REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 105/2024 OF 16TH OCTOBER 2024

BETWEEN

MACHIRI LIMITED ..... APPLICANT

AND

THE ACCOUNTING OFFICER, ATHI

WATER WORKS DEVELOPMENT AGENCY ..... RESPONDENT

ZHONGMEI ENGINEERING GROUP LIMITED/

HUNAN BESTALL WATER CONSERVANCY

CONSTRUCTION CO. LIMITED ..... INTERESTED PARTY

Review against the decision of the Accounting Officer, Athi Water Works Development Agency in relation to Tender No. AWWDA/AFD/NWSP/W-2B/2023 for Construction Works for Gigiri-Karura-Outer Ring Road Transmission Pipeline Project.

BOARD MEMBERS PRESENT

1. Mr. George Murugu, FCIArb, I.P - Chairperson
2. CPA Alexander Musau - Member
3. Ms. Jessica M'mbetsa - Member

IN ATTENDANCE

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

PRESENT BY INVITATION

APPLICANT	**MACHIRI LIMITED**
1. Mr. Charles Njuguna	-Advocate, Njuguna & Partners LLP Advocates
2. James Macharia	- Managing Director, Machiri Limited

RESPONDENT	**THE ACCOUNTING OFFICER, ATHI WATER WORKS DEVELOPMENT AGENCY**
1. Mr. Karuthui Kamau	-Advocate, Gerivia Advocates LLP
2. Billy Kiptoo	- Principal Officer Supply Chain Management

INTERESTED PARTY	**ZHONGMEI ENGINEERING GROUP LIMITED/HUNAN BESTALL WATER CONSERVANCY CONSTRUCTION CO. LIMITED**
Mr. Huang Tu	- Zhongmei Engineering Group Ltd in JV

BACKGROUND OF THE DECISION

The Tendering Process

1. According to a Credit Facility Agreement dated 2nd March 2020, the Government of Kenya (wherein it was referred to as "the Borrower") received a facility from Agence Francaise De Development (wherein it was referred to as "the Lender" and hereinafter referred to as "AFD") towards a project aimed at improving access to drinking water and sanitation in Nairobi through the Nairobi Water and Sanitation Project which entailed construction works for Gigiri-Karura-Outering Ring Road Transmission Pipeline Project (hereinafter referred to as "the project"). Funds received would be transferred by the Borrower to Athi Water Works Development Agency, the implementing agency and the Procuring Entity herein on terms to be approved by the Lender. Subsequently, a Subsidiary Loan Agreement dated 11th November 2020 was entered into between the Borrower and the Procuring Entity for purposes of implementing the project.

2. Athi Water Works Development Agency invited sealed bids in response to Tender No. AWWDA/AFD/NWSP/W-2B/2023 for Construction Works for Gigiri-Karura-Outer Ring Road Transmission Pipeline Project (hereinafter referred to as "the subject tender") advertised on 27th February 2024 on My Gov Publication Newspaper and published on the Procuring Entity's website www.awwda.go.ke and PPIP Portal www.tenders.go.ke where the blank tender document issued to tenderers (hereinafter referred to as the 'Tender Document') was

available for download. The subject tender's submission deadline was on 22nd May 2024 at 12.00 p.m. East African Time.

Submission of Tenders and Tender Opening

3. According to the Tender Opening Minutes signed by members of the Tender Opening Committee on 22nd May 2024 (hereinafter referred to as the 'Tender Opening Minutes') and which Tender Opening Minutes were part of confidential documents furnished to the Public Procurement Administrative Review Board (hereinafter referred to as the 'Board') by the 1st Respondent pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act'), a total of eleven (11) tenders were submitted in response to the subject tender. The said eleven (11) tenders were opened in the presence of tenderers' representatives present at the tender opening session, and were recorded as follows:

Bidder No	**Name of Tenderer**
1.	Fatah Construction and Civil Works Ltd.
2.	Changjian Construction Group Company Limited/ Nanchang Foreign Engineering Co (K) Ltd JV
3.	Toddy Civil Engineering Company Limited
4.	Jiangxi Water and Hydropower Construction Group Co. Limited

5.	Octagon Builders and General Suppliers Limited
6.	Machiri Limited
7.	Sogea Satom
8.	China Road and Bridge Corporation (CRBC)/ Beijing Enterprises Water Group Limited (BEWG) JV
9.	Zhongmei Engineering Group Limited/ Hunan Bestall Water Conservancy Construction Co., Ltd JV.
10.	Shanxi Water Resources & Hydropower/ JLIANCO Heavy Industry Co., Ltd JV
11.	Nanchang Municipal Engineering Development Group Co Limited (NMEDG)

Evaluation of Tenders

4. A Tender Evaluation Committee (hereinafter referred to as the "Evaluation Committee") appointed by the 1st Respondent undertook evaluation of the eleven (11) tenders as captured in a Bid Evaluation Report for the subject tender in the following stages:
   i Preliminary Evaluation;
   ii Technical Evaluation; and
   iii Detailed Examination of Bids.

Preliminary Evaluation

5. The Evaluation Committee carried out a Preliminary Evaluation and examined tenders for responsiveness in accordance with Instructions to Bidders (ITB) Clause 29 and 30 of the Tender Document.

6. At the end of evaluation at this stage, the eleven (11) tenders were determined responsive and proceeded to Technical Evaluation.

Technical Evaluation

7. At this stage of evaluation, the Evaluation Committee carried out a technical examination of the technical proposals to check adequacy of the technical proposals on the basis of their responsiveness in accordance with Instructions to Bidders (ITB) Clause 16 of the Tender Document and in particular to confirm that all requirements of Section VII – Works Requirements have been met without any Material Deviation, Reservation or Omission.

8. At the end of evaluation at this stage, six (6) tenders were rendered non-responsive while five (5) tenders were determined responsive and progressed for further evaluation termed as the Detailed Examination of Bids as can be discerned from the Evaluation Report.

Detailed Examination of Bids

9. At this stage of evaluation, tenders were checked for Arithmetic Errors, Modifications and Discounts as per Clause 35 of the Instructions to Bidders (ITB) of the Tender Document. In accordance with ITB Clause

31 Correction of Arithmetical Errors is conducted as part of the evaluation process, which is procedural in line with AFD Procurement Rules and Procedures and through ITB Clause 27 on clarifications of bids, the Procuring Entity is allowed to seek clarifications from Bidders with arithmetic errors.

10. Following the Detailed Examination of Bids, five (5) bidders whose bids had arithmetic errors were requested to confirm and accept the arithmetic errors as per ITB Clause 31.2 and Four (4) bidders accepted the correction of errors and the corrected Bid Amount. Bidder No. 1 – Fatah Construction and Civil Works did not respond to the Employer's Letter on correction of arithmetic errors.

11. Bids were ranked based on the Corrected / Evaluated Bid Prices as follows:

Rank	***Bidder No.***	***Bidder***	***Corrected/ Evaluated Bid Price (Incl VAT) (kshs)***	***Variation from Engineer's cost estimate***
1	***9***	***Zhongmei Engineering Group Limited/ Hunan Bestall Water Conservancy Construction Co., Ltd JV.***	***1,697,594,976.62***	***(-7.38%)***

2	*2*	*Nanchang Foreign Engineering Co (Kenya) Ltd. In JV With Changjian Construction Company Limited*	*1,730,789,917.80*	*(-5.57%)*
3	*6*	*Machiri Limited*	*1,771,908,512.01*	*(-3.33%)*
4	*4*	*Jiangxi Water and Hydropower Construction Group Co. Limited*	*1,949,142,820.33*	*(+6.34%)*
5	*7*	*Sogea Satom*	*5,272,296,635.82*	*(+187.65%)*

12. Subsequently, an Analysis of Bidder's Unit Rates and Analysis of the Environmental, Social, Health and Safety (ESHS) Cost Schedule and the following bidders were recommended:

Rank	*Bidder No.*	*Bidder*	*Corrected/ Evaluated Bid Price (Incl VAT) (kshs)*
1	*9*	*Zhongmei Engineering Group Limited/ Hunan Bestall Water Conservancy Construction Co., Ltd JV.*	*1,697,594,976.62*
3	*6*	*Machiri Limited*	*1,771,908,512.01*

13. Zhongmei Engineering Group Limited/ Hunan Bestall Water Conservancy Construction Co., Ltd JV, the Interested Party herein, was found to be the lowest evaluated bidder and recommended to be subjected to Post-Qualification Evaluation based on Clause 37 of the ITB and Section III of the Bidding Document.

Due Diligence

14. A due diligence exercise was first conducted on Bidder No. 9 and the Bidder's Eligibility was assessed and summarized as can be discerned at pages 83 of 116 to 115 of 116 of the Bid Evaluation Report. At the end of the due diligence exercise, the Interested Party was considered suitably qualified to undertake the contract in the subject tender though the Evaluation Committee recommended that the following ought to be requested from the said bidder during Contract Negotiation:

.....

- ***Bidder to provide an internal procedure for monitoring compliance with ESHS commitments for Subcontractors, Suppliers and other Partners, before Commencement of the Works***
- ***Bidder to provide internal procedures and preparation tools for preparing employees likely to work or who are working in areas with security risks, before Commencement of the Works***

.....

Evaluation Committee's Recommendation

15. The Evaluation Committee recommended award of the subject tender to Zhongmei Engineering Group Limited/Hunan Bestall Water Conservancy Construction Co. Limited, the Interested Party herein at an evaluated Contract Price of **KShs. 1,697,594,976.62** (One Billion, Six Hundred and Ninety-Seven Million, Five Hundred and Ninety-Four Thousand, Nine Hundred and Seventy-Six Shillings and Cents Sixty-Two Only) inclusive of 16% Value Added Tax.

Professional Opinion

16. In a Professional Opinion (hereinafter referred to as "the Professional Opinion"), the Deputy Director - Supply Chain Management, Ms. Janet Lang'at, reviewed the manner in which the subject procurement process was undertaken including evaluation of tenders and concurred with the recommendations of the Evaluation Committee with respect to award of the subject tender to the Interested Party herein at an evaluated Contract Price of KShs. 1,697,594,976.62 (One Billion, Six Hundred and Ninety-Seven Million, Five Hundred and Ninety-Four Thousand, Nine Hundred and Seventy-Six Shillings and Cents Sixty-Two Only) inclusive of 16% Value Added Tax.

Notification to Tenderers

17. Tenderers were notified of the outcome of evaluation of the subject tender vide letters of Notification of Intention to Award Contract dated 4th October 2024.

REQUEST FOR REVIEW NO. 105 OF 2024

18. On 16th October 2024, the Applicant filed a Request for Review dated 16th October 2024 together with Documents in Support of the Request for Review dated 16th October 2024 and an Affidavit in Support of the Request sworn on 16th October 2024 by Eng. James Mbugua Macharia, its Managing Director (hereinafter referred to as the 'instant Request for Review') through the firm of Njuguna & Partners LLP Advocates seeking the following orders from the Board in verbatim:

a) The entire decision of the Procuring Entity to award the Contract to the Interested Party be set aside.

b) The Procuring Entity be directed to award the Contract to the Applicant at its bid price of Kshs. 1,771,908.512.01.

c) In the alternative to prayer (b) above, a declaration that the tender process terminated automatically and or concluded unsuccessfully on expiry of bid validity period on 19th September 2024 and the Procuring Entity be ordered to retender afresh.

d) In the event of retender, the Board to order and direct that the bid be limited to the bidders who participated in

this Tender and whose Bids had proceeded to financial evaluation.

e) The Board do give other or further orders or directions as it may deem appropriate in the circumstances.

f) The Applicant be awarded costs of the proceedings.

19. In a Notification of Appeal and a letter dated 16th October 2024, Mr. James Kilaka, the Acting Board Secretary of the Board notified the Respondent of the filing of the Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said Respondent a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the Respondent was requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 16th October 2024.

20. On 23rd October 2024, the Respondent filed through Gerivia Advocates LLP a Notice of Appointment of Advocates dated 23rd October 2024, a Respondent's Memorandum of Response dated 23rd October 2024, a Notice of Preliminary Objection by the Respondent dated 23rd October 2024, a Respondent's List of Documents dated 23rd October 2024, and a Replying Affidavit sworn on 23rd October 2024 by Eng. Joseph Kamau

together with confidential documents concerning the subject tender pursuant to section 67(3)(e) of the Act.

21. Vide letters dated 24th October 2024, the Acting Board Secretary notified all tenderers in the subject tender via email, of the existence of the subject Request for Review while forwarding to all tenderers a copy of the Request for Review, copies of the Respondent's responses together with the Board's Circular No. 02/2020 dated 24th March 2020. All tenderers in the subject tender were invited to submit to the Board any information and arguments concerning the subject tender within three (3) days.

22. Vide a Hearing Notice dated 25th October 2024, the Acting Board Secretary, notified parties and all tenderers in the subject tender of an online hearing of the Request for Review slated for 31st October 2024 at 1400 hrs through the link availed in the said Hearing Notice.

23. On 28th October 2024, the Interested Party filed a Memorandum of Response by the Interested Party sworn by Yankun Pang.

24. On 29th October 2024, the Applicant filed through its advocates a Further Affidavit sworn on 29th October 2024 by Eng. James Mbugua Macharia, its Managing Director.

25. On 30th October 2024, the Respondent filed through its advocates Written Submissions dated 30th October 2024 and Respondent's List of Authorities dated 30th October 2024.

26. On 30st October 2024, the Interested Party filed its Written Submissions dated 30th October 2024.

27. On 31st October 2024, the Applicant filed through its advocates Written Submissions dated 31st October 2024, Applicant's Case Digest dated 31st October 2024 and Authorities.

28. At the hearing of the instant Request for Review, the Board read out pleadings filed by parties in the matter and directed that the hearing of the preliminary objection by the Respondent 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.

29. Accordingly, the Board allocated time for parties to highlight their respective cases and the instant Request for Review proceeded for virtual hearing as scheduled.

PARTIES' SUBMISSIONS

Respondent's submission on its Notice of Preliminary Objection

30. In his submissions, counsel for the Respondent, Mr. Kamau relied on the Notice of Preliminary Objection dated 23rd October 2024 and submitted that the gist of the preliminary objection is that the jurisdiction of the Board is ousted by dint of Section 4(2)(f) and 6(1) of the Act.

31. Counsel submitted that the subject procurement proceedings are being undertaken pursuant to the Loan Credit Facility Agreement dated 2nd March 2020 between the Republic of Kenya and Agence Française de Dévelpement / French Development Agency ("AFD") entered into on 2nd March 2020 signed by the Government of Kenya through the National Treasury and the AFD and a subsequent Subsidiary Loan Agreement dated 11th November 2020 signed between the Government of Kenya and the Respondent providing for specific terms and conditions for the utilisation of the funds under the two Agreements.

32. He stated that the purpose of the Credit Facility Agreement was to transfer money from AFD to the National Treasury of the Government of Kenya and define the terms of the transfer while the purpose of the Subsidiary Loan Agreement between the Government of the Republic of Kenya and Procuring Entity was to assign the funding from the National Treasury of the Government of Kenya to the Procuring Entity for purposes of implementing the Nairobi Water and Sanitation Project-

construction works for Gigiri – Karura – Outering Ring Road Transmission Pipeline Project ("the Project") as per the Agreement with the AFD.

33. Counsel pointed out that the Loan Agreement contained specific provisions on the Procurement Guidelines and Procedures that are applicable in the procurement process such as:

(a) Clause 10.12 of the Credit Loan Agreement on page 20 setting out the manner in which the procurement is to be carried out, that is in accordance with the terms of the Procurement Guidelines, with Procurement Guidelines being defined in Schedule 1A (Definitions) on page 44 as Contractual provisions contained in the Guidelines relating to procurement financed by AFD in foreign countries a copy of which has been delivered to the Borrower. Additionally, that the said clause further provided that the Borrower (GoK) is contractually bound by the Guidelines as if they were incorporated by reference to the Agreement and the Borrower represented that it has provided a copy of the Guidelines to the final Beneficiary (the Procuring Entity).

(b) The fact that Clause 10.12 of the Credit Loan Agreement is incorporated into the Subsidiary Loan Agreement through Article X on Procurement on page 14, which confirms that the Procuring Entity is contractually bound by the Procurement Guidelines as if the said Guidelines were incorporated by reference into the Subsidiary Loan Agreement. The said annex reiterates the fact

that procurement shall be carried out in accordance with the Procurement Guidelines of AFD.

(c) Clause 10.6 of the Credit Loan Agreement and Article XI., 11.1 (c) of the Subsidiary Agreement which are representations on "No Conflict with Other Obligations" indicate that the entry of the obligations do not conflict with domestic laws applicable to it, which in essence requires that conflict cannot be used to avoid the Obligations under the two Agreements.

34. Counsel referred to the holding in the case of *Owners of Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd (1989) Eklr* on what constitutes jurisdiction of a court and referred the Board to provisions under Section 4(2)(f) and 6(1) of the Act in addition to Section 27 and 28 of the Act on establishment and functions of the Board. He submitted that Section 167(1) of the Act limits the Board's jurisdiction to cases involving a breach of duty imposed on the Procuring Entity by the Act or the Regulations and that Bilaterally financed procurements are outside the purview of the Act by virtue of sections 4 (2) (f) & 6 (1) as read with section 167 (1) of the Act.

35. Mr. Kamau argued that under the subject procurement proceedings, the Government of the Republic of Kenya entered into a Bilateral Agreement (the Credit Facility Agreement) with AFD which is the Lender, a French public entity governed by French Law, wherein the latter agreed to lend the Republic of Kenya funds to improve access

drinking water and sanitation in Nairobi through the Nairobi Water and Sanitation Project.

36. Counsel further argued that the subject procurement process falls under the purview of sections 4 (2) (f) and 6 (1) of the Act ousting the Board's jurisdiction to hear and determine the instant Request for Review and in support of his argument, referred to the holdings in *Republic v Public Procurement Administrative Review Board & 2 Others Ex Parte Kenya Power & Lighting Company [2019] Eklr* and *PPARB Application No. 76 of 2022 Smart People East Africa - vs – Tana Water Works Development Agency (TWWDA) & Another,*

37. He submitted that the advertisement of the subject tender disclosed to candidates that the procurement proceedings in the subject tender were being undertaken following receipt of financing by the Government of Kenya from the AFD and that bidding would be conducted through open competitive bidding method as specified in the AFD's Procurement Guidelines.

38. He further submitted that an Invitation for Bids (IFB) was also published on 27th February 2024 giving bidders relevant details on the Project, such as the fact that the project was funded by AFD, where bidders were to obtain information and download the bid and basic qualification criteria. While also providing at paragraph 5 that, "the Provisions in the Instruction to Bidders and in the General Conditions

of Contract are the provisions of the AFD's Standard Bidding Documents: Procurement of Works.

39. Counsel pointed out that the detailed bidding procedures were contained in various documents posted on the website of the Procuring Entity (https://www.awwda.go.ke/tenders/) under Project Ref: AWWDA/AFD/NWSP/W-2B/2023 and that in Particular Volume 1 – Bidding Procedures contained all bidding procedures including the mode of filing complaints. He pressed on that the debrief and complaints procedures were different from those contained in the Tender Documents for similar projects funded by the Government of Kenya, which provide for an Award Letter with Debrief Procedures and Request for Review forms as provided by the Public Procurement Regulatory Authority (PPRA).

40. Counsel submitted that the Procuring Entity was undertaking the subject procurement proceedings as an agent of the Government of Kenya in view of the fact that the Credit Facility Agreement dated 2nd March 2020 provided for the Purpose and Conditions of Utilisation at Clause 2.2 stating that the Borrower (Government of Kenya) shall transfer the Funds to the Final Beneficiary, the Athi Water Works Development Agency (hereinafter "AWWDA") on terms which shall be approved by the lender through a Subsidiary Loan Agreement. Additionally, that at Clause D of the Preamble under the Subsidiary Loan Agreement provides that AWWDA has been identified as the

implementing agency that shall carry out the project on behalf of the Government of Kenya.

41. Mr. Kamau argued that it is not for the Board to re-write the Agreement between the Republic of Kenya and the AFD and that the Tender Document stipulated the mode of redress where a bidder had a procurement related complaint so as not to be left without an avenue for recourse.

42. Counsel pointed out that the procurement process in the subject tender was oversighted by the AFD through a rigorous review and 'No Objection' mechanism which meant that all bidders including the Applicant were aware from the point of advertisement to submission of their bid documents that the procurement was being conducted in accordance with the AFB Procurement Guidelines. In support of his submission, he placed reliance on the holding in *Republic v Public Procurement Administrative Review Board; Consortium of TSK Electronica Y Electricdad S A and Ansaldoenergia & Another (Interested parties) Ex parte Kenya Electricity Generating Company Plc(Kengen) [2021] Eklr.*

43. Mr. Kamau urged the Board to uphold the preliminary objection.

Applicant's Response to the Respondent's Notice of Preliminary Objection and Submissions on the Request for Review

44. On whether the Board has jurisdiction to hear and determine the instant Request for Review, counsel for the Applicant, Mr. Njuguna, in opposition to the preliminary objection referred the Board to provisions under Section 4 (2) (f) and 6 (1) of the Act and the interpretation of the said provisions in the case of *Republic v Public Procurement Administrative Review Board & another Ex parte: Athi Water Service Board & another [2017] eKLR* and submitted that the High Court held that where parties to a procurement are the government of Kenya and a foreign government, entity or multilateral agency, the Board does not have jurisdiction to hear the dispute. He further submitted that in the instant Request for Review, the Procuring Entity is a state corporation and not the government and that bidders are not foreign entities.

45. Counsel further made reference to the holding by Justice Nyamweya (as she then was) in *Republic v Public Procurement Administrative Review Board & 2 others Exparte Kenya Power & Lighting Company [2019] Eklr* and stated that the court held that the jurisdiction of the Board is ousted by section 4(2)(f) where the procurement is undertaken as provided for or in accordance with the terms of a bilateral agreement that is entered into between the government of Kenya and foreign government, entity or multi-agency. He pointed out that the court in this case looked at the tender advert and guidelines for the procurement and noted that the subject agreement was between the Government of Kenya and Nordic Development Fund and the tender

advert indicated that the funds were borrowed by the Government of Kenya thus concluding that the Board did not have jurisdiction to hear and determine the matter.

46. Counsel argued that the aforementioned case is distinguishable from the instant Request for Review in that the procurement proceedings in the subject tender are subject to the AFD guidelines. He pointed out that Clause 15.7 of the Credit Finance Agreement states that the procurement guidelines form part of the agreement and have the same legal effect while Article X of the Subsidiary Agreement states that the Respondent is bound by the guidelines and that at the definitions, laws and regulations are defined as the legal and regulatory provisions applicable to the Contracting Authority, being the Procuring Entity.

47. He submitted that Clause 3.2.11 of the Guidelines provides that complaints lodged with any competent administrative or judicial authority where applicable, shall be handled by the latter in accordance with the laws and regulations and that gives the Board priority to hear the dispute over the Procuring Entity's internal dispute resolution mechanisms. Additionally, that Article 14.6 of the Subsidiary Loan Agreement provides that the Agreement is governed and construed in accordance with the Laws of Kenya.

48. In support of his argument, counsel referred the Board to the holding in *PPARB Application No. 1 of 2020 Energy Sector v Kenya Power* and pointed out that the Board was faced with a similar question of

jurisdiction where the applicable guidelines to the procurement were the AFD guidelines and that it noted that the guidelines define laws and regulations as those applicable to the Contracting Authority being the procuring entity. He further pointed out that the Board found that the Guidelines did not exclude application of the Act.

49. Mr. Njuguna submitted that the cases relied upon by the Respondent are distinguishable from the instant Request for Review in that in the KPLC case, the applicable guidelines were the World Bank guidelines that have their own procurement review mechanism and that in the WWDA case and the TSK Electronica case, the applicable guidelines were the AFDB and ODA guidelines respectively. Further that in the KPLC case, the court noted that in the tender advert, it stated that the Government of Kenya had received funds from the Nordic Development Fund while in the instant Request for Review, the tender advert for the subject tender stated that the Procuring Entity had received funds from AFD.

50. Counsel argued that the AFD Guidelines which are entrenched in the Credit Facility Agreement and Subsidiary Loan Agreement do not conflict with the Act and that the said guidelines provide that the Act is the applicable law for the procurement in the subject tender.

51. In support of his argument that the Board is seized with jurisdiction, Mr. Njuguna submitted that:

a. According to the Credit Facility Agreement at Page 20 -22 and page 44-46

   i. The Credit Facility Agreement at Clause 10.12 specified the procurement and asset disposal procedures to be followed and specifically provided that procurement will be done using procurement guidelines which are defined at page 44 of the agreement as Guidelines related to procurement financed by AFD in foreign countries.

   ii. The Credit Facility Agreement at Clause 11.1 further provided that the Borrower would ensure that the final beneficiary complies in all respects with all laws and regulations to which it (final beneficially) or the project is subject.

   iii. The Credit Facility Agreement at Clause 11.4 restated that the Borrower and the final beneficiary would comply with and implement the Procurement Guidelines.

b. According to the Subsidiary Loan Agreement Dated 11th November 2020 at page 14:

   i. The Subsidiary Loan Agreement adopted the same guidelines and that at Clause 10.1 the Procuring Entity confirmed that the procurement allocation and performance of the contracts relating to the implementation of the project would comply with the Procurement Guidelines, a position restated at Clause 10.2c

where the Procuring Entity undertakes to comply with and implement AFD procurement guidelines.

ii. Clause 14.6 was to the effect that the Subsidiary Loan Agreement would be governed by and construed in all respects in accordance with the Laws of Kenya.

c. The Procurement Guidelines for AFD Financed Contracts effectively provided for application of local laws on procurement and that the application of the Act is demonstrated by:

i. The definitions set out at page 8 of the Guidelines whereby Laws and regulations are defined as legal and regulatory provisions and internal rules and procedures related to procurement and performance of public contracts, purchases and any other acquisition of services works or goods applicable to contracting authority i.e the Procuring Entity therein.

ii. Clause 1.2 at page 13 which provided for principles governing contract procurement and performance while Clause 1.2 stipulated that the Contracting Authority would be fully responsible for ensuring that the implementation of AFD financed projects complies with the relevant applicable laws and regulations in particular concerning contract procurement and performance and that the Contracting Authority would also comply with the provisions of the present Guidelines. In the event the laws and regulations were not compatible with the

Guidelines, the Contracting Authority undertook to inform AFD prior to the procurement of any Contract and without the express agreement of AFD the contracting Authority would apply the provisions of the Guidelines.

iii. Counsel argued that from the above provisions, it was clear that the Procuring Entity was fully responsible for ensuring that the implementation of projects complies with relevant applicable laws and regulations in particular concerning contract procurement and performance and that it would only apply the Guidelines when the laws or regulations are incompatible with the said Guidelines.

iv. He pressed on that the effect of the foregoing was that the local law on procurement and regulations thereof are fully applicable insofar as they are not incompatible with the specific provision in the Guidelines, in which instance the provisions of the Guidelines would prevail.

v. Clause 3.2.11 provided for claims appeals and complaints at page 29 of the Guidelines whereby the Contracting Authority would be responsible for handling any complaint appeals and claims received in accordance with the laws and regulations. Counsel argued that that foresaw complaints and appeals lodged with competent administrative and judicial authority and that the Guidelines provided that such appeals and complaints would be

handled by administrative and judicial authorities in accordance with laws and regulations. That the Guidelines further provided that AFD would only issue a no objection letter to the draft contract when the complaints, appeals or claims had been resolved to its satisfaction.

52. In conclusion, counsel invited the Board to find that the AFD Guidelines were applicable in the procurement proceedings in the subject tender and required the Contracting Authority to comply with the relevant and applicable laws and regulations particularly concerning contract procurement and performance and as such, the Procuring entity is subject to provisions of the Act and Regulations 2020. He reiterated that the Board has jurisdiction to hear and determine the instant Request for Review and that the Respondent's Notice of Preliminary Objection ought to be dismissed.

53. On the substantive motion and on the issue of whether the Procuring Entity ought to have applied a margin of preference in the subject tender, counsel referred the Board to the case of *Republic v Public Procurement Administrative Review Board Ex parte Kenya Power & Lighting Company Limited; Energy Sectors Contractors Association & another (Interested Party) [2020] Eklr* and submitted that the subject tender is an international tender and Section 89(f) of the Act provides that a margin of preference ought to be given to 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. Further, that Regulation 164 (c) of Regulations 2020 provided that the margin of preference for international tendering shall be ten percent (10%) margin of preference of the evaluated price of the tender, where the percentage of shareholding of Kenyan citizens is more than fifty percent (50%) while clause 3.2.4 of the AFD guidelines provided for a domestic preference margin of 7.5% for the procurement of works.

54. While referring to the Court of Appeal holding in *Civil Appeal No. 36 of 2002 Gulf Architects & 2 others v Attorney General,* he argued that Clause 33 of the ITB contravenes Article 227 (2) (a) of the Constitution and (b) the principles under sections 3(i), (j) and 89 (f), 155, and 157(8) of the Act.

55. Counsel reiterated that application of preference is provided by statute and is not granted by the Tender Document and as such, the Applicant expected the Procuring Entity to be guided by the law on evaluation of tenders and allowing the Procuring Entity to opt out of statutory requirements would go against express guiding principles of public procurement as set out in in the Act and the Constitution. He further submitted that parties cannot consent or agree to exempt the Procuring Entity from adhering to a statutory requirement and that an illegal provision in the bid document ousting application of local preference cannot be enforced.

56. Nr. Njuguna submitted that the applicable margin of preference as set out in Regulations 2020 is 10% since the Applicant is owned wholly by Kenya citizens and applying this margin on its evaluated price would have made the Applicant the lowest evaluated bidder at Kshs. 1,594.717,661. Further, that even if 7.5% was to be applied as provided under Clause 3.2.4 of the Guidelines, the Applicant's evaluated price would be the lowest at Kshs. 1,639,015,374/- compared with the Interested Party's price of Kshs. 1,697,594,976.62/-

57. On whether this ground of review was time barred, counsel submitted that it was raised within the outlined statutory period under the Act noting that application of preference is granted by statute and not granted by the Tender Document and that the Applicant expected the Procuring Entity to be guided by the law in evaluation of bids submitted in the subject tender. Additionally, that application of preference in international tendering only occurs at the Financial Evaluation stage as provided under Regulation 164 (c) of Regulations 2020 and it has no application if a bidder does not qualify to financial evaluation.

58. He submitted that the Applicant had a legitimate expectation that the preference would be applied as the same is provided under the Constitution, the Act and the AFD Guidelines. He urged the Board to find that the margin of preference is applicable, and the Procuring Entity applies the same to the Applicant's evaluated price at 7.5% as provided by Clause 3.2.4 of the Guidelines.

59. On whether the Procuring Entity sought to award the subject tender outside the tender validity period, counsel submitted that Clause 18.2 of ITB provides that prior to expiration of the tender validity period, the Employer may request bidders to extend the validity of their bids while Section 88 (2) of the Act provides that a notice of extension shall be given in writing to all parties that submitted a tender.

60. He pointed out that the letter addressed to the Interested Party on extension of the tender validity period does not suffice nor comply with the provisions under Clause 18.2 and Section 88(2) of the Act since any extension of the validity period ought to be in writing and communicated to all bidders who participated in the subject tender. He further pointed out that no evidence of extension of the bid security had been availed by the Respondent.

61. Counsel submitted that pursuant to Clause 4.9 of the Guidelines, the Procuring Entity was required to ensure that evaluation of bids and award of the subject tender took place within the tender validity period and if not possible, the Procuring Entity was required to request an extension of the validity period to all bidders and there was no provision for selective requests for extension of the tender validity period to specific bidders only. Additionally, that the maximum period that the Procuring entity could extend the validity period was 30 days as provided for under Section 88(3) of the Act. In support of his arguments, counsel referred the Board to the holding in *Chief Executive Officer, the Public Service Superannuation Fund Board of Trustees v*

CPF Financial Services Limited & 2 others (Civil Appeal E510 of 2022) [2022] KECA 982 (KLR) (9 September 2022) (Judgment). He urged the Board to extend that tender validity period of the subject tender.

62. Mr. Njuguna urged the Board to allow the instant Request for Review as prayed.

Respondent's Submissions

63. In a rejoinder to the Respondent's Preliminary Objection, Mr. Kamau submitted that whereas Clause 3.2.11 of the Procurement Guidelines stated that the Contracting Authority is responsible for handling any complaint appeals and claims received in accordance with the laws and regulations, the Board is required to treat this to mean that the applicability of the laws and regulations is exactly what the said laws and regulations state and this does not admit jurisdiction for the Board. He further submitted that through the agreements, AFD is very clear that parties must dispense with any complaints or appeals that may be pending.

64. He referred the Board to Clause 11.4 of the Credit Facility Agreement and submitted that the Procuring Entity was obligated to comply with and implement the procurement guidelines and the Government of the Republic of Kenya ought to take all steps and actions necessary for effective implementation of the Procurement Guidelines. He stated that the Credit Facility Agreement takes precedence over everything else.

65. Counsel pointed out that Clause 1.2.1 of the Procurement Guidelines at the second and third paragraphs provided that the Contracting Authority is under an obligation to comply with the provisions of the present Guidelines and in the event the laws and regulations are not compatible with the Guidelines, the Contracting Authority undertakes to inform AFD prior to the procurement of any contract. He submitted that selective reading of the Procurement Guidelines will not justify applicability of the Act in the subject tender.

66. Counsel pointed out that Clause 40.3 of the Tender Document provided for how a debrief ought to be handled and that the Contracting Authority is left with the task of addressing any issues that the Applicant may have which doesn't stop it from exhausting those available avenues.

67. On the substantive motion, Mr. Kamau submitted that contrary to the Applicant's allegations, the Procuring Entity complied with provisions of the Tender Document on correcting arithmetic errors and clarifications. He pointed out that although the Notification of Intention to Award initially misstated the Applicant's bid price as higher than the lowest evaluated bid, this error was promptly corrected and clarified to the Applicant via a debrief response. He further pointed out that bids from participants who did not accept arithmetic error corrections were rejected per the tender requirements, and that all clarifications were

made in a timely manner following Instructions to Bidders (ITB) clauses 27.1 and 31.2.

68. Counsel argued that the Applicant's reliance on Section 82 (1) of the Act is misplaced since the Act conflicts with the AFD Loan Agreement governing the subject tender. He indicated that Clause 1.2.1 of the AFD Procurement Guidelines provided that in the event of a conflict between the said Guidelines and the national laws, and in the absence of an express agreement by AFD to the contrary, the Guidelines incorporated in the AFD Loan Agreement took precedence over the Act, rendering the latter inapplicable.

69. He urged the Board to note that the Applicant's access to confidential bid information is a breach of tender confidentiality provided under ITB Clause 26.2 and Sections 65(1)(a) and 67 of the Act and a ground for regulatory action.

70. Without prejudice to his submissions on the Board lacking jurisdiction to hear and determine the instant Request for Review, counsel submitted that the Applicant's complaints emanating from the Bidding Documents, the applicable complaints procedure and on the correction of arithmetic errors which it consented to are all time barred as the same ought to have been raised 14 days from the subject tender closing date of 22nd May 2024 in line with Section 167 of the Act as read with Regulation 203(2)(c) of Regulations 2020. In support of his argument, he referred the Board to the holding in *Civil Appeal E. 135*

of 2022 – Jubilee Health Insurance Limited v PPARB, KCAA, Exparte AAR Insurance and argued that the Applicant participated in the correction of errors and is estopped from protesting the same.

71. On whether the Respondent sought to award the subject tender outside the tender validity period, counsel submitted that the Procuring Entity acted within the Tender Document's provisions and the stipulated bid validity period when awarding the subject tender. He indicated that after receiving a 'No Objection' from the financier, AFD, to award contract in the subject tender to the Interested Party on 16th August 2024, the Procuring Entity notified the successful bidder on 30th August 2024 before the initial tender validity period had lapsed.

72. He further indicated that since due diligence was necessary to assess the bidder's capability to handle the contract, the Procuring Entity approved on the 16th September 2024 a 60-day extension of the bid validity period so as to complete the procurement process and as such, the successful bidder agreed to extend its bid validity period accordingly and the evaluation and due diligence results reaffirmed the Interested Party's capacity to undertake the contract which was endorsed by AFD.

73. Counsel argued that the Applicant has not suffered any prejudice from the extension of the tender validity period noting that its bid document was not subject to post-qualification since it was not the lowest evaluated bid. He further argued that award of the subject tender to the Interested Party aligns with the legal requirements and principle of

obtaining value for money as the Applicant's bid price was significantly higher and less competitive.

74. On whether the Respondent was obligated to apply a margin of preference to the Applicant's bid document, counsel submitted that that claim by the Applicant is unfounded noting that ITB Clause 33 of the Tender Document specifically provided that no margin of preference would apply to the subject tender.

75. He further submitted that the Applicant's reliance on Section 86 (2) of the Act, asserting that a 20% preference should have been applied to make it the lowest evaluated bidder, contradicts the clear stipulations in the Tender Documents. He indicated that the allegation by the Applicant that the Procuring Entity violated the Act by failing to promote local industry is irrelevant, as the procurement which is funded by the AFD is governed by AFD's procurement rules, not the Act's local preference provisions, which only apply when funding is fully Kenyan.

76. Mr. Kamau pointed out that without prejudice to its submissions above regarding the Board's jurisdiction, the Applicant's challenge regarding the lack of preference application in the subject tender is time-barred as it ought to have been raised within 14 days of the tender closing date of 22nd May 2024.

77. In conclusion, he urged the Board to dismiss the instant Request for Review with costs.

Interested Party's Submissions.

78. It is the Interested Party's case that it participated in the subject tender and on conclusion of the evaluation process, was awarded the same. Mr Huang adopted the contents of the Interested partys Memorandum of Response and written submissions filed in response to the request for review.

79. On the issue of correction of errors, the Interested Party submitted that the Procuring Entity acted within the provisions of the Tender Document in correcting arithmetic errors and specifically, Volume 1 of the Bidding Procedures and Form, under Clause 31, authorizes the Procuring Entity to correct such errors in substantially responsive bids. He reiterated that this clause clearly allowed the Procuring Entity to seek clarifications and correct arithmetic discrepancies, ensuring a fair and accurate assessment process.

80. On the issue of substantial responsiveness and error correction, and through pointed out that Clause 31.1 provided that if a bid is substantially responsive, the Employer may correct arithmetic errors in specific instances outlined within the clause. He submitted that the Procuring Entity appropriately exercised its discretion to correct errors, aligning with the established guidelines and ensuring uniformity and consistency in bid evaluation.

81. On the requirement for price adjustment, the Interested party submitted that Clause 35 of Volume 1 of the Tender Document detailing the evaluation of bids, mandates price adjustment during bid evaluation to account for arithmetic errors. It indicated that the Procuring Entity strictly adhered to this instruction within the ITB, ensuring that all necessary price adjustments were conducted as required.

82. On bid compliance and contentions raised by the Applicant in the instant Request for Review, the Interested Party submitted that the allegations by the Applicant as raised in the instant Request for Review were unwarranted and speculative and that the Procuring Entity fully complied with the bidding procedures, including price adjustments necessitated by the evaluation criteria. It expressed deep concern that the Applicant seemed to rely on confidential information that was not accessible to other bidders.

83. The Interested party indicated that all relevant details including necessary approvals by the AFD, were adequately provided by the Procuring Entity to the Board and invited the Board to focus on the validated, factual data provided by the Procuring Entity.

84. The Interested Party urged the Board to enforce appropriate sanctions should it find that the Applicant accessed confidential information in breach of the Tender Document, procurement guidelines and applicable laws.

85. The Interested Party submitted that the Interested Party's response to all clarifications was made within reasonable timeframes and per the Procuring Entity's requests. It further submitted that if the Applicant took issue with the correction of arithmetic errors as provided under the Tender Document for being inconsistent with Section 82 of the Act, it ought to have submitted a protest to the Board within 14 days of receipt of the Tender Document and having failed to raise its concerns, it tacitly accepted those clauses and could not belatedly contest the same, particularly where the Act is not applicable. It pointed that the Applicant's claims relating to the Tender Document are time barred as it failed to challenge the same within 14 days from the tender closing date.

86. The Interested Party submitted that the Tender Document and Procurement Guidelines provides under Clause 1.2.1 that in case of incompatibility between local laws and AFD Guidelines, the Procuring Entity ought to apply the guidelines barring express approval from AFD. It indicated that the Applicant ought to have sought clarity within 14 days of receiving the Tender Document or upon submission of its bid rather than waiting until the bid was unsuccessful as such, was estopped from raising the complaints herein at this point in time by conduct and acquiescence.

87. The Interested Party reiterated that the Procuring Entity's actions in correcting arithmetic errors were consistent with both the procurement

guidelines and Instructions to Bidders and urged the Board to dismiss the instant Request for Review with costs.

Applicant's Rejoinder

88. In a rejoinder, Counsel for the Applicant, referred the Board to the second and third paragraphs under Clause 1.2.1 of the AFD Procurement Guidelines and sought to know whether any incompatibility was identified by the Procuring Entity and if the same was communicated with AFD. He argued that there being no agreement with AFD, the provisions of the Guidelines prevail.

89. Counsel submitted that the only area of incompatibility was on the issue of correction of errors provided under Clause 3.29 of the Guidelines while the Act prohibits correction of errors and in this instance, the Guidelines would take precedence.

90. He further submitted that another area of incompatibility would be on the margin of preference whereby the Guidelines provided for 7.5% as a maximum while the Act provided for 10%. He indicated that the Applicant's case is that the Board ought to be guided by what is provided in the Guidelines and that on any other issue, the Procuring Entity ought to indicate to the Board the specific incompatibility identified.

91. Counsel pointed out that there was a clear distinction between the Procurement Guidelines relating to the subject tender and the World

Bank Guidelines and FDB in that the later provide a clear system of compliance and complaints mechanism while that is not the case in the AFD Procurement Guidelines being the reason why they revert to local laws and regulations.

92. On the issue of letter of objection, he argued that the Procurement Guidelines provided that the responsibility of evaluation belonged to the Procuring Entity and not the financing bank. He further argued that there was no greater prejudice that a party can suffer than when a Procuring Entity fails to follow the law.

93. On the issue of the Request for Review being time barred, counsel referred the Board to the holding in *Republic v Public Procurement Administrative Review Board Ex parte Kenya Power & Lighting Company Limited; Energy Sectors Contractors Association & another (Interested Party) (2020) eKLR* and submitted that there cannot be an ouster clause in a Tender Document to oust the provisions of the Act and such would be invalid and needed not to be declared invalid as it was already unenforceable. He indicated that it was the Applicant's expectation that the Procuring entity would follow the law.

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

CLARIFICATIONS

95. On applicability of the Act to the subject tender, Mr. Njuguna submitted that it is the Applicant's case that the Procurement Guidelines provide

that the local laws and regulations are applicable to any procurement pertaining to the financing agreement which bring into picture the Act and Regulations 2020 being the local laws applicable to the Procuring Entity.

96. When asked why the Applicant failed to move the Board or the Procuring Entity upon realization of the statutory issues raised in the instant Request for Review pertaining to provisions of the Tender Document such as its contest on non-applicability of margin of preference, having understood that the procurement was guided by the Procurement Guidelines, Counsel admitted that indeed the Tender Document provided that there shall not be a margin of preference and submitted that it must be bore in mind that the Act provides for application of margin of preference at the financial evaluation stage and where a bidder has not qualified for financial evaluation, it would not applicable. He further submitted that the Procuring Entity had no discretion of opting out of the statutory provision and an illegality having been committed, no limitations on timelines can be imposed.

97. When asked to clarify to the Board on when the Applicant came to the realization that the Tender Document explicitly excluded the margin of reference or reservation schemes, Counsel submitted that the Applicant came to this realization when it looked at the evaluated price having noted that the margin of preference was not factored in.

98. As to whether the Applicant sought for a clarification on the issue of margin of preference on receipt of the Tender Document, Counsel submitted that no clarification was sought by the Applicant.

99. On applicability of the Act in the instant Request for Review, Mr. Njuguna submitted that in *PPARB Application No. 1 of 2020,* this Board found that it was the intention of AFD that the laws of Kenya would be applicable in as far as the subject procurement is concerned. In distinguishing the facts in the instant Request for Review he referred the Board to the holding in Republic v Public Procurement Administrative Review Board & 2 others Ex parte Kenya Power & Lighting Company (2019) eKLR and pointed out some other procurement guidelines such as the World Bank Procurement Guidelines are very exhaustive on the manner of evaluation, raising complaints and how the complaints are to be handled whereby review is sought by the financing bank while the Procurement Guidelines in the instant case have donated the issue of dealing with complaints to the local courts and authorities which makes the Act and Regulations 2020 applicable.

100. He pointed the Board to paragraph 2(d) of the Applicant's letter of Notification of Intention to Award Contract in the subject tender and submitted that the Procuring Entity referred to the provisions of the Act and attendant regulations available from the website www.ppra.go.ke meaning at that point, the Procuring entity was aware that the

procurement in the subject tender was to be carried out in accordance with the provisions of the Act.

101. On his part, Mr. Kamau submitted that a serious problem would emerge should the Board elect to incorporate the Act against the intentions of the parties to the agreements. He indicated that if the Board was to allow the Applicant's arguments on correction of errors, its price would revert to the one quoted before correction of arithmetic errors and it would not be the lowest evaluated bidder. He pointed the Board to the system of no objection enumerated in the confidential documents and submitted that the decision of the Evaluation Committee was not a decision under the Act noting that the Evaluation Committee under the Act undertakes a purely statutory function that cannot be reviewed even by the accounting officer yet in the instant case, the decision of the Evaluation Committee goes back to the no objection system which is a clear conflict with the Act. He further submitted that the financier retains a right to ask questions on due diligence and submitted that the Act ought not to be admitted in the procurement proceedings of the subject tender. He stated that a mention of the Act does not admit application of the Act where the same does not apply.

102. At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 16th October 2024 was due to expire on 6th November 2024 and that the Board would

communicate its decision on or before 6th November 2024 to all parties to the Request for Review via email.

BOARD'S DECISION

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

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 the following sub-issues:

i Whether the subject tender's procurement is one under a bilateral or multilateral agreement between the Government of Kenya and any other foreign government, agency, entity, or multilateral agency so as to oust the application of the Act by dint of Section 4(2)(f) of the Act and effectively divest the Board of jurisdiction;

Depending on determination of sub-issue (i);

Whether the instant Request for Review as filed before the Board was lodged within the statutory period of 14 days stipulated under

Section 167(1) of the Act read with Regulation 203(2)(c) of Regulations 2020 as to invoke the jurisdiction of the Board.

Depending on the determination of Issue 1;

B. Whether the Respondent's Evaluation Committee evaluated the Applicant's tender in accordance with the procedures and criteria for evaluation set out in the Tender Document and in accordance with the Tender Document, Section 80(2) of the Act read with Article 227(1) of the Constitution.

C. Whether award of the subject tender was within the tender validity period.

D. What orders should the Board grant in the circumstances?

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

104. It is trite law that courts and decision-making bodies can only act in cases where they have jurisdiction and when a question on jurisdiction arises, a Court or tribunal seized of a matter must as a matter of prudence enquire into it before doing anything concerning such a matter in respect of which it is raised.

105. 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."***

106. Jurisdiction is defined in Halsbury's Laws of England (4 th Ed.) Vol. 9 as:

> ***"...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision."***

107. The *locus classicus* case on the question of jurisdiction is the celebrated case of **The Owners of the Motor Vessel "Lillians" -v- Caltex Oil Kenya Ltd (1989) KLR 1** where Nyarangi J.A. held:

> ***"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything, without it, a court has no power to make one more step. Where a court has no***

jurisdiction there would be no basis for continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds that it is without jurisdiction."

108. 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...."***

109. 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."

110. The Supreme Court in the case of **Samuel Kamau Macharia and Another v Kenya Commercial Bank Ltd and 2 Others [2012] eKLR** pronounced itself regarding the source of jurisdiction of a court or any other decision-making body as follows:

> ***"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with Counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter for without jurisdiction the Court cannot entertain any proceedings."***

111. This Board is a creature of statute owing to its establishment as provided for under Section 27(1) of the Act which provides that:

> **"(1)** ***There shall be a central independent procurement appeals review board to be known as the Public***

Procurement Administrative Review Board as an unincorporated Board."

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

(1) The functions of the Review Board shall be—

(a) reviewing, hearing and determining tendering and asset disposal disputes; and

(b) to perform any other function conferred to the Review Board by this Act, Regulations or any other written law."

113. 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 the Board can exercise upon completing a review as follows:

PART XV — ADMINISTRATIVE REVIEW OF PROCUREMENT AND DISPOSAL PROCEEDINGS

167. Request for a review

(1) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk

suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.

(2) .....

(3) .....

(4) The following matters shall not be subject to the review of procurement proceedings under subsection (1)—

(a) the choice of a procurement method;

(b) a termination of a procurement or asset disposal proceedings in accordance with section 63 of this Act; and

(c) where a contract is signed in accordance with section 135 of this Act. **[Emphasis by the Board]**

168. .....

169. .....

170. .....

171. .....

172. .....

172. Dismissal of frivolous appeals

Review Board may dismiss with costs a request if it is of the opinion that the request is frivolous or vexatious or was solely for the purpose of delaying the procurement proceedings or performance of a contract and the applicant shall forfeit the deposit paid.

173. Powers of Review Board

Upon completing a review, the Review Board may do any one or more of the following—

(a) annul anything the accounting officer of a procuring entity has done in the procurement proceedings, including annulling the procurement or disposal proceedings in their entirety;

(b) give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings;

(c) substitute the decision of the Review Board for any decision of the accounting officer of a procuring entity in the procurement or disposal proceedings;

(d) order the payment of costs as between parties to the review in accordance with the scale as prescribed; and

(e) order termination of the procurement process and commencement of a new procurement process.

114. Given the forgoing provisions of the Act, the Board is a creature of the Act and the Board's jurisdiction flows from Section 167 (1) of the Act though limited under the provisions of Section 167(4) of the Act. The Board exercises its powers under Section 172 and 173 of the Act with respect to reviewing an administrative review of procurement proceedings filed before it. It therefore follows that if the Act is not applicable, then the Board is divested of jurisdiction to hear and determine an administrative review presented before since its jurisdiction flows from the Act and it can only exercise powers as granted by the Act.

Whether the subject tender's procurement is one under a bilateral or multilateral agreement between the Government of Kenya and any other foreign government, agency, entity, or multilateral agency so as to oust the application of the Act by dint of Section 4(2)(f) of the Act and effectively divest the Board of jurisdiction;

115. The Respondents objected to the hearing and determination of the instant Request for Review in their Notice of Preliminary Objection dated 23rd October 2024 and filed on even date and at paragraphs 25 of the Respondent's Memorandum of Response dated 23rd October 2024 and filed on even date on the grounds that (a) the Board lacks jurisdiction to hear and entertain the instant Request for Review by dint of Section 4(2)(f) and 6 (1) of the Act, and (b) the procurement is fully funded by the *Agence Française de Développement* ("AFD") and in which a Credit Facility Agreement had been signed between the Government of Kenya and AFD with a Subsidiary Loan Agreement between the Government of Kenya and the Respondent stipulating that all procurements under the program are subject to AFD Procurement Rules and Procedures. This objection is also restated at paragraph 17 in the Respondents replying affidavit sworn on 23rd October, 2024.

116. On the other hand, the Applicant in opposing the preliminary objection raised by the Respondents argues that the Board has jurisdiction to hear and determine the issues raised in the instant Request for Review. The Applicant contends that the provisions in the Credit Facility Agreement specifically provide that procurement will be conducted using the Guidelines related to procurement financed by AFD in foreign countries while the Borrower, being the Government of Kenya, ought to ensure that the final beneficiary, being the implementing agency and Procuring Entity herein, complies with all laws and regulations to which it is subject.

117. The Applicant further contends that the aforementioned position is restated in the Subsidiary Loan Agreement which is governed by the Laws of Kenya. Additionally, the Applicant submitted that the Procurement Guidelines for AFD Financed Contracts effectively provide for application of local laws on procurement and as such, the Act is applicable in the procurement proceedings of the subject tender in so far as the same is not incompatible with specific provisions of the Guidelines in which instance, the Guidelines prevail. It is the Applicant's case that pursuant to Clause 3.2.11 of the Guidelines, states that appeals and complaints shall be handled by administrative and judicial authority in accordance with the laws and regulations which in essence requires the Contracting Authority to comply with the relevant applicable laws and regulations being the Act.

118. The Board is cognizant of the parameters of consideration of a preliminary objection as set out by the Court of Appeal in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd [1969] EA 696.** Notably, none of the documents produced by the Procuring Entity into evidence relating to the subject tender have been contested as to their admissibility or probative value so as render its Preliminary Objection improper. Further, the Board notes that the question of its jurisdiction was not only raised in the Preliminary Objection but in the Respondent's Memorandum of Response and Replying Affidavit as highlighted in paragraph 115 above and thereby formed a substantive preliminary issue for interrogation by the Board on the question of its jurisdiction.

119. The Board having considered parties' submissions on the interpretation of Section 4(2)(f) of the Act and judicial authorities cited is therefore not required to ascertain any of the evidence availed on pleaded facts and deems it fit and necessary to interrogate the aforementioned statutory provision and its import.

120. Section 4(2)(f) of the Act reads:

> ***"(2) For avoidance of doubt, the following are not procurements or asset disposals with respect to which this Act applies –***
>
> ***(a) .....;***
>
> ***(b) .....;***
>
> ***(c) .....;***
>
> ***(d) .....;***
>
> ***(e) .....; and***
>
> ***(f) procurement and disposal of assets under bilateral or multilateral agreements between the Government of Kenya and any other foreign government, agency, entity or multilateral agency unless as otherwise prescribed in the Regulations."[Emphasis Board]***

121. Further, Regulation 5(1) of Regulations 2020 reads:

> ***"(1) Where any bilateral or multilateral agreements are financed through negotiated loans for the procurement of goods, works or services, the Act shall not apply where***

the agreement specifies the procurement and asset disposal procedures to be followed." [Emphasis Board]

122. The import of Section 4(2)(f) of the Act read with Regulation 5(1) of Regulations 2020 is that the Act is not applicable in procurement and asset disposals under bilateral or multilateral agreements between the Government of Kenya and any other foreign government agency, entity or multilateral agency. Additionally, where any such bilateral or multilateral agreements is financed through negotiated loans for the procurement of goods, works or services, the Act is not applicable where such aforementioned agreements specify the procurement and asset disposal procedures to be followed. It is imperative to note that for Section 4(2)(f) of the Act to apply, one of the parties to a procurement and asset disposals or to a procurement and asset disposals undertaken in accordance with the terms of a bilateral or multilateral agreement must be the Government of Kenya.

123. We are cognizant of the fact that the High Court of Kenya has on numerous occasions while considering judicial review matters emanating from the decisions of the Board spoken on the provisions of Section 4(2)(f) of the Act as read with Regulation 5 (1) of Regulations 2020 and Section 6 (1) of the Act.

124. Justice Odunga in **Miscellaneous Application No. 402 of 2016 (Consolidated with Misc. Application No. 405 of 2016) Republic v Public Procurement Administrative Review Board &**

another Ex parte Athi Water Service Board & Another [2017] eKLR (hereinafter referred to as "the Athi Water Case") at paragraphs 152 to 154 pronounced himself on the import of Section 4(2)(f) of the Act as follows:

"[152] The issue for determination was whether the instant procurement was a Procurement and disposal of assets under bilateral or multilateral agreement between the government of Kenya and any other foreign government, agency, entity or multilateral agency. In making this determination the sole consideration is who the parties to the procurement are. A literal reading of this section clearly shows that for a procurement to be exempted under section 4(2)(f), one of the parties must be the Government of Kenya. The other party must be either a Foreign Government, foreign government Agency, foreign government Entity or Multi-lateral Agency. The rationale for such provision is clear; the Government of Kenya cannot rely on its procurement Law as against another Government. Such procurement can only be governed by the terms of their bilateral or multilateral agreement.

[153] In this case, the Procuring Entity, Athi Water Services Board, is a Parastatal created under section 51 of the Water Act 2002 with perpetual succession and a common seal, with power, in and by its corporate name, to sue and be sued. It's not the Government of Kenya. In the instant procurement, the Government of Kenya was not a party to the procurement and

accordingly the Procurement is not exempted under section 4(2) (f).

154. Again the other party in the procurement must be either a Foreign Government, foreign government Agency, foreign government Entity or Multi-lateral Agency. Neither the second applicant nor the interested parties, who were the bidders before the Board were either a Foreign Government, foreign government Agency, foreign government Entity or Multi-lateral Agency. On this limb also the procurement is not exempted.

125. Justice Odunga in the Athi Water Case took the view that jurisdiction of this Board would be ousted by Section 4(2)(f) of the Act where parties to a procurement are (i) the Government of Kenya, and (ii) the other party being a Foreign Government, Foreign Government Agency, Foreign Government Entity or Multi-lateral Agency.

126. While comparing the circumstances in the instant Request for Review and procurement in the subject tender, we note from the Credit Facility Agreement that the contracting parties are the Government of the Republic of Kenya and the AFD and pursuant to Clause 2.2 of the Credit Facility Agreement, funds would be transferred by the Government of the Republic of Kenya to the final beneficiary, Athi Water Works Development Agency, the Procuring Entity herein, on terms which were to be approved by AFD. We also note that a Subsidiary Agreement was

approved being the Subsidiary Loan Agreement dated 11th November 2020 which was entered between the Government of the Republic of Kenya and Athi Water Works Development Agency which stipulated under Clause D at page 3 that:

> ***"The Athi Water Works Development Agency has been identified as the implementing Agency (referred to as Final Beneficiary in the CFA) that shall carry out the Project on behalf of the Government pursuant to this Subsidiary Loan Agreement (referred to as Project Agreement in the CFA)."***

127. In this regard, and in view of provisions under Clause 11.4 of the Credit Facility Agreement it is clear to the Board that the Procuring Entity as the implementing agency of the project under the subject tender on behalf of the Government of the Republic of Kenya is bound by the terms of the Credit Facility Agreement in terms of procurement, award and performance of contracts entered into in connection with the implementation of the Project. Clause 11.4 of the Credit Facility Agreement provides as follows:

> ***"11.4 Procurement***
>
> ***In relation to the procurement, award and performance of contracts entered into in connection with the implementation of the Project, the Borrower shall comply with, and implement, the provisions of the Procurement Guidelines. The Borrower guarantees that***

the Final Beneficiary will comply with and implement the Procurement Guidelines.

The Borrower shall take all actions and steps necessary for the effective implementation of the Procurement Guidelines."

128. In comprehending the meaning of Republic of Kenya with a view to establish who represents it and whether it serves the same purpose as the Government of Kenya indicated in Section 4(2)(f) of the Act, we note that Black's Law Dictionary, 7th Edition defines Republic to mean:

" a form of government which derives all its powers directly or indirectly from the general body of citizens, and in which the executive power is lodged in officers chosen by and representing the people, and holding office for a limited period, or at most during good behavior or at the pleasure of the people"

129. From the foregoing, we find the circumstances of this Request for Review similar to those in the case of **Judicial Review Application No. 181 of 2018, Republic v Public Procurement Administrative Review Board & 2 others Ex parte Kenya Power & Lighting Company [2019] eKLR (hereinafter referred to as "the KPLC Case"),** where Justice Nyamweya (as she then was) took a different approach in addressing the import of Section 4(2)(f) and held at paragraphs 61 to 65 as follows:

"61. It is notable that the determinant factor that was found relevant by the Respondent in assuming jurisdiction in this case was that the subject tender involved the use of donor funds which were to be repaid back by the Kenya public at the end of the day. It however did not engage in any determination of the nature of the ouster clause that was provided for by section 4 (2) (f), and in particular abdicated its discretion and duty to make a finding as to whether the subject procurement process was being undertaken pursuant to a bilateral grant agreement between the Government of Kenya and a foreign international entity, which was what was in issue and was specifically raised and canvassed by the parties as shown in the foregoing.

62. This Court also notes that the Applicant in this regard annexed a copy of the agreement that was entered into between the Government of Kenya and the Nordic Development Fund that it relied upon. The agreement was annexed to a supplementary affidavit that it filed with the Respondent on 16th April 2018.

63. In my view, a reading of section 4(2)(f) shows that the operative action is procurement under a bilateral agreement entered into by the Government of Kenya and

***a foreign government** or **agency**, and not procurement by the Government of Kenya. One of the meanings of the word "under" in the **Concise Oxford English Dictionary** is "as provided for by the rules of; or in accordance with". The plain and ordinary meaning and contextual interpretation of section 4(2)(f) of the Act **is therefore a procurement that is undertaken as provided for or in accordance with the terms of a bilateral agreement that is entered into between the Government of Kenya** and **a foreign government**, **entity** or multi-lateral agency is exempted from the provisions of the Act...*

64. ***It was in this respect incumbent upon the Respondent to satisfy itself that section 4(2) (f) was not applicable before assuming jurisdiction, especially as the said section was an evidential ouster clause that was dependent on a finding that the subject procurement was one that was being undertaken pursuant to a bilateral agreement between the Government of Kenya and a foreign Government or entity.***

65. ***The Respondent in its finding equated the requirements of section 4(2)(f) to the use of funding under a loan or grant where the Government of Kenya is a party, whereas the section specifically states that the***

Respondent should satisfy itself that the procurement is not being made pursuant to the terms of a bilateral treaty or agreement between the Government of Kenya and a foreign government, entity or multilateral agency."
[Emphasis by the Board]

130. In her holding in the KPLC Case, Justice Nyamweya faulted the Board for failure to consider the applicability of the bilateral agreement which was the subject of the proceedings before the Board, in order for it to make a determination on the import of Section 4(2)(f) of the Act. The Learned Judge took the view that Section 4(2)(f) of the Act ousts the jurisdiction of this Board where a procurement is undertaken as provided for or in accordance with the terms of a bilateral agreement or multilateral agreement that is entered into between (i) the Government of Kenya and (ii) the other party being a foreign government, agency, entity or multilateral agency.

131. We note that in the Athi Water Case, the parties to the bilateral agreement were the International Development Association and the Government of Kenya whereas the Procuring Entity was identified as Athi Water Services Board. In the KPLC Case, the parties to the bilateral agreement were Nordic Development Fund and the Government of Kenya while an implementing agency was identified as Kenya Power and Lighting Company to undertake the procurement on behalf of the Government of Kenya, as its agent.

132. The distinguishing factor between the Athi Water Case and the KPLC Case is that the procuring entity in the former was Athi Water Services Board in its own capacity (because there was no evidence of it being an implementing agency of the Government of Kenya) and it was not referred to as the implementing agency in a bilateral agreement in so far as parties to a bilateral agreement are concerned while in the latter Kenya Power and Lighting Company was identified as an implementing agency of the Government of Kenya in a bilateral agreement.

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

> "***.....it follows that when those clauses relating to procurement in the multinational loan agreement between the Republic of Kenya and the African Development Bank are read together with Section 4(2)(f) and 6(1) of the Public Procurement and Asset Disposal Act and Article 2(5) of the Constitution, the***

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

134. In **Judicial Review Application No. E162 of 2021 (Consolidated with E146 of 2021) Republic v Public Procurement Administrative Review Board; Consortium of Tsk Electronica Y Electricdad S A and Ansaldoenergia & another (Interested Parties) Ex parte Kenya Electricity Generating Company Plc (KenGen)[2021]eKLR** (hereinafter referred to as the 'KenGen Case') Justice Ndungu held as follows:

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

parte applicant as the executing agent was entered into. Notably, the subsidiary agreement provides under Article 10.1 that the procurement shall be under the Japanese ODA loans. Article 12 of the subsidiary agreement provides for the amendments, settlement of disputes and applicable law. Article 42.5 of the Standard Bidding Documents Under Japanese ODA Loans. Provides an unsuccessful bidder with an avenue to raise their grievance.

103. In my considered view, had the intention of the drafters of the agreement been that disputes in the tendering process were subject to the Respondents purview, nothing would have been easier than for the drafters to so state in the agreement. As it turns out, this was a procurement undertaken in the terms of a bilateral agreement that as [sic] entered into between the Government of Kenya and a foreign entity, JICA.

104. Nyamweya J (as she then was) in Republic v Public Procurement Administrative Review Board& 2 Others ex parte Kenya Power and Lighting (supra) stated;

> *"63. In my view, a reading of section 4(2)(f) shows that the operative action is procurement under a bilateral agreement entered into by the*

Government of Kenya and a foreign Government or Agency, and not procurement by the Government of Kenya. *One of the meanings of the word "under" in the Concise Oxford English Dictionary is "as provided for by the rules of'; or in accordance with" The plain and ordinary meaning and contextual interpretation of section 4(2)(f) of the Act is therefore that a procurement that is undertaken as provided for or in accordance with the terms of a bilateral agreement that is entered into by the Government of Kenya and a foreign Government, entity or multilateral agency is exempted from the provisions of the Act.*

"64. It was in this respect incumbent upon the respondent to satisfy itself that section 4(2)(f) was not applicable before assuming jurisdiction, especially as the said section was an evidential ouster clause that was dependent on a finding the subject procurement was one that was being undertaken pursuant to a bilateral agreement between the Government of Kenya and a foreign Government or entity. Further, the Respondent made an error in its interpretation of the provision of section 4(2) (f) of the Act when it phrased the issue as follows:

"The main issue that the Board needs to therefore address is whether the mere fact that a particular procurement or procurements are to be undertaken using the proceeds of a grantor a loan where the Government of Kenya is a party can oust the jurisdiction of the Board to hear and determine a dispute relating to the said procurement under the provisions of section 4(2)(f) of the Act indeed under the provisions of the Kenyan Constitution"

"65. The Respondent in its finding equated the requirements of section 4(2)(f) to the use of funding under a loan or a grant where the Government is a party, whereas the section specifically states that the Respondent should satisfy itself that the procurement is not being made pursuant to the terms of a bilateral treaty or agreement between the Government of Kenya and a foreign Government entity or multilateral agency"

105. It was not open to the Respondent to re write the agreement for the parties on the assumption that the same was unconscionable or even unconstitutional. The agreement provided redress avenue for an aggrieved party. All the parties, including the tenderers were aware

all the way from the stage of advertisement for the tender to making of the bids that the procurement was in accordance with Guidelines for procurement under the Japanese ODA loans. This was a bilateral agreement between the Government of Kenya and JICA, a foreign entity and was thus exempt from the application of section 4(2)(f) of the Act.....

106. In light of the foregoing, I find and hold that the Respondent acted without jurisdiction in entertaining and determining Review Application 120 of 2021. In consonance with the principles set out in Pastoli v Kabale District Local Government Council (supra), the Ex parte Applicant in HC Judicial Review Misc. App no. E162 has ably shown that the process and decision of the Respondent in Review App. No. 120 of 2021 was tainted with illegality. The Respondent acted without jurisdiction ultra vires and contrary to the provisions of a law. This action is amenable for review under judicial review."

135. From the foregoing, we are bound by the precedents in the aforementioned judicial authorities as they were made by the High Court which has supervisory powers over the Board.

136. In considering the circumstances in the instant Request for Review, the Board must address its mind to the operative words in Section 4(2)(f) of the Act read with Regulation 5(1) of Regulations 2020 being (a) "procurement under" a bilateral agreement and (b) inapplicability of the Act where the bilateral Agreement is financed through negotiated loans and specifies the procurement procedure to be followed.

137. Turning to the instant Request for Review, the Board has carefully studied the (a) AFD Agreement No. CKE 1135 01H Credit Facility Agreement dated 2nd March 2020 between Agence Francaise De Development ("the Lender") and the Government of the Republic of Kenya ("the Borrower") ("the Credit Facility Agreement"), (b) the Subsidiary Loan Agreement between the Government of the Republic of Kenya and Athi Water Works Development Agency (the Nairobi Water and Sanitation Project) Agence Francaise De Development No. CKE 1135 01H dated 11th November 2020 ("the Subsidiary Loan Agreement"), (c) the Procurement Guidelines for AFD-Financed Contracts in Foreign Countries ("the Procurement Guidelines"), (d) the Invitation for Bids (IFB) that was advertised on 27th February 2024 in My Gov Publication Newspaper ("the Tender advert"), (e) Bidding Documents for Procurement of Construction Works for Gigiri – Karura – Outer Ring Road Transmission Pipeline Project ("the Tender Document for the subject tender herein").

138. We must now address ourselves on whether the procurement in the subject tender was required to be undertaken as provided for or in

accordance with the terms of the Credit Facility Agreement between the Government of the Republic of Kenya and AFD and if such terms point to the applicable law in so far as procurement is concerned.

139. The Credit Facility Agreement provides that pursuant to a resolution no. C20180257 dated 14th June 2018, AFD agreed to make a facility available to the Government of the Republic of Kenya to be used exclusively towards financing eligible expenses under the Nairobi Water and Sanitation Project. Clause 2.2 stipulates that funds would be transferred by the Government of the Republic of Kenya to the Final Beneficiary being Athi Water Works Development Agency (the Procuring Entity herein) on terms to be approved by AFD vide a Subsidiary Agreement. Clause 10.6 further stipulates for no conflict with other obligations and that the entry and performance by the Government of Kenya and transactions contemplated by the financing documents do not conflict with any domestic or foreign law or regulations applicable to it.

140. Further, Clause 10.7 of the Credit Facility Agreement provides that the choice of French law as the governing law of the agreement will be recognized and enforced by the courts and arbitration tribunals in Kenya and that any judgement obtained in relation to the said agreement in a French court or any award by an arbitration tribunal will be recognized and enforced in Kenya.

141. Clause 10.12 of the Credit Facility Agreement provides for Procurement as follows:

"The Borrower: (i) has received a copy of the Procurement Guidelines and (ii) understands the terms of the Procurement Guidelines, in particular, those terms relating to any action which the Lender may take in the case of a breach of the Procurement Guidelines by the Borrower and (iii) has provided a copy of the Procurement Guidelines to the Final Beneficiary which has confirmed that it understands the terms of the Procurement Guidelines and in particular, those terms relating to any actions which the Lender may take in the case if a breach of the Procurement Guidelines by the Final Beneficiary.

The Borrower is contractually bound by the Procurement Guidelines as if such Procurement Guidelines were incorporated by reference into this Agreement. The Borrower confirms that the procurement, allocation and performance of the contracts relating to the implementation of the Project comply with the Procurement Guidelines."

142. The Procurement Guidelines were also defined at page 44 of the Credit Facility Agreement as:

"the contractual provisions contained in the guidelines relating to procurement financed by AFD in foreign countries dated February 2017, a copy of which has been delivered to

the Borrower. The Procurement Guidelines are available on the Lender's Website."

143. In essence, procurement, allocation and performance of any contract relating to the implementation of the Nairobi Water and Sanitation Project was required to comply with the Procurement Guidelines and the Government of Kenya having confirmed receipt of the said Guidelines was required to also provide a copy of the same to the Procuring Entity herein.

144. The Subsidiary Agreement under Article X at page 14 also provides for Procurement and confirms that the Procuring Entity is bound by the Procurement Guidelines and that procurement in the Nairobi Water and Sanitation Project would be carried out in accordance with the AFD Procurement Guidelines. In essence, the applicable law in the said project was the AFD Procurement Guidelines.

145. We note that the purpose of the Procurement Guidelines for AFD-Financed Contracts in Foreign Countries ("the Procurement Guidelines") as stipulated therein is to establish the good practices expected by AFD in terms of procurement, and to specify the scope and procedures for the reviews that AFD conducts concerning compliance with the conditions for the provision of its financing.

146. Clause 1.2 provides for Principles governing Contract procurement and performance whereby Clause 1.2.1 provides as follows:

"1.2.1 Compliance with Laws and Regulations

The Contracting Authority is fully responsible for ensuring that the implementation of AFD-financed projects complies with the relevant applicable Laws and Regulations, in particular concerning Contract procurement and performance. The Contracting Authority shall also comply with the provisions of the present Guidelines. In the event the Laws and Regulations are not compatible and the Guidelines, the Contracting Authority undertakes to inform AFD prior to the procurement of any Contract. Without the express agreement of AFD, the Contracting Authority shall apply the provisions of the Guidelines"

147. We note that nothing was tendered in evidence by the Respondents to show an express agreement of AFD to the exemptions of the application of the Procurement Guidelines in these procurement proceedings.

148. Laws and Regulations are defined at page 8 of the Procurement Guidelines as:

> ***"all the legal and regulatory provisions, and internal rules and procedures, related to the procurement and performance of public Contracts, purchases, and any***

other acquisition of services, works or goods, applicable to the Contracting Authority"

149. Clause 1.2.4 sets out the responsibilities relating to the procurement and performance of Contracts and provides under Clause 1.2.4 a) *inter alia* that the Contracting Authority is solely responsible for handling of any claims, appeals or complaints received. It reads as follows:

"1.2.4 Responsibilities relating to the procurement and performance of Contracts

a) Responsibility of the Contracting Authority

The Contracting Authority retains exclusive and full responsibility for the preparation and implementation of the procurement processes and performance of the Contracts. The Contracting Authority thereby has under its sole responsibility (i) the preparation and content of the Procurement Documents, (ii) the evaluation of documents submitted by the Applicants, Bidders or Consultants in response to National or International Procurement Competitions, or in the context of a Direct Contracting procedure or Request for Quotations, (iii) the award of the Contract and the content of the Contract it has concluded with the awardee for the Contract, (iv) the content of any Amendments made to the Contract, and (v) the handling of any claims, appeals or complaints received.

The relations between the Contracting Authority and an Applicant, Bidder, Consultant or Provider are exclusively governed (i) by the Procurement Documents established by the Contracting Authority, and (ii) by the Contract signed between the Contracting Authority and the Provider."

150. The Procurement Guidelines provided for Claims, Appeals and Complaints under Clause 3.2.11 at page 29 as follows:

"Pursuant to Article 1.2.4, the Contracting Authority is responsible for handling any complaints, appeals and claims received, in accordance with the Laws and Regulations. The Contracting Authority shall acknowledge receipt of any claim within five (5) business days, and provide the Applicant, Bidder or Consultant that filed the claim with its response and information on how its claim is being handled, no later than ten (10) business days following the date of acknowledgement of receipt.

The appeals and complaints lodged with any competent administrative or judicial authority, where applicable, shall be handled by the latter in accordance with the Laws and Regulations.

The Contracting Authority shall inform AFD without delay of any claim, appeal or complaint that has come to its attention, and provide it with all the information at its disposal concerning how those have been handled, and the response provided, for the procurement of AFD-financed Contracts. In the context of prior reviews, AFD may only issue a No Objection Letter on the draft Contract when the complaints, appeals or claims have been resolved to its satisfaction."

151. In essence per paragraph two of Clause 3.2.11 above, applicability of laws and regulations would be defined by the provisions of the very laws and regulations for which Section 4(2)(f) and 6(1) of the Act as read with Regulation 5(1) of Regulations 2020 form an integral and enforceable part which must be considered in determining whether the Board is seized with jurisdiction in the instant matter.

152. The import of the above provisions under Clause 1.2.4 and 3.2.11 of the Procurement Guidelines is that the Board's jurisdiction is ousted since the Procuring Entity is exclusively vested with the sole responsibility of handling any claims, appeals or complaints received by a dissatisfied bidder in the subject tender noting that the Procuring Authority is required to acknowledge receipt of such a claim or compliant within 5 days and provide the complainant with information on how its claim is being handled no later than 10 business days following acknowledgement of receipt and that the complaints have

been resolved to the satisfaction of AFD meaning that the dispute resolution mechanism is self-contained and absolutely left to the Procuring Entity under the supervision and affirmation of AFD. It must also be noted that AFD, according to paragraph 3 of clause 3.2.11, is the institution to determine satisfactory discharge of any complaint, appeal or claims received.

153. According to the Tender Advert, prospective bidders were informed that the Procuring Entity had received funds from AFD towards the cost of the Nairobi Water and Sanitation Project and that part of the proceeds would be applied towards eligible payments under the subject tender. This was also provided under the Invitation for Bids for the subject tender whereby bidders were informed under paragraph 5 that the provisions under the Instructions to Bidders and in the General Conditions of Contract are the provisions of the AFD Standard Bidding Documents for Procurement of Works. In essence, the Tender Document was drafted as per the AFD Standard Bidding Documents for Procurement of Works and not the Standard Tender Document provided by the Public Procurement Regulatory Authority. In saying so, for instance, we take cognizance of Clause 40 at pages 1-17 of the Tender Document which provided for Notification of Award whereby Clause 40.2 stipulated that until a formal contract is prepared and executed, the notification of award shall constitute a binding contract. This is contrary to provisions of Section 87(4) of the Act which clearly provides that a notification of intention to enter into a contract issued to the successful bidder does not form a contract.

154. Additionally, the Procurement Guidelines provide under Clause 3.2 Provisions applicable to the procurement process in the subject tender and a keen examination of the same reveal a great contrast to the provisions stipulated under the Act and Regulations 2020.

155. Having carefully studied the confidential documents related to the subject tender, we note that not only were various provisions of the Tender Document in contrast with the provisions of the Act and Regulations 2020, but also the evaluation process in the subject tender was not carried out by the Evaluation Committee as per the provisions of the Act but in accordance with the provisions of the Procurement Guidelines noting the need for AFD to issue a letter of No Objection in the procurement process so as to clear and approve the procurement proceedings depicting a clear conflict between provisions of the Act and the Procurement Guidelines.

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

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

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

(a) in discreet activities where possible; and

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

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

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

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

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

158. This provision supports the view that Kenya cannot rely on its procurement law where there is a conflict with any obligations of Kenya arising from a treaty, agreement or other convention ratified by Kenya and to which Kenya is a party. Such procurement in case of a conflict, should be governed by the terms of the treaty, agreement or other convention ratified by Kenya and to which Kenya is a party, which form part of the law of Kenya by virtue of Article 2 (6) of the Constitution.

159. From the foregoing provisions of the Credit Facility Agreement, the Subsidiary Loan Agreement, the Procurement Guidelines, the Tender Notice, and the Tender Document, it is clear to the Board that the procurement of the subject tender was one under a bilateral agreement between the Government of Kenya and a foreign multilateral agency and was to be carried out in accordance with the Procurement Guidelines which were in conflict with the Act and Regulations 2020. As such, the procurement of the subject tender falls on all fours under the provisions of Section 4(2)(f) and 6(1) of the Act read with Regulation 5(1) of Regulations 2020.

160. In the circumstances, the application of the Act in conducting the subject tender is ousted by dint of Sections 4(2) (f) and 6(1) of the Act. Simply put, the Act does not apply to the procurement of the subject tender. The ousting of the application of the Act to the procurement of the subject tender effectively divests the Board of jurisdiction to entertain the instant Request for Review.

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

162. The upshot of our finding is that the Respondents' Notice of Preliminary Objection dated 23rd October 2024 succeed and the instant Request for Review is ripe for striking out for want of jurisdiction.

FINAL ORDERS

163. In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, No. 33 of 2015, the Board makes the following orders in the instant Request for Review:

A. The Respondent's Notice of Preliminary Objection dated 23rd October 2024 be and is hereby upheld.

B. The Applicant's Request for Review dated 16th October 2024 be and is hereby struck out for want of jurisdiction.

C. Each party shall bear its own costs in the Request for Review.

Dated at NAIROBI this 5th Day of November 2024.

.....	.....
CHAIRPERSON	**SECRETARY**
PPARB	**PPARB**