

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 129 OF 2021, 132 OF 2021 AND 133 OF 2021**  
**(CONSOLIDATED)**

**BETWEEN**

**SHAILESH PATEL T/A**

**AFRICA INFRASTRUCTURE**

**DEVELOPMENT COMPANY ..... 1<sup>ST</sup> APPLICANT**

**AL GHURAIR PRINTING &**

**PUBLISHING LLC ..... 2<sup>ND</sup> APPLICANT**

**TALL SECURITY PRINT LIMITED ..... 3<sup>RD</sup> APPLICANT**

**AND**

**THE ACCOUNTING OFFICER,**

**INDEPENDENT ELECTORAL**

**AND BOUNDARIES COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**INDEPENDENT ELECTORAL**

**AND BOUNDARIES COMMISSION ..... 2<sup>ND</sup> RESPONDENT**

**INFORM LYKOS (HELLAS) S.A ..... 1<sup>ST</sup> INTERESTED PARTY**

**ELLAMS PRODUCTS LIMITED ..... 2<sup>ND</sup> INTERESTED PARTY**

**GO INSPIRE SOLUTIONS ..... 3<sup>RD</sup> INTERESTED PARTY**

**IN RESPECT OF TENDER NO: IEBC/OIT/002/21/2021/2022 FOR SUPPLY AND DELIVERY OF BALLOT PAPERS; REGISTER OF VOTERS; STATUTORY ELECTION RESULT DECLARATION FORMS TO BE USED AT THE POLLING STATION; ELECTION AND REFERENDUM RESULT DECLARATION FORMS TO BE USED AT THE CONSTITUENCY, COUNTY AND NATIONAL TALLYING CENTRE-A THREE-YEAR FRAMEWORK CONTRACT.**

**BOARD MEMBERS**

1. Ms. Faith Waigwa - Chairperson
2. Mr. Ambrose Ogeto - Member
3. Ms. Rahab Robi - Member
4. Ms. Phylis Chepkemboi - Member
5. Mr. Jackson Awele - Member

**IN ATTENDANCE**

- Mr. Philip Okumu - Acting Board Secretary
- Mr. Stanley Miheso - Secretariat

**BACKGROUND TO THE DECISION**

**The Tendering Process**

The Respondents invited sealed tenders for Tender No. IEBC/OIT/002/21/2021/2022 for Supply and delivery of ballot papers; register of voters; statutory election result declaration forms to be used at the polling station; election and referendum result declaration forms to be used at the constituency, county and national tallying centre-a three-year framework contract (hereinafter referred to as '**the subject**

**tender'**) from qualified and eligible tenderers by advertisement in the Daily Nation newspaper, the 2<sup>nd</sup> Respondent's website ([www.iebc.or.ke](http://www.iebc.or.ke)) and the Public Procurement Information Portal (PIIP) ([www.tenders.go.ke](http://www.tenders.go.ke)) on 14<sup>th</sup> July 2021 using open international tender method.

### **Tender Submission Deadline and Opening of Tenders**

The subject tender's submission deadline was initially set for 13<sup>th</sup> August, 2021. However, subsequently, the Respondents extended the tender submission deadline to 10<sup>th</sup> September, 2021 vide Addenda 3 dated 9<sup>th</sup> August 2021 and 4 dated 23<sup>rd</sup> August 2021.

According to the tender opening register and minutes, the 2<sup>nd</sup> Respondent's Tender Opening Committee opened the subject tender on 10<sup>th</sup> September, 2021 at 11.00 Am virtually through Microsoft teams and in the presence of tenderers' representatives who joined the tender opening session through a link that had earlier on been provided. The following twelve (12) firms/tenderers were noted as having submitted their tenders.

<b>BIDDER NO.</b>	<b>FIRM</b>	<b>ADDRESS</b>
1.	Go Inspire Solutions	147 Scudamore Road, Leicester, LE3 1UQ.
2.	UNIPRINT a Division of Insidedata (South) PTY Ltd	P.O BOX 74313 Rochdale Park 4091 22 Tottum Road

		Cornubia Industrial Business estate Ottawa South, 4339
3.	Aerovote Security Print and Electoral Supplies	Registered Address 28 Patrice Lumumba Road, 5 Oak Court, Airport residential Area, Accra, Ghana
4.	Masar Printing and Publishing LLC	P.O Box 485100, Dubai, UAE
5.	United Printing & Publishing LLC, UAE	P.O Box 39955 Abu Dhabi, UAE
6.	AL Ghurair Printing and Publishing LLC	P.O Box 5613, Dubai, UAE
7.	TALL Security Print Limited	Registered Office-Unit 2, Pembroke Court, Manor Park, Runcorn, WA7 ITJ, UK
8.	Inform Lykos (Hellas) S.A	5 <sup>TH</sup> KLM VARIS-KOROPIOU AVENUE 19400 KOROPI, GREECE
9.	Ellams Products Limited	P.O BOX 42788_00100 Nairobi, Kenya
10.	Africa Infrastructure Development company	P.O BOX 139-00606 Nairobi, Kenya

11.	Seshaasai Business forms PVT LTD	Mumbai India
12.	Kwanginsa Co. LTD	P.O Box 61-20 Wolrongasanan/Paju City

### **Evaluation of Tenders**

An Evaluation Committee appointed by the 2<sup>nd</sup> Respondent's Acting Secretary/CEO, vide memo dated 8<sup>th</sup> September 2021, comprised of the following members:

1. Silas Njeru	DICT	Chairperson
2. Gideon Balang	DVREO	Member
3. Abdidahir Maalim	DVREO	Member
4. Victoria Chege	DF	Member
5. Leonard Lewar	DICT	Member
6. Elizabeth Obegi	DSCM	Secretary

The tender document issued to tenderers by the Respondents (hereinafter referred to as the 'Tender Document') had four (4) stages of evaluation namely;

Stage 1 - Preliminary examination

Stage 2 - Technical Evaluation

Stage 3 - Qualification Evaluation

## Stage 4 - Financial Evaluation

### **Preliminary Evaluation**

At this stage, the Evaluation Committee subjected all the aforementioned 12 (twelve) tenders to preliminary examination by applying the criteria outlined in Sub-clause 2.1 Preliminary Examination of Clause 2.Evaluation of Tenders of Section III-Evaluation and Qualification Criteria at page 33 to 35 of the Tender Document which required compliance with mandatory requirements. At the end of this stage of evaluation, the following nine (9) tenderers' tenders were found non-responsive as follows:

#### **Bidder No. 1 (Go Inspire Solutions) did not: -**

- i. Submit all correctly filled, signed and stamped as appropriate, the Tendering Forms provided in the tender document in the format provided including support documents and sample for each item i.e. Form of Tender: Form1 and Declaration on Corruption and Fraudulent Practice.
- ii. Chronologically serialize all pages of the tender documents submitted.
- iii. Submit notarized/certified Copies of Certificate of incorporation, business registration or equivalent for foreign tenderers.
- iv. Submit notarized/certified Valid tax compliance certificate from Kenya Revenue Authority, or similar document for foreign tenderers.
- v. Submit notarized/certified Audited Accounts for the years 2018, 2019 and 2020. An Auditor's certificate indicating company's unqualified report must be attached.

- vi. Submit notarized/certified ISO 14298 Certificate or its equivalent for security printing from a recognized authority.

**Bidder No. 2** (UNIPRINT a Division of Insidedata (South) PTY Ltd) did not: -

- i. Submit notarized/certified Audited Accounts for the years 2018, 2019 and 2020. An Auditor's certificate indicating company's unqualified report must be attached.
- ii. Submit notarized/certified ISO 14298 Certificate or its equivalent for security printing from a recognized authority.

**Bidder No.3** (Aerovote Security Print and Electoral Supplies) did not:

- i. Submit all correctly filled, signed and stamped as appropriate, the Tendering Forms provided in the tender document in the format provided including support documents and sample for each item i.e. Form of Tender: Form1, Form 9:Tenderer's Eligibility- Confidential Business Questionnaire.
- ii. Fill the total bid price on the form of tender.
- iii. Submit duly filled Form 8A – Certificate of Independent Tender determination.
- iv. Provide consistent Financial reporting dates in the statement of comprehensive income, Cash flow statement and also statement of changes in equity for the financial year 2020.
- v. Submit a notarised/certified ISO 14298 Certificate or its equivalent for security printing from a recognised authority.

**Bidder No.4** (Masar Printing and Publishing LLC ) did not:

- i. Submit all correctly filled, signed and stamped as appropriate, the Tendering Forms provided in the tender document in the format provided including support documents and sample for each item i.e. Form of Tender: Form1, Form 8B: S D1 – Declaration that one is not Debarred Form 8C, Form 8D Form 8E, Form 9 and Form 5.
- ii. Submit Chronologically serialise all pages of the tender documents submitted.
- iii. Submit a notarised/certified Audited Accounts for the years 2018, 2019 and 2020. There was no opinion of an independent Auditor on the financial statements. The financial statements provided belonged to AL SAYEGH Media while the bidders was Masar Printing and Publishing LLC.
- iv. Submit Form 5: Local Content Plan form duty filled or a separate Proposal.
- v. Submit a Tender security amount of kshs.20Million after converting to the Kenyan currency.

**Bidder No. 7** (TALL Security Print Limited) did not:

- i. Submit all correctly filled, signed and stamped as appropriate, the Tendering Forms provided in the tender document in the format provided including support documents and sample for each item i.e. Form of Tender: Form1, Form 8E: Appendix on Fraud and Corruption.



- ii. Submit a notarized/certified ISO 14298 Certificate or its equivalent for security printing from a recognized authority.

**Bidder No. 9** (Ellams Products Limited) did not:

- i. Submit all correctly filled, signed and stamped as appropriate, the Tendering Forms provided in the tender document in the format provided including support documents and sample for each item i.e. Form 8A
- ii. Submit a notarized/certified ISO 14298 Certificate or its equivalent for security printing from a recognized authority

**Bidder No. 10** (Africa Infrastructure Development company) did not:

- i. Submit all correctly filled, signed and stamped as appropriate, the Tendering Forms provided in the tender document in the format provided including support documents and sample for each item.
- ii. Submit Chronologically serialize all pages of the tender documents submitted
- iii. Submit Notarized/certified Copies of Certificate of incorporation, business registration or equivalent for foreign tenderers.
- iv. Submit Notarize Power of Attorney.
- v. Submit Notarized/certified CR12 dated within one month from the date of submission of tenders or Notarized/certified Certificate of Beneficial Ownership issued by the Registrar of Companies, dated within the last one year.
- vi. Submit Notarized/certified Audited Accounts for the years 2018, 2019 and 2020.
- vii. Submit Dully fill Form of Tender: Form1.

- viii. Submit Dully fill Form 8B: SD1 - Declaration that one is not Debarred.
- ix. Submit Dully fill Form 8C: SD2-Declaration on Corruption and Fraudulent Practice.
- x. Submit Form 8C: SD2-Declaration on Corruption and Fraudulent Practice.
- xi. Submit Dully fill Form9: Tenderer's Eligibility- Confidential Business Questionnaire.
- xii. Provide Form 5: Local Content Plan form duly filled or a separate Proposal.
- xiii. Submit Dully Fill Tender Security shall be Kenya Shillings 20 million or equivalent in foreign currency valid for at least 210 days from the date of opening tenders, issued by a Bank recognized in Kenya.
- xiv. Submit Notarized/certified ISO 14298 Certificate or its equivalent for security printing from a recognized authority.
- xv. The bidder submitted a protest letter with copies of email correspondences

**Bidder 11** (Seshaasai Business forms PVT LTD) did not submit:

- i. All correctly filled, signed and stamped as appropriate, the Tendering Forms provided in the tender document in the format provided including support documents and sample for each item.
- ii. Chronologically serialize all pages of the tender documents.
- iii. Notarized/certified Copies of Certificate of incorporation, business registration or equivalent for foreign tenderers.

- iv. Power of Attorney.
- v. Notarised CR12 dated within one month from the date of submission of tenders or Notarised/Certified Certificate of Beneficial Ownership issued by the Registrar of Companies, dated within the last one year.
- vi. Notarised/certified Valid Tax compliance certificate from Kenya Revenue Authority, or similar document for foreign tenderers.
- vii. Notarised/certified Audited Accounts for the years 2018, 2019 and 2020. An Auditor's certificate indicating company's unqualified report was not attached.
- viii. Duly fill Form of Tender: Form1.
- ix. Duly Fill Form9: Tenderer's Eligibility- Confidential Business Questionnaire.
- x. Notarised/certified ISO 14298 Certificate or its equivalent for security printing from a recognised authority.
- xi. Form 5: Local Content Plan duly filled or a separate Proposal.
- xii. Notarised/certified ISO 14298 Certificate or its equivalent for security printing from a recognised authority.

**Bidder 12** (Kwanginsa Co. LTD) did not submit:

- i. All correctly filled, signed and stamped as appropriate, the Tendering Forms provided in the tender document in the format provided including support documents and sample for each item i.e. Form of tender, Form 8A, Form 9.
- ii. Chronologically serialize all pages of the tender documents submitted.

- iii. A notarised/certified Audited Accounts for the years 2018, 2019 and 2020. An Auditor's certificate indicating company's unqualified report was not attached.
- iv. Correct bid security. The bid security provided was for 120 days.
- v. A notarised/certified ISO 14298 Certificate or its equivalent for security printing from a recognised authority.
- vi. Form 5: Local Content Plan duly filled or a separate Proposal.
- vii. A Tender Security of Kenya Shillings 20 million or equivalent in foreign currency valid for at least 210 days from the date of opening tenders, issued by a Bank recognised in Kenya.
- viii. A notarised/certified ISO 14298 Certificate or its equivalent for security printing from a recognised authority.

The following three (3) tenderers' tenders including the 2<sup>nd</sup> Applicant's and the 1<sup>st</sup> Interested Party's tenders were found responsive at the preliminary examination stage, thus proceeded to the next stage of evaluation:

- i. Bidder 5 (United Printing & Publishing LLC, UAE);
- ii. Bidder 6 (AL Ghurair Printing and Publishing LLC) the 2<sup>nd</sup> Applicant herein ; and
- iii. Bidder 8 (Inform Lykos (Hellas) S.A) the 1<sup>st</sup> Interested Party herein.

## **Technical Evaluation**

At this stage, the Evaluation Committee subjected the aforementioned 3 tenders to technical evaluation by applying the criteria outlined in Sub-clause 2.2 Technical Evaluation Criteria of Clause 2. Evaluation of Tenders of Section III – Evaluation and Qualification Criteria at page 36 to 49 of the Tender Document to determine whether samples and literature submitted by the aforementioned 3 tenderers conform with the offered product and to the required technical specifications. All the aforementioned three tenderers' tenders were found responsive in this respect thus, qualified to proceed for evaluation at stage three (3) of evaluation i.e. Qualification Evaluation.

### **Qualification Evaluation**

At this stage, the Evaluation Committee subjected the aforementioned 3 tenders to qualification evaluation by applying the criteria outlined in Sub-clause 2.3 Qualification Evaluation Criteria of Clause 2. Evaluation of Tenders of Section III – Evaluation and Qualification Criteria at page 50 to 51 of the Tender Document by carrying out post-qualification of 3 Tenderers' tenders that passed the technical evaluation criteria, in accordance with the criteria specified in the Tender Document. All the aforementioned three Tenderers' tenders were evaluated as responsive at this stage and proceeded to stage 4 being Financial Evaluation.

### **Financial Evaluation**

According to the Evaluation report, the Evaluation Committee is reported to have carried out a further post-qualification evaluation of the aforementioned three (3) Tenderers' tenders at this stage to determine whether a Tenderer submitted a local content plan (**Form 5**) or a separate

proposal demonstrating that the bidder satisfies or meets the requirement, *inter alia*, of forty percent (40%) local content in accordance with provisions of section 155(5)(b) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act') and Regulation 144(1) of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as the 'Regulations 2020').

The Evaluation Committee computed the forty percent (40%) local content as per the local content plan submitted by each of the aforementioned three Tenderers. Resulting therefrom, Bidders 5 and 6 were found to be non-responsive at Financial Evaluation Criteria for the following reasons:

**Bidder No. 5** (United Printing & Publishing LLC, UAE):

- i. There were arithmetic errors in conversion from the dollar amount to the Kenya shilling in the form of tender and the price schedule.
- ii. Inconsistencies between the total price on the price schedule and the form of tender.
- iii. The Bidder did not meet the 40% local content plan.

**Bidder No. 6** (AL Ghurair Printing and Publishing LLC) the 2<sup>nd</sup> Applicant herein:

- i. The Bidder did not meet the 40% local content plan.

Bidder 8 (Inform Lykos (Hellas) S.A) the 1<sup>st</sup> Interested herein was accordingly found to be the only responsive Tenderer at the end of the financial evaluation stage.

### **Recommendation**

The Evaluation Committee accordingly recommended the 1<sup>st</sup> Interested Party herein, Inform Lykos (Hellas) S.A 5<sup>TH</sup> KLM VARIS-KOROPIOU AVENUE 19400 KOROPI, GREECE to be awarded the subject tender being the most responsive tenderer.

The Evaluation Committee further recommended for due diligence to be carried out before award of the subject tender and which due diligence the Evaluation Committee conducted by :-

1. Communicating with the responsive tenderer of the intention to carry out due diligence exercise;
2. Circularized one of the reference clients to confirm and obtain reference about the responsive tenderer; and
3. Logistical and travel arrangements.

The Evaluation Committee is said to have further carried out due diligence on both the primary and business continuity plants of the responsive tenderer and verified the physical and chemical properties of the paper to be used using data sheet provided by the tenderer.

### **Professional Opinion**

In a Professional Opinion signed on 13<sup>th</sup> October 2021, the 2<sup>nd</sup> Respondent's Director Supply Chain Management, Mr. Harley Mutisya, reviewed how the subject procurement process was undertaken including evaluation of tenders and concurred with the recommendations of the Evaluation Committee recommending the 1<sup>st</sup> Interested Party for award of the subject tender. The 2<sup>nd</sup> Respondent's Acting Secretary/ CEO , Mr. Marjan Hussein Marjan, approved the said Professional Opinion on the same day being the 13<sup>th</sup> day of October 2021.

### **Notification to Tenderers**

In letters dated 14<sup>th</sup> October 2021, the Respondents notified tenderers in the subject tender of the outcome of their respective tenders and of the decision to award the subject tender to the 1<sup>st</sup> Interested Party.

Aggrieved by the said decision the Applicants herein filed their respective requests for review seeking various orders as we shall shortly set out below.

### **PRELIMINARY ISSUES**

On 11<sup>th</sup> November 2021 when these matters came up for hearing, the Board with the consent of all parties present directed that subject to the determination of the preliminary objection in Application Number 129 of 2021, the Requests for Review Nos. 129 of 2021, 132 of 2021 and 133 of 2021 shall be consolidated and heard together in light of the fact that they all relate to the same subject tender and seek to challenge the decisions issued by the Respondents herein. In the event, all parties were on the



said 11<sup>th</sup> November, 2021 granted limited time to highlight their submissions in support of their respective positions as appropriate.

### **BOARD'S DECISION**

The Board has considered each party's case, the pleadings, statements, affidavits, bundle of documents, written submissions and authorities in support of the respective parties' positions, oral submissions of parties as represented by their respective counsel and determines the same in the following order;

### **REQUEST FOR REVIEW NO. 129/2021 (1<sup>st</sup> Applicant's Request for Review)**

This Request for Review was lodged by Shailesh Patel T/A Africa Infrastructure Development Company, the 1<sup>st</sup> Applicant herein, on 27<sup>th</sup> October, 2021 supported by ..... and written submissions dated .....through the firm of Sigano & Omollo Advocates seeking the following orders:

- a) The notification of award of the subject tender number IEBC/OIT/002/21/2021/2022 Supply and Delivery of Ballot Papers; Register of Voters; Statutory Election Result Declaration Forms to be used at the Polling Station; Election and Referendum Result Declaration Forms to be used at the Constituency, County and National Tallying Centre to M/s.***

***INFORM LYKOS (HELLAS) S.A be and is hereby annulled and set aside.***

- b) The notification of unsuccessful bid dated 14th October 2021 and addressed to the Applicant and any other bidders in the subject procurement proceedings in tender number IEBC/OIT/002/21/2021/2022 Supply and Delivery of Ballot Papers; Register of Voters; Statutory Election Result Declaration Forms to be used at the Polling Station; Election and Referendum Result Declaration Forms to be used at the Constituency, County and National Tallying Centre be annulled and set aside.***
- c) The procurement proceedings in tender number IEBC/OIT/002/21/2021/2022 Supply and Delivery of Ballot Papers; Register of Voters; Statutory Election Result Declaration Forms to be used at the Polling Station; Election and Referendum Result Declaration Forms to be used at the Constituency, County and National Tallying Centre be and are hereby terminated.***
- d) The Accounting Officer of the procuring entity be and is hereby directed to commence a new procurement process for Supply and Delivery of Ballot Papers; Register of Voters; Statutory Election Result Declaration Forms to be used at the Polling Station; Election and Referendum Result***

***Declaration Forms to be used at the Constituency, County and National Tallying Centre taking into account the findings of the Review Board herein.***

***e) Any other relief that the Board may deem fit and just to grant.***

***f) Costs of the Review.***

The Respondents have raised a preliminary objection challenging the locus standi of the 1<sup>st</sup> Applicant to institute the 1<sup>st</sup> Applicant's Request for Review and that the Board consequently lacks jurisdiction to entertain the 1<sup>st</sup> Applicant's Request for Review.

It is the law that whenever a jurisdictional challenge is raised, the same must be dealt with at the earliest opportune time before delving into the merits of the case otherwise where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing.

In **Isaak Aliaza v Samuel Kisiavuki [2021] eKLR**, the Court of Appeal held that ***a jurisdictional issue is a fundamental issue whether it is raised either by parties themselves or the Court suo moto, it has to be addressed first before delving into the interrogation of the merits of issues that may be in controversy in a matter.*** (emphasis ours)

That said, the Respondents aver that the 1<sup>st</sup> Applicant did not submit any document in its legal personality in law and neither did it return the completed Tender Document and as such lacks the competence to raise any issue concerning the tender document. They aver that what Africa Infrastructure Development Company submitted was a protest letter and not a tender document and therefore the Board lacks jurisdiction to entertain the 1<sup>st</sup> Applicant's Request for Review. The 1<sup>st</sup> Interested Party supports this position and adds that the breach complained of by the 1<sup>st</sup> Applicant occurred on the date of obtaining the tender document and in any event from 7<sup>th</sup> September 2021 when obtaining clarifications pertaining to the requirements of the 40% local content plan.

In reply, the 1<sup>st</sup> Applicant in its submissions avers that it was a candidate within the meaning of Section 2 of the Act read together with Section 167(1) of the Act as it downloaded the tender documents as instructed in the tender notice and that there were various communications between it and the 2<sup>nd</sup> Respondent on the subject matter.

The Board observes that Section 167(1) of the Act establishes the jurisdiction of this Board in the following terms;

***"Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek***

***administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.”***

From the foregoing, only two categories of parties have locus standi to file an application for review before the Board. A candidate or a tenderer. In a plethora of decisions, this Board has held that any person who demonstrates that it downloaded a tender document from the designated website qualifies as a candidate and accordingly has locus standi to file a request for review provided it does so within fourteen (14) days from the date of occurrence of the breaches complained of. Under section 2 of the Act, a tenderer is a person who submitted a tender pursuant to an invitation by a public entity.

In addition to the grounds raised by the Respondents and the 1<sup>st</sup> Interested Party in their preliminary objections, the Board notes from the tender opening register, there is no record of a person known as Shailesh Patel T/A Africa Infrastructure Development Company that submitted a tender or bid in response to the tender notice. The Board however notes that an entity by the name of Africa Infrastructure Development Company is recorded as having submitted 1 document which had no tender sum, was not serialized and had no essential information in response to the tender document. At the hearing of the consolidated applications, the clarification sought by the Board as to the nexus between Shailesh Patel and Africa Infrastructure Development Company was not clearly answered by the Applicant or at all and there was no demonstration that

the 1<sup>st</sup> Applicant obtained the Tender Document pursuant to an invitation by the 2<sup>nd</sup> Respondent. The Board has also reviewed the confidential documents submitted to it and has found no documents and/or information capable of establishing the legal personality of Africa Infrastructure Development Company as would shed some light on its relationship with the Applicant herein.

In the circumstances, the only plausible conclusion is that Shailesh Patel who is named as the Applicant herein T/A as Africa Infrastructure Development Company is a stranger to the procurement proceedings in the impugned tender and was accordingly neither a candidate nor a tenderer within the meaning of section 2 as read with section 167(1) of the Act. It follows therefore that he had no locus standi to file any application challenging the said tender and the Board is consequently divested of jurisdiction to entertain any issue raised in the 1<sup>st</sup> Applicant's Request for Review.

Inevitably therefore, the 1<sup>st</sup> Applicant's Request for Review must be struck out in its entirety for want of jurisdiction as we hereby do.

**REVIEW APPLICATION NO. 132 OF 2021 (2<sup>nd</sup> Applicant's Request for Review)**

The Request for Review was lodged by Al Ghurair Printing & Publishing LLC, the 2<sup>nd</sup> Applicant herein, on 28<sup>th</sup> October, 2021 through the firm of Orego & Odhiambo Advocates. The same is supported by the statement

of Lakshmanan Ganapathy dated 27<sup>th</sup> October, 2021 and written submissions dated 8<sup>th</sup> November, 2021 seeking the following orders

- a) ***THAT the Applicant's Request for Review be and is hereby allowed.***
  
- b) ***THAT the Respondents' decision to reject the Applicant's bid dated 25<sup>th</sup> October 2021 be and is hereby set aside.***
  
- c) ***THAT the decision to award the tender for the supply and delivery of ballot papers; register of voters; statutory election declaration forms to be used at the constituency, county and national tallying centre framework contract for a period of three (3) years, Tender No. IEBC/OIT/002/21/2021/2022 to M/S Inform Lykos (Hellas) S.A, be and is hereby set aside in its entirety.***
  
- d) ***THAT the Respondents be and are hereby to ordered to re-evaluate the Applicant's tender in strict compliance with the Evaluation Criteria in the bid document.***
  
- e) ***THAT the costs of this Request for Review be granted to the Applicant..***

The Respondents through the firm of Dr. Mutubwa Law filed a Response dated 1<sup>st</sup> November, 2021, a Replying Affidavit and Supplementary Affidavit sworn by the 1<sup>st</sup> Respondent Marjan Hussein Marjan, on 2<sup>nd</sup> November and 9<sup>th</sup> November, 2021 respectively and written submissions dated 8<sup>th</sup> November, 2021.

On 8<sup>th</sup> November, 2021, the 1<sup>st</sup> Interested Party, Inform Lykos (Hellas) S. A. through the firm of Okubasu, Munene & Kazungu Advocates, filed a response and written submissions both of even date opposing the Request for Review.

The 2<sup>nd</sup> Interested Party through the firm of Sigano & Omollo Advocates filed an Affidavit in response to the Request for review dated 8<sup>th</sup> November, 2021 sworn by its General Manager Kandadi Reddy in support of the Request for Review albeit on different grounds essentially in reference to the manner of evaluation of the 2<sup>nd</sup> Interested Party's tender.

The 2<sup>nd</sup> Applicant's Request for Review essentially raises only one (1) issue for determination to wit; that the 2<sup>nd</sup> Applicant's tender was not evaluated in accordance with the evaluation criteria set out in the Tender Document and the law and was accordingly unfair, discriminatory and unlawful.

The 2<sup>nd</sup> Applicant avers that the Respondents vide their notification letter dated 14<sup>th</sup> October, 2021 communicated its decision that the 2<sup>nd</sup> Applicant's tender was not successful on the ground that it did not meet



the Tender Document's requirement for 40% local content. The 2<sup>nd</sup> Applicant avers this was unlawful and irregular as its tender duly complied with the set requirement at FORM 5 in the Tender Document and that the same was duly evaluated at preliminary evaluation stage and duly passed as compliant. It further averred that the relevant part of the Tender Document which provided for the local content plan was contained at page 52 at paragraph 2.4(f) and Page 70 clause 2.1 titled FORM 5 of the Tender Document which provided for what constitutes a local content plan.

The 2<sup>nd</sup> Applicant avers that it duly complied with the Tender Document requirements on 40% local content and submitted the said form 5 duly filled with the requisite information. It avers that its local content plan works out to a total of 41% in compliance to the requirement of the Tender Document. It submits that the Respondents without any lawful cause purported, post facto, to re-compute its tender on the 40% local content plan to 11.2% in contravention of the express terms of the Tender Document.

The 2<sup>nd</sup> Applicant avers that further to the 1<sup>st</sup> Respondent's letter dated 14<sup>th</sup> October 2021 it made a debriefing request reiterating its compliance with the 40% local content requirements vide an email on 18<sup>th</sup> October, 2021 and sought to be debriefed on how the 1<sup>st</sup> Interested Party met the local content plan. It avers that the Respondents vide letter dated 21<sup>st</sup> October, 2021 reiterated the contents of their letter dated 14<sup>th</sup> October, 2021.

The 2<sup>nd</sup> Applicant asserts that the Respondents' decision purporting to exclude payment of taxes in the computation of the local content plan was without any lawful cause or excuse and flies in the face of its own communication to tenderers contained in the Clarification dated 23<sup>rd</sup> July 2021 that expressly includes payment of taxes in the computation of local taxes. It submits that if the Respondents had intended that taxes would not be part of the computation of the local content plan nothing would have been easier than to expressly state so in direct response to the question presented by tenderers as outlined in paragraph 7 of the Clarification under reference. It submits that any other interpretation as to the exclusion of taxes, as the Respondents now purport post facto, in the computation was either to intentionally mislead tenderers, including the 2<sup>nd</sup> Applicant, or is being applied at this stage to arbitrarily lock out the 2<sup>nd</sup> Applicant from award of the subject tender.

The 2<sup>nd</sup> Applicant asserts that in any event the Respondents failed to categorically clarify what would amount to a local content plan in contravention of Section 60 of the Act despite several entreaties by tenderers as shown in the Clarification documents.

Additionally, the 2<sup>nd</sup> Applicant avers that the Tender Document specifically prohibited joint ventures and in the circumstances, it is not feasible for an international tenderer, to comply with the requirement for 40% local content when taxes are excluded from computation.

In response the Respondents contend that the provision on local content is statutory, under Section 155 of the Act as augmented by Regulation 144 of Regulations 2020 and is a public policy provision meant to secure the participation and benefit of Kenyans in international contracts with public entities.

The Respondents contend that the afore-cited provisions are couched in mandatory terms and commands all Public Accounting Officers to comply with the 40 % local content requirement in every tender document as one of the mandatory preliminary evaluation criteria. This was done in the current case.

The Respondents contend that at least five clarifications were sought by tenderers on the interpretation and application of the local content criteria.

- i. Clarification 1, responded to on 23<sup>rd</sup> July 2021.
- ii. Clarification 2, responded to on 23<sup>rd</sup> July, 2021.
- iii. Clarification 3.
- iv. Clarification 4, responded to on 3<sup>rd</sup> August, 2021.
- v. Clarification 5, responded to on 4<sup>th</sup> August 2021.

The Respondents aver that it is clear from the foregoing that it complied with the Law with respect to the 40% local content and there was sufficient clarity supplied, as to the scope and extent required of a tenderer's local content plan.

Based on the clarifications dated 4<sup>th</sup> August 2021 (Item No. 5) of 23<sup>rd</sup> July 2021, the Respondents submit that they clarified that 40% is the minimum and is not tied to taxes. Further, Regulation 144(1) and (3) of Regulations 2020 explicitly articulate the requirements for 40% local content, which requirements did not include taxes.

The Respondents submit that notwithstanding the foregoing clarifications, the 2<sup>nd</sup> Applicant went ahead to conceive and submit a Local Content Plan with substantial taxes and levies components contrary to the clarifications given. This, it submits, was the 2<sup>nd</sup> Applicant's own choice for which it cannot blame the Respondents. On the basis of the foregoing principles, the Respondents contend that it examined and evaluated the Applicant's local content plan and arrived at the following conclusion:

<b>Item</b>	<b>Amount</b>	<b>Remarks</b>
Tender Sum in form of tender(A)	11,424.11	The local Contents should not include Taxes and other Statutory deductions
Total Local Content plan (B)	4,683.89	
Total Taxes (c)	3,403.89	
Actual Local Content (B-C)	1,280.08	
Percentage of Actual Local Content (B-C)/A*100	11.2%	

According to the Respondents, the 2<sup>nd</sup> Applicant proposed an 11.2% local content plan as against the 40% statutory minimum and that being a

mandatory statutory criterion, the 2<sup>nd</sup> Applicant's tender was found to be non-responsive on this account. The Respondents contend that contrary to the 2<sup>nd</sup> Applicant's assertion, it did not post facto re-compute its Local Content Plan but merely examined and evaluated the same so as to establish its compliance with the law and tender requirements. They submit that the noble policy objective of the mandatory Local Content Plan in procurement is to promote local enterprise and to ensure skills transfer and mentorship so as to build capacity for the future. Taxes paid directly to the state do not constitute skills or mentorship transfer or direct benefit for local enterprise.

On its part, the 1<sup>st</sup> Interested Party supports the Respondents' position on the 40% local content rule. It further submits that the object of local content plans as stipulated under sections 155, 157(9) of the Act and regulation 144 of Regulations 2020 is the promotion of local citizens and contractors and that the same is a mandatory preliminary evaluation criteria.

**REVIEW APPLICATION NO. 133 OF 2021 (the 3<sup>rd</sup> Applicant's Request for Review)**

This Application was lodged on 28<sup>th</sup> October, 2021 by Tall Security Print Limited, the 3<sup>rd</sup> Applicant herein, through the firm of CM Thuku & Company Advocates. The Request is accompanied by the Applicant's Supporting Affidavit and Supplementary Affidavit both sworn by Cas

Amato, its Export Manager on 28<sup>th</sup> October, 2021 and 8<sup>th</sup> November, 2021 respectively seeking the following orders:

- i. Pending hearing and full determination of the instant Request for Review an interim stay and suspension be issued by this Board in respect to the entire TENDER NO. IEBC/OIT/002/21/2021/2022 dated 14<sup>th</sup> July, 2021 for the supply and delivery of ballot papers; register of voters; Statutory Election Result Declaration Forms to Be Used at The Polling Station; Election and Referendum Result Declaration Forms to Be Used at The Constituency, County and National Tallying Centre, and all attendant procurement processes, procedures and proceedings thereto (Spent)***
- ii. The Honorable Board cancel and/or annul the entire TENDER NO. IEBC/OIT/002/21/2021/2022 dated 14<sup>th</sup> July, 2021 for the supply and delivery of ballot papers; register of voters; Statutory Election Result Declaration Forms to Be Used at The Polling Station; Election and Referendum Result Declaration Forms to Be Used at The Constituency, County and National Tallying Centre, and all attendant procurement processes, procedures and proceedings thereto;***
- iii. The Honorable Board compels the Respondent to withdraw the entire TENDER NO.***

***IEBC/OIT/002/21/2021/2022 dated 14<sup>th</sup> July, 2021 for the supply and delivery of ballot papers; register of voters; Statutory Election Result Declaration Forms to Be Used at The Polling Station; Election and Referendum Result Declaration Forms to Be Used at The Constituency, County and National Tallying Centre, and all attendant procurement processes, procedures and proceedings thereto;***

- iv. The Honorable Board compels the Respondent to re-advertise afresh the TENDER NO. IEBC/OIT/002/21/2021/2022 dated 14<sup>th</sup> July, 2021 for the supply and delivery of ballot papers; register of voters; Statutory Election Result Declaration Forms to Be Used at The Polling Station; Election and Referendum Result Declaration Forms to Be Used at The Constituency, County and National Tallying Centre;***
- v. Costs of and incidental to these proceedings be awarded to the Applicant;***
- vi. Interest(s) on (iv) above at the Honorable Board's rates;***
- vii. Any other order that the Board may deem fit and appropriate to issue.***

In response to the 3<sup>rd</sup> Applicant's Request for Review, the 1<sup>st</sup> Respondent through the firm of Dr. Mutubwa Law filed a Response dated 1<sup>st</sup> November, 2021, a Replying Affidavit sworn by Harley Mutisya, the Commission's Director Supply Chain Management dated 2<sup>nd</sup> November, 2021 and written submissions and a List and Bundle of Authorities both dated 1<sup>st</sup> November, 2021.

On 8<sup>th</sup> November, 2021, the 1<sup>st</sup> Interested Party, Inform Lykos (Hellas) S. A. through the firm of Okubasu, Munene & Kazungu Advocates, filed its Submissions and a Response to the 3<sup>rd</sup> Applicant's Request for Review both of even date.

The 3<sup>rd</sup> Applicant's Request for Review raises a total of 39 grounds which the Board summarizes as follows;

- i) **Failure to provide ISO 14298 certification or its equivalent and to fill forms 1 and 8E of the Tender document.**

The 3<sup>rd</sup> Applicant avers that vide a Notification dated 14<sup>th</sup> October, 2021 the Respondent informed it that its bid had been disqualified for reasons that;

- i. The Applicant did not submit correctly filled, signed, and stamped Tendering Forms provided in the tender document and in the format*



*provided including supporting documents and samples for each item i.e. Form of Tender: Form 1, Form 8E: Appendix on Fraud and Corruption.*

*ii. The Applicant did not submit a notarized/certified ISO 14298 Certificate for security printing from a recognized authority.*

The 3<sup>rd</sup> Applicant on its part avers and submits that it submitted a completed Form of Tender Form 1 but, in an oversight, omitted to complete the "amount in words" section. It avers that the said section is primarily intended to ensure that there is no confusion in the tender price. To fortify this argument, it avers that during the tender opening meeting, the prices of all the tenderers were called out and nobody including the Respondent asked for clarification. In essence, it argues, there was no doubt as to what its tender price was. The 3<sup>rd</sup> Applicant further contends that the price is also given in the Price Table of the Tender Document as well as the Form of Tender and, therefore, no doubt or confusion as to its tender price could have reasonably and/or justifiably arisen in the mind of the Respondent. It accordingly contends that rejecting its tender on this basis was extremely harsh and unjustified on the part of Respondents.

In respect of Form 8E, the 3<sup>rd</sup> Applicant contends that the Form merely enumerated a set of instructions or a description of what is required and was not a form which needed to be filled in. It avers there was no section at the bottom of the appendix where a tenderer was to complete or key-in his/her/its details including a signature or date section. The 3<sup>rd</sup> Applicant further submits that failure to fill Form 8E cannot and could not

be a lawful and justifiable ground for rejecting its tender, as the defect was originally conceived in the Tender Document itself. It submits that in a bid to comply and abide by the spirit and tenor of Form 8E, it submitted paragraphs relating to Fraud and Corruption, Code of Ethics and Collusive Practices, as stated in the Form of Tender and further provided a filled Form 8C: Form SD2 Self-Declaration that the Person/Tenderer will Not Engage in any Corrupt or Fraudulent Practice which declaration(s) covered and/or cured the defect above stated in respect to the requirements described in the Appendix Form 8E.

On the alleged failure to submit a notarized certified copy of International Organization for Standardization ISO 14298 certificate, the 3<sup>rd</sup> Applicant contends that Addendum Number 4 to the Tender Document dated 23<sup>rd</sup> August, 2021 allowed tenderers to submit an equivalent of ISO 14298 from a recognized authority and therefore as it did not have this particular accreditation, it submitted a notarized certified copy of ISO 27001 & Standard 55 which were equivalent accreditations relating to security printing. The 3<sup>rd</sup> Applicant accordingly submits that failure to supply and/or submit an ISO 14298 certificate should not and could not have been a lawful and/or justifiable ground for rejecting it's tender.

In reply, the Respondents aver that it was a mandatory requirement in the Tender Document that all tenderers must provide notarized copies of the International Organization for Standardization (ISO) ISO 14298 Certificate for security printing or its equivalent. Being a mandatory preliminary evaluation requirement, failure to provide this documentation would lead to automatic disqualification of a tenderer, and that an

equivalent would have been a security documentation certification by a body equivalent to ISO.

It further contends that the ISO 14298 certificate required was one relating to security documents printing and not environmental, information or management systems. The Respondent further submits that the 3<sup>rd</sup> Applicant expressly admits and acknowledges that it did not provide the required ISO 14298 certification or its equivalent, since it did not possess one.

As regards the incomplete tender Form 1 and 8E, the Respondents and the 1<sup>st</sup> Interested Party submit that these were mandatory documents whose failure to provide would lead to automatic disqualification of the candidate and could not be cured in the manner proposed by the 3<sup>rd</sup> Applicant. They assert that strict compliance with tender requirements is obligatory, and any material deviations from the form of tender and its requirements have been held by this tribunal, on many occasions, as being fatal to a tenderer's tender. They have urged that the failure to comply with mandatory tender requirement is not excusable otherwise the very essence of compliance is lost, particularly where such requirements are mandatory.

ii) **Conformity of Local content plan with the Applicable laws**

The 3<sup>rd</sup> Applicant states that the Respondent's evaluation criteria in the Tender Document was marred with discretionary, irregular and,

otherwise, unlawful preference margins. The 3<sup>rd</sup> Applicant contends that Form 5: Local Content Plan in the Tender Document provided Taxes which was a materially defect relative to the Form approved by the Public Procurement and Asset Disposal Act, 2015 Laws of Kenya and Rules and Regulations made thereunder.

It further argues that whereas it was a standard requirement in the Tender Document, Form 5 that the Applicant had to meet a Forty per centum (40%) local content plan against the Total Tender Sum, the Respondent, in a skewed manner, restricted potential foreign/international tenderers from engaging in any joint venture and/or liaison of any nature with local security printers thereby technically disqualifying them at the very commencement of the procurement process even though the nature of the Tender Advert is an open International Tender.

In Reply, the 1<sup>st</sup> Respondent submits that there were at least five clarifications sought and provided by the 2<sup>nd</sup> Respondent which put the question to rest as follows;

- i. Clarification 1, responded to on 23<sup>rd</sup> July 2021 was with reference to the mandatory requirement of 40% local content and as stipulated under clause 2.1 page 33, point 12. That condition serves to look out International security printers based abroad to participate in the tender.***

The 2<sup>nd</sup> Respondent responded that “The requirement for a Local Content Plan is in Compliance with Section 155(5)(b) of the PPADA, 2015 and Regulation 144 of the Public Procurement and Asset Disposal Regulation, 2020 (PPADR, 2020).”

- ii. Clarification 2, responded to on 23<sup>rd</sup> July 2021. A Bidder requested clarity on customs duties, VAT, levies, and any other taxes applicable to each of the products that are being procured: and whether the customs duty is 25% and VAT 16%, these two values already meet the 40% local content.***

The 2<sup>nd</sup> Respondent responded that “For tax obligations, please visit <https://www.kra.go.ke/>. and make any clarification as appropriate.

The format provided for the local content in guidance to avoid multiple interpretation. 40% is the minimum and is not necessarily tied to taxes.”

- iii. Clarification Number 3. A Bidder sought to know if FORM 5 was relevant.***

The 2<sup>nd</sup> Respondent responded that “The requirement for a Local Content Plan is in Compliance with Section 155(5)(b) of the PPADA, 2015 and Regulation 144 of the Public Procurement and Asset Disposal Regulations, 2020 (PPADR, 2020).”

***iv. Clarification Number 4. A Bidder sought more clarity on the issue of 40% local Content.***

The Respondent responded on 3<sup>rd</sup> August, 2021 and stated that:  
"Bidders are advised to read Regulations from the PPADR, 2020

Provisions of Regulations: 144 (1) of the Public Procurement and accounting officers shall, and in accordance with section 155(5) (b) of the Act, ensure that a procuring entity's tender documents contain a mandatory requirement as preliminary evaluation criteria specifying that the successful bidder shall.

(a) transfer technology, skills and knowledge through training, mentoring and participation of Kenyan citizens: and

(b) Reserve at least seventy-five percent (75%) employment opportunities for Kenya citizens for works, consultancy services and non-consultancy services, of which not less than twenty percent (20% shall be reserved for Kenyan professionals at management level.

(2) In complying with the requirements of paragraph (1), an accounting officer shall ensure the procuring entity's tender document contains a mandatory requirement specifying that all tenderers include in their tenders a local content plan for the transfer of technology.

(3) The local content plan referred to under paragraph (1) shall include -

- a) Positions reserved for employment of local citizens;
- b) Capacity building and competence development programme for local citizen;
- c) Timeframes within which to provide employment opportunities;
- d) Demonstrable efforts for accelerated capacity building of Kenya citizens;
- e) Succession planning and management;
- f) A plan demonstrating linkages with local industries which ensures at least forty percent (40% inputs are sourced for locally manufactured articles, material and supplies partially mined or produced in Kenya, or where applicable have been assembled in Kenya. This matter is therefore conclusively clarified.”

***v. Clarification 5. A Bidder made reference to previous emails and reference to relevant section of the PPADA, 2015 in connection with the tender requirement of 40% local content;***

The 2<sup>nd</sup> Respondent responded on 4<sup>th</sup> August 2021 that: “Refer to tender Document and clarification of 23<sup>rd</sup> July, 2021 response for paragraph 8; second line. This format was provided to ensure there

is uniformity of interpretation by bidders; thus details in the form are not exhaustive/conclusive. Bidders are welcome to provide details of what shall constitute their 40% local content.

The condition however remains mandatory. The Procuring Entity has no power to waive what is provided for in law as a mandatory requirement.”

The Respondents urged that there is no form prescribed under the Act, or Regulations 2020, for a Local Content Plan and that none has been produced by the 3<sup>rd</sup> Applicant. The Respondents submits that they merely provided a proposed form 5 which tenderers would amend to fit their respective proposals, as long as the plan proposed by a tenderer accorded with the law.

The 1<sup>st</sup> Interested Party submitted that the 3<sup>rd</sup> Applicant’s contentions in this regard ought to have been raised within 14 days from the date of issuance of the Tender Document and/or the clarifications to the requirement of local content plan. It urged therefore that the Board lacks jurisdiction to entertain any issue concerning this complaint.

As regards the restriction on joint ventures, the Respondents and 1<sup>st</sup> Interested Party submitted that the 2<sup>nd</sup> Respondent as the procuring entity, has the unfettered discretion to determine its needs and criteria for evaluating tenders and that this the 2<sup>nd</sup> Respondent did by clearly stipulating that joint ventures would not be allowed. The Respondents justified the said restriction on the sensitivity of ballot papers, registers



and results transmission form which the Respondents submit are security documents which cannot be sourced from several sources, without the risk of duplication and possibility of election materials not being accounted for. In any event, the Respondents submitted, the fact that joint ventures were not allowed did not limit the tenderer's ability to comply with local content plan.

iii) **NGithinji's email of 16<sup>th</sup> October 2021**

The Applicant has cited an email received from a Mr. Newton Githinji vide the address [ngithinji2000@gmail.com](mailto:ngithinji2000@gmail.com) claiming to blow the lid on irregularities in the manner of appointment of the evaluation committee for the subject tender and casting aspersions on their expertise in light of the nature of the subject tender under review. The 3<sup>rd</sup> Applicant contends inter-alia that from the allegations made in the email, the evaluation committee lacked the relevant expertise in standardization and testing envisaged under the Tender Document and in compliance with the ISO certifications provided in the Tender Document.

In Response, the 1<sup>st</sup> Respondent contends that neither the said email nor its contents have been produced by the Applicant as to warrant inquiry or informed comment. It urges that the same be disregarded for the following reasons:

- i. The email, if it exists constitutes extraneous material to the procurement process. It is not one of the documents to be considered and/or evaluated by the procuring

entity or examined by this Board so as to determine the procedural propriety of the procurement process.

- ii. The Act and Regulations 2020 provide for the manner and forum for any aggrieved party to seek redress in a tender process. Any process that is not based on the law cannot be entertained.
- iii. The authenticity of the email, or factual veracity of its contents cannot be confirmed or tested in the absence of an Affidavit by its authority and cannot form the basis of this Board's inquiry. This Board is not the appropriate forum for investigating allegations based on possibly fabricated material. The 3<sup>rd</sup> Applicant cannot purport to rely on a document which it has not authored, and whose contents he cannot vouch for. To accept that email on its contents would reduce judicial proceedings into a farce and offend the cardinal rules of justice.
- iv. The 3<sup>rd</sup> Applicant, as a responsible person has a duty to report any crime and allow the investigative agencies of state to inquire into the same. No complaint, arrest, prosecution or even inquiry has been commenced on the matters the subject of the allegations in the email. The same remain mere rumors, conjecture and at best

defamatory; and cannot be relied upon by any tribunal in informing its decisions.

The Respondents submitted that the burden of proof of an allegation rests with the person making the allegation - in this case the 3<sup>rd</sup> Applicant. It averred that the 3<sup>rd</sup> Applicant did not cite the technical capacity required, against the statutory requirements and the qualifications and experience of the *Ad hoc* evaluation committee members;

On its part, the 1<sup>st</sup> Interested Party in addition to the above grounds submitted that there is nothing under section 46 of the Act that requires specific expertise for members of an evaluation committee. It accordingly urged us to dismiss this ground of appeal.

We note at this juncture for the record that the 3<sup>rd</sup> Interested party filed a Notice of appointment of Advocates through the firm of Omwoyo Momanyi, Gichuki & Company Advocates dated 9<sup>th</sup> November, 2021. As at the date of hearing however, they had not filed any papers and the same only reached the Board well after the hearings had concluded. In order to ensure equality of arms, fairness and to avoid a situation where adverse allegations are made against a party without affording the affected party an opportunity to be heard on the same and further taking into consideration the limited timelines within which the Board must conclude its proceedings, the Board has determined that the 3<sup>rd</sup> Interested Party's pleadings submitted after the hearing date shall be excluded from these proceedings.

iv) **Mode of Notification of the decision of award**

On this point, the 3<sup>rd</sup> Applicant contends that the Respondent's choice of communicating the notification of the decision of award to wit; via post, was mischievously calculated to delay any appeals against the said decision. The Respondents did not respond to these allegations.

Upon considering the parties pleadings, written and oral submissions and the confidential documents submitted to the Board pursuant to section 67(3) of the Act, the following five (5) issues emerge for determination:

**(i) Whether Tall Security Print Limited's tender was fairly disqualified**

Two sub-issues arise for determination under this issue as follows;

**a. Whether the Applicant provided an ISO 14298 certification or its equivalent.**

**b. Whether the Applicant duly filled the required tender Form 1 and 8E**

On the first sub-issue, parties are in agreement that Addendum Number 4 to the Tender Document dated 23<sup>rd</sup> August, 2021 allowed tenderers to submit ISO 14298 or its equivalent from a recognized authority. The 3<sup>rd</sup> Applicant contends that it could not submit a copy of ISO 14298 certification, as it did not have this particular accreditation though it submitted a notarized certified copy of ISO 27001 & Standard 55 which

were equivalent accreditations relating to security printing. The 3<sup>rd</sup> Applicant accordingly submits that failure to supply and/or submit ISO 14298 certificate should not and could not have established any lawful and/or justifiable ground for rejecting it's tender.

The Respondents oppose this contention and have submitted that it was a mandatory requirement in the Tender Document that all tenderers must provide notarized copies of the International Organization for Standardization (ISO) 14298 Certificate for security printing or its equivalent. Being a mandatory preliminary evaluation requirement, failure to provide this documentation would lead to automatic disqualification of a tenderer, and that an equivalent would have been a security documentation certification by a body equivalent to the ISO and not environmental, information or management systems.

The Board has considered the parties rival submissions and narrows down the issue for determination under this sub issue as whether the ISO 27001 & Standard 55 supplied by the 3<sup>rd</sup> Applicant was an equivalent of the ISO 14298 certification. Under section 107 of the Evidence Act, the burden of proving that the two certifications are similar was the 3<sup>rd</sup> Applicant's.

The 3<sup>rd</sup> Applicant referred the Board to the websites of ISO.org and NQA.com in support of its argument that the ISO certification 14298 and 27001 are similar. Upon perusal of the two websites i.e. of the International Organization for Standardization (ISO) and NQA, the Board noted the following descriptions of the said certifications;

***ISO 14298:2013 specifies requirements for a security printing management system for security printers.***

***ISO 14298:2013 specifies a minimum set of security printing management system requirements. Organizations ensure that customer security requirements are met as appropriate provided these do not conflict with the requirements of ISO 14298:2013."***

ISO 27001 on the other hand is described as below;

***ISO 27001 sets out the requirements of information security management systems. It is part of the ISO 27000 family of standards relating to information and cyber security and offers a comprehensive set of controls, based on best practice in information security.***

ISO 55: Packaging and distribution of goods

On a balance of probability, it would appear that from the 3<sup>rd</sup> Applicant's own evidence, the two standardizations are not similar as ISO 14298 specifies requirements for a security printing management system for security printers whereas ISO 27001 sets out the requirements of information security management systems and ISO 55 deals with packaging and distribution of goods. The Board notes that the Tender Document was explicit that the ISO certification for security printing be

provided. The Board accordingly finds that ISO 27001 and 55 did not comply with the requirement to provide ISO 14298 certification or its equivalent from a Recognized Authority.

With respect to the second sub issue concerning the Form of Tender 1 and 8E, the 3<sup>rd</sup> Applicant asserts that it submitted a completed Tender Form 1 but admits that in an oversight, omitted to complete the "amount in words". It however urges that the price was given in the Price Table of the Tender Document as well as the Form of Tender and, therefore, no doubt or confusion whatsoever as to the Applicant's tender price could have reasonably and/or justifiably arisen in the mind of the Respondents. It accordingly contends that rejecting its tender on account of the same was in the circumstances extremely harsh and unjustified on the part of Respondents.

With respect to Form 8E, the 3<sup>rd</sup> Applicant contends that the said form merely enumerated a set of instructions or a description of what was required and that it was not a form which needed to be filled in. To fortify this argument it urged that there was no section at the bottom of the appendix where a tenderer was to complete or key-in his/her/its details including a signature or date section. The 3<sup>rd</sup> Applicant further submitted that failure to fill Form 8E cannot and could not be a lawful and justifiable ground for rejecting its tender, as the defect was originally conceived in the Tender Document itself.

The Respondent and the 1<sup>st</sup> Interested Party submitted that these were mandatory documents whose failure to provide would lead to automatic

disqualification of the candidate and could not be cured in the manner proposed by the Applicant.

The Board has perused the Tender Document and notes that the requirement for form 1 and 8E was contained in the preliminary evaluation stage at clause 2.1 in which the Tender Document further provides that tenders that do not pass the Preliminary Examination will be considered non-responsive and will not be considered further. The following Clauses are instructive in this regard.

Under 1.4 of the Invitation to Tender of the Tender Document, it is provided as follows:-

***"1.4 A complete set of tender documents in PDF may be obtained by interested candidates by downloading free of charge from IEBC Website at [www.iebc.or.ke](http://www.iebc.or.ke) or [www.tenders.go.ke](http://www.tenders.go.ke). Tenderers who download the tender documents through the website shall register at the Supply Chain Offices or email their contacts through [procurement@iebc.or.ke](mailto:procurement@iebc.or.ke) soon after download but before the closing date; to allow records and communication for any tender clarifications and addenda. The Tenderers shall use the tender document format to prepare and submit their bids using the Tendering Forms and support documents."***



Clause 11.1 of the Instructions to Tenderers of the Tender Document provides as follows:-

***"11.1 The Form of Tender and Price Schedules be prepared using the relevant forms furnished in Section IV, Tendering Forms. The forms must be completed without any alterations to the text. All blank spaces shall be filled in with the information requested. The Tenderer shall chronologically serialise pages of all tender documents submitted.***

The Form of Tender template provided in the Tender Document appears as follows:-

***"FORM 1: FORM OF TENDER***

***Instructions to tenderers***

***i) The Tenderer must prepare this Form of Tender on stationery with its letterhead clearly showing the Tenderer's complete name and business address.***

***ii) All italicized text is to help Tenderer in preparing this form.***

***iii) Tenderer must complete and sign CERTIFICATE OF INDEPENDENT TENDER DETERMINATION and the SELF DECLARATION OF THE TENDERER attached to this Form of Tender***

.....

**The Total Price is: [insert the total price of the Tender in words and figures, indicating the various amounts and the respective currencies];**

The Board further notes that in the Form 8E template provided in the Tender Document the following words appear:-

*"FORM 8E: APPENDIX 1- FRAUD AND CORRUPTION  
(Appendix 1 shall not be modified)*

.....

From the foregoing, the Board observes that the requirement that tenderers *insert the total price of their tender in words and figures, indicating the various amounts and the respective currencies* was a mandatory requirement that all tenderers were expected to comply with. As with all mandatory requirements, failure to comply with the same was fatal to the 3<sup>rd</sup> Applicant's tender. The Board notes that the requirement for form 1 and 8E was contained in the preliminary evaluation stage at clause 2.1 in which the tender document provides that tenders that do not pass the Preliminary Examination will be considered non-responsive and will not be considered further. The Board is further guided by section 80(2) of the Act that mandates evaluations to be carried out in compliance with the Tender Documents. The Board agrees with the Respondents and the 1<sup>st</sup> Interested Party therefore that the requirement to *insert the total price of the Tender in words and figures* was mandatory and failure

to comply therewith fatal. This ground of the Application is accordingly dismissed.

We are however in agreement with the 3<sup>rd</sup> Applicant that Form 8E had no provision/place for modification/customization nor filling in by a tenderer. Using the same standard as above, we concur that failure to fill Form 8E cannot and could not be a lawful and justifiable ground for rejecting the 3<sup>rd</sup> Applicant's tender, as doing so would have contravened the express proscriptions of the Tender Document itself. This ground of the Application succeeds.

**(ii) Whether Form 5 (Local content plan) in the Tender Document was clear and conformed to the form provided for in the Act.**

Three sub-issues arise for determination under this issue as follows;

- a. Whether the Form 5 (Local Content Plan) in the tender document conformed to the form provided in the Act;**
- b. Whether the restriction on joint ventures was reasonable**
- c. Whether the Tender document and the subsequent clarifications in respect of the local content plan were clear in accordance with section 70(6)(e)(vi) of the Act.**

On the first and second sub issues, the 3<sup>rd</sup> Applicant contends that the Respondents' evaluation criteria was marred with discretionary, irregular and, otherwise, unlawful preference margins. It takes issue with the fact that Form 5: Local Content Plan in the Tender Document provides for Taxes which is materially defective from the Form approved by the Act and Rules and Regulations made thereunder. It further argues that as a standard requirement, the fact that the Tender Document, Form 5: Local Content Plan provided and required that tenderers had to allocate Forty per centum (40%) of their Total Tender Sums to local content yet restricted potential foreign/international tenderers from engaging in any joint venture and/or liaison of any nature with local security printers technically disqualified them at the very commencement of the procurement process.

In Response, the 1<sup>st</sup> Respondent submitted that there is no form prescribed under the Act or the Regulations made thereunder, for a Local Content Plan and that the Applicant has produced none. Additionally, it contended that the restriction on joint ventures was justified and well within the discretion of the Respondent and not open to question. It further submitted that there were at least five clarifications sought and provided by the 2<sup>nd</sup> Respondent which put these questions to rest. The 1<sup>st</sup> Interested Party on its part submitted that the 3<sup>rd</sup> Applicant's contentions on these sub issues ought to have been raised within 14 days from the date of issuance of the Tender Document and/or the clarifications to the requirement of local content plans. It urged therefore that the Board lacks jurisdiction to entertain these allegations as the said issues were time barred.

Upon a careful consideration of the parties' pleadings, written submissions and oral highlights on this point, the Board is inclined to agree with the Respondents and the 1<sup>st</sup> Interested Party that the issues raised by the 3<sup>rd</sup> Applicant herein amount to a challenge on the propriety of the Tender Document which must be deemed to have come to the attention of the 3<sup>rd</sup> Applicant on the date it obtained the Tender Document or at the very latest on the date of the last clarification on 4<sup>th</sup> August, 2021. In the circumstances, any challenge to the form, fairness and/or practicability of the provisions of the Tender Document ought to have been filed on or before the 18<sup>th</sup> of August 2021 being the 14<sup>th</sup> day from 4<sup>th</sup> August, 2021 in which 4<sup>th</sup> August is an excluded day.

As we have in this decision already determined, under Section 167(1) of the Act ***a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.***

See **Isaak Aliaza v Samuel Kisiavuki [Supra]**.

Having found therefore that the issues raised by the 3<sup>rd</sup> Applicant with respect to the first and second sub-issue of the second issue are time barred, this Board lacks jurisdiction to entertain them any further and

must down its tools and halt any further interrogation of the said issues forthwith.

The same reasoning applies to the third sub issue of the second issue in which the 2<sup>nd</sup> Applicant alleges that clarifications in respect of the local content plan were not clear in accordance with section 70(6)(e)(vi) of the Act. As adverted to above, the last clarification on local content plans was issued on 4<sup>th</sup> August, 2021. The Applicant ought to have raised this issue and/or concern over the provisions of the Tender Document by or before 18<sup>th</sup> August, 2021 and is by dint of section 167(1) of the Act now time barred. We are in the event constrained to similarly dismiss the said third sub-issue of the second issue.

**(iii) Whether the Email of Newton Githinji ngithinji2000@gmail.com raises justiciable issues capable of determination by this Board**

On this issue, the 3<sup>rd</sup> Applicant relied on an email received from the address [ngithinji2000@gmail.com](mailto:ngithinji2000@gmail.com) citing irregularities in the manner of appointment of the evaluation committee and thereby casting aspersions on the expertise of the members of the said committee to evaluate the tender under review. The 1<sup>st</sup> Respondent contends that neither the email nor its contents have been produced by the Applicant as to warrant inquiry or informed comment. The Respondents further submitted that the burden of proof of an allegation rest with the person making the allegation - in this case the 3<sup>rd</sup> Applicant. It averred that the Applicant did not cite the technical capacity required, against the statutory requirements and

the qualifications and experience of the *Ad hoc* evaluation committee members;

On its part, the 1<sup>st</sup> Interested Party in addition to the above grounds submitted that there is nothing under section 46 of the Act that requires specific expertise for members of an evaluation committee. It accordingly urged us to dismiss this ground of appeal.

The Board observes that whereas the 3<sup>rd</sup> Applicant impleads the email from Newton Githinji vide [ngithinji2000@gmail.com](mailto:ngithinji2000@gmail.com) in support of the allegations in the manner of appointment and qualifications of the evaluation committee, we have scoured through all three affidavits filed in support of its Request for review and note that the said email was not produced in any of the said affidavits. It is trite law under section 107(1) of the Evidence Act that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. As rightly submitted by the Respondents, the 3<sup>rd</sup> Applicant seeks to impugn the credibility and/or expertise of the evaluation committee appointed by the Respondents on the basis of an email whose maker or contents it has not produced and which neither the Respondents nor the 1<sup>st</sup> Interested Party has had the opportunity to review and substantively respond to. Under section 35 (1) of the Evidence Act, any statement made by a person in a document and tending to establish a fact in issue shall, on production of the original document, be admissible as evidence of that fact on the following conditions;

- (a) if the maker of the statement either—
  - (i) had personal knowledge of the matters dealt with by the statement; or
  - (ii) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters; and
- (b) if the maker of the statement is called as a witness in the proceedings: Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or cannot be found, or is incapable of giving evidence, or if his attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable.

In this case the Board observes that the email under review meets none of the above conditions to the extent that its maker is not a witness before us and neither is there any indication as to the capacity in which he makes the allegations attributed to him regarding the Respondents' evaluation committee. In the circumstances, the allegations in the said email are no more than hearsay and inadmissible as evidence before the Board. It will



serve no purpose delving into its contents and we accordingly proceed to dismiss this issue as lacking in merit.

**(iv) Whether the mode of communicating the notifications of the decision of award was lawful.**

The 3<sup>rd</sup> Applicant contends that the Respondent's choice of communicating the notification of the decision of award to wit; via post, was mischievously calculated to delay any appeals against the said decision.

Under Section 87(2) of the Act and regulation 82 of the Regulations 2020, the 1<sup>st</sup> Respondent as the Accounting officer was required to issue the notification to the successful tenderer in writing simultaneously with the notification to the unsuccessful tenderer. The said provisions do not however specify the manner in which notifications are to be sent to tenderers; whether by email or post. The Board observes nevertheless that in Form 1 of the Tender Document, a format for Notification of Intention to Award was provided. It provides in part that that notifications shall be sent to the Tenderer's Authorized Representative named in the Tender Information Form. Amongst the details provided in the said format include the Address, telephone number, Email Address. No indication is however provided as to which of these modes of communication was to be adopted by the Respondents; whether all or any of them.

It is nevertheless important to highlight the fact that Article 35(3), as read with Article 47(1) of the Constitution of Kenya 2010, enjoins all state organs to publish and publicise any important information affecting the nation in a timely and expeditious manner that enables the public to participate meaningfully in the process and any person likely to be adversely affected by the decision or administrative action, to take such action as they deem necessary or appropriate to protect or seek the enforcement of their rights. As regards the 2<sup>nd</sup> Respondent, Section 27(1) of the Independent Elections and Boundaries Commission Act states that

***" The Commission shall publish and publicise all important information within its mandate affecting the nation."***

The aforesaid provisions are to also be construed together with Section 5 of the Fair Administrative Action Act which states that :

***" (1) In any case where any proposed administrative action is likely to materially and adversely affect the legal rights or interests of a group of persons or the general public, an administrator shall—***

***(a) issue a public notice of the proposed administrative action inviting public views in that regard;***

***(b) consider all views submitted in relation to the matter before taking the administrative action;***

***(c) consider all relevant and materials facts; and***

***(d) where the administrator proceeds to take the administrative action proposed in the notice—***

- (i) give reasons for the decision of administrative action as taken;***
- (ii) issue a public notice specifying the internal mechanism available to the persons directly or indirectly affected by his or her action to appeal; and***
- (iii) specify the manner and period within which such appeal shall be lodged.***
- (2) Nothing in this section shall limit the power of any person to—***
- (a) challenge any administrative action or decision in accordance with the procedure set out under the Commission on Administrative Justice Act, 2011 (No. 23 of 2011) or any successor to the Commission on Administrative Justice under section 55 of the Commission on Administrative Justice Act;***
- (b) apply for review of an administrative action or decision by a court of competent jurisdiction in exercise of his or her right under the Constitution or any written law; or***
- (c) institute such legal proceedings for such remedies as may be available under any written law.”***

The aforesaid provisions of statute have, in the context of public procurement of goods and services, been considered by the Court of Appeal in **Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance(NASA) Kenya & 6 others [2017] eKLR** where the court stated as follows:

***" 164. Our analysis of the emerging jurisprudence from the Supreme Court and other superior courts as well as the reading of the express provisions of Section 3 of the Public Procurement and Asset Disposal Act, 2015 as read with Articles 10 (2) (b) and 227 of the Constitution lead us to find that as a general principle (subject to limited exceptions) public participation is a requirement in all procurement by a public entity. The jurisprudence also reveals that allegation of lack of public participation must be considered in the peculiar circumstances of each case. The mode, degree, scope and extent of public participation is to be determined on a case by case basis.***

***165. What is critical is a reasonable notice and reasonable opportunity for public participation. In determining what is reasonable notice, a realistic time frame for public participation should be given. In addition, the purposes and level of public participation should be indicated. Reasonableness is also to be determined from the nature and importance of legislation or decision to be made, and the intensity of the impact of the legislation or decision on the public. The length of consultation during public participation should be given and the issues for consultation. Mechanisms to enable the widest reach to members of public should be put in place; and if the matter is urgent the urgency should be explained."***

Bearing in mind the significance of these procurement proceedings to the national interest as submitted by learned counsel Mr. Wekesa, the Board

is of the considered opinion that the Respondents were expected to adopt a mode of communication that was reasonably expected to notify not only the tenderers but also the public at large of the intention to award the subject tender in good time. Such modes of communication would include the 2<sup>nd</sup> Respondent's web portal as contemplated by Section 138(1) of the Public Procurement and Asset Disposal Act, 2015 which states that

***" The accounting officer of a procuring entity shall publish and publicise all contract awards on their notice boards at conspicuous places, and website if available within a period as prescribed."***

In the current context however, the Board observes that the 3<sup>rd</sup> Applicant filed its Request for review well within the 14 day period from the date of notification of award and has fully participated in these proceedings as it would ordinarily be entitled to do. It has not demonstrated the prejudice if any that it suffered because of the Respondent's preferred method of notification by post. We therefore find this issue to be without merit and hereby dismiss it.

**(v) Whether the Respondents' decision to disqualify and/or reject the 2<sup>nd</sup> Applicant's tender was made in compliance with the Tender Document and the law**

The procedure for evaluation of tenders is elaborately set out under the Act in the following terms;

Under section 80(2) of the Act;

***"The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the provisions of this Act and statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered."***

Under Regulation 74(1)(h) of Regulations 2020;

***"Pursuant to section 80 of the Act and upon opening of tenders, the evaluation committee shall first conduct a preliminary evaluation to determine whether –***

***...all required documents and information have been submitted"***

Under Regulation 75(1) of Regulations 2020;

***"A procuring entity shall reject all tenders, which are not in conformity to the requirements of section 79 of the Act and regulation 74 of these Regulations."***

Section 79 of the Act provides;

***"(1) A tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents.***

***(2) A responsive tender shall not be affected by—***

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

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

***(3) A deviation described in subsection (2)(a) shall—***

***(a) be quantified to the extent possible; and***

***(b) be taken into account in the evaluation and comparison of tenders.***

***At Paragraph 2.1 of the Tender Document titled Preliminary examination of tenders”***

At the financial evaluation stage, regulation 77 of Regulations 2020 sets out the financial evaluation criteria as follows;

***“(1) Upon completion of the technical evaluation under regulation 76 of these Regulations, the evaluation committee shall conduct a financial evaluation and comparison to determine the evaluated price of each tender.***

***(2) The evaluated price for each bid shall be determined by—***

***(a) taking the bid price in the tender form;***

***(b) taking into account any minor deviation from the requirements accepted by a procuring entity under section 79(2)***

***(a) of the Act;***

***(c) where applicable, converting all tenders to the same currency, using the Central Bank of Kenya exchange rate prevailing at the tender opening date;***

***(d) applying any margin of preference indicated in the tender document.***

***(3) Tenders shall be ranked according to their evaluated price and the successful tender shall be in accordance with the provisions of section 86 of the Act.”***

As against the above provisions, the Tender Document under review herein provided as follows with respect to compliance with local content plans;

**Clause 2.1 Preliminary examination of Tenders**

***“The Procuring Entity will start by examining all tenders to ensure they meet in all respects the eligibility criteria and other mandatory requirements in the ITT, and that the tender is complete in all aspects in meeting the requirements provided for in the preliminary evaluation criteria outlined below. Tenders that do not pass the Preliminary Examination will be considered non-responsive and will not be considered further in the evaluation.”***



At paragraph 12 of the said preliminary criteria was the requirement for compliance with attaining 40% local content plan by submitting a duly filled Form 5. It was a term of the tender document that ;

***"Tenders that do not pass the Preliminary Examination will be considered non- responsive and will not be considered further."***

At Financial Evaluation, the Tender document provided as follows;

#### **2.4. Financial Evaluation Criteria**

***"The bids that pass the qualification evaluation criteria shall be subjected to the Financial Evaluation Criteria as provided in the ITT Section E Evaluation and Comparison of Tenders, as summarized below:***

***"...***

***f) The Tenderer meets the 40% local content plan, otherwise shall be disqualified at the financial evaluation stage and not considered further in award.***

***g) The bids that shall then be ranked from the lowest to the highest evaluated total price based on the indicative minimum quantities for framework contract provided for tendering purposes only.***

***h) The Tenderer with the lowest evaluated total price based***

***on the indicative quantities shall be selected.”***

**2.5. Award Criteria**

***a. "The award of the Framework Contract shall be made to the bidder with the lowest evaluated total price based on the indicative minimum quantities.***

***...”***

According to the Evaluation Report submitted to the Board under cover of confidential documents and further corroborated by the Respondents’ response to the 2<sup>nd</sup> Applicant’s Request for Review, the Respondents carried out financial evaluation of tenders submitted to it as follows;

**2.4 FINANCIAL EVALUATION CRITERIA**

***At the financial evaluation the committee carried out the post-qualification of the three (3) bidders that passed the Qualification evaluation criteria, in accordance with the criteria specified in the tender document.***

.....

***Observations:***

- 1. The Committee noted that for Bidder 5 (United Printing & Publishing LLC, UAE) there was a discrepancy between total price on the form of tender and the total price on the price schedule after conversion.***
  
- 2. The tender document required bidders to submit a local content plan (Form 5) or a separate proposal demonstrating that the bidder satisfies or meets the requirement for the forty percent (40 %) local content in accordance with provisions section 155(5)(b) of the PPAD Act, 2016 and Section (sic) 144(1) of the PPAD regulations, 2020.***
  
- 3. The Commission issued a clarification on 3<sup>rd</sup> August 2021 that advised bidders to read PPAD Regulations 2020 on the requirements for the 40% local content.***

***In line with the above, the evaluation committee computed the forty percent (40%) local content as per the local content plan submitted by each bidder.***

.....

#### ***2.4.2 NON – RESPONSIVE BIDDERS***

***Bidders 5 and 6 were non-responsive at Financial Evaluation Criteria.***

***The following are reasons for non-responsiveness;***

***Bidder No.5 (United Printing & Publishing LLC, UAE)***

- i. There were arithmetic errors in conversion from the dollar amount to the Kenya shilling in the form of Tender and the price schedule.***
- ii. Inconsistencies between the total price on the price schedule and the form of tender.***
- iii. The Bidder did not meet the 40% local content plan***

***Bidder No.6 (the 2<sup>nd</sup> Applicant herein)***

- i. The Bidder did not meet the 40% local content plan***

It was on the foregoing basis that the Respondents made the decision to award the subject tender to the 1<sup>st</sup> Interested Party herein. Counsel for the Respondents submitted that the provision on local content is anchored in statute under section 155 of the Act and Regulation 144 of Regulations 2020 and that it is a public policy provision meant to secure the participation and benefit of Kenyans in international contracts with public entities. He submitted that the said provisions are couched in mandatory terms and commands all public accounting officers to comply with the 40 % local content requirement in every Tender Document as one of the mandatory preliminary evaluation criteria (Emphasis by Dr. Willy Mutubwa for the Respondents) and that this was done in the current case.

The Respondents further submitted that at least five clarifications were sought by tenderers on the interpretation and application of the local content criteria as follows;

- i. Clarification 1, responded to on 23<sup>rd</sup> July 2021 was with reference to the mandatory requirement of 40% local content and as stipulated under clause 2.1 page 33, point 12. A bidder sought clarity about provision of the Public Procurement and Asset Disposal Act, 2015 condition serves to look out International security printers based abroad to participate in the tender.***

The Procuring Entity responded that "The requirement for a Local Content Plan is in Compliance with Section 155(5)(b) of the PPADA, 2015 and Regulation 144 of the Public Procurement and Asset Disposal Regulation, 2020 (PPADR, 2020)."

- ii. Clarification 2, responded to on 23<sup>rd</sup> July 2021. A Bidder requested clarity on customs duties, VAT, levies, and any other taxes applicable to each of the products that are being procured: and whether the customs duty if 25% and VAT 16%, these two values already meet the 40% local content.***

The Procuring Entity Responded that "For tax obligations,

please visit <https://www.kra.go.ke/>. and make any clarification as appropriate.

The format provided for the local content in guidance to avoid multiple interpretation. 40% is the minimum and is not necessarily tied to taxes.”

***iii. Clarification Number 3. A Bidder sought to know if FORM 5 was relevant.***

The Procuring Entity responded that “{T}he requirement for a Local Content Plan is in Compliance with Section 155(5)(b) of the PPADA, 2015 and Regulation 144 of the Public Procurement and Asset Disposal Regulations, 2020 (PPADR, 2020).”

***iv. Clarification Number 4. A Bidder sought more clarity on the issue of 40% local Content.***

The Procuring Entity Responded on 3<sup>rd</sup> August, 2021 and stated that: “Bidders are advised to read Regulations from the PPADR, 2020

Provisions of Regulations: 144 (1) of the Public Procurement and accounting officers shall, and in accordance with section 155(5) (b) of the Act, ensure that a procuring entity’s tender documents contain a mandatory

requirement as preliminary evaluation criteria specifying that the successful bidder shall.

(a) transfer technology, skills and knowledge through training, mentoring and participation of Kenyan citizens:  
and

(b) Reserve at least seventy-five percent (75%) employment opportunities for Kenya citizens for works, consultancy services and non-consultancy services, of which not less than twenty percent (20%) shall be reserved for Kenyan professionals at management level.

(2) In complying with the requirements of paragraph (1), an accounting officer shall ensure the procuring entity's tender document contains a mandatory requirement specifying that all tenderers include in their tenders a local content plan for the transfer of technology.

(3) The local content plan referred to under paragraph (1) shall include -

(a) Positions reserved for employment of local citizens;

(b) Capacity building and competence development programme for local citizen;

- (c) Timeframes within which to provide employment opportunities;
- (d) Demonstrable efforts for accelerated capacity building of Kenya citizens;
- (e) Succession planning and management;
- (f) A plan demonstrating linkage with local industries which ensures at least forty percent (40% inputs are sourced for locally manufactured articles, material and supplies partially mined or produced in Kenya, or where applicable have been assembled in Kenya. This matter is therefore conclusively clarified."

***v. Clarification 5. Responded to on 4<sup>th</sup> August 2021. A Bidder made reference to previous emails and reference to relevant section of the PPADA, 2015 in connection with the tender requirement of 40% local content;***

"The Procurement Entity responded that: "Refer to tender Document and clarification of 23<sup>rd</sup> July, 2021 response for paragraph 8; second line. This format was provided to ensure there is uniformity of interpretation by bidders; thus details in the form are not exhaustive/conclusive. Bidders are welcome to provide details of what shall constitute their



40% local content.

The condition however remains mandatory. The Procuring Entity has no power to waive what is provided for in law as a mandatory requirement.” (Emphasis ours)

Counsel for the 2<sup>nd</sup> Applicant however contends that the evaluation of tenders for compliance with the requirement for a local content plan ought to have been done in strict compliance with the provisions of the Tender Document including the five (5) clarifications issued pursuant to requests by tenderers which inter-alia provided that a tenderer’s local content plan conforms to Form 5 or a separate proposal. It submitted that if that were the case then it would be clear that it fully complied with the same. It specifically submits that the Respondents’ decision to exclude taxes from the computation provided by the 2<sup>nd</sup> Applicant was an afterthought specifically tailored to exclude the 2<sup>nd</sup> Applicant’s tender and was done in contravention of the provisions of the Tender Document. It submitted that in none of the clarifications did the Respondents exclude taxes from Form 5. The 2<sup>nd</sup> Applicant contended that clarification No. 2 to the effect that *“the format provided for the local content is guidance to avoid multiple interpretation. 40% is the minimum and is not necessarily tied to taxes”* did not exclude taxes and that if it was the Respondents’ intention to do so, nothing would have been easier than for them to expressly say so at that point.

Additionally, counsel for the 2<sup>nd</sup> Applicant submitted that evaluation of local content plans ought to have been carried out at the preliminary

evaluation stage and was indeed carried out at the said stage. He urged that there is no way the Applicant could have progressed to the 4<sup>th</sup> Evaluation stage (financial evaluation) without complying with the 40% local content plan. Mr. Fred Orego, counsel for the 2<sup>nd</sup> Applicant submitted that before progressing to technical evaluation the Respondents had to first satisfy themselves that clause 2.1 on preliminary evaluation had been complied with. He submitted that the 2<sup>nd</sup> Applicant's tender was evaluated as having duly complied with the said requirement at the said stage hence the decision to progress its tender for evaluation at the technical and financial evaluation stages. He accordingly submitted that the decision to conduct a post qualification evaluation on the 2<sup>nd</sup> Applicant's local content plan at the financial evaluation stage was similarly an afterthought.

In response, the Respondents contend that the evaluation of tenders at the preliminary evaluation stage was merely intended to confirm that the form had been duly filled and submitted. They submit that in disqualifying the 2<sup>nd</sup> Applicant's tender, they referred to the clarification of 3<sup>rd</sup> August 2021 where tenderers sought clarification on the 40% local content. In its response, the 2<sup>nd</sup> Respondent had advised tenderers to read regulation 144(1) of Regulations 2020. Counsel for the Respondents, Dr. Mutubwa, submitted that based on the clarifications dated 4<sup>th</sup> August 2021 (Item No. 5); and 23<sup>rd</sup> July 2021 (Item No. 8) which offered clarity on whether custom duties, VAT, Levies and any other taxes applicable to each of the products that were being procured would constitute the 40% local content, the 2<sup>nd</sup> Respondent clarified that 40% is the minimum and is not tied to taxes. Further, Regulation 144(1) and (3) of the Regulations 2020 explicitly articulate the requirements for 40% local content, which

requirements did not include taxes. The Respondents thus submit that the 2<sup>nd</sup> Applicant was the author of its own misfortune in including taxes in its computation of its local content plan.

From the foregoing rival submissions and positions, the Board observes two sub-issues as arising for determination to wit;

**a) At what stage was evaluation of the local content plan to be carried out; and**

**b) What was the local content plan to comprise of?**

On the first sub-issue, the Board observes that a holistic reading of sections 79 and 80(2), of the Act and regulations 74, 75 and 77 of Regulations 2020 as set out above yields the inescapable conclusion that evaluation of tenders must always be done in strict conformity with Tender Documents and the applicable laws and regulations. Strict compliance with the provisions of the Tender Document and the law serves the critical purpose of ensuring certainty, fairness and transparency in the evaluation of tenders in accordance with the principles of public procurement under Article 227(1) of the Constitution and section 3(1) of the Act.

That said, the Board observes that in the Tender Document it was a preliminary evaluation criterion that tenderers not only present their local content plans but that the same meet the 40% threshold. It was a further term of the preliminary evaluation criteria that any tender that does not

meet any preliminary evaluation criterion would not proceed to technical evaluation. Strictly construed therefore the Board observes that in order to progress past stage 2 of preliminary evaluation, a tenderer needed to demonstrate compliance with all preliminary evaluation requirements in form and substance. The Board is not convinced by the Respondents' argument that all a tenderer needed to do at preliminary evaluation stage in order to progress to stage 3 of evaluation was to merely submit a local content plan for the following three reasons.

First, under regulation 74(1)(h) of the Regulations 2020, a procuring entity is required to satisfy itself inter-alia that a tenderer has provided all documents and information required of it at preliminary evaluation stage. A cursory look at paragraph 12 of clause 2.1 of the tender document shows that amongst the documents and information required at the said stage for this particular tender was such documents and information as to satisfy the criteria of "**Compliance with attaining 40% local content plan.**" The only logical and indeed lawful conclusion in the circumstances would be that the Respondents passed the 2<sup>nd</sup> Applicant's tender for progression to the next stage because it was satisfied that the same had met the criterion in paragraph 12, column 1 of clause 2.1 of the Tender Document in both form and substance. Considering the foregoing provisions of the law as read with column 1 of the tender document, a mere perusal of the form to ascertain that it was duly filled was incapable of ascertaining compliance with the requirement set out in column 1 of criterion 12. It is the Board's considered view that any tender with less than 40% of a local content plan say 30% or 10% ought not to have progressed to the next evaluation stage. The necessary conclusion in the

circumstances is that the Applicant progressed to technical evaluation because it had satisfied the criteria set out in clause 2.1 of the Tender document including paragraph 12 thereof.

Secondly, as submitted by the Respondents, compliance with 40% local content plan by foreign tenderers is a statutory edict couched in mandatory inexcusable terms. In this regard, a reading of section 155 of the Act together with regulation 144 of Regulations 2020 evinces the intention that the same be mandatorily carried out at preliminary evaluation stage. In affirming this position the Applicant's five (5) clarifications were consistent and clear that the requirement for 40% local content plan in the Tender Document was anchored on the provisions of section 155(5)(b) of the Act as read with regulation 144(1) and (2) of Regulations 2020 which require in mandatory terms that the said plans be evaluated at the preliminary evaluation stage. The Respondents cannot be heard to assert the strict applicability of the foregoing provisions on the one hand yet insist that evaluation of local content plans was to be carried out at another stage other than at preliminary evaluation stage.

Thirdly, a careful reading of regulation 77 of Regulations 2020 further demonstrates that financial evaluation of bids is circumscribed and limited to the determination of the evaluated price of each tender.

Under regulation 77(2), *the evaluated price for each bid shall be determined by—*

**(a) taking the bid price in the tender form;**

- (b) taking into account any minor deviation from the requirements accepted by a procuring entity under section 79(2) (a) of the Act;**
- (c) where applicable, converting all tenders to the same currency, using the Central Bank of Kenya exchange rate prevailing at the tender opening date;**
- (d) applying any margin of preference indicated in the tender document.**

Under sub regulation (3) once evaluated, tenders shall be ranked according to their evaluated price and the successful tender shall be in accordance with the provisions of section 86 of the Act.

The long and short of the foregoing is that the argument that financial evaluation of tenders was to include anything more than mere determination of the evaluated price of each tender finds no basis in the applicable law.

In this regard, the 1<sup>st</sup> Interested Party's submission that the Respondents were entitled to carry out local content evaluation at financial evaluation stage pursuant to regulation 77(2)(d) of Regulations 2020 was with respect a grave misapprehension of the said provision. A reading of sections 89(f), 155 and 157 of the Act together with regulation 144 of Regulation 2020 will show that whereas both seek to serve the same object of promoting local and citizen contractors, preference margins are applicable at prescribed rates to tenderers submitted by local and citizen

contractors in order to make them more competitive relative to foreign tenderers whereas local content plans are an obligation imposed on foreign tenderers to encourage transfer of technology and employment skills to the local population. In the present tender, it is not in doubt that there was no local or citizen contractor/tenderer at the financial evaluation stage and therefore the application of preference margins did not arise.

On the second sub issue, the Board observes that it was a requirement of the Tender Document that tenderers submit their local content plans in accordance with form 5 at page 70 and annex 17 of the Tender Document or in a separate proposal. Both the 2<sup>nd</sup> Applicant and the 1<sup>st</sup> Interested Party submitted their proposals vide form 5. A cursory look at the said form shows the information that tenderers were expected to provide and these included taxes at row 2 of the said form. Both the 1<sup>st</sup> Interested Party and the 2<sup>nd</sup> Applicant computed local taxes charged on the supplies they were tendering for together with the employees, shippers, clearing and forwarding agents, warehousing and other local suppliers that they would engage if they were to emerge the successful tenderers. Based on their own computations, both the 2<sup>nd</sup> Applicant and the 1<sup>st</sup> Interested Party urged that they met the local content plan threshold of 40%. After excluding taxes however, the 2<sup>nd</sup> Applicant was deemed non-responsive by the Respondents. It is this exclusion of taxes from computation of local content plans that the 2<sup>nd</sup> Applicant is aggrieved by.

As already noted, in issuing the Tender Document, addenda and all five (5) clarifications issued by the Respondents specifically concerning the

local content plan, at no point did Form 5 change in format or substance. On all occasions, the Respondents retained taxes in the said form in a rather permissive manner. We have particularly considered all clarifications issued in the matter and note that in all of them the issue of taxes in computation of local content plans featured prominently and at no point did the Respondents evince any intention to exclude them from consideration. The Respondent's clarification No. 3 of 23<sup>rd</sup> July 2021 to the effect that 40% is the minimum and is *not necessarily* tied to taxes was a further permissive stance that the Respondents adopted regarding taxes in the computation of local content plans. In this regard, the 2<sup>nd</sup> Respondents' submission that it clarified that 40% is the minimum and is not tied to the taxes was with respect misleading. The clarification was that "40% is the minimum and is not necessarily tied to taxes."

Dr. Mutubwa's submission that the taxes were retained in the said form to allow room for consideration of indirect taxes such as income tax as opposed to *other* taxes is not borne out by the said form 5 or clarifications issued thereon. At best, that submission suggests that throughout the clarifications period the Respondents had a clear idea of which taxes were relevant and irrelevant in the computation of local content plans but opted to leave it open to a myriad of interpretations. To apply the said ambiguity to the benefit of the Respondents would be to countenance arbitrariness and opaqueness in the evaluation of tenders contrary to section 79 and 80(2) of the Act. Section 80(2) of the Act is explicitly directory, that **"evaluation and comparison shall be done using the procedures and criteria set out in the tender documents..."**



We accordingly find and hold that the Applicant was disqualified from financial criteria unfairly and/or based on a criterion that was not set out in the Respondents' tender document.

The Board observes from the Evaluation Reports signed by all members of the Evaluation Committee on 28<sup>th</sup> September 2021, the Evaluation Committee recommended for due diligence to be carried out before award of the tender. In the minutes of tender evaluation of the subject tender that started on 16<sup>th</sup> September 2021, due diligence was conducted on the most responsive tender by the Evaluation Committee but no due diligence report was availed by the Respondents on the same. On this basis, the Board wishes to speak to the importance of a due diligence exercise in a procurement process.

Due diligence, is a post-qualification exercise whose purpose and procedure is outlined in section 83 of the Act as follows:

### ***83. Post-qualification***

***(1) An evaluation committee may, after tender evaluation, but prior to the award of the tender, conduct due diligence and present the report in writing to confirm and verify the qualifications of the tenderer who submitted the lowest evaluated responsive tender to be awarded the contract in accordance with this Act.***

***(2) The conduct of due diligence under subsection (1) may include obtaining confidential references from persons with whom the tenderer has had prior engagement.***

***(3) To acknowledge that the report is a true reflection of the proceedings held, each member who was part of the due diligence by the evaluation committee shall—***

***(a) initial each page of the report; and***

***(b) append his or her signature as well as their full name and designation.***

Due diligence should be conducted by an Evaluation Committee after tender evaluation but prior to award of the tender to confirm and verify the qualifications of the tenderer determined by a procuring entity to have submitted the lowest evaluated responsive tender.

Prior to commencing the due diligence exercise, the Evaluation Committee must first conclude evaluation of tenders at the Preliminary, Technical and Financial Evaluation Stages and recommend the lowest evaluated responsive tenderer for award of the tender. At this stage, due diligence has not been conducted yet, hence the date appearing at the end of the Evaluation Report should be a true reflection of when evaluation at the Preliminary, Technical and Financial stages were concluded.

Further, section 83 (2) of the Act suggests one of the parameters of due diligence that an evaluation committee adopts when undertaking a due diligence exercise is obtaining confidential references from persons with

whom the tenderer has had prior engagement. Pursuant to section 64 (1) of the Act, a procuring entity must request for confidential references in writing.

After concluding the exercise, a due diligence report (which is separate from an Evaluation Report) must be prepared outlining how due diligence was conducted together with the findings of the process. The due diligence report is signed only by members of the Evaluation Committee who took part in the due diligence exercise, and they must include their designation. Further, the report must be initialed on each page by the members of the Evaluation Committee who took part in the due diligence exercise.

Assuming the lowest evaluated responsive tenderer is disqualified after the first due diligence, this fact must be noted in the Due Diligence Report with reasons. In view of the negative responses received on lowest evaluated responsive tenderer, the Evaluation Committee then recommends award to the next lowest evaluated responsive tenderer. Thereafter, a similar due diligence process is conducted on such tenderer. This procedure is applied until the successful tenderer for award of the tender is determined.

Bearing in mind the importance of the subject tender and procurement process and the national interest the subject tender carries, it is important before award of the subject tender, a due diligence exercise must be conducted strictly in accordance with the provisions of section 83 of the Act.

## **FINAL ORDERS**

Pursuant to the powers granted to the Board under section 173 of the Act, the Board makes the following final orders in the consolidated Requests for Review;

**1. The 1<sup>st</sup> Respondent's Letter of Award dated 14<sup>th</sup> October 2021 in Tender No.IEBC/OIT/002/21/2021/2022 for Supply and Delivery of Ballot Papers; Register of Voters; Statutory Election Result Declaration Forms to be used at the Constituency, County and National Tallying center on a Framework Contract for a period of three (3) years issued to the 1<sup>st</sup> Interested Party be and is hereby nullified and set aside.**

**2. The 1<sup>st</sup> Respondent's Notification of intention to Award transmitted on 14<sup>th</sup> October 2021 for Supply and Delivery of Ballot Papers; Register of Voters; Statutory Election Result Declaration Forms to be used at the Constituency, County and National Tallying center on a Framework Contract for a period of three (3) years issued to the 2<sup>nd</sup> Applicant and all other unsuccessful tenderers be and are hereby nullified and set aside.**

**3. The 1<sup>st</sup> Respondent is hereby ordered to direct the Evaluation Committee to re-admit the 2<sup>nd</sup> Applicant's tender at the Financial Evaluation stage and conduct a re-evaluation of the 2<sup>nd</sup>**

**Applicant's tender together with all tenders that made it to the Financial Evaluation stage, at the Financial Evaluation stage in accordance with the provisions of the Tender Document, the Regulations 2020, the Act and the Constitution taking into account the Board's findings in this consolidated Requests for Review.**

**4. Further to order number 3 above, the Respondents are hereby ordered to proceed with the procurement process to its logical conclusion.**

**5. Given that the procurement process is not complete, each party will bear its own costs in the Request for Review.**

**Dated at Nairobi this 17<sup>th</sup> day of November 2021.**

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**PPARB CHAIRPERSON**

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**PPARB BOARD SECRETARY**

**Delivered via virtual platform on the 17<sup>th</sup> day of November 2021  
in the presence of :**

**1. Mr. Justus Omollo for the 1<sup>st</sup> Applicant and 2<sup>nd</sup> Interested Party;**

2. Mr. Fred Orego for the 2<sup>nd</sup> Applicant;
3. Mr. Thuku for the 3<sup>rd</sup> Applicant;
4. Dr. Wilfred Mutubwa and Mr. Wesonga for the 1<sup>st</sup> and 2<sup>nd</sup> Respondent;
5. Dr. Duncan Okubasu for the 1<sup>st</sup> Interested Party; and
6. Mr. Ogeji holding brief for Mr. Nyaberi for the 3<sup>rd</sup> Interested Party.