

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 81/2023 OF 19TH OCTOBER 2023

BETWEEN

BLUESWIFT CONTRACTORS &

GENERAL SUPPLIERS LIMITED APPLICANT

AND

COUNTY GOVERNMENT OF NAKURU 1ST RESPONDENT

CHIEF OFFICER, LANDS, PHYSICAL PLANNING,

HOUSING & URBAN DEVELOPMENT 2ND RESPONDENT

OCTAGON BUILDERS AND

GENERAL SUPPLIERS LIMITED 1ST INTERESTED PARTY

PRINCIPAL SECRETARY, STATE DEPARTMENT OF

HOUSING AND URBAN DEVELOPMENT 2ND INTERESTED PARTY

Review against the decision of the Chief Officer, Lands, Physical Planning, Housing & Urban Development, County Government of Nakuru in relation to Tender No. KE-Nakuru County-371238-CW-RFB for Construction of Karagita Settlement Water Supply Pipeline for the Nakuru County Settlements' Infrastructure Improvement Works.



BOARD MEMBERS PRESENT

1. Mr. George Murugu, FCI Arb - Chairperson
2. QS. Hussein Were - Member
3. Dr. Susan Mambo - Member

IN ATTENDANCE

1. Ms. Sarah Ayoo - Holding brief for Board Secretary
2. Evelyn Weru - Secretariat

PRESENT BY INVITATION

APPLICANT - BLUESWIFT CONTRACTORS & GENERAL CONTRACTORS LIMITED

Mr. Justus Omollo - Advocate, Sigano & Omollo LLP Advocates

RESPONDENTS - COUNTY GOVERNMENT OF NAKURU & CHIEF OFFICER, LANDS, PHYSICAL PLANNING, HOUSING & URBAN DEVELOPMENT

1. Mr. Ngwele - Advocate, JN & P Law Advocates LLP
2. Mr. Vincent Odhiambo - Advocate, JN & P Law Advocates LLP



1ST INTERESTED PARTY

OCTAGON BUILDERS AND

GENERAL SUPPLIERS LIMITED

Ms. Desma Nungo

- Advocate, NOW Advocates LLP

2ND INTERESTED PARTY -

**PRINCIPAL SECRETARY, STATE
DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT**

N/A

BACKGROUND OF THE DECISION

The Tendering Process

1. *Vide* a Request for Bids Small Works County Government of Nakuru, the Procuring Entity and the 1st Respondent herein, invited sealed bids from eligible bidders in response to RFB No. KE-Nakuru County-371238-CW-RFB for Construction of Karagita Settlement Water Supply Pipeline for the Nakuru County Settlements' Infrastructure Improvement Works (hereinafter referred to as the "subject tender").
2. Tendering was conducted through national competitive procurement and the invitation was by way of an advertisement in the *Daily Nation* Newspaper on 31st July 2023 and on the 2nd Respondent's website www.nakuru.go.ke and the Public Procurement Information Portal (PPIP) <https://tenders.go.ke> where the blank tender document was available for download.



Submission of Tenders and Tender Opening

3. A total of fourteen (14) tenders were submitted by the date of tender opening, held on 29th August 2023 and were recorded as follows:

Bidder No.	Bidder's Name
1.	Open Yard Developers
2.	Point Mark Contractors
3.	Daima Contractors Limited
4.	Blue Swift Contractors & General Supplies Limited
5.	Highpoint Agencies Ltd
6.	Magic General Contractors and General Building Contractors
7.	Goldbon Limited
8.	Megapro Engineering Limited
9.	Pacifiv Sterling Contractors Limited
10.	Octagon Builders and General Supplies
11.	Cremona Investments Limited
12.	Machine Center Limited
13.	Nakuru Express Supplies and Services
14.	Meri Construction Company Limited

Evaluation of Tenders

4. A Tender Evaluation Committee appointed by the 2nd Respondent undertook evaluation of the fourteen (14) tenders in the following stages:
- i Preliminary Examination of Bids;
 - ii Detailed Examination of Bids;
 - iii Comparison of the Proposed Bids;



iv Post Qualification.

Preliminary Examination of Bids

5. The Evaluation Committee carried out a Preliminary Evaluation and examined tenders for responsiveness. At the end of evaluation at this stage, nine (9) tenders including the Applicant's tender determined non-responsive while five (5) tenders including the 1st Interested Party's tender 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 as follows:

S/no	Bidder No	As Read Out (KES)	Computation Error (KES)	Corrected Amount
1.	3	109,342,631.70	-199,056.04	109,143,575.60
2.	10	107,228,702.89	446,660	107,675,302.89
3.	9	123,974,690.81	-2.33	123,974,698.48
4.	12	122,450,480.23	-2000,000.00	120,855,611.66
5.	13	138,186,831.90	-207,350.26	137,979,481.64

Comparison of Bids

7. Bids were then ranked from the lowest to the highest evaluated bid price as follows:

Bidder No.	Bidder	Total Comparison Price (KES)	RANKING
10	M/S Octagon Builders and General Suppliers Ltd of P.O Box 10749-00100 Nairobi	107,228,702.89	1
3	M/s M/S Daima Contractors Ltd of P.O Box 16605-00100 Nairobi	109,442,631.70	2
12	M/S Machine Center Ltd of P.O Box 67575-00200 Nairobi,	122,450,480.23	3
9	M/S Pacific Sterling Contractors Ltd of P.O Box 16677-20100 Nairobi	123,974,690.81	4
13	M/S Nakuru Express Supplies & Services Ltd of P.O Box 15647-20100 Nakuru	138,186,831.90	5

Post Qualification

8. Post qualification evaluation was carried out to confirm the qualification information of the bidder with the lowest evaluated bid price, which required it to meet the following minimum qualification criteria: Adequacy of Technical Proposal, Historical Contract Non-Performance, Financial Situation, General and Specific Experience, Personnel, and Equipment.
9. At the end of evaluation at this stage, the Interested Party was considered qualified to undertake the proposed works of the tender.




Evaluation Committee's Recommendation

10. The Evaluation Committee recommended award of the tender to Octagon Builders and General Suppliers Ltd at a price of Kenya Shillings One Hundred and Seven Million, Two Hundred and Twenty-Eight Thousand Seven Hundred and Two only (Kshs. 107,228,702.00/=) VAT inclusive, this being its arithmetically corrected bid price, including the Provisional Sums of Kshs. 6,604,347.83

Professional Opinion

11. In a Professional Opinion dated 28th September 2023, Ms. AnnMarie Kuria, Director, Supply Chain Management reviewed the procurement process and concurred with the recommendations of the Evaluation Committee with respect to award of the tender.
12. Mr. Kamau Kuria, Chief Officer Lands, Physical Planning, Housing & Urban Development approved the Professional Opinion on 29th September 2023.

Notification to Tenderers

13. Tenderers were notified of the outcome of evaluation of the tender *vide* debrief letters dated 9th October 2023.

REQUEST FOR REVIEW NO. 81 OF 2023



14. On 19th October 2023, Messrs Blueswift Contractors & General Suppliers Limited (hereinafter, "the Applicant") filed a Request for Review dated 18th October 2023 together with a Supporting Affidavit sworn on even date by Zakariya Shariff Abdullahi, its Director, through the firm of Sigano & Omollo LLP Advocates seeking the following orders from the Board:

a) The intended award of the subject tender number KE – NAKURU COUNTY 371238-CW-RFB for PROPOSED CONSTRUCTION OF KARAGITA SETTLEMENT WATER SUPPLY PIPELINE FOR THE NAKURU COUNTY SETTLEMENTS' INFRASTRUCTURE IMPROVEMENT WORKS to OCTAGON BUILDERS AND GENERAL SUPPLIES LIMITED as communicated through the notification dated 9th October 2023 or any other notification to that effect be and is hereby annulled and set aside.

b) The Respondents' decision to disqualify the Applicant's bid as contained in the notification dated 9th October 2023 and addressed to the Applicant in respect to the tender number KE – NAKURU COUNTY 371238-CW-RFB for PROPOSED CONSTRUCTION OF KARAGITA SETTLEMENT WATER SUPPLY PIPELINE FOR THE NAKURU COUNTY SETTLEMENTS' INFRASTRUCTURE IMPROVEMENT WORKS be annulled and set aside.

c) The Respondents be and are hereby directed to re-admit the Applicant's bid in the subject tender for evaluation in accordance with the evaluation and qualification criteria set out in the tender document.

d) The Accounting officer of the procuring entity be and is hereby directed to award the subject tender number KE – NAKURU COUNTY 371238-CW-RFB for PROPOSED CONSTRUCTION OF KARAGITA SETTLEMENT WATER SUPPLY PIPELINE FOR THE NAKURU COUNTY SETTLEMENTS' INFRASTRUCTURE IMPROVEMENT WORKS in accordance with the award criteria in the tender document.

e) Any other relief that the Board may deem fit and just to grant pursuant to section 11(1) of the Fair Administrative Action Act.

f) Costs of the Review.

15. In a Notification of Appeal and a letter dated 19th 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.

16. On 26th October 2023, Mr. James Kilaka, sent a letter to the 1st and 2nd Respondents dated 26th October 2023 notifying them that the five (5) days within which they were required to submit a response in the matter lapsed on or about 24th October 2023 and urged them to comply with the Notification of Appeal served upon them on 19th October 2023 in view of the provisions of Regulation 205 of the Public Procurement and Asset Disposal Regulations 2020 (hereinafter referred to as "Regulations 2020").
17. On 30th October 2023, the Acting Board Secretary of the Board sent a reminder via email of his letter dated 26th October 2023 to the 1st and 2nd Respondents.
18. On 1st November 2023, the Respondents filed, via email, a letter dated 31st October 2023 seeking indulgent to file their documents and they also sought to be furnished with annexures to the Applicant's Supporting Affidavit sworn by Zakariya Shariff Abdullahi.
19. *Vide* a Hearing Notice dated 31st October 2023 and 2nd October 2023 sent via email of 2nd November 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 6th November 2023 at 11.30 a.m. through the link availed in the said Hearing Notice.

20. On 2nd November 2023, the Respondents filed through JN & P Law Advocates LLP a Notice of Appointment dated 1st November 2023, a Respondents' Notice of Preliminary Objection dated 1st November 2023, the Procuring Entity's Memorandum of Response dated 1st November 2023, letters dated 1st November 2023 together with confidential documents concerning the subject tender pursuant to section 67(3)(e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act").

21. *Vide* letters dated 2nd November 2023, the Acting Board Secretary notified all tenderers in the subject tender inviting them to submit to the Board any information and arguments concerning the subject tender within three (3) days.

22. The 1st Interested Party filed through NOW Advocates LLP a Notice of Appointment of Advocates, a Notice of Preliminary Objection, together with a Replying Affidavit sworn by Samuel Muiruri Mugo, its Director, all filed and dated 3rd November 2023.

23. The Interested Party filed, through its advocates, Written Submissions and a List and Bundle of Authorities, dated and filed on 6th November 2023.



24. At the hearing the Board directed that the hearing of the preliminary objections by the Respondents and the 1st Interested Party would be heard as part of the substantive Request for Review. This was in accordance with Regulation 209(4) of Regulations 2020 which also allows the Board to deliver one decision having considered the preliminary objections as part of the substantive Request for Review.

25. Accordingly, the Board allocated time for parties to make their respective submissions and the Request for Review proceeded for virtual hearing as scheduled.

PARTIES' SUBMISSIONS

Respondents' submissions on their preliminary objection

26. In his submissions, counsel for the Respondents, Mr. Ngwele, stated that according to Section 4(2)(f) of the Act, the Board's jurisdiction was ousted since the tender forming subject of the Request for Review was fully funded by proceeds of a loan facility extended by the World Bank to the Government of Kenya under a bilateral agreement.

27. Counsel submitted that Section 4(2)(f) of the Act ousts the jurisdiction of the Board and the applicability of the Act to procurement proceedings undertaken by the Government of Kenya and a foreign entity or government under a bilateral or multilateral agreement.

28. He pointed out that the Respondents provided two (2) contracts in the confidential bundle of documents one being a Financing Agreement between the Republic of Kenya and IDA executed by CS Treasury Ukur Yatani on 17th August 2020 and his counterpart from the World Bank with respect to financing of the project. Mr. Ngwele submitted that bilateral agreements are between two agencies hence this agreement fits the bill as it was executed by the CS Treasury on behalf of the Government of Kenya on one part and IDA on the other. He further submitted that the terms of the agreement provided that funds were to cater to the project described therein.

29. Counsel pointed out that the second document provided was the Implementing Document which cascades implementation of the project and had been executed by the Governor of Nakuru County and the CS Ministry of Transport, Infrastructure, Housing and Urban Development and Public Works and it is clear that the funding was to finance the particular project in the Bid Document hence the procurement is pursuant to the Financing Agreement.

30. Counsel referred the Board to Clause 5 at page 5 of the Implementing Document and submitted that the said provision obligated the 1st Respondent to conduct procurement for the goods, works and services to be financed from the proceeds of the Financing in accordance with the World Bank Procurement Regulations July 2016, revised November 2017 and August 2018.

31. Counsel referred the Board to the Bid Document at page iii and submitted that it was clear on the source of funds for the project and that Clause 3 at page iv of the Bid Document provided that bidding would be conducted in accordance with the World Bank Regulations hence the Board lacked jurisdiction.
32. Mr. Ngwele averred that Section 6 of the Act provided that where there is a conflict between the Act and a treaty, the provisions of the treaty shall prevail. He further averred that ITB 50.1 of Section II-Bid Data Sheet (BDS) provided for the procedures for making a procurement related complaint and the Applicant was well aware of the same.
33. In support of his arguments, Counsel relied on the holdings in *JR No. E162/2021*, *JR No. E01/2021*, and *JR No. 181/2018* and urged the Board to down its tools as it lacked jurisdiction to entertain the Request for Review.

1st Interested Party's submissions on its preliminary objection

34. In her submissions, counsel for the 1st Interested Party, Ms. Nungo, associated herself with the submissions made by the Respondents.
35. Ms. Nungo submitted that the Board is a creature of the Constitution and the Act and has several powers as provided under Section 172 and 173 of the Act. In support of her argument, she referred the Board to

the holding of the Supreme Court in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR.

36. On the provisions of Section 4(2)(f) of the Act, Ms. Nungo pointed out that Clause 1 at page iii of the Bid Document notified bidders on the Government of Kenya receiving financing; Clause 2.1 of Section I- Instructions to Bidders (ITB) at page 8 of the Bid Document read with ITB 2.1 of Section II-Bid Data Sheet (BDS) at page 33 of the Bid Document informed bidders that the Government of Kenya had through a loan or financing agreement received a loan or financing; Clause 3 at page iv of the Bid Document informed bidders that bidding would be conducted using Request for Bids (RFB) as specified in the World Bank's Procurement Regulations; and Clause 50.1 of the Instructions to Bidders (ITB) at page 32 of the Bid Document read with ITB 50.1 of the Bid Data Sheet (BDS) at page 37 of the Bid Document informed bidders that the procedures for making a procurement-related complaint with respect to the subject tender was detailed in Annexure III of the World Bank's Procurement Regulations and a link provided.

37. Ms. Nungo submitted that there existed an agreement between the Government of Kenya and the World Bank hence the tender was not subject to the jurisdiction of the Board. In support of her argument, she referred the Board to the holding by Justice Nyamweya in *Judicial Review Application No. 181 of 2018 Republic v Public Procurement Administrative Review Board & 2 others Ex parte Kenya Power & Lighting Company* [2019] eKLR whose import was that Justice Nyaweya

gave the meaning of the word 'under' in Section 4(2)(f) of the Act and held that the Board has a duty to make finding if the financing agreement was a bilateral agreement.

38. Counsel also invited the Board to consider the provisions of Article 189(1) of the Constitution and the finding by Justice Odunga in *Misc. Civil Application 93 of 2015 Republic v Attorney General & another Ex parte Stephen Wanyee Roki* which clarified that the Government includes both national and county government.

39. Ms. Nungo further submitted that Section 6(1) of the Act ousts the application of the Act in cases where there is a conflict between the provisions of the Act and any obligations of the Republic of Kenya arising from a treaty, agreement or other convention ratified by Kenya and to which Kenya is a party. She pointed out that Annex III at page 61 to 65 of the World Bank's Procurement Regulations details the procedure for administration and handling of procurement-related complaints which procedure is totally different from the procedure provided under Section 167 of the Act read with Regulation 203 of Regulations 2020 and as such, it is clear that the provision of the World Bank's Procurement Regulations for administration and handling of procurement related complaints vary and are in conflict with those provided under the Act and Regulations 2020 hence in the circumstances, the provisions of the World Bank Regulations prevail.



40. In conclusion, counsel referred the Board to the holding in *Republic v Public Procurement Administrative Review Board; Consortium of Tsk Electronica Y Electricdad S A and Ansaldoenergia & another (Interested Parties) Ex Parte Kenya Electricity Generating Company Plc (Kengen) [2021] eKLR* and urged the Board to find that the Interested Party's preliminary objection is merited and that the Request for Review ought to be struck out.

Applicant's reply to the preliminary objections and submissions to the Request for Review

41. Counsel for the Applicant, Mr. Omollo, submitted that there was a misconception on the objections raised by the Respondents and Interested Party on provisions of Section 4(2)(f) and Section 6 of the Act. Referring to Section 174 of the Act he argued that the right to review is in addition to any other legal remedy a person may have hence even if the Applicant had recourse under the World Bank Regulations, it could still approach the Board in context of provisions of Section 174 of the Act.

42. Mr. Omollo pressed on by submitting that Regulation 209 of Regulations 2020 provides that a preliminary objection must be filed within 3 days of notification hence in view of the fact that the Request for Review was filed on 19th October and a notification of appeal served on even date by the Board, the preliminary objections were filed out of time and the Board ought to disregard them. Counsel argued that if the



Applicant had filed the Request for Review out of the 14 days' statutory period, the Request for Review would have been deemed to be time barred hence the preliminary objections ought not to be entertained.

43. Mr. Omollo while referring to the provisions of Section 4(2)(f) of the Act submitted that there was no indication of the contents of the Financing Agreement between the Government of Kenya and the World Bank in respect of the financing of the project in the subject tender. He argued that in view of Regulation 5(1) of Regulations 2020 read with Section 4(2)(f) of the Act, there has been instances where the Act applies as provided for in an agreement relating to the specific procedure applicable to an aggrieved party.

44. He further submitted that the Bid Document talks of source of funds that the government has received and intends to apply a portion of the funds meaning that there is a chance that there is a part of financing to come from public funds and hence in instances where public funds are to be applied, the provisions of the Act cannot be ousted.

45. Counsel submitted that provided that there has been no express exclusion of the Act, the Act is applicable so far as procurement proceedings of the subject tender are concerned.

46. He further pointed out that there was a misconception on application of Section 6(1) of the Act in that it was questionable on whether the agreement in the subject tender falls under the boundaries



circumscribed by Section 6(1) of the Act. He pointed out that Section 6(1) of the Act requires to be read with provisions of Article 2(6) of the Constitution which talks of a treaty or convention that forms part of the laws and not a procurement agreement since it is not meant to form part of Kenyan laws.

47. Counsel referred the Board to the Treaty Making and Ratification Act and argued that the Financing Agreement was not one that fell within the ambit of the Treaty Making and Ratification Act hence Section 6(1) of the Act is not applicable in the circumstances to oust the jurisdiction of the Board.

48. Mr. Omollo submitted that the agreement signed by the cabinet secretary being a bilateral agreement is not a bilateral treaty for purposes of Section 6(1) of the Act as the Respondents would have to prove that it underwent the stages of Treaty Making and Ratification Act which includes parliamentary approval.

49. On the substantive request for review, counsel submitted that the Applicant was notified that its bid was unsuccessful because it failed to submit a duly signed and sealed Power of Attorney which was a vague reason for disqualification. He further submitted that ITB 20.3 referred to the Bid Data Sheet on the power of attorney to be submitted and argued that the Bid Document did not give a format of power of



attorney to be presented leaving it open for bidders to choose whichever format the power of attorney would take.

50. Mr. Omollo referred the Board to provisions of Section 37(2)(b) of the Companies Act and submitted that the power of attorney submitted by the Applicant duly recognizes that the person signing the same is a director and the said signature was duly attested hence there was no reason for the Applicant to be disqualified on the basis of a reason not provided for in the Tender Document.

51. He further submitted that the Respondents acted erroneously and breached the provisions of the Act and urged the Board to allow the Request for Review as prayed.

Respondents' rejoinder on their Preliminary Objection and submissions on the Request for Review

52. In a rejoinder on the Respondent's Preliminary Objection, Mr. Ngwele reiterated his earlier submissions on Section 4(2)(f) of the Act read with Section 6(1) of the Act and authorities provided. He pointed out that the Board does not have discretion to take different interpretation from the basis laid out by the High Court.

53. With respect to the Applicant's interpretation of Section 6(1) of the Act on allegations of agreement not being a treaty and not going through parliament, he invited the Board to look at the wording of Section 6(1) of the Act being 'arising from a treaty, agreement, or other convention' and argued that the drafters of this law were aware of these three instruments which are by themselves different from each other and can rise up between the Government of Kenya and another foreign agency and that the Treaty Making and Ratification Act only requires ratification of a treaty and convention and not agreements. Counsel further submitted that in the procurement proceedings in the instant Request for Review, there exists a bilateral agreement between the Government of Kenya and the World Bank.

54. On the substantive issues raised, counsel submitted that the Applicant's bid was unsuccessful since it did not conform to ITB 20.3 of the Bid Data Sheet which was clear that a bidder ought to have provided a duly signed Power of Attorney indicating the name and position held by the person authorized to sign the bid on behalf of the bidder.

55. He concurred with the Applicant that the format for the Power of Attorney was not prescribed but it was clear on the requirement of who ought to sign the bid. He pointed out the Applicant's Power of Attorney was only executed by the donor and not the donor and did not indicate the position of the person authorized to sign hence the Applicant failed on this mandatory requirement.



56. Counsel averred that the Interested Party met the evaluation criteria and was successful since its bid conformed to the mandatory requirements of the Bid Document and was found to have the lowest evaluated price.

57. On notification of award, counsel stated that the Respondents complied with the law with respect to notification of the successful tenderer, the amount awarded and reasons as to why they were successful.

58. On issue of filing the preliminary objection out of time, counsel submitted that the Respondents received the instant Request for Review late and were inadvertently not served with the annexures in the Applicant's Supporting Affidavit which they requested for from the secretariat while requesting for more time to file their documents and for the hearing to be postponed to a later date. He further submitted that the request for more time was allowed and the Respondents proceeded to filing their respective documents.

59. Upon enquiry by the Board on what was stated as the source of funds within the bilateral agreement, counsel submitted that the agreement referred to a credit and was fully funded with no contribution by the national or county government. He further stated that Section 4(2)(f) of the Act does not distinguish between a loan and a grant and that

the documents referred to financing from the World Bank and that the test was existence of an agreement.

60. When asked to clarify by the Board about the format on signing the power of attorney, counsel stated that the Bid Document provided that the name and position by each person signing must be typed and printed below the signature hence where these were to be placed was very clear. He indicated that this authorization was required to be for the subject tender and a bidder was not supposed to present an old power of attorney which did not conform to the provisions of the Tender Document.

61. Upon enquiry by the Board on whether the Respondent's preliminary objection was filed within 3 days of notification and if the alluded communication with the secretariat was in regard to filing documents or filing the preliminary objection, counsel submitted that the regulations provides for filing 3 days after notification and in view of the fact that the Respondents received an incomplete notification, they filed the preliminary objection two days after receipt of the notification and that the period was enlarged upon their request and was hence served within time.

62. When asked to clarify whether the Financing Agreement was express on applicable rules when seeking redress, Mr. Ngwele submitted that the Financing Agreement made reference to the World Bank Procurement Regulations at pages 22 and 28 and this was supposed to



be read together with the Bid Document where ITB 50.1 of the BDS made provision for the procedure for making a procurement related complaint. He further submitted that where a procedure has been provided for dispute mechanism, the same ought to first be exhausted.

1st Interested Party's rejoinder on its Preliminary Objection and submissions on the Request for Review

63. In a rejoinder on the Interested Party's Preliminary Objection, Ms. Nungo submitted that the Interested Party was served with the instant Request for Review on 2nd November 2023 and filed its preliminary objection on the 3rd November 2023 which was within a day of service and was therefore not out of time.

64. She submitted that the timelines notwithstanding, the question of jurisdiction is key and can be moved during the hearing or on the Board's own motion.

65. Counsel further submitted that Section 174 of the Act cannot grant the Board jurisdiction that is expressly excluded by Section 4(2)(f) of the Act.

66. With regard to the Applicant's interpretation of Rule 5(1) of Regulations 2020, counsel invited the Board to look at the Financing Agreement and read it together with Clause 3 of the Bid Document

indicating that the procurement was subject to the World Bank Regulations.

67. Counsel associated herself with the submissions of Mr. Ngwele on the arguments made on provisions of Section 6(1) of the Act read with Article 2(6) of the Constitution.

68. On the substantive issues raised in the instant Request for Review, Ms. Nungo referred to paragraphs 25 to 28 of the Interested Party's Replying Affidavit and paragraphs 19 to 25 of its written submissions and pointed out that they observed aspects of non-compliance by the Applicant.

69. She submitted that the Bid Document required the Power of Attorney to be signed, indicating name and position held by person authorized to sign the bid and that the document was clear that the name and position held must be typed or printed below the signature. She referred to the documentation furnished as what was submitted as the power of attorney and pointed out that the same does not comply with the requirement and that it was signed twenty years before the subject tender in question as it is indicated that it was made on 24th August 2003 by the Applicant meaning there was no power of attorney for purposes of the procurement proceedings.

70. With regard to the interpretation of Section 79 of the Act, counsel referred the Board to the case of *Republic v Public Procurement*



Administrative Review Board & another; Premier Verification Quality Services (PVQS) Limited (Interested Party) Ex parte Tuv Austria Turk [2020] eKLR and invited the Board to make a finding that the disqualification of the Applicant was within the requirements set out in the Tender Document.

71. She also invited the Board to note that the notification to the Interested Party was dated 9th October 2023 which was the same date that the Applicant was also notified and that there was no breach of Sections 87 of the Act. Counsel pointed out that the Applicant's argument that its bid was the lowest is not correct since it did not proceed for evaluation having been disqualified at the preliminary stage.

72. She urged the Board to dismiss the Request for Review with costs.

Applicant's Rejoinder

73. In a rejoinder, Counsel for the Applicant, submitted that the reason now being given by the Respondents for disqualification of the Applicant's bid was that the name the person of signing was not indicated hence not satisfying the provisions of Clause 20.3 of the Tender Documents.

74. He submitted that the name of the person signing the Power of Attorney and his description was provided and if it were to be deemed that the name was not appearing below the signature, this was

immaterial and a minor deviation as it does not change the substance of the Applicant's tender pursuant to Section 79(2) of the Act.

75. He further submitted that there is no legal requirement for both a donor and done to sign the power of attorney and that the date of 2003 was not stated in the reasons for disqualification as the intention was for the year 2023.

76. He urged the Board to also consider the meaning of the word treaty under Section 6(1) of the Act and reference to Article 2(6) of the Constitution and prayed for the Board to allow the Request for Review as prayed.

77. Upon enquiry by the Board on whether when a director signs as per the Company Act it then fulfils the requirements of issuing the Power of Attorney, Counsel submitted that a company's activities are done through its directors and that for purposes of determining whether execution was duly done, the Applicant placed recourse on the provisions of Section 37(2)(b) of the Act.

78. When asked to clarify on whether the Applicant sought any redress using the World Bank Procurement Regulations provides, counsel highlighted the options available to challenge a decision and submitted that the Applicant opted to approach the Board being the impartial body noting that there was a clear conflict as the procedure provided a bidder to lodge a complaint with the head of procurement being the same



body who had issued the same decision the bidder needs resolved contrary to Article 51 of the Constitution.

79. At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 19th October 2023 was due to expire on 8th November 2023 (*meant to be 9th November 2023*) and that the Board would communicate its decision by close of day on 9th November 2023 to all parties to the Request for Review via email.

BOARD'S DECISION

80. 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.

i) Whether the Notices of Preliminary Objection by the Respondents and the 1st Interested Party are time-barred to divest the Board of its jurisdiction.

Depending on the determination of Issue (i);

ii) Whether the Board has jurisdiction to hear and determine the Request for Review;

In order to address the above issue, the Board shall make a determination on whether the subject procurement process meets the conditions set out in section 4(2)(f) of the Act, thus ousting the jurisdiction of this Board.

Depending on the determination of issue (ii);

iii) Whether the Procuring Entity failed to evaluate the Applicant's tender in accordance with the tender document thereby breaching the provisions of Section 80(2) of the Act.

iv) What orders should the Board grant in the circumstances.

As to whether the Notices of Preliminary Objection by the Respondents and the 1st Interested Party are time-barred to divest the Board of its jurisdiction

81. The Respondents lodged a Preliminary Objection dated 1st November 2023 and filed on 2nd November 2023 objecting to the Request for Review on the grounds *inter alia* that (a) the tender subject of the Request for Review is fully funded by proceeds of a loan facility extended by the World Bank to the Government of Kenya under a bilateral agreement; (b) Section 4(2)(f) read with Section 6(2), (3) and (4) of the Act ousts the jurisdiction of the Board and applicability of the Act to procurement proceedings undertaken by the Government of



Kenya and a foreign entity or government under a bilateral or multilateral agreement; and (c) the Instructions to Bidders and the Form of Invitation for Bids expressly stated that bidding is to be conducted in accordance with the World Bank Procurement Regulations.

82. The 1st Interested Party lodged a Preliminary Objection dated 3rd November 2023 on grounds that (a) the procurement with respect to the subject tender is not a procurement with respect to which the Act applies pursuant to Section 4(2)(f) of the Act for being a procurement under a bilateral or multilateral agreement between the Government of the Republic of Kenya and the World Bank; (b) the Board is a creature of the Act having been established under Section 27 of the Act and its functions and powers provided in Sections 28, 172 and 173 of the Act thus its jurisdiction flows from the Act; and (c) the Board is divested of jurisdiction to hear and determine the Request for Review by dint of Section 4(2)(f) of the Act in view of the fact that the Act does not apply to the procurement with respect to the subject tender.

83. In response to the preliminary objections the Applicant submitted that the said preliminary objections were incompetent and bad in law having been filed outside the stipulated timelines of three (3) days from date of notification of filing the Request for Review. It further submitted that the Request for Review having been filed on 19th October 2023, the Respondents and Interested Party were required to file their preliminary objections within three days of notification of the appeal.

84. To resolve this issue the Board takes cognizance of Regulation 209(1) of Regulations 2020, which provides as follows:

"Preliminary Objection

(1) A party notified under regulation 206 may file a preliminary objection to the hearing of the request for review to the Secretary of the Review Board within three days from the date of notification."

85. Regulation 206 of Regulations 2020 referred to above provides as follows:

"206. Notice of Hearing

(1) The Review Board Secretary shall give reasonable notice of the date fixed for hearing to all parties to the review.

(2) The notice referred to in paragraph (1) shall be in the format set out in the Sixteenth Schedule of these Regulations."

86. It is clear from Regulation 209(1) read with Regulation 206 of Regulations 2020 that any preliminary objection filed by any party to a request for review ought to be filed within three (3) days from the date such party is notified of the date fixed for hearing of the request for review and not three (3) days from the date of notification of filing of

the request for review contemplated under Regulation 205(1) and (5) of Regulation 2020.

87. The Board has perused its file in the instant Request for Review and notes that the Acting Board Secretary notified the Respondents via email of the Request for Review on 19th October 2023 and requested them to submit a response within five (5) days from 19th October 2023. On the lapse of the five (5) days period, the Respondents had not filed a response nor submitted any documents which prompted the Acting Board Secretary to send reminders on 26th and 30th October 2023 while at the same time cautioning them on the repercussions of non-compliance.

88. The Board notes that on 1st November 2023, the Respondents sought for more time to file their documents. Noting that the Board was pressed for time to hear and determine the Request for Review, the Acting Board Secretary notified parties that the hearing of the matter was slated for 6th November 2023 at 11.30 a.m. *vide* Hearing Notices dated 31st October 2023 and 2nd November 2023 which were sent via email on the 2nd November 2023.

89. The Respondents proceeded to lodge their pleadings on 2nd November 2023 being the confidential documents in the procurement proceedings of the subject tender, the Procuring Entity's Memorandum of Response dated 1st November 2023 and the Notice of Preliminary Objection dated 1st November 2023.

90. The Acting Board Secretary, being in receipt of the details of bidders who participated in the subject tender, proceeded to notify them of the existence of the Request for Review *vide* letters dated 2nd November 2023 and requested the said bidders to submit their responses, if any, within three (3) days from 2nd November 2023.

91. The 1st Interested Party on its part filed a Notice of Appointment of Advocate, a Notice of Preliminary Objection and a Replying Affidavit sworn by Samuel Mugo, all dated and filed on 3rd November, 2023. The Board notes that the said pleadings were filed one (1) day after notification of the Request for Review by the Acting Board Secretary and one (1) day after notification of the Hearing Notice.

92. In view of the foregoing, the Board finds that the Respondents' Notice of Preliminary Objection dated 1st November 2023 and the 1st Interested Party's Notice of Preliminary Objection dated 3rd November 2023 were filed within the required statutory period stipulated in Regulation 209 (1) of Regulations 2020 and are thus properly before the Board. This ground of objection to the Preliminary Objections therefore fails and is disallowed.

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

93. 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 inquire into it before doing anything concerning such a matter in respect of which it is raised.

94. 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."

95. 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 its tools in respect of the matter before it the moment it holds that it is without jurisdiction.

96. 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 overarching 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...."

97. 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.”

98. 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.”

99. 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.”

100. The jurisdiction of the Board is provided for under Section 167 of the Act which provides for what can and cannot be subject to review of procurement proceedings before the Board and Sections 172 and 173 of the Act which provides for the powers the Board can exercise upon completing a review as follows:

Section 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]"

Section 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."

Section 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.”

101. 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). 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 it since its jurisdiction flows from the Act and it can only exercise powers as granted by the Act.

As to whether the subject procurement process meets the conditions set out in section 4(2)(f) of the Act, thus ousting the jurisdiction of this Board;

102. The Board heard the Respondents submit that it lacked jurisdiction to entertain the Request for Review since the tender forming the subject of the Request for Review was fully funded by proceeds of a loan facility extended by the World Bank to the Government of Kenya under a bilateral agreement hence the procurement was 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). The Respondents further submitted that by dint of Section 4(2)(f) and 6 of the Act was not applicable in the procurement proceedings of the subject tender and that the Board is divested of jurisdiction to hear and determine the Request for Review.

103. In the same vein the 1st Interested Party objected to the Request for Review on the grounds that the subject tender is not a procurement with respect to which the Act applies pursuant to Section 4(2)(f) of the Act for being a procurement under a bilateral or multilateral agreement between the Government of Kenya and the World Bank thus divesting the Board of its jurisdiction to hear and determine the Request for Review.

104. The Applicant, on the other hand, opposed the preliminary objections insisting that the Board is clothed with jurisdiction to hear and determine the issues raised in the Request for Review by dint of the provisions of Section 174 of the Act and given the fact that the Respondents did not point to the contents of the Financing Agreement that excluded application of the Act in the subject procurement in view of provisions of Regulation 5(1) of Regulations 2020. It further argued that Section 6(1) of the Act is read with provisions of Article 2(6) of the Constitution and does not oust the jurisdiction of the Board in the circumstances given the fact that the agreement alluded to did not go

through the stages of treaty making pursuant to the Treaty Making and Ratification Act.

105. The Board, having considered the parties' submissions, deems it necessary to interrogate the ouster provisions of Section 4(2)(f) of the Act cited by parties.

106. 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)

.....;

(e)

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

107. 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]



108. 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.

109. The Board is cognizant of the fact that the High Court of Kenya has on numerous occasions addressed the import of provisions of Section 4(2)(f) of the Act.

110. 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** at paragraphs 152 to 154 pronounced 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.

111. 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.

112. 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]

113. 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.

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

115. 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 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 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 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"

Su

[Signature]

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:

'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 grantor 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 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."

116. As regards the issue of conflict with any obligations of the Republic of Kenya arising from a treaty, agreement or other convention ratified by Kenya, and to which Kenya is a party, Section 6 of the Act provides that:

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



(2) Where the Republic of Kenya is required under the terms of any treaty or convention to which she is party, to contribute from her resources, in any form, to any procurement activities within Kenya, either in part or wholly, jointly or separately, procurement through such contributions shall be –

(a) in discreet activities where possible; and

(b) subject to the applicable provisions of the Act.

(3) The disposal of any or all of the goods or public assets accruing to Kenya as a result of procurement activities to which subsections (1) apply shall be subject to the provisions of the Act.”

117. The Board observes that section 6(1) of the Act takes cognizance of the application of treaties, agreements and conventions ratified by Kenya by dint of Article 2(5) and (6) of the Constitution. This is why the introductory sentence states that the provision of Section 6(1) of the Act is subject to the Constitution. Article 2(5) and (6) of the Constitution provides as follows:

“(5) The general rules of international law shall form part of the law of Kenya.

(6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution”

118. This provisions above support the view that Kenya cannot rely on its procurement law where there is a conflict with any obligations of Kenya arising from a treaty, agreement or other convention ratified by Kenya and to which Kenya is a party. Such procurement in case of a conflict, should be governed by the terms of the treaty, agreement or other convention ratified by Kenya and to which Kenya is a party, which form part of the law of Kenya by virtue of Article 2 (6) of the Constitution. This position was reiterated by Justice Nyamweya in the KPLC Case cited hereinbefore at paragraphs 55-57 as follows:

"[55] *In addition, section 6 resolves any conflict between the Act and the terms of any treaty, agreement or convention to which the Government of Kenya is a party, by providing that the terms of the treaty and agreement shall supersede and apply, subject to the provisions of the Constitution.*

[56] *This exemption is in line with the legal position that the enforcement of international agreements is governed by international law, and in particular the law relating to treaties, and even though many of the functions of such agreements may be analogous to those of domestic law, their efficacy is not judged in the same manner as domestic law because they operate between parties on an international level and are more likely to result in difficulties of*

interpretation and enforcement. The main purpose of the section is to avoid subjecting foreign countries and agencies to domestic law, and to facilitate international comity and co-operation with such foreign countries and agencies

[57] It is also expressly provided for by Article 2(5) and (6) of the Constitution that the general rules of international law shall form part of the law of Kenya, and that any treaty or convention ratified by Kenya shall form part of the law of Kenya under the Constitution.” [Emphasis by the Board]

119. 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.

120. Turning to the circumstances in the instant Request for Review, the Board has carefully studied (a) the Financing Agreement (Second Informal Settlements Improvement Project) between Republic of Kenya and International Development Association Credit Number 6759-KE (hereinafter referred to as “the Financing Agreement”); (b) the



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 Nakuru on Implementation of Second Informal Settlements Improvement Project (KISIP2) (hereinafter referred to as "the Implementation Agreement"); (c) the Tender Notice that was advertised on the Daily Nation Newspaper on 31st July 2023 for Request for Bids Works (Without Prequalification) (hereinafter referred to as "the Tender Notice"); (d) the Tender Document; and (e) 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:

121. On 17th August 2023, the Republic of Kenya and International Development Association entered into a Financing Agreement whereby the International Development Association extended to the Republic of Kenya a credit, which is deemed as Concessional Financing for purposes of the General Conditions, in an amount equivalent to Euro one hundred thirty-four million eight hundred thousand (EUR 134,800,000) to assist in financing the project described under Schedule 1 of the Financing Agreement being what is now being referred to as the Second Informal Settlements Improvement Project (KISIP2). There is no doubt that this Financing Agreement is a bilateral

agreement as envisaged under Section 4(2)(f) of the Act noting that one of the parties to it is the Government of Kenya while the other party being a multilateral agency being the World Bank under the International Development Association.

122. An interrogation of the terms of this bilateral agreement in establishing whether the instant procurement of the subject tender was to be undertaken in accordance with the Financing Agreement, reveals that implementation of the Financing Agreement was provided for in the Implementation Agreement. Clause 5 at page 5 to 6 of the Implementation Agreement provides for Procurement as follows:

"5.1 The County Government shall conduct procurement for the goods, works and services to be financed from the proceeds of the Financing in accordance with the World Bank Procurement Regulations July 2016, revised November 2017 and August 2018....."

123. In view of the above, the Board observes that the aforementioned agreements paved way for the County Government of Nakuru (1st Respondent herein) to invite eligible bidders to participate in the subject tender through the Tender Notice. Prospective bidders were informed at Clause 1 and 3 as follows:

"1. The Government of the Republic of Kenya has received financing from the World Bank toward the cost of the Second Informal Settlements Improvement Project (KISIP2) and intends to apply the proceeds



toward payments under the contract for: Construction of Karagita Settlement Water Supply Pipeline for the Nakuru County Settlements' Infrastructure Improvement Works and

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

124. The above provisions in the Tender Notice were also provided for under Clause 1 at page iii and Clause 3 at page iv of the Bid Document. Further, Clause 50.1 of Section I-Instructions to Bidders (ITB) at page 32 of the Bid Document provided:

"The procedures for making a Procurement-related Complaint are as specified in the BDS."

125. Clause ITB 50.1 of Section II- Bid Data Sheet (BDS) at page 37 of the Bid Document provided:

"The procedures for making a Procurement-related Complaint are detailed in the "Procurement Regulations

for IPF Borrowers (Annex III). If a Bidder wishes to make a Procurement-related Complaint, the Bidder shall submit its complaint following these procedures, In Writing (by the quickest means available, such as by email or fax), to:

**Attention: HEAD OF SUPPLY CHAIN
COUNTY GOVERNMENT OF NAKURU
P.O.BOX 2780-20100, NAKURU, KENYA**

Electronic mail address:

SUPPLYCHAIN@NAKURU.GO.KE

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

- 1. the terms of the Bidding Documents; and**
- 2. the Employer's decision to award the contract"**

126. It is the Board's understanding of the aforementioned provisions of the Implementation Document, the Tender Notice and the Bid Document that the County Government of Nakuru would conduct procurement for the works financed by the World Bank in the subject tender under the bilateral agreement between the Government of Kenya and the IDA in accordance with the World Bank Procurement Regulations and any complaints emanating from the procurement in the subject tender would be submitted in accordance to the World Bank Procurement Regulations.



127. The World Bank Procurement Regulations provides, at page 61 Annex III Procurement-related Complaints, and stipulates 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.

128. 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 3 at page 62 proceeds to provide the timelines and process for review and resolution of complaints.

129. Paragraph 3.6 of Annex III Procurement- related Complaints at page 63 of the World Bank Procurement Regulations further provides in part that:

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

130. In view of the foregoing, the Board in this regard has satisfied itself of the existence of a bilateral agreement between the Government of Kenya and IDA and that the procurement with respect to the subject tender was a procurement under the said bilateral agreement and was to be carried out in accordance with the World Bank Procurement Regulations and not the laws of Kenya. This therefore means that 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 and equally Section 174 of the Act is in applicable in the circumstances of this case.

131. In the circumstances, the Board finds and holds that the Act does not apply to the procurement of the subject tender and this effectively divests the Board of jurisdiction to entertain the instant Request for Review.

132. The Board therefore has no option but to down its tools at this stage and shall not proceed to address the other issues framed for determination.

133. The upshot of the Board's finding is that the Respondents' Notice of Preliminary Objection dated 1st November 2023 and the 1st Interested Party's Notice of Preliminary Objection dated 3rd November 2023 succeed and that the instant Request for Review is ripe for striking out for want of jurisdiction.




FINAL ORDERS

134. 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 this Request for:

- 1. The Respondents' Notice of Preliminary Objection dated 1st November 2023 and the 1st Interested Party's Notice of Preliminary Objection dated 3rd November 2023 be and are hereby upheld.**
- 2. The Request for Review dated 18th October 2023 and filed on 19th October 2023 be and is hereby struck out for want of jurisdiction.**
- 3. Given the findings herein, each party shall bear its own costs in the Request for Review.**

Dated at NAIROBI this 9th Day of November 2023.


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CHAIRMAN
PPARB


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SECRETARY
PPARB