World Bank's Anticorruption Guidelines, dated July 1, 2016, and beneficiary disclosure requirements.

120. Thus, procurement of the goods, works, non-consulting services and consulting services required for the project and financed out of the credit proceeds will be carried out in accordance with the World Bank Procurement Regulations. In order to apply procurement rules, a provision to this effect has been included in the Financing Agreement clarifying that should there be a

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conflict between the World Bank Procurement Regulations and the domestic procurement legislation or regulations, then the World Bank Procurement Regulations will prevail (refer to Schedule 2, Section 1(F) of the Financing Agreement). Further, for all contracts procurement process that uses Bank's Standard Procurement Document (SPD), procurement complaints shall be resolved following arrangements in the World Bank Procurement Regulations rather than the arrangements set forth in the Public Procurement and Asset Disposal Act No.33 of 2015 and the regulations thereunder."

93. In essence, the Project Appraisal Document provided that the applicable law in procurement of the said project was the World Bank Procurement Regulations and a provision to this effect would be included in the Financing Document. Further, in the event of a conflict between the World Bank Procurement Regulation and domestic laws, the World Bank Procurement Regulations would prevail and any procurement complaint would be resolved following the arrangements in the World Bank Procurement Regulations and not the provisions of the Act and Regulations 2020.

94. We note that the Applicant's argument on applicability of the Act and Regulations 2020 is based on the allegation that the subject tender was

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under a National Market Approach placing reliance on the provisions under paragraphs 50 at page 83 and paragraph 57 at page 87 of the Project Appraisal Document.

95. Paragraph 50 at page 83 of the Project Appraisal Document reads:

"50. National competitive bidding procedures. National Competitive Bidding (NCB) shall follow the Open and Competitive Bidding procedure set forth in the Kenya Government and Public Procurement and Disposal Act, provided, that such procedure shall be subject to the provisions of Section V Paragraphs 5.3; 5.4; 5.5; 5.6 of Procurement Regulations for "Procurement in Investment Project Financing, Goods, Works, Non-Consulting and Consulting Services.

Table 1.3: Applicable Procurement Methods and Thresholds (risk rating = Substantial)

<i>Category</i>	<i>Prior Review Threshold (US\$)</i>	<i>ICB Threshold (US\$)</i>	<i>National Short-List Max Value (US\$)</i>
<i>Works</i>	<i>≥ 10,000,000</i>	<i>≥ 15,000,000</i>	<i>n.a</i>
<i>Goods, IT Systems, and Non-</i>	<i>≥ 2,000,000</i>	<i>≥ 3,000,000</i>	<i>n.a</i>

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Consultancy Services			
Consultants (Firms)	$\geq 1,000,000$	<i>n.a</i>	$\leq 300,000$; $\leq 300,000$ (for Engineering and Contract Supervision)
Consultants (Individuals)	$\geq 300,000$	<i>n.a</i>	<i>n.a</i>

96. We note that the Project Appraisal Document provided under paragraph 20 at page 77 as follows:

"Procurement under the project will be carried out in accordance with: (a) the World Bank Procurement Regulations for Investment Project Financing Borrowers: Procurement in Investment Project Financing, Goods, Works, Non-Consulting and Consulting Services, dated July 2016, revised November 2017 and August 2018; (b) introduction of Exceptions to National Competitive Bidding Procedures; and (c) the provisions stipulated in the Legal Agreements. Bank standard procurement documents shall be used for procurement of goods and works through International Competitive Bidding (ICB) and for all consulting services exceeding US\$300,000. The Borrower has prepared a Project

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Procurement Strategy for Development (PPSD) that stipulates the most beneficial procuring approach that forms the basis for the Procurement Plan.

97. Further, paragraph 48 at page 83 for Applicable Procurement Methods provided as follows:

"48. Applicable procurement methods.

Procurement for goods and works under International Competitive Bidding (ICB) contracts will be undertaken using the Bank's latest Standard Procurement Documents (SPD). Procurement of Goods and Non-Consulting Services which are below the ICB threshold (refer, Table 2.3) [The Board believe this is meant to refer to Table 1.3 which provides for Applicable Procurement Methods as Table 2.3 provides for Unfunded Unpaved Class A Road Corridors] can be procured through the National Competitive Bidding Procedure. Procurement of off the shelf goods and commodities of small value contracts of less than US\$70,000 may be procured using RfQ procedures in accordance with Section VI, paragraph 6.7 of Bank's procurement Regulations for IPF Borrowers. Procurement of simple works contracts with value up to US\$ 100,000 may be procured using RfQ method. Where it has been determined to be to the advantage of the operation, Procurement of Goods, non-Consulting services and consultancy services under Direct Selection

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shall be procured in accordance with Section VI, paragraph 6.8/10 of Bank's Procurement Regulations for IPF Borrowers."

98. Our understanding of the above provisions of the Project Appraisal Document is that several procurement methods were applicable in the said project amongst them being International Competitive Bidding and the National Competitive Bidding Procedure. For all consulting services exceeding USD 300,000 the Bank's standard procurement documents would be used. National Competitive Bidding Procedure would only be used where the procurement of goods and non-consulting services were below the International Competitive Bidding threshold of USD 300,000 and would apply the provisions of the Act provided that the said procedure is subject to Section V paragraph 5.3, 5.4. 5.5. 5.6 of the World Bank Procurement Regulations.

99. Notably, paragraph 55 to 57 at page 87 of the Project Appraisal Document provided for procurement complaints handling procedures for both the International markets and National Markets as follows:

"55. With regards to procurement complaints handling procedures, the following provisions shall be applied:

(a) Complaints involving International market and using Bank's SPD:

56. The Complaints handling procedure under IDA funded projects for contracts following the international market, shall follow the complaints mechanism specified

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in the Annex III of the World Bank Procurement Regulations for IPF Borrowers July 2016 Revised November 2017 and August 2018. As communicated in the issued Bidding Document, if a Bidder wishes to make a Procurement-related Complaint, the Bidder shall submit its complaint following the procedures as detailed in the "Procurement Regulations for IPF Borrowers (Annex III)." For complains following international market, the Implementing Agency (IA) of the Borrower shall provide for the Bank's review all the relevant information and documents, including draft responses to the complainant for Bank's review and clearance before responding to the complainant. The IA shall not proceed with the next stage/phase of the procurement process, including the awarding of the contract without receiving confirmation of the satisfactory resolution of complaint(s) from the Bank.

(b) Complaints involving National market and using National SPD with the above listed qualifications:

57. The contracts using the national approach shall be subject to the complaints' handling mechanism under the PPAD Law. The IA shall inform the Bank about the actions taken regarding the complaint. In addition, the IA shall provide to the Bank all relevant documentation, as requested and upload all the documentations to

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Bank's Systematic Tracking of Exchanges in Procurement (STEP)."

100. We note that according to the Financing Agreement, the Government of Kenya received financing in form of a credit from the International Development Association (IDA) towards the implementation costs of the Horn of Africa Gateway Development Project making it a bilateral agreement. Clause F of Schedule 2 Project Execution of Section I at page 21 of the Financing Agreement provides for Procurement Regulations as follows:

"Without limitation to the provision of the General Conditions, the obligations of the Recipient under the Financing Agreement – including the obligation to comply with the Procurement Regulations when undertaking the procurement of goods, works, non-consulting services, and consulting services financed in whole, or in part by the proceeds of the Financing – shall be valid and enforceable in accordance with their terms notwithstanding the laws of the Recipient (including the Recipient's Public Procurement and Asset Disposal Act No. 33 of 2015 and the Public Procurement and Asset Disposal Regulations, 2020 – as both may be amended from time to time). "

101. Schedule I of the Appendix to the Financing Agreement defines "Procurement Regulations" as the "World Bank Procurement

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Regulations for IPF Borrowers" dated July 2016, revised November 2017 and August 2018.

102. Our understanding of the above provisions is that the Republic of Kenya's obligations under the Financing Agreement including its obligation to comply with the World Bank Procurement Regulations when undertaking procurement financed in whole or in part by the proceeds of the credit facility are valid and enforceable notwithstanding the provisions of the Act and Regulations 2020. This shows that the Financing Agreement addressed the procurement perspective of the anticipated projects under the Horn of Africa Gateway Development Project to which the Republic of Kenya bound itself to.

103. As hereinbefore mentioned, a Procurement Plan was one of the key components provided for under Procurement Management of the Project Appraisal Document. Paragraph 127 at page 38 of the Project Appraisal Document provided for a Procurement Plan as follows:

"127. A Procurement Plan (PP) acceptable to the Bank covering the first eighteen months has been prepared and is included in Annex 2. For each contract to be financed by the Credit, the different procurement methods or consultant selection methods, estimated costs, prior review requirements, and time frame agreed upon between the Borrower and World Bank in the approved PP. Subsequent PPs will be submitted and approved through STEP. The PP will be updated at least

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annually or as required to reflect the actual project implementation needs and improvements in institutional capacity.”

104. In essence, the Procurement Plan would identify the different procurement methods or consultant selection methods, provide for estimated costs amongst other requirements. We note from the Procurement Plan submitted to the Board by the 1st Respondent pursuant to Section 67(3)(e) of the Act that the subject tender's Market Approach was provided as Open- International at page 2 under row 3 column 7 and at an Estimated amount of USD 400,000.00 provided at page 2 under row 3 column 8 as follows:

Quality and Cost Based Selection (QCBS), Fixed Budget Based Selection (FBBS), Least Cost Based Selection (LCBS)

Activity Reference No. / Description	In-Process	Loan / Credit No.	Component	Review Type	Category	Market Approach	Estimated Amount (US\$)
.....
KE-KENHA-201820-CS-QCBS/ (UoN) HORN OF AFRICA GATEWAY DEVELOP	No	IDA-67680	Component D: Institutional Strengthening of Selected Transport and	Post	Consultant Services	Open - International	400,000.00

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MENT PROJECT (HoAGDP) : UNIVERSI TY OF NAIROBI (UoN) Consultan cy Services to Undertak e Design Update and Finalizatio n of bidding document , Supervisi on and Contract Managem ent of CELARS Constructi on Works			Related Institutio ns					
*****	*****	*****	*****	****	*****	*****	*****	****

105. Notably, the estimated cost of USD 400,000.00 falls above the threshold estimated for National Competitive Bidding Procedure. In our considered view, this therefore means that the applicable Procurement

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Method in the subject tender in accordance with the provisions of the Project Appraisal Document was International Competitive Bidding.

106. The Tender Notice that was advertised in the Daily Nation Newspaper on 28th September 2023 for Request for Expression of Interest For Consulting Services for Design and Supervision of Construction of a Building Complex for the University of Nairobi calling for eligible consulting firms to submit their Expressions of Interest informed prospective tenderers at paragraph 5 and 7 thereof as follows:

"5. The attention of interested Consultants is drawn to Section III, paragraphs 3.14, 3.16 and 3.17 of the World Bank's "Procurement Regulations for IPF Borrowers" July 2016 revised in November 2017, August 2018 and November 2020 ("Procurement Regulations"), setting forth the World Bank's policy on conflict of Interest.

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7. The firm will be selected in accordance with the Quality and Cost Based Selection (QCBS) method set out in the World Bank's Procurement Regulations."

107. From the provisions of the Request for Expression of Interest Tender Notice above, prospective tenderers were informed that they would be selected in accordance to the Quality and Cost Based Selection (QCBS) method set out in the World Bank's Procurement Regulations.

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108. Following the shortlisting of firms in the Request for Expression of Interest, a Request for Proposal letter dated 28th April 2023 was sent out inviting proposals from six (6) consulting firms. We note that of the six (6) shortlisted firms, two were international firms being (a) M/s Dar Al Omran in association with M/s Grasp Design Ltd and M/s Infra Plus from Jordan and (b) M/s Egis Batiments International in Joint Venture with M/s Egis Kenya Limited from France.

109. The Request for Proposals informed the prospective tenderers at paragraph 5 as follows:

"5. A firm will be selected under Quality and Cost Based Selection (QCBS) procedures and in a Full Technical Proposal (FTP) format as described in this RFP, in accordance with the Bank's "Procurement Regulations for IPF Borrowers" November 2020 ("Procurement Regulations"), which can be found at the following website: www.worldbank.org

The RFP includes the following documents:

....."

110. From the above provisions of the Request for Proposal Letter, prospective tenderers were informed that selection under the Quality and Cost Based Selection (QCBS) procedures and in a Full Technical Proposal format as described in the subject tender would be in accordance with the World Bank's Procurement Regulations for IPF Borrowers. In addition, the 2nd Respondent referred prospective

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tenderer's to the World Bank's website for ease of access of the said Procurement Regulations.

111. The Tender Document on its part provides as follows:

"ITC 35 of Section 2. Instruction to Consultants and Data Sheet reads:

35.1 The procedures for making a Procurement- related Complaint are as specified in the Data Sheet.

ITC Reference 35.1 of Section 2. Instructions to Consultants E. Data Sheet reads:

35.1 The procedures for making a Procurement-related Complaint are detailed in the "Procurement Regulations for IPF Borrowers (Annex III)." If a Consultant wishes to make a Procurement-related Complaint, the Consultant shall submit its complaint following these procedures, in Writing (by the quickest means available, such as by email or fax), to:

For the attention: Levina Wanyonyi

Title/position: Deputy Director Supply Chain Management

Client: Kenya National Highways Authority

Email address: procurement@kenha.co.ke

In summary, a Procurement-related Complaint may challenge any of the following:

1. the terms of this Request for Proposal;

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2. the Client's decision to exclude a Consultant from the procurement process prior to the award of the contract; and
3. the Client's decision to award the contract."

112. We have studied the World Bank Procurement Regulations which provides at page 61 Annexure III Procurement- related Complaints which details the procedure for administration and handling of procurement- related complaints arising in connection with contracts where the Standard Procurement Documents issued by the Bank is to be used by Borrowers for Investment Project Financing (IPF) projects.

113. On submission of Complaints, paragraph 2.4 of Annex III Procurement- related Complaints at page 61 of the World Bank Procurement Regulations provides that complaints shall be submitted in writing to the Borrower (*in this case the borrower being the Republic of Kenya and the implementing agency being the 2nd Respondent herein*). Paragraph 3t page 62 proceeds to provide the timelines and process for review and resolution of Complaints.

114. Paragraph 3.6 of Annex III Procurement- related Complaints at page 63 of the World Bank Procurement Regulations provides in part as follows:

"In resolving a Complaint, the Borrower should ensure a timely and meaningful review of the Complaint, including all relevant documentation and facts and circumstances related to it. The Borrower shall provide

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sufficient information in its response to the complainant, while maintain confidentiality of information as provided under paragraphs 5.19 and 5.20....”

115. From the foregoing provisions of the Project Appraisal Document, the Financing Agreement, the Procurement Plan, the Tender Notice, the Request for Proposal and the Tender Document, it is clear to the Board that the procurement of the subject tender was one under a bilateral agreement between the Government of Kenya and a foreign multilateral agency and was to be carried out in accordance with the World Bank Procurement Regulations and not the laws of Kenya. As such, the procurement of the subject tender falls on all fours under the provisions of Section 4(2)(f) of the Act read with Regulation 5(1) of Regulations 2020.

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

117. 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.

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118. The upshot of our finding is that the Respondents' Notice of Preliminary Objection dated 9th October 2023 succeed and the instant Request for Review is ripe for striking out for want of jurisdiction.

FINAL ORDERS

119. In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, No. 33 of 2015, the Board makes the following orders in the Request for Review dated 3rd October 2023 and filed on even date:

A. The Respondents' Notice of Preliminary Objection dated 9th October 2023 be and is hereby upheld.

B. The Applicant's Request for Review dated 3rd October 2023 be and is hereby struck out for want of jurisdiction.

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

Dated at NAIROBI this 23rd Day of October 2023.


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CHAIRPERSON
PPARB


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SECRETARY
PPARB

