

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 79/2023 OF 16TH OCTOBER 2023

BETWEEN

KISUMU CONCRETE PRODUCTS LIMITED APPLICANT

AND

THE ACCOUNTING OFFICER,

COUNTY GOVERNMENT OF KISUMU 1ST RESPONDENT

COUNTY GOVERNMENT OF KISUMU2ND RESPONDENT

CHAJU BUILDERS LIMITED INTERESTED PARTY

Review against the decision of the Accounting Officer, County Government of Kisumu in relation to RFB No. KE-Kisumu County-362227-CW-RFB for Procurement of Lot 1 (IDA Funded Component): Roads & Drainage Works, Water & Sewerage Works and Public Lighting Works (Bandani, Nyawita, Migosi, Manyatta A & Manyatta B Settlements) in Procurement No. CGK/LHPPUD/KISIP2/NOT/2023-2024/001.

BOARD MEMBERS PRESENT

- | | | |
|--------------------------------|---|-------------------|
| 1. Mrs. Njeri Onyango, FCI Arb | - | Panel Chairperson |
| 2. Mr. Jackson Awele | - | Member |
| 3. CPA Alexander Musau | - | Member |
| 4. Dr. Susan Mambo | - | Member |

5. Dr. Paul Jilani

- Member

IN ATTENDANCE

1. Ms. Sarah Ayoo

- Holding brief for Board Secretary

2. Evelyn Weru

- Secretariat

PRESENT BY INVITATION

APPLICANT

KISUMU CONCRETE PRODUCTS LIMITED

Mr. Meso

-Advocate, Caroline Oduor & Associates

RESPONDENTS

THE ACCOUNTING OFFICER, COUNTY GOVERNMENT OF KISUMU & COUNTY GOVERNMENT OF KISUMU

Mr. Robert Ouma Njoga

-Advocate, Office of the County Attorney

INTERESTED PARTY

CHAJU BUILDERS LIMITED

Dr. Jotham Arwa

- Advocate, Rachier & Amollo LLP

BACKGROUND OF THE DECISION

The Tendering Process

1. Vide a Request for Bids Works (Without Prequalification) County Government of Kisumu, the Procuring Entity and the 2nd Respondent

herein, through the Department of Lands, Housing, Physical Planning and Urban Development (LHPP & UD) invited sealed bids from eligible bidders in response to RFB No. KE-Kisumu County-362227-CW-RFB which comprised of Procurement of Lot 1 (IDA Funded Component): Roads & Drainage Works, Water & Sewerage Works and Public Lighting Works (Bandani, Nyawita, Migosi, Manyatta A & Manyatta B Settlements) (hereinafter referred to as the "subject tender") and Lot 2 (AFD Funded Component): Roads & Drainage Works, Water & Sewerage Works and Public Lighting Works (Kibuye, Shauri Yako, Bondeni, Sangoro, Swahili & Shauri Moyo Settlements) in Procurement No. CGK/LHPPUD/KISIP2/NOT/2023-2024/001.

2. Tendering was conducted through national competitive procurement and the invitation was by way of an advertisement in the Standard Newspaper and the Daily Nation Newspaper on 19th July 2023 and on the 2nd Respondent's website www.kisumucounty.go.ke and the Public Procurement Information Portal (PPIP) <https://tenders.go.ke> where the blank tender document for the subject tender issued to tenderers by the 2nd Respondent (hereinafter referred to as the 'Tender Document') was available for download. Bidders had an option of bidding for one or both lots in the Tender Document. The subject tender's submission deadline was scheduled for 29th August 2023 at 1000 HRS East African Time (EAT).

Submission of Tenders and Tender Opening

3. According to the Minutes of the subject tender's opening held on 29th August 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 ten (10) tenders were submitted in response to the subject tender. The said ten (10) tenders were opened in the presence of tenderers' representatives present at the tender opening session, and were recorded as follows:

No.	Name
1.	Rural Distributors Limited
2.	Waaso Construction Company Limited
3.	Barbat Sitani Construction Ltd
4.	Decotec Enterprise Ltd
5.	Firm Bridge Ltd
6.	Kisumu Concrete Products Ltd
7.	Adawa Investment Company
8.	China-Jiangxi International Economic Corporation Co. Ltd
9.	Octagon Builders and General Suppliers Ltd
10.	Chaju Builders Ltd

Evaluation of Tenders

4. A Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") appointed by the 1st Respondent undertook evaluation of the ten (10) tenders as captured in an Evaluation Report for Lot 1 for the subject tender signed by members of the Evaluation Committee on 11th September 2023 with the exception of one Mr. Duncan Ogango (hereinafter referred to as the "Evaluation Report") in the following stages:
 - i Preliminary Evaluation;
 - ii Detailed Examination of Bids; and
 - iii Post Qualification.

Preliminary Examination

5. The Evaluation Committee carried out a Preliminary Evaluation and examined tenders for responsiveness checks using the criteria provided under Section I- Instructions to Bidders, Section II- Bid Data Sheet (BDS) and Section III- Evaluation and Qualification Criteria of the Tender Document prior to a detailed examination of bids. At the end of evaluation at this stage, the three (3) tenders were determined responsive and proceeded to Detailed Examination of Bids.

Detailed Examination of Bids

6. At this stage of evaluation, the Evaluation Committee examined the responsive bids for arithmetic errors in accordance with Clause 31 of the Instructions to Bidders in order to derive the corrected bid prices as seen from Table 4.2 Summary of errors as follows:

Bidder	Read-out Bid Price (s)		Corrections		Corrected Bid Price(s)	Unconditional Discounts		Corrected/Discounted Bid Price(s)
	Currency (ies)	Amount(s)	Computational Errors	Provisional Sums		Percent	Amount(s)	
(a)	(b)	(c)	(d)	(e)	(f) = (c) + (d) - (e)	(g)	(h)	(I) = (f) - (h)
Chaju Builders LTD P.O Box 897-40100 Kisumu (No. 30)	KES.	1,107,743,903.73	+14,747,443.27.00		1,122,491,347.00			
China-Jiangxi International Economic Corporation Co. LTD P.O Box 31533-Nairobi(No.19)	KES.	1,228,000,616.83	o		1,228,000.616.83			
Decotec Enterprise LTD P.O Box 2171-40100 Kisumu (No. 08)	KES.	1,327,219,728.45	o		1,327,219,728.45			

7. Bids were then ranked from the lowest to the highest evaluated bid price as seen at Table 5.1 (a): Total Comparison Price as follows:

Table 5.1(a): Total Comparison Price

Bidder Number	Bidder	Total Comparison Price (KES.)	Ranking
30	CHAJU BUILDERS LTD	1,122,491,347.00	1
19	CHINA JIANGXI INTERNATIONAL	1,228,000,616.83	2
08	DECOTEC ENTERPRISES LTD	1,327,219,728.45	3

Post Qualification

8. Post qualification evaluation was carried out to confirm the qualification information for the bidder with the lowest evaluated bid price, being the Interested Party herein, using the criteria provided under Section III- Evaluation and Qualification Criteria of the Tender Document.

9. At the end of evaluation of the Interested Party's tender was considered adequate for smooth implementation of the project having established that it understands the requirements of the proposed works, had demonstrated availability of adequate financial resources to undertake the proposed works, had demonstrated hands on experience in similar works which was considered adequate, had proposed personnel with adequate qualification and experience, had demonstrated access to specialized roads, drainage, water and sanitation works as well as

electrical works equipment hence qualified to undertake the proposed works in the subject tender.

Evaluation Committee's Recommendation

10. The Evaluation Committee recommended award of the subject tender to the Interested Party herein at a price of Kenya Shillings One Billion, One Hundred and Twenty-Two Million, Four Hundred and Ninety-One Thousand, Three Hundred and Forty-Seven Shillings only (Kshs. 1,122,491,347/=) VAT inclusive, this being its arithmetically corrected bid price, including the Provisional Sums of Kshs. 66,400,000.00

Professional Opinion

11. In a Professional Opinion dated 13th September 2023 (hereinafter referred to as the Professional Opinion"), Ms. Joan Kanjejo, Director, Supply Chain Management of KISM Registration No. 64907 and License No. K1324/2019 reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders and concurred with the recommendations of the Evaluation Committee with respect to award of the subject tender.

12. Thereafter, Mr. Victor Kanyaura, Chief officer LPPH & UD, approved the Professional Opinion on 20th September 2023.

Notification to Tenderers

13. Tenderers were notified of the outcome of evaluation of the subject tender vide letters of Notification of Intention to Award dated 3rd October 2023 signed by the 1st Respondent.

Withdrawal of Notifications to Tenderers

14. Tenderers were notified of the withdrawal and cancellation of the letters of Notification of Intention to Award for Lot 1 being the subject tender.

REQUEST FOR REVIEW NO. 79 OF 2023

15. On 16th October 2023, the Applicant filed a Request for Review dated 16th October 2023 together with a Statement in Support of the Request for Review made on 16th October 2023 by Vimal Lalji Rabadia, its Director/Shareholder (hereinafter referred to as the 'Request for Review') through the firm of Caroline Oduor & Associates seeking the following orders from the Board in verbatim:

a) The Letter of Notification of Intention to Award issued to the Interested Party herein with respect to Tender No. CGK/LHPPUD/KISIP2/NOT/2023-2024/001; RFB NO. KE-KISUMU COUNTY-362227-CW-RFB for Construction of Roads & Drainage Works/Water supply & Sewerage works/Public lighting works (Bandani, Nyawita, Migosi,

Manyatta A & Manyatta B settlements) be nullified and set aside.

b) The Letter of Notification of Intention to Award dated 3rd October 2023 issued to the Applicant and other unsuccessful tenderers with respect to Tender No. CGK/LHPPUD/KISIP2/NOT/2023-2024/001; RFB NO. KE-KISUMU COUNTY-362227-CW-RFB for Construction of Roads & Drainage Works/Water supply & Sewerage works/Public lighting works (Bandani, Nyawita, Migosi, Manyatta A & Manyatta B settlements) be nullified and set aside.

c) The Honourable Board finds and holds that the 1st and 2nd Respondents' decision and reason for the Applicant's bid being found unsuccessful as stated in the Notification of Intention to Award letter dated 3rd October 2023 is unconstitutional & unlawful.

d) The 1st Respondent be directed to award Tender No. CGK/LHPPUD/KISIP2/NOT/2023-2024/001; RFB NO. KE-KISUMU COUNTY-362227-CW-RFB for Construction of Roads & Drainage Works/Water supply & Sewerage works/Public lighting works (Bandani, Nyawita, Migosi,

Manyatta A & Manyatta B settlements) to the Applicant and issue the requisite letter of notification in accordance with the law within 14 days from the date of the Board's decision.

In the Alternative

e) An order does issue directing the 2nd Respondent's Evaluation Committee to reinstate the Applicant's tender at the Financial Evaluation Stage and evaluate the Applicant's tender price for the 1st Respondent to make an award of the subject tender to the Applicant within 14 days from the date of the Board's decision.

f) The 1st Respondent to pay the cost of the Review.

g) Any other orders as necessary for the ends of justice

16. In a Notification of Appeal and a letter dated 16th 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 documents concerning the subject tender within five (5) days from 16th October 2023.

17. On 19th October 2023, Rachier & Amollo LLP Advocates filed a Notice of Appointment of Advocates dated 19th October 2023 indicating that the 1st and 2nd Respondents had appointed the said advocates to act on their behalf in the said matter together with a Notice of Preliminary Objection dated 19th October 2023.
18. On 19th October 2023, Arwa & Change Advocates LLP filed a Notice of Appointment of Advocate dated 19th October on behalf of the Interested Party
19. On 23rd October 2023, the Respondents filed through the Office of the County Attorney a Notice of Appointment dated 23rd October 2023, a Notice of Preliminary Objection dated 23rd October 2023, a Respondents Memorandum of Response dated 23rd October 2023, together with confidential documents concerning the subject tender pursuant to section 67(3)(e) of the Act.
20. Vide letters dated 23rd 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 23rd October 2023.

21. On 24th October 2023, Rachier & Amollo LLP Advocates filed a Notice of Change of Advocates indicating that the Interested Party had appointed them to act on their behalf in place of Arwa & Change Advocates together with a Notice of Preliminary Objection dated 24th October 2023.
22. Vide a Hearing Notice dated 24th 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 1st November 2023 at 1100 a.m. through the link availed in the said Hearing Notice.
23. On 26th October 2023, the Interested Party filed through its advocates an Interested Party's Memorandum of Response dated 25th October 2023.
24. On 27th October 2023, the Applicant filed through its advocates an Applicant's Replying Affidavit sworn on 27th October 2023 by Vimal Lalji Rabadia.
25. On 31st October 2023, the Respondents filed through the Office of the County Attorney a Supporting Affidavit sworn by Victor Kanyaura, the

Chief Officer Lands, Physical Planning, Housing and Urban Development of the 2nd Respondent.

26. On the morning of 1st November 2023, the Interested Party filed through its advocates an Interested Party's List and Bundle of Authorities dated 1st November 2023.

27. At the hearing of the instant Request for Review, Mr. Meso, counsel for the Applicant, submitted that he had just been served with the Respondents' Supporting Affidavit sworn by Victor Kanyaura, the Chief Officer Lands, Physical Planning, Housing and Urban Development of the 2nd Respondent which was filed on 31st October 2023 and served upon them on the same day but after working hours and the same introduced evidence which the Applicant had not been afforded an opportunity to respond to and was thus an ambush. Counsel urged the Board to strike out the said Supporting Affidavit from the record.

28. In response to Mr. Meso's application to strike out the Supporting Affidavit, Mr. Ouma, County Attorney of the 2nd Respondent and counsel for the Respondents, conceded that indeed the said Supporting Affidavit had been filed on 31st October 2023 with the Board and served upon the Applicant after working hours which was regrettable. He submitted that the Hearing Notice dated 24th October 2023 was only sighted at their offices on 30th October at around 11.00 a.m. which was a result of power and network failure at the building where the offices

of the County Attorney were situated. Counsel further submitted that they had intended to rely on the preliminary objection filed by the Respondents and had hoped that the same would be heard and the matter determined *in limine* but when it dawned on them that they could file additional documents, they took the steps of filing the Supporting Affidavit so as to assist the Board in resolving the matter amicably. Counsel pleaded with the Board not to expunge the Supporting Affidavit as it contained important documents which would assist the Board to come to an understanding of the matter at hand.

29. On the part of the Interested Party, counsel for the Interested Party, Dr. Arwa in his submission reminded the Board that this was not a formal court proceeding but an administrative process where the focus should be on substantive justice without regard to technicalities and as such, justice should be seen to be done. He further pointed out that the Applicant had filed a Replying Affidavit on 27th October 2023 which raised a number of issues that needed to be replied to hence the necessity to file an affidavit after 27th October 2023 and blame ought not to be placed on the Respondents.

30. Having considered parties' submissions, the Board declined to expunge the Respondents' Supporting Affidavit and granted the Applicant's counsel latitude to comment on the same in his submissions. The Board also directed that the hearing of the preliminary objections by the Respondents and Interested Party would be heard as part of the substantive instant Request for Review. 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 allocated time for parties to make their submissions and the instant Request for Review proceeded for virtual hearing as scheduled.

PARTIES' SUBMISSIONS

Applicant's submissions

32. In his submissions, counsel for the Applicant, Mr. Meso, relied on the Request for Review dated 16th October 2023 together with a Statement in Support of the Request for Review made on 16th October 2023 by Vimal Lalji Rabadia and the Applicant's Replying Affidavit sworn on 27th October 2023 by Vimal Lalji Rabadia that were filed before the Board.

33. Mr. Meso submitted that the gist of the Applicant's case is that it submitted its tender in response to the subject tender and was served with a letter of notification of intention to award dated 3rd October 2023 which informed it of its unsuccessfulness because its submitted Qualified Forms were not signed by the person authorized to sign in its Power of Attorney.

34. Counsel submitted that the reasons for disqualification of the Applicant's tender were incorrect and that every document in the said tender was signed at the bottom page as required by the provisions of the Tender document. He further pointed out that the alleged unsigned forms were annexed as exhibits in the instant Request for Review and demonstrate that the reasons for disqualification was unlawful.
35. Counsel pointed out that no clarification was sought by the Procuring Entity as permitted by the Tender Document on contents of the Applicant's bid and in view of the failure to seek clarifications, the reason for disqualification was arbitrary and unlawful.
36. Mr. Meso reiterated that the Applicant's bid was responsive to all the tender requirements and had the lowest tender price as compared to the Interested Party's tender price and as such, the Applicant ought to have been awarded the subject tender pursuant to Section 79 and 86 of the Act.
37. Counsel submitted that the Applicant had lodged a complaint on the aforementioned contentions to the Respondents on 6th October 2023 per the criteria set out at paragraph 5 of the notification letter dated 3rd October 2023 and in accordance with the requirements under Annexure III of the World Bank Procurement Regulations but did not get a response and this necessitated filing of the instant Request for Review.

Respondents' submissions

38. In his submissions, counsel for the Respondent, Mr. Ouma, relied on the Notice of Preliminary Objection dated 23rd October 2023, the Respondents Memorandum of Response dated 23rd October 2023, Supporting Affidavit Supporting Affidavit sworn by Victor Kanyaura, the Chief Officer Lands, Physical Planning, Housing and Urban Development of the 2nd Respondent together with confidential documents concerning the subject tender pursuant to section 67(3)(e) of the Act that were filed before the Board.
39. Mr. Ouma submitted that the Board lacks jurisdiction to hear and determine the instant Request for Review for the reason that the subject of review was financed by the World Bank through IDA and for that reason, the procurement is exempt from provisions of the Act by virtue of Section 4(2)(f) and 6 of the Act.
40. He pointed out that the procurement subject of the review is governed by World Bank Procurement Regulation and all bidders were notified of the same in various documents on regulation of the same. Counsel submitted that for IDA borrowers, dispute resolution mechanisms have been set out and ought to be resorted to before any other body as such, this dispute resolution mechanism was not followed nor exhausted hence the instant Request for Review is premature.

41. Counsel further submitted that the notice of intention to award having been withdrawn, there is no complaint capable of being raised before the Board and that the withdrawal letter had been annexed as an exhibit in the Respondents' Supporting Affidavit. Mr. Ouma pressed on that there exists no decision capable of being contested and as such, there is no competent Request for Review before the Board.
42. Mr. Ouma submitted that a provision was made under the World Bank Procurement Regulations for review by an entity known as Independent Fiduciary Agency which was appointed to review evaluation of the subject tender. The said agency gave a report of its evaluation on 3rd October 2023 with recommendations for bidders who had been disqualified including the Applicant to be elevated and evaluated in the next stage of evaluation and for the process to continue.
43. Counsel reiterated that whatever complaint the Applicant has before the Board has therefore been addressed and that the Evaluation Committee will pick up from where it left off and continue with evaluation of the subject tender. He pointed out that the process had been halted by the instant review proceedings and were it not for the same, evaluation would proceed with no prejudice to the Applicant.
44. With regard to correction of the bid by the Interested Party, counsel submitted that the rules allow for correction of arithmetic errors in bids which is what happened and it was not an amendment as alleged. He

concluded by urging the Board to dismiss the instant Request for Review with costs.

45. Upon enquiry by the Board on whether the complaint by the Applicant was responded to before the instant Request for Review was filed, Mr. Ouma submitted that upon receipt of the Applicant's complaint and before the same could be responded to, the Independent Fiduciary Agent intervened and came up with a report which had recommendations based on which the Procuring Entity sent out the letters of cancellation of the notification of award dated 12th October 2023 hence there was no need to respond having recalled the said notifications and noting that the Applicant was still in the race.

46. Counsel further clarified that the Request for Bids indicated that funding was received from the World Bank and IDA and that the bidding process was to be governed by the World Bank. He further submitted that due to confidentiality requirements that exist in agreements between the Government and World Bank Agencies, the Respondents elected to exhibit a document that camouflages parties and one that was not signed.

Interested Party's Submissions.

47. In his submissions, counsel for the Interested Party, Dr. Arwa, relied on the Notice of Preliminary Objection dated 24th October 2023, the Interested Party's Memorandum of Response dated 25th October 2023

and the Interested Party's List and Bundle of Authorities dated 1st November 2023 that were filed before the Board.

48. Dr. Arwa submitted that the Request for Review is grounded on section 167 of the Act and this section donates rights to apply only to a person who has suffered loss or is at risk of suffering loss as a result of breach of provisions of the Act and Regulations by a procuring entity. Counsel further submitted that the concern was whether there has been any demonstration of the risk or loss suffered by the Applicant or any demonstration of the provisions of the Act breached by the Procuring Entity. He pointed out that without the Applicant showing loss suffered and any breach of duty on the part of the Respondents, there is no competent request for review for the Board's determination.
49. Dr. Arwa submitted that as demonstrated by the Respondents, the procurement was still ongoing and the Applicant was still participating in the same as bids were still up for evaluation and the only delay was the proceedings herein. He pressed on that there was no basis for filing the instant Request for Review and that it is premature and ought not be entertained.
50. Counsel submitted that the procurement in the instant Request for Review was governed by the World Bank Procurement Regulations and that it is clear that the jurisdiction of the Board is ousted by Section 4(2)(f) of the Act. He referred the Board to the holdings in *PPARB Application No. 68 of 2023 Dama Services Limited v Director General*,

Kenya National Highways Authority and 2 others and Republic v Public Procurement Administrative Review Board & 2 Others Ex parte Kenya Power & Lighting Company [2019] eKLR.

51. Counsel indicated that the ouster by Section 4(2)(f) of the Act meant that the Applicant should have sought redress under the World Bank Procurement Regulations which provides a redress mechanism and it was only proper to pursue the mechanisms therein. He submitted that coming to the Board first goes against the doctrine of exhaustion and referred the Board to the holding in *Catherine Mwihaki Ngambi v International Leadership University [2022] eKLR* and *Robert Khamala Situma & 8 others v Acting Clerk of the Nairobi City County Assembly [2022]*.

52. Dr. Arwa submitted that even if the Board was to assume jurisdiction, it is not possible for it to grant the orders sought looking at the reliefs sought under prayers 1, 2, 3, 5 as it would require the Board to do what has already been done as the Applicant's complaint was on the initial letter of intention to award which had already been withdrawn. Further that prayer 4 seeks for the Board to take the place of the Evaluation Committee and the only prayer that was capable of being granted by the Board was prayer 6 on costs which ought to be awarded to the Respondents and Interested Party on dismissal of the Request for Review *in limine*.

Applicant's Rejoinder

53. In a rejoinder, Counsel for the Applicant, submitted that the Applicant became aware of the cancellation of the notification of intention to award on 26th October 2023 via email sent by the Respondents which was during the pendency of the instant Request for Review and no evidence had been submitted of service of the same to the Applicant on 13th October 2023. He further pointed out that the said cancellation was with regard to a notification dated 2nd October 2023 which was alien to the Applicant as it was only in receipt of a notification dated 3rd October 2023.
54. He further contested that the procurement process was borne out of a bilateral agreement as none had been adduced and parties to the same had not been identified. Further that the agreement provided by the respondents was not signed and had no probative value. Counsel further referred the Board to the provisions under Clause 2 of the World Bank Procurement Regulations on applicability of the same and Annexure III of the World Bank Regulations at paragraph 3.9 on dispute mechanism that is applicable in the instant Request for Review.
55. Counsel submitted that the instant Request for Review was lodged as guided on lodging a complaint and that no law was infringed. He further pointed out that the Interested Party was referring to internal procedures of the Respondents against the confidentiality provisions of the Act.

56. Mr. Meso further submitted that Section 82 of the Act is categorical that tender sum shall be absolute and final and in changing the Interested Parties bid price was contrary to this provision noting that the prices read out at the tender opening.

57. At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 16th October 2023 was due to expire on 6th November 2023 and that the Board would communicate its decision by close of day on 6th November 2023 to all parties to the Request for Review via email.

BOARD'S DECISION

58. The Board has considered each of the parties' cases, documents, pleadings, oral 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;

subject to the determination of Issue 1;

B. Whether the letters of withdrawal/cancellation of Notification of Intention to Award the subject tender dated 12th October 2023 are valid;

Subject to the determination of Issue 2;

C. 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.

D. Appropriate reliefs

59. Before addressing the issues framed for determination, the Board would like to dispense with one preliminary aspect arising from the proceedings before it.

60. The Applicant objected to the Interested Party's reference to internal mechanisms of the Respondent averred at paragraphs 10 to 12 of the Interested Party's Memorandum of Response. We note that the Interested Party referred to an appointment of an Independent Fiduciary Agent, its mandate in the subject procurement and the recommendations made by the said agent with regard to evaluation of bids submitted in response to the subject tender.

61. Section 64 (1) of the Act on form of communication provides that:

"(1) All communications and enquiries between parties on procurement and asset disposal proceedings shall be in writing."

62. Further, Section 67 of the Act provides for confidentiality of procurement documents and proceedings by the procuring entity subject to disclosures permitted in law and reads as follows:

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

- (a) Information relating to a procurement whose disclosure would impede law enforcement or whose disclosure would not be in the public interest;***
- (b) Information relating to a procurement whose disclosure would prejudice legitimate commercial interests, intellectual property rights or inhibit fair competition;***
- (c) Information relating to the evaluation, comparison or clarification of tenders, proposals or quotations; or***
- (d) The contents of tenders, proposals or quotations.***

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

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

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

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

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

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

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

(4) Notwithstanding the provisions of subsection (3), the disclosure to an applicant seeking a review under Part XV shall constitute only the summary referred to in section 68(2)(d)(iii).

(5) Any person who contravenes the provisions of this section commits an offence as stipulated in section 176(1)(f) and shall be debarred and prohibited to work

for a government entity or where the government holds shares, for a period of ten years.” [Emphasis by the Board]

63. From the foregoing, noting that all communication and enquires between parties in procurement proceedings must be in writing, it follows that a tenderer must request an accounting officer, in writing, to be furnished with a summary of the proceedings of the evaluation and comparison of the tenders, *inter alia*, being procurement records which can only be disclosed by a procuring entity if such a tenderer is an applicant seeking administrative review of procurement proceedings by the Board. This therefore means that a candidate or tenderer is not entitled to disclosure by the procuring entity of a summary of the proceedings of the evaluation and comparison of the tenders unless he or she has filed a request for review before the Board.

64. Having carefully studied the confidential documents submitted to the Board by the 1st Respondent pursuant to Section 67(3)(e) of the Act, we have not come across any written communication by the Interested Party addressed to the Respondents requesting for any summary of proceedings or any information pertaining to the procurement proceedings in the subject tender including appointment of the said Independent Fiduciary Agent and recommendations made by the said agent.

65. In the absence of proof of any request having been made by the Interested Party in writing to the Respondents to be availed with

information on the proceedings of evaluation of the subject tender, it is lost upon us on where the Interested Party obtained confidential information pertaining to appointment of the said Independent Fiduciary Agent and recommendations made by the said agent.

66. In the circumstances, the averments made by the Interested Party in its Memorandum of response referring to confidential information are hereby expunged from these proceedings.

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

67. 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.

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

69. 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."

70. 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."

71. 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...."

72. 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."

73. 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.”

74. 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.”

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

(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.”

76. The jurisdiction of the Board is provided for under Part XV – Administrative Review of Procurement and Disposal Proceedings and specifically 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.

(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]

168.

169.

170.

171.

172.

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.

77. 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;

78. In a Notice of Preliminary Objection dated 23rd October 2023 and filed on even date, the Respondents objected to the hearing and determination of the instant Request for Review on the grounds that (a) the Board lacks jurisdiction to hear and entertain the instant Request for Review, (b) the procurement in the subject tender is a national competitive procurement governed by the World Bank's Procurement Regulations for IPF borrowers – Procurement in investment projects financing dated July 2016 and revised in October 2017, August 2018 and November 2020 complete with its complaint resolution procedure spelt out in the Bid Data Sheet (BDS) and the instructions to bidders (ITB) which had been flouted by the Applicant, and (c) the instant Request for Review as lodged is premature, misconceived and ought to be struck out *in limine*.

79. On its part, the Interested Party objected to the hearing and determination of the instant Request for Review in its Notice of Preliminary Objection dated 24th October 2023 filed on even date on the grounds that (a) the Board lacks jurisdiction to grant the orders

sought in the Request for Review, (b) the Request for Review is premised on false information contained in the Applicant's tender and consequently ought to be dismissed and, (c) the Request for Review is premature, misconceived, lacks merit and ought to be dismissed *in limine*.

80. On the other hand, the Applicant in opposing the preliminary objection raised by the Respondents and the Interested Party deponed at paragraphs 11 and 12 of the Replying Affidavit sworn on 27th October 2023 by Vimal Lalji Rabadia that the Board is clothed with jurisdiction to hear and determine the issues raised in the instant Request for Review since the provisions of section 4(2)(f) of the Act read with Regulation 5(1) of Regulations 2020 do not oust the jurisdiction of the Board as they relate to procurement proceedings under bilateral or multilateral agreements between the Government of Kenya and any other foreign government or entity. The Applicant further deponed that (a) the procurement in the subject tender *albeit* governed by World Bank Regulations do not fall within the ambit of Section 4(2)(f) of the Act as the subject tender was advertised by the 2nd Respondent on the basis of a Grant No. 67590 by the World Bank and not a Loan Agreement Credit No. 6759-KE as purported and (b) under paragraph 3.9 (Roles & Responsibilities of the Bank) of Annex III of the World Bank Procurement Regulations for IPF Borrowers: Procurement Related Complaints, the World Bank ceded all authority for evaluation, debrief, review and resolution of complaints relating to the procurement process to the Respondents meaning that the said Regulations allows

for complaints related to the procurement proceedings in the subject tender in accordance with Kenyan laws.

81. The Board having considered the parties' submissions deems it necessary to interrogate on the ouster of provisions of Section 4(2)(f) of the Act cited by parties, its import and interpretation of the same in judicial authorities.

82. 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]***

83. 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]

84. 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 or multilateral agency. Additionally, where any such bilateral or multilateral agreement 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 read with Regulation 5(1) of Regulations 2020 to apply, one of the parties must be the Government of Kenya.

85. 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 addressed the import of provisions of Section 4(2)(f) of the Act.

86. 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 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.

87. 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.

88. 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 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 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]

89. 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.

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

91. Turning to the instant Request for Review, we note that the Respondents deponed at paragraph 3 of the Supporting Affidavit sworn by Victor Kanyaura that the subject tender relates to a project known as *Second Kenya informal settlement improvement project (KISIP 2)*

where the 2nd Respondent is identified as the Employer through financing by the World Bank (IDA)- International Development Association in a financing arrangement between it and the Republic of Kenya dubbed credit number 6759-KE. The Respondents further deponed at paragraphs 5 of the Supporting Affidavit that the tendering process was to be governed by the World Bank Regulations as specified in the World Bank's Procurement Regulations for IPF Borrowers- Procurement in Investment Financing dated July 2016 and revised in October 2017, August 2018 and November 2020.

92. The Board has carefully studied the (a) Tender Notice that was advertised in the Standard Newspaper and the Daily Nation Newspaper on 19th July 2023 as a Specific Procurement Notice for Request for Bids Works (Without Prequalification), (b) the Tender Document, and (c) an incomplete, undated, and unsigned Intergovernmental Participation Agreement between the National Government of the Republic of Kenya represented by Ministry of Transport, Infrastructure, Housing and Urban Development and Public Works State Department of Housing and Urban Development and the County Government of XXX and notes the following:

93. The Tender Notice that was advertised in the Standard Newspaper and the Daily Nation Newspaper on 19th July 2023 as a Specific Procurement Notice for Request for Bids Works (Without Prequalification), informed prospective bidders at paragraph 1, and 4 thereof as follows:

"1. The Government of the Republic of Kenya has received financing from the World Bank (IDA) towards the cost of the Second Kenya Informal Settlement Improvement Project (KISIP 2) and intends to apply part of the proceeds toward payments under the contract for Lot 1 (IDA funded component) works in selected settlements in Kisumu County. The contract will be jointly financed by the French Development Agency (AFD) under Lot 2 (AFD funded component) works. Bidding process will be governed by the World Bank's Procurement Regulations.

.....

7. Bidding will be conducted through national competitive procurement using Request for Bids (RFB) as specified in the World Bank "Procurement Regulations for IPF Borrowers – Procurement in Investment Projects Financing" dated July 2016, and revised in October 2017, August 2018 and November 2020", and is open to all eligible Bidders as defined in the Procurement Regulations."

94. In the provisions of the Request for Bids Works Tender Notice above, prospective tenderers were informed, *inter alia*, that (a) the Government of the Republic of Kenya had received financing from the World Bank (IDA) towards the cost of the Second Kenya Informal Settlement Improvement Project (KISIP 2) and intended to apply part

of the proceeds toward payments under the contract for the subject tender, and (b) the bidding process would be governed by the World Bank's Procurement Regulations and using through national competitive procurement.

95. We note that the above provisions in the Tender Notice were also provided for under Clause 1 and 4 at page ii and iv of the Tender Document.

96. That said, the Financing Agreement referenced by the Respondents but not supplied to the Board would have been of much assistance for the Board to understand the legal relationship between the Borrower (the Government of Kenya as depicted in the Tender Advert and the Tender Document) and the World Bank and the terms governing the said agreement with respect to the resultant procurement in the subject review. As held by Justice Nyamweya in the KPLC Case (Supra), section 4(2)(f) of the Act is an evidential ouster clause and one of the responsibilities of the Board in this regard is to satisfy itself of the existence (in fact) of a financing agreement and its provisions to ensure strict compliance with the ouster provisions. Indeed, in the KPLC Case (supra) it was on the basis of the actual bilateral agreement exhibited by the procuring entity that the court was able to satisfy itself of the applicability of section 4(2)(f) of the Act.

97. It bears emphasis that the Respondents only availed as an exhibit the incomplete, undated, and unsigned Intergovernmental Participation

Agreement between the National Government of the Republic of Kenya represented by Ministry of Transport, Infrastructure, Housing and Urban Development and Public Works State Department of Housing and Urban Development and the County Government of XXX. The 2nd Respondent hence was not identified as a party in the said Intergovernmental Participation Agreement. Needless to say, nothing much can turn on the said agreement as it makes no reference to the Respondents herein and neither has it been executed by the parties it refers to for it to be related to the subject tender herein. Further, no bilateral agreement between the Government of Kenya and a foreign government, agency, entity or multilateral agency has been exhibited or supplied to the Board.

98. In an attempt to explain why the duly filled, signed and dated Intergovernmental Participation Agreement and the Financing Agreement were not availed to the Board as part of confidential documents by the 1st Respondent pursuant to Section 67(3)(e) of the Act, counsel for the Respondents, Mr. Ouma, submitted that the same were not disclosed due to the confidential nature of the said agreements and to prevent disclosure of confidential documents. Counsel further justified the applicability of the tender documents on the references to world bank procurement regulations in the tender notice, advert and tender documents and that it was clear to all parties that the said procurement was done under a bilateral financing agreement.

99. As hereinabove outlined, the law relating to the ouster clause in section 4(2)(f) of the Act and procuring entities' responsibilities under Section 67(3)(e) of the Act are now fairly well settled by a long line of authorities. Section 4(2)(f) is an evidential ouster clause that must be strictly proved in order to assist the Board to reach an informed decision on whether or not it has jurisdiction to hear and determine the request for review before it. In this regard, we note that the instant Request for Review is distinguishable from **PPARB Application No. 68 of 2023 Dama Services Limited v Kenya National Highways Authority and others** (hereinafter referred to as "the Dama Services Case") referred to by the Interested Party in that in the Dama Services Case, the Board was afforded an opportunity to interrogate the duly signed Project Appraisal Document, the Financing Agreement, and the Procurement Plan which confirmed without a doubt that the procurement therein 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 hence the procurement in the Dama Services Case fell on all fours under the provisions of Section 4(2)(f) of the Act as read with Regulation 5(1) of Regulations 2020.

100. Similarly, under section 67(3)(e) of the Act, any disclosure made to the Board is excluded by the confidentiality restrictions that govern disclosure of procurement records. There was therefore no justification for the Respondents to withhold the duly executed Intergovernmental

Participation Agreement from the confidential documents submitted to the Board and expect the Board down its tools on the basis only of its bare assertions.

101. That said, it matters not that the world bank procurement regulations were referenced in the advert, tender documents and tender notice if the foundational document that they are anchored on has not been proved.

102. For these reasons, we are not convinced that the instant procurement in the subject tender falls under the ouster clause of Section 4(2)(f) of the Act read with Regulation 5(1) of Regulations 2020. In the circumstances, we find that the Board's jurisdiction is not ousted by the said provisions. The upshot of our finding on the first issue for determination therefore is that this Board has jurisdiction to hear and determine the instant Request for Review.

Whether the letters of withdrawal/cancellation of Notification of Intention to Award the subject tender dated 12th October 2023 are valid;

103. The Respondents contend that vide a letter dated 12th October 2023, they communicated with all bidders in the subject tender of withdrawal of the letters of notification of intention to award the subject tender via a letter erroneously dated 2nd October instead of 3rd October 2023. They submitted that this communication on withdrawal of the said

letters of notification of intention to award was made through the bidders' respective email addresses upon recommendation to re-evaluate the subject tender.

104. On the other hand, during the hearing, counsel for the Applicant pointed out that its complaint in the instant Request for Review was premised on the Respondent's letter of notification of intention to award dated 3rd October 2023 and not 2nd October 2023 as indicated by the Respondents in their letter of withdrawal of the letters of notification of intention to award the subject tender. Counsel contended that the Applicant had not received nor was it privy to a letter of notification of intention to award dated 2nd October 2023 as at the filing of the request for review and that in any event, the Applicant received the said communication on cancellation of the letters of notification of intention to award via email dated 26th October 2023 which was after filing of the instant Request for Review.

105. Having perused the confidential documents submitted to the Board by the 1st Respondent pursuant to Section 67(3)(e) of the Act, we note that vide a letter dated 12th October 2023, the Respondents cancelled/withdrew the notification of intention to award the subject tender and communicated the same to all tenderers in the subject tender. The said letter reads in part:

"

RE: WITHDRAWAL OF NOTIFICATION OF INTENTION TO AWARD FOR LOT 1: CONSTRUCTION OF ROADS &

**DRAINAGE WORKS/WATER SUPPLY AND SEWERAGE
WORKS/PUBLIC LIGHTING WORKS (BANDANI,
NYAWITA, MIGOSI, MANYATTA A & MANYATTA B
SETTLEMENTS) TENDER NO:
CGK/LHPPUD/KISIP2/NOT/2023-2024/001;RFB NO:
KE-KISUMU COUNTY -362227-CW-RFB**

The above refers,

We write in reference to our Notification of Intention to Award the tender for Lot 1 reference number CGK/LHPPUD/KISIP2/NOT/2023-2024/001 dated 2nd October 2023.

The World Bank who is the funding agency of the project has contracted an Independent Fiduciary Agency (IFA) purposely to review the project and ensure absolute fidelity/compliance to the Bidding Document.

Consequently, the Tender Evaluation process has been reviewed and the recommendation handed over to us, which recommendation have a net effect of halting the whole process to facilitate a few adjustments to ensure compliance.

Subsequently, all the Intention to award Letters stand Canceled.

Kindly note that Notification of Intention to Award letters do not constitute award nor do they signify contracts in terms of the Public Procurement Asset and Disposal Act 2015 Section 87(4).

Thank you for your cooperation.

.....”

106. According to the Applicant’s Exhibit marked 5(a) and (b) referenced in paragraphs 4 and 5 of the Applicant’s Replying Affidavit, we note that the above letter was communicated to the Applicant via email on Thursday, 26th October 2023 at 15:53 through the Respondents’ email address kisipkisumucounty@gmail.com . The said email reads:

”.....

Dear Bidder,

I hope this email finds you well.

Please find the attached letter of cancellation of the Notification of Award.

Regards,

KISIP-KISUMU”

107. The Respondents deponed at paragraph 21 of their Supporting Affidavit that the said withdrawal was communicated on 13th October 2023 though no evidence was annexed in support of the same. The reasonable conclusion in the premises is that the above communication on withdrawal/cancellation of the notification of intention to award was made during the pendency of the instant Request for Review having been filed on 16th October 2023. A perusal of the Board’s file in the instant Request for Review reveals that the Acting Board Secretary, Mr. James Kilaka, issued a Notification of Appeal to the Respondents dated 16th October 2023 which reads in part:

".....

You are hereby notified that on the 16th October 2023, a Request for Review was filed with the Public Procurement Administrative Review Board in respect of the above-mentioned tender.

Under Section 168 of the Public Procurement and Asset Disposal Act 2015, the procurement proceedings are hereby suspended and no contract shall be signed between the Procuring Entity and the tenderer awarded the contract unless the Appeal has been finalized.

A copy of the Request for review is forwarded herewith to the Procuring Entity and the PPARB Circular No. 02/2020 of 24th March 2020.

....."

108. It is trite law that procurement proceedings are suspended and come to a standstill pursuant to Section 168 of the Act upon the notification of a request for review, the said section states:

"168. Notification of review and suspension of proceedings

Upon receiving a request for a review under section 167, the Secretary to the Review Board shall notify the accounting officer of a procuring entity of the pending

review from the Review Board and the suspension of the procurement proceedings in such manner as may be prescribed.”

109. This Board is cognizant of the holding by the Honourable Justice Nyamweya in **Judicial Review Application 540 of 2017 Republic v Public Procurement Administrative Review Board; Kenya Power & Lighting Company Limited (Interested Party) Exparte Transcend Media Group Limited [2018] eKLR** where the court held as follows:

“...Section 168 of the Act provides that upon receiving a request for a review under section 167, the Secretary to the Review Board shall notify the accounting officer of a procuring entity of the pending review from the Review Board and the suspension of the procurement proceedings in such manner as may be prescribed. The effect of a stay is to suspend whatever action is being stayed, including applicable time limits, as a stay prevents any further steps being taken that are required to be taken, and is therefore time –specific and time-bound.

53. Proceedings that are stayed will resume at the point they were, once the stay comes to an end, and time will continue to run from that point”

110. It is our considered view accordingly that the Respondents' letter dated 12th October 2023 on cancellation of the notification of intention to award the subject tender having been communicated to the Applicant on 26th October 2023 was issued during a period when all procurement proceedings in the subject tender stood suspended pursuant to Section 168 of the Act. Any action taken by the Respondents in furtherance of the procurement proceedings before the Request for Review has been heard and the Board rendered its decision is null and void and we so find.

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.

111. We understand the crux of the Applicant's Request for Review to be that its tender was unfairly and unlawfully disqualified on the basis that the Qualification Forms submitted in its tender were not signed by the person nominated in its Power of Attorney. The Applicant contends that the bid pages particularized in the letter of notification of intention to award being FIN 3.1, 3.2, 3.3, 3.4/EXP 4.1, 4.2a, 4,2b, 4,2c bear the signature of its representative and were duly stamped and that the law defines a signature to include a mark.

112. On the other hand, we understand the Respondents case on this issue to be that the Applicant is still in the race following recommendations by an Independent Fiduciary Agent to progress the Applicant's tender amongst other tenderers, to the Detailed Evaluation Post Preliminaries. The Respondents contend that the Independent Fiduciary Agent was appointed to, *inter alia*, ensure compliance with the procurement regulations and procurement specifications of the projects and assess the evaluation and shortlisting of tenderers. As such, the technical responsiveness of the Applicant's tender is yet to be determined making the instant Request for Review premature.

113. On its part, the Interested Party associated itself with the submissions of the Respondents on this issue.

114. The Board is cognizant of Article 227 of the Constitution which requires the 2nd Respondent to have a procurement system that is fair, equitable, transparent, competitive, and cost effective and provides for a legislation that governs public procurement and asset disposal framework as follows:

"227. Procurement of public goods and services

(1) When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.

(2) An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for all or any of the following –

- a)**
- b)**
- c) and**
- d)"**

115. The Board observes that the legislation contemplated in Article 227(2) of the Constitution is the Act. Section 80 of the Act is instructive on how evaluation and comparison of tenders should be conducted by a procuring entity as follows:

"80. Evaluation of tender

- (1) The evaluation committee appointed by the accounting officer pursuant to Section 46 of the Act, shall evaluate and compare the responsive tenders other than tenders rejected.**

- (2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the**

provisions of this Act and statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered.

(3) The following requirements shall apply with respect to the procedures and criteria referred to in subsection (2)-

(a) the criteria shall, to the extent possible, be objective and quantifiable;

(b) each criterion shall be expressed so that it is applied, in accordance with the procedures, taking into consideration price, quality, time and service for the purpose of evaluation; and

(4)"

116. Section 80(2) of the Act as indicated above requires the Evaluation Committee to evaluate and compare tenders in a system that is fair using the procedures and criteria set out in the Tender Document. A system that is fair is one that considers equal treatment of all tenders against a criteria of evaluation known by all tenderers since such

criteria is well laid out for in a tender document issued to tenderers by a procuring entity. Section 80(3) of the Act requires for such evaluation criteria to be as objective and quantifiable to the extent possible and to be applied in accordance with the procedures provided in a tender document.

117. Section 79 of the Act provides that:

"(1) A tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents."

(2) A responsive tender shall not be affected by-

(a) minor deviations that do not materially depart from the requirements set out in the tender document; or

(b) errors or oversights that can be corrected without affecting the substance of the tender.

(3) A deviation described in subsection (2)(a) shall-

(a) be quantified to the extent possible; and

(b) be taken into account in the evaluation and comparison of tenders."

118. The import of the above provision is that responsiveness of a tender shall not be affected by any minor deviations that do not materially depart from the requirements set out in the Tender Document and that do not affect the substance of a tender. This provision details a minor

deviation as one that can be quantified to the extent possible and shall be taken into account in the evaluation and comparison of tenders.

119. In **Republic v Public Procurement Administrative Review Board & another; Premier Verification Quality Services (PVQS) Limited (Interested Party) Ex Parte Tuv Austria Turk [2020]**

eKLR the High Court stated:

"In public procurement regulation it is a general rule that procuring entities should consider only conforming, compliant or responsive tenders. Tenders should comply with all aspects of the invitation to tender and meet any other requirements laid down by the procuring entity in its tender documents. Bidders should, in other words, comply with tender conditions; a failure to do so would defeat the underlying purpose of supplying information to bidders for the preparation of tenders and amount to unfairness if some bidders were allowed to circumvent tender conditions. It is important for bidders to compete on an equal footing. Moreover, they have a legitimate expectation that the procuring entity will comply with its own tender conditions. Requiring bidders to submit responsive, conforming or compliant tenders also promotes objectivity and encourages wide competition in that all bidders are required to tender on the same work and to the same terms and conditions."

120. Turning to the instant Request for Review, the Tender Document provided under Clause 20 of Section I- Instructions to Bidders (ITB) at page 18 to 19 of the Tender Document as follows:

".....
20.3 The original and all copies of the Bod shall be typed or written in inedible ink and shall be signed by a person duly authorized to sign on behalf of the Bidder. This authorization shall consist of a written confirmation as specified in the BDS and shall be attached to the Bid. The name and position held by each person signing the authorization must be typed and printed below the signature. All pages of the Bod where entries or amendments have been made shall be signed or initialed by the person signing the Bid.
....."

121. From the above, a tenderer was required to sign both the original and copies of its tender and the signing was to be done by an authorized person and could take the form of either a signature or initials.

122. We note from the Evaluation report that the Applicant's tender was disqualified at the Preliminary Examination stage because its Qualification Forms (FIN 3.1, 3.2, 3.3, 3.4/EXP 4.1, 4.2a, 4.2b, 4.2c) were not signed with the person nominated in the Applicant's Power of Attorney.

123. We have carefully studied the Applicant's tender submitted as part of the confidential documents to the Board by the 1st Respondent pursuant to Section 67(3)(e) of the Act and note that the said Qualifications Forms FIN 3.1, 3.2, 3.3, 3.4/EXP 4.1, 4.2a, 4.2b, 4.2c were not only signed by Vimal Lalji Rabadia, who was authorized in the Applicant's Power of Attorney to sign the tender, but were also stamped and certified as true copies of the original by Seth Ojienda Advocate. The signature on the said pages is similar to the signature appearing on the rest of the pages of the Applicant's tender.

124. Notably, during the hearing of the instant Request for Review, the Respondents conceded that the Applicant's tender was still in the race and was responsive at the preliminary examination stage and would thus be proceeding to the Detailed Technical and Financial Evaluation.

125. In the circumstances, we find that the Evaluation Committee failed to evaluate the Applicant's tender submitted in response to the subject tender in accordance to 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.

Appropriate reliefs

126. We have established that the Board has jurisdiction to hear and determine the instant Request for Review.

127. We have found that the Respondents letter dated 12th October 2023 withdrawing the notification of intention to award supposedly dated 2nd October 2023 was communicated to the Applicant after the filing of the instant Request for Review and is thus null and void.

128. We have also found that the Evaluation Committee failed to evaluate the Applicant's tender submitted in response to the subject 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.

129. Consequently, the Board deems it fit to nullify the letters of notification of intention to award the subject tender to the successful tenderer and the unsuccessful tenderers, including the Applicant herein dated 3rd October 2023 to enable the Respondents to carry out an evaluation of tenders submitted in the subject tender in accordance with the Tender Document, Section 80(2) of the Act read with Article 227(1) of the Constitution.

130. During the proceedings in the instant Request for Review, the Applicant raised an issue concerning changes/corrections made to the Interested Party's bid price which were effected after the date of the subject tender opening and contends that this is contrary to the provisions of Section 82 of the Act.

131. On the other hand, the Respondents and Interested Party made similar arguments that the Tender Document under Clause 31.1 of Section I on Instructions to Bidders permits the employer in respect of a substantially responsive bid to correct arithmetic errors in specific instances and this does not in itself constitute a modification of a tender by dint of Section 6(1) of the Act, this being a World Bank Funded project based on an international treaty and agreement between the World Bank and Government of Kenya hence the provisions of the said agreement and treaty supersedes local laws on this aspect in the event of any conflict.

132. We are cognizant of provisions of Regulation 74(2) of Regulations 2020 which provides that:

"Subject to section 79(2)(b) of the Act, any errors in the submitted tender arising from a miscalculation of unit price, quantity, subtotal and total bid price shall be considered as a major deviation that affects the substance of the tender and shall lead to disqualification of the tender as non-responsive."

133. The import of Regulation 74(2) of Regulations 2020 is that it is subject to the provisions of Section 79(2)(b) of the Act which provides:

"(2) A responsive tender shall not be affected by –
(a)
(b) errors or oversight that can be corrected without affecting the substance of the tender."

134. Our interpretation of the above provisions is that minor deviations from tender requirements that do not affect the substance of a tender cannot be a cause for the disqualification of a tender. This Board in **PPARB Application No. 144 of 2020 County Builders Limited v Principal Secretary Ministry of Transport, Infrastructure, Housing, Urban Development and Public Works, State Department of Housing and Urban Development** at page 43 to 44 held that arithmetic errors in tenders are not an automatic license for disqualification of a tenderer:

"The Board has established certain errors or oversight can be corrected without affecting the substance of a tender. That notwithstanding, the tender remains the same and cannot be corrected even if errors or oversights (which are not necessarily arithmetic errors in a tender) may be identified or corrected pursuant to Section 79(2)(b) of the Act. This explains why a tenderer is bound by its tender sum hence ought to be prepared to implement a tender at its tender sum because award is made based on that tender sum. These provisions support the Board's view that the Procuring Entity did not have leeway to apply Regulation 74 of Regulations 2020 without considering provisions of section 79(2)(b) and 82 of the Act.

Accordingly, the Board finds that Regulation 74(2) of Regulations 2020 does not vest an automatic action for the Procuring Entity to find tenderers non-responsive as a result of arithmetic errors found in their bids during Financial Evaluation because the said provision is subject to section 79(2)(b) of the Act while taking into account how a tender sum ought to be treated under Section 82 of the Act.”

135. Section 82 of the Act bars correction, revision, adjustment or amendment of tender sum save where the method for procurement is direct, competitive negotiations and framework contracting with multiple awards. Section 82 of the Act provides:

"82. Correction, revision, adjustment or amendment of tender

(1) Subject to subsection (2) of this section, the tender sum as submitted and read out during the tender opening shall be absolute and final and shall not be the subject of correction, revision, adjustment or amendment in any way by any person entity.

(2) For avoidance of doubt, the provisions of subsection (1) shall not apply to sections 103, 131, and 141 of this Act.”

136. Having perused the Tender Document, we observe that Clause 14 of Section I- Instructions to Bidders (ITB) at page 14 to 15 of the Tender Document provides for the Bid Price and Discounts. Clause 14.3 reads:

"The price to be quoted in the Letter of Bid, in accordance with ITB 12.1, shall be the total price of the Bid, excluding any discounts offered."

137. Clause 12.1 of Section I- Instructions to Bidders (ITB) at page 14 to 15 of the Tender Document provides for the Letter of Bid and Schedules as follows:

"12.1 The Letter of Bid and Schedules, including the Bill of Quantities, shall be prepared using the relevant forms furnished in Section IV, Bidding Forms. The forms must be completed without any alteration to the text, and no substitutes shall be accepted except as provided under ITB 20.3. All blank spaces shall be filled in with information requested."

138. Clause 31.1 of Section I- Instructions to Bidders (ITB) at page 24 to 25 of the Tender Document referred to by the Respondent and Interested Party provides as follows:

"31.1 Provided that the Bid is substantially responsive, the Employer shall correct arithmetic errors on the following basis:

(a) if there is a discrepancy between the unit price and the total price that is obtained by multiplying the unit

price and quantity, the unit price shall prevail, and the total price shall be corrected unless in the opinion of the Employer there is an obvious misplacement of the decimal point in the unit price, in which case the total price shall govern and the unit price shall be corrected; (b) if there is an error in a total corresponding to the addition or subtraction of subtotals, the subtotals shall prevail, and the total shall be corrected; and (c) if there is a discrepancy between words and figures, the amount in words shall prevail, unless the amount expressed in words is related to an arithmetic error, in which case the amount in figures shall prevail subject to (a) and (b) above.”

139. Our understanding of the above provisions of the Tender Document is that the price to be quoted in the Letter of Bid shall be the total price of the Bid. This total price was subject to correction if (a) there was a discrepancy between the unit price and the total price that is obtained by multiplying the unit price and quantity hence the unit price would prevail and the total price would be corrected, (b) if there was an error in a total corresponding to the addition or subtraction of subtotals, and (c) if there exists a discrepancy between words and figures, the amount in words would prevail.

140. The Interested Party's tender sum of Kshs. 1,107,743,903.73 was the amount read out and captured in the Minutes of the Tender Opening dated and signed by the members of the Tender Opening Committee on 29th August 2023. During the Detailed Examination of Bids stage, the Interested Party's Bid Price was corrected to Kshs. 1,122,491,347.00 as a result of what was identified as computation errors of Kshs. 14,747,443.27.00. It is however not clear how the Evaluation Committee came about these computational errors since it did not expound in the Evaluation Report on how the arithmetic errors came about as provided for in Clause 31.1 of Section I- Instructions to Bidders (ITB) at page 24 to 25 of the Tender Document.

141. The upshot of our finding is that the instant Request for Review dated 16th October 2023 and filed on even date succeeds with respect to the following specific orders:

FINAL ORDERS

142. 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 16th October 2023 and filed on even date:

A. The Respondents' Notice of Preliminary Objection dated 23rd October 2023 and the Interested Party's Notice of Preliminary Objection dated 24th October 2023 be and are hereby dismissed.

B. The Letter of Notification of Intention to Award Lot 1: Construction of Roads & Drainage Works/Water Supply and Sewerage Works/ Public Lighting Works (Bandani, Nyawita, Migosi, Manyatta A & Manyatta B Settlements) Tender No. CGK/LHPPUD/KISIP2/NOT/2023-2024/001; RFB No. KE-KISUMU COUNTY – 362227-CW-RFB to the Interested Party dated 3rd October be and is hereby nullified and set aside.

C. The Letter of Notification of Intention to Award Lot 1: Construction of Roads & Drainage Works/Water Supply and Sewerage Works/ Public Lighting Works (Bandani, Nyawita, Migosi, Manyatta A & Manyatta B Settlements) Tender No. CGK/LHPPUD/KISIP2/NOT/2023-2024/001; RFB No. KE-KISUMU COUNTY – 362227-CW-RFB addressed to the unsuccessful tenderers including the Applicant dated 3rd October be and are hereby nullified and set aside.

D. The 1st Respondent is hereby ordered to direct the Evaluation Committee to admit the Applicant's tender to Detailed Examination of Bids stage and conduct a re-evaluation of all tenders responsive at the Detailed Examination of Bids stage with respect to Award Lot 1: Construction of Roads & Drainage Works/Water Supply and Sewerage Works/ Public Lighting Works (Bandani, Nyawita, Migosi, Manyatta A & Manyatta B Settlements) Tender No.

CGK/LHPPUD/KISIP2/NOT/2023-2024/001; RFB No. KE-KISUMU COUNTY – 362227-CW-RFB in accordance with the provisions of the Tender Document and the applicable laws.

- E. Further to order D above, the Respondents are hereby directed to proceed with the procurement process to its logical conclusion including the making of an award to the successful tenderer with respect to Lot 1: Construction of Roads & Drainage Works/Water Supply and Sewerage Works/ Public Lighting Works (Bandani, Nyawita, Migosi, Manyatta A & Manyatta B Settlements) Tender No. CGK/LHPPUD/KISIP2/NOT/2023-2024/001; RFB No. KE-KISUMU COUNTY – 362227-CW-RFB taking into consideration the Board’s findings in this Request for Review.**
- F. Given that the procurement process for the subject tender is not complete, each party shall bear its own costs in the Request for Review.**

Dated at NAIROBI this 6th Day of November 2023.

.....
PANEL CHAIRPERSON
PPARB

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SECRETARY
PPARB