

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**REVIEW NO. 59/2012 OF 19<sup>TH</sup> NOVEMBER, NO.61/2012 OF 20<sup>TH</sup>  
NOVEMBER AND NO.62/2012 OF 21<sup>ST</sup> NOVEMBER, 2012.**

**BETWEEN**

**AVANTE INTERNATIONAL TECHNOLOGY**

**INC.....APPLICANT**

**BIDVEST PAPERPLUS LTD (LITHOTECH**

**EXPORTS).....APPLICANT**

**SMARTMATIC INTERNATIONAL HOLDING .....APPLICANT**

**AND**

**INDEPENDENT ELETORAL AND BOUNDARIES**

**COMMISSION.....PROCURING ENTITY**

Review against the decision of the Tender Committee of the Independent Electoral and Boundaries Commission in the matter of Tender No. IEBC/14/2011-2012 for Supply, Delivery, Installation, Configuration, Training, Testing and Commissioning of Electronic Voter Identification Devices.

**BOARD MEMBERS PRESENT**

Mr. P.M. Gachoka	-	Chairman
Mr. Sospeter Kioko	-	Member
Ms. Judith Guserwa	-	Member
Mr. Akich Okola	-	Member

Mr. Joshua W. Wambua - Member

**IN ATTENDANCE**

Mr. Nathan Soita - Holding brief for Secretary

Mr. Philemon Chemoiywo - Secretariat

Mr. David Esuron - Secretariat

Ms. Judy Maina - Secretariat.

**PRESENT BY INVITATION**

**1<sup>st</sup> Applicant - M/s Avante International**

Mr. S. Owino - Advocate, Owino & Associates Advocates

Mr. Godfrey Owino - Managing Director

Mr. Bob Ojuok - Officer

**2<sup>nd</sup> Applicant - M/s Bidvest Paperplus Ltd (Lithotech Exports)**

Mr. Geofrey Oriaro - Advocate, Oriaro & Company Advocates

Mr. Kevin. Foulkes - Manager

Mr. Mathew Mutisya - Liaison

**3<sup>rd</sup> Applicant - M/s Smartmatic International Holding**

Mr. Andrew Wandabwa - Wandabwa Advocates

Ms. Elizabeth Ndumia - Representative

**Procuring Entity - Independent Electoral and Boundaries Commission**

Mr. Anthony Lubulellah - Advocate, Lubulellah & Associates Advocates

Mr. Josephat K. - Court Clerk, Lubulellah & Associates

Mr. D, Bargarat	- Advocate, IEBC
Mr. Wilfred Akhonya	- Lawyer, IEBC
Mr. Willie Kamanga	- Procurement Manager
Ms. Milcah C.	- Senior Procurement Officer
Mr. Ponventra Anjimbi	- Procurement Officer UNDP/IEBC

#### **Interested Candidates:**

Dr. S. Patel	- Africa Infrastructure Development Co.
Mr. N. Ogutu	- Africa Infrastructure Development Co.
Dr. Opiyo	- I- Solutions
Mr. J. Kere	- I -Solutions
Mr. Tony Githuku	- BCX (K) Ltd

#### **BOARD'S DECISION**

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

#### **BACKGROUND OF AWARD**

##### **BACKGROUND**

Elections in Kenya have in the past been marred by various election malpractices, such as registration fraud, identity fraud, vote buying, voter intimidation, ballot stuffing, manipulation of votes during counting and delayed transmission of results. These electoral malpractices require various strategies and approaches to minimize their occurrence. Some issues can be addressed through legislation, while

others through voter education, operational reconfigurations and others through technology.

Following the disputed 2007 elections, the Interim Independent Electoral Commission (IEC) was formed by an Act of parliament after the Electoral Commission of Kenya (ECK) was disbanded. The IIEC was tasked with the responsibility of reforming the electoral process in Kenya to ensure the electoral system is free from any form of election malpractice amongst other mandates.

The IIEC has now been succeeded by the Independent Electoral and Boundaries Commission (IEBC) following the enactment of the IEBC Act, 2011. To build on the reforms already started by IIEC, IEBC intends to adopt the use of Electronic Voter Identification Devices in all polling stations throughout the country during the forthcoming general elections and beyond.

The Commission targets to register eighteen million voters using a Biometric Voter Registration Solution. An extract of the voters register from this system containing the full names, gender, dates of birth, 10 fingerprints (500 PPI) and facial image will be extracted by polling unit and loaded onto the Electronic Voter Identification Device to be used on polling day as the register.

The Electronic Voter Identification Device aims at providing information to verify a voter's identity, prevent voter impersonation, and guide the

process of doing so. The specific objectives of the desired system include, but are not limited, to:

- i. Ensure that voters who are eligible to vote are allowed to vote promptly.
- ii. Provide voter identification and authentication (check in) on polling day through the use of biometric (fingerprint) technology.
- iii. Allow for alternative search other than fingerprints based on name or a unique identifier such as voter national Identity Card or Passport Number.
- iv. Provide an efficient and effective means of reconciling the number of voters checked in with the number of votes cast (in the ballot box) at the end of polling day.
- v. Be easy to use and demonstratively reduce the amount of time it takes to clear a voter to vote.
- vi. Allows election officials to monitor the status of each device and monitor voting patterns / turnout at each site.
- vii. Reduce human errors by election officials and be secured from unauthorized access.
- viii. Provide a comprehensive log of all activities, including supervisor over-rides, performed while the device is active.
- ix. Have a long lasting internal battery (12 Hours continuous use).
- x. Generate End of Day reports showing, at a minimum, the voter turnout (i.e. number and percentage of registered voters cleared to vote).

### **Advertisement of Tender**

The Procuring Entity advertised the tender for the supply, delivery, installation, configuration, training, testing and commissioning of Electronic Voter identification devices on Friday 1<sup>st</sup> June, 2012 in the Daily Nation and Standard newspaper.

Pre-bidding conference as per tender advert was held on 14<sup>th</sup> June, 2012 and the Commission responded to the queries and questions asked by prospective bidders.

### **Closing/Opening:**

The tender was closed on 5<sup>th</sup> July, 2012 and opened at anniversary towers at midday. The following 15 firms responded:

1. Equip Agencies Ltd
2. Computer Foundation (Pty) Ltd
3. Face Technologies
4. Smartmatic International
5. ICT Globe Pty Management Ltd
6. Technobrain Ltd
7. Haier Electrical Appliances
8. Richardson and David Ltd
9. Lithotech Exports Ltd
10. Business Connexion
11. Safran Morpho
12. On track Innovations Ltd
13. Africa Infrastructure development Ltd
14. Tata Africa Holding Ltd

## 15. Avante International Technology Inc.

### **EVALUATION**

The tenders were evaluated by an Evaluation Committee of ten members chaired by Mr. Mohamed O. Hassan. The evaluation was carried out in three stages namely Preliminary Evaluation, Technical Evaluation and Financial Evaluation.

#### **Preliminary Evaluation:**

The evaluation committee used the criteria as set in the tender document as shown in table 1 below to determine tenderers responsiveness.

TABLE 1. MANDATORY REQUIREMENTS IN THE TENDER DOCUMENT.		
No.	Preliminary Evaluation Criteria	Clause /Reference in the tender Document
1	Price Validity Period 120 days up to 1st November 2012.	2.13.1
2	Tender Security (in required form) 30 days after price validity up to 1st Dec 2012.	In Sec VI Standard form Tender Security Form.
3	Bid security Amount not less than KES 5,000,000	Tender advert on page1.
4	Tax Compliance Certificate (Local Firm)	2.11.3 (c)
5	Manufacturers Authorization Letter with manufacturer's warranty.	2.11.3 (e)
6	Latest 2 years Audited account. ( for 2011 and 2010)	2.11.3 (a )
7	Certificate of Registration/ Incorporation.	2.11.3 (d )
8	Sample Provided/Working Prototype	2.11.3 (f)
9	Form of tender Duly Filled and signed and in required form	Section VI( Page 51)

10	Price Schedule Form Duly Filled and in required form.	Section VI (Page 51)
11	Confidential Business Questionnaire duly filled and signed and in required form.	Section VI (Page 51)

All tenders that did not satisfy the above requirement were deemed as non responsive as with exceptions given in criteria enumerated in Sec 64 of the Public Procurement and Disposal Act 2005 and the tender.

### Preliminary Evaluation Results

No.	Criteria	Clause/Reference in TD	Bid 1	Bid 2	Bid 3	Bid 4	Bid 5	Bid 6	Bid 7	Bid 8	Bid 9	Bid 10	Bid 11	Bid 12	Bid 13	Bid 14	Bid 15
1	Tender Validity 120 days	2.13.1	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
2	Tender Security Validity +30	Sec. VI	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
3	Tender Security Amount is Kes 5m	Advert	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
4	Tax Compliance (local firms only)	2.11.3.c	<input type="checkbox"/>	n/a	n/a	n/a	<input type="checkbox"/>	<input type="checkbox"/>	n/a	<input type="checkbox"/>	n/a	n/a	n/a	n/a	<input type="checkbox"/>	<input type="checkbox"/>	n/a
5	Manufacturers Authorization	2.11.3.d	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
6	2 Years Audited Accounts	2.11.3.a	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
7	Certificate of Registration/Incorp	2.11.3.d	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
8	Sample Provided	2.11.3.f	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
9	Form Of Tender	Sec. VI	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
10	Price Schedule Form	Sec. VI	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
11	Conf Business Questionnaire	Sec. VI	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
	RESPONSIVE		NO	YES	YES	NO	NO	YES	<input type="checkbox"/>	NO	NO	NO	YES	NO	NO	NO	Yes

The following ten bidders were non responsive and disqualified at preliminary evaluation stage.

BIDDER NO.	NAME OF THE FIRM	REASON FOR DISQUALIFICATION	Breach in tender Document /PPDA 2005/Regulation.
01	EQUIP AGENCIES LTD	Did not submit audited accounts for previous two years - only up to December 2010 no account for year 2011	Latest Audited Account page 7 of the tender Document. Interpreted as audited account for year ending 2010 and 2011.
04	SMARTMATIC INTERNATIONAL	Did not submit audited accounts for previous two years - only up to December 2010 no account for year 2011.	Latest Audited Account page 7 of the tender Document. Interpreted as audited account for year ending 2010 and 2011.



05	ICT GLOBE PTY MANAGEMENT LTD	i) Lead bidder did not name directors on Confidential Business Questionnaire. ii) Financial institution from which Bid Security submitted is neither a bank nor an insurance company approved by the authority iii) Bid Security not the original document.	i) Tender Document page 50 Confidential Business Questionnaire must be <b>completed</b> and submitted with the tender. ii) PPDA 2005 Sec 56(2) and Regulation 41 (3). iii) As a financial Instrument tender security need to be in its <b>original</b> form copies will not be accepted by bank and insurance companies.
07	HAIER ELECTRICAL APPLIANCES	Did not submit audited accounts for previous two years - only up to December 2010 no account for year 2011	Latest Audited Account page 7 of the tender Document. Interpreted as audited account for year ending 2010 and <b>2011</b> .
08	RICHARDSON AND DAVID LTD	i) No Sample provided ii) No audited accounts provided	i) Page 7 of TD clause 2.11.3 (f) ii) Latest Audited Account page 7 of the tender Document
09	LITHOTEC EXPORTS LTD	Bid Security Form does not adhere to language and terms in Tender Document Standard Forms Section VI.5	i) Page 57 of the TD the FORM of tender security was changed. ii) PPDA 2005 Sec 57 (2)
10	BUSINESS CONNEXION	No warranty on the manufacturers Authorization	This is a requirement in manufacturers Authorization form on page 59 of the Tender Document. "Extension of full guarantee and warranty".
12	ON TRACK INNOVATIONS LTD	Did not submit audited accounts for previous two years - only up to December 2010 no account for year 2011.	Latest Audited Account page 7 of the tender Document. Interpreted as audited account for year ending 2010 and <b>2011</b> .
13	AFRICA INFRASTRUCTURE DEVELOPMENT LTD	Bid submitted "in protest" - non responsive No sample provided.	Form of tender submitted in protest.
14	TATA AFRICA HOLDING LTD	Tax compliance certificate expired on 23 February 2012.	Valid Tax Compliance Certificate page 7 of the Tender Document (This company is incorporated in Kenya as per its Certificate of Incorporation.)

The following five responsive bidders qualified to technical evaluation.

<b>BIDDER NO.</b>	<b>NAME OF THE FIRM</b>
02	COMPUTER FOUNDATION (PTY) LTD
03	FACE TECHNOLOGIES
06	TECHNO BRAIN LTD
11	SAFRAN MORPHO
15	AVANTE INTERNATIONAL TECHNOLOGY INC

### **Technical Evaluation:**

The five responsive bids were subjected to technical evaluation based on the criteria provided in the table below:

#### **Expertise of the firms**

	<b>Expertise of firm/Organization Submitting Proposal</b>	<b>Bid documents reference</b>	<b>Critical</b>
1	Is the general organizational capability/ arrangement adequate for this project? (Strength of project management support).	Page 32	
2	Are the proposed quality assurance, risk management procedures and warranty arrangements adequate for this project?	Page 43	
3	Do the key project team members possess the required specialized skills, knowledge, qualifications and experience for these project?	Page 34	✓
4	Do the proposed members of the team have relevant experience or evidence of two or more projects of similar size, scope and complexity in the last five years?	Page 34,35 and 36	✓

### Proposed Work plan and Approach.

Proposed Work Plan and Approach		Bid document reference	Critical
1	Does the supplier clearly understand the task?	Page 32	
2	Does the detailed project plans (milestones/outcomes and responsibility matrix) fit the Commission's plans?	Page 32	✓
3	Has a suitable a maintenance and support plan for the solution that meets the desired scope.	Page 44	
4	Are there adequate plan for Knowledge Transfer and Training of IEBC Technical Staff for technical and end user training.	Page 41	
5	Does the system documentation provide adequate guidelines for technical and operational support/troubleshooting?	Page 43	
6	Is the presentation clear and is the sequence of activities and the planning logical, realistic and promise efficient implementation of the project?	Page 34	
7	Overall, do the proposal work plan and approach meet the commissions' requirements in respect to timelines and functionality?	Page 25-29, 48	✓

### Personnel

	Personnel	bid document reference	Critical
<b>1</b>	<b>Project Manager</b>	<b>Page 34-38</b>	
	General qualification		
	Relevant experience		✓
	Regional experience		✓
	Educational and other qualifications		
<b>2</b>	<b>Data Conversion and Migration Manager</b>	<b>Page 36-38</b>	
	General qualification		
	Relevant experience		✓
	Regional experience		
	Educational and other qualifications		

### Components of Biometric Voter Identification devices

	<b>Biometric Voter Identifications Devices (Minimum specifications)</b>	<b>Bid document reference</b>	<b>Critical</b>
<b>1</b>	<b>Electronic Identification Device</b>	<b>Page 31</b>	
	<b>Processor:</b> Dual Core 1G Hz	<b>Page 31</b>	✓
	<b>Memory/RAM:</b> 1 GB	<b>Page 31</b>	
	<b>Internal Storage:</b> 16 GB	<b>Resp Part 1 No 14</b>	✓
	<b>Screen size:</b> 3.5 inch	<b>Resp Part 3 No 25</b>	
	<b>Connections:</b> Eth/3G/WIFI	<b>Page 31</b>	
	<b>Hardware Keyboard/Keypad:</b>	<b>Page 31</b>	
	<b>Warranty:</b> 1 years manufacture's End-User Warranty	<b>Page 44</b>	
	<b>SD Card Reader</b>	<b>Page 31</b>	✓
	<b>USB Ports:</b> 2 USB 2.0	<b>Page 31</b>	
	<b>Approvals:</b> IP 55	<b>Page 31</b>	
	<b>Speakers:</b> Sound alerts	<b>Page 31</b>	
	<b>LED Indicators/Screen</b>	<b>Page 31, Resp Part 3 No 35</b>	
	<b>Weight:</b> 3 Kg	<b>Page 31</b>	
	<b>Battery:</b> 12 Hrs	<b>Page 31</b>	✓
	<b>Removable Storage:</b> 16 GB	<b>Page 31 Resp Part 2 66</b>	
<b>2</b>	<b>Integrated Finger Print Scanner</b>	<b>Page 31 Resp Part 1 No 29</b>	
	<b>Type:</b> Single Reader	<b>Page 31</b>	✓
<b>3</b>	<b>Carrying Case IP 55</b>	<b>Page 31 Resp Part 3 No. 14</b>	
<b>4</b>	<b>Power backup (Spare)</b>		
	<b>Battery:</b> 12 Hrs	<b>Page 31</b>	✓

### Training

	<b>Training</b>	<b>Bid document reference</b>	<b>Critical</b>
1	Training Scope	<b>Page 39 - 42</b>	
2	Training Plan	<b>Page 39 - 42</b>	✓
3	Training Management	<b>Page 39 - 42</b>	
4	Training Schedule	<b>Page 39 - 42</b>	
5	Training Headcount	<b>Page 39 - 42</b>	

### Warranty

	<b>Maintenance and Support</b>	<b>Bid document reference</b>	<b>Critical</b>
<b>1</b>	System Maintenance	<b>Page 43</b>	
<b>2</b>	Local Technical & Operations Support	<b>Page 43</b>	✓
<b>3</b>	Maintenance scheduling in accordance to manufacture recommendation and SLA	<b>Page 43</b>	

## FUNCTIONAL REQUIREMENTS

### Functionality of the system

	Functions	Bid document reference	Critical
<b>1</b>	<b>Functional</b>		
<b>a</b>	Contain data on all voters within the polling station/constituency/county	Page 25 -31	
<b>b</b>	Display the electoral unit, full names, date of birth, national ID card /passport number as applicable, electors number , registration status (active/inactive), the voter's facial image, and eligibility	Page 25 -31	
<b>c</b>	Ability to retrieve a voter's record by capturing a fingerprint or, exceptionally, using an Electors /National Identification/Passport Number	Page 25 -31	✓
<b>d</b>	Supervisor over-rides to manually identify a voter with their ID or passport number in exceptional circumstances where fingerprint identification	Page 25 -31	✓
<b>e</b>	Ability to notify the election official if a voter has already voted in the election at the same polling station by flagging each voter who has voted.	Page 25 -31	✓
<b>g</b>	Ability to conduct a 1: N search to look up a voter within five seconds or less.	Page 25 -31	✓
<b>h</b>	Public counter on the device screen displaying the number of voters served	Page 25 -31	
<b>i</b>	Device startup and recovery in less than 30 seconds	Page 25 -31	
<b>2</b>	<b>Reporting Requirements</b>	Page 25 -31	
<b>a</b>	Display of on screen voting statistics	Page 25 -31	
<b>b</b>	Generate start and end of day reports	Page 25 -31	✓
<b>3</b>	<b>User Interface</b>	Page 25 -31	
<b>a</b>	Easy to use, with multi-language support	Page 25 -31	
<b>b</b>	Colour screen display	Page 25 -31	
<b>c</b>	LED/Onscreen equivalent status indicators with different colours denoting different statuses	Page 25 -31	
<b>d</b>	User alert sounds such as beeps of various messages to signify success or failure of authentication	Page 25 -31	
<b>4</b>	<b>Network Requirements</b>	Page 25 -31	
<b>a</b>	The device shall have a SIM card slot (3G/EDGE)	Page 25 -31	✓
<b>b</b>	The device shall have Wireless	Page 25 -31	✓
<b>c</b>	The device shall have NIC	Page 25 -31	
<b>5</b>	<b>Power/Transport requirements</b>	Page 25 -31	
<b>a</b>	Charging plug (UK)	Page 25 -31	
<b>b</b>	Check the standby mode	Page 25 -31	
<b>c</b>	Charge duration for the device 4hrs	Page 25 -31	✓
<b>6</b>	<b>Hardware Requirements</b>	Page 25 -31	
<b>a</b>	Highly portable for ease of use and mobility	Page 25 -31	
<b>b</b>	Ability to store transaction (data and voter history) in two locations, one of which is a removable media.	Page 25 -31	✓
<b>c</b>	Each unit should hold a minimum of 1,000 voter records.	Page 25 -31	

	Functions	Bid document reference	Critical
	including 10 fingerprints and facial images of registered voters.		
<b>d</b>	Internal capability to perform self-diagnosis that specifically identifies any malfunctions with context-sensitive and user friendly messages.	Page 25 -31	
<b>e</b>	Devices must be current technology, unused and authorized by the manufacturer	Page 25 -31	
<b>7</b>	<b>Security and Audit</b>	Page 25 -31	
<b>a</b>	Timestamp for each transaction to determine the exact day and time a voter was processed	Page 25 -31	✓
<b>b</b>	Encrypted dual password or biometric protection to facilitate authorization privileges	Page 25 -31	✓
<b>c</b>	Ability to limit functionality to certain user access levels e.g. administrator, operator	Page 25 -31	✓
<b>d</b>	Encrypted user logs to identify who has used and modified the system and devices	Page 25 -31	
<b>e</b>	Stored voter data must be encrypted with 128 bit AES encryption within the device and on a removable device	Page 25 -31	✓
<b>f</b>	Ability to seal the removable memory device with tamper evident cover.	Page 25 -31	
<b>g</b>	Enable the audit of electoral officials actions	Page 25 -31	
<b>h</b>	Each unit should generate unusual system events, e.g. manual shutdown or system restarts.	Page 25 -31	
<b>i</b>	Each device must have a manufacturer assigned unique identification number.	Page 25 -31	
<b>8</b>	<b>Device Configuration Plan</b>		
<b>a</b>	30,000 device configuration plan	Page 33	✓
<b>b</b>	Conversion of AFIS data and migration to the 30,000 devices	Page 32	✓

Results of the technical evaluation are summarized in the table below:

#### Expertise of the firms

	Expertise of firm/Organization Submitting Proposal	Bid documents reference	Critical	Comply (Yes/No)				
				B2	B3	B6	B11	B15
1	Is the general organizational capability/ arrangement adequate for this project? (Strength of project management support).	Page 32		YES	YES	YES	YES	YES
2	Are the proposed quality assurance, risk management procedures and warranty arrangements adequate for this project?	Page 43		YES	YES	YES	YES	YES

3	Do the key project team members possess the required specialized skills, knowledge, qualifications and experience for these project?	Page 34	✓	YES	YES	YES	YES	YES
4	Do the proposed members of the team have relevant experience or evidence of two or more projects of similar size, scope and complexity in the last five years?	Page 34,35 and 36	✓	NO	YES	YES	YES	YES

## Proposed Work plan and Approach

Proposed Work Plan and Approach		Bid document reference	Critical	Comply (Yes/No)				
				B2	B3	B6	B11	B15
1	Does the supplier clearly understand the task?	Page 32		YES	YES	YES	YES	YES
2	Does the detailed project plans (milestones/ outcomes and responsibility matrix) fit the Commission's plans?	Page 32	✓	YES	YES	NO	YES	YES
3	Has a suitable a maintenance and support plan for the solution that meets the desired scope.	Page 44		YES	YES	YES	YES	YES
4	Are there adequate plan for Knowledge Transfer and Training of IEBC Technical Staff for technical and end user training.	Page 41		YES	YES	YES	YES	YES
5	Does the system documentation provide adequate guidelines for technical and operational support/troubleshooting?	Page 43		YES	YES	YES	YES	YES
6	Is the presentation clear and is the sequence of activities and the planning logical, realistic and promise efficient implementation of the project?	Page 34		YES	YES	YES	YES	YES
7	Overall, do the proposal work plan and approach meet the commissions' requirements in respect to timelines and functionality?	Page 25-29, 48	✓	YES	YES	YES	YES	YES

## Personnel

	Personnel	bid document reference	Critical	Comply (Yes/No)				
				B2	B3	B6	B11	B15
1	<b>Project Manager</b>	<b>Page 34-38</b>						
	General qualification			YES	YES	YES	YES	YES
	Relevant experience		✓	NO	YES	YES	YES	YES
	Regional experience		✓	YES	YES	YES	YES	YES
	Educational and other qualifications			YES	YES	YES	YES	YES
2	<b>Data Conversion and Migration Manager</b>	<b>Page 36-38</b>						
	General qualification			YES	YES	YES	YES	YES
	Relevant experience		✓	NO	YES	NO	YES	NO
	Regional experience			YES	YES	YES	YES	YES
	Educational and other qualifications			YES	YES	YES	YES	YES

## Components of Biometric Voter Identification devices

	Biometric Voter Identifications Devices (Minimum specifications)	Bid document reference	Critical	Comply (Yes/No)				
				B2	B3	B6	B11	B15
1	Electronic Identification Device	Page 31						
	Processor: Dual Core 1G Hz	Page 31	✓	NO	NO	NO	NO	YES
	Memory/RAM: 1 GB	Page 31		YES	YES	YES	NO	YES
	Internal Storage: 16 GB	Resp Part 1 No 14	✓	YES	YES	YES	NO	YES
	Screen size: 3.5 inch	Resp Part 3 No 25		YES	YES	YES	NO	YES
	Connections: Eth/3G/WIFI	Page 31		YES	YES	YES	NO	YES
	Hardware Keyboard/Keypad:	Page 31		YES	NO	NO	YES	YES
	Warranty: 1 years manufacture's End-User Warranty	Page 44		YES	YES	YES	YES	YES
	SD Card Reader	Page 31	✓	YES	YES	YES	YES	YES
	USB Ports: 2 USB 2.0	Page 31		NO	YES	NO	NO	YES
	Approvals: IP 55	Page 31		NO	YES	NO	NO	NO
	Speakers: Sound alerts	Page 31		YES	YES	YES	YES	YES
	LED Indicators/Screen	Page 31, Resp Part 3 No 35		YES	YES	YES	YES	YES
	Weight: 3 Kg	Page 31		YES	YES	YES	YES	YES
	Battery: 12 Hrs	Page 31	✓	NO	NO	NO	YES	YES
	Removable Storage: 16 GB	Page 31 Resp Part 2 66		YES	YES	YES	YES	YES
2	Integrated Finger Print Scanner	Page 31 Resp Part 1 No 29						
	Type: Single Reader	Page 31	✓	YES	YES	YES	YES	YES
3	Carrying Case IP 55	Page 31 Resp Part 3 No. 14		NO	YES	NO	NO	NO
4	Power backup (Spare)							
	Battery: 12 Hrs	Page 31	✓	NO	NO	NO	YES	YES

## Training

	Training	Bid document reference	Critical	Comply (Yes/No)				
				B2	B3	B6	B11	B15
1	Training Scope	Page 39 - 42		YES	YES	YES	YES	YES
2	Training Plan	Page 39 - 42	✓	YES	YES	YES	YES	YES
3	Training Management	Page 39 - 42		YES	YES	YES	YES	YES
4	Training Schedule	Page 39 - 42		YES	YES	YES	YES	YES
5	Training Headcount	Page 39 - 42		YES	YES	YES	YES	YES

## Warranty

	Maintenance and Support	Bid document reference	Critical	Comply (Yes/No)				
				B2	B3	B6	B11	B15
1	System Maintenance	Page 43		YES	YES	NO	YES	YES
2	Local Technical & Operations Support	Page 43	✓	YES	YES	NO	YES	YES
3	Maintenance scheduling in accordance to manufacture recommendation and SLA	Page 43		YES	YES	NO	YES	YES

## FUNCTIONAL REQUIREMENTS

### Functionality of the system

	Functions	Bid document reference	Critical	Comply (Yes/No)				
				B2	B3	B6	B11	B15
1	Functional							
a	Contain data on all voters within the polling station/constituency/county	Page 25 - 31		NO : TO BE DECIDED				



	Functions	Bid document reference	Critical	Comply (Yes/No)				
				B2	B3	B6	B11	B15
b	Display the electoral unit, full names, date of birth, national ID card /passport number as applicable, electors number , registration status (active/inactive), the voter's facial image, and eligibility	Page 25 - 31		YES	YES	YES	YES	YES
c	Ability to retrieve a voter's record by capturing a fingerprint or, exceptionally, using an Electors /National Identification/Passport Number	Page 25 - 31	✓	YES	YES	YES	YES	YES
d	Supervisor over-rides to manually identify a voter with their ID or passport number in exceptional circumstances where fingerprint identification	Page 25 - 31	✓	YES	YES	YES	YES	YES
e	Ability to notify the election official if a voter has already voted in the election at the same polling station by flagging each voter who has voted.	Page 25 - 31	✓	YES	YES	YES	YES	YES
g	Ability to conduct a 1: N search to look up a voter within five seconds or less.	Page 25 - 31	✓	YES	YES	YES	YES	YES
h	Public counter on the device screen displaying the number of voters served	Page 25 - 31		YES	YES	YES	YES	YES
i	Device startup and recovery in less than 30 seconds	Page 25 - 31		YES	NO	NO	YES	YES
2	<b>Reporting Requirements</b>	Page 25 - 31						
a	Display of on screen voting statistics	Page 25 - 31		YES	YES	YES	YES	YES
b	Generate start and end of day reports	Page 25 - 31	✓	YES	YES	YES	YES	YES
3	<b>User Interface</b>	Page 25 - 31						
a	Easy to use, with multi-language support	Page 25 - 31		YES	YES	YES	YES	YES
b	Colour screen display	Page 25 - 31		YES	YES	YES	YES	YES
c	LED/Onscreen equivalent status indicators with different colours denoting different statuses	Page 25 - 31		YES	YES	YES	YES	YES
d	User alert sounds such as beeps of various messages to signify success or failure of authentication	Page 25 - 31		YES	YES	YES	YES	YES
4	<b>Network Requirements</b>	Page 25 - 31						
a	The device shall have a SIM card slot (3G/EDGE)	Page 25 - 31	✓	YES	YES	YES	NO	YES
b	The device shall have Wireless	Page 25 - 31	✓	YES	YES	YES	NO	YES
c	The device shall have NIC	Page 25 - 31		NO	NO	NO	YES	YES
5	<b>Power/Transport requirements</b>	Page 25 - 31						
a	Charging plug (UK)	Page 25 - 31		YES	YES	NO	NO	NO
b	Check the standby mode	Page 25 - 31		YES	YES	YES	YES	YES
c	Charge duration for the device 4hrs	Page 25 - 31	✓	YES	YES	YES	YES	YES
6	<b>Hardware Requirements</b>	Page 25 -						

	Functions	Bid document reference	Critical	Comply (Yes/No)				
				B2	B3	B6	B11	B15
		31						
a	Highly portable for ease of use and mobility	Page 25 - 31		YES	YES	YES	YES	NO
b	Ability to store transaction (data and voter history) in two locations, one of which is a removable media.	Page 25 - 31	✓	YES	YES	YES	YES	YES
c	Each unit should hold a minimum of 1,000 voter records, including 10 fingerprints and facial images of registered voters.	Page 25 - 31		YES	YES	YES	YES	YES
d	Internal capability to perform self-diagnosis that specifically identifies any malfunctions with context-sensitive and user friendly messages.	Page 25 - 31		YES	YES	YES	YES	YES
e	Devices must be current technology, unused and authorized by the manufacturer	Page 25 - 31		YES	YES	YES	YES	YES
7	<b>Security and Audit</b>	Page 25 - 31		YES	YES	YES	YES	YES
a	Timestamp for each transaction to determine the exact day and time a voter was processed	Page 25 - 31	✓	YES	YES	YES	YES	YES
b	Encrypted dual password or biometric protection to facilitate authorization privileges	Page 25 - 31	✓	YES	YES	YES	YES	YES
c	Ability to limit functionality to certain user access levels e.g. administrator, operator	Page 25 - 31	✓	YES	YES	YES	YES	YES
d	Encrypted user logs to identify who has used and modified the system and devices	Page 25 - 31		YES	YES	YES	YES	YES
e	Stored voter data must be encrypted with 128 bit AES encryption within the device and on a removable device	Page 25 - 31	✓	YES	YES	NO	NO	YES
f	Ability to seal the removable memory device with tamper evident cover.	Page 25 - 31		YES	YES	YES	YES	YES
g	Enable the audit of electoral officials actions	Page 25 - 31		YES	YES	YES	YES	YES
h	Each unit should generate unusual system events, e.g. manual shutdown or system restarts.	Page 25 - 31		YES	YES	YES	YES	YES
i	Each device must have a manufacturer assigned unique identification number.	Page 25 - 31		NO	NO	NO	NO	NO
8	<b>Device Configuration Plan</b>							
a	30,000 device configuration plan	Page 33	✓	YES See note				
b	Conversion of AFIS data and migration to the 30,000 devices	Page 32	✓					

The following table shows the number of critical requirements where each bidder had a 'NO' answer

No	B2	B3	B6	B11	B15
Number of 'NO'	6	3	7	5	1

## TECHNICALLY DISQUALIFIED BIDDERS

Bidder No	Name of the Firm
02	Computer Foundation
06	Techno Brain

In the opinion of the evaluation committee Bid 2 and Bid 6 did not satisfy the technical requirement.

## TECHNICALLY QUALIFIED BIDDERS

Bidder No	Name of the Firm
03	Face Technologies
11	Safran Morpho
15	Avante Int Tech INC

## FINANCIAL EVALUATION

The following table shows financial evaluation and comparison as per Sections 64 and 66 of the Act and Regulation 50.

Bidder No	Bidder (a)	Read-out Tender Price(s)		Corrections		Corrected Tender Price(s) (f) = (c) + (d) + (e)	Unconditional Discounts		Evaluated Price (i) = (f) - (h)	Minor Deviations (k)
		Currency (ie s) (b)	Amount(s) (c)	Add VAT (d)	Optional items (e)		Percent (g)	Amount(s) (h)		
3	Face Technologies	USD	12,357,000	3,844,139.13	450,000 (Exclude s Taxes)	16,651,139.13	-	-	16,651,139.13	-
11	Safran Morpho	USD	18,341,922.00	-	-	18,341,922.00	-	-	18,341,922.00	-
15	Avante Int Tech INC	USD	26,180,000	-	-	26,180,000	-	-	26,180,000	-

## Exchange Rates

Currency Used for Tender Evaluation: Kshs

**Effective Date of Exchange Rate:** 5<sup>th</sup> July, 2012 (1US\$ to 83. 9417Kshs, Euro to 105.143)

**Authority or Publication Specified for Exchange Rate:** Central Bank of Kenya

### Financial Evaluation (Kshs)

Bidder No	Bidder	Read-out Tender Price(s)		Corrections		Corrected Tender Price(s)	Unconditional Discounts		Evaluated price in KES	Remarks
		Currency(ies)	Amount(s)	Add VAT	Optional items		Percent	Amount(s)		
	(a)	(b)	(c)	(d)	(e)	(f) = (c) + (d) + (e)	(g)	(h)	(i) = (f) - (h)	
3	Face Technologies	USD	1,037,267,586.90	322,683,573.61	37,773,765.00	1,397,724,925.51	-	-	1,397,724,925.51	Lowest evaluated Bidder
		Kshs.								
11	Safran Morpho	USD	1,539,652,113.95	-	-	1,539,652,113.95	-	-	1,539,652,113.95	Second Lowest Evaluated Bidder
15	Avante Int Tech INC	USD	2,197,593,706.00	-		2,197,593,706.00	-	-	2,197,593,706.00	Third Lowest Evaluated Bidder.

**The following are the Terms and Conditions as contained in the bidders documents.**

Bidder No. 3:

- i. Payment terms to be negotiated as part of the contract negotiations
- ii. Payment Guarantee for the full contract price issued by a bank that is acceptable to their bankers

- iii. An irrevocable letter of credit for the full contract price issued by a bank that is acceptable to their bankers
- iv. The price for the protective case excludes VAT

Bidder No. 11

- i. 60% as advance payment 30 days after signing the agreement
- ii. The balance of the contract shall be paid by means of an irrevocable and confirmed letter of credit
- iii. A second installment of USD 6,419,673 will be paid after delivery of 30,000 devices
- iv. A third installment of USD 458,548 will be paid after delivery of the training
- v. A fourth installment of USD 458,548 will be paid thirty days after election day

Bidder 15.

No conditions.

**RECOMMENDATIONS**

The Evaluation committee makes the following recommendations.

- 1. That bidder number 3 M/S Face Technologies be considered for the award of contract at a total cost of USD 16,651,139.13 (KES 1,397,724,925.51 equivalent) being the lowest evaluated Bid.
- 2. That a Proof of Concept be carried out by the procuring entity as envisaged in the tender document at page 44 and in several addenda.

## **THE TENDER COMMITTEE DECISION**

The Commission's Tender Committee at meeting No. 19 held on 31<sup>st</sup> October, 2012 awarded the tender for Supply, delivery, installation, configuration, training, testing and commissioning of electronic voter identification devices to M/s Face Technologies at a tender sum of USD 16,651,139.13 (Ksh.1,397,724,925.51) as the lowest evaluated bidder.

## **THE REVIEW**

The three Requests for Review were lodged on 19<sup>th</sup>, 20<sup>th</sup> and 21<sup>st</sup> November, 2012 respectively against the decision of the Independent Electoral and Boundaries Commission dated 6<sup>th</sup> November, 2012 in the matter of Tender No. IEBC/14/2011-2012 for supply, delivery, installation, configuration, training, testing and commissioning of Electronic Voter Identification Devices.

## **REVIEW NO.59/2012**

The Request for Review was lodged by M/s Avante International Technology Inc. on 19<sup>th</sup> November, 2012.

The Applicant was represented by Mr. S. Owino, Advocate, while the Procuring Entity was represented by Mr. Anthony Lubulellah, Advocate. The interested candidates present were Africa Infrastructure Development Company represented by Dr. S. Patel, Managing Director, I-Solutions represented by Mr. J. Kere, Director and BCX (K) Ltd represented by Mr. Tony Githuku, Director.

The Applicant requested the Board for the following orders:

1. *To direct the Respondent to award the tender to the most responsive or successful tenderer and award the tender to the Applicant.*
2. *To transfer the procuring responsibility to an expert consultant or procuring agents with expertise of this nature on biometric device and thereafter to re-evaluate the selected responsive bidders afresh pursuant to the provisions of Section 18(1) of the Regulation, 2006.*
3. *To direct the Respondent to provide a summary of the evaluation and comparison of tenders to the Applicant forth with as required under Section 45(3) of the Act, 2005.*
4. *To direct the Respondent to produce to the review board the winning bidder's working prototype samples submitted during the tender closing and the one submitted by the Applicant for verification as per Section 64(1), 66(2)(3)(a)(b).*
5. *In the alternative the procurement proceedings be annulled in their entirety.*

The Applicant raised twenty four grounds of review which the Board deals with as follows:

**Grounds 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 15, 22, and 23:**

These are the Applicant's general factual statements in which it cites no breach committed by the Procuring Entity.

**Ground 13: Breach of Regulation 16(4)**

The Applicant submitted that one member of the evaluation committee, Mr. Willy Kamanga, who attended the Proof of Concept (POC)

demonstration was, a member of the Tender Committee. It argued that this was contrary to Regulation 16(4), which states that:

***"No person shall be appointed under paragraph (3) if such person is a member of the tender committee of the procuring entity".***

In response, the Procuring Entity denied that Mr. Kamanga was also a member of the Tender Committee, and stated that he attended the meeting of the Tender Committee in his capacity as the Secretary to that Committee.

The Board notes that indeed, according to the Minutes of the Evaluation Committee which carried out the technical evaluation of the tender in question, dated 29th September, 2012, Mr. Kamanga is recorded as being present and signed the minutes as secretary. The Board further notes that according to the minutes of the Evaluation Committee which met to evaluate Proof of Concept demonstration, which is dated 10th October 2012, Mr. Kamanga is recorded as having participated in the meeting, and affixed his signature against his name, though without any designation as to his position. The Board further notes that according to the minutes of the Evaluation Committee which met for the second time on 22nd October 2012 to evaluate the bidders in respect to Proof of Concept demonstration, Mr. Kamanga is also recorded as being present, and duly affixed his signature against his name, with his designation as secretary. The Board also notes that according to the minutes of the Tender Committee dated 31st October 2012, Mr. Kamanga is recorded as being present, and his designation is given as secretary.



The Board further notes the provisions of Section 26(4) and (5)(b) of the Public Procurement and Disposal Act, 2005 (herein after referred to as "the Act"), which establishes a tender committee and a procurement unit, respectively. Section 26(5) of the Act provides as follows:

*"A tender committee or a body established under subsection (4)... shall-*

*(a).....*

*(b) have as its secretary, the procurement professional(s) in charge of the procurement unit."*

Taking the above provision into account, the Board finds that Mr. Kamanga's presence in the Tender Committee is based on his position as a professional from the procurement unit of the Procuring Entity, who by statute, is mandated to serve as the secretary to the Tender Committee pursuant to Section 26(5)(b) of the Act. Therefore, the claim by the Applicant that the Procuring Entity breached Regulation 16(4) is without foundation.

Accordingly, this ground of Request for Review fails.

**Ground No.14: Breach of Regulation 47(1); Clause 2.9.2 and Clause 2.9.3 of the Tender Document.**

The Applicant submitted that the Procuring Entity breached Clause 2.9.2 of the Tender Document by evaluating the Successful Bidder's bid, notwithstanding the fact that the Successful Bidder's tender did not include all customs duties, port clearance charges, and VAT and other

taxes, as required by Clause 2.9.2. In support of this claim, it cited the provisions of the Clause which states that:

***"Prices indicated in the price schedule shall be the cost of the goods quoted including all customs duties, port clearance charges, and VAT and other taxes payable, and transport charges to the commission's warehouse located on Likoni Road, Industrial Area, Nairobi Kenya."***

In further support of this argument, it cited the statement which appears as a footnote in the Price Schedule which states that:

***"Price Quoted in Price Schedule shall be the cost of the goods quoted including all customs duties, port clearance charges, and VAT and other taxes payable."***

It stated that, according to the minutes of the tender opening register, the price quoted by the Successful Bidder is indicated as US\$ 12,357,000, with the remark that ***"Bid Price Exclusive of Tax."*** In its view, the Successful Bidder, having submitted a bid which did not include the taxes, failed to comply with the requirement set forth in Clause 2.9.2, and should have therefore been disqualified for being non-responsive.

The Applicant further submitted that the bid price of the Successful Bidder was in breach of Clause 2.9.3 which provides that:

***"Prices quoted by the tenderers shall remain fixed during the term of the contract unless otherwise agreed by the parties. A tender submitted***

***with an adjustable price quotation will be treated as non responsive and rejected pursuant to paragraph 2.20.5."***

It argued that the bid price quoted by the Successful Bidder, Face Technologies, is an adjustable bid price in terms of Clause 2.9.3 and therefore breached the Clause 2.9.3, and should, therefore, have been rejected by the Procuring Entity as being non-responsive pursuant to Clause 2.20.5 of the tender document which provides that:

***"If a tender is not substantially responsive, it will be rejected by the Procuring Entity and may not be made responsive by the tenderer by correction of the non-conformity."***

The Applicant further submitted that the Procuring Entity breached Regulation 47(1) by not rejecting the tender of the Successful Bidder, which in its view, did not satisfy the requirements set out in the Regulation.

The Applicant further stated that in any event, the devices to be procured were not subject to taxes by virtue of the clarification which was obtained from the Kenya Revenue Authority (on the advice of the Procuring Entity), under a letter dated 21st November, 2012, which is addressed to M/S Circuit Business Systems (K) Ltd. The Applicant stated that according to the said letter, Poll Book Electronic Device, which is an electronic voter register, is classified in HS Code 8471.90.00 of the Common External Tariff, and by virtue of this fact, is not subject to tax. It argued that by correcting the bid price that was submitted by

Face Technologies, by adding VAT and Taxes to it, the Procuring Entity breached Section 59(3) of the Act in that this correction amounted to a change of the substance of the tender. It argued that this correction could not be considered as a correction of errors and oversights within the meaning of Section 64(2)(b) of the Act, and Regulation 50. In support of this contention, it pointed out that the effect of this correction was that, whereas Face Technologies quoted USD 12 Million, the correction increased the price to USD 16 Million which is an addition of Ksh 360,000,000 over and above Face Technologies bid price.

In response, the Procuring Entity stated that because one bidder, namely, Face Technologies, who is the Successful Bidder, had indicated that its price was not inclusive of taxes, and the other bidders were silent on the taxes, the Procuring Entity decided to put all of them at par by calculating the bid of Face Technologies based on payment of VAT at the rate of 16%. It further stated that correction of errors was allowed by the Act. In this regard, it referred to Section 63(1) which deals with correction of errors, and Section 64(2) of the Act, respectively, and stated that Section 64(2) permits correction of errors and oversights which do not affect the substance of the tender. It argued that by adding the VAT to the price quoted by the Successful Bidder, it was merely correcting the errors committed by that bidder, which action did not affect the substance of the tender. It added that the price at which the tender was awarded to the Successful Bidder included custom and excises at 2.75 percent, duty at 10 percent and VAT at 16 percent this is in the bidder's own document.

Regarding the letter from Kenya Revenue Authority cited by the Applicant, the Procuring Entity stated that the document is not addressed to the Procuring Entity, and further that on the face of it, there is no express or clear statement to the effect that this particular device was actually presented to KRA and actually zero rated. It submitted that upon reading the letter in its entirety, it was clear that it merely gives an interpretation, and gives an opinion of what an electronic device is. It further stated that the letter was of no value insofar as it was not addressed to any of the parties to these proceedings.

After carefully listening to the submissions by the parties and perusing the documents before it, the Board notes:

1. The provisions of Clause 2.9.2 of the tender document cited above which states that:

***"Prices indicated in the price schedule shall be the cost of the goods quoted including all customs duties, port clearance charges, and VAT and other taxes payable, and transport charges to the commission's warehouse located on Likoni Road, Industrial Area, Nairobi Kenya."***

This provision was highlighted, thus giving it prominence as a requirement.

2. The Footnote to the Price Schedule at page 52 of the tender document cited states that:

***"Price Quoted in Price Schedule shall be the cost of the goods quoted including all customs duties, port clearance charges, and VAT and other taxes payable."***

This provision was highlighted, thus giving it prominence as a requirement.

3. Fifteen bidders submitted their bids and that all of them, except the Successful Bidder, quoted tender sums inclusive of all customs duties, port clearance charges, and VAT and other taxes payable, and transport charges to the Commission's warehouse located on Likoni Road, Industrial Area, Nairobi, Kenya.

Based on the above, it is clear to the Board that Clause 2.9.2 of the tender document required all the bidders to indicate in the Price Schedule the tender price inclusive of all the items specified therein, and that there was no discretion on the part of the bidders to quote prices without these items. This is so for the following reasons;

- 1). First, in order to enable the evaluation of tenders submitted by bidders to be evaluated and compared against each other on an equal basis, it is necessary under our procurement law that bidders must comply with instructions to them as set forth in the tender document. If bidders were allowed to exercise their discretion as to which instructions to comply with, and which ones to ignore, the evaluation and comparison of their bids would indeed be impossible as the procuring entity would have no objective basis for determining the responsiveness, or otherwise, of any of the bids. Such a situation would certainly lead to

award being made to a bidder who is not otherwise responsive. It is for this reason that failure to comply with instructions to bidders should lead to automatic disqualification of a bid at the preliminary stage of evaluation.

2). Secondly, it is clear from the language of Clause 2.9.2 that this requirement is mandatory. The Clause uses the expression "shall", thereby making it clear that the Procuring Entity wanted the prices to be inclusive of all the items stated therein. A contrary interpretation to this Clause would have led to some bidders quoting prices inclusive of all the items, others quoting prices including only some of the items, and others, like the Successful Bidder herein, quoting prices which excluded these items, thereby leading to a most chaotic evaluation process.

It is very strange indeed that the Procuring Entity, having given these clear instructions, ignored them in evaluating the submission by the Successful Bidder, and has now disowned them in these proceedings, by claiming that they were merely errors and oversights which it could correct. The logic of this argument is easier to appreciate if made by an aggrieved bidder seeking to challenge the decision of a procuring entity, but difficult to understand when advanced by a procuring entity which should be anxious to defend the integrity of its decisions.

If the instruction was unclear, which could be the only probable reason why the Successful Bidder did not comply with it, then why is it that all the other fourteen bidders understood it, as is manifest from the fact that they all quoted their prices inclusive of the items stated in Clause 2.9.2?

The inevitable question which arises as posed by the Applicant is why the Successful Bidder, having failed to comply with this requirement, was not disqualified pursuant to Clause 2.20.5 cited above, which states that:

***"If a tender is not substantially responsive, it will be rejected by the Procuring Entity and may not be made responsive by the tenderer by correction of the non-conformity."***

These are not rhetorical questions as they are connected with the Applicant's complaint regarding the manner in which the Proof of Concept demonstrations were handled, which the Board deal with hereinafter under Grounds 18, 19, 20, 21 and 24: Breach of Sections 2 and 66(4) of the Act and Regulations 16(5)(a) and 47(g).

#### **Grounds 16 and 17: Breach of Section 45(3) of the Act**

The two grounds have been consolidated since they both relate to provision of a summary of the evaluation report.

The Applicant averred that it wrote a letter to the Procuring Entity dated 9<sup>th</sup> November 2012 requesting for a summary of the evaluation and comparison of tenders as anticipated in the tender documents of the Respondent under Section 45(3) of the Act. It averred that the Procuring Entity has failed/refused and or neglected to supply a summary of the evaluation and comparison of tenders.

In response, the Procuring Entity stated that it provided a summary of the Evaluation report to the bidder as required by Section 45(3) of the Act as read together with Regulation 66(2) and (3) of the Regulations.



Regulation 66(2) and (3) states as follows:

(2): *"Where so requested by an unsuccessful tenderer, a procuring entity shall, within fourteen days after a request, provide written reasons as to why the tender, proposal or application to be pre-qualified was unsuccessful."*

(3) *The reasons given under paragraph (2) shall not contain any information on any other tender other than information that is publicly available from tender openings or published notices."*

The Board notes that from the documents submitted to it, the Applicant wrote to the Procuring Entity on 9<sup>th</sup> November, 2012 requesting for a summary of the evaluation report which was provided by the Procuring Entity by its letter dated 20<sup>th</sup> November, 2012. This was within the required fourteen days.

This being the case, the Board finds no merit in the Applicant's claim. Accordingly these grounds of Request for Review fail.

**Grounds 18, 19, 20, 21 and 24: Breach of Sections 2 and 66(4) of the Act and Regulations 16(5)(a) and 47(g) Clause 2.11.3(f) of the tender document.**

The five grounds have been consolidated as they relate to the evaluation process of the tender.

The Applicant alleged that 15 days after the first Proof of Concept (POC) demonstration was completed, the Procuring Entity, contrary to Clause 2.11.3(f) of the tender document, availed another opportunity to bidders

who failed the Proof of Concept (POC) demonstration on the first trial to give a demonstration of their devices for the second time with different units which were not received at the time of tender closing without the same being done to other responsive evaluated bidders, like the Applicant. It stated that the bidders were required to submit a prototype of a working device and each bidder was required to describe that device in the submission of the tender.

The Applicant further stated that in response to an invitation to it and two other bidders, namely, Face Technologies, and Safran Morpho, whose bids had been found by the Procuring Entity to be technically responsive, it attended at the venue designated for demonstration of the devices on 10th October 2012 and, together with Face Technologies, demonstrated its device. The Applicant further stated that at the conclusion of the demonstrations, the Evaluation Committee felt that the device presented by it **"can satisfactorily meet the specifications provided in the tender document for voter identification device."** This was according to the minutes of the Evaluation Committee dated 10th October, 2012.

The Applicant averred that, according to the same minutes, the Evaluation Committee found that Face Technologies **"....did not demonstrate a prototype that met the POC requirements as stipulated in the tender document. However the firm stated that it received the communications late and were unable to prepare for presentation and provide the relevant prototype. They committed to provide a comprehensive demonstration of their solution given another chance."**

It stated that according to the said minutes, Safran Morpho did not attend the demonstration.

The Applicant further stated that subsequent to this demonstration of the devices, the Procuring Entity invited Face Technologies to demonstrate its device once again, and Safran Morpho, to demonstrate its device for the first time, on October 22, 2012. It pointed out that unlike Face Technologies who were invited for the second time, the Applicant was not similarly favoured. The Applicant pointed out that, according to the minutes of the Evaluation Committee dated 24th October, 2012, the Committee Noted that ***"...Face Technologies demonstrated a different device from that submitted during the close of the tender. Demonstration of an improved device was accepted in reference to Addendum to Tender No 14/2011-2012 Response to Clarification Part 3 Final Number 7 and 9."***

On the basis of the foregoing, the Applicant argued that there was no provision under the Tender Document that allowed the Procuring Entity to permit a bidder whose device had been submitted before the close of Tender, and which had failed in proof of concept, to come up with a new device. It argued that by allowing a bidder to present a new device that was not submitted with its tender as required by the tender document, the Procuring Entity was giving such a bidder an opportunity to meet a requirement which was not given to other bidders. It stated that by accepting a different device, the Procuring Entity contradicted the tender notice in the daily newspaper of 1<sup>st</sup> June, 2012. It argued that by this conduct the Procuring Entity breached Regulations 48(1) & 49(2).

The Applicant further argued that in any event, the entire Proof of Concept exercise was a mere charade by the Procuring Entity since it had already made a decision to award the tender to Face Technology. In support of this contention, it pointed out that according to the minutes of the Evaluation Committee dated September 29th, 2012, the Evaluation Committee had already decided to award the tender to Face Technologies. It referred to the said minutes, according to which, the Evaluation Committee recommended that ***"...bidder number 3 M/S Face Technology be considered for the award of the contract at a total cost of USD 16,651,139.13 (KES 1,397,724,925.51)."*** In its view, this meant that the whole exercise of Proof of Concept was meaningless as a decision had already been made to award the tender to a bidder whose device was not even responsive.

The Applicant further averred that the Evaluation Committee failed to have a marking scheme. In this regard it pointed out that the Preliminary Evaluation consisted of "Yes" & "No" marking scheme. It stated that this scheme, which in its view was not a marking scheme at all, given the fact that no weight was given to the scores, was used in the evaluation of technical submissions as well. It submitted that this was in breach of regulation 16(10)(c) and (e) failing to award scores on the technical specifications.

It further submitted that the Evaluation Committee failed to comply with Regulation 16(5)(a), which requires that the technical evaluation of the tenders be received in strict adherences to the compliance and evaluation criteria set out in the tender documents.

The Applicant averred that the Procuring Entity failed to comply with Section 66(4) of the Act and the Regulations thereunder requiring that the tender be awarded to the tenderer with the lowest evaluated tender. It added that the Procuring Entity failed to comply with the provision of the Act requiring that the tender be awarded to the most responsive bidder. It alleged that by so doing, the process of evaluating and comparing tenders was not transparent, fair, open and accountable as required by Section 2 of the Act.

In response, the Procuring Entity submitted that the Applicant's tender was responsive having been considered in the preliminary, technical evaluation and Proof of Concept during the entire tender process and did not suffer any prejudice in the assessment of the tender. It stated that the Applicant tendered USD 26,180,000 (Ksh. 2,197,593,706.00 equivalent) being the highest evaluated tender price. The Commission awarded the contract to the lowest evaluated price at USD 16,651,139.13 (Ksh. 1,397,724,925.51 equivalent) as required by Section 66(4) of the Act.

The Procuring Entity further submitted that the prototype submitted was specified in ITT/2.111.3/f, the pre-bid meeting and several addenda which required that the Commission expected to see an impression of the device during tender submission. However, during Proof of Concept, the Commission expected to see similar device to the one that would be procured.

As to the issue of the Procuring Entity allowing the Successful Bidder to demonstrate a device which was not presented with the tender

document, the Procuring Entity stated that this was permitted by addendum to tender no 14/2011-2012. It averred that the improvement was on the basis of a clarification sought by the Procuring Entity and that, in any event, the Procuring Entity would not have been prudent if it did not accept a product which was superior to that which had been submitted with the tender document.

It further submitted that this device was lower in price as compared to those offered by the other bidders, which was consistent with the Act and the Regulations.

After carefully hearing the submissions by the parties and perusing the documents before it, the Board makes the following findings. The Board notes that:

1. This tender was evaluated in three stages namely; Preliminary, Technical and Financial evaluation. The Applicant qualified through the Preliminary and Technical evaluation stages but was eliminated at the Financial stage for having quoted a tender sum of USD 26,180,000 (Ksh. 2,197,593,706.00 equivalent) and ranked third as compared to the Successful Bidder's tender sum of USD 16,651,139.13 (Ksh. 1,397,724,925.51 equivalent).
2. The tender document stipulated that each bidder should submit a working prototype of its device.

3. The three bidders, which were considered technically responsive, submitted prototypes of their respective devices together with their tender documents.

4. The three bidders that qualified through the Technical evaluation stage namely; Avante Technologies (Applicant), Safran Morpho and Face Technologies (Successful Bidder) were invited to make their presentations on 10<sup>th</sup> October, 2012 at Sopa Lodge Naivasha.

5. The Applicant, Avante, made its presentation which was acceptable to the evaluation committee.

6. The Successful Bidder made a presentation of a prototype that did not meet the requirements stipulated in the tender document but stated that it had received communication late and was unable to prepare for the presentation and provide the relevant prototype.

7. The other firm M/s Safran Morpho did not turn up for the demonstration which took place on 10<sup>th</sup> October, 2012, allegedly due to the short notice given to it by the Procuring Entity.

8. The two firms, namely, Face Technologies, and Safran Morpho, requested for sufficient time to demonstrate their solution following the first Proof of Concept demonstration.

9. In view of the above, the second session of the Proof of Concept was held on 22<sup>nd</sup> October, 2012 where the two firms presented a demonstration that also met the Commission's requirements.

10. At the presentation of 22<sup>nd</sup> October, 2012, only Safran Morpho and Face Technologies were present, Avante having not been invited.

11. At the presentation, Face Technology presented a different device from the one which it had submitted with its tender document.

12. The two invited firms made their presentations and the Evaluation Committee recommended the new device demonstrated by Face Technologies.

13. From the Minutes of the Evaluation Committee dated 29<sup>th</sup> September, 2012, the Evaluation Committee recommended Face Technologies even before the demonstration on Proof of Concept.

14. At its meeting on 31<sup>st</sup> October, 2012, the Tender Committee of the Procuring Entity awarded the tender to the Successful Bidder, M/S Face Technologies at the tender sum of USD 16,651, 139.13, with the remark that, ***"Even if the appearance of the device presented at the closing /opening of the tender and at the proof of concept was different, function ability of the second device was as per the IEBC needs. The device at the POC had no specifications and therefore cannot be pinned down."***

It should be noted that the Successful Bidder had quoted a tender sum of USD 12,357,000.00 but the Evaluation Committee adjusted this figure by



a sum of USD 4,294,139.13 allegedly to cover the items specified in Clause 2.9.2 of the Tender Document.

15. The preliminary evaluation and technical evaluations were done using "Yes" and "No" as answers to indicate responsiveness of bidders to the Procuring Entity's requirements, but no weight was attached to the answers. It also noted that the Evaluation Committee recommended that the three bidders who had the lowest number of "NOs" should proceed to financial evaluation.

16. It is not clear whether taxes are payable in respect of the device being procured in this tender in view of the fact that the Applicant has obtained a letter dated 21<sup>st</sup> November, 2012 from Kenya Revenue Authority stating that the device is zero rated.

It is necessary to set out these facts in order for the Board to be able to determine the claim by the Applicant that the Procuring Entity breached the various provisions of the Act, the Regulations and Clauses of the tender document, which are alleged by the Applicant to have been breached by the Procuring Entity. In this regard, the only issue for determination by the Board is whether or not it was proper for the Procuring Entity to evaluate a device during the Proof of Concept demonstration, which was not submitted by a bidder with its bid documents?

It is not in dispute that during the second meeting on Proof of Concept which was held on 22<sup>nd</sup> October, 2012, that the Successful Bidder

demonstrated the functionality of a machine which was completely different from that which it had submitted with its tender document. This is clear from the minutes of the meeting of the Evaluation Committee which sat on 22nd October, 2012 to evaluate the presentation by the Successful Bidder. According to these minutes as set out under the heading ***"Conclusions for Face Technology"***, wherein it is recorded that, **"The Committee noted that Face Technologies demonstrated a different device from that submitted during close of tender."** The justification for this, according to the Committee, is that it was accepted in reference to "Addendum No 14/2011-2012 Response to Clarification Part 3 Final, Number 7 and 9."

Assuming that the addendum referred to by the Procuring Entity formed the authority for its decision, the question which arises is why the other bidder, namely, Avante, whose bid was considered responsive, and who, during the Proof of Concept demonstration held on 10th October, 2012, demonstrated a device that, in the words of the Committee, ***"..can satisfactorily meet the specifications provided in the tender document for the voter identification device,"*** was not invited, like the Successful Bidder, to make further presentation of its device. This question is even more pressing given the fact that at that initial presentation, Avante demonstrated the superiority of its device, on head-to head comparison with that of the Successful Bidder, whose device, in the words of the Committee, ***"...did not demonstrate a prototype that met the POC requirements as stipulated in the tender document."*** Further, looking at the analysis of the consolidated technical evaluation at page 24 of the Technical Evaluation Report dated 29th

September, 2012, the crude evaluation method of "Yes" and "No" indicated that Avante scored one "No" compared to three "Nos" scored by the Successful Bidder. The conclusion which can be drawn from these facts is that Avante:

1. Complied with the requirements of the Procuring Entity by submitting with its tender document a device as specified by the Procuring Entity.
2. Offered a device which, upon being evaluated for its technical responsiveness, emerged superior to that of the Successful Bidder.
3. Offered a device which, when subjected to Proof of Concept demonstration, beat that of the Successful Bidder.
4. Was never given the opportunity to participate in the second round of demonstration, unlike the Successful Bidder.

The Board further notes that there is no valid reason for the Evaluation Committee allowing the Successful Bidder to the second demonstration on Proof of Concept using a different device from the one submitted with its bid.

It is therefore evident from these facts that the Procuring Entity was bent on awarding the tender to Face Technologies, come what may. This conclusion is buttressed by the conduct of the Procuring Entity in

relation to its decision not to disqualify the Successful Bidder when it submitted its tender without factoring in the items specified in Clause 2.9.2 of the tender document. The tender document was clear that these items had to be included in a bidder's tender sum and, therefore, failure by the Successful Bidder to include them should have led to automatic disqualification. Instead of taking this measure against Face Technology, the Procuring Entity went out of its way to accommodate the bidder by pricing the items itself and including them in the tender sum of the Successful Bidder's tender.

In relation to the issue of the observed lapses by the Procuring Entity in conducting the Proof of Concept demonstrations, the Procuring Entity has defended its actions by claiming that its authority was based on the addendum cited above, and further that, in the words of the Tender Committee cited above, ***"Even if the appearance of the device presented at the closing /opening of the tender and at the proof of concept was different, function ability of the second device was as per the IEBC needs."*** This latter statement may be true, but so is it true that the device submitted by Avante, in the words of the Evaluation Committee, ***"..can satisfactorily meet the specifications provided in the tender document for the voter identification device."*** In the circumstance, what criteria did the Procuring Entity apply in determining that the tender should be awarded to Face Technologies and not to Avante, especially in light of the fact that from the technical evaluation stage to the Proof of Concept demonstration stage, Avante beat Face Technologies. In the view of the Board, the criteria could only be one that was intended to achieve the objective of awarding the tender to Face Technologies, no matter what.

It further claimed to found its decision on the fact that the Successful Bidder offered the best price. It is a cardinal principle in our procurement law that the determination of price must be based on observance of the principles and objectives as set out in Section 2 of the Act, which underpin our procurement law. These principles and objectives are indivisible, and one cannot be exercised in isolation from the others. Thus, determination of price cannot be arrived at by sacrificing fairness to bidders, as was the case in this matter. Accordingly, the Board is not persuaded that the price offered by the Successful Bidder, notwithstanding the fact that it was lower than that of Avante, was arrived at in a manner that was fair to the other bidders, having regard to the fact that the Successful Bidder's tender did not comply with the requirements of the tender document.

Turning to the reasons advanced by the Procuring Entity for not disqualifying Face Technologies by reason of failure to comply with instructions to include all the items specified in Clause 2.9.2 of the tender document, the Procuring Entity has claimed that its intention was to ensure that all bidders were at par with each other. It has further defended its action by citing textual support for its decision to calculate the items specified in Clause 2.9.2 and adding them to the sum quoted by the Successful Bidder. In this regard, it cited Section 64(2)(b) as the authority for its action. As the Board has already pointed out in this decision, it is most unusual indeed for a procuring entity to be magnanimous in interpreting its tender document, especially in favour of some of the bidders. But even if it felt generous in this particular case, it can hardly be the case that failure to comply with mandatory

instructions, especially one that is cast in mandatory terms, can be treated as an error that can be corrected without affecting the substance of the tender in terms of Section 64(2)(b) of the Act. This raises the question as to why the Procuring Entity acted in this manner. The Board is of the view that the motive of the Procuring Entity was to ensure that the Successful Bidder was awarded this tender.

The Board will make its holdings in relation to the prayers sought after considering all the Applications for this tender.

### **REVIEW NO.61/2012**

The Request for Review was lodged by M/s Bidvest Paperplus (Pty) Ltd trading as Lithotech Exports on 20<sup>th</sup> November, 2012. The Applicant was represented by Mr. Geoffrey Oriaro, Advocate, while the Procuring Entity was represented by Mr. Anthony Lubulellah, Advocate.

The Applicant requested the Board for the following Orders;

- a) The decision to exclude the tender security bid of the applicant as non responsive be reversed and the applicant's bid be subjected to evaluation as per tender document.*
- b) The award of Tender No. IEBC/14/2011-2012 for the supply, delivery, installation, configuration, training, testing and commissioning of electronic voter identification devices be annulled.*
- c) The procuring entity be ordered to re-evaluate the responsive tenders strictly as per the tender documents, with special emphasis on the strict compliance to the minimum specifications of the critical components*

*described at point 2 above as this has ramifications on price and efficiency.*

- d) Substitute its own decision for that of the procuring entity by naming the bidders who did not meet technical specifications in the tender document as non responsive to avoid repeated request for review on same issue taking into account the importance of the tender to the public and the limited timeline available for further procurement proceedings.*
- e) Procuring entity be ordered to provide the evaluation report and prototype samples and the final proof of concept submitted by responsive bidders and that of the applicant during hearing of the request for review and in advance to allow analysis of the same.*
- f) Costs of the Review.*

The Applicant raised four grounds of review which the Board deals with as follows:

**Grounds 1, 2, 3 and 4: Breach of Sections 2, 59(2), 64(2) and 66(1) of the Act**

The four grounds have been consolidated as they relate to the evaluation process of the tender.

The Applicant averred that the Procuring Entity failed to consider that the Applicant had provided a tender security in an acceptable format as provided by section VI-Standard Forms note 5 at page 51 of the Tender Document, and that the deviation was minor and could not affect the substance of the tender as provided by Section 64(2) (a) of the Act. It stated that the format of tender security used captured the spirit and purpose of the tender security and was valid up to 12<sup>th</sup> December 2012

and for an amount of US\$ 80,000.00 which meets the requirements of not being less than the stipulated amount of Kshs. five million. It argued that the Procuring Entity had accepted tender security in similar format provided by the Applicant in Tender No. IEBC 08/2011-2012 thus creating a legitimate expectation that the tender security format provided by Applicant's bankers in the form of a Bank Guarantee was acceptable. Similarly, the Procuring Entity had also accepted a tender security issued by the same bank (Nedbank Ltd, S. Africa) to the Applicant, in Tender No. IEBC/09/2009-2010 and was awarded the supply of item 86 as per Notification of Award letter dated June, 1, 2010. It stated that the discretion to determine whether a tender security is acceptable or not is to be exercised judiciously and not erratically based on personal interests but should be based on the purpose of the tender security and whether the format employed achieves the purpose intended.

The Applicant further averred that the Procuring Entity did not evaluate the bids as per the criteria set out in the tender documents. It stated that it is aware of the functional components of its rivals in the industry and it is aware that most of the electronic voter identification offered do not have an internal battery that can supply power for 12 hours continuous operation. The tender document (page 25, clause 1 (ix) ,page 27 clause 1.6 (v) and page 32) provided that the Electronic Voter Identification device shall have a long lasting internal battery (12 hours continuous use). It stated that Page 32 of the tender document specifies the minimum specifications of the devices and especially with respect to the



following critical components and which have a great bearing on the costing and final pricing.

The Applicant further submitted that the Procuring Entity breached Section 59(2) of the Act by allowing a change in the substance of tenders after deadline for tender submission. It stated that at the tender opening it was noted that Face Technologies had quoted a price that it did not factor taxes. It was noted in the tender opening minutes. Clause 2.9.2 of the tender document provides that ***"prices indicated on the Price Schedule shall be the cost of the goods quoted including all customs duties, port clearance charges, and VAT and other taxes payable, and transport charges to the Commissions' warehouse located on Likoni road, Industrial Area, Nairobi, Kenya"***. This requirement is also re-confirmed in Addendum Part 4, query 13.

It stated that another breach occurred when a bidder was allowed to substitute a sample that had been tendered during tender submission. The sample tendered at the tender submission deadline stage became part of the tender and to alter the same amounted to change in the substance of the tender which is prohibited by law. It is clearly stated at page 45 of the tender document that: "The bidders will be required to submit a returnable sample (a working prototype) of the EVID". The emphasis is a working prototype.

The Applicant argued that the Procuring Entity did not treat competitors fairly contrary to Section 2 (b) of the Act and Regulation 48(1) by allowing a bidder to make proof of concept presentation twice while

other bidders were only allowed once. This gave the bidder an opportunity to address shortcomings in the first presentation by offering a different sample after the first prototype sample failed to meet the tender specifications.

In response, the Procuring Entity stated that the Applicant failed to meet the requirements of preliminary evaluation and did not qualify for subsequent evaluations as per Regulation 47(1)(f), and Clause 2.11.3(a). It stated that Regulations 47(2) empowers the Evaluation Committee to reject tenders which do not satisfy the requirements set out in Regulation 47(1). It argued that the Applicant did not provide a Bid Security in the form that adhere to language and terms in the Tender document, and accordingly, the Procuring Entity was justified in rejecting its bid at the preliminary evaluation stage.

The Board has carefully listened to the submissions by the parties, and considered the documents before it and makes the following decision:

The Board notes:

1. That bidders were to submit a bid security of Kes.5,000,000 from a reputable Financial Institution/Insurance or Bankers Cheque payable to the Commission.
2. Clause 5 of Section VI of the tender document provides that "*...when required by the tender document the tenderer shall provide the tender*

***security either in the form included hereinafter or in another format acceptable to the procuring entity."***

3. The Tender document provided the standard Tender Security Form indicating that the tender guarantee will remain in force up to and including 30 days after the period of tender validity of 120 days.

4. Clause 2.12.1 of the tender document which provides that **"The tenderer shall furnish, as part of its tender, a tender security for the amount and form specified in the Appendix to Instructions to Tenderers."**

5. That the Applicant provided a letter of guarantee from Nedbank Corporate that did not conform to the format given in the said Standard Tender Security Form in terms of the wording used.

6. That Procuring Entity had in a previous tender in which the Applicant participated, accepted a security provided by the same bank and worded exactly as that which pertains to this tender.

6. That in view of the above, the Applicant was disqualified at the Preliminary stage of evaluation and could not be subjected to further evaluation.

Arising from the above, the issue for consideration by the Board is whether or not the Procuring Entity was justified in disqualifying the Applicant's tender on the ground that the tender security provided by

the Applicant did not comply with the Procuring Entity's requirement. In this regard, the Board notes that Clause 2.12.1 cited above addresses two issues; The first issue is the amount of the security required by the Procuring Entity, which is stated in the tender notice to be the sum of Ksh. 5,000,000. The second issue is the Form of the tender security, which is to be found in Section VI of the tender document.

A comparative analysis of the tender security form referred to above and the one submitted by the Applicant indicates that in substance, there is virtually no difference between the two. Both of them address the obligation of the surety; the conditions under which payments will be made by the surety to the Procuring Entity; the amount of the surety; and the period of the validity of the security.

However, the security given by the Applicant's Bank is more far-reaching and more favourable to the Procuring Entity in that, it provides at paragraph 9 that "***Notwithstanding anything to the contrary herein, the Bank's obligation hereunder shall be construed as principal and not as accessory to the obligations of the Client and compliance with any demand for payment received by the Bank in terms hereof shall not be delayed, nor shall the Bank's obligations in terms hereof be discharged, by the fact that a dispute may exist between the Client and the Beneficiary.***" There is no equivalent to this Clause in the Procuring Entity's form.

A less favourable and substantive clause in the security submitted by the Applicant relates to the law applicable to the security. In this respect

Clause 12 subjects the security to the law of South Africa. This provision is clearly in conflict with Clause 3.16 of the General Conditions of Contract which states that "The contract shall be interpreted in accordance with the laws of Kenya unless otherwise expressly specified in the SCC (Special Conditions of Contract). The table immediately below Clause 3 of the Special Conditions of Contract clarifies the applicable law to be that of Kenya.

The condition specified under Clause 12 of the surety is clearly in conflict with the provisions of the tender document cited above and, would have justified rejection of the surety by the Procuring Entity.

These matters relating to the contents of the two documents, including the provisions of Clause 5 of Section VI cited above which gave the Procuring Entity discretion to accept a tender security in another form, notwithstanding, it appears that the Procuring Entity was more interested in form, rather than in substance and, to this end, disqualified the Applicant for failure to provide a tender security which complied with its instructions as to form. It is not clear why it had previously accepted a tender security in a related tender which was in substance similar in every way, except as to the amount of security, to the tender security under consideration, but found fault in this case. The Procuring Entity's decision to stand on ceremony on this issue stands in stark contrast to the alacrity with which it was prepared to bend over backwards to accommodate the Successful Bidder when the latter failed to factor in taxes and other items specified in Clause 2.9.2 of the tender document into its submission, and when the said bidder failed to

demonstrate the efficacy of its device during the first leg of the Proof of Concept demonstration.

This kind of conduct, viewed together with the Procuring Entity's conduct regarding the issues of incomplete pricing of the Successful Bidder's tender, and its decision to give the Successful Bidder a second bite of the cherry in relation to the Proof of Concept demonstrations, suggest a pattern of partiality in processing of tenders, which is offensive to our procurement law. It appears to have adopted in the processing of this tender, a scheme of nitpicking when it came to the tenders of bidders which it did not favour, and one of cosiness when it came to dealing with the Successful Bidder.

This being said, the Board is cognisant of the fact that the form used by the Procuring Entity is one that has been approved as a standard document. In the circumstance, the Board finds that the Procuring Entity was within its rights to insist upon use of the form in question. In the Board's view, although the Procuring Entity was more concerned with the Form, the serious defect with the tender security was the fact that it was subjected to the laws of South Africa and therefore not enforceable in Kenya contrary to the requirement of the Tender Document.

Accordingly, this ground of Request for Review fails.

Turning to the question of allowing the Successful Bidder to demonstrate a different device, the Board has already dealt with this

matter extensively in Application No 59/2012 and, therefore need not say any more about it in this cause.

As to the claim that the Procuring Entity breached Section 59(2) of the Act by allowing a change in the substance of tenders after deadline for tender submission, the Board has also dealt with this issue extensively in Application No 59/2012 above and therefore need say no more on the matter.

As already stated, the Board will make its holdings after consideration of all the Applications.

#### **REVIEW NO. 62/2012**

The Request for Review was lodged by M/s Smartmatic International Holding BV on 21<sup>st</sup> November, 2012. The Applicant was represented by Mr. Andrew Wandabwa, Advocate, while the Procuring Entity was represented by Mr. Anthony Lubulellah, Advocate.

The Applicant requested the Board for the following orders;

1. *The Procuring Entities decision to reject the Applicant's tender at the preliminary stage be annulled.*
2. *The Procuring Entity be ordered to allow for a further evaluation of the Applicant's tender.*
3. *In the alternative, this tender be cancelled.*
4. *The costs of this appeal be borne by the procuring entity.*

The Applicant raised four grounds of review which the Board deals with as follows:

**Grounds 1, 2, 3 and 4: Breach of Sections 2, and 64 of the Act and Regulations 47 and 48.**

The Applicant stated that it was knocked out at the preliminary stage, because it had not submitted audited accounts for the last 2 years. It submitted that the mere fact that the Tender Document requires accounts for the previous 2 years previous does not mean the preceding 2 years. In its view meaning of any past account for the past 2 years, does not necessarily mean the preceding ones. It argued that former or prior means occurring immediately before the time of utterance and that previous means occurring at some time before the utterance. It submitted that there is a clear distinction between the preceding and previous and to the extent that what was used in this tender document was previous, that does not mean it meant proceeding-that is the last 2 years. On this premise it averred that the Procuring Entity erred in rejecting its tender at the Preliminary stage, when in fact it had submitted all the required documents and information. It stated that in any event, the Applicant's purported deviation from the tender requirements is a minor one, if at all, which ought to have been overlooked in keeping with the provisions of Section 64 of the Act.

It argued that the manner in which the Evaluation was done flies in the face of the objectives of the Act in that the criteria used was not objective or quantifiable as required by provisions of Section 66 (3) of the Act in



that it was done merely on a "Yes" or "No" which simply meant that if one had more "Yeses" and fewer "Nos" then one proceeded to the next stage of evaluation.

It concluded by requesting the Board to order that re-evaluation be done.

In response, the Procuring Entity stated that the Commission conformed to all provisions of the Act, the Regulations, the Instructions to Tenderers (ITT) and the four Addenda that formed the Bidding process during the tender advertisement, evaluation and recommendation of award of contract. It submitted that the Applicant failed to meet the requirements of preliminary evaluation and did not qualify for subsequent evaluations as per regulation 47(1)(f), and item 2.11.3(a) which is found on page 13 of the Technical evaluation report. It stated that Regulations, 47(2) gives the technical evaluation committee powers to reject tenders which do not satisfy the requirements set out in paragraph 47(1). It argued that the Applicant did not submit Audited Accounts for the last two years as required and therefore was properly excluded from the process.

The Board has carefully listened to the submissions by the parties and perused the documents before it and makes the following findings.

1. Clause 2.11.3(a) of the Tender document states as follows:

**2.11.3 *"In addition to the above qualifications a tenderer MUST provide the following documents***

***a. A copy of Audited accounts for the previous 2 years"***

2. The Applicant submitted copies of audited accounts for periods December 2007 to December 2010 while the Evaluation Committee considered the audited accounts for 2010 and 2011 being the last two years.

3. In view of this, the Applicant was disqualified at the Preliminary evaluation stage for not meeting the requirement on submission of audited accounts for the previous 2 years.

The Applicant has vigorously argued that "previous" does not mean the "preceding" in support of its contention that by submitting audited accounts for period 2007-2010, the Applicant complied with the requirements of the Procuring Entity. In the view of the Board, this is a mere sophistry. To the mind of the Board the distinction which the Applicant seeks to draw between "previous" and "preceding" is a distinction without a difference as what the Procuring Entity wanted was audited accounts for the past two years. This observation is supported by the fact that all the other bidders understood this instruction and complied with it, and, accordingly, the argument by the Applicant is a mere afterthought.

Having considered all the above matters, the Board now deals with the remedies sought by the Applicants in these three cases. On its part, the Applicant in Application No.59/2012 has urged the Board:

1. To direct the Respondent to award the tender to the most responsive or successful tenderer and award the tender to the Applicant.
2. Annul the procurement proceedings in their entirety.

These are the principal prayers of the Applicant.

On its part, the Applicant in Application No. 61/2012 has urged the Board to rule that:

- a) The decision to exclude the tender security bid of the applicant as non responsive be reversed and the applicant's bid be subjected to evaluation as per tender document.
- b) The award of Tender No. IEBC/14/2011-2012 for the supply, delivery, installation, configuration, training, testing and commissioning of electronic voter identification devices be annulled.
- c) The procuring entity be ordered to re-evaluate the responsive tenders strictly as per the tender documents.
- d) Substitute its own decision for that of the procuring entity.

On its part, the Applicant in Application No. 62/2012 has prayed to the Board to rule that:

1. The Procuring Entity's decision to reject the Applicant's tender at the preliminary stage be annulled.
2. The Procuring Entity be ordered to allow for a further evaluation of the Applicant's tender.
3. In the alternative, this tender be cancelled.

Analysis of the prayers by the Applicants in the three cases can be summarised as follows:

1. Award of tender to Avante, as the most responsive bidder
2. Annulment of the decision of the Procuring Entity;
3. Re-evaluation; or
4. Cancellation.

It is clear to the Board, that the following serious breaches of the Act, Regulations and the Tender document have been committed by the Procuring Entity in the course of tender process;

1. Failing to disqualify the Successful Bidder for failure to quote its tender price in compliance with clause 2.9.2 of the Instructions to Tenderers that required a bidder to set out in its price inclusive of all custom duties, port clearance charges, VAT and transport charges.
2. Allowing the Successful Bidder to participate in the second demonstration of Proof of Concept having failed in the first demonstration, and further allowing it to introduce a device that was different from the one that it had submitted with its tender.
3. Adjusting the price of the Successful Bidder by a staggering sum of USD 4,294,139.13 allegedly to cover the items set in clause 2.9.2 of the Tender document. This amounts to change of the tender price contrary to Section 59(3) of the Act.

It is on the basis of these irregularities that the Applicants have sought the prayers cited above.

On its part, the Procuring Entity has prayed to the Board to allow its decision to stand, arguing that having regard to the fact that the next general elections are only two-and-a-half months away, it is in the public interest that the Procuring Entity should proceed with the process.

Turning first to the prayer by the Procuring Entity, as the Board observed in *Imprimerie Nationale and Ministry for Immigration and Registration of Persons* [Application no 25/2012 of 25<sup>th</sup> may 2012"] First, it should be noted that our procurement law does not contain any provision which deals with the concept of national interest. This is to be contrasted with such jurisdictions as Tanzania, Zimbabwe and Seychelles, among others, where the applicable procurement law allows a procuring entity to swear an affidavit stating that a particular procurement is of national interest, and thus permit the procurement in question to continue, while the matter is being litigated. The safeguard in those laws is that should the procuring entity lose the case and is found to have breached the law, then the complainant is entitled to damages." In that case the Applicant urged the Board not to nullify the decision of the Procuring Entity on the ground that the matter concerned the public interest."

That was not the first time that the Board was faced with the issue of public interest. Previous to the case cited above the Board dealt with this issue in the case of *Lantech (Africa) Limited v. The Ministry Of Finance* [Application No. 2/2007]. In rejecting the plea of the Procuring Entity that the matter was of public interest and thus the decision of the

Procuring Entity should be upheld, the Board rejected the plea and stated at page 14 that:

***"It is not lost on the Board that this is a tender of great significance to the country. However, it is important for the Procuring Entity to handle such a tender with great care and attention that it deserves including strict adherence to the Regulations. The Board wrestled with this issue and decided that it is more important in the long term public interest and for future good governance and propriety in public procurement, that critical legally established procedures are adhered to. A bad precedent on an important procurement could well lead to backsliding in adherence to procedures in procurements of lesser importance. Early prevention of a malady is better than attempting to cure it later."***

It is clear from these decisions that the Board has been reluctant to grant prayers based on the claim of public interest. This reluctance is guided by the fact that procurement should be carried out with proper planning. In fact Section 26(3)(a) of the Act requires all procuring entities to plan their procurement and thus states that:

***(3) All procurement shall be-***

***(a) within the approved budget of the procuring entity and shall be planned by the procuring entity concerned through an annual procurement plan."***

The question which arises from the prayer by the Procuring Entity is: why did they not plan procurements relating to the impending general elections in order to avoid putting itself in bind in which it now finds

itself? It has been a badly kept secret since our new Constitution was adopted in August 2010 that elections would be held either in December 2012 or shortly thereafter. So why has it taken the Commission all this time to carry out its procurements relating to the general elections? The argument that a matter is of national interest, and thus a procurement decision which either circumvents the proper procedures set forth in our procurement law, or that breaches these procedures, should be sanctioned is, to the mind of the Board, to offer a carte blanche to procuring entities to return to the days of unregulated procurement.

Having said that, and having registered its dissatisfaction with the way this procurement has been handled, the Board is nevertheless alive to the fact that the time left before the elections are held is short, and any decision which it makes which may interrupt the staging of the elections would not be in the interest of the country. It is for this reason that the prayers sought by the Applicants in these cases, which are at the very least, to carry out re-evaluation, and at the extreme end, to annul the proceedings in their entirety, would in our view not be in the interest of the nation. This view is supported by the fact that, according to the minutes of the Tender Committee of 31st October, 2012 at minute No. 4, delivery of the devices will not start immediately as negotiations still need to be held with the supplier; confirmation still need to be made of the compatibility of the devices with the BVR kits, among other things.

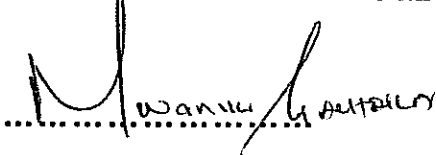
It is clear to the Board that the Procuring Entity is acting with impunity and is waving the card of public interest as its defense in the various breaches of the Procurement law. Although the Board in normal

circumstances would have had no hesitation to annul this tender, to do so in this case will certainly jeopardize the holding of the forthcoming general elections.

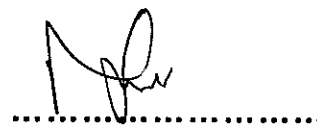
Taking into consideration all the above, the prayers that command themselves to the Board are as follows:

1. The award of the tender to the Successful Bidder is upheld at the original tender sum which is quoted in the Form of Tender, that is USD 12,357,000.
2. On the issue of Taxes, the Board orders that they are payable subject to clarification from Kenya Revenue Authority.
3. Based on the finding on the irregularities in this tender, the Board directs that the Director General of the Public Procurement Oversight Authority (PPOA) carries out an investigation pursuant to the powers conferred by Section 102 of the Act and take appropriate action.

**Dated at Nairobi on this 11<sup>th</sup> day of December, 2012.**

  
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**CHAIRMAN  
PPARB**

  
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**SECRETARY  
PPARB**