

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 109/2023 OF 13<sup>TH</sup> DECEMBER 2023**

**BETWEEN**

**NIAVANA AGENCIES LIMITED ..... APPLICANT**

**AND**

**ACCOUNTING OFFICER, KENYA POWER**

**& LIGHTING COMPANY PLC..... 1<sup>ST</sup> RESPONDENT**

**KENYA POWER & LIGHTING COMPANY PLC ..... 2<sup>ND</sup> RESPONDENT**

Review against the decision of the Accounting Officer, Kenya Power & Lighting Company Plc in relation to Tender No. KPI/9A.3/OT/07/23-24 for Supply of Single Phase and Three Phase Smart Meters (Local Manufacturers and Assemblers).

**BOARD MEMBERS PRESENT**

- |                        |   |                   |
|------------------------|---|-------------------|
| 1. Mr. Joshua Kiptoo   | - | Panel Chairperson |
| 2. Ms. Alice Oeri      | - | Member            |
| 3. CPA Alexander Musau | - | Member            |

**IN ATTENDANCE**

- |                     |   |                        |
|---------------------|---|------------------------|
| 1. Mr. James Kilaka | - | Acting Board Secretary |
|---------------------|---|------------------------|

2. Mr. Philemon Kiprop - Secretariat
3. Ms. Sarah Ayoo - Secretariat
4. Ms. Evelyn Weru - Secretariat

## **PRESENT BY INVITATION**

### **APPLICANT**

### **NIAVANA AGENCIES LIMITED**

Mr. Omollo

-Advocate, Sigano & Omollo LLP Advocates

### **RESPONDENTS**

### **ACCOUNTING OFFICER, KENYA POWER**

### **& LIGHTING COMPANY PLC& KENYA**

### **POWER & LIGHTING COMPANY PLC**

Ms. Lynn Owano

- Advocate, Kenya Power & Lighting  
Company PLC

## **BACKGROUND OF THE DECISION**

### **The Tendering Process**

1. Kenya Power & Lighting Company PLC, the Procuring Entity and the 2<sup>nd</sup> Respondent herein invited bids from interested and eligible tenderers in response to Tender No. KPI/9A.3/OT/07/23-24 for Supply of Single Phase and Three Phase Smart Meters (Local Manufacturers and Assemblers) (hereinafter referred to as the "subject tender"). The invitation was by way of an advertisement on 7<sup>th</sup> November 2023 on My Gov Newspaper, on the Procuring Entity's

website [www.kplc.co.ke](http://www.kplc.co.ke) and from the KPLC E-Procurement Portal – RFX No. 1000002412 where the blank tender document for the subject tender issued to tenderers by the Procuring Entity (hereinafter referred to as the ‘Tender Document’) was available for download. Additionally, the invitation to tender was open to Local Meter Manufacturers and Assemblers only in two categories being (a) Category 1 – Manufacturers with more than two (2) years’ Experience and successfully supplied to completion, new meters to a public entity in Kenya before, and (b) Category 2 – Manufacturers with less than two (2) years’ Experience and may NOT have successfully supplied to completion, new meters to a public entity in Kenya before.

2. The 2<sup>nd</sup> Respondent used an electronic-procurement system referred to as SAP Tendering Portal on [www.kplc.co.ke](http://www.kplc.co.ke) to manage issuance of tendering document, submission of tenders and opening of tenders. Prospective bidders were required to log on and register via the said e-procurement system to be able to participate on the subject tender.

3. The subject tender’s submission deadline was scheduled for 1<sup>st</sup> December 2023 at 10.00 a.m.

## **Addenda & Clarifications**

4. The 2<sup>nd</sup> Respondent issued two Addenda that amended some provisions of the Tender Document namely: (a) Addendum No.1 dated 27<sup>th</sup> November 2023 (hereinafter referred to as "Addendum No. 1") and (b) Addendum No. 2 dated 28<sup>th</sup> November 2023(hereinafter referred to as "Addendum No. 2").

### **Submission of Tenders and Tender Opening**

5. According to the Minutes of the subject tender's opening held on 1<sup>st</sup> December 2023 signed by members of the Tender Opening Committee on 1<sup>st</sup> December 2023 (hereinafter referred to as the 'Tender Opening Minutes') and which Tender Opening Minutes were part of confidential documents furnished to the Public Procurement Administrative Review Board (hereinafter referred to as the 'Board')by the 1<sup>st</sup>Respondent pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act'),a total of eight (8) tenders were submitted in response to the subject tender. The said eight (8) tenders were opened in the presence of tenderers' representatives present at the tender opening session, and were recorded as follows:

<b>Bidder No.</b>	<b>Name</b>
1.	M/s Yocean Group Ltd
2.	M/s Hexing Technology Company Ltd
3.	M/s Inhemeter Africa Company Ltd

4.	M/s Smart Meter Technology Ltd
5.	M/s Chartford Limited
6.	M/s East Africa Meter Company Ltd
7.	M/s Magnate Ventures Ltd
8.	M/s House of Procurement Ltd

### **Suspension of Procurement Proceedings**

6. The procurement proceedings of the subject tender were suspended pursuant to Section 168 of the Act when a Request for Review No. 109 of 2023 dated 11<sup>th</sup> December 2023 was filed on 13<sup>th</sup> December 2023 before the Board.

### **REQUEST FOR REVIEW NO. 109 OF 2023**

7. On 13<sup>th</sup> December 2023, Niavana Agencies Limited, the Applicant herein, filed Request for Review No. 109 of 2023 dated 11<sup>th</sup> December 2023 together with a Supporting Affidavit sworn on 11<sup>th</sup> December 2023 by Benedict Kabugi Ndungu, its Managing Director (hereinafter referred to as "the instant Request for Review) seeking the following orders:

- a) The procurement proceedings in Tender No. KP1/9A.3/OT/07/23-24 SUPPLY OF SINGLE PHASE AND THREE PHASE SMART METERS. (LOCAL***

***MANUFACTURERS AND ASSEMBLERS)) be and are hereby annulled in entirety and set aside.***

- b) The Accounting Officer of Kenya Power & Lighting Company PLC be and is hereby directed to publish the new tender notice and tender document for Tender No. KP1/9A.3/OT/07/23-24 SUPPLY OF SINGLE PHASE AND THREE PHASE SMART METERS. (LOCAL MANUFACTURERS AND ASSEMBLERS)) on the Government of Kenya's Public Procurement Information Portal ([www.tenders.go.ke](http://www.tenders.go.ke)) within such period to be stipulated by the Review Board.***
- c) Without prejudice to the foregoing, the Accounting Officer of Kenya Power & Lighting Company PLC be and is hereby directed to issue a fresh notice and tender document for tender number KP1/9A.3/OT/07/23-24 SUPPLY OF SINGLE PHASE AND THREE PHASE SMART METERS. (LOCAL MANUFACTURERS AND ASSEMBLERS)) based on the appropriate Standard Tender Document for Procurement of SINGLE PHASE AND THREE PHASE SMART METERS as issued by the Public Procurement Regulatory Authority and taking into consideration the findings and orders of the Review Board herein.***
- d) Any other relief that the Board may deem fit and just to grant.***

***e) Costs of the Review***

8. In a Notification of Appeal and a letter dated 13<sup>th</sup> December 2023, Mr. James Kilaka, the Acting 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 them a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24<sup>th</sup> 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 instant Request for Review together with confidential documents concerning the subject tender within five (5) days from the date of the Notification of Appeal and letter dated 13<sup>th</sup> December 2023.
9. On 18<sup>th</sup> December 2023, the Respondents through Lynn Owano Advocate filed a Memorandum of Response dated 18<sup>th</sup> December 2023 together with confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act.
10. Vide a Hearing Notice dated 18<sup>th</sup> December 2023, the Acting Board Secretary, notified parties and all tenderers in the subject tender of an online hearing of the instant Request for Review slated for 20<sup>th</sup> December 2023 at 10:00 a.m., through a link availed in the said Hearing Notice.

11. On 19<sup>th</sup> December 2023, the Respondents filed Written Submissions dated 19<sup>th</sup> December 2023 in opposition of the instant Request for Review.
  
12. When the matter first came up for hearing on 20<sup>th</sup> December 2023 at 10.00 a.m. counsel for the Applicant, Mr. Omollo sought leave to file a supplementary affidavit and written submissions in response to issues raised by the Respondents. In response, counsel for the Respondents, Ms. Owano sought corresponding leave to file supplementary submissions on any new matters raised in the Applicant's supplementary affidavit and written submissions.
  
13. Having considered parties' submissions, the Board allowed the Applicant's application to file a supplementary affidavit and written submissions and directed (a) the Applicant to file and serve its supplementary affidavit and written submissions by 4.00 p.m. on 20<sup>th</sup> December 2023, (b) the Respondents be granted corresponding leave to file and serve its supplementary submissions limited to new issues raised by the Applicant in its supplementary affidavit and written submissions by 9.00 a.m. on 21<sup>st</sup> December 2023, and (c) that the matter would proceed for hearing on Thursday, 21<sup>st</sup> December 2023 at 1.00 p.m. Parties were cautioned to observe the timelines issued in filing their respective documents.

14. On 20<sup>th</sup> December 2023, the Applicant filed via email a Supplementary Affidavit sworn on 20<sup>th</sup> December 2023 by Benedict Kabugi Ndungu, its Managing Director.

15. At the hearing of the matter on 21<sup>st</sup> December 2023, the Board confirmed pleadings filed and served by all the parties and parties compliance with its orders issued on 20<sup>th</sup> December 2023 and directed that the hearing of the preliminary objections by the Respondents would be heard as part of the substantive instant Request for Review. This was in accordance with Regulation 209(4) of the Public Procurement and Asset Disposal Regulations 2020 (hereinafter referred to as "Regulations 2020") which also allows the Board to deliver one decision having considered the preliminary objections as part of the substantive instant Request for Review. Thus, the instant Request for Review proceeded for virtual hearing as scheduled.

## **PARTIES' SUBMISSIONS**

### **Applicant's Submissions**

16. In his submissions, Counsel for the Applicant, Mr. Omollo relied on the Request for Review dated 11<sup>th</sup> December 2023, Supporting Affidavit sworn on 11<sup>th</sup> December 2023 by Benedict Kabugi Ndungu and Supplementary Affidavit sworn on 20<sup>th</sup> December 2023 by Benedict Kabugi Ndungu that were filed before the Board.

17. Mr. Omollo submitted that the instant Request for Review challenges the contents and provisions of the Tender Document as provided by the Respondents in the subject tender. He further submitted that the contention of the Applicant was that the Respondents have breached their obligations under the Act and Regulations 2020 when commencing the procurement proceedings in the instant Request for Review.

18. Counsel submitted that the subject tender was published on 9<sup>th</sup> November 2023 but subsequently amended via Addendum 1 dated 27<sup>th</sup> November 2023 and Addendum No. 2 dated 28<sup>th</sup> November 2023. He referred the Board to the holding in *PPARB Application No. 1 Energy Sector Contractors v The Accounting Officer, Kenya Power and Lighting Company Limited* where the Board held that computation of time when a Request for Review ought to be filed is from the date of the last addendum was issued as the Procuring Entity still had an opportunity to amend the Tender Document. He pointed out that in the instant Request for Review, the Tender Document stood to have been fully issued on 28<sup>th</sup> November 2023 and as such, time within which the Request for Review ought to have been filed began running when Addendum No. 2 was issued on 28<sup>th</sup> November 2023 as the Tender Document is deemed complete.

19. In computing time, Mr. Omollo submitted that the statutory period of 14 days from 28<sup>th</sup> November 2023 would lapse on 12<sup>th</sup> December 2023 which was a public holiday and an excluded day pursuant to

Section 57(b) of the Interpretation and General Provisions Act hence the last day was 13<sup>th</sup> December 2023 and as such, the instant Request for Review was lodged within the statutory timelines stipulated under Section 167(1) of the Act read with Regulation 203(2)(c) of Regulations 2020.

20. On the issue of whether the Applicant has locus standi to institute the instant Request for Review, counsel submitted that Section 167(1) of the Act confers locus standi to institute applications for administrative review upon candidates or tenderers and according to Section 2 of the Act, a candidate means a person who has obtained the tender documents from a public entity pursuant to an invitation notice by a procuring entity.

21. He pointed out that the invitation notice issued by the Procuring Entity required tenderers to obtain the Tender Document from its website and the Applicant downloaded the Tender Document annexed to the instant Request for Review from the Procuring Entity's website together with the Addenda and the said documents have not been contested, these being the subject of the instant application. He referred the Board to the holding in PPARB Application No. 1/2020 and submitted that nothing disqualifies the Applicant within the meaning of Section 2 and Section 167(1) of the Act which places locus standi on a candidate hence the Applicant being a candidate has locus standi to institute the Request for Review.

22. On the substantive issues, counsel submitted that the award criteria provided in the Tender Document was in breach of Section 86(1) of the Act which stipulates award to the tenderer with the lowest evaluated price without any other conditions such as those imposed in the subject tender by the Respondents. He argued that the award criteria purport that bidders are required to bid for all lots but can only be awarded one lot meaning where a bidder emerges as the lowest evaluated tenderer in for instance 3 lots, it would not be awarded all the three lots as it will be awarded the lot with the highest value whereas the other two lots which it would otherwise be entitled to would be awarded to a bidder whose bid was not the lowest evaluated bid.

23. Counsel submitted that the Respondents have contravened provisions of Section 80(2) & (3) of the Act by providing an evaluation criteria which is neither objective nor quantifiable especially the criteria for determining whether a bidder is a local manufacturer or a local assembler. He further submitted that the Respondents contravened Section 3(b) of the Act by restricting the participation of bidders to local manufacturers or assemblers only which was a non-existent preference and reservation scheme under Article 227(2) of the Constitution, the Act and Regulations 2020.

24. He argued that the Respondents failed to comply with their obligations to give effect to Section 155 and 157 of the Act by implementing a non-existent preference and reservation scheme

contrary to Section 227(1) of the Constitution. Further, that the Respondents have contravened Section 3(i) and (j) of the Act by failing to promote local industry and citizen contractors which would be given effect by Section 155 of the Act.

25. He pressed on that the Respondents contravened Section 60(1) of the Act by failing to provide specific requirements regarding participation of citizen contractors which would allow open and fair competition among citizen contractors that wish to participate in the subject procurement proceedings. Counsel argued that the Respondents contravened Section 70(6)(e)(vi) of the Act by failing to clearly spell out in the Tender Document the instructions on preparation and submission which ensures that preference and reservation applicable per Section 155 of the Act are applied to citizen contractors.

26. Mr. Omollo submitted that the Tender Document was not fully published in the Public Procurement Information Portal and it was only after the instant Request for Review was filed that the Respondent opted to publish the 1<sup>st</sup> Addendum on 16<sup>th</sup> December 2023 and this was in breach of Section 96(1) & (3) of the Act read with Regulation 85(2) of Regulations 2020 and Circular No. 4/2022 dated 1<sup>st</sup> July 2022.

27. Mr. Omollo further submitted that the Respondents breached Section 75(5) of the Act which is couched in mandatory terms by

failing to extend the tender submission deadline to allow the amendment in Addendum No. 1 and 2 to be taken into account by candidates and bidders in preparation or amendment of their respective tenders.

28. He urged the Board to allow the Request for Review as prayed.

### **Respondents' submissions**

29. Counsel for the Respondents, Ms. Owano relied on the Memorandum of Response dated 18<sup>th</sup> December 2023 together with confidential documents concerning the subject tender pursuant to Section 67(3)(e) of the Act and Written Submissions dated 19<sup>th</sup> December 2023 that were filed before the Board.

30. Ms. Owano submitted that the instant Request for Review as filed is time barred thus divesting the Board of its jurisdiction. She pointed out that the 2<sup>nd</sup> Respondent published the last addendum on 28<sup>th</sup> November 2023 and the instant Request for Review having been filed on 13<sup>th</sup> December 2023 was filed outside the statutory period of 14 days from the date of occurrence of breach complained of as the Applicant should have raised its concerns with regard to the principal tender document and or addenda within 14 days of their publication. She urged the Board to strike out the Request for Review in this ground.

31. Counsel further submitted that the Applicant lacks *locus standi* to institute the instant Request for Review since according to Section 167(1) of the Act, only a candidate or tenderer can institute administrative review procedures before the Board. She pointed out that according to the tender opening minutes, the Applicant was not a tenderer, having failed to submit its bid in the subject tender.
32. Ms. Owano pressed on that the deponent to the supporting affidavit namely Benedict Kabugi Ndungu lacks the requisite locus standi to institute and pursue proceedings on behalf of the Applicant as against the Respondent as he has not demonstrated his involvement in the subject tender or any nexus in the matter as the Applicant is neither a candidate or a tenderer. Ms Owano further pointed out that the Applicant did not demonstrate that it had complied with provisions of Section 167(2) of the Act read with Regulation 204(1) requiring it to deposit a refundable deposit with the Board to accompany the Request for Review.
33. On the substantive issues, Ms. Owano submitted that the subject tender sought to promote local industry being the reason why it was limited to local manufacturers and assemblers. She referred the Board to page 8 and 9 of the Tender Document and state that the criteria used to identify bidders as local is provision of Tax Compliance Certificate, KRA PIN Certificate, Firm Registration Certificate and CR 12 to confirm directorship.

34. She submitted that the subject tender is tailored for local industry and that the Addenda to the Tender Document mainly dealt with clerical errors and clarifications and the Respondents had the discretion according to the Tender Document to extend the tender submission deadline and there being no material amendments made to the Tender Document, opted to exercise their discretion and not extend the tender submission deadline.

35. Ms.Owano further submitted that the subject tender was specific to local manufacturers and assemblers and the provisions of preference and reservation schemes have been taken into account through the Annual Procurement Plan and Budget which is a continuous annual process and in the spirit of buy Kenya Build Kenya as envisaged under the Act.

36. On the allegations of loss of earnings pleaded by the Applicant, she submitted that the burden of proving the alleged loss of earnings is on the Applicant who has failed to demonstrate that it is a local contractor as alleged nor a candidate or tenderer or its nature of business. She submitted that the Respondents complied with the Constitution and the Act.

37. Ms. Owano submitted that the Procuring Entity is charged with the responsibility of supplying consistent and steady electricity to its consumers and is currently faced with a backlog of over 150,000 meters which translates to over 150,000 electricity customers

awaiting installation of meters to their premises and they are greatly prejudiced by the further delays of provision of meters and the Applicants' unsubstantiated allegations in the instant Request for Review leading to suspension of the procurement process are injurious to public interest and curtail the interests of the clients.

38. She pointed out that the Applicant's deponent is a vexatious litigant whose intention is to frustrate the Respondents having previously filed on 2 occasions cases before the High Court challenging the previous tender for supply of meters.

39. Ms. Owano objected to the Deed of Authority and CR 12 filed in the Applicant's Supplementary Affidavit deeming them as an afterthought since the Applicant ought to have filed the same at the first instant when lodging the instant Request for Review. She pointed out that Exhibit marked BK-4 being a letter from the Director General Public Procurement Regulatory Authority has no bearing on the current tender.

40. On the issue of award criteria provided in the Tender Document, Ms. Owano submitted that the Respondent has fully complied with the provisions of Section 86(1) of the Act which provides for 4 award criteria and that the Applicant is jumping the gun as the Respondents are yet to evaluate and award the subject tender. She urged the Board to dismiss the Request of Review with costs.

41. When asked to clarify whether the moratorium on provisions of Section 167(2) of the Act had been lifted, counsel sought the Board's directions on the same citing that she was not aware that there were conservatory orders in place.

### **Applicant's Rejoinder**

42. In a rejoinder, Counsel for the Applicant, Mr. Omollo submitted that the Respondents were profiling the Applicant as a vexatious litigant yet the pleadings in the cases referred to were on different tenders.

43. He reiterated that the Applicant is a candidate as per Section 2 of the Act and has locus standi to institute the instant Request for Review. He further reiterated that the Tender Document became complete upon issuance of Addendum 2 on 28<sup>th</sup> November 2023 hence the instant Request for Review is not time barred.

44. Counsel submitted that Section 167(1) of the Act does not require the Applicant to demonstrate its business. He pressed on that Section 86(1) of the Act provides for award to the lowest evaluated tenderer and the award criteria as provided in the Tender Document is to the lowest evaluated tenderer.

45. Mr. Omollo submitted that it was immaterial that the Addenda had no material amendments since Section 75(5) of the Act is couched in mandatory terms and the Respondents were obligated to extend the tender submission deadline.

46. Mr. Omollo objected to the Memorandum of Response as filed by the Applicant citing that counsel was giving evidence from the bar as no authorization form the 1<sup>st</sup> Respondent had been presented before the Board and that the Memorandum of Response has no probative value as it can't be used to challenge the contents of an affidavit which is sworn evidence.

47. He urged the Board to allow the Request for Review as prayed.

48. Upon enquiry by the Board on why the Applicant required additional submission time, Mr. Omollo pointed out that it was not what the Applicant required but what is prescribed under Section 75(5) of the Act. He further clarified that the Applicant had submitted a screenshot evidence failure by the Respondents to publish the Tender Document on the PPIP. He also reiterated that Section 75(4) of the Act provides that an Addendum forms part of the Tender Document and the Addenda issued on 27<sup>th</sup> and 28<sup>th</sup> November 2023 is to be treated as a whole in the subject tender.

49. At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 13<sup>th</sup> December 2023 was due to expire on 3<sup>rd</sup> January 2024 and that the Board would communicate its decision on or before 3<sup>rd</sup> January 2024 to all parties to the Request for Review via email.

## **BOARD'S DECISION**

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

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

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

- i Whether the Applicant has locus standi to institute the instant Request for Review before the Board;*
- ii Whether the instant Request for Review was filed within the statutory period of 14 days of notification of award or occurrence of alleged breach by the Respondents in accordance with section 167(1) of the Act read with Regulation 203(2)(c) of Regulations 2020 to invoke the jurisdiction of the Board;*

**B. Whether the provisions of the Tender Document in the subject tender are in breach of the Constitution, the Act and Regulations 2020;**

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

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

51. It is trite law that courts and decision making bodies should only act in cases where they have jurisdiction and when a question of jurisdiction arises, a Court or tribunal seized of a matter must as a matter of prudence enquire into it before taking any further steps in the matter

52. 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."***

53. In his book, "Words and Phrases Legally Defined", Vol. 3, John Beecroft Saunders defines jurisdiction as follows:

*"By jurisdiction is meant 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 its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court [or other decision making body] is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics.... Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given."*

54. The celebrated Court of Appeal decision in **The Owners of Motor Vessel "Lilian S" v Caltex Oil Kenya Limited [1989]eKLR; Mombasa Court of Appeal Civil Appeal No. 50 of 1989** underscores the centrality of the principle of jurisdiction. In particular, Nyarangi JA, decreed:

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

55. The Supreme Court added its voice on the source of jurisdiction of a court or other decision making body in the case **Samuel Kamau Macharia and another v Kenya Commercial Bank Ltd and 2 others [2012] eKLR; Supreme Court Application No. 2 of 2011** when it decreed that;

***"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 Respondent 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.”*

56. In the persuasive authority from the Supreme Court of Nigeria in the case of **State v Onagoruwa [1992] 2 NWLR 221 – 33 at 57 – 59** the Supreme Court held:

*“Jurisdiction is the determinant of the vires of a court to come into a matter before it. Conversely, where a court has no jurisdiction over a matter, it cannot validly exercise any judicial power thereon. It is now common place, indeed a well beaten legal track, that jurisdiction is the legal right by which courts exercise their authority. It is the power and authority to hear and determine judicial proceedings. A court with jurisdiction builds on a solid foundation because jurisdiction is the bedrock on which court proceedings are based.”*

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

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

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

58. 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.”*

59. The jurisdiction of a court, tribunal, quasi-judicial body or an adjudicating body can only flow from either the Constitution or a Statute (Act of Parliament) or both.

60. This Board is a creature of statute owing to the provisions of Section 27 (1) of the Act which provides:

***“(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.”***

61. Further, Section 28 of the Act provides for the functions and powers of the Board as follows:

**(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.***

62. The above provisions demonstrate that the Board is a specialized, central independent procurement appeals review board with its main function being reviewing, hearing and determining tendering and asset disposal disputes.

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

64. 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 read with Section 172 and 173 of the Act which donates powers to the Board with respect to an administrative review of procurement proceedings before the Board.

65. It therefore follows, for one to invoke the jurisdiction of the Board, they need to approach the Board as provided under Section 167 (1) of the Act. Section 167(1) of the Act, requires any person invoking the jurisdiction of the board to satisfy the following (i) must either be a candidate or a tenderer (within the meaning of Section 2 of the Act) (ii) must claim to have suffered or to risk suffering, loss or damage due to breach of a duty imposed on a procuring entity by the Act or Regulations 2020 (iii) must seek administrative review by the Board within fourteen (14) days of notification of award or date of occurrence of alleged breach of duty imposed on a procuring entity by the Act and Regulations 2020 at any stage of the procurement process in a manner prescribed.

66. The manner in which an aggrieved candidate or tenderer seeks administrative review is prescribed under Part XV – Administrative Review of Procurement and Disposal Proceedings of Regulations 2020 and specific under Regulation 203 of Regulations 2020 as follows:

***PART XV – ADMINISTRATIVE REVIEW OF  
PROCUREMENT AND DISPOSAL PROCEEDINGS***

**203. 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.**

**(d) be accompanied by the fees set out in the Fifteenth Schedule of these Regulations, which shall not be refundable.**

**(3) Every request for review shall be filed with the Review Board Secretary upon payment of the requisite fees and refundable deposits.**

**(4) The Review Board Secretary shall acknowledge by stamping and signing the request filed for review immediately.**

67. Regulation 203 prescribes an administrative review sought by an aggrieved candidate or tenderer under Section 167(1) of the Act to be by way of (i) a request for review which is to be (ii) accompanied by such statements as the applicant considers necessary in support of its request. The request for review is to be in a form set out in the Fourteenth Schedule of Regulations 2020. The Fourteenth Schedule of Regulations 2020 provides for a form known as a Request for Review.

68. A reading of Section 167(1) of the Act read with Regulation 203(1), (2) & (3) of Regulations 2020 and the Fourteenth Schedule of Regulations 2020 requires for one to invoke the jurisdiction of the Board, they must either be (i) a candidate or tenderer (within the meaning of Section 2 of the Act); (ii) must claim to have suffered or to risk suffering, loss or damage due to breach of a duty imposed on a procuring entity by the Act or Regulations 2020; (iii) must seek administrative review by the Board within fourteen (14) days of (a) occurrence of breach complained of, having taken place before an award is made, (b) notification under Section 87 of the Act; or (c) occurrence of breach complained of, having taken place after making of an award to the successful tenderer (iv) by way of a request for review which is accompanied by (v) such statements as the applicant considers necessary in support of its request.

69. Section 87 of the Act referred to in Regulation 203(2)(c)(ii) of Regulations 2020 provides as follows:

***87. Notification of intention to enter into a contract***

***(1) Before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity shall notify in writing the person submitting the successful tender that his tender has been accepted.***

***(2) The successful bidder shall signify in writing the acceptance of the award within the time frame specified in the notification of award.***

***(3) When a person submitting the successful tender is notified under subsection (1), the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof.***

***(4) For greater certainty, a notification under subsection (1) does not form a contract nor reduce the validity period for a tender or tender security.***

70. It is therefore clear from a reading of Section 167(1) and 87 of the Act, Regulation 203(1), (2)(c) & (3) of Regulations 2020 and the Fourteenth Schedule of Regulations 2020 requires for one to invoke the jurisdiction of the Board, they must either be (i) a candidate or

tenderer (within the meaning of Section 2 of the Act); (ii) must claim to have suffered or to risk suffering, loss or damage due to breach of a duty imposed on a procuring entity by the Act or Regulations 2020; (iii) must seek administrative review by the Board within fourteen (14) days of (a) occurrence of breach complained of, having taken place before an award is made, (b) notification of intention to enter into a contract having been issued; or (c) occurrence of breach complained of, having taken place after making of an award to the successful tenderer (iv) by way of a request for review which is accompanied by (v) such statements as the applicant considers necessary in support of its request.

71. The option available for an aggrieved candidate or tenderer in the aforementioned three instances is determinant on when occurrence of breach complained of took place and should be within 14 days of such occurrence of breach. It was not the intention of the legislature that where an alleged breach occurs before notification to enter into a contract is issued, the same is only complained of after notification to enter into a contract has been issued. We say so because there would be no need to provide the three instances within which a Request for Review may be filed.

***i Whether the Applicant has locus standi to institute the instant Request for Review before the Board;***

72. The Respondents at paragraph 29 of the Memorandum of Response dated 18<sup>th</sup> December 2023 contends that the deponent in the instant Request of Review, Mr. Benedict Kabugi Ndungu, is a vexatious litigant as he has not adduced any document vesting him with the authority to institute the instant proceedings on behalf of the Applicant. The Respondents further contend that the Applicant lacks the requisite *locus standi* to institute and pursue proceedings herein as it is neither a candidate or tenderer in the subject tender.

73. In response, the Applicant submitted that Section 167(1) of the Act confers *locus standi* to institute administrative reviews upon candidates or tenderers and the Respondents erroneously intimate that the Applicant is neither a candidate or tenderer in the instant Request for Review yet the Applicant was a candidate within the meaning of Section 2 of the Act and obtained a copy of the Tender Document pursuant to the invitation notice published by the Procuring Entity. The Applicant further submitted that Mr. Benedict Kabugi Ndungu was authorized to institute the instant Request for Review as evidenced by Exhibits marked "BK-01" and "BK-02" annexed to the Applicant's Supplementary Affidavit sworn on 20<sup>th</sup> November 2023 by Benedict Kabugi Ndungu.

74. Regulation 203(2)(b) of Regulations 2020 require that Requests for Review before the Board to be accompanied by statements in the following terms:

**"203. 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;***

75. A perusal of the Exhibit marked "BK-02" annexed at paragraph 1 of the Applicant's Supplementary Affidavit sworn on 20<sup>th</sup> November 2023 by Benedict Kabugi Ndungu being a CR 12 dated 19<sup>th</sup> December 2023 indicates that the Applicant is a private limited liability whose directors are (a) Ms. Anne Waithira Muriithi and (b) Mr. Benedict Kabugi Ndungu, the deponent in the instant Request for Review. Additionally, Exhibit marked "BK-01" being a Deed of Authority executed on 30<sup>th</sup> November 2023 indicates at paragraph 2 that the said deponent was authorized to appear, act, plead, depone any affidavit and sign all documents on behalf of the Applicant as shall be necessary in commencing and sustaining the administrative review proceedings before the Board.

76. The Board is cognizant of the holding by Justice Odunga in his Judgement in the case of **Leo Investments Ltd V Trident Insurance Company Limited (2014) eKLR** referred to the

holding of **Hewett, J.** in **Assia Pharmaceuticals v Nairobi Veterinary Centre Ltd** HCCC No. 391 of 2000 as follows:

*"It is settled law that where a suit is to be instituted for and on behalf of a company there should be a company resolution to that effect..... As regards litigation by an incorporated company, the directors are as a rule, the persons who have the authority to act for the company; but in the absence of any contract to the contrary in the articles of association, the majority of the members of the company are entitled to decide even to the extent of overruling the directors, whether an action in the name of the company should be commenced or allowed to proceed. The secretary of the company cannot institute proceedings in the name of the company in the absence of express authority to do so; but proceedings started without proper authority may subsequently be ratified."*

77. It is not in contest that the above referenced Deed of Authority filed by the Applicant was not initially filed with the Request for Review. In establishing whether this omission invalidates the Request for Review as filed, we note that Justice Kimaru in **Republic v Registrar General & 13 Ors (2005) eKLR** held that:

***"... that the legal position was that such a resolution of the Board Directors of a company may be filed at any time before the suit is fixed for hearing."***

78. In view of the foregoing, we find that the instant Request for Review was filed with the necessary authorization having established that Mr. Benedict Kabugi Ndungu, the Applicant has sufficiently adduced documents proving that he was vested with authority to institute the instant proceedings on behalf of the Applicant.

79. On the question of whether or not the Applicant was a candidate in the subject tender to invoke the jurisdiction of this Board within the statutory timelines provided for in section 167(1) of the Act we note that Section 2 of the Act defines a candidate in the following terms:

***"candidate" means a person who has obtained the tender documents from a public entity pursuant to an invitation notice by a procuring entity;***

80. The High Court in **Petition No. 237 of 2018, Philip Nyandieka (Suing on his own behalf and on behalf of the general public) v. National Government CDF- Bomachoge Borabu constituency [2019] eKLR** while considering the meaning of a "candidate" (and tenderer) under Section 2 of the Act had this to say:

***"Section 2 of the Act defines a "candidate" as "a person who has obtained the tender documents from a public entity pursuant to an invitation notice by a procuring entity". The said section defines a "tenderer" to mean "a person who submitted a tender pursuant to an invitation by a public entity".***

***This Court notes that the above provisions of the Act are restrictive on the persons who may approach the Board in the event of dissatisfaction with the tendering process and cannot overlook the disadvantage faced by the petitioner in as far as seeking a remedy before the said Board is concerned considering the fact that Section 167 (1) of the Act more or less closes the door to persons who do not fall within the meaning of a candidate and/or tenderer.*** [Emphasis by the Board]

81. From the foregoing provision and case law, for one to be a candidate, such a person must have obtained a tender document from a public entity pursuant to an invitation by a procuring entity.

82. We note that the Tender Advert dated 7<sup>th</sup> November 2023 issued by the Procuring Entity in the subject tender provided that:

***"Tender documents detailing the requirements of the above tenders may be obtained from the Kenya Power website ([www.kplc.co.ke](http://www.kplc.co.ke)) from the date shown above."***

83. The Applicant at paragraph 8 of its Supporting Affidavit sworn on 11<sup>th</sup> December 2023 by Benedict Kabugi Ndungu annexed as an exhibit marked "BK-01" a copy of the Tender Document and submitted that it obtained a copy of the Tender Document by downloading the tender document from KPLC's website ([www.kplc.co.ke](http://www.kplc.co.ke)). In **PPARB Application No. 30 of 2016, Achelis Material Handling Limited v. County Government of Kitui (hereinafter referred to as the County Government of Kitui's case)** the Board explained the import of the term "candidate" under Section 2 of the Act as follows:

***"The law is therefore clear that a party to a Request for Review must first demonstrate that it made an attempt to participate in the procurement process by first and foremost obtaining the tender document. This is necessary to avoid a situation where anyone may choose to interfere with a procurement process in jest or as an afterthought or to just settle scores. The threshold for candidature in this tender as set out by the law is that one must demonstrate they intended to participate in the tender by obtaining the tender document"***

84. In essence, a candidate must therefore demonstrate its intention to participate in a procurement process by complying with the manner

and procedure set out by a procuring entity for obtaining a tender document.

85. In our considered view, the Applicant having demonstrated its intention of participating in the subject tender by obtaining a copy of the tender document from the Procuring Entity's website and lack of rebuttal of these facts by the Respondents, the Applicant is a candidate within the meaning of Section 2 of the Act read with Section 167(1) of the Act and therefore has the *locus standi* to institute administrative review proceedings before the Board

86. In the circumstances, we find and hold that the Applicant is a candidate under the meaning of Section 2 of the Act read with Section 167(1) of the Act and has *locus standi* to institute the instant Request for Review before the Board.

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

87. We understand the Respondents' case on this issue to be that the instant Request for Review as filed is time barred having been filed

outside the stipulated statutory period of 14 days of occurrence of breach complained of. According to the Respondents, the Applicant ought to have lodged its complaints regarding the Tender Document and/or addenda within 14 days from the date of their publication and in filing the instant Request for Review on 13<sup>th</sup> December 2023, failed to meet the statutory timelines as stipulated under Section 167(1) of the Act read with Regulation 203 (2)(c) of Regulations 2020.

88. We understand the Applicant's case on this issue to be that the Request for Review as filed is not time barred because (a) the Respondents issued Addendum No. 2 on 28<sup>th</sup> November 2023, (b) the Tender Document issued by the Respondents only became complete on 28<sup>th</sup> November 2023 being the date when the Respondents issued a last amendment in the form of Addendum No. 2 prior to the tender submission deadline whose contents were part and parcel of the Tender Document, and (c) since the Tender Document was only rendered complete on 28<sup>th</sup> November 2023, the 14 days within which a Request for Review ought to be filed began running on 28<sup>th</sup> November 2023 and ought to have lapsed on 12<sup>th</sup> December 2023 which was a public holiday and an excluded day pursuant to Section 57(b) of the Interpretation and General Provisions Act (hereinafter referred to as "IGPA") and as such the last day for filing fell on 13<sup>th</sup> December 2023.

89. Having considered parties' pleadings, submissions, and the confidential documents contained in the confidential file submitted by

the Respondents pursuant to section 67 of the Act, the issue that calls for determination by this Board is what were the circumstances in the instant Request for Review that determine the period when the Applicant ought to have approached the Board?

90. We note that Section 167 of the Act and Regulation 203 of the 2020 Regulations identifies the benchmark events for the running of time to be the date of notification of the award or date of occurrence of the breach complained of. The gravamen of the Applicant's case as can be discerned at Paragraph 10 of the Supporting Affidavit sworn on 11<sup>th</sup> December 2023 by Benedict Kabugi Ndungu is that the procurement proceedings as commenced in the subject tender through the Tender Document and Addenda is unlawful, irregular, null and void since the Respondents breached their obligations under the Constitution, the Act and Regulations 2020.

91. The Applicant contends, *inter alia*, that the Respondents breached (a) Section 58(1) and Section 70(2) of the Act by failing to use the appropriate standard tender document prescribed by the Public Procurement Regulatory Authority (hereinafter referred to as "the Authority") (b) Section 75(5) of the Act by issuing Addendum No. 2 dated 28<sup>th</sup> November 2023 and in the same vein failing to extend the tender submission deadline to allow the said amendment to be taken into account by tenderers in preparation of their tender, (c) Section 80(2) & (3) of the Act by providing evaluation criteria that is neither objective or quantifiable, (d) the Act by providing an award criteria

that grossly violates Section 86(1) (a) of the Act, (e) Section 96(1) & (3) of the Act read with Regulation 85(2) of Regulations 2020 by failing to publish the Tender Notice and Tender Document on the Public Procurement Information Portal, (f) Section 3 (b) of the Act by restricting the participation of bidders to Local Manufacturers/ Assembly only under ITT 32.5 of Section II- Tender Data Sheet and discriminating against citizen contractors by failing to give effect to Section 155 of the Act and introducing a non-existent preference and reservation scheme unknown in law, (g) Section 3 (i) and (j) of the Act by failing to promote local industry and citizen contractors which would be attained by giving effect to Section 155 of the Act, (h) Section 155 and 157 of the Act by implementing a non-existent preference and reservation scheme which is unknown in law, and (i) Section 70(6)(e)(vi) of the Act by failing to clearly spell out in the Tender Document the instructions on preparation and submission which ensures that preference and reservation per Section 155 of the Act are applied to citizen contractors.

92. It is not in contest that (a) the Tender Advert in regard to the subject tender was advertised on 7<sup>th</sup> November 2023, (b) the Tender Document was published on 9<sup>th</sup> November 2023 (c) Addendum No. 1 was issued on 27<sup>th</sup> November 2023 and (c) Addendum No. 2 was issued on 28<sup>th</sup> November 2023. The issue in contest is whether the Tender Document as published can be considered to have been a complete document for purposes of when time starts to run in view of lodging a complaint with the Board pursuant to Section 167 (1) of the

Act irrespective of amendments and clarifications issued touching on the Tender Document in Addendum No. 1 and Addendum No. 2.

93. In our considered view, the only instance when the Applicant could have invoked the jurisdiction of the Board was after issuance by the Procuring Entity of Addendum No. 2 dated 28<sup>th</sup> November 2023 being the date when the Applicant received the complete Tender Document and therefore ought to have contested the procurement proceedings as commenced in the subject tender through the Tender Document and Addenda by virtue of Regulation 203 (2)(c)(i) of Regulations 2020.

94. In saying so, we are guided by this Board's holding in **PPARB Application No. 1 of 2020 Energy Sector Contractors v The Accounting Officer, Kenya Power and Lighting Company Limited**(hereinafter referred to as "the Energy Sector Contractors case") where the Board held at page 35 to 39 as follows:

***"Accordingly, once a procuring entity's tender document is amended on the procuring entity's own initiative or pursuant to a clarification sought by a candidate or tenderer, such amendment becomes part of the tender document previously issued by such procuring entity. In this case, the Procuring Entity's Bidding Document only became complete on the date it issued the last amendment in the form of an Addendum***

*prior to the tender closing date. These amendments would be taken into consideration by bidders as being part and parcel of the Bidding Document previously issued after the Procuring Entity's Invitation Notice of 20th August 2019.*

*This therefore leads the Board to address the question, when was the Bidding Document of the subject tender complete by virtue of amendments issued by the Procuring Entity on its own initiative or in response to an inquiry by a candidate or tenderer, for consideration by such candidates or tenderers?*

*From the confidential file that was submitted to the Board by virtue of section 67 (3) (e) of the Act, the Procuring Entity, following clarifications sought on various issues in the Bidding Document, issued the Last Addendum dated 24th December 2019, known as Clarification No. 2. Therefore, the Procuring Entity's Bidding Document was deemed complete as at 24th December 2019 when the last Addendum/Clarification No. 2 was issued.*

.....  
*It is the Board's considered view that the Applicant in the instant Request for Review had a right to approach*

*the Board where there was an alleged breach of duty arising from the contents of the Bidding Document which became complete as a result of the last Addendum issued on 24th December 2019, since as at that date, it became apparent that the response to clarifications sought by bidders would remain as per the last Addendum/Clarification No. 2 dated 24th December 2019."*

95. Notably, Justice Mativo while considering **Miscellaneous Civil Application No. 36 of 2020 Republic v Public Procurement Administrative Review Board Ex parte Kenya Power & Lighting Company Limited; Energy Sectors Contractors Association & another (Interested Parties) [2020]** being an application of Judicial Review of the Board's Decision in the Energy Sector Contractors case upheld the Board's decision and held at paragraph 65 as follows:

*"65. As was held in Republic v Public Procurement Administrative Review Board & 2 Others[21] the jurisdiction of the Board is only available where an application for review has been filed within 14 days from the date of the delivery of the results of the tender process or from the date of the occurrence of an alleged breach where the tender process has not been concluded. Section 167 (1) of the Act which provides:-*

***"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." I find and hold that time began to run on 24<sup>th</sup> December 2019 when the clarification was provided. The effect is that the Request for Review was filed within time. It follows that the Respondent properly exercised its jurisdiction by entertaining the Request for Review. This ground of review fails."***

96. In computing time, the Board is guided by Section 57 of the IGPA which provides as follows:

***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.***

97. In computing time when the Applicant should have sought administrative review before the Board with respect to challenging the procurement proceedings as commenced in the subject tender through the Tender Document and Addenda, the 28<sup>th</sup> November 2023 is excluded pursuant to Section 57(a) of IGPA being the day when the Applicant came to learn of the alleged breach of duty by the Respondents. This means, 14 days started running from 29<sup>th</sup> November 2023 and lapsed on 12<sup>th</sup> December 2023 which according Article 9 (3) and (4) of the Constitution is a national day

identified as Jamhuri Day thus a public holiday and an excluded day pursuant to Section 57(b) of the IGPA. The 14 days therefore lapsed on 13<sup>th</sup> December 2023. In essence, the Applicant had between the 29<sup>th</sup> November 2023 and 13<sup>th</sup> December 2023 to seek administrative review before the Board. The Applicant filed the instant Request for Review on 13<sup>th</sup> December 2023 which was within the statutory period of fourteen (14) days prescribed under section 167(1) of the Act read with Regulation 203(2)(c)(i) of Regulations 2020 to invoke the jurisdiction of the Board.

98. In the circumstance, the Board finds and holds that it has jurisdiction to hear and determine the instant Request for Review having been filed in good time. We shall now proceed to consider the Request for Review on its merit by determining the remaining substantive issues.

**Whether the provisions of the Tender Document in the subject tender are in breach of the Constitution, the Act and Regulations 2020;**

99. We understand the Applicant's case on this issue to be that the procurement proceedings as commenced through the Tender Document and Addenda in the subject tender is unlawful, irregular, null and void since the Respondents in issuing the said Tender

Document and Addenda, breached their obligations under the Constitution, the Act and Regulations 2020.

100. The Applicant contends, *inter alia*, that the Respondents breached (a) Section 58(1) and Section 70(2) of the Act by failing to use the appropriate standard tender document prescribed by the Public Procurement Regulatory Authority (hereinafter referred to as "the Authority") (b) Section 75(5) of the Act by issuing Addendum No. 2 dated 28<sup>th</sup> November 2023 and in the same vein failing to extend the tender submission deadline to allow the said amendment to be taken into account by tenderers in preparation of their tender, (c) Section 80(2) & (3) of the Act by providing evaluation criteria that is neither objective or quantifiable, (d) the Act by providing an award criteria that grossly violates Section 86(1) (a) of the Act, (e) Section 96(1) & (3) of the Act read with Regulation 85(2) of Regulations 2020 by failing to publish the Tender Notice and Tender Document on the Public Procurement Information Portal, (f) Section 3 (b) of the Act by restricting the participation of bidders to Local Manufacturers/ Assembly only under ITT 32.5 of Section II- Tender Data Sheet and discriminating against citizen contractors by failing to give effect to Section 155 of the Act and introducing a non-existent preference and reservation scheme unknown in law, (g) Section 3 (i) and (j) of the Act by failing to promote local industry and citizen contractors which would be attained by giving effect to Section 155 of the Act, (h) Section 155 and 157 of the Act by implementing a non-existent preference and reservation scheme which is unknown in law, and (i)

Section 70(6)(e)(vi) of the Act by failing to clearly spell out in the Tender Document the instructions on preparation and submission which ensures that preference and reservation per Section 155 of the Act are applied to citizen contractors.

101. On the other hand, the Respondents' case on this issue is that (a) Addendum No. 1 and Addendum No. 2 were issued specifically to correct clerical errors and make general clarifications on issues raised by bidders and had no impact on the substantive requirements in the Tender Document to require extension of the Tender Submission Deadline and as such the Procuring Entity chose not to exercise its discretion to extend the tender submission deadline as the two days left before the tender submission deadline were sufficient, (b) the subject tender was open, non-discriminatory and specific to local manufacturers and local assemblers which includes citizen contractors, (c) the Applicant has failed to demonstrate how the award criteria provided in the Tender Document was in breach of Section 86(1); (d) the provisions of preference and reservation schemes had been taken into account in the annual procurement plan and budget and they gave preference to local manufacturers and assemblers in the spirit of Buy Kenya Build Kenya as envisaged by the Act, (e) no breach of the Constitution, the Act and Regulations 2020 has been demonstrated by the Applicant as alleged.

102. We note that the objective of public procurement is to provide quality goods and services in a system that implements the principles specified in Article 227 of the Constitution which provides as follows:

***"227. Procurement of public goods and services***

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

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

***a) Categories of preference in the allocation of contracts;***

***b) The protection or advancement of persons, categories of persons or groups previously disadvantaged by unfair competition or discrimination;***

***c) ..... and***

***d) ....."***

103. Further to the above provision, the national values and principles of governance under Article 10 of the Constitution apply to State organs

and public entities contracting for goods and services. Article 10 provides as follows:

***"(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—***

***(a) applies or interprets this Constitution;***

***(b) enacts, applies or interprets any law; or***

***(c) makes or implements public policy decisions.***

***(2) The national values and principles of governance include—***

***(a) .....***

***(b) .....***

***(c) good governance, integrity, transparency and accountability***

104. Efficient good governance in public procurement proceedings provides tenderers with an assurance that public procurement and asset disposal processes are operating effectively and efficiently. Such processes are also underpinned by broader principles such as the rule of law, integrity, transparency and accountability amongst others.

105. The Board observes that the legislation contemplated in Article 227(2) of the Constitution is the Act. Section 3 of the Act further underpin good governance, integrity, transparency and accountability as key pillars in public procurement and asset disposal proceedings and provides as follows:

***"Public procurement and asset disposal by State organs and public entities shall be guided by the following values and principles of the Constitution and relevant legislation—***

***(a) the national values and principles provided for under Article 10;***

***(b) the equality and freedom from discrimination provided for under Article 27;***

***(c) affirmative action programmes provided for under Articles 55 and 56;***

***(d) principles of integrity under the Leadership and Integrity Act, 2012 (No. 19 of 2012);***

***(e) the principles of public finance under Article 201;***

***(f) the values and principles of public service as provided for under Article 232;***

***(g) principles governing the procurement profession, international norms;***

***(h) maximisation of value for money;***

***(i) promotion of local industry, sustainable development and protection of the environment; and***  
***(j) promotion of citizen contractors.”***

***i On whether the Procuring Entity failed to use the standard tender document prescribed by the Authority;***

106. The Respondents submitted that the Tender Document is a standard document as prescribed by the Authority and its requirements are realistic, attainable, and competitive. Further that the tender specifications were clear in every aspect including the type of goods required, the specifications for said goods as well as their nature of use; and this can be attested by the minimal and straightforward clarifications sought by the bidders

107. We note that Section 58 of the Act requires a procuring entity to use a standard tender document which contains sufficient information. Section 58 reads as follows:

***“(1) An accounting officer of a procuring entity shall use a standard procurement and asset disposal documents issued by the Authority in all procurement and asset disposal proceedings.***

***(2) The tender documents used by a procuring entity under subsection (1) shall contain sufficient***

***information to allow fairness, equitability, transparency, cost-effectiveness and competition among those who may wish to submit their applications.”***

108. Further Section 60 provides as follows:

***“(1) An accounting officer of a procuring entity shall prepare specific requirements relating to the goods, works or services being procured that are clear, that give a correct and complete description of what is to be procured and that allow for fair and open competition among those who may wish to participate in the procurement proceedings.***

***(2) The specific requirements shall include all the procuring entity’s technical requirements with respect to the goods, works or services being procured.***

***(3) .....***

***(4) .....”***

109. Section 70 of the Act requires a procuring entity to use a standard tender document which contains sufficient information to allow for fair competition among tenderers. Section 70(3), (4), (6(e)(vi) reads as follows:

***"(3) The tender documents used by a procuring entity pursuant to subsection (2) shall contain sufficient information to allow fair competition among those who may wish to submit tenders.***

***(4) An accounting officer of a procuring entity shall be responsible for preparation of tender documents in consultation with the user and other relevant departments.***

.....

***(6) (e) instructions for the preparation and submission of tenders including***

.....

***(vi) the procurement function ensuring that where necessary, the preference and reservations of the tender are clearly spelt out in the bidding documents."***

110. Regulation 68 of Regulations 2020 also provides for use of standard tender documents and formats. Regulation 68(4) of Regulations 2020 provides:

***"(4) Pursuant to section 70(4) of the Act, the accounting officer of a procuring entity shall prepare the tender document clearly indicating the technical and financial evaluation criteria to be applied which***

***shall be quantifiable, measurable and objective in line with the provisions of section 80(3) of the Act in consultation with the user department and other relevant departments."***

111. Having carefully perused the Tender Document, we note the preface at page 2 of the Tender Document reads:

***"Preface***

***Pursuant to Section 70 of the Public Procurement and Asset Disposal Act, 2015 (PPADA), this Standard Tender Document (STD) for procurement of Goods has been prepared by Kenya Power based on The Public Procurement Regulatory Authority's Standard Tender Document (STD) for "Procurement of Goods" (February 2021) 2021)."***

112. In essence, the Procuring Entity confirms having complied with Sections 58, 60 and 70 of the Act by preparing the Tender Document based on the Public Procurement Regulatory Authority's Standard Tender Document (STD) for Procurement of Goods February 2021.

113. In the circumstances we find that this allegation by the Applicant is unsubstantiated as the Tender Document issued in the subject tender was in compliance with the Standard Tender Document issued by the

Authority with necessary modifications to align with the goods, works or services being procured in the subject tender.

***ii On whether the Procuring Entity breached Section 96(1) and (3) of the Act read together with the provisions of the Tender Document;***

114. In its submissions, the Applicant concedes that the Tender Document was published on the Public Procurement Information Portal on 9<sup>th</sup> November 2023 while Addendum No. 1 was only published on the said portal on 16<sup>th</sup> December 2023 after the Respondents were notified of these proceedings while Addendum No. 2 was not published on the said portal.

115. On its part, the Respondents contend that they complied with the provisions of Section 96(1) and (3) of the Act in that they advertised the tender on 7<sup>th</sup> November 2023 and subsequently published the Tender Document on the Public Procurement Information Portal on 9<sup>th</sup> November 2023.

116. Section 96 (1), (2), and (3) of the Act provides:

***"(1) The accounting officer of a procuring entity shall take such steps as are reasonable to bring the invitation to tender to the attention of those who may wish to submit tenders.***

***(2) Despite the provisions of subsection (1), if the estimated value of the goods, works or services being procured is equal to, or more than the prescribed threshold for county, national and international advertising, the procuring entity shall advertise in the dedicated Government tenders' portals or in its own website, or a notice in at least two daily newspapers of nationwide circulation or a notice in at least two free to air television stations and two radio stations of national reach***

***(3) In addition to subsection (2) a procuring entity shall— (a) use Kenya's dedicated tenders portal or any other electronic advertisements as prescribed; and (b) post advertisements at any conspicuous place reserved for this purpose in the premises of the procuring entity”***

117. The import of the above provisions is that a procuring entity shall advertise an invitation to tender in the dedicated government portal or in its own website or a notice in at least two daily newspapers of nationwide circulation or at least two free to air television stations and two radio stations in addition to dedicated tenders portals or any other electronic advertisements or posting the said advert at any conspicuous place reserved for such purposes in the premises of the procuring entity.

118. It is our considered view that the Procuring Entity met the provisions of Section 96(1) and (3) of the Act having advertised the subject tender in My Gov Newspaper publication, on its website and on the Public Procurement Information Portal. No prejudice has been cited by the Applicant on failure to have published Addendum No. 1 and No. 2 as the same were published on the Procuring Entity's website.

119. We note that ITT 1.3 of the Invitation For Tender at page 7 of the Tender Document requires tenderers to visit the Procuring Entity's E-Procurement Portal from time to time for revised closing dates and addendums. We also note that ITT 7.2 of Section I – Instructions to Tenderers at page 14 of the Tender Document provided:

***"Any addendum issued shall be part of the tendering document and shall be communicated in writing to all who have obtained the tender document from KPLC in accordance with ITT 6.3 KPLC shall also promptly publish the addendum on KPLC's web page in accordance with ITT 7.1"***

120. We note that the Applicant in the instant Request for Review did not raise any allegations of having not received communication from the Procuring Entity on Addendum 1 issued on 27<sup>th</sup> November 2023 and Addendum 2 issued on 28<sup>th</sup> November 2023. In the circumstances we find that the Procuring Entity complied with

provisions Section 96(1) and (3) of the Act and the provisions of the Tender Document highlighted above.

***iii On whether the Procuring Entity breached the provisions of Section 75(5) of the Act read together with the provisions of the Tender Document;***

121. The Applicant submitted that the Respondents breached Section 75(5) of the Act by failing to extend the tender submission deadline following issuance of Addendum No. 1 and Addendum No. 2 to allow the amendments in the said addenda to be taken into account by candidates and bidders in preparation of their bid documents.

122. In response, the Respondents submitted that Addendum No. 1 and Addendum No. 2 were issued specifically to correct clerical errors and make general clarifications on issues raised by bidders and had no impact on the substantive requirements in the Tender Document to require extension of the Tender Submission Deadline and as such the Procuring Entity chose not to exercise its discretion to extend the tender submission deadline as the two days left before the tender submission deadline were sufficient.

123. Section 75 of the Act provides for modification of tender documents as follows:

**"(1) A procuring entity may amend the tender documents at any time before the deadline for submitting tenders by issuing an addendum without materially altering the substance of the original tender.**

***(2) An amendment may be made on the procuring entity's own initiative or in response to an inquiry by a candidate or tenderer.***

***(3) A procuring entity shall promptly provide a copy of the addendum to each person to whom the procuring entity provided copies of the tender documents.***

***(4) The addendum shall be deemed to be part of the tender documents.***

**(5) If the tender documents are amended when the time remaining before the deadline for submitting tenders is less than one third of the time allowed for the preparation of tenders, or the time remaining is less than the period indicated in instructions to tenderers, the accounting officer of a procuring entity shall extend the deadline as necessary to allow the amendment of the tender documents to be taken into account in the preparation or amendment of tenders.** [Emphasis Board]

124. The import of the above provision is that (a) a Procuring Entity may amend a tender document at any time before the tender submission deadline by issuing an addendum that does not materially alter the substance of the original tender, (b) such amendment may be made on the procuring entity's own initiative or in response to an inquiry by a candidate or tenderer, (c) the procuring entity shall promptly issue a copy of the addendum to each person whom it had issued a copy of the tender document and this addendum shall be deemed to be part of the tender document and, (d) where a tender document is amended when the time remaining before the tender submission deadline is less than one third of the time allowed for preparation of tenders or the time remaining is less than the period indicated in instructions to tenderers, **the accounting officer shall extend the tender submission deadline as necessary** to allow the amendment of the tender documents to be taken into account in preparation or amendment of tenders.

125. Turning to the circumstances of the instant Request for Review, we note that the Respondents aver at paragraph 15 of the Memorandum of Response dated 18<sup>th</sup> November 2023 that the amendments to the Tender Document as communicated in Addendum No. 1 and Addendum No. 2 had no impact whatsoever on the substantive requirements in the Tender Document. The Respondents further aver at paragraph 17 of the Memorandum of Response dated 18<sup>th</sup> November 2023 that the Procuring Entity had the discretion to extend

the tender submission deadline and exercised that discretion in exercise of ITT 7.3 at page 14 of the Tender Document.

126. We note that The Tender Document provided at ITT 21.2 of Section I- Instructions to Tenderers at page 20 of the Tender Document for the deadline for submission of tenders as follows:

***"21.2 KPLC may, at its discretion, extend the deadline for the submission of Tenders by amending the tendering documents in accordance with ITT 7, in which case all rights and obligations of KPLC and tenderers previously subject to the deadline shall thereafter be subject to the deadline as extended."***

127. Further, ITT 7.3 of Section I – Instructions to Tenderers at page 14 of the Tender Document provided that:

***"7.3 To give prospective Tenderers reasonable time in which to take an addendum into account in preparing their Tenders, KPLC may, at its discretion, extend the deadline for the submission of Tenders, pursuant to ITT 21.1"***

128. In view of the above provisions of the Act and the Tender Document in the subject tender, it is our considered view that discretion is afforded to the 1<sup>st</sup> Respondent to extend the tender submission deadline **where necessary** to allow amendment of the Tender document communicated in Addendum No. 1 and Addendum

No. 2 to be taken into account by bidders in preparation or amendments of tenders in the subject tender.

129. In the circumstances we find and hold that the Procuring Entity rightfully exercised its discretion in considering whether or not it was necessary to extend the tender submission deadline following issuance of Addendum No. 1 and Addendum No. 2 and the 1<sup>st</sup> Respondent and cannot be faulted for not extending the tender submission deadline. As such, the Procuring Entity did not breach the provisions of Section 75(5) of the Act read together with the provisions of the Tender Document.

***iv On whether the Procuring Entity breached the provisions of Section 86(1)(a) of the Act read together with the provisions of the Tender Document;***

130. Section 86(1)(a) of the Act provides:

***"(1) The successful tender shall be the one who meets any one of the following as specified in the tender document—  
(a) the tender with the lowest evaluated price;"***

131. ITT 40.1 of Section I – Instructions to Tenderers at page 25 of the Tender Document provides for the Award Criteria as follows:

***"KPLC shall award the Contract to the successful tenderer whose tender has been determined to be the Lowest Evaluated Tender in accordance with***

**procedures in Section 3: Evaluation and Qualification Criteria.”**

132. ITT 40.1 of Section II – Tender Data Sheet (TDS) at page 31 of the Tender Document provides for the Award of Contract as follows:

***ITT 40***

***1. Mode of award shall be in accordance with the following:***

***a) Award shall be to the tenderer(s) with the lowest evaluated price per lot.***

***b) Bidders may quote for all or as many items in the various lots as per their eligibility as stated in ITT 3.6 Above.***

***c) Each successful bidder will be awarded ONE LOT subject to (d) below. If a bidder emerges the lowest in more than one lot they will be awarded the lot with the highest value.***

***d) Consequently, the subsequent lots shall be awarded sequentially following (c) above until all the lots are allocated provided that the price of the subsequent qualified bidder is within the prevailing market price.***

***i) In case of a tie, the award will be split amongst the bidders.***

*ii) In case there is no other qualified subsequent tenderer for the unallocated lot(s) in a given category, the award will revert to the tenderer with the lowest evaluated price per lot, notwithstanding (C) above.*

*2. KPLC shall also take into consideration the following:*

*a) Delivery capability as per information given in the Capacity Declaration form;*

*b) The monthly production capacity;*

*c) Timely Delivery as per delivery schedule in previous order and satisfactory performance as per the provided delivery Schedule or at least 50% delivery on previous orders.*

133. In essence, (a) the mode of award in the subject tender would be to the tenderer(s) with the lowest evaluated price per lot, (b) a tenderer was allowed to quote for all or as many items in the various lots as per their eligibility (c) a successful tenderer would be awarded only one lot subject to sequential award of the various lots provided that the price for the subsequent qualified bidder is within the prevailing market price, (d) where a tie exists, the award would be split amongst the tying bidders, and (e) where there is no other qualified subsequent tenderer in an unallocated lot(s) in a given category, the award will revert to the tenderer with the lowest evaluated bidder.

134. As such, in making an award, the first action that the Evaluation Committee would be required to undertake is to establish the lowest bidder per lot and where a bidder is the lowest in more than one lot, it will be awarded the lot with the highest value. Once a successful bidder is awarded a lot, subsequent lots (being the second highest lot to the least lot) will be awarded sequentially (to the lowest bidder in that lot) and where there is no other qualified subsequent bidder for an allocated lot(s) the award will revert to the tenderer with the lowest evaluated tender price notwithstanding whether such bidder has already been awarded. We note that the Board interpreted and held on award criteria similar to the award criteria in the instant Request for Review in **PPARB Application No. 77/2022 consolidated with PPARB Application No. 81/2022 Pasondia Cables Private Limited & Showan Limited v The Accounting Officer, Kenya Power & Lighting Company PLC & others.**

135. In view of the foregoing, we find that the above award criteria as provide in the Tender Document is not in breach of Section 86(1) of the Act and that the Applicant has not substantiated its allegations that the Respondents stipulated an award criteria in the Tender Document that grossly violates the provisions of Section 86(1)(a) of the Act.

***v On whether the Procuring Entity provided in its the Tender Document for a non-existent preference and reservation***

***scheme by restricting participation of bidders to local manufacturers and assemblers and discriminating against citizen contractors;***

136. It is the Applicant's case that the Respondents are in breach of Section 80(2) and (3) of the Act by providing in the Tender Document an evaluation criterion that is neither objective nor quantifiable especially the criteria for determining whether a tenderer is a local manufacturer or assembler. According to the Applicant the subject tender restricts participation of bidders to local manufacturers or assemblers, which it argues to be a non-existent preference and reservation scheme unknown to law, to the exclusion of citizen contractors, an action that it deems to be discriminatory and a curtailment of the principle of competition and fairness in the procurement process in the subject tender.

137. On the other hand, it is the Respondent's case that the subject tender being an open tender doesn't discriminate against any person as it is specific to local manufacturers and local assemblers and this includes citizen contractors. The Respondents argue that the subject tender sought to promote local industry by giving preference to locally manufactured or assembled goods.

138. Section 80 of the Act is instructive on how evaluation and comparison of tenders should be conducted by a procuring entity as follows:

**"80. Evaluation of tender**

- (1) The evaluation committee appointed by the accounting officer pursuant to Section 46 of the Act, shall evaluate and compare the responsive tenders other than tenders rejected.**
- (2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the provisions of this Act and statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered.**
- (3) The following requirements shall apply with respect to the procedures and criteria referred to in subsection (2)-**

  - (a) the criteria shall, to the extent possible, be objective and quantifiable;**
  - (b) each criterion shall be expressed so that it is applied, in accordance with the procedures, taking into consideration price, quality, time and service for the purpose of evaluation; and**
- (4) .....**

139. Section 80(2) of the Act as indicated above requires the Evaluation Committee to evaluate and compare tenders in a system that is fair using the procedures and criteria set out in the Tender Document. A system that is fair is one that considers equal treatment of all tenders against a criteria of evaluation known by all tenderers since such criteria is well laid out for in a tender document issued to tenderers by a procuring entity. Section 80(3) of the Act requires for such evaluation criteria to be as objective and quantifiable to the extent possible and to be applied in accordance with the procedures provided in a tender document.

140. Turning to the circumstances in the instant Request for Review, we note that the Tender Document provides as follows:

141. ITT 1.1 of the Invitation for Tender at page 7 of the Tender Document provides:

***"Introduction***

***The Kenya Power & Lighting Company Plc (KPLC) invites bids from eligible Tenderers for Supply of Single Phase and Three Phase Smart Meters. (Local Meter Manufacturers and Assemblers) Interested Eligible Tenderers may obtain further information from .....***"

142. ITT 32 of the Invitation for Tender at page 23 of the Tender Document on Margin of Preference and Reservations provides:

***"32.1 A margin of preference may be allowed on locally manufactured goods when the contract is open to international tendering, where the tender is likely to attract foreign goods and where the contract exceeds the threshold specified in the Regulations.***

***32.2 For purposes of granting a margin of preference on locally manufactured goods under international competitive tendering, a procuring entity shall not subject the items listed below to international tender and hence no margin of preference shall be allowed. The affected items are:***

***(a) motor vehicles, plant and equipment which are assembled in Kenya;***

***(b) furniture, textiles, foodstuffs, oil and gas, information communication technology, steel, cement, leather, agro-processing, sanitary products, and other goods made in Kenya; or***

***(c) goods manufactured, mined, extracted or grown in Kenya.***

***32.3 A margin of preference shall not be allowed unless it is specified so in the TDS***

***32.4 Contracts procured on basis of international competitive tendering shall not be subject to reservations to specific groups as provided in ITT 32.5***

***32.5 Where it is intended to reserve a contract to a specific group of businesses (these groups are Small and Medium Enterprises, Women Enterprises, Youth Enterprises and Enterprises of persons living with disability, as the case may be), and who are appropriately registered as such by the authority to be specified in the TDS, a procuring entity shall ensure that the invitation to tender specifically indicates that only businesses or firms belonging to the specified group are eligible to tender as specified in the TDS. No tender shall be reserved to more than one group. If not so stated in the Tender documents, the invitation to tender will be open to all interested tenderers.”***

143. We further note that Section II – Tender Data Sheet (TDS) of the Tender Document provides for specific data which is aimed at complementing, supplementing, or amending the provisions in the Instructions to Tenderers (ITT) and whenever there is a conflict, the provisions of the TDS prevail over those in the ITT.

144. ITTs 3.6, 32.3 and 32.5 of Section II – Tender Data Sheet (TDS) at page 27 and 31 of the Tender Document provides:

<b>ITT 3.6</b>	<p><b><i>This invitation to Tender is open to Local Meter Manufacturer And Assemblers) only in two categories.</i></b></p> <p><b><i>Category 1 – Manufacturers with more than two (2) years’ Experience and successfully supplied to completion, new meters to a public entity in Kenya before.</i></b></p> <p><b><i>Category 2 – Manufacturers with less than two (2) years’ Experience and may NOT have successfully supplied to completion, new meters to a public entity in Kenya before.</i></b></p>
.....	.....
<b>ITT 32.3</b>	<p><b><i>A margin of Preference and/or reservation shall apply and specify the details.</i></b></p> <p><b><i>Note the application methodology as defined in Section III – Evaluation and Qualification Criteria</i></b></p>
<b>ITT 32.5</b>	<p><b><i>The invitation to tender <u>is extended</u> to Local manufacturers/ Assemblers only.</i></b></p>

145. Our interpretation of the above provisions of the subject tender is that the invitation of bids in the subject tender was reserved for local meter manufacturers and assemblers. ITT 32.5 of Section II – Tender Data Sheet (TDS) of the Tender Document amended provisions of ITT 32.5 of Section I – Instructions to Tenderers of the Tender Document by extending the subject tender to a specific group

being the local manufacturers or assemblers only and as such, the preferences and reservations of the subject tender are clearly spelt out. Further, a margin of preference and/or reservation is applicable in the subject tender. It is therefore clear that an eligible tenderer in the subject tender is one who is able to confirm that they fall within the reserved group of local meter manufacturers and assemblers in view of the provisions of Section III- Evaluation and Qualification Criteria of the Tender Document, which is well laid out at pages 33 to 41 of the Tender Document and is known by all tenderers.

146. Section 2 of the Act defines:

- a) **a local contractor** as *"a person or firm registered in Kenya under the Companies Act, 2015 (No. 17 2015) of or any other written law and whose operation is based in Kenya"*;
- b) **locally produced product or service** as *"goods and services that are manufactured in Kenya by firms that are registered and undertaking their business in Kenya."*
- c) **a citizen contractor** as *"a person or a firm wholly owned and controlled by persons who are citizens of Kenya."*

147. In view of the above definition, both local and citizen contractor require to be registered in Kenya and in view of the provisions of the Tender Document in the instant subject tender, nothing precludes a citizen contractor from being a local manufacturer or assembler as long as it is registered in Kenya, undertaking its business in Kenya and its goods and services are manufactured in Kenya. As such, it is

our considered view that citizen contractors were not restricted from participating in the subject tender.

148. We note that The Act outlines several preference and reservation schemes under Part XII thereof. Section 155 of the Act provides:

***"155. Requirement for preferences and reservations***

***(1) Pursuant to Article 227(2) of the Constitution and despite any other provision of this Act or any other legislation, all procuring entities shall comply with the provisions of this Part.***

***(2) Subject to availability and realization of the applicable international or local standards, only such manufactured articles, materials or supplies wholly mined and produced in Kenya shall be subject to preferential procurement.***

***(3) Despite the provisions of subsection (1), preference shall be given to—***

***(a) manufactured articles, materials and supplies partially mined or produced in Kenya or where applicable have been assembled in Kenya; or***

***(b) firms where Kenyans are shareholders.***

***(4) The threshold for the provision under subsection (3) (b) shall be above fifty-one percent of Kenyan shareholders.***

***(5) Where a procuring entity seeks to procure items not wholly or partially manufactured in Kenya—***

*(a) the accounting officer shall cause a report to be prepared detailing evidence of inability to procure manufactured articles, materials and supplies wholly mined or produced in Kenya; and*

*(b) the procuring entity shall require successful bidders to cause technological transfer or create employment opportunities as shall be prescribed in the Regulations.”*

149. Further, Section 157 of the Act provides as follows:

**"(1) Candidates shall participate in procurement proceedings without discrimination except where participation is limited in accordance with this Act and the regulations.**

***(2) Subject to subsection (8), the Cabinet Secretary shall, in consideration of economic and social development factors, prescribe preferences and or reservations in public procurement and asset disposal.***

***(3) The preferences and reservations referred to in subsection (2) shall—***

***(a) be non-discriminatory in respect of the targeted groups;***

***(b) allow competition amongst the eligible persons; and***

***(c) be monitored and evaluated by the Authority.***

***(4) For the purpose of protecting and ensuring the advancement of persons, categories of persons or groups previously disadvantaged by unfair competition***

*or discrimination, reservations, preferences and shall apply to—*

*(a) candidates such as disadvantaged groups;*

*(b) micro, small and medium enterprises;*

*(c) works, services and goods, or any combination thereof;*

*(d) identified regions; and*

*(e) such other categories as may be prescribed.*

*(5) An accounting officer of a procuring entity shall, when processing procurement, reserve a prescribed percentage of its procurement budget, which shall not be less than thirty per cent, to the disadvantaged group and comply with the provisions of this Act and the regulations in respect of preferences and reservations.*

*(6) To qualify for a specific preference or reservation, a candidate shall provide evidence of eligibility as prescribed.*

*(7) The Authority shall maintain an up-to-date register of contractors in works, goods and services, or any combination thereof, in order to be cognizant at all times of the workload and performance record.*

*(8) In applying the preferences and reservations under this section—*

*(a) exclusive preferences shall be given to citizens of Kenya where—*

*(i) the funding is 100% from the national government or county government or a Kenyan body; and*

*(ii) the amounts are below the prescribed threshold;*

*(iii) the prescribed threshold for exclusive preference shall be above five hundred million shillings;*

*(b) a prescribed margin of preference shall be given—*

*(i) in the evaluation of tenders to candidates offering goods manufactured, assembled, mined, extracted or grown in Kenya;*

*or*

*(ii) works, goods and services where a preference may be applied depending on the percentage of shareholding of the locals on a graduating scale as prescribed.*

*(9) For the purpose of ensuring sustainable promotion of local industry, a procuring entity shall have in its tender documents a mandatory requirement as preliminary evaluation criteria for all foreign tenderers participating in international tenders to source at least forty percent of their supplies from citizen contractors prior to submitting a tender.*

*(10) Despite subsection (2) or any other provisions of this Act, every procuring entity shall ensure that at least thirty percent of its procurement value in every financial year is allocated to the youth, women and persons with disability.*

***(11) Every procuring entity shall ensure that all money paid out to an enterprise owned by youth, women or persons with disability is paid into an account where the mandatory signatory is a youth, woman or a person with disability.***

***(12) The procuring entities at the national and county level shall make a report after every six months to the Authority.***

***(13) A report under subsection (12) shall—***

***(a) certify compliance with the provisions of this section; and***

***(b) provide data disaggregated to indicate the number of youth, women and persons with disability whose goods and services have been procured by the procuring entity.***

***(14) The Authority shall make a report to Parliament after every six months for consideration by the relevant committee responsible for equalization of opportunities for youth, women and persons with disability, which report shall contain details of the procuring entities and how they have complied with the provisions of this section.***

***(15) The Cabinet Secretary shall prescribe the preferences that shall facilitate the attainment of the quota specified in subsection (10) in order for the State***

*to achieve the objectives of Articles 55 and 227(2) of the Constitution.*

*(16) The preferences referred to in subsection (15) shall—*

*(a) be prescribed within ninety days after commencement of this Act; (b) be subject to such conditions as the Cabinet Secretary may specify therein but such conditions shall not pose any unnecessary impediment to the youth from participating in public procurement. (17) The National Treasury shall*

*operationalize a preference and reservations secretariat to be responsible for the implementation of the preferences and reservations under this Act which shall be responsible for—*

*(a) registration, prequalification and certification of the persons, categories of persons or groups as provided for in under Part XII;*

*(b) training and capacity building of the above target groups;*

*(c) providing technical and advisory assistance to procuring entities in the implementation of the preferences and reservations under this Act; and*

*(d) monitoring and evaluating the implementation of the preferences and reservations under this Act.*

*(18) The National Treasury shall provide adequate staff and resources for the operations of the secretariat.”*

150. From the above provisions under Section 155 and 157 of the Act, preference shall be given to manufactured articles, materials, and supplies partially mined or produced in Kenya and where applicable assembled in Kenya and candidates shall participate in such procurement proceedings without discrimination and competition shall be allowed amongst eligible tenderers.

151. An allegation of discrimination in the subject tender has been raised by the Applicant. This Board is cognizant of its Decision in **PPARB Application No. 79 of 2022 CIC General Insurance Limited v The Accounting Officer, Kenya Airports Authority & Another** where it held at pages 28 to 37 as follows:

“.....

*The mandatory requirement MR-13 in the subject tender has been challenged on the grounds of being discriminatory against the Applicant and locks it out of the bidding process.*

*Black’s Law Dictionary, 9th Edition defines “discrimination” as*

***(1) the effect of a law or established practice that confers privileges on a certain class because of race, age sex, nationality, religion or hardship***

***(2) Differential treatment especially a failure to treat all persons equally when no reasonable***

***distinction can be found between those favoured and those not favoured.***

*In the case of **Jacqueline Okeyo Manani & 5 Others v. Attorney General & Another [2018] eKLR** Justice Mwita while addressing the issue of discrimination stated:*

***"27. In the case of Peter K Waweru v Republic [2006]eKLR, the court stated of discrimination thus:-***

***"Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions whereby persons of one such description are subjected to ... restrictions to which persons of another description are not made subject or have accorded privileges or advantages which are not accorded to persons of another such description... Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age sex ... a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured."(emphasis)***

***28. From the above definition, discrimination, simply put, is any distinction, exclusion or preference made on the basis of differences to***

*persons or group of persons based such considerations as race, colour, sex, religious beliefs political persuasion or any such attributes that has real or potential effect of nullifying or impairing equality of opportunity or treatment between two persons or groups. Article 27 of the Constitution prohibits any form of discrimination stating that. (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law, and that (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.*

*29. The Constitution advocates for non-discrimination as a fundamental right which guarantees that people in equal circumstances be treated or dealt with equally both in law and practice without unreasonable distinction or differentiation. It must however be borne in mind that it is not every distinction or differentiation in treatment that amounts to discrimination. Discrimination as seen from the definitions, will be deemed to arise where equal classes of people are subjected to different treatment, without objective or reasonable justification or proportionality between the aim sought and the means employed to achieve that aim.*

.....

***43. I agree with the Court's observation in the case of Law Society of Kenya v Attorney General & National Assembly [2016] eKLR that discrimination which is disallowed by the Constitution is that which is unjustifiable and without any rational basis. It is always the duty of the party who alleges discrimination to demonstrate that indeed there is unreasonable differential treatment accorded to persons of the same class or category to amount to real discrimination. At the same time it must be clear to all those who move the court alleging discrimination, that it is not every differentiation that amounts to discrimination. It is important, if not necessary, to identify the criteria that separates legitimate differentiation from constitutionally impermissible differentiation, (Nelson Andayi Havi v Law Society of Kenya & 3 Others- (supra), And that equality must not be confused with uniformity lest uniformity becomes the enemy of equality. (National Coalition for Gay and Lesbian Equality v Minister for Justice-supra)"***

*The Board also observes that in the case of **James Nyasora Nyarangi & 3others v Attorney General [2008]***

*eKLR* (hereinafter referred to as "the James Nyasora case") Nyamu J. (as he then was) while discussing discrimination stated:

***"Discrimination which is forbidden by the Constitution involves an element of unfavourable bias. Thus, firstly on unfavourable bias must be shown by a complainant. And secondly, the bias must be based on the grounds set out in the Constitutional definition of the word "discriminatory" in Section 82 of the Constitution. Both discrimination by substantive law and by procedural law, is forbidden by the constitution. Similarly, class legislation is forbidden but the Constitution does not forbid classification. Permissible classification which is what has happened in this case through the challenged by laws must satisfy two conditions namely:***

***(i) it must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group; and***

***(ii) the differentia must have a rational relation to the object sought to be achieved by the law in question.***

***(iii) the differentia and object are different, and it follows that the object by itself cannot be the basis of the classification.”***

*From the James Nyasora case the Board notes that discrimination as seen from the definitions, will be deemed to arise where equal classes of people are subjected to different treatment, without objective or reasonable justification or proportionality between the aim sought and the means employed to achieve that aim. Additionally, it must be clear to all those who move the court alleging discrimination, that it is not every differentiation that amounts to discrimination. It is important, if not necessary, to identify the criteria that separates legitimate differentiation from constitutionally impermissible differentiation. The law does not prohibit discrimination but rather unfair discrimination. For the Applicant to succeed on the issue of discrimination, it must prove unfavourable bias and the said bias must be based on the grounds set out in the Constitution.*

.....

*What emerges from the above statutory provisions is that the preparation of a tender document is the mandate of the accounting officer in consultation with the relevant department and the Public Procurement Regulatory Authority.*

.....

*Applying the formulae in the James Nyasora case in determining whether the Mandatory Requirement Item MR-13 is a permissible classification, it is the Board considered view that the differentia is that the insurance underwriter must have a portfolio balance between motor and non-motor business with gross underwritten premium for motor business not exceeding an average of 30% of the total general business for each of the last three consecutive years i.e. 2019, 2020 and 2021 (or 2022) and must provide copies of audited accounts for each of these years.*

*On the other hand, the object to be achieved by this mandatory requirement is that it is necessary to ensure that paid premiums are secured and utilized for the intended purpose and not diverted to other portfolios when required for contracted services. This has been said to be a cautionary measure to safeguard against loss of public funds. The Procuring Entity wants to ensure that the successful bidder is one with a sound financial standing and would thus not commit funds to settlement of motor business to the disadvantage of medical business when required. The Procuring entity's cautionary measure cannot be said to be irrational as the Board takes judicial notice of instances where medical insurance policies have failed to be honored by an insurer.*

*The Board opines this to be a reasonable objective and considers Justice Mativo's holding in the case of **Judicial Review Application No. 646 of 2017 Konton Trading Limited V Kenya Revenue Authority & 3 others** while addressing the concept of reasonableness stated at paragraph 64 that:*

***"Review by a court of the reasonableness of decision made by another repository of power is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process but also with whether the decision falls within a range of possible, acceptable outcomes which are defensible with respect to the facts and law."***

*Consequently, despite the fact that insurers offering motor insurance have been treated differently from insurers offering other types of insurance such as travel, life insurance, property insurance etc, this cannot be termed as discrimination and does not amount to unfavourable bias as there is a clear rational relation between the differentia and the object of the mandatory requirement MR-13.*

*In light of the above, and bearing in mind that a procuring entity is better placed to know the needs of its specific user department, the Board finds that the specific requirements of a Tender Document are within the preserve of the Procuring Entity. This discretion is vested on the Procuring Entity provided that it ensures such requirements allow for fair and*

open competition and are applicable to all parties who wish to participate in the subject tender. [Emphasis]

.....

152. In **Constitutional Petition No. 607 of 2017 Nelson Andayi Havi v Law Society of Kenya & 3 others [2018] eKLR**, Justice Mativo, *as he then was*, held as follows in regard to the question of discrimination on account of a set age requirement which was under dispute:

".....

**95. It is not every differentiation that amounts to discrimination. Consequently, it is always necessary to identify the criteria that separate legitimate differentiation from constitutionally impermissible differentiation. Put differently, differentiation is permissible if it does not constitute unfair discrimination.**

***96. The jurisprudence on discrimination suggests that law or conduct which promotes differentiation must have a legitimate purpose and should bear a rational connection between the differentiation and the purpose. The rationality requirement is intended to prevent arbitrary differentiation. The authorities on equality suggest that the right to equality does not prohibit discrimination but prohibits unfair discrimination.***

**97. The requirement for qualifications to occupy a particular office cannot amount to unfair discrimination. The test will depend on the nature of the job or post the applicants are required to perform, and the responsibilities that go with it. The drafters of the provisions under challenge in their wisdom felt that the post of the President of the Law Society is a high calling that calls for the most qualified person. Consequently, they opted for high qualifications. They felt that the qualifications similar to those required for appointment of a Supreme Court Judge would suffice.**

.....

**99. In my view, lowering the bar to make it easy for people to qualify may not necessarily be in the best interests of the society. But should the majority feel the necessity to effect the changes, then this can be achieved legally by Members voting for the changes in a properly constituted AGM. That way, the majority will have their say as opposed to a Court decision which may have the force of law, but may go against the preference of the majority. In other words, a court of law should be hesitant to involve itself in internal matters of professional bodies especially where the law provides for clear mechanisms of resolving them.**

.....” [Emphasis]

153. In the instant Request for Review, the Respondents are adamant that the subject tender was open, specific to local manufacturers and assemblers including citizen contractors without discriminating against any eligible tenderer. Further, the Respondents contend that the criteria used to identify whether a bidder was local included provision of, inter alia, a valid tax compliance certificate from Kenya Revenue Authority, a KRA PIN Certificate, and a copy of a firms Certificate of Registration accompanied with a CR-12 to confirm directorship and shareholding.

154. From the foregoing, it is our considered view that the specific requirements of the Tender Document reserving the subject tender to local manufacturers and assemblers, being a preserve of the Procuring Entity, allows for competition amongst tenderers who are qualified and eligible in the tendering process. We find no fault on the Procuring Entity for restricting the Tender Document to local manufacturers and assemblers without limiting the participation of citizen contractors as long as they were eligible tenderers noting that the same was non-discriminatory and in line with the provisions of the Constitution, the Act and the Regulations. We are therefore not persuaded by the Applicant's submission that the preference was to a non-existent preference and reservation scheme and was discriminative with the aim of stifling competition.

155. In the circumstances, we find and hold that the provisions of the Tender Document in the subject tender are not in breach of the Constitution, the Act and Regulations 2020.

### **What orders should the Board grant in the circumstances?**

156. In determining the appropriate order to issue in the circumstances, we have found that this Board has jurisdiction to hear and determine the instant Request for Review.

157. The Board has established that the provisions of the Tender Document in the subject tender are not in breach of the Constitution, the Act and Regulations 2020.

158. In totality of the foregoing, the Request for Review is for dismissal and the Board proceeds to make the following specific orders:

### **FINAL ORDERS**

159. In exercise of the powers conferred upon it by Section 173 of the Act, the Board makes the following orders in the Request for Review dated 11<sup>th</sup> December 2023 and filed on 13<sup>th</sup> December 2023:

**A. The Request for Review dated 11<sup>th</sup> December 2023 and filed on 13<sup>th</sup> December 2023 by the Applicant herein with respect to Tender No. KPI/9A.3/OT/07/23-24 for Supply**

of Single Phase and Three Phase Smart Meters (Local Manufacturers and Assemblers)be and is hereby dismissed.

**B. The Respondents are hereby ordered to proceed with the procurement proceedings in respect to Tender No. KPI/9A.3/OT/07/23-24 for Supply of Single Phase and Three Phase Smart Meters (Local Manufacturers and Assemblers) to its logical conclusion in accordance with the provisions of the Tender Document, the Act, Regulations 2020 and the Constitution.**

**C. Given that the subject procurement process has not been concluded, each party shall bear its own costs in the Request for Review**

**Dated at NAIROBI, this 22<sup>nd</sup> Day of December 2023.**

.....

**PANEL CHAIRPERSON**

**PPARB**

.....

**SECRETARY**

**PPARB**

