

**REPUBLIC OF KENYA**

**THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW**

**BOARD**

**APPLICATION NO.35/2007 OF 15<sup>TH</sup> JUNE, 2007**

**BETWEEN**

**LITHOTECH EXPORTS (PTY) LTD.....APPLICANT**

**AND**

**ELECTORAL COMMISSION OF KENYA...PROCURING ENTITY**

Appeal against the decision of the Tender Committee of the Electoral Commission of Kenya dated 18<sup>th</sup> May, 2007 in the matter of tender NO.ECK/31/2006-2007 for Printing and Supply of Ballot Papers.

**BOARD MEMBERS PRESENT**

Mr. Richard Mwongo	-	Chairman
Mr. Adam S. Marjan	-	Member
Ms. Phyllis N. Nganga	-	Member
Eng. D. W. Njora	-	Member
Mr. P. M. Gachoka	-	Member
Mr. J. W. Wambua	-	Member
Mr. John W. Wamaguru	-	Member

**IN ATTENDANCE**

Mr. C.R. Amoth	-	Holding Brief for Secretary
Mr. I. K. Kigen	-	Secretariat

**PRESENT BY INVITATION FOR APPLICATION NO.35/2007**

**Applicant, Lithotech Exports (PTY) Ltd**

Mr. F. Okeyo - Advocate, Otieno Okeyo & Co.  
Advocates

**Procuring Entity, Electoral Commission of Kenya**

Mr. Okundi Ogonji - Advocate, Onsando Ogonji &  
Tiego, Advocates  
Mr. John Matolo - Senior Legal Counsel  
Mr. D. O. Mosomi - Procurement & Supplies Manager

**Interested Candidates**

Mr. C. N. Kihara - C. N. Kihara & Co. Advocates, for  
AL Ghurair Printing & Publishing  
House Co. LLC  
Mr. Jaspal Singh Nyotta - Managing Director, A.G. Printing  
& Publishing, Nairobi  
Mr. Nicholas Ogutu - Manager, Africa Infrastructure  
Development Company  
Mr. E. G. Wanderi - Smith & Ouzman  
Ms Mary M. Mwisiwa - Systemedia Technologies Limited  
Mr. Ben Kobetbet - Lexlines Press Pty

## BOARD'S DECISION

Upon hearing the Applicant, the Procuring Entity and the interested candidates herein, and upon considering the information in all the documents before it, the Board hereby decides as follows:

## BACKGROUND

The Applicant's request for Review dated 12<sup>th</sup> June 2007 was filed on the 15<sup>th</sup> June 2007, and the Procuring Entity's Memorandum of Response dated 20<sup>th</sup> June 2007 was filed on 25<sup>th</sup> June 2007, together with the original tender documents and other documents requested by the Board. The following interested candidates also filed written submissions: Al Ghurair Printing and Publishing House LLC, of United Arab Emirates, Lexlines Press Pty, of South Africa, Edward Thompson Printers Group, of England, and Systemedia Technologies Limited of Kenya.

At the hearing, the Applicant was represented by Mr F. Okeyo, Advocate and the Procuring Entity was represented by Mr Okundi Ogonji, Advocate, Mr John Matolo Officer of ECK and Mr. D.O. Mosomi, Procurement and Supplies Manager. Lexlines Press Pty., was represented by Mr Benjamin Kobetbet, Advocate, Al Ghurair Printing and Publishing House LLC were represented by Mr C.N. Kihara, Advocate, Systemedia Technologies by Mr Munywoki and Smith & Ouzman were represented by Mr Chris Ouzman.

The tender entailed the printing and supply of ballot papers in preparation for by-elections and the general elections 2007. Open pre-qualification and tender notice was advertised on 13<sup>th</sup>, 21<sup>st</sup>, and 26<sup>th</sup> February, and 1<sup>st</sup> March, 2007, in addition to advertisement on the ECK website. The tender was closed / opened on 14<sup>th</sup> March, 2007 at 2.30 p.m. It attracted Thirty Six (36 No.) firms who bought the tender documents, but only fourteen (14 No.) responded. Those that responded were:

1. M/s Renform CC Ltd, South Africa
2. M/s Kalamazoo Security Print Ltd, UK
3. M/s Manipal Press Ltd, India
4. M/s Smith & Ouzman Ltd, UK
5. M/s Ramco Printing Works Ltd, Kenya
6. M/s Systemedia Technologies, Kenya

7. M/s Edward Thompson Group Ltd, UK
8. M/s Wincy Trading Company Ltd, Kenya
9. M/s Al Ghurair Printing & Publishing House Co. LLC, UAE
10. M/s Universal Print Group Ltd, South Africa
11. M/s Lexlines Press Ltd, South Africa
12. M/s Shave & Gibson (Pty) Ltd, South Africa
13. M/s Lithotech Exports Ltd, South Africa
14. M/s Africa Infrastructure Development Co.Ltd, Kenya

The tender was processed through the prequalification and technical evaluation stages including financial evaluation as follows:-

### **Pre-qualification and Marking Scheme**

A marking scheme was developed for prequalification of the tenderers to assess their responsiveness to prequalification and special conditions on the basis of the following parameters:-

### **Pre-qualification**

<b>No.</b>	<b>Pre-Qualification</b>	<b>Max Score</b>	<b>Score</b>	<b>Remarks</b>
1(a)	Confirmation	1		
(b)	Name of CEO	1		
(c)	Signed date	2		
(d)	Executive Summary	2		
2 (a)	Valid copy of Registration duly certified	2		
(b)	(i) Company Locally Registered	2		
	(iii) Year of Registration 2004 and before	2		
(c)	(i) Relevant core line of Business	2		
	(ii) Supporting Documents	2		
(e)	<b>Bank Statement</b>			
	(i) February, 2007 OR	5		
	(ii) August 2006 or before	2		

(f)	<b>Copy of latest audited A/Cs</b>			
	(i) Year 2005 or	3		
	(ii) Year 2004 or before	1		
(g)	Letter of credit worthiness from reputable Bank	5		
3 (a)	Letter of confirmation of Performance (key management staff up to 5 or 2 to 4	2 1		
(b)	<b>Plant/Machinery/Equipment</b>			
	(i) Relevant > 5 or	3		
	(ii) Relevant 2-4	1		
4 (a)	Physical Location	1		
(b)	Plot No.	1		
(c)	Postal Address	1		
(d)	<b>Telephone</b>			
	(i) Landline or	1		
	(ii) Mobile and Landline	2		
	(iii) Fax No.	1		
5 (a)	<b>Organizations served</b>			
	(i) GOK/International > 5	5		
	or	3		
	(ii) Ditto < 5 or	1		
	(iii) Others			
(b)	Relevant documentations	3		
6. (a)	<b>Firms Status</b>			
	Solvency (state	1		
(b)	<b>Tax evidence</b>			
	(i) VAT certificate	1		
	(ii) PIN	2		
	(iii) NSSF	1		
	(iv) Corruption free	1		
7 (a)	<b>Special Conditions</b>			
	Form S33 completed	5		

(b)	List of Directors	2		
(c)	<b>Price Validity for tendering</b> (i) 120 days/over or (ii) 90-119 days	2 1		
(d)	<b>Price valid for contract period (up to 30<sup>th</sup> June, 2008)</b> (i) 1 Year and above or (ii) 6-11 months	2 1		
(e)	<b>Delivery period</b> (i) 1-4 weeks (ii) 4-6 weeks	3 1		
(f)	Bid bond 2% of tender sum by reputable bank	10		
(g)	Documents signed and stamped	3		
	<b>TOTAL SCORE</b>	<b>81</b>		

### Marking Scheme

Clause	Requirements	Max Score	Score	Remarks
4.1	Colour			
4.1.1	<b>Type 1.</b> Ballot Paper maroon for Presidential or	5		
	<b>Type 2.</b> Ballot Paper yellow for Parliamentary or	5		
	<b>Type 3.</b> Ballot paper white colour for Local Authority or	5		
	<b>Type 4.</b> Ballot Paper purple for Referendum	5		
4.2	Workmanship and finish			
4.2.1	<b>Finish</b> Smooth and free of defects	3		
4.2.2	<b>Prints</b> Format, content of prints and	5		

	colour of prints			
4.2.2	Print orientation – Landscape	10		
4.2.3	Coloured Party Symbols	5		
4.2.5	Security Features (3)	15		
4.2.6	Perforations	10		
4.2.7	Serialization	5		
4.3	Dimensions (A4 or A5)	10		
4.5	<b>Physical characteristics</b>			
	(i) Substance (gsm) 80±5%	2		
	(ii) Tear factor, (mNm <sup>2</sup> /g) Min 55	2		
	(iii) Breaking length (m) min 2700	2		
	(iv) Moisture contents (%) range 4-7	2		
	(v) Cobb, per minute (g/m <sup>2</sup> ) Max 20	2		
4.6	<b>Light fastness</b> Minimum light fastness rating of 3.0 on the blue wool reference scale	5		
4.7	<b>Cover</b> Ballot paper booklet substance of 160± 5% (gms)	2		
4	Parking and Marking	5		
	<b>TOTAL MARKS</b>	<b>90</b>		

The cut off point was set at 43 marks (53.1%) based on key factors i.e. financial ability, manpower/key management staff, relevant plant/ machinery /equipment, past experience and acceptable delivery period as follows:-

No.	Key Factors	Marks
1.	<b>Financial Ability</b>	
	➤ Bank statement	5 marks
	➤ Copy of Audited Accounts	3 marks
	➤ Letter of credit worthiness	5 marks
	➤ Bid Bond (mandatory)	10 marks
2.	Manpower (key management	2 marks

	staff)	
3.	Relevant Plant and Machinery	3 marks
4.	<b>Past relevant experience</b> <ul style="list-style-type: none"> <li>➤ Organizations served</li> <li>➤ Documentary evidence</li> <li>➤ Relevant core line of Business</li> <li>➤ Supporting documents</li> </ul>	5 marks 3 marks 2 marks 2 marks
5.	Acceptable delivery period	3 marks
	<b>TOTAL</b>	<b>43 marks</b>

In order to qualify for the next stage of evaluation, all bidders were required to fulfill the above requirements as stipulated in the tender document. Ten (10 No.) bidders failed the pre-qualification while Four (4 No.) passed the prequalification analysis.

Those who passed and qualified for the next stage were Kalamazoo Security Print Ltd, Smith & Ouzman Ltd, Universal Print Group Ltd and Lithotech Exports (PTY) Limited

The Applicant, Lithotech Exports (PTY) Limited scored 93% (75 marks out of a total score of 81) against a pass mark of 53.1% (43 marks out of a total score of 81).

### **Technical Evaluation**

Technical evaluation was carried out to ascertain conformity of samples to the specifications in the standards referenced as **ECK03:2007** and the scores were as follows:-



**Item Code: A005- Ballot Paper (Local)**

<b>Bidder No.</b>	<b>Sample Code</b>	<b>Score Out Of 90 Marks</b>	<b>Percentage (%) Score</b>	<b>Remarks</b>
2.	0231A005(A,B,C)	80	89	Passed
4.	0431A005	51	57	Passed
10.	1031A005	88	98	Passed
13.	1331A005	78	87	Passed

**Item Code – A010- Ballot Paper (Parliamentary)**

<b>Bidder No.</b>	<b>Sample Code</b>	<b>Score Out Of 90 Marks</b>	<b>Percentage (%) Score</b>	<b>Remarks</b>
2.	0231A010	70	78	Passed
4.	0431A010	68	76	Passed
10.	1031A010	88	98	Passed
13.	1331A010	78	87	Passed

**Item Code – A015- Ballot Paper (Presidential)**

<b>Bidder No</b>	<b>Sample code</b>	<b>Score Out Of 90 Marks</b>	<b>Percentage (%) Score</b>	<b>Remarks</b>
2	0231A015	75	83	Passed
4	0431A015 (B)	51	57	Passed
10	1031A015	88	98	Passed
13	1331A015	78	87	Passed

**Item Code – A020- Ballot Paper (Referendum)**

<b>Bidder No</b>	<b>Sample Code</b>	<b>Score Out Of 90 Marks</b>	<b>Percentage (%) Score</b>	<b>Remarks</b>
2.	0231A020	75	83	Passed
4.	0431A020	53	59	Passed
10.	1031A020	88	98	Passed
13.	1331A020	66	73	Passed

The pass mark for technical evaluation was set at 50 out of a total score of 90 marks (i.e. 56%) and all samples submitted by the pre-qualified bidders passed the technical evaluation as follows:-

Bidder No.	Ballot papers			
	Local	Parliamentary	Presidential	Referendum
2.	89%	78%	83%	83%
4.	57%	76%	57%	59%
10.	98%	98%	98%	98%
13.	87%	87%	87%	73%

A detailed Evaluation report was prepared and duly signed by the Technical Evaluation Committee.

#### **Site Visit for Verification**

The tender document required the evaluation to include a site visit to pre-qualified firms. The Commission therefore sent two separate teams to the recommended firms to carry out physical verification to confirm the following matters:- Availability, capacity and capability of relevant plant, machinery, equipment and manpower; adequacy of space for operations; and the firm's ability in resource mobilization (finances and supply arrangement for key requisite materials) for timely execution of the contract if awarded.

Based on the above key factors, all the four bidders including the Applicant were recommended.

Two site visit reports, one for the team to U.K and the other for the team that visited South Africa, were forwarded to the Tender Committee.

#### **Financial Evaluation**

A standard financial evaluation criteria was developed for all the 14No. bidders who responded. It was based on the following criteria:

- Unit price quoted per item (excluding VAT)
- VAT on the quoted unit price

- Delivery period given for each item
- Bidder's payment terms
- An undertaking to provide a bid bond/performance bond
- Ranking of bidders
- All quoted prices were checked comprehensively for accuracy

All the above factors were presented on a price comparison schedule that was tabulated for each item and respective quantity as per the tender document, and bidders were ranked accordingly from lowest to highest.

The four bidders that were financially evaluated were ranked as shown here below:-

No.	Item description/Category	Ranking
1	Ballot papers; Local	Ranked 3 <sup>rd</sup> lowest evaluated
2	Ballot papers; Parliamentary	Ranked 7 <sup>th</sup> lowest evaluated
3	Ballot papers; Presidential	Ranked 5 <sup>th</sup> lowest evaluated
4	Ballot papers; Referendum	Ranked 3 <sup>rd</sup> lowest evaluated

#### **Tender Committee Award**

The tender was presented to ECK Tender Committee at two separate sittings as follows:-

- 1) On 24<sup>th</sup> April, 2007 for adjudication and award for purposes of Magarini parliamentary and several civic by-elections held on 14<sup>th</sup> May 2007.
- 2) On 4<sup>th</sup> May, 2007 for final award for presidential and referendum ballot papers.

The Tender Committee discussed the tender and approved award to the lowest evaluated bidder in each item taking into account both technical and financial aspects including acceptable/realistic delivery period. Immediate communication of the award was permitted.

Consequently, letters of acceptance and Local Purchase Orders were placed to the awarded firms to enable urgent printing & delivery of the ballot papers

in readiness for the by-election. Copies of Letters of Acceptance and Local Purchase Orders to the awarded firms were produced at for hearing by the Procuring Entity.

## **THE APPEAL**

The Applicant raised six grounds of appeal in its Request for Review. At the hearing, the Applicant consolidated these grounds into two main complaints concerning flawed evaluation in grounds 1-4, and late notification of award in grounds 5 and 6. The Applicant prayed for orders as follows:

- 1) The Board to review the decision by the Respondent awarding the tender to Universal Print Group Ltd and cancel the same forthwith.
- 2) The Board to direct the Respondent to award the tender to the Applicants.
- 3) The Board in the alternative do order the Respondent to re-evaluate the tender correctly and transparently in the pricing aspect of the tender.
- 4) The Board do award the Applicant the costs of the application.

The Board will deal with the grounds in the same clusters as presented by the Applicant.

### **Grounds 1-4**

In these grounds the Applicant complained of breaches of Sections 64, 66 and 66(4) of the Public Procurement and Disposal Act, 2005, and Regulations 47, 48, 49, 50, 50(3), 51 and 52 of the Public Procurement and Disposal Regulations, 2006. Counsel for the Applicant submitted that the Procuring Entity's decision to award the successful tenderer was erroneous and flawed in that at the opening of tenders, the prices read out pursuant to Section 60(5) and Regulation 45 did not include prices for options or alternatives which were awarded. Counsel pointed out that the Applicant had offered a single price of US\$5,987,200 for all of the items quoted for as required in the tender document and, accordingly that was the price read out at the tender opening. However, the Procuring Entity in its letter dated 18<sup>th</sup> May 2007 notifying the Applicant that they were not successful, had stated as follows:

"...This is to inform you that your bid for supply of items in the above tender was received among fourteen (14) competitive bids and evaluated as required...You complied with the pre-qualification analysis, technical evaluation of samples and site visit. However, your prices were not very competitive and [were] ranked 3<sup>rd</sup> 5<sup>th</sup> and 7<sup>th</sup> lowest hence not successful..."

In response to the Procuring Entity's letter the Applicant had written, *inter alia*, as follows on 11<sup>th</sup> June 2007:

"1...

2..... when your team visited our facilities for a due diligence, we were informed that only four companies had qualified for the stage of the evaluation process. It therefore meant that we could only be ranked between the first and fourth position. What we find perturbing, is the fact that the second paragraph of your letter indicates that we were ranked, 3/5/7 for the different lots out of 14 tenders received..."

Counsel argued that the successful bidder's price as read out had been US\$ 7,258,839.20. Therefore, the core of the Applicant's complaint was that whilst Regulation 50(1)(a) required that after technical evaluation, the financial evaluation should be determined by taking the bid price as read out at the bid opening, the price of the successful bidders as read out had been US\$1,272,639 higher than the Applicant's. Counsel submitted that Regulation 50(3) required that the successful tender should be the tender with the lowest evaluated price. He further argued that Section 50(2)(a) required that the evaluated bid price be determined by taking the bid price as read out at the tender opening, and as no alternative offers were read out, they could not be evaluated.

Counsel further argued that the Procuring Entity, in their Memorandum of Response, had indicated that some bidders had offered alternative bids, which was not allowed in the tender documents. He pointed out that the specifications, colour, size, paper, and delivery period specified in the tender did not leave room for alternative offers. In addition, he questioned whether such alternative offers, also had alternative bid bonds to go with them. As only one price for each bidder had been read out at tender opening, the Procuring Entity was not entitled to evaluate any other offers, or reject any offers without also rejecting their respective bid bonds. If only one bid bond

was provided then it would be rejected with the read-out offer that had been rejected.

Counsel's second limb of argument on evaluation was that the Procuring Entity failed to award the tenders within thirty days as required by Section 66(6) and Regulation 46. Counsel pointed out that the award was made on 24<sup>th</sup> April 2007 which was outside the statutory period allowed for evaluation. This flaw rendered the award irregular and a nullity.

Finally, Counsel's third limb of argument was that the Procuring Entity the was in breach of the Regulations in adjudicating the tender in separate parts and awarding for Magarini by-election ballot papers separately on 24<sup>th</sup> April 2007, whilst other awards were made on 2<sup>nd</sup> May 2007. He argued that the tender document did not allow segregation to enable segregated awards. Counsel did not, however, support this allegation by citing the relevant breach of the law or obligation imposed by the Act, the Regulations or the tender documents.

In his response to these grounds, Counsel for the Procuring Entity indicated he would rely on the filed Memorandum of Response and the documents supplied by the Procuring Entity. He then took the Board through the background to the tender. He pointed out that all fourteen bidders were required to be subjected to the four stages of the evaluation as indicated in the tender documents as set out in Page 8 of the Memorandum of Response. These stages were:

- a) Prequalification analysis
- b) Technical evaluation of the samples submitted to ensure conformance to standards/specifications
- c) Site visit and evaluation
- d) Financial evaluation of bids

Counsel submitted that a marking scheme was developed for the pre-qualification process, and not all the bidders qualified for the other stages. He also pointed out that those that qualified for financial evaluation were duly evaluated, and the findings were as indicated at Page 9 of the Procuring Entity's Memorandum of Response. Counsel asserted that all the required stages of evaluation were duly conducted in accordance with the tender documents and the legal provisions, and there was no breach thereof.

With regard to the alternative bids received, Counsel argued that there was no express restriction in the tender documents on options, or how a bid was to be submitted. Accordingly, some bidders provided alternative offers for some items. He submitted that the bid bonds submitted covered the offers submitted, and there was no requirement to submit more than one bid bond for each alternative offer. All that was required as far as the Procuring Entity was concerned, was that the bid should be for at least 2% of the highest offer made. Accordingly, the awards were properly made by the Procuring Entity to the lowest evaluated tenderer in accordance with the law.

With regard to the second limb of the Applicant's complaint that the Procuring Entity failed to award the tender within thirty days, Counsel denied that there had been any breach of Section 66(6) or Regulation 46. Counsel pointed out that a proper reading of those provisions required that the evaluation be carried out within the prescribed time-frame of thirty days, and there was no requirement that the award itself should be made within that same time-frame as argued by the Applicant. He argued that so long as evaluation was done within thirty days, the award can be made any time thereafter.

With regard to the third limb, Counsel denied that there was any breach of the Act, the Regulations or the tender documents by the Procuring Entity making the award for the Magarini by-election ballot papers at a different sitting from that at which the other awards were made. Counsel indicated that at Page 8 of the Memorandum of Response, it was clear that the Procuring Entity did not make separate or segregated awards of the tender. All that happened was that since the Magarini by-election – to be held on 14<sup>th</sup> May 2007 – urgently required ballot papers to be available, the Tender Committee made the award for Parliamentary and Civic ballots on 24<sup>th</sup> April, and deferred the decision on the Presidential and Referendum ballot papers until 4<sup>th</sup> May 2007. As there was no segregation of the awards for each item, the Applicant's complaint did not stand.

The Board has carefully considered the submissions made on these grounds of appeal and has perused the tender documents availed.

The tender document used by the Procuring Entity essentially comprised two documents. The first was contained in pages 1-13 of Annex 2 of the Annexures to the Memorandum of Response, and expressed the Procuring Entity's requirements and tender conditions. The second document

contained Ballot Papers Specification Standards number ECK 03:2007 for item codes A005-A015, containing ten pages, including specimen ballot papers. The tender document, at Page 9, required bidders to provide their bids for four items in a table as follows:

“Provide your most competitive bid for supply of the following items

Item Code	Code Standard	Item Description	Unit of Issue	Quantity Required	Unit Price Excluding VAT	VAT 16%	Total Cost
A005	ECK:03:2007	Ballot papers (Local)	(No)	16,000,000			
A010	ECK:03:2007	Ballot papers (parliamentary)	(No)	16,000,000			
A015	ECK:03:2007	Ballot papers (Presidential)	(No)	30,000,000			
A020	ECK:03:2007	Ballot papers (Referendum)	(No)	16,000,000			
TOTAL TENDER SUM							

”

The format of the above table clearly shows that bidders were required to indicate the Unit Price and Total Cost of each of the four different ballot papers. Thereafter, each bidder had to indicate the Total Tender Sum.

This interpretation is supported by the requirements of the provisions of Paragraph 11 and 12 of the Special Conditions for Bidding on Page 11 of the tender document. These paragraphs provide as follows:

“11. All bidders are required to state the tender sum (total value of items quoted for) on the space provided in Form S.31 attached and on Page 9 of this document.

12. Bidders must provide a **Bid Bond equivalent to 2% of the Tender Sum** which shall be converted into performance bond in the eventuality they are awarded the contract...Bidders to note that Bid bond less than 2% of the tender sum is **not acceptable**.”

It is clear from these two paragraphs that only one tender sum was required to be stated. It was to comprise the cumulative total cost of each item including VAT at 16%. The tender sum was also to be transferred to or



stated in Form S.31 which is the Standard Form of Tender, and also in table on Page 9 of the tender document. In addition, only one bid bond was to be provided, the amount of which should have been 2% of the stated tender sum. We therefore find that the framing of the table of requirements on Page 9, and the wording of paragraphs 11 and 12 of the Special Conditions for bidding, leave no room for an interpretation that more than one tender sum or one bid bond was required. We therefore hold that neither alternative bids nor alternative bid bonds were specified or permitted in the tender requirements. Accordingly, bidders who provided alternative bids were not responsive and evaluation of such bids would be unfair. Further, there was no means provided for evaluating such alternative bids.

In this regard, the Board noted that of the four bidders whose prices were evaluated, two bidders, namely M/S Smith and Ouzman Ltd and M/S Universal Print Group Ltd provided two or more tender sum alternatives/options for each of the four items respectively. The other two bidders, namely, Kalamazoo Security Ltd and Lithotech Exports Ltd submitted only one offer for each of the four items required. Further, the Standard Form of Tender, Form S31 which was issued to tenderers was altered and customized by some tenderers who chose not to complete and sign it as presented to them.

The Board also observed that although that tender required for prices to be stated inclusive of VAT, all the bidders' Standard Forms of Tender provided a tender sum which was exclusive of VAT.

It is trite law that the Form of Tender constitutes the offer of a bidder which may be accepted by the Procuring Entity. Upon perusal of the Forms of Tender of the final four financially evaluated bidders, the Board made the following observations:-

- a) Universal Print Group Ltd did not fill the Standard Form of Tender S.31 provided, but prepared their own which they signed. The total sum indicated was US\$ 7,258,839.20.
- b) Kalamazoo Security Print Ltd did not fill the Standard Form of Tender Form S.31 provided. They prepared and signed their own form which indicated the total tender sum as Stg £ 3,353,772.00.

- c) Smith & Ouzman Ltd filled the Standard Form of Tender Form S.31, which they signed. The Total Tender Sum indicated was Stg £ 3,290,400.
- d) Lithotech Printers Pty filled in the Standard Form of Tender Form S.31, which they signed. The Total Tender Sum indicated was US\$ 5, 987,200.

All the bid bonds provided were sufficient for the offers made.

It is clear from these offers that no bidder in fact offered any binding alternative offer in the Form of Tender. This left the evaluation process prone to unfairness when alternative bids were considered, as the bidders were then not competing on a like-for-like basis.

Accordingly, we find that the Procuring Entity applied an evaluation criteria that was not provided for in the tender documents, when it took into account more than one offer of a tender sum for each item submitted by some of the tenderers. This limb of the appeal therefore succeeds.

The Applicant's second limb on these grounds was that the evaluation was flawed in that it was not carried out within the statutory time-frame of thirty days, as required by Section 66(6) and Regulation 46.

It is not disputed that the tender closed and was opened on 14<sup>th</sup> March 2007. It is also not disputed that tender evaluation was required to be done in four stages, namely, Prequalification analysis; secondly Technical evaluation of samples; thirdly Site visit and evaluation; and finally, Financial evaluation. This was provided for on Page 1 of 13 of the tender document. It is further not disputed that the evaluation should have been done in thirty days and should have been completed by 14<sup>th</sup> April 2007.

Section 66(6) provides that

“The evaluation shall be carried out within such period as may be prescribed”

Regulation 46 contains the prescribed period, and provides as follows:

“A procuring entity shall, for purposes of Section 66(6) of the Act, evaluate the tenders within a period of thirty days after the opening of the tender”

During the hearing, the Procuring Entity referred to the Technical Evaluation Report, Site Visit and Evaluation Reports and Tender Committee Minutes in response to the allegations on this limb of the Applicant’s complaint.

The Technical Evaluation Committee Report (Annex 8) indicates that the Technical Evaluation Committee met on 11<sup>th</sup>, 12<sup>th</sup> and 13<sup>th</sup> April 2007. The report was duly signed by the members of the committee and was dated 17<sup>th</sup> April 2007. Three of the members signed on 17<sup>th</sup> April 2007, but the date when the other members signed, is not indicated. *Prima facie*, the Technical Evaluation Committee Report may be deemed to have been completed on 17<sup>th</sup> April 2007, which is three days beyond the statutory permitted time-frame.

In the Report itself, at Page 5 of 5 it is indicated that the Evaluation Committee agreed to set up a team to conduct site visits for physical verification of recommended firms. Thus, the Site Visit and Evaluation that was yet to be carried out, was finally carried out by two teams who also prepared reports shown as Annex 12 of the Procuring Entity’s documents.

The first site visit report dated 23<sup>rd</sup> April 2007 covered site visits and evaluation of printing firms in the UK, between 21<sup>st</sup> and 23<sup>rd</sup> April 2007. The second report is undated but covered site visits and evaluation of printing firms in South Africa between 20<sup>th</sup> – 24<sup>th</sup> April 2007. According to the Procuring Entity, these reports were prepared just in time for the Tender Committee meeting of 24<sup>th</sup> April 2007, which made the first tender awards, as earlier mentioned.

It is not clear, from the documents availed, when the financial evaluation was done as the Price Comparison Schedule availed by the Procuring Entity (Annex 4) was not signed by the members of the Technical Evaluation Committee. However, the schedule was signed by one G. Ongeru on 18<sup>th</sup> April 2007, in the space allocated for counter-checking.

It is evident from the foregoing, that of the four evaluation stages which were required to be done under the tender document, none of them was completed by 14<sup>th</sup> April 2007, which was the thirty day mandatory time-

frame provided by Section 66(6) of the Act and Regulation 46. To that extent, the Procuring Entity was in breach of the obligations imposed upon it by the law.

The Board further noted that the Procuring Entity's Chairman, Mr S. M. Kivuitu sat as a member of both the Technical Evaluation Committee as shown in the Technical Evaluation Report and the Tender Committee in its meeting held on 24<sup>th</sup> April 2007 (Annexes 8 and 9 of the Procuring Entity's documents). This constituted a breach of Regulation 16(4) which provides as follows:

“No person shall be appointed under paragraph (3) [on an evaluation committee] if such person is a member of the tender committee of the procuring entity.”

The rationale for this is, obviously, to preclude a tender evaluator from proceeding to sit as adjudicator and making an award of the same tender which he evaluated. This constitutes a conflict of interest, and amounts to a breach of one of the cardinal rules of natural justice namely; no man may be a judge in his own cause.

It was also observed that none of the reports of the evaluation committee (Site Visit and Evaluation Report, Technical Evaluation Report or Price Comparison Schedule) made a final recommendation to the Tender Committee for award. A perusal of the Tender Committee Minutes of the 24<sup>th</sup> April and 4<sup>th</sup> May 2007, at Pages 15 of 17, and 12 of 25, respectively, show that the Tender Committee made recommendations to itself and then approved the awards.

This amounts to a breach of Regulation 16(9) and (10)(f) which make it mandatory for the evaluation committee to prepare final recommendations for award. Those Regulations provide as follows:

“16(9) An evaluation committee shall prepare a report on the analysis of the tenders received, and **final** rating assigned to each tender and submit the report to the tender committee.

(10) The report prepared under paragraph (9) shall include –

- (f) a recommendation to award the tender to the lowest evaluated tenderer or the person who submitted the proposal with the highest total score” (emphasis ours).

Finally, during the hearing on this ground it was observed from the Tender Committee Minutes of 24<sup>th</sup> April 2007, that Mr J. H. Tsola, the Commission Secretary who is also the Procuring Entity’s Accounting Officer sat as the Chairman of the Tender Committee. This is contrary to Regulation 10 and the Second Schedule Paragraph 11 which provide that the Chairman of Commissions (Permanent) Tender Committee should be a person appointed by the accounting officer.

In view of the foregoing serious flaws, this limb of the grounds of appeal also succeeds.

The Applicant’s third limb of these grounds of appeal, concerned the segregation of the award by awarding for the Magarini by-election separately from the other awards. As earlier stated, the Applicant failed to provide statutory support of its allegations of breach on this issue. After due consideration of the Tender Committee’s award the Board found that there is no bar to the Procuring Entity’s Tender Committee having several sittings at which it deliberates upon, and makes it awards. The Applicant’s allegations could therefore not be sustained, as no breach has been occasioned. Accordingly, that limb of the Applicant’s ground fails.

### Grounds 5 and 6

In these grounds, the Applicant complained that the Procuring Entity was in breach of Section 67(2) of the Act in that it failed to notify successful and unsuccessful tenderers of their success or failure, at the same time.

Counsel submitted that the letter of notification of its non-success was dated 18<sup>th</sup> April 2007, yet was received by fax on 5<sup>th</sup> May 2007. Counsel averred that successful bidders received their notifications earlier, and that the delay in notifying the Applicant was done in bad faith with the aim of preventing the Applicant from filing the appeal. This made the process lack transparency resulting in its being flawed.

In response, the Procuring Entity argued that Section 67(2) merely required the Procuring Entity to be fair and notify successful and unsuccessful

bidders, at roughly the same time. Further Counsel pointed out that no prejudice had been suffered by the Applicant as it had been able to file the appeal within time. Counsel, however, admitted that the successful bidders were notified before the Applicant was notified on 5<sup>th</sup> May 2007.

In addition, Counsel pointed out that with regard to the awards made on 24<sup>th</sup> April 2007, notification to the successful bidders was required to be made urgently in view of the Magarini by-election which was scheduled for the 14<sup>th</sup> May 2007.

The Interested candidates Al Ghurair Printing and Publishing and Lexlines Press associated themselves with the arguments of the Applicant and submitted that the tender process was flawed and should be annulled. On his part Mr. Ouzman for Smith & Ouzman stated that although he was a successful bidder, he offered an alternative bid because the specifications were not clear, particularly on the provision of water marks on ballot papers, and the number of polling stations for Civil by elections. Further, he stated that the samples they were given by the Procuring Entity were photocopies which did not indicate the water marks.

The Board has considered the submissions of the parties on these grounds. It is not disputed that the notification of success was not communicated at the same time as the notification of non-success. The Procuring Entity candidly admitted this. Section 67(2) is mandatory and is clear that two types of notices must be made: to the successful tenderers, and to the unsuccessful tenderers. These notifications must be made at the same time.

Accordingly this ground of the appeal succeeds.

At the close of his replying submissions, Counsel for Procuring Entity raised an argument that the procurement which was the subject of the tender was meant for the general elections, and that its hands are tied by time-frames which are not within its control. Counsel submitted that these time-frames are determined by the Constitution of Kenya and the Presidential and Parliamentary Elections Act. He pointed out that if, for example, the President were to declare the elections this month, the Procuring Entity would find it hard to comply with the time-frames under the Procurement Act, or in the event that an order of the Board affected the Procuring Entity's award.

Finally, Counsel for the Procuring Entity raised an objection to the jurisdiction of the Board. He argued that under Section 42(a) of the Constitution, the Electoral Commission of Kenya has been given functions which it must carry out. In carrying out some of these functions, procurement is core to their effective performance. Counsel argued that the Constitution also provides that the Electoral Commission of Kenya shall not be supervised by any other body in carrying out its constitutional functions. By virtue of Section 65 and 123(8) of the Constitution, only the High Court has jurisdiction to review the actions of the Electoral Commission of Kenya. Accordingly, he argued, the provisions of the Public Procurement and Disposal Act 2005, were *ultra vires* the Constitution, insofar as it attempted to legislate provisions creating oversight over the Electoral Commission of Kenya.

In reply, Counsel for the Applicant, supported by Counsel for Al Ghurair Printing and Publishing House, argued that the procurement was not a core constitutional function of the Procuring Entity. As such, the Procuring Entity being a public entity that uses public funds was properly provided for in the Act. Counsel pointed out that Section 3(1) of the Act defines "public entity" to include "the commissions established under the constitution", and therefore the Procuring Entity is a regulated body for purposes of procurement.

Further, Counsel pointed out that the Procuring Entity submitted to the Board's jurisdiction by filing its documents under the Act, and that the Board was not the right forum to frame or raise constitutional issues. In addition, Counsel indicated that the tender floated by the Procuring Entity was on an "as and when required" basis. Thus, it was not an emergency type tender for which a constitutional or emergency measures would be warranted. The tender was for Presidential, Parliamentary and Civic Elections for the whole period between 2007 and 2008. As this was not a tender linked to a specific election or by-election, and was advertised in February 2007, the issues raised by the Procuring Entity on constraints in time-frames, were not genuine.

The Board has considered the parties' submissions on the Procuring Entity's closing arguments. With regard to the question of jurisdiction, the Board finds its jurisdiction in the Public Procurement and Disposal Act. As Section 3(1) clearly places the Procuring Entity within the Board's jurisdiction, there is no need to make any further comments on that point.

With regard to the constraints faced by the Procuring Entity concerning time-frames for delivery of its constitutional mandate vis-à-vis the procurement time-frames and obligations imposed by the Procurement Act, we would make the following observations.

The fears of the Procuring Entity that an election would be paralyzed in the attempt to comply with the provisions of the Procurement Act and Regulations, appear to us to be entirely misplaced. The Procuring Entity has two clear options, under the Act, for fast-tracking a procurement which cannot be planned because of the exigencies of the circumstances. However, procurement such as the one in issue in this appeal, which was on an "as and when required" basis, clearly can be planned far in advance.

Section 26(3) and Regulation 20 require a procuring entity to plan all its procurements in each financial year as part of its annual budget process. Such plans are supposed to be submitted to the accounting officer at least thirty days before the end of each financial year (Regulation 20(5)). With such a system in place, then the accounting officer of the Electoral Commission of Kenya would be in a position to easily effect the regular procurements of the Procuring Entity within the provisions of the Act.

The procurement process may, however, be fast-tracked in the following circumstances:

- a) Under Section 74(1) and (3) the Procuring Entity may use Direct Procurement method where the object is not to avoid competition; and there is urgent need for the goods works or services; and the urgency was unforeseeable and not due to dilatory conduct on the part of the procuring entity.
- b) Under Section 92 the procuring entity may use a Specially Permitted Procurement Procedure authorized by the Public Procurement Oversight Authority. In particular, Section 92(4) permits the Authority to exempt such procedure from the application of a provision or provisions of Part IV of the Act on General Procurement Rules.

Thus, procurements by ECK need not suffer any undue delays on account of the procurement law.



The upshot of all we have said is that all of the Applicant's grounds of appeal, save for one limb thereof, have succeeded. Taking into account the serious flaws in the tender evaluation, the improperly constituted Tender Committee, the fact that the Technical Evaluation Committee did not make any final recommendations for award, and the other observations we have made, we are unable to grant prayers two and three of the orders sought by the Applicant.

In the circumstances pursuant to Section 98(a), the Board hereby annuls the awards made by the Procuring Entity on the 24<sup>th</sup> April and 4<sup>th</sup> May 2007. Pursuant to Section 98(b) the Procuring Entity may re-tender and may use restricted tendering procedure under Section 73, involving the fourteen tenderers that participated in this tender. The retender should be done within the shortest possible time.

Finally, the Board is alive to the concerns of the Procuring Entity that there is an impending general election. As already stated, the law has taken care of such an eventuality. The Procuring Entity in such a case may use the expedited procurement procedures provided for in the Act. It is recommended that the Public Procurement Oversight Authority provide all due assistance to the Procuring Entity both in preparing appropriate tender documents and in granting authorizations for hastened tendering.

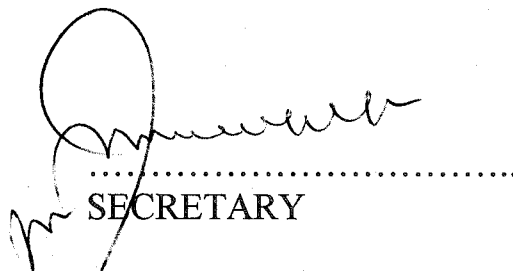
Dated at Nairobi this 9<sup>th</sup> day of July, 2007



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CHAIRMAN

PPARB



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SECRETARY

PPARB

