

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 98/2023 OF 24TH NOVEMBER 2023

BETWEEN

EQUISTAR LIMITED.....APPLICANT

AND

THE ACCOUNTING OFFICER,

COUNTY GOVERNMENT OF KILIFI.....1ST RESPONDENT

COUNTY GOVERNMENT OF KILIFI.....2ND RESPONDENT

DEROW CONSTRUCTION CO. LIMITED.....1ST INTERESTED PARTY

EARTH CONSTRUCTION LIMITED.....2ND INTERESTED PARTY

Review against the decision of the Accounting Officer, County Government of Kilifi in relation to Tender No. KE-Kilifi County-371773-CW-RFB for Construction of Roads/ Footpaths & Drainage Systems, Water Supply and Public Lighting Infrastructure Works in Selected Informal Settlements of Mtaani, Kisumu Ndogo, Kalolo, Kibaoni & Baya Magonzi in Kilifi Town and Muyeye in Malindi Town; All within Kilifi County

BOARD MEMBERS PRESENT

1. Mr. George Murugu, FCI Arb. - Chairperson
2. Ms. Alice Oeri - Member
3. Mr. Daniel Langat - Member

IN ATTENDANCE

Mr. James Kilaka - Acting Board Secretary
Ms. Sarah Ayoo - Secretariat
Mr. Anthony Simiyu - Secretariat

PRESENT BY INVITATION

APPLICANT

EQUISTAR LIMITED

Mr. Kenneth Kithinji -Advocate, Hassan Alawi& Company Advocates

RESPONDENTS

THE ACCOUNTING OFFICER, COUNTY GOVERNMENT OF KILIFI

COUNTY OF GOVERNMENT OF KILIFI

Mr. Hassan Nura -Advocate, Garane & Somane Advocates

1ST INTERESTED PARTY DEROW CONSTRUCTION CO. LIMITED

2ND INTERESTED PARTY EARTH CONSTRUCTION LIMITED

Mr. Hussein -Advocate, YMA Law Advocates LLP

BACKGROUND OF THE DECISION

The Tendering Process

1. The County Government of Kilifi, the Procuring Entity together with the 1st Respondent herein, invited submission of sealed tenders in response

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to Tender No. Tender No. KE-Kilifi County-371773-CW-RFB for Construction of Roads/ Footpaths & Drainage Systems, Water Supply and Public Lighting Infrastructure Works in Selected Informal Settlements of Mtaani, Kisumu Ndogo, Kalolo, Kibaoni & Baya Magonzi in Kilifi Town and Muyeye in Malindi Town; All within Kilifi County using an open international competitive tender method. The subject tender's submission deadline was Monday, 4th September 2023 at 10.30 a.m.

Submission of Tenders and Tender Opening

2. The tenders in the subject tender were to be submitted in Lots. According to the signed Tender Opening Minutes dated 4th September 2023 2023, submitted under the Confidential File submitted by the Procuring Entity, the following 16 tenderers were recorded as having submitted their respective tenders in response to the subject tender under Lot 1 by the tender submission deadline:

No.	Name of Tenderer
1.	Gesima Works & Services Limited
2.	All Weather Investments Co. Limited
3.	Widescope Construction Limited
4.	Derow Construction Limited
5.	Rural Distributors Enterprises Limited
6.	Ekaya Construction Company Limited
7.	Magic General Contractors Limited
8.	Capricon Freight Forwarders Limited
9.	Africent Enterprises Limited
10.	SS Metha & Sons Limited
11.	Octagon Builders & General Suppliers Limited

12.	Awantech Limited
13.	Laton Engineering Limited
14.	Gragab Agencies Company Limited
15.	Waaso Construction Limited
16.	Equistar Limited

3. Under Lot 2, the following 14 tenderers were recorded as having submitted their respective tenders by the tender submission deadline:

No.	Name of Tenderer
1.	Gesima Works & Services Limited
2.	Stone Contractors Limited
3.	Machine Centre Limited
4.	Ekaya Construction Company Limited
5.	Magic General Contractors Limited
6.	Capricon Freight Forwarders Limited
7.	Firm bridge Limited
8.	Earth Construction Limited
9.	Motkens Limited
10.	Octagon Builders & General Suppliers Limited
11.	Awantech Limited
12.	Laton Engineering Limited
13.	Waaso Construction Limited
14.	Equistar Limited

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Evaluation of Tenders

4. The Respondent constituted a Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") to undertake an evaluation of the received tenders in the following 3 stages as captured in the Evaluation Report
 - i. Preliminary Examination of Bids
 - ii. Detailed Examination of Bids
 - iii. Post Qualification of Bidders for Determination of Award

Preliminary Examination of Bids

5. At this stage of the evaluation, the submitted tenders were to be examined using the criteria set out as A. Qualification under Section III – EVALUATION AND QUALIFICATION CRITERIA on page 40 of the Tender Document.
6. The evaluation was to be on a Yes/No basis and tenderers who failed to meet any criteria outlined at this Stage would be disqualified from further evaluation.
7. At the end of the evaluation at this stage under Lot 1, 12 tenders were found unresponsive with only 4 tenders including that of the Applicant and 1st Interested Party qualifying for further evaluation at the next evaluation stage.
8. At the end of the evaluation at this stage under Lot 2, 10 tenders were found unresponsive with only 4 tenders including that of the Applicant

and 2nd Interested Party qualifying for further evaluation at the next evaluation stage.

Detailed Examination of Bids

9. The Evaluation Committee was required at this stage to subject the tenderers successful at the Preliminary Stage to a detailed examination which included correction of Arithmetic errors, Correction for Provisional sums and Modifications and Discounts.
10. The Evaluation Report notes that the tenderers tender sums were each loaded on the standard provisional sum of Kshs. 39,090,000.

Post Qualification of Bidders for Determination of Award

11. At this stage of evaluation, the Evaluation Committee was required to examine the tenders using the Criteria set out as A. Qualification under Section III– EVALUATION AND QUALIFICATION CRITERIA on pages 41 to 45 of the Tender Document.
12. According to the Tender Document, the Post Qualification entailed an examination of the tenderer's financial capability, Average Annual Construction Turnover, General Experience, Specific Construction experience, Qualifications and experience of Key personnel; Major items of construction equipment; History of non-performing contracts; Pending litigation and Financial Performance. The lowest evaluated tenderer from the Detailed Examination of Bids Stage, would be first to be subjected to Post-qualification and where rejected, the next lowest evaluated tenderer would be subjected to post-qualification.

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13. The Applicant was the lowest evaluated tenderer at the Detailed Examination of Bids Stage in respect of both Lot 1 and 2. However, the Applicant's tender was disqualified at the Post-qualification stage with the result that the 1st and 2nd Interested Parties herein were found as the successful tenderers under Lots 1 and 2 respectively.

Evaluation Committee's Recommendation

14. Accordingly, the Evaluation Committee recommended the award of the subject tender for Lots 1 and 2 to the 1st and 2nd Interested Parties at their tender sums of **Kenya Shillings Five Hundred and Fifteen Million, Six Hundred and Sixty-Two Thousand, Six Hundred and Sixty-Two and Thirty Cents only (Kshs. 515,662,662.30)** inclusive of taxes and **Kenya Shillings Three Hundred and Forty-Three Million, Eighty Thousand and Sixty-Nine and Thirty-Five Cents only (Kshs. 343,080,069.35)** inclusive of taxes, respectively.

Professional Opinion

15. In a Professional Opinion dated 13th October 2023 (hereinafter referred to as the "Professional Opinion"), the Procuring Entity's Principal Procurement Officer, Mr. Titus Ngumbao Katana, reviewed the manner in which the subject procurement process was undertaken including the evaluation of tenders and agreed with the Evaluation Committee's recommendation for the award of the subject tender to the Interested Parties.
16. On the same day, on 23rd October 2023, the 1st Respondent concurred with the Professional Opinion.

Notification to Tenderers

17. Accordingly, tenderers were notified of the outcome of the evaluation of tenders submitted in response to the subject tender vide letters dated 3rd October 2023.

REQUEST FOR REVIEW

18. On 24th November 2023, the Applicant through the firm of Hassan Alawi & Company Advocates, filed a Request for Review dated 23rd November 2023 supported by an Affidavit sworn on 23rd November 2023 by Fahim Awadh Ahmed, a Director at the Applicant, seeking the following orders from the Board in verbatim:

- 1. The process of award of the tender and/or the award of tender for Construction of Roads/Footpaths & Drainage Systems, Water Supply and Public Lighting Infrastructure Works in Selected Informal Settlements of Mtaani, Kisumu Ndogo, Kalolo, Kibaoni & Baya Magonzi in Kilifi Town and Muyeye in Malindi Town; all within Kilifi County, RFB NO. KE-KILIFI COUNTY – 371773-CW-RFB for Lot 1 and Lot 2 to the winning bidders by the Respondents be and is hereby cancelled.*

- 2. The Respondents be and are hereby compelled and ordered to award the tender for Construction of Roads/Footpaths & Drainage Systems, Water Supply and Public Lighting Infrastructure Works in Selected Informal Settlements of Mtaani, Kisumu Ndogo, Kalolo, Kibaoni & Baya Magonzi in Kilifi Town and Muyeye in Malindi Town; all within Kilifi County, RFB NO. KE-KILIFI COUNTY – 371773-CW-RFB for*

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Lot 1 and Lot 2 to the Applicant forthwith , and in any event not more than 14 days from the date of the Board's judgment.

IN THE ALTERNATIVE

- 3. The Respondents be and are hereby ordered to prepare, advertise, and float a fresh tender for Construction of Roads/Footpaths & Drainage Systems, Water Supply and Public Lighting Infrastructure Works in Selected Informal Settlements of Mtaani, Kisumu Ndogo, Kalolo, Kibaoni & Baya Magonzi in Kilifi Town and Muyeye in Malindi Town; all within Kilifi County, RFB NO. KE-KILIFI COUNTY – 371773-CW-RFB for Lot 1 and Lot 2 in strict conformity with the Constitution of Kenya, 2010 and all Procurement Laws and Regulations.***
- 4. Any other Orders the Board deems expedient***
- 5. Costs of this Request for Review***

19. In a Notification of Appeal and a letter dated 24th November 2023, Mr. James Kilaka, the Acting Board Secretary of the Board notified the Respondent of the filing of the instant Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said Respondent 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 Respondent was requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 24th November 2023.

20. In response to the Request for Review, on 30th November 2023, the Respondents through the firm of Garane & Somane Advocates filed a Notice of Appointment of Advocates and Preliminary Objection, both dated 30th November 2023.
21. On 1st December 2023, the Applicant filed a Replying affidavit sworn on even date by Kenneth Kithinji-Advocate in response to the Respondents' Preliminary Objection.
22. Vide letters dated 5th December 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 3 days from 5th December 2023.
23. On the same day, 5th December 2023, the Acting Board Secretary, sent out to the parties a Hearing Notice dated 5th December 2023 notifying parties and all tenderers in the subject tender that the hearing of the instant Request for Review would be by online hearing on 8th December 2023 at 12.00 noon through the link availed in the said Hearing Notice. Later on the same day the Acting Board Secretary sent another Hearing Notice rescheduling the Hearing to 8th December 2.00 p.m.
24. Still on 5th December 2023, the Applicants filed Written Submissions dated 4th December 2023.

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25. Subsequently on 6th December 2023, the Respondents filed a Memorandum of Response dated 30th November 2023. The Respondent also submitted the confidential documents in the subject tender pursuant to Section 67(3)(e) of the Act.
26. On 7th December 2023, the Respondents filed Written Submissions dated 6th December 2023.
27. On the same day, 7th December 2023, the Interested Parties herein filed a Notice of Appointment of Advocates through the law firm of YMA Law Advocates LLP.
28. On 8th December 2023 at 2:00 p.m., parties through their respective Advocates joined the online hearing session.
29. The Board read out to the parties the documents that had been filed in the Request for Review and sought for parties' confirmation that those were the documents that had been filed and served upon them. Parties' Advocates confirmed having filed and been served with the said documents
30. Thereafter the Board observing that the Respondents had filed a Preliminary Objection in the matter directed that this would be heard alongside the substantive Request for Review inline wit Regulation 209(4) which allows Preliminary Objections to be heard as part of Requests for Review. The Board also gave directions on the order of address by parties as follows:

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- i. The Respondents would start by arguing their Preliminary Objection in 3 minutes
- ii. The Applicant would thereafter have 13 minutes to respond to the Preliminary Objection and argue its Request for Review;
- iii. The Interested Party would then have 10 minutes to respond to the Request for Review
- iv. The Respondent would have 13 minutes to offer a rejoinder on its Preliminary Objection and respond to the Request for Review
- v. The Applicant would close by having 3 minutes to offer a rejoinder on its Request for Review.

PARTIES SUBMISSIONS

Respondents' Submissions on their Preliminary Objection

31. Counsel for the Respondents, Mr. Nura, relying on the cases of ***Vastergarrd Frandsen (SA) v The Public Procurement Supply Management Consortium and Ministry of Health*** and ***Lordship Africa Limited v Public Procurement Administrative Review Board & 20rs [2018] eKLR*** contended that the instant Request for Review was time-barred as it was filed outside the 14 days' statutory timeline provided for under Section 167(1) of the Act and Regulation 203(2) of the Regulations 2020.
32. He submitted that the Applicant had through paragraphs 3 to 6 of the affidavit of Fahim Awadh Ahmed in support of the Request for Review admitted that it was aware that the Request for Review was filed more than a month after the Procuring Entity's sent the Notification of Intention to Award the subject tender.

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33. Counsel submitted that this Board has no jurisdiction to enlarge the timeline under Section 167(1) of the Act while relying on the High Court case of ***Republic v Public Procurement Administrative Review Board & 2 Ors [2015] eKLR.***

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

34. Counsel for the Applicant, Mr. Kithinji, indicated that the Applicant would be relying on the Applicant's filed documents i.e. Request for Review dated 23rd November 2023, Replying Affidavit sworn on 1st December 2023 by Kenneth Kithinji, Written Submissions dated 4th December 2023,
35. Mr. Kithinji argued that Section 167(1) of the Act allows an Applicant to seek administrative review within 14 days from the date of notification or date of occurrence of a breach of a statutory duty on the part of the Procuring Entity. He argued that the Applicant herein was invoking the second limb i.e. 14 days from the occurrence of a breach of a statutory duty on the part of the Procuring Entity. According to Counsel, the instant Request for Review was premised on the Procuring Entity's letter dated 14th November 2023.
36. Counsel argued that the 14-day statutory timeline was not triggered at the point of the Procuring Entity issuing a notification. He also made an alternative argument that in the event the instant Request for Review was filed outside time, this Board had jurisdiction to enlarge time for its filing. For this he urged the Board to consider the High Court cases in ***Brian Weke & anor v Attorney General & anor [2014] eKLR; ADK Technologies Limited in Consortium with Transnational***

Computer Technologies Limited v Public Procurement Administrative Review Board & 4 Ors [2021] eKLR and Republic v Public Procurement Administrative Review Board Ex parte Syner-Chemie Limited [2016] eKLR.

37. Mr. Kithinji argued that the Applicant subjected itself to the internal dispute resolution to avert the eventuality of being met with a response that it had not exhausted the internal dispute resolution mechanism.
38. He further argued that it was not possible for the Regulations of a financier such as the World Bank to oust the applicability of the Constitution of Kenya 2010 or Kenya's public procurement laws. Further that Financing Agreement entered in to between the Republic of Kenya and the International Development Association was not a treaty and was also not ratified by Parliament. Additionally, that paragraph 2.3.4 contained a vague arbitration clause which is open ended in terms of time within which the arbitration should be conducted.
39. Counsel submitted that the tender process was flawed as no due diligence process was carried out on the successful tenderers. He argued that the Applicant sought for information concerning the subject tender from the Procuring Entity and that this was not provided.
40. Mr. Kithinji submitted that the Applicant's tenders in respect of Lot 1 and 2 of the subject tender were the most responsive and thus the Applicant had a legitimate expectation of being the successful tenderer in both lots. Counsel invited the Board to interrogate the circumstances under which the evaluation process found the Applicant's tenders as unresponsive.

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41. He further submitted that no due diligence was carried out in the subject tender and that no professional opinion from the Procuring Entity's head of procurement was prepared and shared with the Accounting Officer. Counsel indicated that the Procuring Entity's letter of 14th November 2023 confirmed that no due diligence was conducted and that this was fatal omission in the subject tender. He relied upon the cases of ***Republic v Public Procurement Administrative Review Board & Anor; Rentco Africa Limited (Ex parte) Judicial Review Misc. Application E100 of 2022 [2022] KEGC 12978 (KLR) (Judicial Review); Republic v Public Procurement Administrative Review Board; Kenya Pipeline Company Ltd & anor (Interested Parties) Ex parte Krohne (PTY) Ltd [2018] eKLR;*** and ***Republic v Public Procurement Administrative Review Board & anor Ex-parte University of Eldoret [2017] eKLR***
42. Mr. Kithinji questioned the basis of there being an external consultant assisting in the evaluation of the tenders submitted in the subject tender and why the Applicant was not given a chance to clarify on the responsiveness of its tender document.
43. He invited the Board to take cognizance of the fact that that the Respondents had not given any evidence on oath in the instant Request for Review. Accordingly, Counsel urged the Board to allow the Request for Review.

Interested Parties' Submissions on the Request for Review

44. Counsel for the Interested Parties, Mr. Hussein, submitted that the Interested Party followed the due process and no evidence had been

tendered to substantiate the Applicant's allegation that the Interested Parties tenders were unresponsive to the tender requirements.

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

45. Counsel for the Respondent, Mr. Nura, submitted that the Notification of Intention to Award contained information on successful tenderers and their respective tender prices. He indicated that the Applicant was not the lowest evaluated tenderer in any of the lots in the subject tender.

46. He also submitted that the Applicant was not successful under Lot 1 because:

- i. Its proposed safety officer, Ms. Sharon Omondi, was not a holder of a diploma certificate in occupational health and safety and was also not a certified occupational health and safety officer.
- ii. It also failed to demonstrate ownership of the construction equipment it intended to use in the event it was successful in the subject tender

47. Mr. Nura submitted that the Applicant was not successful under Lot 2 because:

- i. It supplied an expired NEMA License Certificate for Godwin Lidahuli
- ii. There was no proof that its proposed occupational health and safety officer, Emmanuel Simiyu held a diploma certificate in occupational health and safety.
- iii. There was no proof that its proposed occupational health officer was a certified officer of occupational health and safety.

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iv. The Applicant failed to demonstrate ownership of the construction equipment to be used in the event it was successful in the subject tender.

48. Counsel submitted that the Applicant was not the lowest evaluated tenderer as it did not meet the tender requirements and this fact was explained to it when it sought clarification why its tender was not successful. Relying on the High Court Case ***Nairobi Misc. Civil Application No. 60 of 2020*** it was argued that a tenderer who fails to meet the requirements under a tender document cannot seek review after failing to qualify.

49. Mr. Nura further pointed to the Board that the contracts in respect of Lots 1 and 2 under the subject tender were executed on 23rd November 2023 and 21st November 2023 respectively and before service of the stay of proceedings orders in respect of the subject tender.

50. The Respondents therefore urged that the Request for Review should fail and sought that the Board upholds the Respondents' Preliminary Objection.

Applicant's Rejoinder

51. In a brief rejoinder, Counsel for the Applicant, Mr. Kithinji submitted that had the Procuring Entity sought clarification on the Applicant's tender, then it would have been apparent that the Applicant's tender was responsive. According to Counsel, the Applicant supplied the equipment lease agreements and/or ownership documents.

CLARIFICATIONS

52. The Board sought clarity from the Applicant on whether its submitted tender document was responsive to all the tender requirements to which question Mr. Kithinji responded in the affirmative.
53. Additionally, the Board sought to know the documents that the Applicant sought to be furnished by the Procuring Entity but was not furnished. Mr. Kithinji pointed these documents to include the Due Diligence Report, Professional Opinion and the Evaluation Committee's scoring mechanism.
54. Further, the Board inquired in to why the Applicant did not file its Request for Review within 14 days from the time it received the Notification of Intention to Award the subject tender. Mr. Kithinji pointed out that the Applicant wanted to exhaust the internal dispute resolution mechanism before invoking the Board's jurisdiction.
55. The Board observed that the Applicant's Counsel, Mr. Kithinji had deponed an affidavit in the instant Request for Review and sought to understand the circumstances under which as Counsel he chose to adduce evidence on behalf of his client. Mr. Kithinji responded that he had difficulties in securing the Director from his Client to sign the affidavit.
56. The Board inquired whether the Applicant was aware that the subject tender was being financed by the World Bank and was being done under the World Bank Regulations to which Mr. Kithinji answered in the affirmative but added that the said World Bank Regulations did not oust the jurisdiction of the Board.

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57. The Board further asked whether the Applicant was familiar with section 4(2)(f) and regulation 5(1) of the Act to which Mr. Kithinji responded that he was inviting the Board to depart from its previous decisions on the interpretation of the said section.

58. At the conclusion of the hearing, the Board notified the parties that the instant Request for Review having been filed on 24th November 2023 had to be determined by 15th December 2023. Therefore, the Board would communicate its decision on or before 15th December 2023 to all parties via email.

BOARD'S DECISION

59. The Board has considered all documents, oral submissions and pleadings together with confidential documents submitted to it 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 determining this issue, the Board will consider:

- a) Whether the Request for Review was filed within the 14 days' statutory timeline provided for under Section 167(1) of the Act and Regulation 203 of the Regulations 2020?
- b) Whether the Board's jurisdiction was ousted by virtue of Section 4(2)(f) as read together with regulation 5(1) of the Act?
- c) Whether the procurement contracts between the Procuring Entity and the Interested Parties were executed in accordance with Section 135 of the Act as to divest the Board its jurisdiction by dint of Section 167(4)(c) of the Act?

- II. ***Whether the Procuring Entity properly evaluated the Applicant's tender document submitted in response to the subject tender in accordance with Section 80 of the Act and the provisions of the Tender Document?***
- III. ***What orders should the Board issue in the circumstance?***

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

60. The Respondents filed a Preliminary Objection dated 30th November 2023 premised on 2 grounds i.e. (i) that the Request for Review was time-barred and (ii) that the World Bank's Procurement Regulations for IPF Borrowers, 2016 clauses 2.24, 2.25 and 2.26 provided for a separate dispute resolution mechanism.
61. This Board acknowledges the established legal principle that courts and decision-making bodies can only preside over 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.
62. 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***

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decisions and declare judgment; The legal rights by which judges exercise their authority."

63. On its part, Halsbury's Laws of England (4th Ed.) Vol. 9 defines jurisdiction 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."

64. The locus classicus case on the question of jurisdiction is the celebrated case of ***The Owners of the Motor Vessel "Lillian S" -v- Caltex Oil Kenya Ltd (1989) KLR 1*** where Nyarangi J.A. made the oft-cited dictum:

"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."

65. In the case of ***Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 Others [2013] eKLR***, the Court of Appeal emphasized the centrality of the issue of jurisdiction and held that:

"...So central and determinative is the issue of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings is concerned. It is a threshold question

and best taken at inception. It is definitive and determinative and prompt pronouncement on it, once it appears to be in issue, is a desideratum imposed on courts out of a decent respect for economy and efficiency and a necessary eschewing of a polite but ultimately futile undertaking of proceedings that will end in barren cul de sac. Courts, like nature, must not act and must not sit in vain...."

66. 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."

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

"The functions of the Review Board shall be— reviewing, hearing and determining tendering and asset disposal disputes; and to perform any other function conferred to the Review Board by this Act, Regulations or any other written law."

68. The Board shall now examine each of the grounds for the jurisdictional challenge.

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a. Whether the Request for Review was filed within the 14 days' statutory timeline provided for under Section 167(1) of the Act and Regulation 203(2) of the Regulations 2020?

69. During hearing, Counsel for the Respondents, Mr. Nura, submitted that the Notifications of Intention to Award the subject tender in respect of Lots 1 and 2 were sent on 23rd October 2023 even though the Applicant indicated that it only got the notifications on 31st October 2023. Counsel indicated that even if the 14 days' statutory timeline provided for under Section 167(1) of the Act and Regulation 203(2) of the Regulations 2020, was to be computed from the said 31st October, 2023, the instant Request for Review was still time-barred.
70. He submitted that the Applicant had through paragraphs 3 to 6 of the affidavit of Fahim Awadh Ahmed in support of the Request for Review admitted that it was aware that the Request for Review was filed more than a month after the Procuring Entity's Notification of Intention to Award the subject tender.
71. Counsel for the Interested Party, Mr. Hussein left it to the Board to determine the Preliminary Objection in its entirety.
72. In opposing this ground of the Preliminary Objection, Counsel for the Applicant, Mr. Kithinji argued that Section 167(1) of the Act allows an Applicant to seek administrative review within 14 days from the date of notification or date of occurrence of a breach of a statutory duty on the part of the Procuring Entity. He argued that the Applicant herein was invoking the second limb i.e. 14 days from the occurrence of a breach of a statutory duty on the part of the Procuring Entity. According to Counsel, the instant Request for Review was premised on the Procuring Entity's

letter dated 14th November 2023 and from which date the Request for Review was filed within the 14 days' statutory timeline.

73. Counsel argued that the 14-day statutory timeline was not triggered at the point of the Procuring Entity issuing a notification. He also made an alternative argument that in the event the instant Request for Review was filed outside time, this Board had jurisdiction to enlarge time for its filing.

74. The Board shall now interrogate the circumstances under which the instant Request for Review was filed to establish whether it is time-barred.

75. A reading of section 167(1) of the Act denotes that the jurisdiction of the Board should be invoked within a specified timeline of 14 days:

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.

76. Regulation 203(2) (c) of the Regulations 2020 equally affirms the 14-days timeline in the following terms:

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"Request for a review

1) A request for review under section 167(1) of the Act shall be made in the Form set out in the Fourteenth Schedule of these Regulations.

2) The request referred to in paragraph (1) shall—

a) state the reasons for the complaint, including any alleged breach of the Constitution, the Act or these Regulations;

b) be accompanied by such statements as the applicant considers necessary in support of its request;

c) be made within fourteen days of —

i. the occurrence of the breach complained of, where the request is made before the making of an award;

ii. the notification under section 87 of the Act; or

iii. the occurrence of the breach complained of, where the request is made after making of an award to the successful bidder"

77. Our interpretation of the above provisions is that an Applicant seeking the intervention of this Board in any procurement proceedings must file their request within the 14-day statutory timeline. Accordingly, Requests for Review made outside the 14 days would be time-barred and this Board would be divested of the jurisdiction to hear the same.

78. It is therefore clear from a reading of section 167(1) of the Act, Regulation 203(1)(2)(c) & 3 of Regulations 2020 and the Fourteenth Schedule of Regulations 2020 that an aggrieved candidate or tenderer invokes the

jurisdiction of the Board by filing a Request for Review with the Board Secretary within 14 days of (i) occurrence of breach complained of, having taken place before an award is made (ii) notification of intention to enter in to a contract having been issued or (iii) occurrence of breach complained of, having taken place after making of an award to the successful tenderer. Simply put, an aggrieved candidate or tenderer can invoke the jurisdiction of the Board in three (3) instances namely (i) before notification of intention to enter in to a contract is made (ii) when notification of intention to enter into a contract has been made and (iii) after notification to enter into a contract has been made. The option available to an aggrieved candidate or tenderer in the aforementioned instances is determinant on when occurrence of breach complained took place and should be within 14 days of such breach.

79. It was not the intention of the legislature that where an alleged breach occurs before notification to enter in to contract is issued, the same is only complained after the notification to enter into a contract has been issued. We say so because there would be no need to provide 3 instances within which such Request for Review may be filed.
80. Section 167(1) of the Act and Regulation 203 of the 2020 Regulations 2020 identify the benchmark events for the running of time to be the date of notification of the award or the date of occurrence of the breach complained of.
81. Turning to the case at hand, the gravamen of the Applicant's Request for Review is that the it was erroneously disqualified in the subject tender. The above, all stem from the communication contained in the

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Notifications of Intention to Award dated 23rd October 2023, which were sent to tenderers by email.

82. The Applicant pleaded at paragraphs 3 and 4 of the supporting affidavit sworn on 23rd November 2023 by Fahim Awadh Ahmed in support of the Request for Review that the Applicant received its Notifications on 31st October 2023:

"3. THAT the Applicant was served with a letter on 31st October 2023 titled "Notification of Intention to Award" dated 23rd October 2023 in respect of Lot 1 of the subject tender. Annexed hereto and marked "FAA3" is a copy of the said letter.

4. THAT likewise the Applicant was served with a letter on 31st October 2021 (sic) titled "Notification of Intention to Award" dated 23rd October 2023 in respect of Lot 2 of the subject tender. Annexed hereto and marked "FAA4 is a copy of the said letter."

83. Even though the Respondents argued that the that the Notifications were sent through email on 23rd October 2023 the evidence on record shows that they were not delivered to the Applicant on this day. The Applicant produced annexure FAA4(b), an email transcript annexed to the affidavit of Fahim Awadh Ahmed in support of the Request for Review, showing that there was an email delivery report indicating that the emails sent to the Applicant on 23rd October 2023 through the email addresses equistar09@roctmail.com and equistar09@rocketmail.com were not delivered.

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84. However, a cursory look at the Applicant's letter dated 2nd November 2023 to the Procuring Entity, the Applicant alludes to have received the notification on 31st October 2023. The letter is annexed as annexure FAA5 to the affidavit of Fahim Awadh Ahmed in support of the Request for Review. Reproduced below is an excerpt of the letter:

"...
**RE: COMPLAINT IN RESPECT OF TENDER NAME;
CONSTRUCTION OF ROADS/FOOTPATHS & DRAINAGE
SYSTEMS, WATER SUPPLY AND PUBLIC LIGHTING
INFRASTRUCTURE WORKS IN SELECTED INFORMAL
SETTLEMENTS OF MTAANI, KISUMU NDOGO, KALOLO
KIBAONI & BAYA MAGONZI IN KILIFI TOWN AND MUYEYE IN
MALINDI TOWN; ALL WITHIN KILIFI COUNTY: , RFB NO. KE-
KILIFI COUNTY-371773-CW-RFB FOR LOT 1 AND LOT 2**

...
*The Complainant was served with/received a letter on 31st
October 2023 titled "Notification of Intention to Award" dated
23rd October 2023 and therefore any timelines relating to the
captioned tender start running from the date of
service/receipt.*

*The Complainant hereby expresses its reservations with the
procurement process relating to the said tender and hereby
brings forth this complaint for your urgent attention. The
Complainant is dissatisfied with the process of the tender
evaluation and award in respect of the captioned tender. It is
the position of the Complainant that its bid was the most
responsive and the one capable of garnering the highest
technical score and therefore it ought to have been the
successful tenderer...*

...

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Yours faithfully

Signed

FAHIM WADH AHMED

DIRECTOR"

85. From the above, it is clear that as at 2nd November, 2023 the Applicant's Director confirmed that the Applicant had received the Notification in respect of the subject tender on 31st October 2023 which fact is further affirmed by the depositions of Fahim Awadh Ahmed at paragraph 3 and 4 of his supporting affidavit sworn on 23rd November 2023 reproduced and highlighted above.
86. This Board takes the view that 31st October 2023 should be the benchmark date of when the 14 days' statutory timelines should run as it is the date when the Applicant confirms having received the notifications. We say so because knowledge of an alleged breach is the trigger of the running of the statutory timeline as was affirmed by the High Court in ***Nairobi High Court Judicial Review Application No. 102 of 2023; Republic v Public Procurement Administrative Review Board and Anor Ex parte Sheemax Consulting.***
87. In the above recent case, which is binding on this Board, the High Court endorsed the long strand of cases that hold that the 14 days' statutory timeline under Section 167 of the Act and Section 203 of the Regulations 2020 starts to run when a candidate or tenderer learns of the breach being complained of:

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"120. In Republic v Public Procurement Administrative Review Board & 2 others Ex- parte Kemotrade Investment Limited [2018] eKLR the High Court noted that to determine when time starts to run, such determination can only be made upon examination of the alleged breach and when the aggrieved tenderer had knowledge of the said breach"

88. From the foregoing, the Board finds no reason to doubt that the Applicant was at 31st October 2023 aware of the outcome of the evaluation process in the subject tender. The Board will now proceed to compute the timeline within which the instant Request for Review ought to have been filed before it. In computing the 14 days contemplated under the Act, we take guidance from section 57 of the Interpretation and General Provisions Act:

"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”

89. When computing time when the Applicant ought to have sought administrative review before the Board, 31st October 2023 is excluded as per section 57(a) of the IGPA being the day that the Applicant plausibly learnt of the occurrence of the alleged breach. This means time started to run on 31st October 2023 and lapsed on 14th November 2023. In essence, the Applicant had between 31st October 2023 and 14th November 2023 to seek administrative review before the Board. The instant Request for Review was filed on 24th November 2023 which was 10 days past the deadline of bringing the instant Request for Review and therefore outside the 14 days' statutory timeline. Consequently, this ground of the Respondents' Preliminary Objection succeeds.

b. Whether the Board's jurisdiction was ousted by virtue of Section 4(2)(f) of the Act?

90. The Respondents indicated under Ground 3 of its Preliminary Objection that this Board lacked jurisdiction on account that the subject tender was governed by the World Bank Procurement Regulations for IPF Borrowers, 2016. The Board was referred to Clauses 2.24, 2.26 and 2.27 of the Regulations which provided for the mode of dispute resolution.

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91. Clauses 2.24, 2.25 and 2.26 of the World Bank Procurement Regulations for IPF Borrowers provide as follows:

"Applicable Law and Settlement of Disputes

2.24 The conditions of contract for international competitive procurement shall include provisions dealing with the applicable law and the forum for the settlement of disputes. All international competitive procurement contracts are required to include appropriate mechanisms for independent dispute resolution either, Dispute Review Experts or Dispute Review Boards.

2.25 International commercial arbitration in a neutral venue shall also be required unless the national regulations and arbitration procedures are acceptable to the Bank in terms of equivalence to international commercial arbitration and the venue is neutral, or the contract has been awarded to a Bidder/Proposer/Consultant from the Borrower's country.

2.26 The Bank shall not be named arbitrator or be asked to name an arbitrator. It is understood, however, that officials of the International Center for Settlement of Investment disputes (ICSID) shall remain free to name arbitrators in their capacity as ICSID officials."

92. This Board's attention is drawn to Section 4(2)(f) of the Act which 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) ...

(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.

93. This Board also draws guidance from the case of *Republic v Public Procurement Administrative Review Board & 2 others Ex parte Kenya Power & Lighting Company [2019] eKLR* where the High Court offered clarity on the application of section 4(2)(f) of the Act. In the case, this Board's decision was under challenge for the reason that the Board assumed jurisdiction to hear a Request for Review on account of the fact that donor funds were being applied in the tender under challenge. In finding that the Board's decision in the matter was ultra vires, the High Court clarified that when confronted with a jurisdictional challenge under section 4(2)(f) of the Act the primary consideration should be given to whether the procurement process was founded on a bilateral agreement between the Government of Kenya and a foreign entity:

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

64. It was in this respect incumbent upon the Respondent to satisfy itself that section 4(2)(f) was not applicable before

assuming jurisdiction, especially as the said section was an evidential ouster clause that was dependant on a finding 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..."

94. Turning to the instant Request for Review, the Respondents supplied the Board with a signed Financing Agreement dated 17th August 2020 between the Republic of Kenya and the International Development Association.

95. The Respondents equally supplied the Board with an Intergovernmental Participation Agreement dated 25th January 2021 between the National Government of the Republic of Kenya and the County Government of Kilifi on the implementation of the project under the subject tender. The preamble of this Agreement acknowledges that the project was being undertaken pursuant to the Financing Agreement between the Government of Kenya and the International Development Association:

"Whereas

A. The Republic of Kenya has negotiated and signed a Financing Agreement dated August 17, 2020 (the "Financing Agreement") with the International Development Association (IDA) (hereinafter called the "IDA") for an amount of USD 150 million equivalent (the "Financing") to fund the Second Informal Settlements Improvement Project (hereinafter called "KISIP2" or the "Project") on the terms and conditions set forth in the Financing Agreement"

See

96. From the foregoing, it is apparent that the project being undertaken in the subject tender can be traced to the Financing Agreement dated 17th August 2020 between the Government of Kenya and the International Development Association. This agreement is by its very nature a bilateral agreement between the Government of Kenya and foreign agency and thus the subject tender process is caught by the provisions of Section 4(2)(f) of the Act as read with Regulation 5(1) of the Regulations 2020 which provides:

"5. Bilateral and multilateral agreements

(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.

97. . The provisions of the Act including the institution of administrative review proceedings such as the instant Request for Review are therefore inapplicable in respect of the subject tender. Consequently, this ground of the Preliminary Objection equally succeeds.

c. Whether the procurement contracts between the Procuring Entity and the Interested Parties were executed in accordance with Section 135 of the Act as to divest the Board its jurisdiction by dint of Section 167(4)(c) of the Act?

98. The Respondents through paragraphs 16 and 17 of their Memorandum of Response brought it to the attention of the Board that the Procuring Entity

and the Interested Parties had already executed the procurement contracts in respect of Lots 1 and 2 of the subject tender as at the time of filing the instant Request for Review.

99. This Board is mindful of the provisions under Section 167(4)(c) of the Act that exclude the Board from exercising its jurisdiction over Requests for Review in instances where procurement contracts have already been signed in accordance with the law. The section reads:

"(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."

100. On its part Section 135 of the Act provides as follows:

"135. Creation of procurement contracts
(1) The existence of a contract shall be confirmed through the signature of a contract document incorporating all agreements between the parties and such contract shall be signed by the accounting officer or an officer authorized in writing by the accounting officer of the procuring entity and the successful tenderer.
(2) An accounting officer of a procuring entity shall enter into a written contract with the person submitting the successful

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tender based on the tender documents and any clarifications that emanate from the procurement proceedings.

(3) The written contract shall be entered into within the period specified in the notification but not before fourteen days have elapsed following the giving of that notification provided that a contract shall be signed within the tender validity period.

(4) No contract is formed between the person submitting the successful tender and the accounting officer of a procuring entity until the written contract is signed by the parties.

(5) An accounting officer of a procuring entity shall not enter into a contract with any person or firm unless an award has been made and where a contract has been signed without the authority of the accounting officer, such a contract shall be invalid.

(6) The tender documents shall be the basis of all procurement contracts and shall, constitute at a minimum—

- (a) Contract Agreement Form;**
- (b) Tender Form;**
- (c) price schedule or bills of quantities submitted by the tenderer;**
- (d) Schedule of Requirements;**
- (e) Technical Specifications;**
- (f) General Conditions of Contract;**
- (g) Special Conditions of Contract;**
- (h) Notification of Award.**

(7) A person who contravenes the provisions of this section commits an offence.”

101. From the above provisions it is clear that the Board's jurisdiction is divested under Section 167(4)(c) of the Act only where it is demonstrated that a contract has been executed in compliance with section 135 of the Act. Section 135 on its part imposes the conditions that a contract must be signed within the tender validity period but not before the lapse of fourteen (14) days following the Procuring Entity's giving of a Notification of Intention to Award the tender in question.
102. In the instant Request for Review, as pointed out above the 14 days stand still period started running from 31st October 2023 and lapsed on 14th November 2023. Accordingly, the Procuring Entity and the Interested Parties could only validly sign contracts in respect of the subject tender on any date after 14th November 2023.
103. The Respondents produced before the Board signed procurement contracts in respect of Lots 1 and 2 dated 23rd November 2023 and 21st November 2023 respectively. The dates appearing on these procurement contracts indicate that they were signed after 14th November 2023. Further, though the Tender Document does not clearly stipulate the tender validity period in the subject tender, there was no suggestion made by any party in the proceedings that the said contracts were made outside the tender validity period. It therefore follows that the procurement contracts between the Procuring Entity and the Interested Parties herein were validly executed in accordance with Section 135 of the Act as to divest the Board its jurisdiction.



104. In light of the foregoing analysis, the Board finds that it lacks jurisdiction to hear and determine the instant Request for Review and therefore proceeds to down its tools.

Whether the Procuring Entity properly evaluated the Applicant's tender document submitted in response to the subject tender in accordance with Section 80 of the Act and the provisions of the Tender Document?

105. In view of the Board's finding above that it lacks jurisdiction to hear and determine the instant Request for Review, we shall not address this issue.

What orders the Board should grant in the circumstances?

106. The Board has found that it lacks jurisdiction to hear and determine the instant Request for Review as (i) the Request for Review was filed outside the 14 days' statutory timeline; (ii) the subject tender was founded on a bilateral agreement between the Government of Kenya and a foreign agency; and (iii) Valid procurement contracts had already been executed in respect of the subject tender.

107. The upshot of our finding is that the Request for Review dated 23rd November 2023 in respect of Tender No. KE-Kilifi County-371773-CW-RFB for Construction of Roads/ Footpaths & Drainage Systems, Water Supply and Public Lighting Infrastructure Works in Selected Informal Settlements of Mtaani, Kisumu Ndogo, Kalolo, Kibaoni & Baya Magonzi in Kilifi Town and Muyeye in Malindi Town; All within Kilifi County fails in the following specific terms:

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FINAL ORDERS

108. 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 23rd November 2023:

- 1. The Respondents' Preliminary Objection dated 30th November 2023 be and is hereby upheld.**
- 2. The Request for Review dated 23rd November 2023 be and is hereby struck out.**
- 3. The Procuring Entity is at liberty to proceed with the Tender No. KE-Kilifi County-371773-CW-RFB for Construction of Roads/ Footpaths & Drainage Systems, Water Supply and Public Lighting Infrastructure Works in Selected Informal Settlements of Mtaani, Kisumu Ndogo, Kalolo, Kibaoni & Baya Magonzi in Kilifi Town and Muyeye in Malindi Town; All within Kilifi County to its logical conclusion.**
- 4. Given the Board's finding above, each party shall bear its own costs.**

Dated at NAIROBI, this 14th Day of December 2023.


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PANEL CHAIRPERSON
PPARB


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SECRETARY
PPARB





