

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 107/2021 OF 11TH AUGUST 2021

BETWEEN

RISK AFRICA INNOVATIS LIMITED APPLICANT

AND

THE ACCOUNTING OFFICER,

INDEPENDENT ELECTORAL & BOUNDARIES

COMMISSION RESPONDENT

SHAILESH PATEL T/A AFRICA

INFRASTRUCTURE DEVELOPMENT

COMPANY INTERESTED PARTY

**REQUEST FOR REVIEW AGAINST THE ACCOUNTING OFFICER,
INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION IN
TENDER NO: IEBC/OIT/001/21/2020/2021 FOR THE SUPPLY,
DELIVERY, INSTALLATION, TESTING, COMMISSIONING,
SUPPORT AND MAINTENANCE OF THE KENYA INTEGRATED
ELECTIONS MANAGEMENT SYSTEM (KIEMS); AND HARDWARE
EQUIPMENT AND ACCESSORIES**

BOARD MEMBERS

- | | |
|---------------------------|---------------|
| 1. Ms. Faith Waigwa | - Chairperson |
| 2. Mr. Jackson Awele | - Member |
| 3. Ms. Phyllis Chepkemboi | - Member |
| 4. Mr. Ambrose Ogeto | - Member |
| 5. Ms. Rahab Chacha | - Member |

IN ATTENDANCE

Mr. Philip Okumu

-The Acting Board Secretary

BACKGROUND TO THE DECISION

The Tendering Process

The Independent Electoral and Boundaries Commission (hereinafter referred to as "the Procuring Entity") advertised an International Open Tender, Tender No. IEBC/OIT/001/21/2020/2021 for Supply, Delivery, Installation, Testing, Commissioning, Support and Maintenance of the Kenya Integrated Elections Management System (KIEMS); and Hardware Equipment and Accessories in the following Lots:- Lot 1: - Framework for the Supply and Delivery of the Hardware Equipment and Accessories as and when required and Lot 2:- Supply, Delivery, Installation, Testing, Commissioning, Support and Maintenance of the Kenya Integrated Elections Management Systems (KIEMS) (hereinafter referred to as the 'subject tender'). The subject tender was advertised through a Tender Notice dated and issued on 14th April, 2021 and published on the Procuring Entity's website (www.iebc.or.ke) and the Public Procurement Information Portal (PPIP) Government tender's portal website (<http://www.tenders.go.ke>).

Tender submission deadline and opening of tenders

The initial deadline for submission of tenders was 14th May 2021. However, following issuance of three (3) Addendums to the Tender Document by the Procuring Entity, the submission deadline was extended to 18th June 2021. Tenders were opened on 18th June 2021 and the Procuring Entity's Tender Opening Committee (hereinafter referred to as

the 'Tender Opening Committee') recorded the following tenderers as having submitted their respective tenders as can be seen from the Tender Opening Minutes of 18th June 2021:

1. Indra Soluciones Tecnologias De La Informacion
2. Smartmatic International Holding B.V
3. Genkey Solutions BV
4. Laxton Group Limited
5. Africa Infrastructure Development Company

Evaluation of Tenders

According to the Respondent, the evaluation of tenders had not been completed at the time of filing the Request for Review.

THE REQUEST FOR REVIEW

The Applicant lodged a Request for Review No. 107 of 2021 and its appurtenant Supporting Affidavit sworn by Henry Mien, a Shareholder and Director of the Applicant, on 10th August 2021 and filed on 11th August 2021. Subsequently, the Applicant filed an Amended Request for Review and its appurtenant Supporting Affidavit sworn by Henry Mien on 13th August 2021 and filed on even date, through the firm of Henia Anzala & Associates. The Request for Review as amended is premised on two main grounds as follows;

- a) that the tender document does not provide for preference margins in favour of local and/or citizen contractors as contemplated by the

Constitution of Kenya and the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act') and;

- b) that the tender document does not require foreign tenderers participating in the subject tender to source at least forty percent of their supplies from citizen contractors prior to submitting a tender.

The Applicant consequently prays for ORDERS that:-

- 1. An order cancelling and/or annulling the Tender Document and all procurement proceedings in respect of the entire Tender No. IEBC /OIT/001/21/2020/2021 dated 14th April, 2021 for the Supply, Delivery, Installation, Testing, Commissioning, Support and Maintenance of the Kenya Integrated Elections Management System (KIEMS); and Hardware Equipment and Accessories and the entire procurement process in relation thereto;***

- 2. An order compelling the Respondent to withdraw the entire Tender No. IEBC /OIT/001/21/2020/2021 dated 14th April, 2021 for the Supply, Delivery, Installation, Testing, Commissioning, Support and Maintenance of the Kenya Integrated Elections Management System (KIEMS); and Hardware Equipment and Accessories and re-advertise the same via a fresh tender document that complies with the law in preference and reservations set out in the Constitution and the Public Procurement and Asset Disposal Act in explicit terms;***

3. An order awarding costs of and incidental to these proceedings; and

4. Such further or other orders as the Honourable Board may deem fit to issue.

In response to the Applicant's Request for Review, the Respondent, Mr. Harley Mutisya, the Director, Supply Chain Management of the Respondent wrote a letter to the Acting Board Secretary dated 12th August 2021. Subsequently, the Respondent filed a Notice of Preliminary Objection dated and filed on 18th August 2021 claiming the Applicant lacks locus standi to file the Request for Review and that the Request for Review is time barred. The Applicant swore a Replying Affidavit on 13th August 2021 and filed on 18th August 2021 and further, filed a Response to Amended Request for Review dated 18th August 2021 on even date through the firm of Muchemi & Co. Advocates. The Respondent opposes the request for review and invites the Board to find and hold that:-

1. The Respondent was not in breach of or in contravention of the provisions of the Constitution, or any other provisions of the Public Procurement and Asset Disposal Act, 2015;

2. The Amended Request for Review be dismissed;

3. The Applicant should bear the costs of the Review.

Vide letters dated 13th August 2021, the Acting Board Secretary notified all tenderers in the subject tender of the existence of the Request for

Review as amended while inviting them to respond to the same if they wished to do so. Further, the Acting Board Secretary furnished all tenderers with the Board's Circular No. 2/2020 dated 24th March 2020, detailing administrative and contingency measures to mitigate the spread of Covid-19. However, save for Shailesh Patel t/a Africa Infrastructure Development Company, all other tenderers in the subject tender did not respond in support or in opposition to the Request for Review as amended.

The Interested Party, Shailesh Patel t/a Africa Infrastructure Development Company filed a Notice of Appointment of Advocates dated 18th August 2021 and a Supporting Affidavit sworn by one Dr. Shailesh Patel on 18th August 2021 and filed on even date through the firm of CM Thuku & Company Advocates. The Interested Party is aggrieved by the Respondent's failure and/or neglect to respond and/or satisfactorily respond to concerns the Interested Party raised in respect of the Tender Document as more particularly stated in paragraphs 14 and 15 of the Supporting Affidavit of Dr. Shailesh Patel. The Interested Party accordingly seeks the cancellation of the tender and for re-advertisement of the same albeit on the grounds stated in its affidavit.

Pursuant to the Board's Circular No. 2/2020 dated 24th March 2020, detailing an administrative and contingency plan to mitigate Covid-19 pandemic, the Board dispensed with physical hearings and directed that all request for review applications be canvassed by way of Written Submissions. Clause 1 at page 2 of the said Circular further specified that

pleadings and documents would be deemed as properly filed if they bear the official stamp of the Board.

The Applicant filed its Written Submissions and a list of Authorities dated 20th August 2021 on 23rd August 2021 whilst the Respondent filed his Written Submissions dated 27th August 2021 on even date.

BOARD'S DECISION

The Board has considered the Respondent's objection, each of the parties' pleadings together with their appurtenant supporting documentation, written submissions and confidential documents submitted by the Respondent pursuant to section 67 (3) (e) of the Act and finds the following issues call for determination: -

1. Whether the Board has jurisdiction to hear the subject Request for Review as amended;

In determining this issue, the Board shall make a finding on:-

(i) Whether the Applicant has locus standi to file the Request for Review;

(ii) Whether the Request for Review as amended is time barred;

Depending on the outcome of the first issue;

2. Whether the Tender Document is in violation of the Act that entitles local and/or citizen contractors to preferences when participating in an international competitive tender or at all;

3. Whether the interested party's grievances are justiciable before the Board and the appropriate orders for the same

4. Who should bear the costs of this Application.

On the first issue framed for determination, it is trite that whenever a jurisdictional challenge is raised, the same must be dealt with first as a threshold matter.

In the locus classicus case of **The Owners of Motor Vessel "Lillian S" vs. Caltex Oil Kenya Limited (1989) KLR 1**, the Court of Appeal held that jurisdiction is everything and the moment it holds that it has no jurisdiction, a court or any *other decision making body* has no power to make one more step.

The Supreme Court in the case of **Samuel Kamau Macharia and Another vs. Kenya Commercial Bank Ltd and 2 Others, Civil Application No. 2 of 2011** reinforced the above decision as follows;

"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with Counsel for the first and second Respondents in his

submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter for without jurisdiction the Court cannot entertain any proceedings."

The Board is a creature of statute established under section 27 of the Act as a central independent procurement appeals review board whose main function and power is to review, hear and determine tendering and asset disposal disputes as stipulated under section 28 of the Act. Tendering or asset disposal disputes are lodged before the Board in accordance with section 167 of the Act. In essence, the Board's jurisdiction can only be invoked if a tendering or asset disposal dispute is filed with the Board in accordance with section 167 of the Act.

Turning to the circumstances of the instant Request for Review as amended, the Board proceeds to determine the preliminary objection which is the first issue framed for determination as follows;

(i) Whether the Applicant has locus standi to file the Request for Review.

In his preliminary objection, the Respondent avers that the Applicant is neither a candidate nor a tenderer within the meaning of section 167(1) of the Act and therefore lacks locus standi before the Board. The Respondent avers that a "**candidate**" means a person who has obtained

the tender document from a public entity pursuant to an invitation notice by a procuring entity. It submits in this regard, that Clause 1.3 of the tender document advised as follows:-

"Tenderers who download the tender documents through the website are advised to register with the Commission, providing their email address through procurement@iebc.or.ke, before the closing date; to enable communication for any tender clarifications, addenda and to get the tender opening link."

The Respondent avers that the Applicant did not register with the Respondent through the email provided and is not in the register of emails sent to tenderers who downloaded/obtained the Tender Document.

In paragraph 7 of Henry Mien's Supporting Affidavit of 13th August 2021, the Applicant avers that it participated in the subject tender by downloading the Tender Document from the Procuring Entity's website as directed and annexes the Tender Document as an exhibit. As such, the Applicant avers it is a candidate within the meaning of section 2 of the Act. Further, in its Written Submissions dated 20th August 2021 and filed on 23rd August 2021, the Applicant submits in response, that having obtained the Tender Document from the Respondent's website, it was a candidate and accordingly, has locus standi to file the Request for Review as amended. The Applicant states that under section 2 of the Act, a Candidate is defined as **a person who has obtained the tender**

documents from a public entity pursuant to an invitation notice by a procuring entity.

The Applicant submits that any person who demonstrates that he/she/it obtained tender documents pursuant to an invitation notice by a procuring entity, whether or not they submit their tender, is ipso facto a candidate and accordingly entitled to request for review of a procurement process at any stage of the procurement process. The Applicant has cited the Decision of the Board in **PPARB No. 1 of 2020 (Energy Sector Contractors vs. The Accounting Officer, Kenya Power and Lighting Company Limited)** in which it submits the Board adopted a permissive and unqualified definition of *a candidate* as follows:-

"From the definition provided in section 2 of the Act, for one to be a candidate in a procurement proceeding or asset being disposed, what that person has to do is to obtain the tender documents from a public entity pursuant to an invitation notice by a procuring entity. The Procuring Entity in this instance provided two methods that any person could have used to obtain the tender document, and the Applicant chose to exercise one of the two, that is, to download a copy of the Bidding Document applicable to the subject tender from the Procuring Entity's Official Website. The Act does not require such person to do anything further in order to qualify as a candidate, but to merely obtain the Bidding Document issued by the Procuring Entity."
(Emphasis added)

The Interested Party did not comment or submit on this issue.

Upon consideration of the parties' rival submissions, 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 this case the Applicant avers to be a candidate by virtue of having downloaded tender documents from the Procuring Entity's website and that to require more of it would amount to supplanting the provisions of the Act with a more onerous standard not contemplated therein. This Board has had occasion to deal with this question in previous matters most notably in **PPARB No. 1 of 2020 (Energy Sector Contractors vs The Accounting Officer, Kenya Power and Lighting Company Limited)** where the Board was emphatic that the Act does not require an Applicant to do anything more than merely obtain the Tender Document issued by the Procuring

Entity in order to qualify as a candidate. The said position remains good law. We venture to add that a strict application of the Act leads to the singular conclusion that any person who demonstrates that it downloaded the Tender Document from the designated website qualifies, without more, as a candidate and accordingly has locus standi to file a request for review provided it does so within the prescribed period as hereinafter determined. It is the Board's considered opinion in the circumstances that the advisory contained in Clause 1.3 of the tender document and indeed any additional requirement imposed by the tender document over and above the provisions of law as to who qualifies as a candidate may only be considered as a preliminary evaluation criterion at the time of evaluation and not for purposes of determining who may or may not approach the Board. Bearing in mind that procurement proceedings under the Act derive from Article 227 of the Constitution, this Board is duty bound to promote rather than stifle access to it in strict compliance with the applicable law.

To fortify the above findings, the Board notes that section 98 of the Act on provision of tender documents provides as follows:-

"(1) Upon advertisement, the accounting officer of a procuring entity shall immediately provide copies of the tender documents and in accordance with the invitation to tender and the accounting officer shall upload the tender document on the website.

(2) The accounting officer of a procuring entity may charge such fees as may be prescribed for copies of the tender documents.” [Emphasis by the Board]

Section 74(1) of the Act sets out mandatory provisions that an accounting officer must include in a tender document and we note that none of the said requirements suggests that obtaining a tender document requires anything more than that which has been prescribed by law or regulations. The said provision states;

The accounting officer shall ensure the preparation of an invitation to tender that sets out the following—

- (a) the name and address of the procuring entity;***
- (b) the tender number assigned to the procurement proceedings by the procuring entity;***
- (c) a brief description of the goods, works or services being procured including the time limit for delivery or completion;***
- (d) an explanation of how to obtain the tender documents, including the amount of any fee, if any;***
- (e) an explanation of where and when tenders shall be submitted and where and when the tenders shall be opened;***
- (f) a statement that those submitting tenders or their representatives may attend the opening of tenders;***
- (g) applicable preferences and reservations pursuant to this Act;***

- (h) a declaration that the tender is only open to those who meet the requirements for eligibility;***
- (i) requirement of serialisation of pages by the bidder for each bid submitted; and***
- (j) any other requirement as may be prescribed.***

Evidently therefore there is nothing in law to support the proposition that a procuring entity needs to do more than make the tender documents available to the public either by uploading the document on the procuring entity's website or to charge a fee to those who may wish to obtain physical copies of the tender documents. In this case, the Procuring Entity elected to upload the document to its website and any person who saw the Invitation To Tender notice and downloaded the Tender Document, obtained the Tender Document and hence qualified as a candidate for purposes of a request for review.

In **Miscellaneous Application No. 637 of 2016, Republic v Independent Electoral and Boundaries Commission & another Ex Parte Coalition for Reform and Democracy & 2 others [2017] eKLR**, the court , while considering persons who may approach this Board , held as follows:-

"With respect to the matters raised in these proceedings, it is clear that the applicant could not move the Review Board for determination. I agree with the IEBC that pursuant to section 167(1) of the Public Procurement and Asset Disposal Act, 2015 administrative review is available only to the candidates or

tenderers and that the Applicant was neither a candidate nor a tenderer in the subject procurement. Strictly speaking therefore, it was not the spirit or text of that law that parties other than candidates or tenderers should be permitted to challenge procurement processes before the Review Board through the procedure provided for under the Act. To that extent I agree that persons who fall within the category of the Applicant herein who neither obtained the tender document nor participated in the tendering process have no locus to commence proceedings before the Review Board

From the above decision, the Board notes that the Court does not allude to any additional conditions or requirements other than the definition under section 2 of the Act in determining who a candidate is. In essence, the Act does not require such person to do anything but to merely obtain the tender document issued by a procuring entity in order to qualify as a candidate.

In the circumstances, the Applicant has the locus standi to file the Request for Review as amended because it obtained the Tender Document pursuant to an invitation notice issued by the Procuring Entity.

(ii) Whether the the Request for Review as amended is time barred

In his Response to the Amended Request for Review, the Respondent states that the Applicant acted contrary to the provisions of section 167(1) of the Act by filing the instant Amended Request for Review on 13th August, 2021 which is outside the statutory period of 14 days. According to the Respondent the occurrence of a breach in the context of section 167(1) of the Act would be;

- (a) the date of publishing of the tender which occurred on 14th April 2021, or
- (b) the date of Tender Opening which occurred on 18th June 2021, or
- (c) notification of award.

The Applicant, on its part submits that the Act does not define when the date of occurrence of a breach is. It contends that the date of occurrence of a breach is the date when an aggrieved person becomes aware of the breach, which in this case was 3rd August 2021 when, as deponed by Mr. Henry Mien in his Supporting Affidavit, the Applicant became aware of the breaches complained of. The Applicant accordingly submits that it filed the Request for Review within the prescribed time i.e. on 11th August, 2021.

Section 167(1) of the Act stipulates the time period within which a request for review may be filed as follows;

Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage

due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.

As rightly submitted by the Applicant, the above provision does not define when the date of occurrence of a breach is save that a review must be filed within 14 days from the date of the said occurrence. The Applicant submits that the date of occurrence of a breach is the date when the aggrieved person becomes aware of that breach which in its case is 3rd August 2021 and hence it filed its Request for Review within the prescribed period of 14 days after the said date. i.e. on 11th August 2021. The Respondent on the other hand avers that the date of breach ought to be either the date of publishing of the tender which occurred on 14th April 2021, or the date of tender opening which occurred on 18th June 2021.

In Republic v Public Procurement Administrative Review Board Ex parte Kenya Power & Lighting Company Limited; Energy Sectors Contractors Association & another (Interested Parties) [2020] eKLR the court in determining the date of occurrence of breach found inter-alia, in respect to the case before it, that the date of occurrence of breach was the date when the Applicant's request for clarification on the issue under review was answered by the procuring entity. In so holding, the court provided important principles that should guide the determination of the date of occurrence of breach. It held;

***“The contestation here is whether the alleged breach occurred on 24th December 2019 when the clarification was made or on 30th August 2019 when the first Interested Party sought the clarification. The applicant’s position is that the first Interested Party was already aware of the alleged breach particularly considering that he described the bid conditions as discriminatory in his letter suggesting that it was fully aware of the nature of the breach.*”**

The following principles must be borne in mind. One, the Bidding Documents should be read and interpreted with reference to the principles contained in Article 227 of the Constitution. Two, the court must be alive to the ever-present duty of a Public Procuring Entity to act fairly. Three, fairness is to be determined on the circumstances of each case. Four, it may in some instances be fair to ask a Procuring Entity to explain an ambiguity in its Bidding Document or to correct an obvious mistake. Five, in a complex tender, it may be fair to ask for clarifications or details to ensure the proper evaluation of the tender, provided that doing so does not affect the fairness of the process. Six, whatever the case, the tender process must remain transparent, competitive and cost effective.

....

My reading of the Bidding Document and the above Regulation is that once a clarification is sought, the Procuring Entity has a duty to provide the clarification promptly. The argument that the first Interested Party was aware of the breach is founded on the applicant's use of the words "the conditions (of the Invitation to Bid) seem to discriminate against the people of Kenya." The use of the word "seem" in the request for clarification is worth noting. At the centre of this argument is the correct meaning of the words "seem" and "clarification." ...

63. The word "seem" is defined as to appear to be, feel, do, etc; to appear to one's own senses, mind, observation, judgment, etc; to appear to exist; to appear to be true, probable, or evident; to give the outward appearance of being or to pretend to be. [17] Clarification is defined as the action of making a statement or situation less confused and more comprehensible;[18] the act of clarifying; the act or process of making clear or transparent...;[19] to make (an idea, statement, etc.) clear or intelligible; to free from ambiguity.[20] These being the accepted definitions of the two words, the applicant's argument that the applicant was aware of the breach cannot be sustained. A person may seek clarification not because he does not know, but because he entertains doubts which he desires to clear.

...

65. As was held in Republic v Public Procurement Administrative Review Board & 2 Others[21] the jurisdiction of the Board is only available where an application for review has been filed within 14 days from the date of the delivery of the results of the tender process or from the date of the occurrence of an alleged breach where the tender process has not been concluded. ... I find and hold that time began to run on 24th December 2019 when the clarification was provided. The effect is that the Request for Review was filed within time. It follows that the Respondent properly exercised its jurisdiction by entertaining the Request for Review. This ground of review fails.

From the foregoing holding of the High Court, the following principles to be considered in determining the date of occurrence of a breach stand out to wit; *Public Procuring Entity has the ever-present duty to act fairly, that, fairness is to be determined on the circumstances of each case and that whatever the case, the tender process must remain transparent, competitive and cost effective.*

In light of the foregoing, an important question in the circumstances of this case would be, what happens where a clarification is not sought and an Applicant instead chooses to approach this Board directly? Would the Board be divested of jurisdiction? This Board thinks not. As directed by the High Court in **Republic v Public Procurement Administrative Review Board Ex parte Kenya Power & Lighting Company Limited; Energy Sectors Contractors Association & another (Interested Parties) [supra]** each case must be considered on its own

merit and further that a public procuring entity has the ever-present duty to act fairly and remain transparent, competitive and cost effective throughout the procurement process.

The Court of Appeal sitting in Nairobi in Civil Appeal No.224 of 2017 Independent Electoral and Boundaries Commission (IEBC) v. The National Super Alliance (NASA) Kenya, Al Ghurair Printing and Publishing LLC & 5 Others held as follows with respect to time:

"Notwithstanding the foregoing, we must emphasize that IEBC and all State organs are bound by the values and principles enunciated among others in Articles 10, 201, 227 (1) of the Constitution. The values and principles of accountability, transparency, free and fair elections can never be sacrificed at the altar of time constraints. It is not worth to hold a non-transparent and flawed General Election at whatever cost simply because time is a constraint. Notwithstanding time constraints, IEBC and all procurement entities must at all times remain accountable and transparent in their operations and must adhere to the values in Articles 10, 201, 227 and 232 of the Constitution as incorporated in Section 3 of the Public Procurement and Asset Disposal Act. We reiterate and endorse the statement by the trial court at paragraph 153 of its judgment that in the conduct of elections, IEBC must adhere to the standards set in Articles 81 and 86 of the Constitution and conduct free and fair elections that are inter alia accountable and transparent."

To our mind, the substantive issues raised by the Applicant herein relate to peremptory constitutional and statutory questions touching on the competitiveness of the procurement process herein which this Board is enjoined to uphold and promote. The Board would be shirking its responsibility if parties were to be turned away from the seat of justice merely because they discovered a breach of law *after* tender opening as suggested by the Respondent. Put differently, a breach is not cured by the mere closing of tenders. The Respondent's reasoning is in our respectful view inimical to the continuing duty of every person to respect and uphold the Constitution including the values and principles of good governance, integrity, transparency and accountability. In line with the reasoning of the High Court hereinbefore outlined, the Procuring Entity has a continuing duty to act fairly and the overriding consideration in any event is that the principles of public procurement under article 227(1) of the Constitution and section 3(1) of the Act must be upheld at all times. Further, technical specifications or issues such as those raised by the Interested Party are ordinarily subjective and vary depending on the competencies of a tenderer. Matters of law on the other hand are universal and enduring. The Board is accordingly of the view that a purposive consideration of an application of this nature- where public funds are intended for use in a critical exercise as a general election - demands of it to employ permissive interpretation of the applicable law in the public interest. This reasoning is particularly persuasive considering that an award is yet to be made and therefore all parties still have the opportunity to participate in the tender.

In sum, the Board accepts the Applicant's contention that it filed the instant Request for Review as amended within the prescribed period of 14 days of the date of occurrence of alleged breach.

Consequently, the Board has jurisdiction to hear and determine the Request for Review as amended, having already found that the Applicant has locus to institute the instant review and that the Request for Review as amended was filed within 14 days of the date of occurrence of alleged breach.

Whether the tender documents are in violation of the Act that entitles local and/or citizen contractors to preference when participating in an international competitive bid or at all

On the second issue framed for determination, the Applicant alleges that in violation of Article 227(2)(a) of the Constitution of Kenya, as read with sections 3(i) and (j); 89(f); 155(1), (2), (3)(b), (4) and 157(1), (2), (4), (8)(b)(ii) of the Act and Regulations 77(2)(d), 144 and 164(a), (b) and (c) of the Public Procurement and Asset Disposal Regulations 2020 (hereinafter referred to as 'Regulations 2020'), the Tender Document does not provide for preference margins in favour of local and/or citizen contractors or at all. It submits that the Procuring Entity has purported to reserve upon itself the discretion to apply preference margins and not mandatorily as by law provided.

The Applicant makes reference to Clause 2.25.1 of Section II-Instructions To Tenders of the Tender Document in which the Tender Document provides as follows:

"2.25.1 Preference where allowed in the evaluation of tenders shall not exceed 15%."

The Applicant submits that a cursory review of the Tender Document shows that the evaluation criteria set out in the Tender Document does not provide for the application of any preference margins as by law required or at all nor does it require foreign tenderers participating in the tender to source at least forty percent of their supplies from citizen contractors prior to submitting a tender as per section 157(9) of the Act.

The Applicant asserts that the application of preference margins in international tenders is mandatory and not discretionary and ought to be as prescribed under regulation 164 of Regulations 2020. It is further of the view that the limitation of the applicable preference margins to a maximum of 15% only is unfounded in law and ultra vires section 157(8) of the Act which provides that the applicable preference margins shall be as prescribed in Regulation 164 of Regulations 2020.

In his Response, the Respondent states that the application of preference margins is an entitlement by law and the application matrix is well spelled out under Regulation 164 of the Regulations 2020.

The Interested Party did not comment or submit on this issue.

The Board has had occasion to pronounce itself on the issue of preference margins in several decisions. Of note is that preference margins derive from Article 227 of the Constitution as follows;

Article 227(1) provides;

When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.

With specific respect to preference margins, Article 227(2) (a) provides:-

"An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for all or any of the following—

(a) categories of preference in the allocation of contracts...

...

The law contemplated under Article 227 (2) (a) is Part XII as read with sections 3 and 89(f) of the Act which outline provisions for preference and reservation schemes.

To begin with, Section 3 (i) and (j) of the Act state: -

"Public procurement and asset disposal by State organs and public entities shall be guided by the following values and principles of the Constitution and relevant legislation—

(a) the national values and principles provided for under Article 10;

(b) the equality and freedom from discrimination provided for under Article 27

....

(i) promotion of local industry, sustainable development and protection of the environment; and

(j) promotion of citizen contractors.

Section 155 of the Act provides that:-

"(1) Pursuant to Article 227(2) of the Constitution and despite any other provision of this Act or any other legislation, all procuring entities shall comply with the provisions of this Part.

(2) Subject to availability and realization of the applicable international or local standards, only such manufactured articles, materials or supplies wholly mined and produced in Kenya shall be subject to preferential procurement.

(3) Despite the provisions of subsection (1), preference shall be given to—

(a) manufactured articles, materials and supplies partially mined or produced in Kenya or where applicable have been assembled in Kenya; or

(b) firms where Kenyans are shareholders.

(4) The threshold for the provision under subsection (3) (b) shall be above fifty-one percent of Kenyan shareholders.

(5) Where a procuring entity seeks to procure items not wholly or partially manufactured in Kenya—

(a) the accounting officer shall cause a report to be prepared detailing evidence of inability to procure manufactured articles, materials and supplies wholly mined or produced in Kenya; and

(b) the procuring entity shall require successful bidders to cause technological transfer or create employment opportunities as shall be prescribed in the Regulations.”

Section 157 of the Act further provides inter-alia as follows;

(1) Candidates shall participate in procurement proceedings without discrimination except where participation is limited in accordance with this Act and the Regulations.

(2) Subject to subsection (8), the Cabinet Secretary shall, in consideration of economic and social development factors, prescribe preferences and or reservations in public procurement and asset disposal.

....

(6) To qualify for a specific preference or reservation, a candidate shall provide evidence of eligibility as prescribed.

...

(8) In applying the preferences and reservations under this section—

....

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

(i) in the evaluation of tenders to candidates offering goods manufactured, assembled, mined, extracted or grown in Kenya; or

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

Section 86(2) of the Act provides

"For the avoidance of doubt, citizen contractors, or those entities in which Kenyan citizens own at least fifty- one per cent shares, shall be entitled to twenty percent of their total

score in the evaluation, provided the entities or contractors have attained the minimum technical score.”

Section 70 and 74 of the Act stipulate the manner in which procuring entities are expected to implement the foregoing preference margins. In particular, section 70 (6) (e) (vi) of the Act provides that: -

“The tender documents shall set out the following—

.....

instructions for the preparation and submission of tenders including ...the procurement function ensuring that where necessary, the preferences and reservations of the tender are clearly spelt out in the bidding documents.”

Section 74(1) of the Act provides;

“The accounting officer shall ensure the preparation of an invitation to tender that sets out inter-alia....

(g) applicable preferences and reservations pursuant to this Act;”

In Judicial Review Miscellaneous Application No. 540 of 2008, Republic v. Public Procurement Administrative Review Board & Kenya Revenue Authority the court held:-

"The margin of preference consideration was a statutory one and although in the Act the provision is couched in discretionary terms due to the use of the word may, in Regulation 28 (2) (a) (of the 2006 Regulations) the preference is couched in mandatory terms and therefore forms part of the substantive law on procurement..."

Under the Act, section 70 (6) (e) (vi) provides for the equivalent of regulation 28(2)(a) of the 2006 Regulations.

In **Republic v Public Procurement Administrative Review Board & 2 others Ex parte Niavana Agencies Limited; M/S Five Blocks Enterprises Ltd (Interested Party) [2021] eKLR**, the High Court stated the objective of preference margins and reservations as follows;

"The idea behind preferences and reservations is, inter alia, to promote locally manufactured goods or locally available services; it is to promote local industry and, in other instances, to support those who are likely to be disadvantaged by unfair competition and discrimination. This concept is expressly acknowledged in Article 227 of the Constitution."

The totality of the foregoing provisions and caselaw is that in international tenders where foreigners participate or are likely to participate, the procuring entity has a mandatory duty to ensure that preference margins

are clearly spelt out in the tender documents. This serves the purpose of notifying and encouraging eligible local and citizen contractors who may qualify for preference margins to know in advance that preference margins will be applied and more importantly the parameters that will be used to apply the same i.e. whether by virtue of locally manufactured goods or citizenry shareholding of a tenderer. Clearly spelling out applicable margins and the manner of their application facilitates transparency, accountability and fairness in the evaluation of tenders while upholding the principles of public procurement as espoused in Article 227 (1) of the Constitution.

In **PPARB No.1 of 2020 Energy Sector Contractors Association vs The Accounting Officer Kenya Power and Lighting Company Limited** this Board determined inter-alia as follows;

"It is the Board's considered view that section 70 (6) (e) (vi) of the Act requires the procuring entity to ensure that where necessary, the preferences are clearly spelt out in the bidding documents."

In the instant case, the Respondent put out an international tender which foreign tenderers were inevitably bound to participate in, as was indeed the case. The Applicant has demonstrated that it is a local contractor fully owned by Kenyan citizens and therefore would have been entitled to preference margins prescribed under the Act. What we understand it to be saying is that had it been clearly specified that the prescribed preference margins would apply, several local and citizen contractors may have submitted a tender in response to the subject tender. It contends

that in any event, it is a mandatory evaluation requirement that preference margins be provided for in the Tender Document in clear and unequivocal terms to encourage and promote local participation in accordance with section 3(i) and (j) of the Act. Having looked at the response to the tender, it *may* very well be the case that failure to clearly set out preference margins and the manner of their application may have contributed to the poor showing by local and citizen contractors in the subject tender. Be that as it may, this Board is of the considered view that it is inimical to the tenets of accountability, transparency and fairness in public procurement for tenderers to submit their tenders in the hope that somehow the procuring entity will apply preference margins fairly. This Board can imagine no prejudice that would be occasioned on the Procuring Entity in clearly spelling out applicable preference margins and/or that would outweigh the values of transparency and accountability in public procurement.

In this case, we are persuaded by the Applicant's contention that not only is the attempted provision for preference margins under clause 2.25.1 of Section II-Instructions To Tenderers of the Tender Document vague, it is unlawful for the reason that it appears to leave the determination of the actual margins and the categories to which they are to be applied in the evaluation of tenders to the discretion of the Procuring Entity. In the instant case, the evaluation criteria in the tender document makes no mention of how preference margins will be applied and the Respondent does not demonstrate in his response how the same is to be achieved.

The Board further concurs with the Applicant that preference margins are prescribed by the Cabinet Secretary responsible for matters relating to finance pursuant to his powers under section 157(2) of the Act in order to ensure certainty in their application. Under regulation 164 of the Regulations 2020, the percentages of preference margins are prescribed in fixed and absolute figures as follows;

"for purposes of section 157(8) (b) of the Act, the margin of preference for international tendering and competition pursuant to section 89 of the Act shall be—

- (a) twenty percent (20%) margin of preference of the evaluated price of the tender given to candidates offering goods manufactured, mined, extracted, grown, assembled or semi-processed in Kenya and the percentage of shareholding of Kenyan citizens is more than fifty percent (50%);***
- (b) fifteen percent (15%) margin of preference of the evaluated price of the tender given to candidates offering goods manufactured, mined, extracted, grown, assembled or semi-processed in Kenya;***
- (c) ten percent (10%) margin of preference of the evaluated price of the tender, where the percentage of shareholding of Kenyan citizens is more than fifty percent (50%);***
- (d) eight percent (8%) margin of preference of the evaluated price of the tender, where the percentage of shareholding of Kenyan citizens is less than fifty percent (50%) but above twenty percent (20%); and***

(e) six percent (6%) margin of preference of the evaluated price of the tender, where percentage of shareholding of Kenyan citizens is above five percent (5%) and less than twenty percent (20%).

To therefore suggest that a procuring entity may apply upto a certain maximum essentially means that the procuring entity may apply figures other than those prescribed by the Cabinet Secretary responsible for matters relating to finance. The power to *prescribe* is akin to legislative power. Section 2 defines **prescribed** as follows;

“prescribed” means prescribed by the Act in which the word occurs or by subsidiary legislation made thereunder;

Procuring entities cannot therefore purport to prescribe for themselves applicable margins other than those specifically prescribed by the Cabinet Secretary responsible for matters relating to finance under the Act or Regulations 2020. To do so would amount to an unlawful usurpation of the Cabinet Secretary’s law-making powers under the Act.

In the circumstances, this Board has no difficulty in finding, as we hereby do, that pursuant to sections 74(1)(g) and 70 (6) (e) (vi) of the Act a procuring entity must clearly spell out all applicable preference margins to an international tender in strict conformity with provisions of the Constitution and the Act. In line with the principles of accountability and transparency in public procurement, the same cannot be left to the vagaries of conjecture and speculation.

Finally on this issue, the Applicant contends that the tender document is unlawful in so far as it fails to comply with the provisions of section 157(9) of the Act. Section 157(9) of the Act provides as follows;

(9) For the purpose of ensuring sustainable promotion of local industry, a procuring entity shall have in its tender documents a mandatory requirement as preliminary evaluation criteria for all foreign tenderers participating in international tenders to source at least forty percent of their supplies from citizen contractors prior to submitting a tender.

The Respondent avers that under its technical mandatory evaluation requirements under paragraphs 9 and 10 on page 68 of the Tender Document, it complied with the requirements for the transfer of technology. It further submits that the mandatory requirement for vendor valuation also provided that the bidder should provide a detailed support and maintenance plan by attaching documentary proof of ICT technical support staff with a local registered office in Kenya. The Respondent submits that the local content plan matter was revisited and clarified as in paragraph 49 of the Addendum of 5th May, 2021 which was uploaded on the Procuring Entity's website for wide circulation and information.

The Board has perused the Tender Document and notes as follows;

Clause 2.12.3 of Section II – Instructions to Tenderers of the Tender Document provides as follows:-

"2.12.3 The documentary evidence of the tenderer's qualifications to perform the contract if accepted shall be established to the Procuring Entity's satisfaction:-

(a)

(b)

(c) That, in the case of a tenderer not doing business within Kenya, the tenderer is or will be (if awarded the contract) represented by an Agent in Kenya equipped and able to carry out the Tenderer's maintenance, repair, and spare parts-stocking obligations prescribed in the Conditions of Contract and/or Technical Specifications."

The Board has carefully studied the Tender Document and observes that the Preliminary Evaluation of Lot 1 and Lot 2 of Evaluation and Comparison of Tenders at page 20 to 21 of the Tender Document provided eleven (11) mandatory requirements that tenderers needed to satisfy before their respective tenders could proceed to technical evaluation. However, none of these eleven (11) mandatory requirements of the preliminary evaluation criteria required foreign tenderers participating in the subject tender to source at least 40% of their supplies from citizen contractors prior to submitting a tender.

Clause 9 and 10 of Lot 2: Technical Evaluation of B. Technical Evaluation of Evaluation and Comparison of Tenders at page 68 of the Tender Document provide as follows:-

S/No	Evaluation Criteria		Bidder Response	Compliance (Y/N)
	Item Description	Evidence		
9.	TECHNICAL SKILLS/ KNOWLEDGE	<i>Bidder must submit a proposal containing delivery methodology in the following requirements:</i>		
	TRANSFER AND TRAINING	<i>The selected bidder shall develop detailed skills, knowledge-transfer and training plan identifying the task and milestone schedule for coordinating training requirements coordination and training delivery</i>		
		<i>The training plan shall provide comprehensive training in the operations and management of the system and its components, as applicable to users, supervisors, managers and operations support personnel.</i>		
		<i>Bidders shall be required to develop customised training documentation and to deliver customised training with manuals covering hardware, software and</i>		

S/No	Evaluation Criteria		Bidder Response	Compliance (Y/N)
	Item Description	Evidence		
		<i>the system functional processes for the election.</i>		
		<i>The training proposal shall cover both practical (hands-on) and theory training.</i>		
		<i>The hardware and software supplied shall be capable of supporting training of new users without impacting production operations or the integrity of the system's identification records databases</i>		
10.	TECHNICAL KNOWLEDGE TRANSFER	<i>Bidder MUST submit a Proposal containing delivery methodology in the following requirements:</i>		
		<i>The successful bidder shall be required to set up a sandbox environment for technical testing and training.</i>		
		<i>The successful bidder shall conduct full System Installation of BVR, EVI, and</i>		

S/No	Evaluation Criteria	Bidder Response	Compliance (Y/N)
	Item Description	Evidence	
		<i>technical knowledge transfer for Commission staff</i>	
		<i>RTS for both front-end and back-end functions</i>	
		<i>covering, but not limited to, the following areas to ensure full operational control of the supplied solution. Bidders MUST submit a proposal</i>	
		<i>System configuration of BVI, EVI and RTS covering application, databases and operating system</i>	
		<i>containing delivery methodology in the following requirements</i>	
		<i>System integration processes through either import, export or scripting</i>	
		<i>Data validation, verification</i>	

S/No	Evaluation Criteria		Bidder Response	Compliance (Y/N)
	Item Description	Evidence		
			<i>and quality control processes</i>	
			<i>Security configurations and controls for BVR, EVI and RTS applications and databases</i>	
			<i>Network configurations for BVR, EVI and RTS</i>	
			<i>System administration and monitoring tools for BVR, EVI and RTS</i>	
			<i>System support and</i>	

S/No	Evaluation Criteria		Bidder Response	Compliance (Y/N)	
	Item Description	Evidence			
			<i>troubleshooting tools of BVR, EVI and RTS</i>		
			<i>Report extraction and generation tools for BVR, EVI and RTS</i>		
			<i>Business intelligence for report generations</i>		
		<i>Bidder commitment for full knowledge transfer. Failure to deliver full knowledge transfer by the vendor will be considered breach of obligation and Commission shall be at liberty to take any action that may be deemed necessary</i>			

The Board is further invited to note that the section C: Vendor Evaluation of Evaluation and Comparison of Tenders at page 70 to 71 of the Tender Document provides as follows:-

LOT 1:

TECHNICAL SPECIFICATION	REQUIREMENTS	COMPLIANCE
.....	
Support and Maintenance	The Bidder should provide a detailed support and maintenance plan. Attach documentary proof of ICT technical support staff with a local registered office in Kenya	
.....	

LOT 2

TECHNICAL SPECIFICATION	REQUIREMENTS	COMPLIANCE
.....	
Support and Maintenance	The Bidder should provide a detailed support and maintenance plan.	
Local Representation	The Bidder must show proof of ICT technical support staff with a local registered office in Kenya	

.....	
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From the foregoing it is apparent that the Tender Document makes no mention of the specific quantity of local supplies that must be sourced locally by foreign tenderers as required by section 157(9) of the Act. Regulation 165 of Regulations 2020 clarifies the supplies contemplated in section 157(9) of the Act include goods, works, non-consulting and consulting services. In addition, Regulation 144 of Regulations 2020 provides extensive mandatory requirements that must be contained in every tender document in order to satisfy the requirements of technology transfer and local content as follows;

(1) An accounting officer 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 Kenyan 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 that 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 citizens;

(c) timeframes within which to provide employment opportunities;

(e) succession planning and management;

(f) a plan demonstrating linkages with local industries which ensures at least forty percent (40%) inputs are sourced from locally manufactured articles, materials and supplies partially mined or produced in Kenya, or where applicable have been assembled in Kenya.

(3) In circumstances where international tendering and competition does not meet the requirement of paragraph (1), an accounting officer shall cause a report to be prepared detailing evidence of the inability to meet this provision and measures to be undertaken

to ensure compliance with this regulation, and submit the report to the National Treasury to grant a waiver of the requirement.

While paragraphs 9 and 10 of Lot 2: Technical Evaluation of B. Technical Evaluation of Evaluation and Comparison of Tenders at page 68 of the Tender Document appear to comply with regulation 144(2) of Regulations 2020 above, they do not satisfactorily put foreign tenderers to task of ensuring that Kenyan citizens at large are mentored, that at least seventy-five percent (75%) employment opportunities for Kenyan citizens for works, consultancy services and non-consultancy services and not less than twenty percent (20%) of the said opportunities are reserved for Kenyan professionals at management level- not just the Respondent's employees. It bears emphasis at this juncture that these provisions are not mere suggestions or flowery aspirations that should be tangentially referred to show compliance. Under section 3 of the Act, public procurement and asset disposal by State organs and public entities shall be guided by inter-alia the national values and principles provided for under Article 10 of the Constitution. Under Article 10 (2) of the Constitution, the national values and principles of governance include—

.....

(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;

And bind all State organs, State officers, public officers and all persons whenever any of them enacts, applies or interprets any law; or makes or implements public policy decisions.

Procuring entities must therefore, as a matter of constitutional edict, be deliberate in ensuring compliance in order to achieve the intentions of the law to wit; the promotion and development of local industry. This Board plays an important role in ensuring procuring entities give effect to this aspiration and will not hesitate to cancel a tender that departs from it.

In the circumstances, the Board finds the Tender Document is in violation of the Act and Regulations 2020 that entitles local and/or citizen contractors to preferences when participating in the subject tender having found that the Tender Document breaches section 74(1)(g) and 70(6)(e)(vi) of the Act and Section 157(9) of the Act for failing to prescribe the specific margin of preference available to local and/or citizen contractors and for not providing as a mandatory requirement as preliminary evaluation criteria for all foreign tenderers participating in an international tender to secure at least forty percent supplies for citizen contractors prior to submitting a tender.

Whether the interested party's grievances are justiciable before the Board and the appropriate orders.

On the third issue framed for determination, the Interested Party filed an affidavit in support of the Request for Review herein albeit on different

grounds from those advanced by the Applicant. At paragraphs 14 and 15 of the said Affidavit it sets out grievances touching on technical specifications of the goods and services subject of the Tender Document which it alleges the Respondent has declined, neglected or refused to satisfactorily respond to despite a request for clarification. As at the date of this decision the Respondent had not responded to these allegations despite the fact that the said affidavit has been served upon it. The Board has interrogated the issues raised by the Interested Party and observes the Interested Party is riding on the Applicant's Request for Review as amended whilst raising its own grievances and which grievances are different from the ones raised by the Applicant. The Board finds the Interested Party is in essence filing a review through the backdoor without meeting the obligation of paying the requisite filing fees as contemplated under section 167(1) of the Act read together with Regulation 203 of Regulations 2020. In the circumstances, the Interested Party has failed to invoke the jurisdiction of this Board with respect to its grievances as contemplated under section 167 of the Act read together with Regulation 203 of the Regulations 2020. In effect, the Board will refrain from making a determination on the grievances raised by the Interested Party.

Who should bear the costs of this Application?

As regards the issue of costs, the Supreme Court in **Jasbir Singh Rai & 3 Others v Tavlochan Singh Rai & 4 others (2014) eKLR** set out the following guidelines on the exercise of the discretionary power to award costs when it held as follows:-

"It emerges that the award of costs would normally be guided by the principle that costs follow the event; the effect

being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or Respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously exercised discretion of the court, accommodation of the special circumstances of the case, while being guided by the ends of justice.

In the event, even though costs should follow the event, a decision maker should exercise its discretion on whether or not to award costs by accommodating the special circumstances of the case. In light of the final orders below and the fact that the Request for Review as amended succeeds, the Board shall refrain from awarding costs.

Accordingly, the Board proceeds to make the following specific orders:-

FINAL ORDERS

In exercise of the powers conferred upon it by section 173 of the Act, the Board makes the following orders:-

- 1. The Respondent's Preliminary Objection dated 18th August 2021 be and is hereby dismissed.**
- 2. The Procuring Entity's Tender Document for Tender No: IEBC/OIT/001/21/2020/2021 for Supply, Delivery, Installation, Testing, Commissioning, Support and Maintenance of the Kenya Integrated Elections Management**

System (KIEMS); and Hardware Equipment and Accessories be and is hereby nullified and set aside.

- 3. The Procuring Entity is hereby directed to prepare a fresh Tender Document within thirty (30) days from the date of this decision, taking into consideration the provisions of the Constitution of Kenya, the Public Procurement and Asset Disposal Act, the Public Procurement and Disposal and Asset Disposal Regulations, 2020 and the findings of the Board in this review.**
- 4. Further to Order No. 3 above, the Procuring Entity is hereby directed to re-tender for the Supply, Delivery, Installation, Testing, Commissioning, Support and Maintenance of the Kenya Integrated Elections Management System (KIEMS); and Hardware Equipment and Accessories within forty-five (45) days from the date of this decision.**
- 5. Each party shall bear its own costs.**

Dated at Nairobi this 1st day of September 2021.

CHAIRPERSON

SECRETARY

PPARB

PPARB