

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**  
**APPLICATION NO. 61/2025 FILED ON 16<sup>TH</sup> MAY 2025**

**BETWEEN**

**CK SOLUTION CO. LTD IN JOINT VENTURE WITH  
KUMKANG CONSTRUCTION COMPANY LTD AND  
BEYOND TRADING COMPANY LTD.....APPLICANT**

**AND**

**ACCOUNTING OFFICER,  
KENYA URBAN ROADS AUTHORITY.....RESPONDENT  
YOUNG JIN JY.....INTERESTED PARTY**

Review against the decision of the Accounting Officer, Kenya Urban Roads Authority, in relation to TENDER NO. KURA/DEV/HQ/426/2024-2025 – Establishment of Bus Rapid Transit Line 5 Project.

**BOARD MEMBERS PRESENT**

Mr. George Murugu FCIArB & IP      Chairperson

Ms. Jessica M'mbetsa                      Member

Mr. Robert Chelagat                      Member



## **IN ATTENDANCE**

Ms. Philemon Kiprop

Holding brief for Acting Board  
Secretary

Mr. Erickson Nani

Secretariat

## **PRESENT BY INVITATION**

### **APPLICANT**

**CK SOLUTION CO. LTD IN JOINT  
VENTURE WITH  
KUMKANG CONSTRUCTION COMPANY  
LTD AND  
BEYOND TRADING COMPANY LTD**

Mr. Andrew Muge

Advocate, Muge Law Advocates

### **RESPONDENT**

**ACCOUNTING OFFICER,  
KENYA URBAN ROADS AUTHORITY**

Mr. Peter Ogamba

Advocate, Kenya Urban Roads Authority

## **BACKGROUND OF THE DECISION**

### **THE TENDERING PROCESS**

1. The Kenya Urban Roads Authority (hereinafter referred to as the



“Procuring Entity”) invited tenders through an open international tender process under Tender No. KURA/DEV/HQ/426/2024-2025 for the Establishment of the Bus Rapid Transit Line 5 Project (hereinafter referred to as the “subject tender”). Bidders were required to submit their tender documents to the designated address specified in the advertisement on or before 28th March 2025 at 10:00 a.m.

### **Addenda/Clarifications**

2. According to the confidential documents submitted to the Public Procurement Administrative Review Board (hereinafter referred to as the “Board”) by the Procuring Entity pursuant to Section 67(3)(e) of the Public Procurement and Asset Disposal Act (hereinafter referred to as the “Act”), the Procuring Entity issued two addenda, one of which, Addendum No. 2, had the effect of extending the tender submission deadline from 28th March 2025 to 17th April 2025.

### **Submission of Bids and Tender Opening**

3. According to the Tender Opening Register dated 17th April 2025, submitted as part of the confidential documents, one tender was received in response to the subject tender. The tender was recorded as follows:

<b>NO.</b>	<b>Tenderer</b>
1.	Youngjin JV Limited



## REQUEST FOR REVIEW

4. On 16th May 2025, the Applicant, through the firm of Muge Law Advocates, filed a Request for Review dated the same day. The application was accompanied by a Supporting Affidavit sworn on 16th May 2025 by Paul Mungai, a Director of Beyond Trading Company Ltd. In the Request for Review, the Applicant sought the following orders:

***a) The Decision of the Respondent contained in its letter of 2<sup>nd</sup> May 2025 purporting to justify refusal to accept the Applicants' bid and the ejection of the Applicants' representatives in regard to Tender No. Nupea/OT/DICT/004/23-24 For Supply, Delivery, Installation, Testing, Training, Commissioning and Support Services for Enterprise Resource Planning (ERP) System be and is hereby quashed and/or vitiated;***

***b) The Decision of the Respondent of 17<sup>th</sup> April 2025 purporting to refuse to accept the Applicants' bid in regard to Tender No: KURA/DEV/HQ/426/2024-2025 PROJECT NO: KEN – 5 FOR ESTABLISHMENT OF BUS RAPID TRANSIT LINE 5 PROJECT be and is hereby vitiated, set aside, and/or nullified;***

***c) Any Award issued by the Respondent to any party in regard to Tender No: KURA/DEV/HQ/426/2024-2025 PROJECT NO: KEN – 5 FOR ESTABLISHMENT OF BUS***



***RAPID TRANSIT LINE 5 PROJECT be and is hereby set aside, vacated, and/or nullified;***

***d) The Applicants' bid be admitted for evaluation;***

***e) Such other orders and reliefs as the Review Board may deem fit and just to grant; and***

***f) The costs of this review be awarded to the Applicant.***

5. In a Notification of Appeal and a letter dated 16th May 2025, Mr. James Kilaka, the Acting Secretary of the Board notified the Respondents of the filing of the Request for Review and the suspension of the procurement proceedings of the subject tender, while forwarding to the said Procuring Entity a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of COVID-19. Further, the Respondents were requested to submit a response to the Request for Review together with confidential documents concerning the subject tender within five (5) days from 16th May 2025.
6. On 19th May 2025, the Applicant filed an Amended Request for Review accompanied by a Supporting Affidavit sworn on 16th May 2025 by Paul Mungai, a Director of Beyond Trading Company Ltd. The Amended Request for Review sought the same orders as those reproduced above.
7. On 20th May 2025, the Respondent, through Advocate Peter Bosire,



filed a Notice of Appointment of Advocates dated the same day, together with a Notice of Preliminary Objection also dated 20th May 2025.

8. On 23rd May 2025, the Applicant filed a Further Affidavit sworn on the same date by Paul Mungai, a Director of Beyond Trading Company Ltd.
9. On 23<sup>rd</sup> May 2025, the Acting Board Secretary issued a Hearing Notice dated 23<sup>rd</sup> May 2025 to the parties, informing them that the hearing of the Request for Review would be held virtually on 29th May 2025 at 14:00 PM via the provided link.
10. On 28th May 2025, the Applicant sent a letter of the same date requesting an adjournment of the hearing to any other date apart from 3rd June 2025, on the ground that Counsel for the Applicant was scheduled to appear before the High Court in other matters on the same date and time.
11. On 29th May 2025, the Board issued an order standing the hearing over to 4th June 2025 at 8:00 a.m. Further, the Respondent was ordered to avail the confidential documents and to file and serve their response to the Request for Review by 3rd June 2025 at 9:00 a.m. The Applicant was granted leave to file a Further Affidavit, if necessary, by 3rd June 2025 at 5:00 p.m.
12. On 3rd June 2025, the Respondent filed a Replying Affidavit sworn by Eng. Silas Kinoti, the Director General of the Procuring Entity, on the same date.



13. On 3rd June 2025, the Applicant filed a Further Affidavit sworn on 23rd May 2025 by Paul Mungai, a Director of Beyond Trading Company Ltd.
14. On 3rd June 2025, the Applicant filed its Written Submissions dated the same day, together with a List of Authorities also dated 3rd June 2025.
15. On 4th June 2025, when the Board convened for the hearing at 8:00 a.m., the Applicant was represented by Mr. Muge, while the Respondent was represented by Mr. Bosire. The Board read aloud the pleadings filed by the parties, who confirmed that all documents had been duly filed and exchanged.
16. Before the hearing commenced, the Applicant's Counsel applied to withdraw the Further Affidavit sworn on 23rd May 2025, stating that reliance would be placed solely on the Further Affidavit sworn on 3rd June 2025. The Respondent's Counsel raised no objection, and the application was accordingly allowed. The Board then allocated time for each party to present their respective submissions.

## **PARTIES SUBMISSIONS**

### **Applicant's Submissions on the Notice of Preliminary Objection and the Request for Review**

17. Counsel for the Applicant submitted that the procurement process conducted by the Respondent under the subject tender was marred by multiple irregularities, including confusion over the submission venue, an exorbitant tender document fee of KES 50,000 for an electronic copy,



unlawful restriction of eligibility to Korean firms, breach of the mandatory standstill period, and the imposition of an illegal internal complaints mechanism under ITB 44 of the tender document.

18. It was further submitted that the Respondent's Preliminary Objection, which asserted that the procurement process was governed exclusively by donor rules due to a bilateral agreement with the Republic of Korea and hence excluded from the jurisdiction of the Board under section 4(2)(f) of the Act, was misconceived. Counsel argued that this objection did not raise a pure point of law, and relied on incomplete and unverified factual evidence, including a partial loan agreement.
19. The Applicant's counsel argued that even if section 4(2)(f) of the Act applied, the Respondent had not demonstrated any inconsistency between the Act and the loan agreement sufficient to oust the Board's jurisdiction. It was emphasized that neither the loan agreement nor any procurement guidelines from the donor were disclosed or proved to contain terms excluding the application of the Act or the Board's oversight.
20. Counsel contended that the reliance on section 4(2)(f) of the Act raised serious constitutional concerns. In particular, it was submitted that interpreting the provision as excluding any local oversight over donor-funded procurements would violate Articles 47, 48, 50 and 227 of the Constitution, which guarantee fair administrative action, access to justice, the right to an impartial tribunal, and fair, transparent, and competitive procurement respectively.





21. On the internal complaint mechanism under ITB 44, it was submitted that this clause unlawfully placed the Respondent as the judge in its own cause by requiring complaints to be lodged and resolved internally, contrary to the PPADA which designates the Board as the forum for procurement grievances. It was contended that such a mechanism was ultra vires the Act, lacked legal basis, and undermined the principles of independence, fairness, and accountability.
22. The Applicant's counsel further argued that the Respondent's internal complaints mechanism was ineffective, having no substantive procedures in the Bidding Data Sheet as referenced in ITB 44, and that the Applicant's complaint to the Respondent was summarily dismissed with no meaningful resolution. Accordingly, it was urged that the Board declare ITB 44 null and void.
23. In regard to the conduct of the tender process, the Applicant's counsel asserted that the Applicant was obstructed from submitting its bid due to ambiguity in the tender submission and opening venues. Despite arriving on time, the Applicant was misdirected and prevented from lodging its bid before the deadline, a fact which was not denied by the Respondent. This, counsel argued, violated sections 77 and 78 of the PPADA and Articles 47 and 227 of the Constitution.
24. It was further argued that the confusion over submission venues—alternating between the ground floor, the fourth floor, and meeting rooms—breached section 60 of the PPADA which requires clarity and



completeness in tender documents. The Board was invited to find that the ambiguity materially affected the Applicant's ability to participate and thus vitiated the procurement process.

25. On the issue of tender document fees, counsel submitted that the Respondent acted unlawfully by charging KES 50,000 for electronic tender documents, in violation of section 70(5) of the Act and Regulation 68 of the Regulations 2020. It was emphasized that the law prohibits any fee for electronically obtained tender documents and that the Respondent's action constituted unjust enrichment and an unlawful barrier to participation.
26. The Applicant's counsel contended that the restriction of eligibility to only firms of Korean nationality was arbitrary, discriminatory, and not supported by the loan agreement. It was submitted that this restriction contravened section 60(4) of the Act, which prohibits technical specifications based on national origin, and was in direct conflict with Article 227 of the Constitution.
27. The Applicant also distinguished the case of ***Judicial Review Miscellaneous Application E162 & 146 of 2021 (Consolidated)*** which had been cited in support of ouster of jurisdiction. It was submitted that, unlike in that case where the donor agreement provided a dispute resolution mechanism, in the present matter, no such mechanism exists and the Respondent failed to disclose any such alternative avenue. Accordingly, the Board was urged not to be bound by that precedent in the current factual context.



## **Respondents' Submissions on the Notice of Preliminary Objection and the Request for Review**

28. The Respondent submitted that the procurement process in question was undertaken pursuant to a Government-to-Government loan agreement between the Republic of Kenya and the Republic of Korea, and as such falls within the exemption contemplated under section 4(2)(f) of the Act. It was averred that the subject project is financed through a bilateral loan issued by the Korean government via the Korea Export-Import Bank (KEXIM), a state agency responsible for administering Korea's Economic Development Cooperation Fund.
29. It was further contended that the loan agreement governing the project expressly provides that Korean law shall regulate all aspects of the agreement, including funding, procurement, and implementation of the project.
30. The Respondent also asserted that the Applicant had improperly sought recourse from both this Board and KEXIM Bank, thereby engaging in forum shopping. It was claimed that the Applicant submitted its bid directly to KEXIM Bank, yet failed to submit the same to the Respondent as required. The Respondent suggested that this conduct was inconsistent with the procedure stipulated in the governing loan agreement.
31. It was submitted that KEXIM Bank, via an email dated 26th May 2025, determined that the Applicant's purported bid was substantially non-responsive. A copy of the said email was annexed and marked as part



of the Respondent's evidence. The Respondent therefore argued that the Applicant's grievance had already been considered and resolved by the donor agency in accordance with the applicable procurement framework.

### **Applicant's Rejoinder**

32. The Applicant's Counsel argued that the allegation that the Applicant submitted a bid to KEXIM Bank is unfounded, emphasizing that no evidence had been presented to support such a claim.
33. Counsel further argued that, contrary to the requirements of Article 227 of the Constitution, the Respondent neither relied on the agreement nor demonstrated that it had done so.

### **CLARIFICATIONS**

34. The Board sought clarification from the Applicant's Counsel on whether the Applicant had paid the KES 50,000 access fee. In response, Counsel confirmed payment, adding that the fee was required for the provision of the tender documents.
35. The Board sought clarification on whether the KES 50,000 fee was paid by all interested bidders. In response, the Respondent's Counsel confirmed that all interested bidders had paid the amount.
36. The Board sought clarification on when the Applicant was denied the opportunity to submit their tender. In response, Counsel stated that the



tender submission deadline was 17th April 2025.

37. Following up on the previous inquiry, the Board sought clarification from the Applicant's Counsel as to why the Request for Review was not filed until 16th May 2025. In response, Counsel explained that the Applicant initially raised a complaint with the Respondent, who responded on 2nd May 2025.
38. The Board sought clarification from the Applicant's Counsel on whether he was aware of the Board's approach to the computation of time. In response, Counsel stated that the relevant dates are determined based on when a party has no further recourse in relation to the issue raised in the response.
39. The Board sought clarification from the Applicant's Counsel regarding the purpose of the Applicant's correspondence with the Respondent. In response, Counsel stated that the letter was intended to seek resolution of the complaints, and it was the Respondent's response that prompted the filing of the Request for Review.
40. The Board sought clarification from the Applicant's Counsel on when he considered the cause of action to have arisen—whether on 17th April 2025 or 2nd May 2025. In response, the Applicant's Counsel stated that the cause of action arose on 2nd May 2025.
41. The Board sought clarification from the Applicant's Counsel on whether the complaint was that the Applicant was denied an opportunity to submit its tender or that it received a response affirming the decision to reject its tender on the grounds that it was late in filing the



documents on 17th April 2025.

42. In response, Counsel stated that the main complaint is that the Applicant was denied the opportunity to submit its tender on 17th April 2025. Further, pursuant to ITT 44.1, the Applicant sought to resolve the issue with the Respondent through correspondence, which elicited the response dated 2nd May 2025.
43. The Board sought clarification on whether the Applicant's approach to the Respondent to resolve the complaint paused the running of the 14-day limitation period. Counsel responded in the affirmative.
44. The Board sought clarification from the Applicant's Counsel regarding the letter sent to KEXIM Bank and the response received, which stated that the complaint was unmerited. In response, Counsel asserted that the Applicant did not submit its bid documents and that the response indicated KEXIM Bank had evaluated a bid it did not receive.
45. The Board sought clarification from the Applicant's Counsel on the basis for sending a complaint to KEXIM Bank. In response, Counsel stated that the email was sent to KEXIM Bank to request the procurement procedures, enabling the Applicant to verify whether the Respondent had adhered to them.
46. The Board sought clarification from the Respondent's Counsel regarding the questions posed to the Applicant's Counsel. In response, Respondent's Counsel maintained that the Request for Review is time-barred.



47. The Board sought clarification from the Respondent's Counsel on whether the Applicant was denied an opportunity to submit its tender, and on the applicability of ITT 44.1. In response, Counsel stated that ITT 44.1 was issued by KEXIM Bank and forms part of the governing regulations of the loan agreement. Further, Counsel maintained that the Applicant was never denied an opportunity to submit its bid documents.

### **BOARD'S DECISION**

48. The Board has considered all documents, submissions, and pleadings, including the confidential documents submitted pursuant to Section 67(3)(e) of the Act. Accordingly, the following issues arise 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 Board's jurisdiction is ousted by virtue of Section 4(2)(f) of the Act.

Depending on the finding of the first sub-issue:

- ii. Whether the Request for Review was filed outside the timeline



under section 167 (1) of the Act.

**B. Whether the Applicant was unlawfully denied an opportunity to submit its bid documents.**

**C. What orders the Board should issue in the circumstance.**

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

49. In response to the Request for Review, the Respondent filed a Notice of Preliminary Objection and a Replying Affidavit, substantially arguing that the Board lacks jurisdiction pursuant to section 4(2)(f) of the Act.
50. Furthermore, during the hearing, the issue arose as to whether the Request for Review was time-barred pursuant to Section 167(1) of the Act.
51. If either of the two issues raised above is proven, this Board would be deprived of jurisdiction to entertain the present Request for Review. Accordingly, given their preliminary nature, these issues must be addressed as a matter of priority.
52. This Board is mindful of the well-established legal principle that courts and decision-making bodies can only adjudicate matters within their jurisdiction. When a question of jurisdiction arises, it is essential that the court or tribunal seized of the matter addresses it as a threshold issue before proceeding further.





53. As a fundamental principle, when the issue of jurisdiction is raised before a court or decision-making body, it must be addressed as a priority issue before any other matters are considered. Jurisdiction is the cornerstone of adjudication, and in its absence, a court or tribunal lacks the legal authority to proceed further.
54. In ***Kenya Hotel Properties Limited v Attorney General & 5 others (Petition 16 of 2020) [2022] KESC 62 (KLR) (Civ) (7 October 2022)***, the Supreme Court reaffirmed that jurisdiction is the cornerstone of any judicial or quasi-judicial process. Where a question of jurisdiction is raised, it must be addressed and resolved at the earliest stage of the proceedings.

***On our part, and this is trite law, jurisdiction is everything as it denotes the authority or power to hear and determine judicial disputes. It was this court's finding in In [R v Karisa Chengo](#) [2017] eKLR, that jurisdiction is that which grants a court authority to decide matters by holding;***

***"By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and***



***matters of which the particular court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics...where a court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given."***

55. This Board is a creature of statute, established under Section 27(1) of the Act, which provides:

***(1) There shall be a central independent procurement appeals review board to be known as the Public Procurement Administrative Review Board as an unincorporated Board.***

56. Section 28 of the Act outlines the functions of the Board as follows:

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

57. The jurisdiction of this Board is established under Part XV – Administrative Review of Procurement and Disposal Proceedings. Specifically, Section 167 of the Act defines the matters that can and cannot be brought before the Board, while Sections 172 and 173 outline



the Board's powers in handling such proceedings.

58. Therefore, in light of the foregoing, the Board must first examine whether it has jurisdiction under Section 4(2)(f) of the Act and whether the Request for Review was filed within the prescribed statutory timeline.

**Whether the Board's jurisdiction is ousted by virtue of Section 4(2)(f) of the Act.**

59. In their Notice of Preliminary Objection and Replying Affidavit, the Respondent argued that the Board lacks jurisdiction pursuant to Section 4(2)(f) of the Act.
60. The Respondent submitted that the procurement process in question was undertaken pursuant to a Government-to-Government loan agreement between the Republic of Kenya and the Republic of Korea, and as such falls within the exemption contemplated under section 4(2)(f) of the Act. It was averred that the subject project is financed through a bilateral loan issued by the Korean government via the Korea Export-Import Bank (KEXIM), a state agency responsible for administering Korea's Economic Development Cooperation Fund.
61. It was further contended that the loan agreement governing the project expressly provides that Korean law shall regulate all aspects of the agreement, including funding, procurement, and implementation of the project.
62. In response, the Applicant's Counsel argued that the Notice of



Preliminary Objection, which asserted that the procurement process was governed exclusively by donor rules due to a bilateral agreement with the Republic of Korea and hence excluded from the jurisdiction of the Board under section 4(2)(f) of the Act, was misconceived. Counsel argued that this objection did not raise a pure point of law, and relied on incomplete and unverified factual evidence, including a partial loan agreement.

63. The Applicant's counsel argued that even if section 4(2)(f) of the Act applied, the Respondent had not demonstrated any inconsistency between the Act and the loan agreement sufficient to oust the Board's jurisdiction. It was emphasized that neither the loan agreement nor any procurement guidelines from the donor were disclosed or proved to contain terms excluding the application of the Act or the Board's oversight.
64. The Applicant also distinguished the case of ***Judicial Review Miscellaneous Application E162 & 146 of 2021 (Consolidated)*** which had been cited in support of ouster of jurisdiction. It was submitted that, unlike in that case where the donor agreement provided a dispute resolution mechanism, in the present matter, no such mechanism exists and the Respondent failed to disclose any such alternative avenue. Accordingly, the Board was urged not to be bound by that precedent in the current factual context.
65. The starting point for discussing this issue is Section 4(2)(f) of the Act, which provides as follows:

#### ***4. Application of this Act***



**1. ...**

**2. For avoidance of doubt, the following are not procurements or asset disposals with respect to which this Act applies—**

**(a)...**

**(b)...**

**...**

**(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.**

66. The Board understands the above decision to mean that the provisions of the Act do not apply to procurement and asset disposal activities undertaken pursuant to bilateral or multilateral agreements between the Government of Kenya and foreign governments, agencies, entities, or multilateral organizations, except where the Regulations expressly provide otherwise. This exclusion is rooted in the recognition that such international agreements often come with their own procurement frameworks, rules, or conditions that may be inconsistent with Kenya's domestic procurement laws. The exemption ensures that the Government of Kenya can fulfill its obligations under those agreements without legal conflict, provided that the applicable regulations do not



require otherwise.

67. The High Court in ***Republic v Public Procurement Administrative Review Board Ex-Parte Geothermal Development Company Limited & another [2017] eKLR*** stated the following:

***52. In my view a purposeful reading of section 4(2)(f) of the PPAAD Act must necessarily lead to the conclusion that for a procurement to be exempted thereunder, one of the parties must be the Government of Kenya while the other party must be either a Foreign Government, foreign government Agency, foreign government Entity or Multi-lateral Agency. I also agree at the rationale for such provision is clear must be to avoid the imposition of Kenyan law on another Government and that such procurement can only be governed by the terms of their bilateral or multilateral agreement, which agreements are of course subject to Parliamentary scrutiny. This exception would be justified under Article 2(5) of the Constitution which provides that the general rules of international law shall form part of the law of Kenya.***

68. The Board understands the above decision to mean that for a procurement process to fall outside the scope of the Public Procurement and Asset Disposal Act under Section 4(2)(f) of the Act, it must involve the Government of Kenya on one side, and a foreign government, its agency or entity, or a multilateral agency on the other. The purpose of this exemption is to respect the sovereignty and procurement



frameworks of foreign states or international bodies, thereby avoiding the automatic application of Kenyan procurement law to such arrangements. These international agreements are presumed to have their own terms governing procurement and disposal, which supersede domestic procedures unless the Regulations state otherwise. This exception aligns with Article 2(5) of the Constitution, which incorporates general rules of international law into Kenya's legal system and allows for such agreements to take effect domestically, subject to Parliamentary oversight.

69. The case of ***Judicial Review Application No. 181 of 2018 Republic vs. Public Procurement Administrative Review Board, Astonefield Solesa Solar Kenya Ltd/ Clearwater Industries Ltd and Shenzen Clou Electronics Ltd Ex Parte Kenya Power & Lighting Company (2019) eKLR*** held that: -

**"The application or otherwise of such a bilateral treaty or agreement to the use of funds in a procurement is the relevant factor, and is what places such a procurement under the realm of international law, and therefore not amenable to resolution by application of domestic law and specifically review. It is notable that even though ouster clauses are generally construed narrowly, in the present case and shown in the foregoing, the Constitution expressly allows for the application of international law as opposed to domestic law in such circumstances."**

70. The above case law means that when a procurement is funded and



governed by the terms of a bilateral or multilateral agreement, the key consideration is whether that agreement specifically regulates how the funds are to be used. If it does, then the procurement falls under the scope of international law, not Kenyan domestic law, including the Act. As such, the procurement process is not subject to review under Kenya's internal procurement dispute mechanisms.

71. The Board has carefully reviewed the confidential documents submitted and notes that the Invitation for Bids stated that the Government of Kenya received a loan of USD 59,000,000 from the Export-Import Bank of Korea, sourced from the Economic Development Cooperation Fund (EDCF) of the Republic of Korea, to finance the Establishment of Bus Rapid Transit Line 5 Project. A portion of the loan proceeds is intended to be applied toward payments under the contract for the project.
72. Furthermore, the Board notes that the terms and conditions of the contract, as well as payments by the Bank, are subject in all respects to the terms and conditions of the Loan Agreement, including the Guidelines for Procurement under the EDCF Loan (the "Guidelines"). Except where the Bank expressly agrees otherwise, no party other than the Borrower shall derive any rights from the Loan Agreement or have any claims on the Loan Proceeds.
73. Considering the above and other confidential documents reviewed by the Board, there is no doubt that the instant procurement proceedings arise pursuant to a bilateral agreement between the Republic of Kenya and the Republic of Korea.
74. The Procuring Entity acts as an agent of the Republic of Kenya, serving





as the implementing entity for the project described in the loan agreement. Since the subject tender forms part of this project and is to be financed by proceeds from the loan extended by EXIM Bank to the Republic of Kenya, it is clear that the procurement falls under the scope of a bilateral agreement.

75. Having reached the foregoing conclusion, the Board now turns to consider whether the loan agreement or the Guidelines provide for a dispute resolution mechanism other than this Board, in line with the reasoning in ***Republic v Public Procurement Administrative Review Board Ex-Parte Geothermal Development Company Limited (supra)***.

76. In addressing the foregoing question, the Board notes that it had the opportunity to peruse the loan agreement and observed that it expressly stipulates that the governing law shall be the laws of the Republic of Korea.

77. Further, the Board notes that the newspaper advertisement included the following provisions:

***Bidding will be conducted through Competitive Bidding (CB) procedures specified in the Guideline for Procurement under EDCF Loans, and is open to all eligible bidders that meet the following minimum qualification criteria:***

...

78. The Board observes that the loan agreement for the subject tender



referred to certain guidelines intended to establish the procedural framework.

79. The Board reviewed the guidelines referenced above, contained in the document titled *Guidelines for Procurement under the EDCF Loan*. Notably, the Board observed that clauses 2.21 and 2.32(c) provide as follows:

***2.21 Settlement of Disputes***

***Whenever possible, the conditions of contract shall contain provisions dealing with the applicable law and the forum for the settlement of disputes. It would usually be advantageous to consider international commercial arbitration in contracts for the procurement of goods and services. The Bank, however, shall not be named arbitrator or be asked to name an arbitrator.***

***2.32(c)***

***During the Standstill Period, an interested party has three (3) business days (on the receipt of the Notification of Intention to Award) to request a debriefing from the Borrower. The Borrower should provide the debriefing, either in writing and/or in a debriefing meeting, within five (5) business days of receiving the request. If there is a justifiable reason, the Borrower may provide the debriefing later than five (5) business days deadline. If this happens,***



***the Standstill Period is automatically extended to a date that is five (5) business days after the date of the last debrief. All the bidders (or if there has been prequalification of bidders, the qualified bidders) will be promptly notified, by the quickest means available, of the extended Standstill Period. The requesting bidder should bear all the costs of attending such a debriefing.***

80. The Board finds that the aforementioned clauses, when read together with the relevant provisions of the loan agreement, establish a clear procedural framework for dispute resolution as well as the applicable legal regime. Consequently, the Board is satisfied that the agreement provides a binding dispute resolution mechanism, and the accompanying guidelines go a step further by setting out the applicable dispute resolution mechanism available to all parties involved, thereby excluding the application of the Public Procurement and Asset Disposal Act. This position is further reinforced by the Board's earlier observation that the loan agreement expressly stipulates that the governing law shall be the laws of the Republic of Korea.
81. In view of the foregoing analysis, the Board finds that the loan agreement expressly provides that the applicable law shall be the laws of the Republic of Korea, and the accompanying guidelines go a step further by setting out the applicable dispute resolution mechanism.
82. Therefore, the Board finds that Section 4(2)(f) of the Act applies to this tender due to the dispute resolution mechanisms set out in the



guidelines accompanying the agreement, thereby divesting the Board of jurisdiction. Furthermore, the Board emphasizes that parties involved in donor-funded tenders cannot claim ignorance of the prescribed dispute resolution procedures, as it is incumbent upon them to familiarize themselves with the complete regulatory and legal framework governing such procurement.

83. In light of the foregoing, the Board is satisfied that it lacks the requisite jurisdiction to hear and determine the merits of the Request for Review.

**Whether the Request for Review was filed outside the timeline under section 167 (1) of the Act.**

84. During the hearing, the Board raised, suo moto, the issue of whether the Request for Review was filed out of time.
85. In response to this issue, Counsel for the Applicant submitted that the Applicant was denied the opportunity to submit its bid on 17th April 2025. Consequently, the Applicant wrote to the Respondent seeking an explanation, to which the Respondent responded on 2nd May 2025.
86. The Applicant's Counsel argued that the time for filing the Request for Review was supposed to commence from 2nd May 2025, when the Applicant received a response from the Respondent. Counsel contended that the principal complaint was the denial of opportunity to submit the tender on 17th April 2025. Pursuant to ITT 44.1, the Applicant was required to attempt to resolve the matter with the Respondent, which it did by way of the letter that prompted the Respondent's response on



2nd May 2025. Therefore, Counsel maintained that the time began running from 2nd May 2025, making the Request for Review timely filed.

87. In response to the Board's concern on the issue of timeliness, the Respondent's Counsel argued that the Request for Review was time barred.

88. Section 167(1) of the Act provides:

***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.***

89. In essence, to properly invoke the jurisdiction of the Review Board under Section 167(1) of the Act, an applicant must satisfy the following conditions:

- (a) they must qualify as either a candidate or a tenderer, as defined under Section 2 of the Act;
- (b) they must claim to have suffered, or be at risk of suffering, loss or damage as a result of a breach of a duty imposed on a procuring entity by the Act or its Regulations; and
- (c) they must file the request for administrative review within fourteen



(14) days from the date of notification of the award or the occurrence of the alleged breach, in accordance with Regulation 203 of the Public Procurement and Asset Disposal Regulations, 2020.

90. Regulation 203(2)(c)(i) of the Regulations, 2020 similarly reinforces the fourteen (14) day timeline, stating as follows:

***Request for a review***

- 1) A request for review under section 167(1) of the Act shall be made in the Form set out in the Fourteenth Schedule of these Regulations.***
- 2) The request referred to in paragraph (1) shall—***
  - a. state the reasons for the complaint, including any alleged breach of the Constitution, the Act or these Regulations;***
  - b. be accompanied by such statements as the applicant considers necessary in support of its request;***
  - c. be made within fourteen days of—***
    - i. the occurrence of the breach complained of, where the request is made before the making of an award;***
    - ii. the notification under section 87 of the Act; or***
    - iii. the occurrence of the breach complained of, where the request is made after making of an award to the successful bidder***



91. Our interpretation of the above provisions is that an Applicant seeking the Board's intervention in any procurement proceedings must file their request within the prescribed 14-day statutory timeline. Consequently, any Request for Review filed beyond this period would be time-barred, thereby divesting the Board of jurisdiction to entertain it.
92. Section 167 of the Act and Regulation 203 of the Regulations 2020 establish the benchmark events for the commencement of the statutory timeline as either the date of notification of the award or the date of occurrence of the alleged breach. In the context of the instant Request for Review, the critical point of reference is the date of occurrence of the alleged breach.
93. In ***Republic v Public Procurement Administrative Review Board & 2 others Ex-Parte Kemotrade Investment Limited [2018] eKLR***, the High Court provided guidance on the commencement of the statutory timeline, stating as follows:

***66. The answer then to the question when time started to run in the present application can only be reached upon an examination of the breach that was alleged by the 2nd Interested Party in its Request for Review, and when the 2nd Interested Party had knowledge of the said breach.***

94. From the foregoing, in computing time under Section 167(1) of the Act and Regulation 203(2)(c)(i) of the Regulations 2020, consideration should be given to the specific breach complained of in the Request for Review and the point at which the Applicant became aware of the



alleged breach.

95. Turning to the present Request for Review, the Board has carefully examined the Applicant's pleadings and observes that the crux of the claim arises from the events of 17th April 2025, when the Applicant alleges it was denied the opportunity to submit its bid. Consequently, the Applicant lodged a complaint with the Respondent regarding the said events and received a response on 2nd May 2025.
96. The Board notes that during the hearing, the Applicant's Counsel conceded that the primary cause of action stems from the events of 17th April 2025, when the Applicant was allegedly denied the opportunity to submit its bid documents.
97. The Board further observed the attempt by the Applicant's Counsel to argue that time should commence running from the date the Applicant received the Respondent's response on 2nd May 2025.
98. The Board notes that the response received by the Applicant from the Respondent was an attempt to address the root cause of action, namely the events of 17th April 2025. Consequently, the outcome of these efforts to resolve the underlying issue cannot be regarded as the point from which time begins to run.
99. In light of the foregoing, the Board finds that the timeline for filing the Request for Review commenced on 17th April 2025, the date when the Applicant was allegedly denied an opportunity to submit its bid and effectively became aware of the breach.





100. The Board notes that the Request for Review was filed on 16th May 2025. In light of the foregoing, the Board now turns to examine the period between the date when the Applicant was denied an opportunity to submit its bid, namely 17th April 2025, and whether the mandatory 14-day period for filing had elapsed by the time the Request for Review was filed on 16th May 2025.

101. The Board observes that there are 29 days between 17th April 2025, when the alleged breach occurred, and 16th May 2025, when the Request for Review was filed. In view of the foregoing, the Board finds that the period of 29 days exceeds the 14-day time limit prescribed under Section 167(1) of the Act, thereby effectively divesting the Board of the requisite jurisdiction to entertain the matter.

102. Before concluding, the Board wishes to emphasize that it has consistently ruled, that time for filing a Request for Review effectively starts running on occurrence of events enumerated and elaborated under section 167(1) and Regulation 203 reproduced above and any dispute resolution mechanism adopted by a party must take into account that the statutory time for filing a Request for Review does not remain suspended or on hold.

103. Therefore, the Board finds that the Request for Review is time barred, having been filed 29 days after the breach occurred, thereby effectively divesting the Board of jurisdiction as provided under section 167(1) of the Act.



### **What orders the Board should issue in the circumstance.**

104. The Board finds that it lacks the requisite jurisdiction pursuant to the provisions of section 4(2)(f) of the Act, considering that the present tendering proceedings arise from a bilateral agreement between the Republic of Kenya and the Republic of Korea.

105. The Board further finds that it lacks the requisite jurisdiction to pursuant to Section 167(1) of the Act considering that the Request for review was filed 29 days after the alleged breach had occurred.

106. Consequently, the Amended Request for Review dated 19th May 2025, concerning TENDER NO. KURA/DEV/HQ/426/2024-2025 – Establishment of Bus Rapid Transit Line 5 Project, is hereby struck out on the following specific grounds:

### **FINAL ORDERS**

107. In the exercise of the powers conferred upon it by section 173 of the Act, the Board makes the following orders in the Amended Request for Review dated 19th May 2025:

- 1. The Amended Request for Review dated 19th May 2025 be and is hereby struck out for want of jurisdiction;**
- 2. The Respondent of the KENYA URBAN ROADS AUTHORITY is hereby directed to proceed with oversee the tender**




proceedings for TENDER NO. KURA/DEV/HQ/426/2024-2025 – Establishment of Bus Rapid Transit Line 5 Project to their logical and lawful conclusion; and

3. Each party shall bear its own costs of the proceedings.

Dated at NAIROBI, this 6<sup>th</sup> day of June 2025.

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

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

