

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 89/2025 OF 7TH AUGUST 2025

BETWEEN

ARAB CONTRACTORS JV METITO

OVERSEAS LIMITED APPLICANT

AND

THE CHIEF EXECUTIVE OFFICER,

COAST WATER WORKS DEVELOPMENT AGENCY . 1ST RESPONDENT

COAST WATER WORKS DEVELOPMENT AGENCY . 2ND RESPONDENT

Review against the decision of the Chief Executive Officer, Coast Water Works Development Agency in relation to Contract Number: CWWDA/AFD/PQ/W3/2022-2023 for Improvement of Drinking Water and Sanitation Systems in Mombasa – Mwache Project.

BOARD MEMBERS PRESENT

- | | |
|-------------------------------|---------------------|
| 1. Mr. Jackson Awele | - Panel Chairperson |
| 2. Mrs. Njeri Onyango FCI Arb | - Member |
| 3. Mr. Robert Chelagat | - Member |

IN ATTENDANCE

Mr. Abdalla Issa - Holding brief for Board Secretary

Ms. Evelyn Weru

- Secretariat

PRESENT BY INVITATION

APPLICANT ARAB CONTRACTORS JV METITO OVERSEAS LIMITED

Mr. Eddie Omondi - Advocate, Humphrey & Company LLP Advocates

RESPONDENTS THE CHIEF EXECUTIVE OFFICER, COAST WATER WORKS DEVELOPMENT AGENCY & COAST WATER WORKS DEVELOPMENT AGENCY

Mr. Mugambi Mutua - Advocate, Mugambi and Company Advocates

BACKGROUND OF THE DECISION

The Tendering Process

1. The Coast Water Works Development Agency, the 2nd Respondent and Procuring Entity herein, through the Government of Kenya received funds from Agence Francaise de Development (hereinafter referred to as "AFD") towards the cost of the Improvement of drinking water and sanitation systems in Mombasa – Mwache Project. *Vide* an advertisement on 14th February 2023 on the Daily Nation and My Gov, the Procuring Entity invited eligible and qualified bidders to apply for Initial Selection in Contract Number: CWWDA/AFD/PQ/W3/2022-2023 for Improvement of Drinking Water and Sanitation Systems in

Mombasa – Mwache Project (hereinafter referred to as “the subject tender”). *Vide* an addendum dated 16th March 2023, the Procuring Entity informed bidders that clarifications had been uploaded on its website www.cwwda.go.ke and the tender submission deadline extended to 25th April 2023 at 12.00 p.m.

2. Twelve (12) bidders submitted their bids for the initial selection and according to the Initial Selection Report sent to AFD on 18th July 2023 and upon a No Objection confirmation received from AFD on 31st August 2023, the following bidders were recommended to progress to the next stage of the bidding process which included submission and evaluation of Technical and Financial Proposals:

No	Name of the Bidder	Nature of Association	Lead Member	Country of Origin Lead Member	Responses to reconfirmation for Interest to Bid
1	Arab Contractors and Metito Overseas Limited (AC-MOL JV)	Joint-Venture	Arab Contractors	Egypt	Confirmed
2	Power China Zhongnan Engineering Corp. JV Safbon Water Service Holding Inc.	Joint-Venture	Power China	China	Confirmed
3	Larsen & Toubro Limited	Single	N/A	India	Withdrawn
4	Eiffage Genie Civil and Wabag (Eiffage – WABAG JV)	Joint-Venture	Eiffage	France	Withdrawn
5	Vinci Construction Grand Projects, Sogea Satom and Orascom Construction (VCGP/ SOGEA-SATOM/ORASCOM CONSTRUCTION JV)	Joint-Venture	VCGP	France	Confirmed

3. A request for reconfirmation of interest was sent to the selected bidders by the Procuring Entity on 5th August 2024 and out of the five (5) successful bidders, only three (3) bidders reconfirmed their interest to

continue with the bidding process. Subsequently, the Tender Document was issued to the three (3) bidders with a submission deadline of 11th November 2024 which was later on extended to 7th February 2025.

Submission of Tenders and Tender Opening

4. According to the 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 three (3) tenders were submitted in response to the subject tender and were recorded as follows:

No.	Name of Bidder	Bid submission Form – Technical Bid	Written confirmation authorizing the signatory of the Bid	JV Agreement or the letter of intent to form a JV signed by all intended members of the future JV	Bid Security 2million Euros	No. of Documents (3 Paper Copies + 2Digital Copies)	Financial Bid-Envelope
1.	Power China Zhongman Eng. Corp. JV Saffon Water Services	Yes. Duly Signed	Yes	Yes	Yes. Stanbic Bank valid up to 20 th July 2025	1 original of 7 sets and 3 copies of the same + 2Flashdisks	1 Envelope left unopened
2	Vinci Construction Grands JV Sogea-Satom/Orascom Construction	Yes. Duly Signed	Yes	Yes	Yes. Bank of Africa valid up to 10 th July 2025	1 original of 3 sets and 3 copies of the same + 2Flashdisks	1 Envelope left unopened
3	The Arab Contractors JV Metito	Yes. Duly Signed	Yes	Not attached	Yes. Africa Merchants Assurance Co. Ltd. (AMACO)	1 original of 8 sets and 3 copies of the same + 1 CD Drive	1 original Envelope and one copy envelope

					valid up to 7 th July 2025		left unopened
--	--	--	--	--	---	--	------------------

Evaluation of Tenders

5. A Tender Evaluation Committee (hereinafter referred to as the “Evaluation Committee”) appointed by the 1st Respondent undertook evaluation of the three (3) tenders as captured in a Technical Evaluation Report for the subject tender signed by members of the Evaluation Committee on 25th July 2023 (hereinafter referred to as the “Evaluation Report”) in the following stages:
- i Technical Evaluation (Compliance Check and Technical Scoring)
 - ii Financial Evaluation; and
 - iii Combined Technical and Financial Evaluation.

Technical Evaluation (Compliance Check and Technical Scoring)

6. This initial stage involved reviewing bidder’s submissions for completeness in accordance with Clause 11.2 of Instruction to Bidders /Data Sheet of the Tender Document, ensuring that all the requirements under Section VII – Employer’s Requirements were met without any material deviation, reservation, or omission as stipulated in ITB 30.3 of the Tender Document. At the end of the Compliance Check, two (2) bids were deemed as compliant while one bid, being the Applicant’s bid was declared unresponsive.
7. The two (2) responsive bids proceeded for Technical Scoring which consisted of three (3) main sections being (a) Approach and

methodology (60% weighting), (b) key personnel qualifications and resource schedule (30% weighting), and (c) additional factors – ESHS and Social inclusion methodologies (10% weighting). The minimum score was set at 70% for a bidder to qualify for the opening of the Financial Proposal. At the end of the scoring, the results were summarized as follows:

Section	Maximum Score	Score for Bidder 1	Score for Bidder 2
1. Approach and Methodology	60%	50.12%	49.72%
2. Key personnel qualifications and resource schedule	30%	20.33%	24.25%
3. Additional factors - ESHS & Social inclusion methodology	10%	9.20%	8.00%
Total Score	100%	79.65%	81.97%

Evaluation Committee’s Recommendation

8. The Evaluation Committee recommended that Power China Zhongnan Engineering Corp. JV Safbon Water Service (Holding) Inc., Shanghai (Power China – Safbon JV) and Vinci Construction Grand Projects, Sogea Satom and Orascom Construction (VCGP/ SOGEA-SATOM/ORASCOM CONSTRUCTION JV) proceed to the opening of the financial proposal stage.

Professional Opinion

9. In a Professional Opinion dated 25th July 2025 (hereinafter referred to as the “Professional Opinion”), the Ag. Head of Procurement Function, Masudi Omar, reviewed the manner in which the subject procurement process was undertaken and concurred with the recommendations of the Evaluation Committee with respect to opening the financial proposals of Power China Zhongnan Engineering Corp. JV Safbon Water

Service (Holding) Inc., Shanghai (Power China – Safbon JV) and Vinci Construction Grand Projects, Sogea Satom and Orascom Construction (VCGP/ SOGEA-SATOM/ORASCOM CONSTRUCTION JV) who had attained the minimum pass mark technical score of 70%.

10. Thereafter, the 1st Respondent herein, approved the Professional Opinion on 25th July 2025.

Notification to the Applicant

11. The Applicant herein was notified of the outcome of evaluation of its bid *vide* letter dated 25th July 2025.

Invitation for Opening of Financial Bids

12. *Vide* letter dated 29th July 2025, bidders in the subject tender were notified that the financial opening of bids in the subject tender had been postponed to 8th August 2025 due to technical reasons.

REQUEST FOR REVIEW NO. 89 OF 2025

13. On 7th August 2025, the Applicant filed a Request for Review dated 6th August 2025 together with an Affidavit In Support of the Request for Review sworn on 7th August 2025 by Mohamed A. F. Abelrahman (hereinafter referred to as the 'instant Request for Review') through the firm of Humphrey & Company LLP Advocates seeking the following orders from the Board in verbatim:

- i. An order staying the opening of the Financial Proposals on the 8th August 2025.***
- ii. A declaration that the Applicant's Technical Proposal for Contract No. THE RESPONDENT/AFD/PQ/W3/2022-2023 is responsive and compliant with the requirements of the tender as invited by the 2nd Respondent.***
- iii. An order setting aside the 2nd Respondent's decision contained in its letter dated 25th July 2025 rejecting the Applicant's bid for alleged non-responsiveness.***
- iv. An order directing the 2nd Respondent to include the Applicant's bid in the ongoing procurement process and to open the Applicant's Financial Proposal alongside those of the other qualified tenderers.***
- v. An order compelling the 2nd Respondent to evaluate the Applicant's bid in accordance with the Constitution of Kenya, the Public Procurement and Asset Disposal Act, and the tender documents.***
- vi. Costs of this Request for Review.***
- vii. Any such further orders, directions, or reliefs as the Honourable Board shall deem fit, just, and expedient in***

the circumstances.

14. In a Notification of Appeal and a letter dated 7th August 2025, Mr. P. Kiprop, the Board Secretary notified the 1st and 2nd Respondents of the filing of the instant Request for Review and the suspension of the procurement proceedings for the subject tender, while forwarding to the said Respondents a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020. 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 7th August 2025.

15. On 12th August 2025, the Respondents filed through Mugambi & Company Advocates a Notice of Appointment of Advocates dated 11th August 2025, Respondents' Notice of Preliminary Objection dated 11th August 2025, Respondent's Memorandum of Response dated 11th August 2025, an Affidavit in Support of the Respondents' Memorandum of Response sworn on 11th August 2025 by Hamoud Mguza together with confidential documents concerning the subject tender pursuant to section 67(3)(e) of the Act.

16. *Vide* letters dated 14th August 2025, the Board Secretary notified all tenderers in the subject tender via email, of the existence of the subject Request for Review while forwarding to all tenderers a copy of the Request for Review together with the Board's Circular No. 02/2020 dated 24th March 2020. All tenderers in the subject tender were invited

to submit to the Board any information and arguments concerning the subject tender within three (3) days.

17. *Vide* a Hearing Notice dated 13th August 2025, the Board Secretary, notified parties and all tenderers in the subject tender of an online hearing of the Request for Review slated for 20th August 2025 at 2.00 p.m. through the link availed in the said Hearing Notice.
18. On 20th August 2025, the Applicant filed Applicant's Further List of Documents dated 20th August 2025.
19. On the same 20th August 2025, the Respondents filed Amended Respondent's Notice of Preliminary Objection amended on 20th August 2025 and Written Submissions dated 20th August 2025.
20. At the hearing of the instant Request for Review on 20th August 2025 at 2.00 p.m., the Board confirmed the pleadings on record as filed by all parties in the instant Request for Review and directed that the hearing of the preliminary objections by the Respondents would be heard as part of the substantive instant Request for Review. This was in accordance with Regulation 209(4) of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as 'Regulations 2020') which also allows the Board to deliver one decision having considered the preliminary objections as part of the substantive instant Request for Review.

21. Thus, the instant Request for Review proceeded for virtual hearing as scheduled.

PARTIES' SUBMISSIONS

Applicant's Submissions

22. In his submissions, counsel for the Applicant, Mr. Omondi, relied on the Applicant's documents that were filed before the Board.

23. In response to the Respondents' preliminary objection, counsel submitted that the holding in *Republic v Public Procurement Administrative Review Board Ex parte ADK Technologies Limited in Consortium with Transnational Computer Technologies Limited; Principal Secretary National Treasury and Planning & 2 others (Interested Parties) [2021] KEHC 7886 (KLR)* (hereinafter referred to as "the ADK case") relied upon by the Respondent was misunderstood since this case did not relate to the legal person's capacity to sue or not. He pointed out that the Board in striking out the review pertaining to the ADK case held that in the event a tender is submitted by a joint venture, members of the joint venture must expressly authorize the filing of a review before the Board.

24. As to whether the procurement proceedings in the subject tender are exempted from application of the Act by virtue of Section 4(2)(f) of the Act as read with Section 6(1) of the Act, Mr. Omondi submitted that whilst the case made out by the Respondents is that there exists a bilateral agreement, none had been placed before the Board for its

consideration and that in its absence, the Respondents cannot allege reference to a non-existent document.

25. As to the allegation that there was no authority to institute the instant Request for Review as raised in the Respondents' Amended Request for Review, Mr. Omondi submitted that this issue had been cured pursuant to the filed Applicant's Further List of Documents where an Authority to institute and maintain proceedings is attached.

26. Counsel submitted that the mere fact that the preliminary objections raised by the Respondents require adducing of evidence renders them as not proper preliminary objections.

27. On the substantive grounds raised in the instant Request for Review, counsel submitted that the allegations by the Respondents pertaining the Applicant's Power of Attorney is disingenuous and referred the Board to page 152 of the Respondents' exhibit marked Annexure 4. He pointed out that the Power of Attorney therein denotes power to Mohamed Ahmed Shehata Abdelrahman and also referred the Board to the Applicant's bid document which contained a Power of Attorney made out to Ahmed Ibrahim Ahmed Mansour. While making reference to page 154 of the said exhibits, he indicated that the power of attorney therein was brought to the Procuring Entity by the party delivering the tender and that this document was not part of the bid document submitted in the subject tender.

28. He indicated that this was confirmed by the receipt stamp engrossed thereon and by virtue of the fact that this party believed that they needed a power of attorney to be able to submit these particular documents. Counsel submitted that this was lost in translation from the Egyptian version but even if this was not the case, the document relied upon by the Respondents was not part of what was submitted in the bid document for their consideration.

29. Counsel urged the Board to note that the Respondents in their communication addressed Ahmed Ibrahim Ahmed Mansour and not any other party captured in the other Power of Attorney.

30. Mr. Omondi submitted that this was a two-stage evaluation process comprising of technical and financial evaluation with a preliminary evaluation being undertaken as part of the technical evaluation requiring a bidder to meet the minimum mandatory requirements. He argued that the Respondents failed to evaluate the subject tender in the manner provided for in the Tender Document since if this had been done, the Applicant having been dismissed at the mandatory stage needed not have undergone a technical evaluation nor been invited for the financial opening.

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

Respondents' Submissions

32. In his submissions, counsel for the Respondents relied on the Respondents' documents that were filed before the Board.

33. With regard to the preliminary objections raised, counsel submitted that the Applicant is not a legal person capable of suing in its own name and referred the Board to the holding by the High Court in the ADK case. Mr. Mugambi argued that in filing the instant Request for Review, the Arab Contractors ought to have been captured as the 1st Applicant while Metito Overseas Limited ought to have been captured as the 2nd Applicant since both entities maintained their distinct and separate legal personalities despite coming together as a joint venture. He argued that the two companies cannot approach the Board as a joint venture since they can only sue together for a common cause but as separate entities.

34. He further submitted that the instant Request for Review as filed is fatally defective for want of authority by both members of the joint venture being Arab Contractors (Osman Ahmed Osman & Co.) and Metito Overseas Limited. Mr. Mugambi referred to the Applicant's annexure M-01 being an authority under the letterhead of Arab Contractors (Osman Ahmed Osman & Co). He argued that this authority is not signed by Metito Overseas Limited and that there is also no authority by Metito Overseas Limited that has been exhibited nor Resolution by both parties to file the instant Request for Review.

35. Counsel argued that whereas the Applicant had realised its mistake and filed a further list of documents, all documents had been submitted through an affidavit and the further list of documents purports there is an initial list of documents yet none had been filed. He further argued that the Authority to Institute and Maintain Proceedings as filed by the Applicant has no evidentiary value and ought to be disregarded.

36. As regard the Board's jurisdiction to entertain the matter, counsel submitted that the procurement process under review was undertaken through a bilateral agreement in compliance with the AFD Procurement Guidelines, February 2024 and standard bidding documents for design, build and operate works. He argued that Section 4(2)(f) as read with Section 6(1) of the Act exempts procurement made under a bilateral agreement from review by the Board and as such, the Board lacks jurisdiction to hear and determine the instant Request for Review.

37. Counsel submitted that Clause 1 of the Invitation for Initial Selection indicated that the Procuring Entity through the Government of Kenya had received funds from AFD towards the cost of improvement of drinking water and sanitation system on Mombasa-Mwache project and it intended to apply part of the funds to payments under the contract for Design, Build and Operate of Mwache Water Treatment Plan (WTP) and associated works. He pointed out that this was repeated in clause 2 of Instructions to Bidders under source of funds and contends that the procurement was made under a bilateral agreement between the Government of Kenya and AFD which is a foreign agency. Counsel

further pointed out that the loan agreement between the Government of Kenya and AFD is a bilateral agreement and that the Procuring Entity is an agent of the Republic of Kenya as its implementing agency of the project described in the loan agreement. He indicated that the subject tender being part of the project described in the loan agreement and which was financed out of the proceeds of the funds extended by AFD to the Republic of Kenya is a procurement under a bilateral agreement and as such, the Act does not apply.

38. In support of his argument, he made reference to the holding in *Republic v Public Procurement Administrative Review Board & 2 Others Ex Parte Kenya Power & Lighting Company [2019] eKLR; Application No 76 of 2022; Smart People Africa Limited v Tana Water Works, Development Agency & 2 Others; and Application No 88 of 2022; Earthview Management Limited v The Accounting Officer, Central Rift Valley Water Works Development Agency & 2 Others.*

39. On the substantive motion, Mr. Mugambi submitted that the Applicant's technical bid was non-responsive for the following reasons:

- a. The original paper bid contained a power of attorney dated 2nd February 2025 jointly issued by both joint venture parties appointing one Mr. Mohamed Ahmed Shehata Abderahman as the true and lawful representative and attorney with full powers and authority to represent the JV and authority to solely sign the tender. See Respondents' annexure HM-4.
- b. The digital bid contained a power of attorney dated 2nd February 2025 jointly issued by both joint venture parties appointing one

Mr. Ahmed Ibrahim Ahmed Mansour as the true and lawful representative and attorney with full powers and authority to represent the JV and authority to solely sign the tender. See Respondents' annexure HM-5.

- c. The original bid and the digital bid were not notarized or attested.
- d. The original bid was signed by unauthorized signatory.
- e. The Applicant's Bid did not meet the Employer's requirements on performance guarantees.
- f. The bid did not include a Social Inclusion Methodology.
- g. The bid had an incomplete Environmental, Social, Health & Safety Methodology in that it omitted mandatory SEA/SH prevention plan, workers' transport plan, and inspection procedures.

40. Counsel submitted that the two (2) Power of Attorneys submitted by the Applicant in the original and digital bids were not notarized and did not comply with ITB 21.2. He further submitted that the two (2) Power of Attorneys indicated different authorized signatories in that the Power of Attorney in the original bid indicated Mr. Mohamed Ahem Shehata Abdelrahman as the authorized signatory whereas the power of attorney in the digital copy indicated Mr. Ahmed Ibrahim Ahmed Mansour as the authorized signatory.

41. Mr. Mugambi submitted that the original bid was submitted and signed by Mr. Ahmed Ibrahim Ahmed Mansour and that ITB 21.1 of the Tender Document provides that in the event of discrepancy between the

original and copies, the original prevails. Hence, according to the original bid submitted by the Applicant, the authorized representative was Mr. Mohamed Ahem Shehata Abdelrahman yet this was not the person who signed the original bid and as such, the said bid was not signed by the authorized person.

42. As to the performance guarantee, counsel reiterated that the Applicant's bid did not meet the requirements of the employer and that ITB 33.2 provided that a bid that does not meet the minimum acceptable standards for the specified minimum (or maximum as the case may be) would be rejected for non-responsiveness.

43. As to the social inclusion methodology, counsel submitted that this was an integral part of the bid and that the Applicant did not submit a social inclusion methodology in its bid which was a material omission since Section 1.1 under Section 3 – Evaluation and Qualification Criteria provided that if a social inclusion methodology was not provided, the bid would be rejected.

44. As regards the Environmental, Social, Health & Safety Methodology (ESHS Methodology), counsel reiterated that the ESHS Methodology submitted was grossly unsatisfactory and was not prepared in line with the guidelines and contents that were provided to bidders in Appendix 1 of the ESHS specifications. He pointed out that Section 1.1 under Section 3 – Evaluation and Qualification Criteria provided that a bid for

which the ESHS Methodology was not substantially responsive would be rejected.

45. In view of the foregoing, Mr. Mugambi urged the Board to dismiss the instant Request for Review with costs.

Applicant's Rejoinder

46. In a rejoinder, Mr. Omondi submitted that the Respondents were relying on the incorrect documents in a deliberate attempt at disenfranchising the Applicant noting that the correct Power of Attorney was well captured in the table of contents as presented in the Applicant's bid.

47. He reiterated that the Technical Evaluation Criteria as provided in the Tender Document was not relied upon by the Respondents in evaluation of the Applicant's bid and urged the Board to allow the instant Request for Review as prayed.

CLARIFICATIONS

48. The Board sought to know if Mr. Omondi had filed a Notice of Appointment of Advocates in view of the fact that the instant Request for Review was by the Applicant yet it had been signed by its advocates. In response, Mr. Omondi submitted that he was of the opinion that he did not require written instructions or to be appointed expressly to institute the instant matter.

49. Asked to clarify on which of the Applicant's Power of Attorney should the Board look at in establishing whoever swore an affidavit or made statements in support of the instant Request for Review was authorized to institute the said proceeding, Mr. Omondi pointed the Board to the Applicant's exhibit marked M-01 addressed to the Board and dated 6th August 2025 confirming that Mr. Mohamed Abdelhamid Fahmy Abelrahman is duly authorized to appear, apply, or act in court, tribunal, board or any quasi-judicial body within Kenya and to execute all necessary documents and court pleadings for and on behalf of Arab Contractors JV Metito Overseas Limited in relation to the subject tender.

50. As to whether a report on the preliminary evaluation of the subject tender was submitted to the Board, Mr. Mugmabi answered in the affirmative and indicated that a summary of the technical evaluation was also submitted.

51. When asked on the exact number of people that were authorised to transact the documents during the tendering process, Mr. Omondi made reference to the Applicant's bid and submitted that the Power of Attorney as submitted in the Applicant's bid authorized Mr. Ahmed Ibrahim Ahmed Mansour to transact on behalf of the parties in the subject tender but out of abundance of caution, the individual delivering the tender document came with a power of attorney in his hand that was separate from what was submitted and this was meant to introduce himself as the person authorized to submit the said tender.

Hence, out of this process, the Applicant ended up with two sets of power of attorneys.

52. The Board sought to know at what point was the Applicant disqualified in the subject tender. In response, Mr. Mugambi submitted that the Applicant was disqualified at the preliminary stage during compliance checking and technical evaluation since there was verification of completeness of bids submitted in the subject tender.

53. The Board sought to know Mr. Omondi's opinion on the jurisdiction of the Board in the event the Board was in receipt of the bilateral agreement concerning the procurement proceedings in the subject tender in view of Section 67(3)(e) of the Act. In response, Mr. Omondi submitted that in the event that the bilateral agreement exists, he would be obliged on the ouster of the Board's jurisdiction to hear and determine the instant Request for Review.

54. At the conclusion of the online hearing, the Board informed parties that the instant Request for Review having been filed on 7th August 2025 was due to expire on 28th August 2025 and that the Board would communicate its decision on or before 28th August 2025 to all parties to the Request for Review via email.

BOARD'S DECISION

55. 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 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 the determination of Issue A;

B. Whether the instant Request for Review as filed is competent?

Depending on the determination of Issue B;

C. Whether the 2nd 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.

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

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

56. 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.

57. 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."

58. 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."

59. 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."

60. 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...."

61. 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."

62. 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."

63. 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."

64. 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.”

65. 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.

66. 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.

67. 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 it 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;

68. The Respondents objected to the hearing and determination of the instant Request for Review in their Notice of Preliminary Objection dated 11th August 2025 and amended on 20th August 2025 on the grounds that the procurement process under review was undertaken in compliance with the AFD Procurement Guidelines (February 2024) and as such, the Board lacks jurisdiction to hear and entertain the instant Request for Review by dint of Section 4(2)(f) of the Act read with Section 6(1) of the Act which exempts procurement made under a bilateral agreement from review by the Board.

69. In response, Mr. Omondi for the Applicant submitted that the Applicant had not had sight of such an agreement and as such the Board is clothed with sufficient jurisdiction to hear and determine the issues raised in the instant Request for Review. When the Board sought to know if it would still have jurisdiction to hear and determine the matter in the event such bilateral agreement had been submitted to it as part of the confidential documents by the 1st Respondent pursuant to Section 67(3)(e) of the Act, Mr. Omondi submitted that in such a turn of events, he would be obliged on the ouster of the Board's jurisdiction to hear and determine the instant Request for Review.

70. The Board having considered parties' submissions on the relevance of Section 4(2)(f) of the Act and judicial authorities cited deems it necessary to interrogate the aforementioned statutory provision and its import in the instant Request for Review.

71. Section 4(2)(f) of the Act provides as follows:

"(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]**

72. We also take cognizance of Regulation 5(1) of Regulations 2020 which 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]**

73. 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.

74. 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.

75. 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.

76. 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.

77. Justice Nyamweya took a different approach in addressing the import of Section 4(2)(f) in **Judicial Review Application No. 181 of 2018, Republic v Public Procurement Administrative Review Board & 2 others Ex parte Kenya Power & Lighting Company [2019] eKLR** (hereinafter referred to as "the KPLC Case") cited by the Respondents, and held at paragraphs 61 to 65 as follows:

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

and was specifically raised and canvassed by the parties as shown in the foregoing.

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

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

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

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

78. 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.

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

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

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

".....

102. I have carefully considered the loan agreement herein. As correctly submitted by counsel for the applicant, the scenario in the instant case is similar to the facts in Republic v Public Procurement Administrative Review Board & 2 Others ex parte Kenya Power and Lighting Company (2019) eKLR. The project herein is borne out of a bilateral agreement between the Republic of Kenya and JICA. This is the loan agreement NO. KE-P33. The procurement of goods and services was to be financed out of the loan in accordance with the Guidelines for procurement under the Japanese ODA rules. A subsidiary agreement dated 17th April 2020 between JICA and the Republic of Kenya through the ex parte applicant as the executing agent was entered into. Notably, the subsidiary agreement provides under Article 10.1 that the procurement shall be under the Japanese ODA loans. Article 12 of the subsidiary agreement provides for the amendments, settlement of disputes

and applicable law. Article 42.5 of the Standard Bidding Documents Under Japanese ODA Loans. Provides an unsuccessful bidder with an avenue to raise their grievance.

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

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

"63. In my view, a reading of section 4(2)(f) shows that the operative action is procurement under a bilateral agreement entered into by the Government of Kenya and a foreign Government or Agency, and not procurement by the Government of Kenya. One of the meanings of the word "under" in the Concise Oxford English Dictionary is "as provided for by the rules of"; or in accordance with"

The plain and ordinary meaning and contextual interpretation of section 4(2)(f) of the Act is therefore that a procurement that is undertaken as provided for or in accordance with the terms of a bilateral agreement that is entered into by the Government of Kenya and a foreign Government, entity or multilateral agency is exempted from the provisions of the Act.

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

'The main issue that the Board needs to therefore address is whether the mere fact that a particular procurement or procurements are to be undertaken using the proceeds of a grantor a loan where the

Government of Kenya is a party can oust the jurisdiction of the Board to hear and determine a dispute relating to the said procurement under the provisions of section 4(2)(f) of the Act indeed under the provisions of the Kenyan Constitution”

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

105. It was not open to the Respondent to re write the agreement for the parties on the assumption that the same was unconscionable or even unconstitutional. The agreement provided redress avenue for an aggrieved party. All the parties, including the tenderers were aware all the way from the stage of advertisement for the tender to making of the bids that the procurement was in accordance with Guidelines for procurement under the Japanese ODA loans. This was a bilateral agreement between the Government of Kenya and JICA, a foreign

entity and was thus exempt from the application of section 4(2)(f) of the Act.....

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

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

82. Turning to the instant Request for Review, the Board notes that part of the confidential documents submitted to it by the 1st Respondent pursuant to Section 67(3)(e) of the Act is a Credit Facility Agreement dated 21st June 2018 between AFD as the Lender and the Government of Kenya as the Borrower. Having carefully scrutinized the Credit Facility Agreement, we make the following observations:

83. Clause 2.2 of the Credit Facility Agreement provides the purpose of the facility as follows:

" 2.2 Purpose

The Borrower shall apply all amounts borrowed by it under this Facility exclusively towards financing Eligible Expenses, in accordance with the Improvement of drinking water and sanitation systems in Mombasa: Mwache Project's description set out in Schedule 2 (Project Description) and the Financing Plan set out in Schedule 3 (Indicative Financing Plan).

Funds will be transferred by the Borrower to the Final Beneficiary (CWSB) on terms which shall be approved by the Lender ('Project Agreement')."

84. Schedule 2- Project Description at page 47 of the Credit Facility Agreement defines the project as:

"Improvement of drinking water and sanitation systems in Mombasa: Mwache Project."

85. We note that Clause 10.7 of the Credit Facility Agreement provides the governing law to be French Law as follows:

"10.7 Governing law and enforcement

(a) The choice of French law as the governing law of this Agreement will be recognized and enforced by the courts and arbitration tribunals in the jurisdiction of the Borrower.

(b) Any judgment obtained in relation to this Agreement in a French court or any award by an arbitration tribunal will be recognized and enforced in Kenya."

86. The import of the above provisions in the Credit Facility Agreement is that the Government of Kenya received funds under a bilateral agreement with AFD towards financing of the Improvement of drinking water and sanitation systems in Mombasa: Mwache Project. The governing law with regard to the executed Credit Facility Agreement is provided to be French law which ought to be recognized and enforced by the courts and arbitration tribunals in Kenya and that any judgment 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.

87. Further to the above, Clause 7 of the Credit Facility Agreement reiterates that the agreement is governed by French law and provides as follows with regard to settlement of any disputes arising out of or in connection with the said agreement:

"17.2 Arbitration

Any dispute arising out of or in connection with this Agreement shall be referred to and finally settled by arbitration under the Rules of Conciliation and Arbitration of the International Chamber of Commerce applicable on the date of commencement of arbitration proceedings, by one or more arbitrators to be appointed in accordance with such Rules.

The seat of arbitration shall be in Paris and the language of arbitration shall be English.

This arbitration clause shall remain in full force and effect if this Agreement is declared void or is terminated or cancelled and following expiry of this Agreement. The parties' contractual obligations under this Agreement are not suspended if a party initiates legal proceedings against the other Party.

The Parties expressly agree that, by signing this Agreement, the Borrower irrevocably waives all rights of immunity in respect of jurisdiction or execution on which it could otherwise rely."

88. As regards procurement, Clause 10.12 of the Credit Facility Agreement provides 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 actions 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 of 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.”

89. In the same vein, Clause 11.4 of the Credit Facility Agreement provides:

"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.”

90. In view of the reference to Procurement Guidelines, we note that the said guidelines are 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.”

91. Clause 15.7 of the Credit Facility Agreement then states the legal effect of the Procurement Guidelines is as follows:

“ 15.7 Legal effect

The Schedules annexed hereto, the Procurement Guidelines and the recitals hereof form part of this Agreement and have the same legal effect.”

92. The import of the aforementioned clauses is that the Government of the Republic of Kenya, being the borrower, is contractually bound by the AFD Procurement Guidelines which it is required to provide to the

Final Beneficiary which also ought to confirm its understanding of the same. Hence, the Government of the Republic of Kenya and the Final Beneficiary in the funded project were under a duty to confirm that the procurement, allocation and performance of the contracts relating to the implementation of the said project complies with the AFD Procurement Guidelines noting that these guidelines formed part of the Credit Facility Agreement and bore a similar legal effect.

93. As to the Final Beneficiary, we note from the Tender Notice advertised in the Daily Nation on 14th February 2023, the Procuring Entity issued a Specific Procurement Notice (SPN) for Invitation of Initial Selection (IIS) as follows:

"....."

Country :	Kenya
Project Name :	Improvement of drinking water and sanitation systems in Mombasa – Mwache Project, CKE1103
Contract Name:	Design, Build and Operate of Mwache Water Treatment Plant and Associated Works
Contract Number:	CWWDA/AFD/PQ/W3/2022-2023

1. The Coast Water Works Development Agency (CWWDA) through the Government of Kenya has received funds from Agence Francaise Development (AFD) toward the cost of the Improvement of drinking

water and sanitation systems in Mombasa – Mwache Project, and it intends to apply part of the funds to payments under the contract for Design, Build and Operate of Mwache Water Treatment Plant (WTP) and associated works Contract No. CWWDA/AFD/PQ/W3/2022-2023. The CWWDA intends to initially select a maximum of five (5) qualified contractors for the Works.

.....”

94. From the above, the Coast Water Works Development Agency identifies as the Final Beneficiary having received through the Government of Kenya funds from AFD towards the cost of the project for which the Credit Facility Agreement was executed. It also informed prospective bidders that it had received funds from AFD towards the cost of the Improvement of drinking water and sanitation systems in Mombasa – Mwache Project, and that it intended to apply part of the funds towards payments under the subject tender.

95. The Board having also carefully studied the confidential documents related to evaluation of the subject tender notes that the evaluation process in the subject tender as carried out by the Evaluation Committee was in accordance with the provisions of the Procurement Guidelines requiring AFD to issue a letter of No Objection in the procurement process so as to clear and approve the procurement proceedings thus depicting a clear conflict between the provisions of

the Act and the Procurement Guidelines, since neither the Act nor the Regulations require issuance of a letter of No Objection in the procurement process.

96. 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. "

97. 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"

98. 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.

99. From the foregoing analysis, 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 as stipulated in the Credit Facility Agreement. 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.

100. 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 as read with Regulation 5(1) of Regulations 2020. 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.

101. 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.

102. The upshot of our finding is that Ground 2 of the Respondents' Amended Notice of Preliminary Objection amended on 20th August 2025 succeeds and the instant Request for Review is ripe for striking out for want of jurisdiction.

FINAL ORDERS

103. 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:

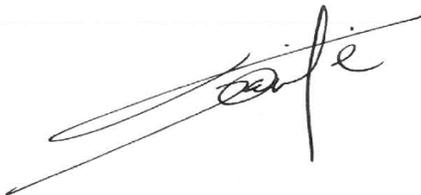
A. Ground 2 of the Respondents' Amended Notice of Preliminary Objection amended on 20th August 2025 be and is hereby upheld.

B. The Request for Review dated 6th August 2025 be and is hereby struck out for want of jurisdiction.

C. The 1st Respondent is hereby directed to proceed with Contract Number: CWWDA/AFD/PQ/W3/2022-2023 for Improvement of Drinking Water and Sanitation Systems in Mombasa – Mwache Project to its logical and lawful conclusion taking into consideration the Board's findings in this Decision.

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

Dated at NAIROBI this 28th Day of August 2025.



.....

PANEL CHAIRPERSON

PPARB



.....

SECRETARY

PPARB