REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 134/2020 OF 8TH OCTOBER 2020

BETWEEN

CHINA COMMUNICATION SERVICES INTERNATIONAL LTD..........................................................APPLICANT

AND

ACCOUNTING OFFICER, KENYA NATIONAL HIGHWAYS AUTHORITY........................................1ST RESPONDENT
KENYA NATIONAL HIGHWAYS AUTHORITY........2ND RESPONDENT
SOLITON TELMEC LIMITED.................................1ST INTERESTED PARTY
WHITESPACE TECHNOLOGIES LIMITED..... 2ND INTERESTED PARTY
GEONET TECHNOLOGIES LIMITED.................3RD INTERESTED PARTY


BOARD MEMBERS
1. Ms. Faith Waigwa -Chairperson
2. Mr. Nicholas Mruttu -Member
3. Dr. Joseph Gitari -Member

IN ATTENDANCE
1. Mr. Stanley Miheeso -Holding brief for the Secretary
BACKGROUND TO THE DECISION

The Bidding Process


Bid Submission Deadline and Opening of Bids

The Procuring Entity received a total of ten (10) bids by the bid submission deadline of 17th June 2020. The same were opened shortly thereafter by a Tender Opening Committee in the presence of bidders’ representatives and recorded as follows:

<table>
<thead>
<tr>
<th>Bidder No.</th>
<th>Bidder Name</th>
<th>Read out Bid Prices (Kshs)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>M/s China Communication Services International Limited</td>
<td>478,594,026.51</td>
</tr>
<tr>
<td>2</td>
<td>M/s NEC Africa Pty Ltd in Joint Venture with M/s Quavatel Limited</td>
<td>589,585,512.44</td>
</tr>
<tr>
<td>3</td>
<td>M/s CAMUSAT Kenya Limited</td>
<td>859,158,782.79</td>
</tr>
<tr>
<td>4</td>
<td>M/s Adrian Kenya Limited</td>
<td>467,439,615.00</td>
</tr>
<tr>
<td>5</td>
<td>M/s White Space Technologies Limited</td>
<td>491,441,018.25</td>
</tr>
<tr>
<td>6</td>
<td>M/s Soliton Telmec Limited</td>
<td>516,686,606.10</td>
</tr>
<tr>
<td>7</td>
<td>M/s Geonet Technologies Limited in Joint Venture with M/s Vindhya Telelinks Limited of India</td>
<td>433,875,806.25</td>
</tr>
<tr>
<td>8</td>
<td>M/s Turbi Energy and Logistic</td>
<td>317,259,293.95</td>
</tr>
</tbody>
</table>
Evaluation of Bids

Having appointed an Evaluation Committee, evaluation of bids in the subject tender was undertaken in the following stages:

i. Preliminary Examination and Determination of Responsiveness;

ii. Detailed Evaluation;

iii. Post Qualification; and

iv. Comparison of Bid Prices.

1. Preliminary Examination and Determination of Responsiveness

At this stage, the Evaluation Committee evaluated the ten bids received against the criteria found in Section I. Instructions to Bidders of the Bidding Document and outlined the outcome of evaluation as follows:

<table>
<thead>
<tr>
<th>Bidder No</th>
<th>Name of Bidder</th>
<th>Substantial Responsiveness</th>
<th>Acceptance for Detailed Examination</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>M/s China Communication Services International Limited</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>2</td>
<td>M/s NEC Africa Pty Ltd in Joint Venture with M/s Quavatel Limited</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>3</td>
<td>M/s CAMUSAT Kenya Limited</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>4</td>
<td>M/s Adrian Kenya Limited</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>5</td>
<td>M/s White Space Technologies Limited</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>6</td>
<td>M/s Soliton Telmec Limited</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>7</td>
<td>M/s Geonet Technologies Limited in Joint Venture with M/s Vindhya Telelinks Limited of India</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>8</td>
<td>M/s Turbi Energy and Logistic</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Bidder No</td>
<td>Name of Bidder</td>
<td>Modifications or Comments</td>
<td></td>
</tr>
<tr>
<td>-----------</td>
<td>-------------------------------------------------------------------------------</td>
<td>-----------------------------------</td>
<td></td>
</tr>
<tr>
<td>1</td>
<td>M/s China Communication Services International Limited</td>
<td>No Discounts</td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>M/s NEC Africa Pty Ltd in Joint Venture with M/s Quavatel Limited</td>
<td>No Discounts</td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>M/s CAMUSAT Kenya Limited</td>
<td>No Discounts</td>
<td></td>
</tr>
<tr>
<td>4</td>
<td>M/s Adrian Kenya Limited</td>
<td>No Discounts</td>
<td></td>
</tr>
<tr>
<td>5</td>
<td>M/s White Space Technologies Limited</td>
<td>No Discounts</td>
<td></td>
</tr>
<tr>
<td>6</td>
<td>M/s Soliton Telmec Limited</td>
<td>No Discounts</td>
<td></td>
</tr>
<tr>
<td>7</td>
<td>M/s Geonet Technologies Limited in Joint Venture with M/s Vindhya Teelinks Limited of India</td>
<td>No Discounts</td>
<td></td>
</tr>
<tr>
<td>8</td>
<td>M/s Turbi Energy and Logistic</td>
<td>No Discounts</td>
<td></td>
</tr>
<tr>
<td>9</td>
<td>M/s Sagemcom Energy &amp; Telecom SAS</td>
<td>No Discounts</td>
<td></td>
</tr>
<tr>
<td>10</td>
<td>M/s Barize Construction Limited in Joint Venture with M/s Cobra Gestion De Infraestructuras, S.A.U (Grupo Cobra)</td>
<td>No Discounts</td>
<td></td>
</tr>
</tbody>
</table>

2. Detailed Evaluation

At this stage, the Evaluation Committee applied the criterion under ITB Clause 14 of Section I. Instructions to Bidders of the Bidding Document and outlined the outcome of evaluation as follows:

3. Comparison of Bid Prices

At this stage, the Evaluation Committee subjected six bids to the evaluation criterion under ITB Clause 35 and ITB Clause 36 of Section I. Instructions to
Bidders of the Bidding Document and recorded the outcome of evaluation as follows:

<table>
<thead>
<tr>
<th>Bidder No</th>
<th>Name</th>
<th>Sub A</th>
<th>PC Sums</th>
<th>VAT 14%</th>
<th>Contingency</th>
<th>Total</th>
<th>Sub A less PC Sums</th>
<th>Ranking</th>
</tr>
</thead>
<tbody>
<tr>
<td>6</td>
<td>M/s Soliton Telmec Limited</td>
<td>365,587,0</td>
<td>20,000,00</td>
<td>51,182,19</td>
<td>94.08</td>
<td>453,327,9</td>
<td>345,587,0</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td></td>
<td>92.00</td>
<td>0.00</td>
<td>2.88</td>
<td>9.20</td>
<td>92.00</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1</td>
<td>M/s China Communication Services Internatio Limited</td>
<td>383,017,5</td>
<td>20,000,00</td>
<td>53,622,45</td>
<td>6.50</td>
<td>474,941,7</td>
<td>363,017,5</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td></td>
<td>65.00</td>
<td>0.00</td>
<td>9.10</td>
<td>6.50</td>
<td>65.00</td>
<td></td>
<td></td>
</tr>
<tr>
<td>5</td>
<td>M/s White Space Technologies Limited</td>
<td>393,262,3</td>
<td>20,000,00</td>
<td>55,056,73</td>
<td>7.50</td>
<td>487,645,3</td>
<td>373,262,3</td>
<td>3</td>
</tr>
<tr>
<td></td>
<td></td>
<td>75.00</td>
<td>0.00</td>
<td>2.50</td>
<td>7.50</td>
<td>75.00</td>
<td></td>
<td></td>
</tr>
<tr>
<td>4</td>
<td>M/s Adrian Kenya Limited</td>
<td>465,034,7</td>
<td>20,000,00</td>
<td>65,104,86</td>
<td>5.00</td>
<td>576,643,0</td>
<td>445,034,7</td>
<td>4</td>
</tr>
<tr>
<td></td>
<td></td>
<td>50.00</td>
<td>0.00</td>
<td>5.00</td>
<td>5.00</td>
<td>50.00</td>
<td></td>
<td></td>
</tr>
<tr>
<td>9</td>
<td>M/s Sagemcom Energy &amp; Telecom SAS</td>
<td>646,422,1</td>
<td>20,000,00</td>
<td>90,499,09</td>
<td>0.43</td>
<td>801,563,4</td>
<td>626,422,1</td>
<td>5</td>
</tr>
<tr>
<td></td>
<td></td>
<td>04.26</td>
<td>0.00</td>
<td>4.60</td>
<td>0.43</td>
<td>04.26</td>
<td></td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>M/s CAMUSAT Kenya Limited</td>
<td>700,134,5</td>
<td>20,000,00</td>
<td>98,018,84</td>
<td>9.55</td>
<td>868,166,8</td>
<td>680,134,5</td>
<td>6</td>
</tr>
<tr>
<td></td>
<td></td>
<td>95.53</td>
<td>0.00</td>
<td>3.37</td>
<td>9.55</td>
<td>95.53</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Recommendation**

According to the Evaluation Report dated 27th July 2020, the Evaluation Committee recommended award of the subject tender to M/s Soliton Telmec Limited having submitted the lowest evaluated bid at the sum of Kshs. 516,686,606.10

**Due Diligence**
The Evaluation Committee carried out a due diligence exercise to the confirm the authenticity of the documents and information of the lowest evaluated bidder (i.e. M/s Soliton Telmec Limited) based on the parameters and information obtained from the institutions mentioned hereinbelow:

<table>
<thead>
<tr>
<th>S/No</th>
<th>Parameters</th>
<th>Result (Yes/No)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Firms' Experience (Safaricom)</td>
<td>Yes</td>
</tr>
<tr>
<td>2</td>
<td>National Transport &amp; Safety Authority (Authenticity of the Log books for the Equipments submitted by the bidder)</td>
<td>Yes</td>
</tr>
<tr>
<td>3</td>
<td>Line of Credit (Authenticity of the Bid Security submitted by the Bidder)</td>
<td>Yes</td>
</tr>
<tr>
<td>4</td>
<td>Bid Security</td>
<td>Yes</td>
</tr>
<tr>
<td></td>
<td><strong>Overall Remarks (Pass/Fail)</strong></td>
<td><strong>Pass</strong></td>
</tr>
</tbody>
</table>

From the foregoing, the Evaluation Committee noted that M/s Soliton Telmec Limited satisfied the requirements of the due diligence exercise conducted on it.

**Professional Opinion**

In a Professional Opinion dated 29th July 2020, the Procuring Entity's Deputy Director, Supply Chain Management reviewed the Evaluation Report dated 27th July 2020 whilst outlining the background to the procurement process. She requested the Procuring Entity's Director General to consider and approve award of the subject tender to M/s Soliton Telmec Limited at the price of Kshs. 516,686,606.10 for being the lowest evaluated bidder. The
said professional opinion was approved by the Procuring Entity’s Director-General on 30th July 2020.

Notification to Bidders

In letters dated 11th August 2020, the Procuring Entity’s Director General notified the successful bidder and unsuccessful bidders of the outcome of their bids.

REQUEST FOR REVIEW NO. 121/2020

M/s China Communications Services International Ltd lodged a Request for Review dated 26th August 2020 and filed on 26th August 2020 together with a Statement in Support of the Request for Review sworn on 25th August 2020 and filed on even date and a Further Affidavit sworn on 7th September and filed on even date, through the firm of Onyango, Ndolo & Company Advocates, seeking the following orders:

1. An order setting aside the Respondents’ decision dated 11th August 2020 declaring the Applicant’s bid unsuccessful and substituting thereof an order declaring the Applicant’s bid successful;

2. An order directing the Respondents to produce the original copy minutes of the Tender Opening Committee and Tender Evaluation Committee (Financial Evaluation precisely);

3. An order directing the Respondents to re-evaluate the financial bids submitted by the two finalists being the Applicant and the
Interested Party herein with respect to Tender No. KeNHA/2297/2020 in Lot 5;

4. An order directing the Procuring Entity to award the tender to the Applicant herein who had the lowest responsive bid as to price/cost;

5. An order directing the Respondents to bear the cost of the Request for Review; and

6. Such order orders as the Review Board may deem fit to issue.

Having considered each of the parties’ cases, the Board rendered a decision on 15th September 2020 directing as follows: -


3. The Procuring Entity is hereby directed to reinstate the Applicant’s tender and the 1st Interested Party’s tender
together with all other bidders that made it to Financial Evaluation, at the Financial Evaluation Stage, and conduct a re-evaluation at the Financial Evaluation Stage in accordance with section 86 (1) (a) of the Public Procurement and Asset Disposal Act, 2015 and Regulation 77 of the Public Procurement and Asset Disposal Regulations, 2020, whilst taking into consideration the Board’s findings in this Review.

4. Further to Order No. 3 above, the Procuring Entity is hereby directed to conclude the procurement process in Tender No. KeNHA/2297/2020- Civil Works for the Main Build of Optic Fiber Cable for Eldoret-Lokichar-Nakodok Corridor, Lot 5: Eldoret-Lokichar Section (285KM) including the making of an award within fourteen (14) days from the date of this decision.

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

Re-evaluation

According to the Evaluation Report dated 29th September 2020, the Evaluation Committee recorded the prices quoted by bidders as follows:
<table>
<thead>
<tr>
<th>Bid No</th>
<th>Bidder Identification</th>
<th>Read-out Bid Price(s)</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td><strong>Bidder Identification</strong></td>
<td><strong>Currency</strong></td>
<td><strong>Amount(s) or %</strong></td>
</tr>
<tr>
<td>1</td>
<td>M/s. China Communication Services International Limited.</td>
<td>KES</td>
<td>478,594,026.51</td>
</tr>
<tr>
<td>3</td>
<td>M/s. CAMUSAT Kenya Limited.</td>
<td>KES</td>
<td>859,158,782.79</td>
</tr>
<tr>
<td>4</td>
<td>M/s. Adrian Kenya Limited</td>
<td>KES</td>
<td>467,439,615.00</td>
</tr>
<tr>
<td>5</td>
<td>M/s. White Space Technologies Limited.</td>
<td>KES</td>
<td>491,441,018.25</td>
</tr>
<tr>
<td>6</td>
<td>M/s. Soliton Telmec Limited</td>
<td>KES</td>
<td>516,686,606.10</td>
</tr>
<tr>
<td>9</td>
<td>M/s. Sagemcim Energy &amp; Telecom SAS.</td>
<td>KES</td>
<td>808,903,318.00</td>
</tr>
</tbody>
</table>

The Evaluation Committee proceeded to carry out re-evaluation at the Comparison of Bid Prices Stage (i.e. Financial Evaluation) based on “Corrections, Adjustments and Unconditional Discounts, Additions, Adjustments, and Priced Deviations” which included exclusion of contingency amount specified in the Activity Schedule completed by bidders. The Evaluation Committee determined that M/s Soliton Telmec Limited had the lowest evaluated tender price as follows: -

<table>
<thead>
<tr>
<th>Lowest Evaluated Responsive Bidder (proposed for contract award)</th>
<th>M/s Soliton Telmec Limited</th>
</tr>
</thead>
<tbody>
<tr>
<td>If bid submitted by agent list actual supplier</td>
<td>N/A</td>
</tr>
<tr>
<td>If bid from joint venture, list all partners, nationalities and estimated shares of contract</td>
<td>N/A</td>
</tr>
<tr>
<td>Principle country of origin of goods/materials</td>
<td>N/A</td>
</tr>
<tr>
<td>Estimated delivery to project site/completion period</td>
<td>February 2022</td>
</tr>
<tr>
<td>Estimated date from contract signing</td>
<td>August 2020</td>
</tr>
<tr>
<td>-------------------------------------</td>
<td>-------------</td>
</tr>
<tr>
<td><strong>Currency</strong></td>
<td><strong>Amount or %</strong></td>
</tr>
<tr>
<td>Bid Price (Read Out)</td>
<td>Kshs</td>
</tr>
<tr>
<td>Corrections for Errors</td>
<td>Kshs.</td>
</tr>
<tr>
<td>Discounts</td>
<td>Kshs.</td>
</tr>
<tr>
<td>Other Adjustments</td>
<td>Kshs.</td>
</tr>
<tr>
<td>Proposed Award</td>
<td>Kshs.</td>
</tr>
<tr>
<td>Disbursements Category</td>
<td>2A</td>
</tr>
</tbody>
</table>

**Recommendation**

The Evaluation Committee recommended award of the subject tender to M/s Soliton Telmec Limited at the price of **Kenya Shillings Four Hundred Fifty-Six Million, Seven Hundred Thirty-Six Thousand, Two Hundred Thirteen and Thirty-Seven Cents only** (Kshs 456,736,213.37).

**Due Diligence**

The Evaluation Committee carried out due diligence to confirm the authenticity of the documents and information provided by the lowest evaluated bidder on the following parameters.

<table>
<thead>
<tr>
<th>S/No</th>
<th>Parameters</th>
<th>Result (Yes/No)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Firms’ Experiences (Safaricom)</td>
<td>Yes</td>
</tr>
<tr>
<td>2.</td>
<td>National Transport &amp; Safety Authority (NTSA)</td>
<td>Yes</td>
</tr>
<tr>
<td>3.</td>
<td>Line of Credit</td>
<td>Yes</td>
</tr>
<tr>
<td>4.</td>
<td>Bid Security</td>
<td>Yes</td>
</tr>
<tr>
<td>S/No</td>
<td>Parameters</td>
<td>Result (Yes/No)</td>
</tr>
<tr>
<td>------</td>
<td>-----------------------------------</td>
<td>-----------------</td>
</tr>
<tr>
<td></td>
<td>Overall Remarks (Pass/Fail)</td>
<td>Pass</td>
</tr>
</tbody>
</table>

Professional Opinion

In a professional opinion dated 29th September 2020, the Procuring Entity’s Deputy Director, Supply Chain Management outlined the manner in which the subject procurement process was undertaken, indicated that the default procurement process used was the World Bank Guidelines Revised in 2014 and the National Competitive Bidding method in line with the Financial Agreement dated 20th July 2015. He further noted that the Evaluation Committee re-evaluated the bid of M/s China Communications Services International Ltd together with all other tenders at the Comparison of Bid Prices Stage in line with World Bank Guidelines revised in 2014. He therefore urged the Procuring Entity’s Director General to approve award of the subject tender to M/s Soliton Telmec Limited at the price of **Kenya Shillings Four Hundred Fifty-Six Million, Seven Hundred Thirty-Six Thousand, Two Hundred Thirteen and Thirty-Seven Cents Only (Kshs 456,736,213.37)** having been determined to have submitted the lowest evaluated bid. The said professional opinion was approved on the same date of 29th September 2020.
Notification to Bidders

In letters dated 29th September 2020, the Procuring Entity notified the successful bidder and all unsuccessful bidders of the outcome of their bids.

REQUEST FOR REVIEW NO. 134/2020

M/s China Communication Services International Ltd (hereinafter referred to as “the Applicant”) lodged another Request for Review dated and filed on 8th October 2020 together with a Supporting Affidavit sworn on 8th October 2020 and filed on even date, through the firm of Siçano & Omollo LLP Advocates, seeking the following orders: -

a) An order declaring the Procuring Entity’s Letter of Notification of Award of Tender No. KeNHA/2297/2020- Civil Works for the Main Build of Optic Fiber Cable for Eldoret-Lokichar-Nakokodok Corridor, Lot 5: Eldoret-Lokichar Section (285KM) purporting to award the subject tender to M/s Soliton Telmeq Ltd, at the adjusted, corrected and amended price of KES 456,736,213.37 null and void;

b) An order declaring the Procuring Entity’s Letter of Notification of unsuccessful bid dated 29th September 2020 with respect to Tender No. KeNHA/ 2297/2020- Civil Works for the Main Build of Optic Fiber Cable for Eldoret-Lokichar-Nakokodok Corridor, Lot 5: Eldoret-Lokichar Section (285KM) addressed to the Applicant, null and void;
c) An order directing the Procuring Entity to award the subject Tender No. KeNHA/2297/2020- Civil Works for the Main Build of Optic Fiber Cable for Eldoret-Lokichar-Nakodok Corridor, Lot 5: Eldoret-Lokichar Section (285KM) to the Applicant herein having met the award criteria under Section 86 (1) (a) of the Public Procurement and Asset Disposal Act as read with Regulation 77 of the Public Procurement and Asset Disposal Regulations, 2020;

d) Any other relief that the Board may deem fit and just to grant; and

e) An order awarding costs of the Review to the Applicant.

In response, the Respondents lodged a Memorandum of Response dated and filed on 13th October 2020 together with a Replying Affidavit sworn on 13th October 2020 and filed on even date, through the firm of Robson Harris & Company Advocates, the 1st Interested Party lodged a Replying Affidavit sworn on 16th October 2020 and filed on even date through the firm of Garane & Somane Advocates while the 2nd Interested Party lodged an Affidavit in Support of the Request for Review sworn on 19th October 2020 and filed on even date through the firm of KRK Advocates LLP, the 3rd Interested Party filed a Memorandum of Response dated 21st October 2020 and filed on even date together with a Replying Affidavit sworn on 21st October 2020 and filed on even date through its Managing Director, Mr. Joel Kimutai.
On 16th March 2020, the Board issued Circular No. 1/2020 and the same was published on the Public Procurement Regulatory Authority’s website (www.ppra.go.ke) in recognition of the challenges posed by Covid-19 pandemic. Through the said Circular, the Board instituted certain measures to restrict the number of representatives of parties that may appear before the Board during administrative review proceedings in line with the presidential directives on containment and treatment protocols to mitigate against the potential risks of the pandemic.

On 24th March 2020, the Board issued Circular No. 2/2020 further detailing the Board’s administrative and contingency management plan to mitigate Covid-19 pandemic. Through this circular, the Board dispensed with physical hearings and directed that all request for review applications would be canvassed by way of written submissions. Clause 1 at page 2 of the said Circular further specified that pleadings and documents would be deemed as properly filed if they bear the official stamp of the Board.

The Applicant lodged Written Submissions dated 16th October 2020 and filed on 19th October 2020, the Respondents lodged Written Submissions dated 22nd October 2020 and filed on even date while the 1st Interested Party lodged Written Submissions dated 21st October 2020 and filed on 22nd October 2020 and Supplementary Submissions dated 26th October 2020 and filed on even date. The 2nd Interested Party lodged Written Submissions dated 28th October 2020 and filed on 29th October 2020 while the 3rd Interested Party did not lodge written submissions.
BOARD’S DECISION

The Board has considered the pleadings and written submissions filed before it, including the confidential documents submitted to it pursuant to section 67 (3) (e) of the Act and finds that the following issues call for determination:

I. Whether the Procuring Entity complied with the orders of the Board issued on 15th September 2020 in PPARB Application No. 121 of 2020, China Communication Services Ltd v. The Accounting Officer, Kenya National Highways Authority & 2 Others.

II. Whether the obtaining circumstances justify exercise of the Board’s powers under section 173 (c) of the Act to substitute its decision for the decision of the Respondents in the subject tender.

Before the Board addresses the above issues, the Board would like to make a determination on a preliminary issue raised by the 2nd Interested Party, and the other one raised by the Respondents and the 1st Interested Party.

At paragraphs 19 and 20 of its Affidavit in Support of the Request for Review, the 2nd Interested Party depones that the Respondents did not notify the 2nd Interested Party of the decision to award the subject tender to the 1st Interested Party and the reason why the 2nd Interested Party’s bid was unsuccessful. According to the 2nd Interested Party, it only learnt of the
award of the subject tender upon being served by the Board with a copy of
the instant Request for Review. The 2nd Interested Party depones that the
failure by the Respondents is a violation of section 87 (3) of the Act, which
makes it mandatory for the accounting officer of a procuring entity to notify
all bidders that their bids were unsuccessful, who was the successful
tenderer and the reasons thereof.

Having considered the 2nd Interested Party’s pleadings, the Board notes that
the 2nd Interested Party raised an alleged breach of duty by the Procuring
Entity, imposed under section 87 (3) of the Act regarding issuance of letters
of notification to bidders. This Board takes cognizance of section 167 (1) of
the Act which guides candidates and tenderers of the manner in which they
ought to approach this Board seeking administrative review of an alleged
breach of duty by a procuring entity. The said section provides as follows: -

"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".
Regulation 203 of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as “Regulations 2020”) provides guidance on the applicable Form for filing Request for Review applications, the contents of the application and the fees payable. Section 167 (1) of the Act directs tenderers such as the 2\textsuperscript{nd} Interested Party herein to seek administrative review by filing a Request for Review application within fourteen days of notification of award or date of occurrence of an alleged breach of duty by a procuring entity. This means, the 2\textsuperscript{nd} Interested Party ought to have lodged a Request for Review within fourteen days from the date it was served with a copy of the instant Request for Review, so as to raise an alleged breach of section 87 of the Act by the Respondents, in the 2\textsuperscript{nd} Interested Party’s own Request for Review application and lodge the same at the Board upon payment of the requisite fees.

The 2\textsuperscript{nd} Interested Party seeks to lodge a Request for Review through the backdoor by raising an alleged breach of duty by the Respondents, through its response to the Request for Review contrary to the procedure specified in section 167 (1) of the Act and Regulation 203 of Regulations 2020. Such an alleged breach of duty cannot be entertained at this point because it does not conform to the manner in which an aggrieved tenderer ought to invoke the jurisdiction of this Board to undertake a review on a procuring entity’s action.
Accordingly, the Board declines the invitation to entertain the 2nd Interested Party’s allegations raised at paragraphs 19 and 20 of its Affidavit in Support of the Request for Review because the same were raised contrary to the procedure specified in section 167 (1) of the Act and Regulation 203 of the Regulations 2020.

On the second preliminary issue touching on its jurisdiction raised by the Respondents and the 1st Interested Party, the Board notes that at paragraphs 12 to 14 of their Memorandum of Response and paragraphs 12 to 14 of their Replying Affidavit, the Respondents aver that pursuant to a Financing Agreement dated 20th July 2015 between the World Bank and the Government of Kenya, the subject procurement process including preparation of the Bidding Document was guided by the World Bank: Guidelines for Procurement of Goods, Works and Non-Consulting Services under IBRD Loans and IDA credits and grants by World Bank Borrower dated January 2011 (Revised July 2014) (hereinafter referred to as “World Bank Guidelines as revised in 2014”). According to the Respondents, since the subject tender is being undertaken under a bilateral agreement between the Government of Kenya and the World Bank, the same is not subject to provisions of the Act by virtue of section 4 (2) (f) of the Act. As a result, the jurisdiction of the Board is excluded. According to paragraph 11 (c) of its Replying Affidavit, the 1st Interested Party depones that the subject procurement process falls within the purview of section 4 (2) (f) of the Act and the same is therefore excluded from provisions of the Act with effect
that the jurisdiction of the Board over the subject procurement process is ousted.

In response to the foregoing, the Applicant at paragraphs 7 to 9 of its Written Submissions, states that the question whether the Board has jurisdiction to entertain the Request for Review in so far as the subject procurement process is concerned was settled by the Board in **PPARB Application No. 121 of 2020, China Communication Services Ltd v. The Accounting Officer, Kenya National Highways Authority & 2 Others** (hereinafter referred to as “Review No. 121/2020”). According to the Applicant, the jurisdictional issue raised by the Respondents and the 1st Interested Party in the instant Request for Review is moot and a complete non-starter. In the Applicant’s view, if the said parties believed the findings of the Board in Review No. 121/2020 were incorrect, they ought to have challenged the said decision through the procedure provided in section 175 (1) of the Act.

Having considered parties’ pleadings and written submissions, the Board notes that it is not in dispute that the Applicant herein previously lodged Review No. 121/2020 wherein the Respondents took the position that the subject procurement process meets the conditions of section 4 (2) (f) of the Act thus ousting the application of the Act and jurisdiction of the Board in entertaining Review No. 121/2020. It is also worth noting that the Board addressed the question whether the subject procurement process meets the conditions set out in section 4 (2) (f) of the Act, for the jurisdiction of the
Board to be ousted as its first issue framed for determination in Review No. 121/2020. The salient findings on that issue were as follows:

- **Page 31 to 33 of the decision in Review No. 121/2020, the Board studied the documents submitted by the Procuring Entity which included; a Financing Agreement dated 20th July 2015 which made reference to World Bank Guidelines as revised in 2014 and the Procuring Entity’s Specific Procurement Notice dated 28th April 2020 which stated that the subject procurement would be conducted through national competitive procurement using Request for Bids (RFB) as specified in the World Bank Regulations for IPF Borrowers, July 2016 Revised November 2017 and August 2018 (hereinafter referred to as “the World Bank Procurement Regulations as revised in 2018”);**

- **Page 38 of the decision in Review No. 121/2020, the Board observed that the World Bank Procurement Regulations as revised in 2018 replaced the World Bank Guidelines as revised in 2014 thereby introducing alternative procurement arrangements (i.e. National Competitive Bidding Procedures) which may include the use of procurement rules of a borrower to a procurement process;**

- **Page 41 of the decision in Review No. 121/2020, the Board established that the World Bank Procurement Regulations as revised in 2018 permit the use of procurement procedures of a borrower’s country and gave leeway for the Procuring Entity to use its Tender Documents (i.e. (i.e. standard tender documents prepared by the Public Procurement**
Regulatory Authority) (hereinafter referred to as “the Authority”) subject to the World Bank’s consent;

- Page 43 of the decision in Review No. 121/2020, the Board listed elements that must be satisfied in order to arrive at the conclusion whether the Act is not applicable to the subject procurement process for the jurisdiction of the Board to be ousted, which elements included; (i) existence of a bilateral agreement or multilateral agreement between the Government of Kenya and any other foreign government, agency, entity or multilateral agency, (ii) existence of a procurement and disposal of assets under (i.e. as provided for or in accordance with the terms and conditions of) the said bilateral or multilateral agreement, (iii) the terms and conditions of the bilateral or multilateral agreement do not allow for the use of the procurement laws of the borrower (in this instance, the Government of Kenya) and/or the procurement laws of the Procuring Entity (in this case, Kenya National Highways Authority);

- Page 44 of the decision in Review No. 121/2020, the Board found that the Procuring Entity undertook the subject procurement process in accordance with the World Bank Procurement Regulations as revised in 2018 which replaced the World Bank Guidelines as revised in 2014, since the Procuring Entity applied national competitive bidding procedures whilst incorporating provisions of the Act to the subject procurement process, thus failed to satisfy the elements outlined at page 43 of the said decision in order for section 4 (2) (f) of the Act to
be invoked in ousting application of the Act and jurisdiction of the Board; and

- Page 44 of the decision in Review No. 121/2020, the Board found that it had jurisdiction to entertain Review No. 121/2020 because the Act was applicable to the subject procurement process.

It is evident the Board in Review No. 121/2020, which review was with respect to the subject tender already addressed the question whether the subject procurement process meets the conditions set out in section 4 (2) (f) of the Act in ousting application of the Act and jurisdiction of this Board.

The question that arises for the Board’s determination is whether this Board can entertain an issue that it already settled through an earlier Request for Review between the same parties, with respect to the subject tender (same subject matter) and that the decision of the Board in the earlier determined Request for Review was not challenged, thus became final and binding to all parties including all tenderers (i.e. tenderers filed responses and those who chose not to lodge a response to the request for review).

To address this question, the Board considered the decision of the Court of Appeal in Civil Appeal No. 42 of 2014, John Florence Maritime Services Ltd v. Cabinet Secretary for Transport and Infrastructure & 3 Others (2015) eKLR (hereinafter referred to as “Civil Appeal No. 40 of 2014”) where it was held as follows: -
"...when entertaining these proceedings, res judicata is a matter affecting the jurisdiction of the court, it is therefore prudent that this be determined in limine before delving into the merits of the case, if jurisdiction is established. From the above, the ingredients of res judicata are firstly, that the issue in dispute in the former suit between the parties must be directly or substantially be in dispute between the parties in the subsequent suit... Secondly, that the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title and lastly that the court or tribunal before which the former suit was litigated was competent and determined the suit finally.

Res judicata is a subject which is not at all novel. It is a discourse on which a lot of judicial ink has been spilt and is now sufficiently settled. We therefore do not intend to re-invent any new wheel. We can however do no better than reproduce the re-indention of the doctrine many centuries ago as captured in the case of Henderson v Henderson [1843] 67 ER 313: -

".....where a given matter becomes the subject of litigation in and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not
(except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case."

The court in Civil Appeal No. 40 of 2014 went further to hold that:

"The doctrine of res judicata has two main dimensions: cause of action res judicata and issue res judicata. Res judicata based on a cause of action, arises where the cause of action in the latter proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter.

Issue res judicata may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant and one of the parties seeks to re-open that issue."
Having considered the finding in the foregoing case, the Board observes that the ingredients of *res judicata* are as follows:

i. The former suit should be between the same parties, or parties under whom they or any of them claim, litigating under the same title;

ii. The issue in dispute in the former suit between the parties must directly or substantially be in dispute between the parties in the subsequent suit;

iii. The court or tribunal before which the former suit was litigated was competent and determined the suit with finality;

iv. The plea of *res judicata* extends to points upon which the court was actually required by parties to form an opinion and pronounce a judgment on, including every point which properly belonged to the subject of litigation.

Applying the ingredients listed hereinbefore to the instant Request for Review, the Board notes that: (a) the parties in Review No. 121/2020 are the same parties in the instant Request for Review i.e. the Applicant, the Respondents and the 1st Interested Party including other tenderers who were notified of the initial Request for Review but chose not to file pleadings who participated in the subject procurement process and the decision of the Board in Review No. 121/2020 was final and binding to them pursuant to section 175 (1) of the Act), (b) one of the issues raised in the Review No. 121/2020 regarding section 4 (2) (f) of the Act in so far as application of the Act and jurisdiction of the Board is concerned is also one of the issues raised
in the instant Request for Review, (c) the Board was competent having been moved by the Applicant pursuant to section 167 (1) of the Act, to determine applicability of section 4 (2) of the Act in so far as application of the Act and jurisdiction of the Board is concerned and the Board determine such issue with finality (which determination has not been challenged at the High Court) and (d) the issue of applicability of section 4 (2) of the Act in so far as application of the Act and jurisdiction of the Board is concerned, was an issue raised by parties who required this Board to form an opinion and pronounce a judgment on with respect to the subject procurement process currently under consideration and was still under consideration in Review No. 121/2020 and (e) the Board made a determination on such issue raised in Review No. 121/2020 and is now called upon to determine the same issue in the instant Request for Review.

The Act does not give this Board the mandate and jurisdiction to undertake a review of its own decision with respect to a matter that the Board already decided or pronounced itself on and that the decision of the Board was never challenged, thus became final and binding to the parties in Review No. 121/2020 pursuant to section 175 (1) of the Act, having failed to challenge such decision at the High Court. What was left for the Respondents, having failed to challenge the decision of the Board, was to take into consideration the findings made by the Board as regards the elements that need to be satisfied before section 4 (2) (f) of the Act can be invoked in ousting application of the Act and jurisdiction of the Board.
The Board observes that, the plea of \textit{res judicata} is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter (wastage of time and public resources. As rightly observed in Civil Appeal No. 40 of 2014: -

"...Res judicata ensures the economic use of court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably."

The Board is inclined to adopt the position of the court in Civil Appeal No. 40 of 2014 and therefore resists the Respondents’ and the 1st Interested Party’s invitation to address an issue that was raised and settled by the Board in its decision of 15th September 2020 in Review No. 121/2020. Given that the Board’s decision of 15th September 2020 in Review No. 121/2020 was not challenged at the High Court through judicial review proceedings, the said decision remains final and binding to all parties and it is clear that applicability of section 4 (2) (f) of the act, was already settled by this Board.
The Board’s determination on section 4 (2) (f) of the Act was not challenged thus became final and binding to all parties. Assuming that the same was challenged at the High Court and that upon conclusion of proceedings at the High Court, Review No. 121/2020 is remitted to the Board for fresh hearing and determination, the issue of applicability of section 4 (2) (f) of the Act would not have been res judicata. However, no party challenged the Board’s decision within the timelines under section 175 (1) of the Act.

In summary, the Board finds that the issue of applicability of section 4 (2) (f) of the Act in ousting application of the Act and jurisdiction of this Board, is a settled matter as the Board pronounced itself on the same in Review No. 121/2020 therefore, the same is res judicata.

Having dispensed with the above preliminary issues, the Board shall now address the issues raised in the substantive Request for Review.

On the first issue for determination, the Board notes that the Applicant was among ten tenderers that participated in the subject procurement process by submitting a tender by the tender submission deadline of 17th June 2020 in response to the Procuring Entity’s Specific Procurement Notice of 28th April 2020. Evaluation of bids was conducted and recommendation of award of the subject tender was made to the 1st Interested Party herein at its tender sum of Kshs. 516,686,606.10 as can be seen from the Evaluation Report dated 27th July 2020. Thereafter, a due diligence exercise on the 1st Interested Party was undertaken and a professional opinion issued by the
Procuring Entity’s Deputy Director, Supply Chain Management on 29th July 2020 advising the 1st Respondent to consider and approve award of the subject tender to the 1st Interested Party at the price of Kshs. 516,686,606.10 for being the lowest evaluated bidder. The said professional opinion was approved by the 1st Respondent on 30th July 2020 thus paving way for letters of notification issued to tenderers on 11th August 2020.

The Applicant was aggrieved by the decision of the 1st Respondent on award of the subject tender to the 1st Interested Party, thus lodged Review No. 121/2020 before this Board. The Board having considered all parties’ pleadings and written submissions filed with respect to Review No. 121/2020 first addressed a jurisdictional issue raised before it as outlined hereinbefore and further made a determination on whether the Procuring Entity awarded the subject tender in accordance with section 86 of the Act and Regulation 77 of the Public Procurement and Asset Disposal Regulations, 2020. (hereinafter referred to as “Regulations 2020”). In its final orders, the Board in Review No. 121/2020 directed as follows:


3. The Procuring Entity is hereby directed to reinstate the Applicant’s tender and the 1st Interested Party’s tender together with all other bidders that made it to Financial Evaluation, at the Financial Evaluation Stage, and conduct a re-evaluation at the Financial Evaluation Stage in accordance with section 86 (1) (a) of the Public Procurement and Asset Disposal Act, 2015 and Regulation 77 of the Public Procurement and Asset Disposal Regulations, 2020, whilst taking into consideration the Board’s findings in this Review.

4. Further to Order No. 3 above, the Procuring Entity is hereby directed to conclude the procurement process in Tender No. KeNHA/2297/2020- Civil Works for the Main Build of Optic Fiber Cable for Eldoret-Lokichar-Nakodok Corridor, Lot 5: Eldoret-Lokichar Section (285KM) including the making of an award within fourteen (14) days from the date of this decision.

5. Given that the subject procurement process has not been concluded, each party shall bear its own costs in the Request for Review.
It is worth noting that the Board; (1) nullified the 1st Interested Party’s letter of notification of award dated 11th August 2020, (2) nullified the Applicant’s letter of notification of unsuccessful bid dated 11th August 2020, (3) directed the Procuring Entity to reinstate the Applicant’s tender and the 1st Interested Party’s tender together with all other bidders that made it to Financial Evaluation, at the Financial Evaluation Stage, and conduct a re-evaluation at the Financial Evaluation Stage in accordance with section 86 (1) (a) of the Act and Regulation 77 of Regulations 2020, taking into consideration the Board’s findings in Review No. 121/2020, (4) directed the Procuring Entity to conclude the procurement process within 14 days from 15th September 2020 and (5) directed each party to bear its own costs in Review No. 121/2020.

The salient findings of the Board’s decision of 15th September 2020 in Review No. 121/2020 with respect to Order No. 3 are as follows:

- **Page 51 to 52 of the decision in Review No. 121/2020, the Board having established the Act applies to the subject procurement process and that the Procuring Entity selectively applied provisions of the Act, addressed its mind on the provisions of section 86 (1) (a) of the Act and Regulation 77 of Regulations 2020. In doing so, the Board observed that to arrive at the evaluated price of a tender, a procuring entity; (i) considers the price in the Form of Tender, (ii) considers any minor deviation from the requirements accepted by a procuring entity**
under section 79 (2) (a) of the Act, (iii) where applicable, converts all
tenders to the same currency using the Central Bank Exchange Rate
prevailing at the tender opening date and (iv) applies any margin of
preference indicated in the tender document;

- Page 53 of the decision in Review No. 121/2020, the Board found that
the Procuring Entity was required to rank tenders in accordance with
their evaluated price pursuant to Regulation 77 (2) of Regulations 2020
and make a determination on the successful tender in accordance with
the award criteria applicable to the procurement process by dint of
section 86 of the Act;

- Page 56 of the decision in Review No. 121/2020, the Board established
that Regulation 77 of Regulations 2020 do not recognize provisional
sums and contingency amounts as part of the components used when
arriving at the lowest evaluated price, even though a procuring entity
may direct bidders to specify provisional sums and contingency
amounts in their respective Bill of Quantities to cater for unforeseeable
circumstances during implementation of the tender;

- Page 57 of the decision in Review No. 121/2020, the Board found that
Clause 35.2 of Section II. Instructions to Bidders of the Bidding
Document did not conform to the manner in which a procuring entity
ought to arrive at the lowest evaluated price and where there is a
conflict between the Bidding Document prepared in a tender that
applied national competitive bidding procedures and the Act, the Act
must prevail;
• Page 57 to 58 of the decision in Review No. 121/2020, the Board found that the Procuring Entity calculated 14% of Sub-Total A indicated by bidders in their respective Activity Schedules for Lot 5 (as amended by Addendum No. 1 dated 9th June 2020) to arrive at VAT amount and calculated 10% of Sub-Total A indicated by bidders in their respective Activity Schedules for Lot 5 to arrive at Contingency amounts; thereby arriving at an adjusted price after introducing a new formula for calculating VAT and contingencies amounts that was not specified in the Activity Schedule for Lot 5 (as amended by Addendum No. 1 dated 9th June 2020);

• Page 58 of the decision in Review No. 121/2020, the Board observed that whereas the Applicant asserted that it was the lowest evaluated bidder, it did not rightfully fill the Activity Schedule for Lot 5 (as amended by Addendum No. 1 dated 9th June 2020) since the Applicant introduced additional items to its Activity Schedule;

• Page 61 of the decision in Review No. 121/2020, the Board found that the Procuring Entity departed from its own Bidding Document, which in any case did not conform to the manner of arriving at the lowest evaluated bidder as envisioned by the Act and Regulations 2020, thus failed to award the subject tender in accordance with Regulation 77 (1) of Regulations 2020 read together with section 86 (1) (a) of the Act.

The Applicant’s averment that the Respondents and the 1st Interested Party did not challenge the Board’s decision through Judicial Review proceedings filed at the High Court within fourteen (14) days of the decision has not been
controverted by any of the other parties to the instant Request for Review. Furthermore, to the best of the Board’s knowledge, no judicial review proceedings were filed at the High Court challenging the Board’s decision of 15th September 2020 in Review No. 121/2020 within the period of 14 days specified in section 175 (1) of the Act. This means that the Board’s decision of 15th September 2020 in Review No. 121/2020 is final and binding to all parties to the instant Request for Review in accordance with section 175 (1) of the Act and any action by a party in Review No. 121/2020 contrary to the decision of the Board of 15th September 2020 in Review No. 121/2020 will be in disobedience of the Board’s decision, in breach of the Act and such action shall be null and void in accordance with section 175 (6) of the Act.

It now behooves upon this Board to determine whether the Procuring Entity complied with the orders of the Board, specifically in relation to the findings in Review No. 121/2020 that the Procuring Entity was required to take into consideration in concluding the subject procurement process.

According to paragraph 27 to 28 of the Respondents’ Memorandum of Response, the Respondents aver that the Applicant’s bid price of Kshs. 478,594,026.51 at tender opening was lower than that of the 1st Interested Party which was Kshs. 516,686,606.10. However, to evaluate the bids, the Respondents aver that ITB Clause 35 of Section II. Instructions to Bidders of the Bidding Document required the Procuring Entity to consider the bid price excluding Provisional Sums, Contingencies as well as Taxes if any and
that ITB Clause 35.2 (a) of Section II. Instructions to Bidders of the Bidding Document allowed for price adjustments. According to the Respondents, the price adjustments were done for comparison purposes only by subtracting a contingency amount of Kshs. 59,950,392.73 from the 1st Interested Party’s tender price thus adjusting the 1st Interested Party’s tender price from Kshs. 516,686,606.10 to Kshs. 456,736,213.37. At paragraphs 8 to 10 of its Replying Affidavit, the 1st Interested Party deposes that the evaluated price was arrived at pursuant to section 79 (2) (b) of the Act by correcting an error and oversight, for purposes of comparison only and not for alteration of the quoted bid price. According to the 1st Interested Party, the Procuring Entity awarded the subject tender based on the 1st Interested Party’s quoted bid price.

On its part, the 2nd Interested Party deposes at paragraphs 14 to 18 of its Affidavit in Support of the Request for Review that upon perusal of the copy of the Request for Review served upon it, it learnt that the 1st Interested Party was awarded the subject tender at Kshs. 456,736,213.37, yet its bid price was Kshs. 516,686,606.10. According to the 2nd Interested Party, such variation amounts to an adjustment/amendment. While making reference to the Board’s decision in Review No. 121/2020, the 2nd Interested Party deposes that the Board directed the Respondents on the manner of arriving at the lowest evaluated price pursuant to Regulation 77 of Regulations 2020. In his view, the Respondents’ re-evaluation process did not conform to sections 82, 86 (1) (a) and Regulation 77 of Regulations 2020, and is therefore null and void. On the other hand, the 3rd Interested Party at
paragraph 12 of its Memorandum of Response avers that it associates itself fully with the Applicant’s Request for Review whilst adding that the tender price as submitted by bidders cannot be adjusted, corrected or amended at the whim of the Procuring Entity. According to the 3rd Interested Party, the Procuring Entity has not demonstrated how the price adjustment it undertook during Financial Evaluation qualifies as a minor deviation under section 79 (2) (a) of the Act.

The Applicant on its part states at paragraph 16 of its Written Submissions that the Respondents had a mandatory duty to comply with the orders of the Board issued in Review No. 121/2020, but instead of complying with the said orders, the Respondents adjusted, corrected and amended the 1st Interested Party’s tender price of Kshs. 516,686,606.10, thus purported to award the subject tender to the 1st Interested Party at an adjusted price of Kshs. 456,736,213.37.

From the foregoing submissions, and having established the salient features of the Board’s decision in Review No. 121/2020, the Board first studied the Procuring Entity’s confidential file submitted pursuant to section 67 (3) (e) of the Act and notes that the Evaluation Report dated 29th September 2020 shows the Evaluation Committee first recorded the bid prices submitted by bidders at tender opening as follows: -
<table>
<thead>
<tr>
<th>Bid No</th>
<th>Bidder Identification</th>
<th>Read-out Bid Price(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Name</td>
<td>Currency</td>
</tr>
<tr>
<td>(a)</td>
<td></td>
<td>(d)</td>
</tr>
<tr>
<td>1</td>
<td>M/s. China Communication Services International Limited.</td>
<td>KES</td>
</tr>
<tr>
<td>3</td>
<td>M/s. CAMUSAT Kenya Limited.</td>
<td>KES</td>
</tr>
<tr>
<td>4</td>
<td>M/s. Adrian Kenya Limited</td>
<td>KES</td>
</tr>
<tr>
<td>5</td>
<td>M/s. White Space Technologies Limited.</td>
<td>KES</td>
</tr>
<tr>
<td>6</td>
<td>M/s. Soliton Telmec Limited</td>
<td>KES</td>
</tr>
<tr>
<td>9</td>
<td>M/s. Sagemcim Energy &amp; Telecom SAS.</td>
<td>KES</td>
</tr>
</tbody>
</table>

The Evaluation Committee proceeded to undertake what it referred to as "Corrections, Adjustments and Unconditional Discounts, Additions, Adjustments, and Priced Deviations". According to Table 13 found at page 14 of the Evaluation Report dated 29th September 2020, the Evaluation Committee outlined details of the proposed award of the subject tender to the 1st Interested Party as follows:

<table>
<thead>
<tr>
<th>Lowest Evaluated Responsive Bidder (proposed for contract award)</th>
<th>N/s Soliton Telmec Limited</th>
</tr>
</thead>
<tbody>
<tr>
<td>If bid submitted by agent list actual supplier</td>
<td>N/A</td>
</tr>
<tr>
<td>If bid from joint venture, list all partners, nationalities and estimated shares of contract</td>
<td>N/A</td>
</tr>
<tr>
<td>Principle country of origin of goods/materials</td>
<td>N/A</td>
</tr>
<tr>
<td>Estimated delivery to project site/completion period</td>
<td>February 2022</td>
</tr>
<tr>
<td>Estimated date from contract signing</td>
<td>August 2020</td>
</tr>
<tr>
<td>Currency</td>
<td>Amount or %</td>
</tr>
<tr>
<td>Bid Price (Read Out)</td>
<td>Kshs</td>
</tr>
</tbody>
</table>
The Board observes that whereas the Board in Review No. 121/2020 guided the Respondents on how to arrive at the lowest evaluated tender price, the Respondents still applied the provisions of Clause 35.2 and Clause 36 of Section II. Instructions to Bidders of the Bidding Document despite the Board’s finding in Review No. 121/2020 that Clause 35.2 of Section II. Instructions to Bidders of the Bidding Document did not conform to the manner in which a procuring entity ought to arrive at the lowest evaluated price and that where there is a conflict between the Bidding Document prepared in a tender that applied national competitive bidding procedures and the Act, the Act must prevail.

According to the Respondents, the 1st Interested Party specified a contingency amount of **Kshs. 59,950,392.73** which was subtracted (excluded) from the 1st Interested Party’s tender price of **Kshs. 516,686,606.10** pursuant to ITB Clause 35.2 (a) of Section II. Instructions to Bidders of the Bidding Document, thus arriving at an adjusted price of **Kshs. 456,736,213.37**, used to conclude that the 1st Interested Party submitted the lowest evaluated tender price. The Respondents applied this formula despite the Board having held that ITB Clause 35.2 (a) of Section
II. Instructions to Bidders of the Bidding Document does not conform to the manner in which a procuring entity ought to arrive at the lowest evaluated price and that where there is a conflict between the Bidding Document prepared in a tender that applied national competitive bidding procedures and the Act, the Act must prevail.

Whereas the Respondents and the 1st Interested Party state that the price adjustment undertaken during Financial Evaluation was for comparison purposes only, the Board notes that recommendation of award of the subject tender was made to the 1st Interested Party based on the adjusted price of Kshs. 456,736,213.37, which recommendation was noted by the Procuring Entity’s Head of Procurement function in his professional opinion of 29th September 2020 who requested the 1st Respondent to approve award of the subject tender to the 1st Interested Party at the adjusted price of Kshs. 456,736,213.37. As a matter of fact, the 1st Interested Party’s Letter of Notification of award dated 29th September 2020 clearly shows the 1st Respondent awarded the subject tender to the 1st Interested Party at the adjusted price of Kshs. 456,736,213.37 and not its tender sum Kshs. 516,686,606.10. This shows that the Respondents and the 1st Interested Party misled this Board by asserting that price adjustment was for purposes of comparison only, yet the same formed the basis for award of the subject tender to the 1st Interested Party.

It is also worth noting that the 1st Interested Party introduced an argument that the Respondents arrived at the evaluated price pursuant to section 79 (2) (b) of the Act by correcting an error and oversight, for purposes of
comparison only and not for alteration of the quoted bid price. However, the 3rd Interested Party took the view that the Respondents did not demonstrate how the price adjustment it undertook on the 1st Interested Party’s tender price qualifies as a minor deviation under section 79 (2) (a) of the Act.

Having considered the foregoing submissions, the Board observes that section 79 (2) (a) & (b) of the Act provide that:

"A responsive tender shall not be affected by—

(a) minor deviations that do not materially depart from the requirements set out in the tender documents

(b) errors or oversights that can be corrected without affecting the substance of the tender"

On the other hand, Regulation 74 (2) of Regulations 2020 provide that:

"Subject to section 79 (2) (b) of the Act, any errors in the submitted tender arising from a miscalculation of unit price, quantity, sub-total and total bid price shall be considered as a major deviation that affects the substance of the tender and shall lead to disqualification of the tender as non-responsive"

According to the Oxford Dictionary of English, 8th Edition, miscalculation in so far as calculation of figures is concerned is described as:
"To make a mistake in calculating numbers;
To count or estimate incorrectly;
A wrong calculation."

Therefore, the Board deduces the meaning of Regulation 74 (2) of Regulations 2020 to mean that any errors in a tender arising from; (a) a wrong calculation of the unit price, (b) a wrong calculation of the quantity, (c) a wrong calculation of the subtotal and (d) a wrong calculation of the total bid price shall be considered as a major deviation affecting the substance of the tender.

In this instance, the Respondents required bidders to include provisional sums and contingency amounts when completing the Activity Schedule for Lot 5 (as amended by Addendum No. 1 dated 9th June 2020) which had the following details: -

<table>
<thead>
<tr>
<th>Item No.</th>
<th>Description</th>
<th>Unit</th>
<th>Amount (Kshs)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.01</td>
<td>Provision of Design Services including relevant documentation as directed by</td>
<td>Lump Sum</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Project Manager</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1.02</td>
<td>Trenching laying of HDPE duct, backfilling and installation of warning tape</td>
<td>Lump Sum</td>
<td></td>
</tr>
<tr>
<td></td>
<td>including construction of manholes/hand-holes in soft/firm ground as directed by Project</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Description</td>
<td>Quantity/Description</td>
<td></td>
</tr>
<tr>
<td>---</td>
<td>-----------------------------------------------------------------------------</td>
<td>------------------------------------</td>
<td></td>
</tr>
<tr>
<td>1.03</td>
<td>Trenching, laying of HDPE duct and backfilling and installation of warning tape including construction of manholes/hand-holes in rocky ground as directed by Project Manager (approx. 25% of the Section)</td>
<td>Lump Sum</td>
<td></td>
</tr>
<tr>
<td>1.04</td>
<td>Bore drilling on major road crossings, driveways and as directed by the Project Manager</td>
<td>Lump Sum</td>
<td></td>
</tr>
<tr>
<td>1.05</td>
<td>Provision of Gabion Mesh, Installation and rock filling in dry river bed crossings and erosion-prone soils as directed by the Project Manager</td>
<td>Lump Sum</td>
<td></td>
</tr>
<tr>
<td>1.06</td>
<td>Provision of Project Manager’s facilities including furnished office, stationery, accommodation and vehicles as directed by the Project Manager</td>
<td>Lump Sum 35,000,000.00</td>
<td></td>
</tr>
<tr>
<td>1.07</td>
<td>Provisional sums for additional ES outcomes including HIV/AIDS and Road Safety</td>
<td>Prov. Sum 15,000,000.00</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Provisional sums for the Employer's portion (50%) of DAAB fees and expenses</td>
<td>Prov. Sum</td>
<td>5,000,000.00</td>
</tr>
<tr>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>A</td>
<td>SUB-TOTAL A</td>
<td></td>
<td></td>
</tr>
<tr>
<td>B</td>
<td>Provisional Sums specified in the Schedule</td>
<td></td>
<td>15,000,000.00</td>
</tr>
<tr>
<td>C</td>
<td>Sub-Total of Bills (A) Less Provisional Sums specified in Schedule (B)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>D</td>
<td>Add 10% of (C) for Physical Contingencies to be expended in part or deleted by the Project Manager pursuant to Clause 41 of the Conditions of Contract</td>
<td></td>
<td></td>
</tr>
<tr>
<td>E</td>
<td>Sub-Total E = A+C+D</td>
<td></td>
<td></td>
</tr>
<tr>
<td>F</td>
<td>Add 14% of E for VAT</td>
<td></td>
<td></td>
</tr>
<tr>
<td>G</td>
<td>GRAND-TOTAL CARRIED FORWAD TO FORM OF BID (E+F)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

As was held by the Board in Review No. 121/2020, a procuring entity may direct bidders to include provisional sums and contingencies in their respective Bill of Quantities to cater for unforeseeable circumstances during
implementation of a tender. At page 55 of the decision in Review No. 121/2020, the Board explained thus:

"Having considered the meaning of the term "provisional sum" and "contingencies", the Board observes that a procuring entity may require bidders to insert a provisional sum in their Bill of Quantities to cover certain items of work which cannot be accurately defined, detailed or valued at the time that the tender documents are issued by the procuring entity. On the other hand, a contingency is an amount that is held in reserve to deal with unforeseeable circumstances. For example, if certain items of work were not accurately defined, detailed or valued at the time of issuance of tender documents, the contingency amount is useful in catering for any excess costs incurred when the item or activity is undertaken when implementing a tender.

It is the Board's considered view that the Procuring Entity is better placed to know its needs in so far as implementation of the subject tender is concerned and nothing stops the Procuring Entity from directing bidders to specify provisional sums and contingencies in their respective Bill of Quantifies to cater for unforeseeable circumstances during implementation of the subject tender. That notwithstanding, if such amounts are to be provided by bidders, the Procuring Entity must provide the same percentage of contingency or the same amount for provisional sums, so that bidders
compete on an equal footing when the Procuring Entity interrogates whether or not bidders took provisional sums and contingencies into account in their respective Bills of Quantities.

However, Regulation 77 (2) of Regulations 2020 do not recognize provisional sums and contingency amounts as part of the components used when arriving at the lowest evaluated bidder’’

The Board in Review No. 121/2020 already held that Regulation 77 of Regulations 2020 do not recognize provisional sums and contingency amounts as part of the components used when arriving at the lowest evaluated bidder. This is because if a procuring entity excludes provisional sums and contingency amounts during Financial Evaluation, this would lead to price adjustments undertaken contrary to section 82 of the Act which states as follows: -

"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."

Adjustment of the 1st Interested Party’s tender price of Kshs. 516,686,606.10 to Kshs. 456,736,213.37 cannot be considered to be a minor deviation because it amounts to adjustment of the 1st Interested Party’s tender sum
contrary to section 82 of the Act. This action gave the 1st Interested Party an advantage over other bidders since the 1st Interested Party was awarded the subject tender at an adjusted lower amount. Secondly, the contingency amount included by the 1st Interested Party was not an error and/or oversight as alleged by the 1st Interested Party because the Activity Schedule for Lot 5 (as amended by Addendum No. 1 dated 9th June 2020) already directed bidders to include contingencies and provisional sums as was determined by the Board in Review No. 121/2020, to cater for unforeseeable circumstances during implementation of the subject tender.

It is evident from the foregoing that the Respondents; (a) reverted back to the World Bank Guidelines as revised in 2014 despite the Board having found the World Bank Procurement Regulations as revised in 2018 replaced the World Bank Guidelines as revised in 2014 (b) reverted back to applying ITB Clause 35 read together with ITB Clause 36 of the Instructions to Tenderers of the Bidding Document thus adjusted the 1st Interested Party’s tender price in complete disregard of the Board’s finding in Review No. 121/2020 that the Act prevails over the Bidding Document in the event of conflict between the Act and the Bidding Document, (c) awarded the subject tender to the 1st Interested Party at an adjusted price of Kshs. 456,736,213.37 despite the fact that section 82 of the Act precludes the Procuring Entity from interfering with a tender sum read out at tender opening and provided for in a Form of Tender, (d) failed to adhere to the orders of the Board issued on 15th September 2020 in Review No. 121/2020 (specifically Order No. 3 thereof) which required the Procuring Entity to confine itself to carrying out a re-
evaluation at the Comparison of Bid Prices-Stage (i.e. Financial Evaluation) in accordance with Regulation 77 of Regulations 2020 and section 86 (1) (a) of the Act.

The Board in Review No. 121/2020 noted the Respondents’ conduct of the subject procurement process where on one hand they assert applicability of the World Bank Guidelines as revised in 2014 to the exclusion of the Act and on the other hand, selectively applied provisions of the Act in appointment of an Evaluation Committee pursuant to section 46 of the Act and issuance of a professional opinion under section 84 of the Act. Similarly, in the instant Request for Review, the Procuring Entity’s Deputy Director, Supply Chain Management in his professional opinion dated 29th September 2020 confirms the said professional opinion was prepared in fulfillment of the requirements of section 84 of the Act. This shows that the Respondents applied provisions of the Act, though selectively in both Request for Review applications, but also failed to comply with the orders of the Board, which became final and binding on the Respondents having failed to exercise the right under section 175 (1) of the Act.

In effect, the Respondents undertook a re-evaluation that was contrary to the specific orders of the Board in the decision of 15th September 2020 in Review No. 121/2020 and in breach of the Act. Such action is null and void as stated in section 175 (6) of the Act as follows: -
"A party to the review which disobeys the decision of the Review Board or the High Court or the Court of Appeal shall be in breach of this Act and any action by such party contrary to the decision of the Review Board or the High Court or the Court of Appeal shall be null and void"

It is clear from the above provision that disobedience of a decision of this Board amounts to a breach of the Act. In Judicial Review Miscellaneous Application No. 154 of 2016, Republic v Public Procurement Administrative Review Board Ex parte Kenya Electricity Generating Company Limited (KEGEN) & 3 others [2016] eKLR, the court held that:

"In this case, the finality of the Board's decision as affirmed by this Court was that the procuring Entity was at liberty to proceed with the procurement process to its logical conclusion in accordance with the law. If in the course of purporting to proceed with the procurement the applicant made a decision which was contrary to the law, an aggrieved party was of course at liberty to challenge the same as the interested party did in this matter. However, that challenge had to be in accordance with the law and the challenge had to be initiated within 7 days of the decision under the repealed statute and within 14 days under the current statute. A failure to comply with a decision of the Review Board or to appeal from such decision leads to blatant disobedience of the orders of a decision making body established by law"
Further in **PPARB Application No. 94 of 2016, Lyape Investments v. Kenya Marine & Fisheries Research Institute & Another**, the Board held that: -

"**The Procuring Entity having failed to follow the orders of the Board in Review No. 83 of 2016, this Board cannot fold its hands when faced with a situation where the Procuring Entity fails to obey the orders made by it. The Board will employ the powers conferred upon it by section 173 of the Act and make such orders as will meet the ends of justice in any matter pending before it**"

Having considered the above authorities, the Board would like to note that the framers of the Act, in establishing this Board envisioned that public procurement processes would be guided by tenets of the Constitution and the Act. This means that the public would benefit from services offered by a procuring entity but such procuring entity would uphold the rule of law in its procurement process. The Constitution and the Act cannot be upheld where a procuring entity chooses not to comply with orders issued to it by the Board and at the same time fails to challenge such orders.

It is high time this Board reminds accounting officers of procuring entities that the Act and the Constitution impose responsibilities upon them during a procurement process and such responsibilities should not be viewed as mere statutory or constitutional provisions. The duty to obey the orders issued by a decision making body established under statute is paramount in the
maintenance of the rule of law, good order and administration of justice. In
his Third Annual Message to the United States of America Congress,
(7th December, 1903), Theodore Roosevelt, the 26th President of the
United States of America once said:

"No man is above the law and no man is below it; nor do we
ask any man's permission to obey it. Obedience to the law is
demanded as a right; not as a favour".

This Board will not condone deliberate disobedience of its orders and will not
shy away from its responsibility to deal firmly with a party that disobeys the
Board’s orders. It is the plain and unqualified obligation of every person
against, or in respect of whom; an order is made by this Board to obey it
unless and until that order is discharged. A party who knows of an order,
whether null or valid, regular or irregular, cannot be permitted to disobey it.
It would be most dangerous to hold that litigants and/or their Advocates,
could themselves judge whether an order is null or valid – whether it is
regular or irregular. As long as this Board’s order exists, it must not be
disobeyed.

The provisions of Article 10 of the Constitution would serve no purpose when
a procuring entity fails to comply with orders issued by this Board upon
completing the review of a procurement process. Article 10 (2) of the
Constitution states that:

"The national values and principles of governance include—
(a) ......................................
(b) ......................................
(c) *good governance, integrity, transparency and accountability*

The national values and principles of governance cited in Article 10 (2) of the Constitution, including good governance and accountability should guide a procuring entity in upholding the rule of law. The Accounting Officer of the Procuring Entity herein failed to take these principles into account by its failure to comply with the orders of this Board and such failure cannot be overlooked.

This Board is alive to the fact that there are institutions established by various laws in this country that have a regulatory role in public procurement and asset disposal processes including the mandate of carrying out investigations over the decisions and actions by public entities. One such institution is the Authority which has powers to ensure public entities’ compliance with provisions of the Act. Section 34 of the Act provides as follows:-

"Section 34. Powers to ensure compliance

A public entity shall provide the National Treasury or the Authority with such information relating to procurement and asset disposal as may be required in writing."
Pursuant to section 34 of the Act, the Authority has the power to obtain information from a public entity relating to procurement and asset disposal as may be required in writing. Further, in its Annual Report 2018/2019, the Authority explains the manner in which it ensures procuring entities comply with the Act by stating as follows:

"The Authority is mandated to enforce standards developed under the Act; to act on complaints received on procurement and asset disposal proceedings and to undertake investigations. Compliance and Monitoring reviews have continued to ensure value for money is achieved by public procurement systems that pay attention to economy and efficiency. A strategic outcome of compliance has allowed stakeholders to understand and monitor how public funds are spent through public procurement."

The failure by the Procuring Entity herein makes the instant Request for Review, a good case for the Authority to pursue investigations with or without other investigative agencies to ensure compliance with the Board's orders of 15th September 2020 in Review No. 121/2020 and take the necessary action, which orders remain final and binding to all parties having established that no Judicial Review was sought at the High Court within 14 days from 15th September 2020 with respect to the orders of the Board in Review No. 121/2020. Furthermore, since the orders of the Board remain final and binding to all parties in Review No. 121/2020, including the
Respondents, such orders remain in force and must be discharged in the manner specified by the Board in the final orders herein.

On the second issue for determination, the Board notes that at paragraph 27 of its Written Submissions, the Applicant referred to one of the prayers in the Request for Review, that is, for the Board to direct the Procuring Entity to award the subject tender to the Applicant, since according to the Applicant, it met the award criteria under section 86 (1) (a) of the Act read together with Regulation 77 of Regulations 2020. In that regard, the Applicant cited section 173 (c) of the Act which provides as follows:

"173. Upon completing a review, the Review Board may do any one or more of the following: -

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

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

(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"

The Applicant also referred the Board to the decision in PPARB Application No. 12 & 15 of 2019 (Consolidated), Sigmund Peak International Limited & Another v. Communications Authority of Kenya & Another (hereinafter referred to as “the Sigmund Peak Case”) where the Board cited the decision of the High Court of Kenya in Republic vs. Public Procurement Administrative Review Board & 2 Others Ex parte
Numerical Machining Complex Ltd, (hereinafter referred to as "Numerical Machining Case") where the court held as follows regarding the exercise of the power under section 173 (c) of the Act:

"...the provisions of section 173 (c) of the 2015 Act cannot be read in isolation to the other provisions of the Act and that the power to substitute the decision of the Procuring Entity cannot be unlimited. It must be exercised lawfully. That power can only be exercised with respect to what the Procuring Entity was lawfully permitted to undertake both substantively and procedurally."

The Board also addressed its mind on the decision in Gauteng Gambling Board v Silverstar Development Ltd and Others (80/2004) [2005] ZASCA 19 (29 March 2005) (hereinafter referred to as "Gauteng Gambling Case") where the Supreme Court of South Africa addressed the meaning of section 8(1) (c) (ii) (aa) of the Promotion of Administrative Justice Act 3. of 2000 of South Africa which contains an almost similar discretionary power (i.e. section 173 (c) of the Act) enumerated as follows:

"The Review Court may undertake any of the following-
'set aside the procurement decision and remit it for reconsideration or, in exceptional cases, substitute the procurement decision or correct a defect resulting from it.'"
In that case, the Supreme Court of South Africa explained the term 'exceptional' as applied in the aforementioned legislation as follows:

'Since the normal rule of common law is that an administrative organ on which a power is conferred is the appropriate entity to exercise that power, a case is exceptional when, upon a proper consideration of all the relevant facts, a court is persuaded that a decision to exercise a power should not be left to the designated functionary. How that conclusion is to be reached is not statutorily ordained and will depend on established principles informed by the constitutional imperative that administrative action must be lawful, reasonable and procedurally fair.'

Having considered the foregoing findings, the Board in the Sigmund Peak Case held as follows:

"the review before this Board is one of the exceptional circumstances where the duty imposed upon the Procuring Entity to determine the award of the subject tender need not be left upon it, since it is obvious that the award ought to be made to the only remaining responsive bidder i.e. the 2nd Applicant. The Board finds that it is a waste of time and public resources contrary to Article 201 (d) and (e) of the Constitution to order the Procuring Entity to re-evaluate the 2nd Applicant's proposal at the Financial stage since the evaluation was already conducted and it is evident that the
Procuring Entity will come to a conclusion that the 2nd Applicant is the responsive bidder noting that the 2nd Applicant is the only bidder remaining at the Financial stage.

Accordingly, the Board holds that the 2nd Applicant is eligible for award of tender in the subject tender, being the only remaining bidder at the Financial Evaluation stage.

This Board considered the finding made by the Supreme Court of South Africa in the Gauteng Gambling Case, the High Court in Numerical Machining Case, and the Board in the Sigmund Case requiring that there ought to be exceptional circumstances for the exercise of the Board’s discretion in section 173 (c) of the Act and is mindful of its finding at page 58 of the decision in Review No. 121/2020. In Review No. 121/2020, the Board noted the Applicant’s assertion that it was the lowest evaluated bidder, yet it did not fill the Activity Schedule for Lot 5 (as Amended by Addendum No. 1 dated 9th June 2020) as required, since the Applicant introduced additional items to its duly completed Activity Schedule and moreso, was re-evaluated at the Financial Evaluation Stage together with other bidders thus, is not the only remaining bidder at the Financial Evaluation Stage.

The Board’s finding that the Applicant did not fill the Activity Schedule for Lot 5 (as Amended by Addendum No. 1 dated 9th June 2020) as required has not been challenged, and such decision remains final and binding to all
parties to the Request for Review. It behooves upon the Respondents to comply with the orders of the Board as directed in Review No. 121/2020 when conducting a re-evaluation taking into consideration the finding of the Board in Review No. 121/2020 regarding the Applicant’s Activity Schedule.

Accordingly, the Board finds that the obtaining circumstances do not justify exercise of the Board’s power under section 173 (c) of the Act because the Respondents ought to take into consideration the finding of the Board regarding the Applicant’s Activity Schedule when conducting a re-evaluation in accordance with the orders in Review No. 121/2020, which orders remain final and binding.

In determining the appropriate orders to grant in the circumstances, the Board observes that the Bidding Document did not specify a number of days for the Tender Validity period. However, ITB Clause 18.1 of Section II. Bid Data Sheet of the Bidding Document states that the tender shall be valid until 15th October 2020. Since the tenders were opened on 17th June 2020, it follows that the tender validity period of the subject tender was 120 days after the tender submission deadline of 17th June 2020. By the time the Applicant lodged Review No. 121/2020 on 26th August 2020, 69 days of the tender validity period had run. Time stopped running between 26th August 2020 and 15th September 2020 when Request for Review proceedings were before this Board through Review No. 121/2020, pursuant to section 68 of the Act which provides for suspension of procurement proceedings (which
includes the tender validity period). Time started running a day after 15th September 2020 up to 7th October 2020. By the time the Applicant lodged the instant Request for Review, 106 days of the tender validity period had run. This means that 14 days of the tender validity period remain valid, which will again start running a day after the date of the decision of the Board in the instant Request for Review. From the documentation provided to the Board, there is no evidence that the 1st Respondent exercised discretion under section 88 (1) of the Act to extend the tender validity period of the subject tender. Having noted the time taken by the Procuring Entity in undertaking the subject procurement process including use of public resources and that the tender validity period will only have 14 days remaining from the date of this decision, the Board finds it necessary to direct the Accounting Officer of the Procuring Entity to exercise the power under section 88 (1) of the Act to extend the tender validity period of the subject tender for a period of 30 days and to conclude the subject procurement process herein by fully complying with the Board’s orders issued on 15th September 2020 in Review No. 121/2020.

In totality, the Request for Review succeeds in terms of the following specific orders: -

**FINAL ORDERS**

In exercise of the powers conferred upon it by section 173 of the Act, the Board issues the following orders in the Request for Review: -
1. The Accounting Officer of the Procuring Entity’s Letter of Notification of Award of Tender No. KeNHA/2297/2020- Civil Works for the Main Build of Optic Fiber Cable for Eldoret-Lokichar-Nakodok Corridor, Lot 5: Eldoret-Lokichar Section (285KM) dated 29th September 2020 addressed to the 1st Interested Party herein, be and is hereby cancelled and set aside.

2. The Accounting Officer of the Procuring Entity’s Letter of Notification of Unsuccessful Bid in Tender No. KeNHA/2297/2020- Civil Works for the Main Build of Optic Fiber Cable for Eldoret-Lokichar-Nakodok Corridor, Lot 5: Eldoret-Lokichar Section (285KM) dated 29th September 2020 addressed to the Applicant and all other tenderers, be and is hereby cancelled and set aside.

3. The Accounting Officer of the Procuring Entity is hereby directed to fully comply with the orders of the Board issued on 15th September 2020 in PPARB Application No. 121 of 2020, China Communication Services Ltd v. The Accounting Officer, Kenya National Highways Authority & 2 Others, including issuance of notification letters to all tenderers within fourteen (14) days from the date of this decision, taking into consideration the findings of the Board in this Review.

4. The Accounting Officer of the Procuring Entity is hereby directed to extend the Tender Validity Period of the subject
tender pursuant to section 88 (1) of the Act for a further 30 days from the date of its expiry.

5. The Procuring Entity shall bear the costs of this Request for Review amounting to Kshs. 305,000/- to be paid to the Applicant.

Dated at Nairobi this 29th day of October 2020

CHAIRPERSON

SECRETARY

PPARB

PPARB