

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 83/2023 OF 25TH OCTOBER 2023

BETWEEN

EMKAY CONSTRUCTION LIMITED APPLICANT

AND

THE COUNTY SECRETARY,

THE COUNTY GOVERNMENT OF NAKURU 1ST RESPONDENT

THE COUNTY GOVERNMENT

OF NAKURU 2ND RESPONDENT/PROCURING ENTITY

UNIVERSAL TRENDS LIMITED INTERESTED PARTY

Review against the decision of the Chief Officer, Lands, Physical Planning, Housing & Urban Development, County Government of Nakuru in relation to RFB No. KE-Nakuru County-371238-CW-RFB for Construction of Roads. Footpaths, Non-Motorized Transport Facilities, Storm Water in Lakeview, London/Hilton and Kwa Murogi Settlements for the Nakuru County Settlements' Infrastructure Improvement Works.

BOARD MEMBERS PRESENT

- | | | |
|-------------------------------|---|-------------|
| 1. Mr. George Murugu, FCI Arb | - | Chairperson |
| 2. Joshua Kiptoo | - | Member |

3. CPA Alexander Musau

- Member

IN ATTENDANCE

1. Mr. James Kilaka

- Acting Board Secretary

2. Evelyn Weru

- Secretariat

PRESENT BY INVITATION

APPLICANT

EMKAY CONSTRUCTION LIMITED

Mr. Maingi Musyimi

-Advocate, Maingi Musyimi & Associates

RESPONDENTS

**THE COUNTY SECRETARY, THE COUNTY
GOVERNMENT OF NAKURU & THE
COUNTY GOVERNMENT OF NAKURU**

1. Mr. Ngwele

-Advocate, JN & P Law Advocates LLP

2. Mr. Vincent Odhiambo

- Advocate, JN & P Law Advocates LLP

INTERESTED PARTY

UNIVERSAL TRENDS LIMITED

Ms. Desma Nungo

- Advocate, NOW Advocates LLP

BACKGROUND OF THE DECISION

The Tendering Process

1. *Vide* a Request for Bids for Small Works County Government of Nakuru, the Procuring Entity, the 2nd Respondent herein, invited sealed bids from eligible bidders in response to RFB No. KE-Nakuru County-371238-CW-RFB for Construction of Roads. Footpaths, Non-Motorized Transport Facilities, Storm Water in Lakeview, London/Hilton and Kwa Murogi Settlements 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 for the subject tender issued to bidders (hereinafter referred to as the 'Tender Document') was available for download. The subject tender's submission deadline was scheduled for 29th August 2023 at 10.00 a.m. 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') pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act'), a total of nine (9) tenders were submitted in response to the subject tender. The said nine (9) tenders were opened in the presence of tenderers' representatives present at the tender opening session, and were recorded as follows:

No.	Name
1.	Firm Bridge Ltd
2.	Gedi Boss General Trading and Transport Ltd
3.	Octagon Builders and General Suppliers Ltd
4.	Magic General Construction Limited
5.	Machine Centre Ltd
6.	Lesma Engineering Ltd
7.	Universal Trends Ltd
8.	Rural Distributors Enterprises Ltd
9.	Emkay Construction Limited

Evaluation of Tenders

4. A Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") undertook evaluation of the nine (9) tenders as captured in an Evaluation Report of the subject tender signed by members of the Evaluation Committee on 28th September 2023

(hereinafter referred to as the "Evaluation Report") in the following stages:

- i Preliminary Examination of Bids;
- ii Detailed Examination of Bids;
- iii Comparison of 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, six (6) tenders including the Applicant's tender were determined non-responsive while three (3) tenders including the 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	Bidder's name	As Read Out (KES)	Computation Error (KES)	Corrected Amount
1.	3	Octagon Builders & General Suppliers Ltd P.O. Box 10749-00100 Nairobi	478,471,899.31	255,200.00	478,216,699.31
2.	5	Machine Center Ltd P.O Box 67575-00200 Nairobi	495,913,474.91	12,989,003.00	482,924,471.91
3.	7	Universal Trends Ltd P.O. Box 52580-00100 Nairobi	475,999,332.66	138,700.00	476,138,032.70

Comparison of Bids

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

Bidder Number	Bidder	Total Comparison Price (KES.)	Ranking
7	M/s Universal Trends Ltd P.O Box 52580-00100 Nairobi	476,138,032.70	1
3	M/s Octagon Builders & General Suppliers Ltd P.O. Box 10749-00100 Nairobi	478,216,699.31	2
5	M/s Machine Center Ltd P.O Box 67575-00200 Nairobi	482,924,470.92	3

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, 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 subject tender to Universal Trends Limited at a price of Kenya Shillings Four Hundred and Seventy-Six Million, One Hundred and Thirty-Eight Thousand, and Thirty-Two Shillings only (Kshs. 476,138,032.00/=) VAT inclusive, this being its arithmetically corrected bid price, including the Provisional Sums of Kshs. 138,703.00

Professional Opinion

11. In a Professional Opinion dated 28th September 2023 (hereinafter referred to as the Professional Opinion"), Ms. AnnMarie Kuria, Director, Supply Chain Management 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. 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 subject tender vide letters dated 9th October 2023.

REQUEST FOR REVIEW NO. 83 OF 2023

14. On 25th October 2023, Messrs Emkay Construction Limited (hereinafter, "the Applicant") filed a Request for Review dated 25th October 2023 together with a Supporting Affidavit sworn on 25th October 2023 by Margaret Magiri Mwangi, its Director (hereinafter referred to as the 'instant Request for Review') through the firm of Maingi Musyimi & Associates seeking the following orders from the Board in verbatim:

a) The Board be pleased to annul and/quash the decision of the Procuring Entity in awarding the tender to M/S Universal Trends Limited.

b) The decision declaring the Applicant's tender as unsuccessful vide the procuring Entity's letter dated 9th October 2023 be set aside and/or annulled.

c) The Board be pleased to direct the Procuring Entity to evaluate and determine the lowest and competitive bid from among the eligible bids in exclusion of M/S Universal Trends Limited.

d) The costs of this Review be awarded to the Applicant.



e) The Board be at liberty to make any other Order as may be applicable so that the ends of justice are effectively vindicated.

15. In a Notification of Appeal and a letter dated 25th 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 25th October 2023.

16. On 1st November 2023, the Respondents filed, via email, a letter dated 31st October 2023 seeking indulgence to file their documents.

17. Vide a Hearing Notice dated 3rd 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 8th November 2023 at 1400 hrs through the link availed in the said Hearing Notice.

18. On 3rd November 2023, the Respondents filed through JN & P 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 the confidential documents concerning the subject tender pursuant to section 67(3)(e) of the Act.
19. Vide letters dated 2nd November 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.
20. On 7th November 2023, the Interested Party filed through NOW Advocates LLP a Notice of Appointment of Advocates dated 7th November 2023, an Interested Party's Notice of Preliminary Objection dated 7th November 2023 and an Interested Party's Replying Affidavit sworn on 7th November 2023 by Lydia Muthoni Macharia, its Director.
21. On the morning of 8th November 2023, the Interested Party filed through its advocates Written Submissions dated 8th November 2023 and List and Bundle of Authorities dated 8th November 2023.



22. When the matter first came up for hearing on 8th November 2023 at 2.00 p.m., Mr. Ngwele, counsel for the Respondents, submitted that he had been served via email at 1.18 p.m. with the Applicant's Supplementary Affidavit sworn on 8th November 2023 by Margaret Magiri Mwangi and urged the Board to expunge the same for having been filed outside the stipulated timelines and in the event the Board would not expunge the same, counsel prayed for more time to appraise themselves and substantively address and respond to new issues raised therein.
23. In response, Mr. Maingi, counsel for the Applicant submitted that the said Supplementary Affidavit had been filed pursuant to Regulation 209 of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as 'Regulations 2020') in response to the preliminary objections by the Respondents and Interested Party.
24. He further submitted that the Supplementary Affidavit was sent to the Board and served upon parties in advance via email prior to filing of the hard copy with the Board due to time constraints. He pointed out that the late filing was orchestrated by the Respondents and Interested Party who had filed their documents out of time and urged the Board to do substantive justice in line with Article 159 of the Constitution since the proceedings herein are administrative in nature and that the Board should not elevate technicalities. He sought for the Board's leave to have the Supplementary Affidavit sent to the Board via email to be considered as being properly on record and in the event that such leave



was not granted, counsel sought leave to file and serve the said Supplementary Affidavit.

25. In a rejoinder, Mr. Ngwele reiterated his earlier submissions arguing that the Applicant had introduced new evidence in the Supplementary Affidavit. On her part, Ms. Nungo, counsel for the Interested Party submitted that the Interested Party's pleadings in response to the Request for Review were filed within the stipulated timelines having been notified by the Acting Board Secretary of the Request for Review on 3rd November 2023 which was a Friday and considering that offices were closed for the weekend, the 3 days within which the Interested Party was required to file their documents lapsed on 7th November 2023. She further submitted that she was not opposed to admission of the Applicant's Supplementary Affidavit on record and sought corresponding leave to file any further response by the Interested Party, if any.

26. Having considered parties' submissions, the Board sought to know whether parties were agreeable to canvassing the instant Request for Review by way of filing exhaustive written submissions in the interest of time and there being no objection by parties, the Board directed that the instant Request for Review would be canvassed by way of written submissions and directed (a) the Applicant to file with the Board and serve its Supplementary Affidavit within one (1) hour of conclusion of the hearing on 8th November 2023, (b) the Respondents and Interested Party to file and serve a further affidavit by 9.00 a.m. on 9th November



2023 in response to the Applicant's Supplementary Affidavit, (c) the Applicant to file and serve its written submissions and list and bundle of documents, if any, by 4.00 p.m. on 9th November 2023, (d) the Respondents and Interested Party to file and serve their written submissions by 10.00 a.m. on 10th November 2023, and (e) the Applicant to file and serve its written rejoinder limited to points of law only arising from the Respondents and Interested Party' written submissions, if any, by 1.00 p.m. on 10th November 2023. Parties were cautioned to adhere to the strict timelines as specified in the Board's directions and that any pleading filed outside the stipulated timelines would be struck out and any payment made outside the stipulated timelines would not be accepted since the Board would rely strictly on the documentation filed before it in rendering its decision.

27. The Board also directed that the hearing of the preliminary objections by the Respondents and the 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 instant Request for Review.

28. At around 3.00 p.m. on 8th November 2023, the Applicant filed an Applicant's Supplementary Affidavit sworn on 8th November 2023 by Margaret Magiri Mwangi.



29. In an attempt to comply with the Board's directions, on 9th November 2023 at around 3.30 p.m., the Respondents filed a Procuring Entity's Further Replying Affidavit sworn on 8th November 2023 by David Kuria, the 2nd Respondent's County Chief responsible for Housing and Urban Planning and the 1st Respondent herein albeit late, contrary to the Board's directions. Accordingly, the Board shall not consider the Respondent's Further Replying Affidavit sworn by David Kuria on 8th November 2023 when making its findings with respect to the instant Request for Review.

30. On 9th November 2023 at around 3.30 p.m., the Applicant filed with the Board Written Submissions dated 9th November 2023 together with a Bundle of Authorities.

31. On 10th November 2023 at around 8.30 a.m., the Interested Party filed Supplementary Written Submissions dated 10th November 2023 together with a Supplementary List and Bundle of Authorities dated 10th November 2023.

32. On 10th November 2023 at around 9.30 a.m., the Respondents filed Written Submissions dated 10th November 2023.

PARTIES' SUBMISSIONS

Applicant's case

33. In its submissions, the Applicant relied on the Request for Review dated 25th October 2023 together with Supporting Affidavit sworn on

25th October 2023 by Margaret Magiri Mwangi, the Applicant's Supplementary Affidavit sworn on 8th November 2023 by Margaret Magiri Mwangi and Written Submissions dated 9th November 2023 together with a Bundle of Authorities that were filed before the Board.

34. The Applicant pointed out that the Interested Party's pleadings were filed out of the statutory period of 3 days as prescribed under Regulation 209 of the Public Procurement and Asset Disposal Regulations, 2020 and ought to therefore be struck out.

35. On the issue of whether the Board has jurisdiction to hear and determine the Request for Review, the Applicant submitted that the provisions of Section 4(2)(f) of the Act and Section 6(1) of the Act are not cast into stone and that the Board has Jurisdiction to hear the dispute since the World Bank Regulations and the Bilateral agreements are subject to the Constitution of Kenya and in the event of inconsistency then the Constitutional pre-requisites should prevail.

36. The Applicant submits that the ouster of Section 4(2)(f) and Section 6 of the Act can only be applicable as long as they are aligned or not inconsistent with the Constitution of Kenya. In support of its argument, the Applicant relied on the holding in *PPARB No. 93 Of 2021 Power Transmission Line Contractors Association -Vs- The Accounting Officer, Kenya Power & Lighting Company Limited*.

37. The Applicant drew the Board's attention to (a) Section V, Clause 5.3 and 5.4 of the World Bank Procurement Regulation IPF Borrowers on

National Procurement Procedures and argued that the said sections provide that the use national procurement laws are permissible as long as requirements like an effective complaints mechanism are demonstrated, and (b) Annex III, Clause 3.1 to 3.9 of the World Bank Procurement Regulations on Resolution of Complaints and argued that this provisions places the Procuring Entity as the arbiter in respect to any disputes arising out of the procurement process which goes against Articles 47, 50 [1] and 227 of the Constitution since the Procuring Entity cannot be an impartial arbiter as it would be conflicted hence the condition precedent in Section 6(1) of the Act for application of the ouster clause remains unfulfilled.

38. The Applicant submitted that there are certain conditions that need to be demonstrated before an ouster clause can be applied and referred the Board to the case of *Republic -Vs- Public Procurement Administrative Review Board & Another Exparte Athi Water Services Board & Another [2017] Eklr.*

39. It is the Applicant's argument that the Procuring Entity is not a party to the Financing Agreement dated 17th August 2020 between the World Bank and the Government of Kenya and that the Intergovernmental Participation Agreement dated 25th January 2021 between the National Government and the County Government of Nakuru cannot be interpreted to be a bilateral agreement contemplated under Sections 4 and 6 of the Act.

40. The Applicant invited the Board to look at the notification letter dated 9th October 2023 and submitted that the Respondents admitted to the jurisdiction of the Board hence the doctrine of Estoppel was applicable in the circumstances. The Applicant further invited the Board to find that the instant Request for Review falls on all fours with case before the Board in *PPARB 79 of 2023 Kisumu Concrete Products Limited -Vs- The Accounting Officer, County Government Of Kisumu & Others*.
41. The Applicant submitted that it received the letter of notification dated 9th October 2023 on 12th October 2023 as deposed in the Supporting Affidavit of Margaret Magiri sworn on 25th October 2023 hence the Request for Review was filed within the statutory period stipulated in Section 167(1) of the Act. Further, the Applicant submitted that as a bidder, it had committed time and resources to participate in the tendering process and had pleaded in the Request for Review that the breaches in the procurement process by the Procuring Entity prejudiced it in terms of the high possibility of winning the subject tender.
42. The Applicant pressed on that the tendering process undertaken by the Procuring Entity was saddled with massive irregularities and the same polluted the final outcome in the subject tender noting that the Interested party did not meet the requirements stipulated at Section III Clause 4 of the Tender Document having been incorporated in 2017 and hence did not meet the requirement of having a minimum of 10 years' experience from 1st January 2013.

43. The Applicant further pointed out that there was no standard format required for submission of a Power of Attorney and that it submitted in its bid, a document which contained the required information as contained in a Power of Attorney which identified the Director authorized to sign not only the Tender Document but all matters in respect to the subject tender. The Applicant invited the Board to uphold substance over form and urged it to apply the provisions of Section 79(2) of the Act in interpretation of the same claiming that the deviation was not a material deviation that would affect delivery or quality if the services offered. In support of this argument, the Applicant relied on the holding in *Republic -Vs- Public Procurement Administrative Review Board Exparte Willis Protocol & Concierge Services Limited [2021] Eklr* and *PPARB 71 of 2023 Of Frejed Engineering Services Limited -Versus- The Director, Kenya Maritime Authority.*

44. On whether evaluation of tenders in the subject tender was carried out within a maximum period of 30 days, the Applicant submitted that tenders were submitted on 29th August 2023 and it was expected that the evaluation process would take the prescribed 30 days which was not the case leading it write to the Procuring Entity vide a letter dated 29th September 2023 enquiring on the same.

45. The Applicant urged the Board to allow the Request for Review as prayed.



Respondents' case

46. In their submissions, the Respondents, relied on the Notice of Preliminary Objection dated 1st November 2023, the Procuring Entity's Memorandum of Response dated 1st November 2023, Procuring Entity's Further Replying Affidavit sworn on 8th November 2023 by David Kuria the 2nd Respondent's County Chief responsible for Housing and Urban Planning and the 1st Respondent herein, Written Submissions dated 10th November 2023 together with confidential documents concerning the subject tender pursuant to section 67(3)(e) of the Act that were filed before the Board.

47. The Respondents submit that the jurisdictional challenge is anchored on Sections 4(2)(f) of the Act read with Section 6(1) of the Act whose legal effect is that (a) the Act does not apply to public procurement projects that development finance institutions, foreign sovereign governments, agencies of foreign sovereign governments and international organizations finance under bilateral or multilateral agreements with the Government of Kenya and (b) where there is a conflict between the provisions of the Act and any obligations of the Government of Kenya arising from a treaty, agreement, or other convention ratified by Kenya, the terms of the treaty shall prevail.

48. The Respondents submitted that in August 2020, the Government of Kenya received financing from the World Bank(IDA) towards the cost of the second Kenya Informal Settlement Improvement Project(KISIP2) and intended to apply part of the proceeds toward payments under the

contract for the subject tender. Having supplied the Board in its confidential file with the Financing Agreement and the Intergovernmental Participation Agreement, the Respondents submit that there is no doubt that the impugned procurement has been conducted under a bilateral agreement between the Government of Kenya and the World Bank and that section 4 (2) (f) automatically comes into play to oust the applicability of the Act to the impugned procurement hence the Board, being a creature of the Act, cannot proceed further.

49. The Respondents pointed out that Clause 5 of the Intergovernmental Participation Agreement expressly provides that the Procuring Entity shall conduct the procurement for the goods, works and services to be financed from the proceeds of the financing in accordance with the World Bank Procurement Regulations (World Bank Procurement Regulations July 2016, revised November 2017 and August 2018) and that the Tender Advert notified potential bidders that the project would be financed through monies received by the Republic of Kenya from the World Bank and that bidding would be conducted through procurement methods specified in the World Bank's Procurement Regulations.

50. It is the Respondents case that the Applicant did not follow the dispute resolution process stipulated at page 61 of the World Bank Procurement Regulations and that specifically, the Applicant failed to submit a written complaint to the in accordance with Clause 50.1 of Section 1 –



of the Instructions to Bidders (ITB) and ITB 50.1 of the Bid Data Sheet (BDS).

51. In support of their arguments, the Respondents relied on the holdings in Civil Appeal *Kenya Medical Supplies Authority (KEMSA) v Revital Health EPZ Limited*, Civil Appeal No. 65 of 2016 [2017] eKLR, *Republic v Public Procurement Administrative Review Board & 2 Others Ex parte Kenya Power & Lighting Company* [2019] eKLR, *Republic v Public Procurement Administrative Review Board, Consortium of TSK Electronica Y Electricdad S A and Ansaldoenergia & Another Ex parte Kenya Electricity Generating Company Plc* [2021] eKLR, *Republic v Public Procurement Administrative Review Board & Another, Ex parte Accounting Officer, Kenya Electricity Transmission Company Limited* [2021] eKLR, and *PPARB Application No. 81 of 2023*.

52. On the substantive issues raised in the instant Request for Review, the Respondents submits that the procurement proceedings and the evaluation of the tender was done in accordance with the Constitution, the law and the Public Procurement and Disposal Regulations 2020 and the World Bank Procurement Regulations July 2016, revised November 2017 and August 2018 and that there were no irregularities. The Respondents further submits that they evaluated the Applicant's bid using the requirements stated in the instruction to the bidders, Bid data sheet, eligibility and qualification criteria and that pursuant to the provisions of the Association Agreement that was submitted by the Interested Party, the aspect of experience was adequately addressed.

Since the Association of the Interested Party and Tai Enterprises Limited had a cumulative experience of close to 20 years which is above the 10-year period that was provided for in the Tender document.

53. The Respondent pointed out that the Tender Document allowed for joint ventures and that the successful tenderer together with its joint venture partner had a combined expertise.

54. The Respondents pressed on that the Applicant failed to conform to the mandatory provisions of the Tender Document since it did not submit a power of attorney and that evaluation of the subject tender was conducted within the prescribed 30 days.

55. The Respondents urged the Board to strike out the Request for Review for want of jurisdiction and in the alternative to dismiss it in totality with costs.

Interested Party's case.

56. In its submissions, the Interested Party, relied on the Notice of Preliminary Objection dated 7th November 2023, the Interested Party's Replying Affidavit sworn on 7th November 2023 by Lydia Muthoni Macharia, Written Submissions dated 8th November 2023, List and Bundle of Authorities dated 8th November 2023, Supplementary Written Submissions dated 10th November 2023 together with a Supplementary List and Bundle of Authorities dated 10th November 2023 that were filed before the Board.

57. The Interested Party contends that contrary to the Board's directions of 8th November 2023 on filing of written submission by parties, the Applicant served it with its Written Submissions via email of 9th November 2023 at 5:38 p.m. which was outside the stipulated timelines to have served by 4:00 p.m. and prayed for the said submissions to be struck out.

58. On whether its responses to the Request for Review are properly on record, the Interested Party submit that this issue was not pleaded and has only been brought up at the submission stage and should not be entertained. The Applicant further submits that it was notified of the Request for Review on 2nd November 2023 via email and it has not pleaded of having been served with a hearing notice by the Ag. Board Secretary on either 2nd or 3rd November 2023. In any event, the Interested Party argued that in view of the provisions of Section 57 of the Interpretation of General Provisions Act, its preliminary objection and Replying Affidavit were properly filed and served on all parties to the review on 7th November 2023 and are properly on record.

59. It is the Interested Party's case that there is no dispute on the facts that require ascertainment by examining the evidence before the Board as to whether (a) payments under the contract for the subject tender will be made out of the proceeds of the loan or finance received by the Government of the Republic of Kenya from the World Bank, (b) the bidding of the subject tender was to be conducted using the World



Bank's Procurement Regulations, (c) the subject tender was open to only eligible bidders defined in the World Bank's Procurement Regulations and, (d) a bidder who wished to make a procurement-related complaint was to submit its complaint following the procedures provided under Annex III of the World Bank's Procurement Regulations in writing.

60. The Interested party submits that the Board is a creature of the Act following its establishment under Section 27(1) of the Act as a central independent appeals review Board and as an unincorporated Board and that its jurisdiction flows from Section 28 of the Act with several powers provided under Section 172 and 173 of the Act.

61. The Interested party points out that Section 4(2)(f) of the Act provides for the Application of the Act and enumerates procurements with respect to which the Act does not apply and that one such procurement where the Act does not apply is a procurement under a bilateral or multilateral agreement between the Government of Kenya and any other foreign government, agency, entity or multilateral agency. The Applicant presses on that the Board would have no jurisdiction to entertain any proceedings with respect to procurements where the Act does not apply pursuant to Section 4(2)(f) of the Act.

62. The Interested party submits that the procurement with respect to the subject tender is a procurement under a bilateral agreement between the Government of Kenya and the World Bank in view of the Financing

Agreement dated 17th August 2020 and the International Participation Agreement dated 25th January 2021 supplied to the Board as part of the confidential documents by the Respondents and as indicated and deduced from page 12 of the Respondents' Response to the Request for Review.

63. The Interested party submits that an interrogation of parties to the Financing Agreement reveals that the Financing Agreement is between the Republic of Kenya and the World Bank and is definitely a bilateral agreement between the Government of Kenya and a multilateral agency as envisaged in Section 4(2)(f) of the Act.

64. The Interested party further submits that having demonstrated that the Financing Agreement is a bilateral agreement between the Republic of Kenya (as the Government of Kenya) and the World Bank (as a multilateral agency) and having demonstrated that the subject tender is part of the project known as the Second Kenya Informal Settlements Improvement Project (KISIP2) whose source of funds is the financing under the Financing Agreement with its implementation provided under the Implementing Agreement, it follows that the procurement of the subject tender is under the Financing Agreement and the World Bank envisaged under Section 4(2)(f) of the Act hence the Board is divested of jurisdiction to hear and determine the Request for Review.

65. The Interested Party pointed out that Section 6 of the Act ousts the application of the Act on 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. It further pointed out that there was no intention to apply any provisions of the Act in the procurement of the subject tender and if there was such intentions, the Bidding Document would have provided for application of the Act with respect to making of procurement-related complaints by bidders.

66. The Interested Party submits that the provisions of the World Bank Procurement Regulations for administration and handling of procurement related complaints vary and are in conflict with those provided in the Act and Regulations 2020 and that in the circumstances, the provisions of the World Bank Procurement Regulations prevail over the provisions of the Act. In support of its argument, the Interested Party relied on the holding by Justice A.K. Ndungu 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.*

67. The Interested Party submits that the Applicant was fully aware of the provisions of Clause 50.1 at page 32 of the Tender Document read with ITB 50.1 of the Bid Data Sheet at page 37 of the Tender Document and by its own conduct submitted to the procedures for bidding and complaint mechanisms with respect to the subject tender and estopped from challenging the constitutionality of the provisions of the Tender

Document at this late stage which ought to have been challenged within 14 days of learning of the impugned provision of the Tender Document pursuant to Section 167(1) of the Act and as such, the latest time to challenge the same would have been before the deadline for submission of the subject tender and before the Applicant submitted its bid.

68. The Interested Party pointed out that the circumstances of the instant Request for Review are on all fours with the Board's recent decision on *PPARB Application No. 81 of 2023 Blueswift Contractors & General Supplies Limited v County Government of Nakuru and 3 others* in that the Financing Agreement and the Implementing Agreement in the said case are the same agreements as in the instant Request for Review.

69. On whether the Request for Review as drawn and filed is incompetent and fatally defective, the Interested Party while relying on the provisions of Section 167 (1) of the Act read with Regulation 203(1),(2)(c)(ii), and (3) of Regulations 2020 and Section 87 of the Act, submitted that (a) being guided by Section 57 of the Interpretation of General Provisions Act, the Applicant ought to have filed the Request for Review latest by 23rd October 2023 noting that the notification of regret was dated 9th October 2023 hence the Request for Review having been filed on 25th October 2023 was time barred for having been filed outside the stipulated 14 days' statutory period, (b) the Applicant has in its Request for Review alleged various breaches of duty

imposed on the Procuring Entity by the Act but has failed to claim and/or plead that it has suffered or risks suffering loss or damage due to the alleged breaches of duty imposed on the Procuring Entity by the Act and Regulations 2020, and (c) the Applicant joined the 1st Respondent as a party to the Request for Review yet the 1st Respondent is not the Chief Officer- Housing & Urban Development, Department of Lands, Physical Planning, Housing & Urban Development of the County Government of Nakuru as seen from the notification letter and the 2nd Respondent is also not a party to the Request for Review as it is not the procuring entity and as such failed to join the mandatory parties in view of Section 170 of the Act. In support of its argument, the Interested Party relied on the holding in the *James Oyondi t/a Betoyo Contractors & another v Elroba Enterprises Limited & 8 others [2019] Eklr.*

70. On the substantive issues raised in the Request for Review, the Interested Party submitted that submission of a power of attorney was a mandatory requirement and that the Applicant's purported document showing who is authorized to sign on behalf of the Applicant did not conform to the requirements of Clause 11.1(e) and Clause 20.3 of Section I-Instructions to Bidders at page 14 and 20 of the Tender Document respectively and ITB 20.3 of Section II- Bid Data Sheet (BDS) at page 36 of the Tender Document since (a) it was not a written confirmation of the person authorized to sign on behalf of a bidder, (b) it did not take the form of a power of attorney and (c) it did not indicate the name, position held by the person authorized to sign a bid on behalf



of a bidder. As such, the Applicant did not satisfy the mandatory requirement under Clause 11.1(e) and Clause 20.3 of Section I- Instructions to Bidders at page 14 and 20 of the Tender Document respectively and ITB 20.3 of Section II- Bid Data Sheet (BDS) at page 36 of the Tender Document.

71. The Interested Part referred the Board to the provisions of Section 79 of the Act and the holding in *Republic v Public Procurement Administrative Review Board & another; Premier Verification Quality Services (PVQS) Limited (Interested Party) Ex parte Tuv Austria turk [2020] eKLR* and *Republic v Public Procurement Administrative Review Board; Arid Contractors & General Supplies (Interested Party) Ex parte Meru University of Sciences & Technology [2019] eKLR* in support of its argument.

72. On whether the Interested Party met the eligibility criteria set out in Clause 4.1 of Section I-Instructions to Bidders (ITB) at page 8 and 9 of the Tender Document read with ITB 4.1 of Section II- Bid Data Sheet (BDS) at page 33 of the Tender Document, the Interested Party submitted that as part of its original bid in the subject tender informed the 2nd Respondent in its letter of bid that it had a joint venture partner with respect to the subject tender and availed documents confirming that its joint venture partner was incorporated on 1st December 2003 and the combined general and specific experience of the Interested Party and its joint venture partner runs more than ten (10) years.

73. In conclusion, the Interested party submitted that the Applicant had not substantiated its allegations that the procuring entity evaluated bids in the subject tender outside the statutory period of 30 days and relied on the holding in *Civil Appeal No. E270 of 2022 CIC General Insurance Limited v Madison General Insurance Kenya Ltd and 2 others*.

74. The Interested Party urged the Board to uphold its preliminary objection or in the alternative dismiss the Request for Review for lacking merit with costs of the proceedings to the Interested Party.

75. Parties were informed that the instant Request for Review having been filed on 25th October 2023 was due to expire on 14th November 2023 and that the Board would communicate its decision on or before 14th November 2023 to all parties to the Request for Review via email.

BOARD'S DECISION

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

In order to address the above issue, the Board shall make a determination on:



a) *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 outcome of sub-issue (i) above;

b) *Whether the Request for Review as filed is incompetent and fatally defective;*

c) *Whether the Request for Review was filed within the statutory period of 14 days of notification of award in accordance with Section 167(1) of the Act read with Regulation 203(2)(c)(ii) of Regulations 2020 to invoke the jurisdiction of the Board;*

d) *Whether the Applicant has locus standi before the Board;*

Depending on the determination of issue (i);

ii Whether the 2nd Respondent's Evaluation Committee failed to evaluate the Applicant's tender in accordance with the procedures and criteria for evaluation set out in the Tender Document thereby breaching Section 80(2) of the Act read with Article 227(1) of the Constitution.

iii What orders should the Board grant in the circumstances.

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

78. When the matter first came up for hearing on 8th November 2023, counsel for the Applicant, Mr. Maingi pointed out that the Respondents and Interested Party had filed their responses to the instant Request for Review outside the timelines stipulated in the Act and therefore orchestrated the late filing of the Applicant's Supplementary Affidavit sworn on 8th November 2023 by Margaret Magiri Mwangi. Further, the Applicant in its Written Submissions dated and filed on 9th November 2023 urged the Board to strike out the pleadings of the Interested Party filed on 7th November 2023 (*being the Notice of Preliminary Objection dated 7th November 2023 and the Interested Party's Replying Affidavit sworn on 7th November 2023 by Lydia Muthoni Macharia*) for having been filed outside the stipulated timelines of three (3) days pursuant to Regulation 209 of Regulations 2020.

79. In response, the Interested Party submitted in its Supplementary Written Submissions dated and filed on 10th November 2023 that (a) the Applicant was required to file and serve all parties to the instant Request for Review with its submissions latest at 4.00 p.m. on Thursday 9th November, 2023 as directed by the Board on 8th November 2023 but



instead filed its Written Submissions dated 9th November 2023 and served upon the Interested Party through the Interested Party's lawyers via email of 9th November 2023 at 5:38 p.m. contrary to the directions of the Board and prays for the striking out of the Applicant's Written submissions in line with the directions of the Board of 8th November 2023; and (b) the allegation that the Interested Pleadings are not properly on record for having been filed outside the three (3) days under Regulation 209 of Regulations 2020 is new, was never pleaded by the Applicant and has only been introduced in the Applicant's submissions and ought not to be entertained.

80. Regulation 205 of Regulations 2020 provide that:

"(1) The Secretary shall, immediately after the filing of the request under regulation 203, serve a notice thereof to the accounting officer of a procuring entity in accordance with section 168 of the Act.

(2) The notification of the filing of the request for review and suspension of procurement proceedings shall be communicated, in writing, by the Review Board Secretary

(3) Upon being served with a notice of a request for review, the accounting officer of a procuring entity shall within five days or such lesser period as may be stated by the Secretary in a particular case, submit to the Secretary a written memorandum of response to the request for review together with such documents as may be specified.

(4) An accounting officer of a procuring entity who fails to submit the document within the stipulated period under paragraph (3), commits an offence and shall be liable to a fine not exceeding four million shillings or to imprisonment for a term not exceeding ten years, or to both.

(5) The Review Board Secretary shall immediately notify all other parties to the review upon receipt of such documents from a procuring entity under paragraph (3)."

81. In essence, the Board's Secretary serves a notice to the accounting officer of a procuring entity in accordance with Section 168 of the Act upon receipt of a request for review. Upon service of the notice of the request for review, the accounting officer is under an obligation to file a response together with all confidential document in the procurement proceedings within five (5) days of the notice or such lesser period as may be specified by the Board Secretary. Failure by the accounting officer to submit a response and documents requested within the stipulated time is an offence which attracts a fine not exceeding four million shillings or imprisonment for a term not exceeding ten years or both. Upon receipt of the confidential documents from a procuring entity, the Board Secretary is under an obligation to immediately notify all other parties to the review.



82. Further Regulation 209(1) of Regulations 2020 provides as follows with regard to a preliminary objection filed with the Board:

"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.

(2) A preliminary objection filed under paragraph (1) shall set out the grounds upon which it is based on and shall be served to the applicant at least one day before the hearing.

(3) The applicant may file a reply to the preliminary objection before the time of the hearing of the request.

(4) The Review Board may hear the preliminary objection either separately or as part of the substantive request for review and give a separate or one decision

(5) The fees chargeable for filing a preliminary objection shall be as set out in the Fifteenth Schedule of these Regulations."

83. Regulation 206 of Regulations 2020 referred to above provides for Hearing Notices issued by the Board 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.”

84. Our interpretation of Regulation 209(1) read with Regulation 206 of Regulations 2020 is that any party notified by the Board Secretary of a date fixed for hearing of a request for review may file a preliminary objection to the hearing of the request for review within three (3) days from the date of being notified by the Board Secretary of the date fixed to hear the request for review. It is our understanding that any preliminary objection filed by any of the parties 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.

85. Turning to the circumstances in the instant Request for Review, we have studied the Board's file and note that the Acting Board Secretary, Mr. James Kilaka vide a notification of appeal and a letter dated 25th October 2023 notified the Respondents via email of the Request for Review and requested them to submit a response within five (5) days from 25th October 2023.



86. We note that on 1st November 2023, the Respondents sought for more time, via email of even date, to file their response. *Vide* a Hearing Notice dated 3rd November all parties to the Request for Review were notified by the Acting Board Secretary of hearing of the matter slated on 8th November 2023 at 2.00 p.m. On the same day of 3rd November 2023, the Respondents filed their responses together with the confidential documents in the subject tender and other tenderer were subsequently notified vide letters dated 2nd November 2023 of the filed Request for Review and requested to file their responses. Further parties were notified vide a hearing Notice dated 3rd November 2023 sent via email of even date that the matter was slated to be heard on 8th November 2023 at 2.00 p.m. It is important to note that 3rd November 2023 fell on a Friday.

87. The Interested Party proceeded on 7th November 2023 to file a Notice of Appointment of Advocate dated 7th November 2023, a Notice of Preliminary Objection dated 7th November 2023 and a Replying Affidavit sworn on 7th November 2023 by Lydia Muthoni Macharia. In determining whether or not the said responses by the Interested Party are time barred, we are guided by the provisions of Section 57 of the Interpretation and General Provisions Act (hereinafter referred to as "IGPA") on computation of time which provides that:

"57. Computation of time

***In computing time for the purposes of a written law,
unless the contrary intention appears—***



- (a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;*
- (b) if the last day of the period is Sunday or a public holiday or all official non-working days (which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day;*
- (c) where an act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;*
- (d) where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time.*

88. In view of the above, in computing time when the Interested Party should have filed its response upon notification of the filed Request for Review and the Hearing Notice, having been notified of hearing of the



matter on 3rd November 2023, the 4th and 5th November 2023 falling on a Saturday and Sunday respectively and being non-working days when the offices of the Board also remain closed, are then deemed as excluded days pursuant to Section 57 of the IGPA. This therefore means that three (3) days within which the Interested Party was required to file its response to the Request for Review started running on 6th November 2023 and lapsed on 8th November 2023. The Interested Party having filed its response and its preliminary objection to the Request for Review on the 7th of November, 2023 was therefore within the stipulated statutory timelines.

89. In view of the late service of the Applicants submissions as argued by the Applicant, we note that the Applicant filed with the Board its Written Submissions on 9th November 2023 at around 3.30 p.m. in compliance with the Board's directions of 8th November 2023. However, the Interested Party contends that it was served with the said submissions at 5:38 p.m. on 9th November 2023. However, no evidence has been presented before the Board by the Interested Party in support of its claim and prayer for striking out of the Applicant's Written Submissions due to the alleged late service contrary to the Board's directions of 8th November 2023.

90. It is elementary and trite law that he who alleges must prove. We are guided by the holding of the Supreme Court in the case of **Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 others [2014] eKLR** which stated:



"The person who makes such an allegation must lead evidence to prove the fact. She or he bears the initial legal burden of proof which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of the law. On the other hand, the evidential burden is a shifting one, and is a requisite response to an already-discharged initial burden. The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue" [Cross and Tapper on Evidence, (Oxford University Press, 12th ed, 2010, page 124)]."

91. In the circumstances, the Board finds that the Interested Party's responses to the instant Request for Review were filed within the required statutory period stipulated in Regulation 205 and 209 of Regulations 202 and that the Applicant's Written Submissions are properly before the Board.

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

92. 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.

93. 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."

94. 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."

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 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. 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."

99. 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.”

100. 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.”

101. 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.

102. 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.

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;

103. The Respondents lodged a Respondents' Notice of Preliminary Objection dated 1st November 2023 objecting to the Request for Review and prayed for the same to be struck out from the record with costs to the Respondents on the grounds *inter alia* that (a) the tender forming 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.

104. The Respondents submitted that the impugned procurement was conducted under a bilateral agreement between the Government of Kenya and the World Bank, was fully funded by proceeds of a loan facility extended by the World Bank to the Government of Kenya as evidenced by the Financing Agreement submitted to the Board as part of the confidential documents pursuant to Section 67(3)(e) of the Act. As such, 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) which have been flouted by the Applicant. The Respondents further submitted that by dint of Section 4(2)(f) together with Section 6 of the Act the Board is divested of jurisdiction to hear and determine the instant Request for Review.

105. On its part, the Interested Party lodged a Notice of Preliminary Objection dated 7th November 2023 praying for the Request for Review



to be struck out for want of jurisdiction on grounds *inter alia* 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.

106. The Interested Party submitted that Section 4(2)(f) of the Act provides for the application of the Act and enumerates procurements with respect to which the Act does not apply, one such procurement being a procurement under a bilateral or multilateral agreement between the Government of Kenya and any other foreign government agency, entity or multilateral agency. The Interested Party further submitted that Section 4(2)(f) of the Act divests the Board of jurisdiction in instances where procurements are under bilateral or multilateral agreements between the Government of Kenya and any other foreign government agency, entity or multilateral agency. While relying on page 12 of the Respondents' Response Appendices containing, *inter alia*, confidential documents submitted to the Board, the Interested Party submitted that that the procurement of the subject



tender is under the Financing Agreement dated 17th August 2020 between the Republic of Kenya and the World Bank (IDA) towards the cost of the Second Kenya Informal Settlement Improvement Project (KISIP2), as a bilateral agreement envisaged under Section 4(2)(f) of the Act.

107. On the other hand, the Applicant in opposing the preliminary objections raised by the Respondents and the Interested Party contend in its Supplementary Affidavit sworn on 8th November 2023 by Margaret Magiri Mwangi that the World Bank Procurement Regulations are required to conform and be aligned to Article 227 of the Constitution and in instances of derogation, then the Constitution prerequisites of the said Article prevail. The Applicant further contends that the Dispute Resolution Mechanism contemplated at Annex III Paragraph 1, 2, and 3 of the World Bank Procurement Regulations derogate from the spirit and express provisions of Article 227 of the Constitution as they purport to confer the procuring entity with the sole mandate of being judge, jury and executor in the resolution of disputes thereby offending the rules of natural justice.

108. The Applicant submitted that the Board is clothed with jurisdiction to hear and determine the issues raised in the instant Request for Review drawing the Board's attention to Section V Clause 5.3 and 5.4 of the World Bank Procurement Regulations on National Procurement Procedures which provides that the use of national procurement laws is permissible as long as requirements like an effective complaints



mechanisms are demonstrated. The Applicant further submitted that the Procuring Entity cannot be an impartial arbiter as it would be conflicted and goes against Article 47, 50(1) and 227 of the Constitution. It is the Applicant's case that the Procuring Entity is not a party to the Financing Agreement dated 17th August 2020 between the Government of Kenya and the World Bank and that the Intergovernmental Participation Agreement dated 25th January 2021 is between the National Government and the County Government of Nakuru and cannot be interpreted to be the bilateral agreement contemplated under Section 4 and 6 of the Act.

109. The Applicant submitted that the doctrine of estoppel was applicable to the instant Request for Review since the Procuring Entity admitted to the jurisdiction of the Board from the contents of the letter of notification of award dated 9th October 2023.

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

111. 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]

112. 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]

113. 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.

114. 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.

115. 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 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.

116. 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.

117. 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]

118. 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.

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

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

120. 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 Electricdad S A and Ansaldoenergia & another**



(Interested Parties) Ex parte Kenya Electricity Generating Company Plc (KenGen)[2021]eKLR (hereinafter referred to as the 'KenGen Case') Justice Ndungu held as follows:

".....

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

121. 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. ”

122. 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 provisions of section 6(1) of the Act is subject to the Constitution.

123. Article 2(5) and (6) of the Constitution provides that:

“(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”

124. This provision supports 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]

125. 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.

126. Turning to the circumstances in the instant Request for Review, we have carefully studied (a) the Financing Agreement (Second Informal Settlements Improvement Project) between Republic of Kenya and International Development Association Credit Number 6759-KE dated 17th August 2020 (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 (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:

127. On 17th August 2020, 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 is the World Bank (under the International Development Association) which is a multilateral agency.

128. It is important for us to point out the circumstances in the instant Request for Review are distinguishable from those in ***PPARB No. 79 of 2023 Kisumu Concrete Products Limited -Vs- The Accounting Officer, County Government Of Kisumu & Others*** (hereinafter "PPARB No. 79 of 2023") relied upon by the Applicant in that the Respondents in PPARB No. 79 of 2023 failed to avail the Financing Agreement, being the foundational document, to the Board for its interrogation to satisfy itself of applicability of Section 4(2)(f) of the Act and for it to reach an informed decision of whether or not it had jurisdiction to hear and determine the request for review before it. Consequently, the Board in PPARB NO. 79 of 2023 was not convinced that the procurement of the subject tender therein fell under the ouster clause of Section 4(2)(f) of the Act read with Regulation 5(1) of Regulations 2020 hence the Board had jurisdiction to hear and determine the Request for Review. Unlike in PPARB NO. 79 of 2023, the Respondents in the instant Request for Review did not withhold any confidential documents for the Board's interrogation.

129. An interrogation of the terms of the Financing Agreement (which we have found to be a bilateral agreement) to establish 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 in line with Schedule 2 at page 7 to 18 of the Financing Agreement. Clause 5 at page 5 to 6 of the said 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....."

130. In view of the above, we observe that the aforementioned agreements paved way for the 1st Respondent 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."

131. 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."

132. 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"

133. Our understanding of the aforementioned provisions of the Implementation Document, the Tender Notice and the Bid Document is 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. This is information that was available to tenderers before the tender submissions closed and no evidence has been presented to the Board challenging by any of the tenderers, the provisions stipulated on the procedure for making a procurement related complaint before the tender closed.

134. We have studied the World Bank Procurement Regulations and note that 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.

135. 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 page 62 proceeds to provide the timelines and process for review and resolution of Complaints.

136. 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...."

137. 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 there is no breach of the provisions of the Constitution as alleged by the Applicant.

138. In the circumstances, we find and hold 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.

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

140. The upshot of our finding is that the Respondents' Notice of Preliminary Objection dated 1st November 2023 and the Interested Party's Notice of Preliminary Objection dated 7th November 2023 succeed and that the instant Request for Review is ripe for striking out for want of jurisdiction.

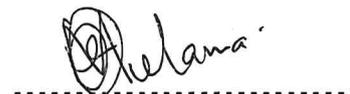
FINAL ORDERS

141. 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 25th October 2023 and filed on even date:

- A. The Respondents' Notice of Preliminary Objection dated 1st November 2023 and the Interested Party's Notice of Preliminary Objection dated 7th November 2023 be and are hereby upheld.**
- B. The Applicant's Request for Review dated 25th October 2023 and filed on even date be and is hereby struck out for want of jurisdiction.**
- C. Given the findings herein, each party shall bear its own costs in the Request for Review.**

Dated at NAIROBI this 14th Day of November 2023.


.....
CHAIRPERSON
PPARB


.....
SECRETARY
PPARB