

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 42/2018 OF 29TH MARCH, 2018

BETWEEN

ASTONFIELD SOLESA SOLAR KENYA LTD/

CLEANWATERINDUSTRIES LIMITED.....APPLICANT

AND

KENYA POWER & LIGHTING COMPANY.....PROCURING ENTITY

Review against the decision of the Kenya Power and Lighting Company in the matter of Tender No. KPL/6D.4/PT/1/17 for procurement Plant, Supply, installation and commissioning 550 KV solar plant at Lodwar Power station.

BOARD MEMBERS PRESENT

- | | |
|---------------------------|------------|
| 1. Mr. Paul Gicheru | - Chairman |
| 2. Mr. Hussein Were | - Member |
| 3. Mr. Peter BitiaOndieki | - Member |
| 4. Mr. Nelson Orgut | - Member |

IN ATTENDANCE

- | | |
|-----------------|---------------|
| 1. Philip Okumu | - Secretariat |
|-----------------|---------------|

2. Judy Maina - Secretariat

PRESENT BY INVITATION

Applicant – Astonfield Solesa Solar Kenya Ltd/Clearwater Industries Limited

1. S. O. Owino - Advocate, S. O. Owino & Associates
2.

Procuring Entity – Kenya Power & Lighting Company Limited

1. Gershom Otachi - Advocate, Ogetto Oyachi & Co. Advocates
2. Morara Omoke - Advocate, Ogetto Oyachi & Co. Advocates
3. Constantine Ogari - Advocate, Ogetto Oyachi & Co. Advocates
4. Owiti Awuor - Manager Legal Services, KPLC

INTERESTED PARTIES

1. Geoffrey Muchoki - Advocate, Shenzen Clou
2. Samuel Buyu - Company Rep., Sinotec Co. Ltd
3. Yujwu Wang - Local Office Rep., Shenzen Clou
4. Xiao Lou - Local Officer Rep., Shenzen Clou
5. Zheo Yupeng - Local Officer Rep., Shenzen Clou
6. Musa A. Sheikh - Local Officer Rep., Shenzen Clou
7. Boniface Mwalimu - Technical Sales Manager, Joh Achelis

BOARD'S DECISION

Upon hearing the representations of the parties and interested candidates before the Board and upon considering the information and all the documents before it, the Board decides as follows:

BACKGROUND OF THE AWARD

INTRODUCTION

Tender No. KP1/6D.4/PT/1/17 For Procurement of Plant, Supply, installation and commissioning 550kv solar plant at Lodwar power station was advertised in the local dailies and KPLC website on Thursday, 18th April, 2017. The tender was to close on 20th October 2017 but was extended to 18th July 2017.

The following Twenty Six (26) bidders submitted their Bids by the deadline of Tuesday 18th July 2017 at 10.00AM.

The Bids were opened on Tuesday 18th July 2017 at 10:30 am, at Kenya Power and Lighting Company offices at the Auditorium in the presence of representatives from the bidders and KPLC. The read-out prices were as shown in the table below.

Read Out Tender Opening Prices and Unconditional Discount

NO.	NAME OF THE BIDDER	CUR REN CY	AMOUNT(S)	MODIFI CATION S OR COMME NTS
1	Gamma Solutions S.L	USD	2,079,435.81	None
		KES	0	
2	Electro Power Systems	USD	1,801,244.00	
		KES		
3	CPF Financial Services and OFGEN Ltd JV	USD		
		KES	199,124,847.00	
4	Urbarsolar SAS and Urbasolar Kenya	EURO	1,527,503.00	No Bid Bond
		KES		
5	Solar Century Holdings Ltd	USD	1,370,183.82	
		EURO	110,532.34	
		KES	37,900,837.14	
6	Solar Future Energy Ltd	USD		
		KES	181,611,711.98	
7	Bell Cargo Services Ltd	USD	1,924,243.63	
		KES		
8	Johs Gran-hanssen Ltd	USD	1,779,386.78	

		KES	30,625,787.39	
9	Shenzhen FNS Power Technology Inc.Cd.Fns.Ltd	USD	2,307,983.34	
		KES	0	
10	Astonfield Solesea,solar Kenya Ltd and Clear water Industries Ltd JV	USD	183,760,092.00	
		KES		
11	Joh Achelis and SohneGmbh and SPI Kenya Ltd JV	USD	930,462.50	
		KES	32,927,793.00	
12	Hyperteck Electrical Services Ltd	USD		
		KES	209,357,911.55	
13	China Jiangxi Corporation for International Economic and Technical Cooperation and Sungrow Power Supply Co.Ltd	USD	185,000,000.00	
		KES		
14	Sinotec Co.Ltd	USD	1,743,149.60	
		KES		
15	Vergnet SA	EURO	1,137,996.16	
		USD	294,200.27	
		KES	35,284,530.00	
16	Haier Global Business Corporation Ltd ,Eldan Company Ltd, MNE Technology Company Ltd	USD	2,332,372.00	
		KES		
17	Master Piece Electricals Ltd	USD	2,072,991.80	
		KES		
18	Go Solar Systems Ltd	USD		
		KES	266,786,520.00	
19	Akuo Energy Solution Ltd	USD		
		KES	241,259,280.001	
20	VP Solar srl ,Power point E.A Ltd and Climosferasrl	EURO	2,348,212.65	
		KES		
21	Express Automation Ltd and Whitespace Technologies Ltd and Premier Solar Powertech Ltd	USD		
		KES	274,757,598.00	
22	Lomas & Lomas Ltd and MK Light Africa Right Ltd, solar works E.A Ltd	EURO	1,980,332.49	
		KES	29,114,376.00	
23	SAGEMCOM Energy &Telcom SAS,SAGEMCOM Kenya Ltd	USD	1,459,786.00	
		KES	76,598,964.00	
24	CHINT Electric Company Ltd	USD	1,896,655.33	
		KES		
25	Consolidated Power projects Group Ltd	USD	1,739,850.75	
		KES		
26	Shenzhen Clou Electronics Ltd	USD	1,513,063.68	
		KES	15,185,260.00	

The conclusions and Recommendation

Upon the conclusion of the evaluation process it was concluded that **M/s Shenzhen Clou Electronics Co. Ltd** was the lowest evaluated bidder and had demonstrated the necessary experience and ability to implement a project of the size and complexity of the Procurement of Transformer Densification

It was therefore recommended that the Bidder **M/s Shenzhen Clou Electronics Co. Ltd** be awarded the Tender No. KP1/6D.4/PT/17 for Procurement of Plant, Supply, Installation and commissioning of 550 kW Solar Plant at a Total Cost of **US\$. 1,513,057.79** and **Ksh.15,155,260.00** Equivalent to **Kes.172, 524,164.18 Inclusive of Taxes.**

Professional Opinion

The Ag. General Manager Supplies in his professional opinion dated 22nd December, 2017 stated that Pursuant to Section 84 of the Public Procurement and Asset Disposal Act 2015, he had reviewed the tender evaluation report and noted that the referenced purchase was processed in compliance with the Act and in conformity with the requirements published in the advertisement and in accordance with the Guidelines for the procurement of World Bank financed contracts in foreign countries and requested the Procuring Officer's Accounting Officer to award the same which he did as per the recommendation of award.

THE REQUEST FOR REVIEW

The request for review was lodged by Messrs Astoufield Solesa Solar Kenya Ltd/ Clearwater Industries Limited (hereinafter, "the

Applicant)" on the 29th March 2018 in the matter of Tender No. KPI/6D.4/PT/1/17 for the Procurement of Plant, Supply, Installation and Commissioning of 550KV Solar Plant at the Lodwar Power Station – Kenya Electricity Expansion Project (KEEP).

The Applicant sought for the following orders from the Board:-

- a. The decision of the procuring entity to award the Tender be nullified.*
- b. The procuring entity be ordered to award the Tender No. KPI/6D.4/PT/1/17 to the applicant.*
- c. In the alternative and without prejudice to the request in (b) above, the procuring entity be ordered to evaluate the Tender No. KPI/6D.4/PT/1/17 and award the Tender in compliance with the Provision of the Public Procurement and Asset Disposal Act No. 33 of 2015, the regulations therein and the Tender documents issued by the Procurement Entity.*
- d. The costs of the review be awarded to the Applicant.*
- e. Any other relief that the Board may deem fit and just to grant.*

The Applicant was represented by Mr. S.O.Owino advocate from the firm of S.O.Owino & Associates while Mr. Gershom Otachi of Ogetto, Otachi & Company advocates appeared for the Procuring Entity. Mr. Geoffrey Muchoki advocate represented the Interested Party (successful bidder).

THE APPLICANT'S SUBMISSIONS

Counsel for the Applicant relied on the Request for Review and the written submissions filed before the Board. Counsel for the Applicant maintained that contrary to what the Procuring Entity was saying, the

Applicant had filed this Request for Review on time. He submitted that Section 167(1) of the Act entitles a tenderer to elect whether to file the Review at the time of the occurrence of the breach or at the end of the process after notification of the outcome of its tender. He submitted that in this case, the Applicant waited until the letter of notification was issued then filed the application. Secondly, Counsel for the Applicant contended that the breach complained of in the Request for Review was against the Procuring Entity's decision not to award the Applicant preference. Counsel for the Applicant stated that a party would have to wait until evaluation is done and a notification is given to a bidder for it to determine whether the margin preference had been applied in the evaluation or not. Counsel for the Applicant stated that it would not be possible for a bidder to challenge a decision regarding the issue of whether preference had been given or not before the evaluation process had been concluded and an award made.

Mr. Owino therefore stated that the Applicant was within its right to lodge the Request for Review within a period of fourteen (14) days from the date of receipt of the letter of notification of the outcome of its tender.

Turning to the objection that the Board does not have the jurisdiction to hear and determine the Request for Review under the provisions of Section 4(2)(f) and 6(1) of the Public Procurement and Asset Disposal Act, Counsel for the Applicant argued that the two provisions of the Act are only applicable where the Government of Kenya is the Procuring Entity which was not the case in the dispute before the Board.

He further argued that the Procuring Entity in this case was the Kenya Power & Lighting Company Ltd but not the Government and that the provisions of Sections 4(2)(f) and 6(1) of the Act were not therefore applicable to this case.

He further argued that the funds which were to be used in the procurement were public funds even though in the form of a grant and the procurement was therefore subject to the Constitution and the Act. He further argued that the bilateral agreement relied upon by the Procuring Entity did not talk of the procurement procedure to be used and therefore the applicable procedure was that provided for by the Act.

On the issue of preference, Counsel for the Applicant submitted that the application of preference in any tender process was a matter of law and that a Procuring Entity was under a duty to consider whether any bidder was entitled to preference or not. He stated that in this particular case the Applicant was entitled to preference under the provisions of Section 157(9) of the Act which the Procuring Entity did not award it. He argued that any award made in disregard of the provisions of the law on preference was irregular and unlawful and ought to be set aside and the Procuring Entity directed to comply with the law.

Finally on the objection that the application was incompetent because the successful bidder had not been named as a party in the heading of the Request for Review, Counsel for the Applicant submitted that it was not necessary nor fatal not to name the successful bidder as a party to the review since the successful bidder had been served with the Request for Review by the Board and had appeared and participated in the

hearing. He therefore urged the Board to dismiss all the objections raised by Counsel for the Procuring Entity and allow the Request for Review.

THE PROCURING ENTITY'S RESPONSE

Mr. Gerishom Otachi advocate for the Procuring Entity opposed the Applicant's Request for Review and contended that the Board did not have the jurisdiction to hear and determine the same for various reasons.

He firstly submitted that the Request for Review was filed out of time contrary to the provisions of Section 167(1) of the Public Procurement and Asset Disposal Act. He further submitted that the basis for this objection was that it was evident from paragraph 11 of the Request for Review that the Applicant's main grievance was that the Procuring Entity had not applied the margin of preference provisions in favour of the Applicant. He stated that the Applicant ought to have filed the Request for Review immediately the tender was advertised since it was apparent on the face of the advertisement that the provisions on preference would not be applicable because the tender was being conducted pursuant to the World Bank Rules/Regulations on procurement. He stated that the applicable procedures were fully set out in the advertisement which should have put the Applicant on notice and that the Applicant should have therefore challenged the procurement process immediately but not wait until the end after the process had come to an end and then complain.

On the second ground of objection to the Board's jurisdiction, Counsel for the Procuring Entity submitted that the provisions of Sections 4(2)(f) and 6(1) of the Public Procurement and Asset Disposal Act precluded

the Board from hearing and determining the Request for Review. The basis for the said argument was that the procurement in question was being undertaken pursuant to a bilateral grant agreement between the Government of Kenya and the Nordic Development Fund and that the subject procurement would be undertaken using the World Bank Rules which would govern the procurement.

Counsel for the Procuring Entity further submitted that the Government of Kenya would pursuant to the said agreement implement the project through the agency of the Ministry of Energy and the Kenya Power and Lighting Company Ltd.

Counsel for the Procuring Entity additionally stated that by virtue of the fact that the funds to be used in this procurement were donor funds, then the procurement was not subject to the jurisdiction of the Board under the provisions of Sections 4(2)(f) and 6(1) of the Public Procurement and Asset Disposal Act and that the Board should therefore decline to exercise jurisdiction in this matter on that ground.

Counsel for the Procuring Entity further submitted that in view of the strict position taken by donors on the implementation of their procurement Regulations to be in procurement processes where donor funds were used, any decision given by the Board in this matter would be futile and would be incapable of enforcement if it goes against the donor conditions and Regulations.

The third ground of objection which was argued by Counsel for the Procuring Entity in opposition to the Request for Review was that the same was incompetent on the ground that the successful bidder had not

been joined as a party to the Request for Review. He argued that this was contrary to the provisions of Section 170 of the Public Procurement and Asset Disposal Act and that the Request for Review therefore ought to be struck out.

On the substantive issue of preference, it was the Procuring Entity's case that the Procuring Entity did not award the Applicant preference because the agreement between the Government of Kenya, the Nordic Development Fund through the lead agency of the World did not have a provision for the granting of preference to any of the bidders who participated in the procurement process which was the subject matter of the Request for Review.

He further submitted that the project in issue was what is ordinarily referred to as a turnkey project and that being the case, any application of a preference under the provisions of part XII of the Act on preferences and reservations in procurement would be inconsistent with the World Bank Rules governing turnkey projects and to that extent Section 6(1) of the Act would be applicable in which case the provisions contained in the World Bank Rules and Regulations would be applicable to the exclusion of the statutory requirement set out in Section 157(9) of the Act.

He therefore urged the Board to find that the Procuring Entity properly failed to apply the provisions relating to preference in favour of the Applicant or any other bidder in this procurement.

THE INTERESTED PARTY'S RESPONSE

Mr. Geoffrey Muchoki advocate who appeared on behalf of the interested party/the successful bidder fully associated himself with the submissions made by Counsel for the Procuring Entity and reiterated that the Board did not have the jurisdiction to hear and determine the Request for Review under the provisions of Section 4(2)(f) of the Public Procurement and Asset Disposal Act because the project in issue was being funded by the Nordic Development fund.

He further submitted that the funds therefore being donor funds, the Government of Kenya would not give any contribution whatsoever and further that if the Applicant was unclear about what the source of the funds would be or whether preference would be applicable or not then the Applicant ought to have sought for clarification. He further stated that Section 3 at page 53 of the tender document containing the evaluation criteria for the tender expressly stipulated that domestic preference would not be applicable in the procurement.

He therefore submitted that the provisions of Section 157 of the Act on preference was inapplicable in this case and contended that the successful bidder would be prejudiced because it had already made financial commitment's with other third parties upon being awarded the tender. He therefore urged the Board to dismiss the Applicant's Request for Review with costs.

THE APPLICANT'S RESPONSE TO THE SUBMISSIONS MADE BY THE PROCURING ENTITY AND THE INTERESTED PARTY.

In a short response to the submissions made by Counsel for the Procuring Entity and Counsel for the Successful bidder, Counsel for the Applicant reiterated his earlier submissions and stated that the Procuring Entity had elected to conduct the procurement in issue in accordance with the Kenyan law and that once the Procuring Entity had elected to use a procedure provided for in law then it was bound to follow the same.

On the issue of the preliminary objections, Counsel for the Applicant referred the Board to his initial submissions which he stated had sufficiently answered the issues raised by the objections.

THE BOARD'S FINDINGS

The Board has considered the submissions made by the parties and has further examined all the documents submitted to it and has identified the following issues for determination in this request for Review:

- i) Whether the Board lacks the jurisdiction to hear the Request for Review on the ground that:-*
 - a) The Request for Review was filed out of time.*
 - b) The Request for Review offends the provisions of Section 4(2)(f) and 6(1) of the Public Procurement and Asset Disposal Act.*
 - c) The Request for Review is incompetent for failure to name the successful bidder on the body of the Request for Review.*
- ii) Whether the Procuring Entity failed to evaluate the tender with regard to the procurement of Plant, Supply, Installation and Commissioning 550KV Solar Plant at the Lodwar Power Station by not according the requisite preferences hence contravening the*

provisions of Sections 155 to 157 of the Act and Regulation 28 of the Regulations.

ISSUE NO. I

Whether the Board lacks the jurisdiction to hear the Applicant's Request for Review on the ground that it was filed out of time.

On the first issue framed for determination, the procuring entity contended that the Applicant's application was time barred as the breach complained of related to events that took place at the time the tender documents were made available to the public through advertisement and that the Applicant's Request for Review had therefore been filed outside the statutory period of fourteen (14) days from the date of the advertisement contrary to the provisions of Section 167(1) of the Act.

The Board has considered the submissions made by all the parties on this issue and is of the view that it is clear from the provisions of Section 167(1) of the Act that a tenderer can file a Request for Review either within a period of fourteen days from the date of the occurrence of a breach or within a period of (14) fourteen days from the date of notification of the outcome of its tender.

The said Section 167(1) of the Act provides as follows:-

167(1): "Subject to the provisions of this Part, a candidate or a tenderer, who claim to have suffered or risk suffering, loss or damage due to the breach of a duty imposed on a

procuring entity by this Act or Regulations may seek Administrative Review within 14 days of notification of award or date of occurrence alleged breach at any stage of the procurement process or disposal process as in such a manner as may be prescribed."

In this particular case an examination of the Applicant's complaint shows that the same revolves around the contention that the Applicant was not accorded preference during the evaluation of its tenders. It is obvious that the Applicant would not have been able to know of the alleged breach before the evaluation of the tenders was concluded and a notification issued to it of the outcome of its tender. This is because preference can only be awarded or be denied during the evaluation process of a tender but not at the advertisement or any other stage of the procurement process.

The conclusion of a procurement process is ordinarily signified by the issuance of letters of notification and it is only then that a bidder becomes aware of the reasons why its tender was not successful and it is only upon becoming aware of the reasons that it can file a Request for Review.

The Applicant in this case was therefore rightly entitled to file its Request for Review within a period of fourteen (14) days from the date of notification of the outcome of its tender and the Request for Review now before the Board was filed within time and the Procuring Entity's objection on this ground therefore fails and is disallowed.

ISSUE NO. II

Whether the failure to name the successful bidder as a party in the heading of the Request for Review renders the same incompetent.

As to whether the failure to name the successful bidder in the heading of the Request for Review is fatal, the Board finds that under the provisions of Section 170 of the Public Procurement and Asset Disposal Act 2015, the law deems certain legal persons as automatic parties to a Request for Review and that the Board also has the power to join parties into the proceedings pending before it who are likely to be affected by the proceedings. Section 170 of the Act provides as follows in so far as who the parties to a Request for Review pending before the Board are:-

Section 170:

“170: The parties to a review shall be:-

- a) The persons who requested for the review**
- b) The accounting officer of the procuring entity;**
- c) The tenderer notified as successful by the procuring entity; and**
- d) Such other persons as the Review Board may determine.**

Under the provisions of Section 170(c) of the Act therefore, the law automatically deems the successful bidder as a party to the proceedings pending before the Board. As stated in several decisions, the Board has also always taken the view that any bidder who has participated in a procurement process is entitled to participate in the proceedings pending before the Board as a matter of right. This is however not the case where the proposed participants are not bidders and any party desiring to join the proceedings before the Board under the provisions of

the new Act must make an application to that effect and give reasons to show that its participation in the proceedings will be relevant and will assist the Board while considering the issues pending before it.

Turning back to the issue of not naming the successful bidder, as a party in the heading of the Request for Review, the Board finds that in addition to being deemed an automatic party to the proceedings by virtue of the provisions of Section 170(c) of the Act, the successful bidder was also notified of the existence of the proceedings and appeared before the Board through Mr. Geoffrey Muchoki Advocate who fully participated in the proceedings before the Board as shown by a summary of the submissions made by the parties before the Board and which have already been set out in this decision.

In view of all the above findings, the procuring entity's objection that the successful bidder was not joined as a party to the Request for Review therefore fails and is therefore similarly disallowed.

ISSUE NO. III

Whether the Board lacks the jurisdiction to hear and determine the Applicant's Request for Review by virtue of the provisions of Section 4(2)(f) and 6(1) of the Act.

The third objection raised by the Procuring Entity and which was also supported by Counsel for the interested party was that the Board lacks the jurisdiction to hear and determine this Request for Review on the ground that the project which is the subject matter of the Request for Review is being funded through donor funds.

Both parties relied on the provisions of Section 4(2)(f) and 6(1) of the Act. The Board has considered the rival arguments made by all the parties regarding the above objection and wishes to commence the determination of this issue by setting out the provisions of Section 4(2)(f) and 6(1) of the Act which read as follows:-

"4(2)For avoidance of doubt, the following are not procurements or asset disposalswith respect to which this Act applies-

a).....

b).....

f) Procurement and disposal of assets under bilateral or multilateralagreements between the Government of Kenya and any other foreign government, agency, entity or multilateral agency unless as otherwise prescribed in the Regulations.

6.(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."

The main issue that the Board needs to therefore addressis whether the mere fact that a particular procurement or procurements are to be undertaken using the proceeds of a grant or 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.

The Board wishes to state that this often vexed issue has been determined by the court in several decisions which are binding on the Board.

One such decision is the case of **Republic -vs- Public Administrative Review Board, Machiri Limited, Athi Water Services Board and Weihia International Economic & Technical Cooperation Company Ltd [Nai HC Milimani Commercial Courts Misc. JR Application No's 402 & 405 (consolidated) of 2016]** where the High Court stated that the mere fact that a project is being financed by funds from a donor cannot deprive the Board or the court of the oversight and supervisory jurisdiction to hear and determine the dispute pursuant to the provisions of Section 4(2)(f) of the Act.

The court observed as follows in paragraphs 171 to 173 of the said decision which the Board has referred to severally in several previous decisions and which it again finds necessary to reproduce hereunder for the avoidance of doubt in this and future cases that may come before it on this issue:-

171: Therefore any Public Procurement or Asset Disposal must be undertaken in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. In my view the framers of the Constitution were alive to the fact that public procurement necessarily involves an element of taxation and hence amounts to a burden to the tax payer. Similarly public asset disposal involves diminution of the proceeds of taxation. It is therefore necessary that in both instances the taxpayer be made aware of how his taxes are being spent and how the assets

procured with the taxes are being disposed of. For a public entity to procure a financial facility whose repayment is shrouded in mystery and bind the public with its repayment when the process did not comply with the principles under Article 227 of the Constitution would be clearly contrary to the spirit of the Constitution”.

172: It is therefore my view that only in exceptional circumstances should a provision of an enactment be interpreted in a manner that excludes public scrutiny since Article 227 of the Constitution embraces all instances where a state organ or any other public entity is contracting for goods or services. To hold that Parliament can through its delegated power enact a law whose effect would be to decide which entities are subject to Article 227 of the Constitution without justification from the Constitution would amount to scuttling the letter and spirit of the said Article”.

173: I therefore agree with the Respondent and the interested party herein that a purposeful reading of Section 4(2)(f) of the Public Procurement and Asset Disposal 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 of 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”.

The court restated the same position in the case of **Republic -vs- The Public Procurement Administrative Review Board, Lex Oilfield Solutions Limited, Geothermal Development Company Limited & Netfast Communications Limited** (Nai HC Misc. Appl. No’s 71 & 72 of 2017).

The legal position as regards similar provisions in the repealed Act was stated by the High Court in the case of **Okiya Omtata Ouko & 2 Others -vs- The Attorney General and 3 Others** (Petition No. 58 of 2014 [2014] eKLR where the Honourable Justice Isaac Lenaola who heard the Petition in the High Court stated as follows at page 27 of his said decision:-

“This fact is undisputed and being so it follows that the terms and conditions of the loan as negotiated would be applicable in the event there is a conflict with The Public Procurement and Disposal Act. The issue that I must therefore address my mind to is whether there is a conflict between the terms of the loan with Exim Bank and the Provisions of the Public Procurement and Disposal Act. I am clear in my mind that there is no conflict at all. I say so because the Act has laid down procedures to be followed in Public Procurement of goods and services. In particular, it demands the use of open tendering in Procurement with set down procedures and requirements and matters which

ought to be evaluated as well as the notification of successful parties and unsuccessful parties. I have already stated elsewhere above the conditions which the Government of Kenya had to satisfy before the financing of the SGR Project. They include the following; the finances required would be met by the Chinese Government and that the mode of Procurement of the SGR Project had to be in line with the conditions made by Exim Bank; i.e the 4th Respondent had to be awarded the contract”.

It is evident from all the above and other decisions on this issue that the overriding consideration when dealing with this issue is whether the donor funds in question are to be repaid back by the Kenyan public at the end of the day and if the answer to such question is in the affirmative, then the institutions charged with the duty to provide oversight over the use of such funds both under the Constitution and other laws are vested with the jurisdiction to provide such an oversight.

Still on this issue, the Board has considered the Procuring Entity's contention that any decision given by the Board or indeed by the court's regarding a procurement where donor funds are to be used may be a decision in vain and may not be given effect.

The Board is with respect of a contrary opinion for the reason that the above fear is not based on any solid factual basis by way of illustration this Board has made decisions in several cases involving donor funds which have been complied with by donors one such decision being the case of **China Gezhbouba Group Co.Ltd =vs. = Ministry of Water & Irrigation In Review No.33 of 2017** among many others.

It is also clear in the Board's mind that donors who are an important and who play an extremely significant role in the economic development of this Country are entities which respect and would like to see the rule of law prevail. Donors also avail funds knowing that any procurement that may be undertaken using the said funds will be used prudently and that bidders who participate in such processes would be accorded an equal and a fair opportunity to participate in the procurement processes as envisaged by the provisions of various Articles of the Constitution, the Public Procurement and Asset Disposal Act and all the other laws that may be relevant to the issue. It is also clear in the Board's mind that no donor possibly has any favoured candidate in any procurement process and that is why the procurement processes/tenders are advertised to enable all those eligible members of the public participate.

The Board therefore finds the suggestion that donors may disregard the decisions of the Board and by extension the court as speculative and unfounded.

This ground of objection to the Board's jurisdiction therefore also fails and is disallowed.

ISSUE NO. IV

Whether the Procuring Entity failed to evaluate the tender with regard to the procurement of Plant, Supply, Installation and Commissioning 550KV Solar Plant at the Lodwar Power Station by not according the requisite preferences hence contravening the provisions of Sections 155 to 157 of the Act and Regulation 28 of the Regulations.

Having determined that the Board has the jurisdiction to hear and determine this Request for Review, the next issue which the Board must now determine is whether the Procuring Entity acted in accordance with the law by admittedly failing to accord preference to the Applicant and other local bidders or any other bidder who was entitled to preference on the ground that the funds which are to be used in this procurement are to be sourced from a donor.

Owing to the significance and the public importance attached to this issue the Board wishes to observe that the preference and reservations scheme set out under part XII of the Act running from Sections 155 to 157 of the Public Procurement and Asset Disposal Act were enacted for a purpose namely the promotion of local industry and the economic empowerment of Kenyan Citizen by enhancing their ability to participate in procurement processes by cushioning them against skewed competition.

The Board has gone through the constitutional and statutory provisions, the relevant Regulations relating to preference and reservations and more significantly to a number of decided cases on the issue of preference and it is clear from all the above sources of law that the issue of preference has been treated as a matter of law which a Procuring Entity must consider. A Procuring Entity is therefore under a legal duty to consider whether a bidder is entitled to preference or not and where it finds that a bidder is entitled to preference, and then it must accord the bidder preference notwithstanding any silence in the tender document or any express provisions to the contrary in the tender document.

There are numerous decisions by the court on this issue but the Board will do no better than cite two of the said decisions:-

In the case of **Republic -vs- The Public Procurement and Administrative Review Board and The Kenya Revenue Authority (NAI HC Constitutional and Judicial Review Misc. Application No. 540 of 2008)** the court held as follows in as far as a Procuring Entity and the Board's obligation to consider preference is concerned:-

"The margin of preference consideration was a statutory one and although in the Act the Provision is couched in discretionary terms due to the use of the word "may" in Regulation 28(2)(a), the preference is couched in mandatory terms and therefore forms part of the substantive law on the procurement. The procuring entity was clearly in violation of Regulation 28(2)(a) and so is the Board. This category of preference is also incorporated in the tender documents in mandatory terms"

".....The Applicant was entitled to a preference per the existing law and consequently the Board did commit a fundamental error of law in not addressing it at all".

The court stated as follows on the same issue in the case of **Republic -vs- The Public Procurement and Administrative Board, National Training Authority and Coretech Solutions and Systems Ltd exparte (Nai Misc. Appl. No. 334 of 2015);**

"It goes without saying that the issue of preference and reservations is one provided for by the procurement laws.... The Board was under a duty to consider the question and make a determination. Its ultimate decision was therefore made without

taking this very relevant question into consideration....I find that the failure by the Board to make a determination on the question of preference and reservations rendered its decision incomplete”.

Returning to the substantive law relating to preference, Section 155 of the Act stipulates that pursuant to Article 227 (2) of the Constitution and despite any other Provision of the Act or any other legislation, all procuring entities shall comply with the law on preference and reservations.

The Board notes that Section 157 (8) of the Act which sets out the margin of exclusive preference to be accorded to local bidders which states as follows:-

“157(8)In applying the preferences and reservations under this section-

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

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

Section 157(9) of the same Act on the other hand states as follows:-

“157.(9)For the purpose of ensuring sustainable promotion of local industry, a procuring entity shall have in its tender documents a mandatory requirement as preliminary evaluation criteria for all foreign tenderers participating in international

tenders to source at least forty percent of their supplies from citizen contractors prior to submitting a tender. "

Although the tender document used in the procurement which is the subject matter of this Request for Review did not apparently have a mandatory requirement requiring the Procuring Entity to apply the preference and reservation scheme, the Board is of the firm view based on the law and the decided cases that preference ought to have been awarded to the Applicant and any other bidders who were entitled to it.

The Procuring Entity attempted to justify the failure by it to consider the preference and reservation scheme on the ground that the donor conditions had stipulated that preference would not be applicable in this procurement as part of the conditions for availing the funds for the project by the donors of the funds to be used in the project.

The Board is unfortunately unable to accept the above reasoning because is clearly runs contrary to the provisions of Constitution and those of the Act and defeats the very purpose for the enactment of the statutory provisions on preference and reservations. The Board wishes to add that if any such bilateral agreement purports or purported to take away the right to preference and reservation, then the same would be contrary to the letter and the spirit of the law.

This is more so because the eventual burden to repay funds whether be they from the Government itself or from the donors solely rests on the shoulders of the Kenyan tax payer. The Kenyan tax payer who must bear the burden must also by the same token benefit from the preference

and reservation scheme no matter the source of the funds being the ultimate bearer of the repayment burden.

If the Board or any other public authority was to allow a donor to impose conditions that omit the application of the preference and reservation scheme merely because the donor is the one donating the funds, then local contractors/tenderers will be elbowed out of a significant number of procurement processes in this country a fact that will render part XII of the Act of no much economic benefit to local contractors/tenderers and the public.

The Board therefore finds that the Procuring Entity herein acted contrary to the law by failing to consider and accord preference to the Applicant and any other bidder who was entitled to the application of such scheme in its favour in this procurement.

This ground of review therefore succeeds and is allowed.

Before concluding this issue, the Board notes that while carrying out the financial evaluation of this tender, the Procuring Entity significantly altered the prices submitted by some bidders from those read out at tender opening. This was clearly contrary to the provisions of Section 82 of the Act which provides as follows:-

Section 82. The tender sum as submitted and read out during the tender opening shall be absolute and final and shall not be the subject of correction, adjustment or amendment in any way by any person or entity.

ON THE NATURE OF THE RELIEFS

On the nature of the reliefs to be granted, the Board is cognisant for procurement processes to be concluded expeditiously. The Board however notes that the need for expedition should not be used as an excuse to deny a bidder or bidders the benefits of rights which have been conferred upon them by law.

The need for expedition should not also be used by any Procuring Entity in promoting unfair practices or in furthering practices which are contrary to the letter and the spirit of the Constitution and the Public Procurement and Asset Disposal Act.

The Board further wishes to add that most procurement processes in this Country have not been slowed down by litigation or the desire by bidders to unnecessarily vex or place hurdles on the way of procuring entities but rather by blatant acts of disregard of the provisions of the Constitution, statutory law, procedural rules, vested interest among many other improper practices. If all officers of all procuring entities could faithfully adhere to the law and avoid such negative practices, this would eliminate all such impediments and eliminate a large numbers of disputes and render litigation unnecessary.

The Board will therefore strike a balance between all the above objectives and direct the Procuring Entity in this procurement to re-evaluate the tenders submitted to it and complete the exercise within the shortest possible time.

The Request for Review filed by the Applicant herein is therefore allowed on the following terms.

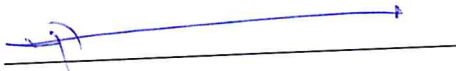
FINAL ORDERS

In view of the above findings and in exercise of the Powers conferred upon it by the Provisions of Section 173 of the Public Procurement and Asset Disposal Act, 2015, the Board makes the following orders on this Request for Review.

1. The request for review dated 28th March 2018 and filed by the Applicant, Messrs Astoufield Solesa Solar Kenya Ltd/ Clearwater Industries Limited (hereinafter, "the Applicant") on the 29th March 2018 in the matter of Tender No. KPI/6D.4/PT/1/17 for the Procurement of Plant, Supply, Installation and Commissioning of 550KV Solar Plant at the Lodwar Power Station – Kenya Electricity Expansion Project (KEEP), be and is hereby allowed.
2. The award of the subject tender to the successful bidder, M/s Shenzhen Clou Electronics Co. Limited, be and is hereby annulled and set aside.
3. The Procuring Entity is directed to re-evaluate afresh the bids for financial bids submitted to it taking into account the findings of the Board herein and complete the procurement process including the making of an award within 14 days from the date of this decision.
4. In view of the nature of the orders issued above and in further view of the fact that the Applicant and the other bidders who participated in this procurement process will have a second opportunity to participate in the fresh financial re-evaluation

participated in this procurement process will have a second opportunity to participate in the fresh financial re-evaluation process ordered, the Board orders that of each party shall bear its own costs of this Request for Review.

Dated at Nairobi on this 19th day of April, 2018.

A blue ink signature, appearing to be 'J. N. N.', is written over a horizontal line.

**CHAIRMAN
PPARB**

A blue ink signature, appearing to be 'V. G.', is written over a horizontal line.

**SECRETARY
PPARB**

