

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 69/2012 OF 14<sup>TH</sup> DECEMBER, 2012

BETWEEN

KONNEXION SYSTEMS LTD .....APPLICANT

AND

INDEPENDENT ELECTION AND BOUNDARIES COMMISSION (IEBC)

.....PROCURING ENTITY

Review against the decision of the Tender Committee of the Independent Election & Boundaries Commission dated 29<sup>th</sup> November, 2012 in the matter of Tender No. IEBC/01/2012-2012 for the Supply of General Election Materials (Solar lanterns).

**BOARD MEMBERS PRESENT**

- |                        |   |                   |
|------------------------|---|-------------------|
| 1. Joshua Wambua       | - | Member (In Chair) |
| 2. Eng. Christine Ogut | - | Member            |
| 3. Mrs. Loise Ruhui    | - | Member            |
| 4. Amb. Charles Amira  | - | Member            |
| 5. Mr. Akich Okola     | - | Member            |

**IN ATTENDANCE**

1. Philemon Kiprop - Holding Brief for the Secretary
2. Shelmith Miano - Secretariat

#### **PRESENT BY INVITATION:**

#### **PROCURING ENTITY - INDEPENDENT ELECTION & BOUNDARIES COMMISSION**

1. Wilfred Mutubwa - Advocate
2. Antony Lubulellah - Advocate
3. Gabriel Mutunga - Procurement Officer
4. Abdi Elempa - Procurement Officer

#### **APPLICANT 'S - KONNEXION SYSTEMS**

1. Robert Mworira - General Manager
2. Steve Mbogori - Operations Manager
3. Koome Mbogo - Manager

#### **INTERESTED PARTY**

1. Alex Masika - Advocate, Solamark technologies
2. Joyce Makena - Director Solamark
3. Jonston Tirop - PA, MOE,

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

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

## **BACKGROUND OF AWARD**

### **1. Preliminary**

The Independent Electoral and Boundaries Commission (IEBC) will conduct General Election exercise both Nationally and for Kenyans in the East Africa countries ,hence the need to expedite the procurement of the materials for this exercise was paramount crucial.

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

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

The IIEC has now been succeeded by the Independent Electoral and Boundaries Commission (IEBC) following the enactment of the IEBC Act, 2011. Independent Electoral and Boundaries Commission (IEBC) will conduct the General election which shall be held on 4<sup>th</sup> of March 2013, where various elections materials are required for conducting free and fair election.

Following these requirements Independent Electoral and Boundaries Commission (IEBC) advertised for the procurement of election materials.

**2. Advertisement of the tender.**

The tender for the supply and delivery of General Elections Materials was advertised on 2<sup>nd</sup> October 2012 through the Daily Nation as required by the law.

**3. Closing/Opening of tender.**

The tender was closed on 22<sup>nd</sup> October, 2012 at noon and thereafter immediately opened at Nairobi Safari Club Hotel Lillian Towers.

A total of 138 bidders submitted their document at the close of tender as shown in the table below

**List of Bidders who submitted their tender documents**

Bidder No	Name of the Bidder
1	M/S Kalzat Security Print Ltd
2	M/S Euncem Technologies Limited
3	M/S Top Connectors Ltd
4	M/S Option General Supplies
5	M/S Graphic Line up
6	M/S Soleca Communication Ltd
7	M/S Javaris Traders
8	M/S Disk and Bob Investment
9	M/S Krone Limited
10	M/S Konnexion System ltd
11	M/S Kiwaka General Merchants
12	M/S Hill Brough Co. Ltd
13	M/S Akenya Investment Ltd
14	M/S Solar Mart Technologies
15	M/S Kensouth Supplies
16	M/S Mbirwe Systems Ltd
17	M/S Ramco Printing Works Ltd

18	M/S Movem Kester E.A .Ltd
19	M/S Iftah Communication Ltd
20	M/S Lino Stationers (A) ltd
21	M/S Sage Links Construction Ltd
22	M/S Ridge Pole Ent.Ltd
23	M/S Giwells Limited
24	M/S Paperline Office Supplies Ltd
25	M/S Specific Supplies Ltd
26	M/S Rockey Africa Ltd
27	M/S Officemart Ltd
28	M/S Juggi Rubber Works Ltd
29	M/S Lithotech Exports
30	M/S Ovation Enterprises
31	M/S Flemax Enterprises Ltd
32	M/S Summit Sales and Services
33	M/S Erre Di Esse Grafice Spa
34	M/S Elite Offset Ltd
35	M/S Akshar Africa Ltd
36	M/S Charwins Limited
37	M/S Print Fast K Ltd
38	M/S Mini Mix Agencies
39	M/S Duke Enterprises
40	M/S Magnate Ventures Ltd
41	M/S Pacific Stationery K Ltd
42	M/S Guaca Stationers Ltd
43	M/S Five Stars Aromantics Co. Ltd
44	M/S Hopeland and Advert Desesigns Ltd
45	M/S King Wear Ltd
46	M/S Ellams Products Ltd
47	M/S Punclines Security Prints
48	M/S Munishram Int. Business Machines Ltd
49	M/S KCC College
50	M/S First Supplies Ltd
51	M/S Antco. Investment Ltd
52	M/S Sky jemik Enterprises Ltd
53	M/S Kenya Suitcase Manufacturers Ltd
54	M/S Triump Suppliers
55	M/S Helios Enterprises
56	M/S Terton Ltd
57	M/S Equip Agencies

58	M/S Rural Distributors
59	M/S Acme Press Kenya Ltd
60	M/S Easco Africa Ltd
61	M/S Scan House Press Ltd
62	M/S System Media Technologies
63	M/S Zedgee Ltd
64	M/S Kenya Toner and Ink Supplies
65	M/S Safenet Technologies
66	M/S Camp Stationers
67	M/S Amirati Enterprises
68	M/S Thumari Founders
69	Plexus Energy Limited
70	M/S Dype Transit Limited
71	M/S Jackway General Ltd
72	M/S Splash General Supplies
73	M/S Bizone Limited
74	M/S Veteran General Merchants
75	M/S Precision Rubber Stamp Work
76	M/S Chafra Communication Services
77	M/S RH Devani
78	M/S Security Group
79	M/S Exclusive Equipment
80	M/S Bittval Suppliers
81	M/S Marine Sage Investment Ltd
83	M/S Broadview Enterprises Ltd
84	M/S Facelift Enterprises
85	M/S Riesece Enterprises
86	M/S Tre vta Limited
87	M/S Mercci Investment
88	M/S Firms star Limited
89	M/S Spero Africa Ltd
90	M/S Hivale Investments
91	M/S Huska construction Company
92	M/S Zycon K Ltd
93	M/S Tibyatec Systems
94	M/S Concrete Enterprises
95	M/S Capital Four Limited
95	M/S MF Portables K Ltd
96	M/S Pelican Sign Ltd
97	M/S Gabbie Holdings

98	M/S Legend Solution
100	M/S Best Digital Ltd
101	M/S Kiotebetes Ent. Ltd
102	M/S Double sight services
103	M/S Multi Level Traders
104	M/S Eldama Engineering Co. Ltd
105	M/S Risce Enterprises
106	M/S Aliko Printers and Stationers
107	M/S Kenya Trading Co. Ltd
108	M/S Copy max stationers and printers
109	M/S Gemuk Enterprises
110	M/S Rosebridge Enterprises
111	M/S Pewin Supplies
112	M/S Paper Plus Trading Co. Ltd
113	M/S Risen Enterprises
114	M/S Rand Logistics E. A Ltd
115	M/S Anchor Ltd
116	M/S Winston International Ltd
117	M/S Aenon Enterprises
118	M/S Precise Industries Supplies
119	M/S African Commodity Supplies Ltd
120	M/S Afyare Enterprises Ltd
121	M/S Concrete Technologies
122	M/S Pisu and Co. Ltd
123	M/S Toror Safaris Ltd
124	M/S Bryma Technologies Ltd
125	M/S Wamwa Trading Co. Ltd
126	M/S Keomang General Supplies Ltd
127	M/S Scan Graphic K Ltd
128	M/S Office Technologies Ltd
129	M/S Soloh Worldwide Inter Enterprises
130	M/S Kenafric Diaries Manufacturers Ltd
131	M/S Wamucho Supplies
132	M/S Geant Enterprises
133	M/S Thinkom Stationers and printers
134	M/S Kedong Investment and General Supplies
135	M/S Vaitoo Enterprises
136	M/S Sheribiz Supplies
137	M/S Pinnies Agency Ltd
138	M/S Africa Infrastructure Development Co. Ltd

#### 4. Evaluation

The Accounting Officer appointed a team of officers to evaluate the submitted bids. The Tender Evaluation Committee was composed of eight members under the chairmanship of Michael Oyalo, Manager Strategy.

The Evaluation committee evaluated the bids in three stages.

1. Preliminary Evaluation
2. Technical Evaluation
3. Financial Evaluation

##### **PRELIMINARY EVALUATION**

A preliminary examination was conducted on the bidding documents to confirm that all preliminary and technical documentation requested in the tender documents had been provided.

##### **A) Tender Mandatory Requirements /Tenderers Eligibility and Qualification**

(Sub section 2.11.3)

The Committee checked the compliance of the bidders to the **mandatory** requirements of the tender as contained in the tenderers eligibility and qualifications.

These conditions were as follows

- Bid bond equivalent to 2% of the total tender sum.
- Valid Tax compliance certificate
- Completely filled and signed Confidential Business Questionnaire.
- Form of tender –S31 Completely filled and signed.
- A copy of the audited accounts for the previous 2 years
- Price Validity period of 120days.
- Validity bid bond period of 150 days.



## **b) List of Bidders Who Did Not Meet the Mandatory Requirements**

The following bidders did not meet mandatory requirements as specified in the tender document.

### **List of Disqualified Bidders**

<b>Bidder No</b>	<b>Bidder name</b>	<b>Reasons for Disqualification</b>
43	M/sFive stars Aromantics Co. Ltd	Inadequate Bid Bond
131	M/S Wamuche Supplies	Form of tender has no amount in words and figures Bid bond less by KES 1,358,020 Tax Compliance expired on 27/8/12
51	M/S Antco Investment Ltd	Validity bid bond stated 21 <sup>st</sup> January 2012 not 19/3/12
21	M/S Sage Links Construction Ltd	Tax compliance expired on 10 <sup>th</sup> August, 2012
24	M/S Paperline Office Supplies Ltd	Validity period of bid bond period less 150 days Form of tender not properly filled
7	M/S Javaris Traders	Insufficient bid bond Form of tender not properly filled
5	M/S Graphic Line up	No bid bond, Tax compliance certificate expired on August, 2012
2	M/S Euncem Technologies Ltd	Tax Compliance expired on August, 2012
3	M/S Top Connectors Ltd	Validity bid bond period of 120 days (21 <sup>st</sup>

Bidder No	Bidder name	Reasons for Disqualification
		February,2012
6	M/S Soleca Communication Ltd	Bid bond validity period 120 days instead of 150 days
27	M/S Office Mart Ltd	Validity period of bid bond expires on 18/3/12
110	M/S Rosebridge Enterprises	Audited accounts not attached
23	M/S Giwells Limited	Insufficient bid bond
123	M/S Toror Safaris Ltd	No bid bond attached, form of tender not properly filled
80	M/S Bittval Suppliers	Tax compliance certificate not attached, Form of tender not filled,
81	M/S Marine Sage Investment Ltd	Validity bid bond period 120 days instead of 150 days.
76	M/S Chafra Communication Services	Insufficient bid bond
75	M/S Precision Rubber Stamp Work	No tax compliance certificate
		No audited accounts
71	M/S Jackway General Supplies	Form of tender not properly filled
4	M/S Option General Supplies	Insufficient bid bond
		Form of tender not properly filled.

Bidder No	Bidder name	Reasons for Disqualification
109	M/S Gemuk Enterprises	Attached audited accounts for 2009 & 2010 not for 2011
13	M/S Akenya Investment Ltd	No bid bond provided, form of tender not filled
74	M/S Veteran General Merchants	Insufficient bid bond KES 500,000 against KES13,809,643
107	M/S Kenlaysia Trading Co. Ltd	Validity period of 120 days not 150 days.
108	M/S Copy Printers and Stationers Ltd	Insufficient bid bond provided KES 2,000,000 instead KES 5,685,966
92	M/S Zycon K Ltd	Insufficient bid bond KES 300,000 instead KES 558,200
9	M/S Krone Limited	No bid bond, No tax compliance certificate attached Confidential business questionnaire not filled.
54	M/S Triump Suppliers	Insufficient bid bond KES 115,200 instead of KES 151,200 Validity bid bond period 120 days instead 150 days
20	M/S Lino Stationers (A) Ltd	Insufficient bid bond Form of tender not properly filled.
132	M/S Geant Enterprises	Insufficient bid bond by KES 368,000 Validity bid bond period expires January 2013 No Audited accounts attached
133	M/S Thinkon Stationers and	Tax compliance certificate expired on 16/2/12

Bidder No	Bidder name	Reasons for Disqualification
	Printers Ltd	No Audited accounts for 2011
1	M/SKalzat Security Printing	Form of tender not properly filled
89	M/SSpero Africa Ltd	Insufficient bid bond by KES 283,530.40 Validity period of 120 days.
85	M/SRiscan Enterprises	Confidential business Questionnaire missing
84	M/SFacelift Enterprises	Validity bid bond period of 120 days Price validity period of 90 days
86	M/STrevas Limited	No tax compliance certificate attached
135	M/SVaitoo Enterprises	Validity period of 90 days
		Price validity period 90 days,
96	M/SMF Portables K ltd	Validity bid bond period less than 150 days
90	M/SHivale Investments	Insufficient bid bond KES 50,000 against 180,000, form of tender not filled.
68	M/SThumari Founders	Insufficient bid bond kes 700,000 against kes 1,081,450
49	M/SKCCTCollege	Tax compliance certificate not attached Bid bond less by kes 417,000 gave chq of 100,000 Form of tender not filled
69	M/S Plexus Energy Limited	No bid bond attached.
66	M/SCamp Stationers	No bid bond ,no audited accounts,
105	M/SRisce Enterprises	Insufficient bid bond by KES 8,000
127	M/SScan Graphic K Limited	Insufficient bid bond of KES 100,000 instead of KES 189,897.84,Audited accounts of 2010,,2009 and 2008

Bidder No	Bidder name	Reasons for Disqualification
104	M/S Eldama Engineering Co. Ltd	No bid bond
		Form of tender not completed
101	M/S Kiotebes Enterprises Ltd	Tax compliance expired on 26/3/12
		Form of tender not completed,insufficient bid bond
45	M/SKings Wear Ltd	Tax Compliance certificate expired 28/8/12
67	M/S Amirati Enterprises	Bid bond is for Huska Construction Ltd
39	M/S Duke Enterprises	No Bid bond attached ,No Audited accounts
97	M/S Pelican Sign Ltd	Insufficient bid bond ,validity bid bond period 120days,audited accounts of 2009 and 2010,Confidential business questionnaire not properly filled
36	M/S Charwins Limited	Insufficient bid bond as per the calculated tender sum of KES 331,115,800 ,Form of tender not properly filled
35	M/S Akshar Africa Limited	Tax compliance certificate expired
19	M/S Iftah Communication	Audited Accounts for 2011 only
55	M/S Helios Enterprises	Bid Bond validity period less than 150 days ,Form of tender not properly filled
61	M/S Scanhouse Press Limited	Bid bond validity period less than 150 days
138	M/S Africa Infrastructure Dev.Co. Ltd	No Registration documents
		No bid bond
		No audited accounts

The following firms were found to be responsive and therefore recommended to proceed for technical evaluation.

<b>BIDDER NO</b>	<b>BIDDERS NAME</b>
15	M/SKensouth Supplies
26	M/SRockey (A) Ltd
52	M/SSky Jemik Enterprises
53	M/SKenya Suitcase Manufacturers Ltd
120	M/SAfyare Enterprises Co. Ltd
16	M/SMbirwe Systems
134	M/S Plexus Energy Ltd
88	M/S Firmstar Ltd
87	M/SMerci Investment
83	M/S Broad View Enterprises Ltd
91	M/SHuska Construction Company Ltd
93	M/S Tibyatec Systems
121	M/S Concrete Technologies
11	M/S General Merchants
30	M/S Ovation Enterprises
29	M/S Litho tech Exports
10	M/S Konnexion System Ltd
122	M/S Pisu and Co. Ltd
34	M/S Elite Offset Ltd
70	M/S Dye Transit Ltd
72	M/S Splash General Supplies

50	M/S Firstling Supplies Ltd
17	M/S Ramco Printing Works Ltd
73	M/S Bizone Ltd
77	M/S R.H. Devani
78	M/S Security Group
63	M/S Zedgee Ltd
48	M/S MIBM Ltd
60	M/S Easco Africa Ltd
65	M/S Safenet Technologies
62	M/S System Media Technologies
46	M/S Ellams Product Ltd
129	M/S Soloh Worldwide Inter Enterprises
128	M/S Office Technologies Ltd
98	M/S Gabbie Holdings
95	M/S Capital Four Africa
136	M/S Sherbiz Supplies
8	M/S Disk and Bob Investment Ltd
28	M/S Jugi Rubber Works Ltd
111	M/S Pewin Supplies
112	M/S Paper Plus Trading Co. Ltd
113	M/S Risen Enterprises
114	M/S Rand Logistics E.A Ltd
126	M/S Keomag General Supplies Ltd
115	M/S Anchor Ltd
116	M/S Winston International Ltd
22	M/S Ridge Pole Enterprises Ltd
25	M/S Specific Supplies Ltd

12	M/SHills Brough Co. Ltd
117	M/SAenon Enterprises
118	M/SPrecise Industries Supplies
119	M/SAfrican Commodity Supplies Ltd
40	M/SMagnate Ventures
41	M/SPacific Stationers K Ltd
42	M/SGuaca Stationers Ltd
125	M/SKiwaka Trading Co. Ltd
124	M/SByrma Technologies Suppliers Ltd
82	M/SExclusive Equipment

**Disqualified Bidders through Online KRA Tax Compliance Certificate Checker**

The following 13 bidders were disqualified for having invalid Tax Compliance Certificate as per (KRA/TCC checker)

Disqualified Bidders:-



Bidder No	NAME OF THE BIDDER	REMARKS
87	Mercci Investment	Tax Compliance Certificate is invalid
134	Kedong Investment and General Supplies	Tax Compliance Certificate is invalid
136	Sheribiz Supplies	Tcc expired on 1/6/12 yet was attached shows 1/11/12
34	Elite Offset	Tax compliance expired 3/10/12
15	Kensouth Supplies	Tax Compliance certificate invalid
46	Ellams Products Ltd	Tax Compliance expired 26/6/12
22	Ridge Pole Enterprises Ltd	Tax compliance certificate is invalid
125	Wamwa Trading Co.Ltd	Tax compliance certificate expired on 20/8/12
106	Aliki Printers and Stationers	Tax compliance certificate expired August 2012
70	Dye Transit Ltd	Tax Compliance certificate invalid
62	System Media Technologies	Tax Compliance Certificate expired 22/6/12
50	Firstling Supplies Ltd	Tax Compliance Certificate Invalid
118	Precise Industries Supplies	Tax Compliance certificate attached is for Geoscientex

The following list of bidders qualified for technical evaluation stage after evaluating their tender document and confirming their Tax Compliance certificate validity through KRA online (ICC checker.)

Bidder	NAME OF THE BIDDERS
--------	---------------------

No	
08	M/SDisk and Bob Investment
10	M/SKonnexion System Ltd
11	M/SKiwaka General Merchants
12	M/SHillBrough Co. Ltd
14	M/SSolarMart Technologies
16	M/SMbwire Systems Ltd
17	M/SRamco Printing Work Ltd
18	M/SMorven Kester (E.A)Ltd
25	M/SSpecific Supplies Ltd
26	M/SRockey Africa Ltd
28	M/S Jugi Rubber Works Ltd
29	M/SLithotech Exports
30	M/SOvalation Enterprises
31	M/S Flexmax Enterpries
32	M/SSummit Sales and Services
33	M/S Erre Di Esse Grafice Spa
37	M/S Print Fast Kenya Ltd
38	M/S Mini Mix Agencies
40	M/S Magnate Ventures
41	M/S Pacific Stationery KLtd
42	M/S Guaca Stationers Ltd
44	M/SHopeland Advert and Design Ltd
47	M/S Punch lines Security Ltd
48	M/S Munishram International Business Machines Ltd
52	M/SSky Jemik Enterprises
53	M/SKenya Suitcase Manufactures Ltd

56	M/S Terton Ltd
57	M/S Equip Agencies
58	M/S Rural Distributors
59	M/S Acme Press Ltd
60	M/S Easco Africa Ltd
63	M/S Zedge Limited
64	M/S Kenya Toner and Ink Supplies
65	M/S Safenet Technologies
72	M/S Splash General Supplies
73	M/S Bizone Limited
77	M/S R.H Devani
78	M/S Security Group
82	M/S Exclusive Equipment
83	M/S Broadview Enterprises Ltd
88	M/S Firm star Ltd
91	M/S Huska Construction Ltd
93	M/S Tibyatec Systems
94	M/S Concrete Enterprises
95	M/S Capital Four Africa
98	M/S Gabbie Holdings
102	M/S Double sight services
103	M/S Multi Level Traders
111	M/S Pewin Supplies
112	M/S Paper Plus Trading Limited
113	M/S Risen Enterprises
114	M/S Rand Logistics E.A Ltd
115	M/S Anchor Ltd

116	M/S Winston International Ltd
117	M/S Aeon Enterprises
119	M/S African Commodity Supplies Ltd
120	M/S Afyare Enterprises Ltd
121	M/S Concrete Enterprises
122	M/S Pisu and Co. Ltd
124	M/S Bryma Technologies Ltd
126	M/S Keomag General Supplies Ltd
128	M/S Office Technologies Ltd
129	M/S Solor Worldwide Inter Enterprises
130	M/S Kenafric Diaries Manufactures Ltd

## DETAILED TECHNICAL EVALUATION

Detailed technical evaluation was carried out to determine their responsiveness to the specification. Extracted herein is technical evaluation for the item under review and the results are as below:

### ITEM: SOLAR LANTERNS

B/N	Item	Technical Specification Requirements														Totals	
		3.1.1	3.1.2	3.1.4	3.2	4.1	4.2	4.3.1	4.3.2	4.7	5.0	6.0	b)	c)	7)M(arking(9		8) Packag ing(5)
77	Mar ks	10	0	0	0	0	0										51
	Re mar ks		M ec ha ni	30 mo nth s	15d ays	Ca nn ot be	5	5	5	5	0	2	2	2	5	5	

B/N O	Item	Technical Specification Requirements														Totals	
		3.1.1 Lightering (10)	3.1.2 Life expectancy (25)	3.1.4 Lighting Performance (10)	3.2 Operating condition (5)	4.1 PVC Module (5)	4.2 Battery (5)	4.3.1 Lamp (5)	4.3.2 Lampp mounting (5)	4.7 Switch (5)	5.0 (1) Construction (15)	6.0 Operating and manual (2)	b) maintenance (2)	c) Use of lantern (2)	7) Marking (9)		8) Packaging (5)
			sm not provided			exposed to direct sunlight											
57	Marks	10	0	0	2	5	5	5	5	5	5	2	2	2	7	1	56
	Remarks		Nom mechanics provided	To be charged after 3 months							separate						
25	Marks	0	0	0	0	5	5	5	5	5	0	2	2	2	3	5	44
	Remarks	Not indicated	Nom mechanics	Not indicated	3 months						rigid						
130	Marks	10	0	0	0	0	5	5	5	5	10	5	0	0	6	1	52
	Remarks		Nom mechanics	Not indicated	2 months	Not indicated					rigid		Not provided				
116	Marks	10	0	0	0	0	5	5	5	5	5	5	0	0	6	1	52
	Remarks										rigid		Not indicated	Not in			

B/N O	Item	Technical Specification Requirements														Totals	
		3.1.1 Light e n i n g (10)	3.1.2 Life ex p e c t a n c y (25)	3.1.4 Lig ht e n i n g P e r f o r m a n c e (10)	3.2 Op e r a t i n g c o n d i t i o n (5)	4.1 P o w e r M o d u l e (5)	4.2 B a t t e r y (5)	4.3.1 L a m p (5)	4.3.2 L a m p m o u n t i n g (5)	4.7 S w i t c h (5)	5.0 (1) C o n s t r u c t i o n (15)	6.0 O p e r a t i n g a n d m a n u a l (2)	b) m a i n t e n a n c e (2)	c) U s e o f l a n t e r n (2)	7)M (arking (9)		8) P a c k a g i n g (5)
														dic a t e d			
14	Mar ks	10	5	10	10	5	5	5	5	5	15	2	2	2	9	5	115
	Re mar ks																
53	Mar ks	10	0	10	0	5	5	5	5	5	10	2	2	0	7	1	72
	Re mar ks		N o m e c h a n i s m		Not i n d i c a t e d						rig id						
72	Mar ks	10	0	0	0	5	5	5	5	5	10	2	2	2	4	1	56
	Re mar ks		N o m e c h a n i s m	11 y e a r	2m o n t h s						rig id						
10	Mar ks	10	25	0	0	5	5	5	5	5	10	2	2	2	5	5	89
	Re mar ks			Not i n d i c a t e d	Not i n d i c a t e d						rig id						
17	Mar ks	10	0	0	0	5	5	5	5	0	0	0	2	2	7	5	53
	Re mar ks																

### Critical Parameters

3.1.1. Minimum lightening (10)

3.1.2 life expectancy (25)

3.1.4 life performance (10)

- 4.1.1PVC module(5)
- 4.2.1 Battery(5)
- 4.3.2lamp mounting(5)
- 4.7 switch (5)
- 5.0 construction(15)
- 6.(b)Operation(2)
- 7.Marking(9)
- 8Packaging(5)

**Total                      96**

Based on the critical parameters above, only 2 bidders scored 89 marks and above therefore, recommended for the Financial Evaluation Stage.

No.	Bidder No.	Totals
1.	14	95
2.	10	89

### **DETAILED FINANCIAL EVALUATION**

Financial evaluation which constituted the third phase .Was done for the bidders who qualified in the preliminary and Technical evaluation stages

The parameters that were considered at this stage were,

- a) The bid price as read out during bid opening
- b) Arithmetic corrections made by the Commission relating to errors of computations.

The Committee evaluated the prices quoted by the qualified bidders in each group per item.

### RECOMMENDATION

The Evaluation Committee Members recommended the lowest evaluated bidder in each item quoted of the evaluation report to be awarded the contract.

### SUMMARY OF BIDDERS RECOMMENDED TO SUPPLY GENERAL ELECTION MATERIALS FOR EACH ITEM.

A total of thirteen (13) bidders are recommended to supply general election materials.

Details of what each of the bidders recommended to supply are in the tables below:

B/NO	Bidder Name, And Contact	Quantity Required	Unit Price(Ksh)	Total Amount	Remarks
28	M/S Jugi Rubber Works.Po Box, 33213-00600 Nrb.Tom Mboya Street,Ncm Building 3 Rd Floor Tel: 0722- 825687/020-2242345				
	IEBC -Rubber Stamps	72,000	69.00	4,968,000	Lowest Evaluated Bidder
	IEBC Presiding Officer	72,000	69.00	4,968,000	
	IEBC Rejected-Rubber Stamps	72,000	69.00	4,968,000	
	IEBC Disputed Rubberstamps	72,000	69.00	4,968,000	
	<b>TOTAL AMOUNT (KSHS)</b>			<b>19,872,000</b>	

B/NO	Bidder Name And	Quantity Required	Unit Price	Total Amount	Remarks
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	<b>Contact</b>				
41	M/S Pacific Stationers Kenya Ltd Box 10562-00400 Nrb Industrial Area-Glesoi Road Tel: 020- 2020200/6533508/9				
	IEBC Returning Officer Rubber Stamps	580	40,020		<b>Lowest Evaluated Bidder</b>
	IEBC Spoilt-Rubber Stamps	72000	4,968,000		
	IEBC Rejection Objected To(Rubberstamps)	72000	4,968,000		
	<b>TOTAL AMOUNT (KSHS)</b>		9,976,020	9,976,020.00	

<b>B/NO</b>	<b>Bidder Name And Contact</b>	<b>Quantity Required</b>	<b>Unit Price</b>	<b>Total Amount</b>	<b>Remarks</b>
38	M/S Mini Mix Agencies Box 11583-00100 Nrb River Side Tel: 0722- 304242/020-				

	2140323.				
	Indelible Marker Pen(25% Silver Nitrate)	105,000	1,000.00	105,000,000	Lowest Evaluated Bidder
	<b>Total Amount (Kshs)</b>			<b>105,000,000.00</b>	

B/N O	Bidder Name And Contact	Quantity Required	Unit Price	Total Amount	Remarks
112	M/S Paper Plus Trading Co.Ltd. Box 75751 -00200, Nrb. Tel: 020-2048908/9				
	Security Seals (IEBC Colours-Serialized	3,000,000	6.59	19,770,000	
	Sample Ballot Posters,President,Senator,Governor,National Assembly Member, Women Member Of National Assembly And County Assembly	(72,000x6)	9.97	4,307,040	
	Polling Station Arrows -Left And Right	180,000x2	9.97	3,589,200	
	Dummy Ballot Papers For Training	36,000	198.25	7,137,000	
	<b>TOTAL AMOUNT (KSHS)</b>			<b>34,803,240</b>	

B/N O	Bidder Name and contact	Quantit y required	Unit price (Ksh)	Total Amount	Remarks
91	M/S Huska Construction Company Co.Ltd Box40666 - 00100, Nrb South C Msa Rd. Tel: 523682.				
	Constituency Returning Officer	290	23	6,670	Lowest Evaluated Bidder
	Constituency Deputy Returning Officer	290	23	6,670	
	County Returning Officer	47	23	1,081	
	County Deputy Returning Officer	47	23	1,081	
	Deputy Presiding officer	36000	23	828,000	
	Polling clerk	180000		4,140,000	
	Queuing Clerk	23,000	23	529,000	
	Tallying Clerk	3,420	23	78,660	
				5,591,162	

B/No	Bidder Name	Quantity Required	Unit Price(Ksh)	Total Amount	Remarks
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	<b>And Contact</b>				
52	M/S Sky Jemik Enterprises. Box 102421-00101, Nrb. Lr: 209/1736, St: Tom Boya St. Tel: 20-24866320.				
	Presiding Officer Badge	36,000	29.00	1,044,000	<b>Lowest Evaluated Bidder</b>
	<b>Total Amount (Kshs)</b>			<b>1,044,000.00</b>	

B/NO	Bidder Name And Contact	Quantity Required	Unit Price	Total Amount	Remarks
14	M/S SOLAR MARK TECHNOLOGIES BOX 10514-00400, NRB. KAMPUS MALL GROUND FLOOR TEL:020-2630058				
	Solar Lanterns	28,000	3750	105,000,000	<b>Lowest Evaluated Bidder</b>
	<b>TOTAL AMOUNT (KSHS)</b>			<b>105,000,000.00</b>	

B/NO	Bidder Name and contact	Quantity required	Unit price(Ksh)	Total Amount	Remarks
93	M/S Tibyatec Systems, P.O Box 10684-00200 Jogoo Lane Off Jogoo Road Tel:0720-081791				
	Election Manual	72,000	280	20,160,000	Evaluated Bidder.
	<b>TOTAL AMOUNT (KSHS)</b>			<b>20,160,000.00</b>	

B/NO	Bidder Name and contact.	Quantity required	Unit price (Ksh)	Total Amount	Remarks
44	M/S Hopeland Advertising And Design Ltd Box 17618 - 00100, Trv Office Plaza,Muthithi Road P.O Box 0722-714806				
	Polling Station Banner	36,000	1800	64,800,000	Lowest Evaluated Bidder
	Constituency Tallying centre banner	580	1800	1,044,000	
	County tallying	94	1800	169,200	

	Centre				
	National tallying centre	2	1800	3,600	
	Rebranding of IEBC Bags	279,100	50	13,955,000	
	<b>TOTAL AMOUNT (KSHS)</b>			<b>79,971,800</b>	
<b>B/NO</b>	<b>Bidder Name and contact</b>	<b>Quantity required</b>	<b>Unit price (Ksh)</b>	<b>Total Amount</b>	<b>Remarks</b>
241	M/S OFFICE TECHNOLOGIES LTD. BOX 27574-00506, NRB. MOMBASA ROAD TEL: 020-8042780				
	Tallying centre printer Model Cannon IR 5035.	337	760,000	256,120,000	<b>Lowest Evaluated Bidder</b>
	<b>TOTAL AMOUNT (KSHS)</b>			<b>256,120,000.00</b>	

B/NO	Bidder Name and contact	Quantity required	Unit price(Ksh)	Total Amount	Remarks
57	M/S EASCO AFRICA LTD P.O BOX 8746-00200 AGIP HOUSE-				

	HAILE SELLAISIE ROAD. 0722-839842.				
	Polling Day Diary	72,000	95.00	6,840,000	Lowest Evaluated Bidder
	TOTAL AMOUNT (KSHS)			6,840,000.00	
B/NO	Bidder Name and contact	Quantity required	Unit price(Ksh)	Total Amount	Remarks
11	M/S KIWAKA GENERAL MERCHANTS LTD. BOX 38671-00623 NRB MURANGA RD. TEL: 0722-259232				
	IEBC Branded executive brief case	337	3200	1,078,400	Lowest Evaluated Bidder
	TOTAL AMOUNT (KSHS)			1,078,400.00	

B/N O	Bidder Name And Contact	Quantity Required	Unit Price(Ksh)	Total Amount	Remarks
17	M/S RAMCO PRINTING WORKS LTD BOX 27750-00506, NRB DUNGA CLOSE ROAD-INDUSRIAL AREA TEL:0733- 600538/0722-513109				
	IEBC Branded Table Cloth	342	480.00	164,160.00	Lowest Evaluated Bidder
	Heavy Duty Spiral Binders And Spirals	18	90,000.00	1,620,000.00	
	<b>TOTAL AMOUNT (KSHS)</b>			<b>1,784,160</b>	

B/NO	Bidder Name and Contact	Quantity Required	Unit price(Ksh)	Total Price	Remarks
77	M/S Rh Devani P.O Box 18342-00500 Nrb, Kitui Road Industrial Area Tel:020-2627446/7/8	27944	528.00	14,754,432.00	Lowest evaluate bidder



	Refilling of gas cylinders 3kgs				
	TOTAL AMOUNT (KSHS)			14,754,432.00	

### **THE TENDER COMMITTEE DECISION**

The Tender Committee in its meeting No. 24/2012-2013 held on 29<sup>th</sup> November, 2012 deliberated on the recommendations of the Evaluation Committee and approved the award of Supply of General Election Materials(Solar lanterns) to solar mart Technologies at total cost of ksh,. 105,000,000.00

### **THE REQUEST FOR REVIEW**

The Request for Review was lodged by Konnexion Systems Ltd on 14<sup>th</sup> December, 2012 in the matter of Tender No: IEBC/01/2012-2012 for the Supply of General Election Materials (Solar lanterns).

The Applicant was represented by Robert Mworira General Manager, the procuring Entity was represented by Wilfred Mutubwa , Advocate other interested parties were Alex masika, Advocate for Solarmak Technologies

The Applicant requested the board for the following orders:

1. The award of the tender to the winning bidder be annulled.
2. The Board to substitute the decision of the Tender Committee and award the tender to the Applicant.
3. The Procuring Entity to pay for costs incurred by the Applicant.

The Applicant raises five (5) grounds of review which we comment on as follows:

**Grounds 1, 3, 4 & 5: - Breach of Sections 66(4) & 67,** of the Public Procurement and Disposal Act, 2005 (hereinafter referred to "the Act") and Regulation 47 & 45 of the Public Procurement and Disposal regulation, 2006 (hereinafter referred to as "the Regulation").

These grounds have been combined since they raise similar issues regarding evaluation.

The Applicant submitted that the Procuring Entity breached Section 66 (4) of the Act by awarding the Contract to a bidder who was not the lowest for item No. 8 (Solar Lanterns) which states that "*the successful tender shall be the tender with the lowest evaluated price.*"

The Applicant further submitted that during the tender opening held on 22<sup>nd</sup> October, 2012 prices were read out and the winning bidder's prices was Kshs. 4,550 while that of the Applicant was Kshs. 3,850/=. It stated that, according to the tender submitted by the Successful Bidder, the Solar mark undertook to supply 28000 units at the price of Ksh 127,400, which works out at Ksh. 4550, a fact which confirmed its contention that the price quoted by the Successful Bidder was in fact Ksh 4550 per unit, and not Ksh. 3750, which was the price per unit at which the Procuring Entity awarded the tender to Solar Mart. It stated that this clearly indicates that the Procuring Entity manipulated the prices with the view to awarding the tender to Solar Mart, in breach of Section 68 of the Act. In the circumstance, therefore, the Procuring Entity failed to carry out fair evaluation and that if this had been done the Applicant would have emerged the winner.

The Applicant further stated that Procuring Entity breached Regulation (47) of the Act by not disqualifying the Successful Bidder at the Preliminary Evaluation stage for submitting an invalid tax compliance certificate. In support of this contention the Applicant stated that it

had carried out due diligence by going to the Kenya Revenue Authority website and established that the Tax Compliance Certificate presented by the Successful Bidder purporting that the Successful Bidder was tax compliant was in fact a forgery as the information available on the website indicated that the Tax Compliance Certificate KRA 18/038871/2012, submitted by the Solar Mart Technologies on 8th October, 2012, was in fact issued on 8th November, 2012 which was long after the tender was closed. It further stated that upon checking the tax registration and PIN details of Solar Mat using KRA TCC Checker, it established that PO 514047741T for the Successful Bidder was also issued on 8th November, 2012.

The Applicant further submitted that the Certificate of Registration CPR/2012/80722, purportedly issued by the Registrar-General attesting to the registration of the Successful Bidder as a limited liability company, was a forgery as the company was not in existence in 2008. It stated that it had carried out due diligence in the Companies Registry and had confirmed that, in fact, the company was registered on 22nd August, 2012 and, accordingly, the audited accounts submitted by the Successful Bidder purportedly in compliance with Clause 2.11.3.9(a) of the tender document, were forgeries as the company was not in existence during the period specified in the said Clause.

The Applicant presented to the Board the letter dated.... allegedly written to it by the Registrar-General stating that the Successful Bidder was registered on 2nd August, 2012 as evidence to back its claim that the Certificate of Registration submitted by the Successful Bidder with its tender was a forgery.

The Applicant further argued that according to the records, the company which submitted the tender was "Solar Mak" Technologies, whereas the company to which the award was made was "Solar Mart Technologies." It argued that this being the case, the award was

made to a company which did not participate in the subject tender and is, accordingly, an illegality.

The Applicant averred that Procuring Entity breached Section (67) of the Act by not notifying it at the same time with the winning firm. It stated that it physically went to the premises of the Procuring Entity on 6th December 2012 to pick up its letter of notification, and that it discovered at that time that the letter had been sent to an address which was not specified in its tender document. In its view, this was done deliberately in order to ensure that it did not get the notification. It further stated that it wrote to the Procuring Entity seeking clarification on the contents of the said letter but to date it had not received any communication from them, which contravene Section (45) of the Act and Regulation (66).

In response, the Procuring Entity stated that its decision was correct and lawful and that the Commission conformed to all provisions of the Public Procurement and Disposal Act, 2005, Public Procurement Regulations, 2006, the Instructions to Tender (ITT) that formed the Bidding Process during the tender advertisement, evaluation and recommendation of award of Contract.

It averred that the Applicant's tender was responsive having been considered in the preliminary, technical and financial evaluation and during the entire tender process and, accordingly, the Applicant did not suffer any prejudice in the evaluation of its tender.

The Procuring Entity further stated that the Successful Bidder's price was Kshs 3,750- and not Kshs. 4,550- as stated by the Applicant whose bid price was Kshs. 3,850 which means that the Applicant's price was higher than that of the Successful Bidder. It argued that in any case, determination of a successful bid is not based the lowest price quoted by a bidder, but is based on the lowest evaluated price as stipulated in Section 66(4) of the Act.

On the issue of winning bidder tax compliance the Procuring Entity averred that the tax compliance certificate submitted by the Successful Bidder was proper and valid. It argued that the allegation by the Applicant that the Tax Compliance Certificate submitted by the Successful Bidder was a forgery was not supported by any evidence as they were based on notes compiled by the Applicant whose accuracy could not be vouched for. It submitted that it would be dangerous for the Board to rely on evidence based on such notes as their credibility could not be verified.

As to the claim by the Applicant that the Certificate of Registration of the Successful Bidder was a forgery, the Procuring Entity argued that as this was not part of the complaint by the Applicant; reference to documents pertaining to it should not be entertained by the Board.

The Procuring Entity further stated that it notified both the Successful Bidder and the unsuccessful bidders at the same time by letters. On the issue of the correspondence /clarification referred to by the Applicant to the Procuring Entity it stated that the said clarification letter submitted before the board is not stamped and as such there is no proof that the same was served upon the Commission. While admitting that the letter was misaddressed, it argued that, in any event, the Applicant had suffered no prejudice as it was able to file its request for review within the statutory period.

In conclusion, the Procuring Entity submitted that the Board should consider the public interest and, therefore, not annul the tender, or make any decision that would disturb the process in any way, as requested by the Applicant, as such a decision would interfere with the electoral calendar. In support of this argument, it pointed out that nullification would result in re-advertising the tender, evaluating tenders received, awarding the tender and notifying all the bidders, as required by law, which is a process that could not be concluded within the electoral calendar. It stated that taking into account the fact that the items which are the subject matter of this procurement would need to be distributed to all corners of

Kenya, delay in their procurement would make it difficult, if not impossible, for this to be achieved, thus putting the conduct of the elections, which are scheduled for 4th March 2013, in jeopardy. The Procuring Entity argued that the procurement of electoral materials, including those in the subject tender, involved one hundred and thirty eight bidders, and it was only the Applicant which had complained. It argued that in a situation such as this, the Board should consider the public interest, and public policy, and should find that it supersedes the interest of the individual.

It concluded by stating that looking at the number of procurements involved holistically, the Board should find that the Procuring Entity had done a good job, and thus reject the petition by the Applicant.

On its part, the Successful Bidder argued that the claim by the Applicant that the Certificate of Registration of the Successful Bidder was a forgery should be dismissed by the Board in light of the fact that the letter tendered in evidence by the Applicant purporting to emanate from the Registrar-General is addressed to a firm of advocates, and not to the Applicant, and therefore, such evidence was not admissible. It stated that contrary to the claim by the Applicant that the Successful Bidder was not registered in 2008, the firm was in fact registered in that year.

On the issue of the Tax Compliance Certificate, the Successful Bidder argued that no evidence had been tendered before the Board to substantiate the claim by the Applicant that the Successful Bidder was not tax compliant. In this regard it pointed out that the claim by Applicant was not backed by a letter from the Kenya Revenue Authority, and was merely based on its notes, which could not be verified.

As regards the claim by the Applicant that the tender was awarded to a bidder whose price was not the lowest; the Successful Bidder stated that the emphasis in the evaluation of

tenders is not on price alone, but rather on the lowest evaluated price. In this regard it argued that the Applicant had not demonstrated that its product was technically superior so as to justify its claim that the award should not have been made to the Successful Bidder.

Regarding the claim by the Applicant that it was not notified of the outcome of the process at the same time as the Successful Bidder was notified, it argued that the Applicant had suffered no prejudice as it was able to file its request for review within the statutory period.

The Successful Bidder supported the claim by the Procuring Entity that this tender was of national interest and should therefore not be annulled by the Board. In support of this contention it cited the cases of *AVANTE, LITHOTECH SMARTMATIC AND INDEPENDENT, ELECTORAL COMMISSION, [Application Nos. 59, 61 and 62 of 2012]*, in which the Board, after considering the submissions by the Applicant in that case on the issue of public interest, dismissed the applications on the ground of public interest.

In conclusion, the Successful Bidder stated that if the Board were to find that the tender was not properly done it should, nevertheless, uphold the decision of the Procuring Entity, and consider awarding costs to the Applicant.

In reply, the Applicant argued that having raised the issue of the authenticity of the documents submitted by the Successful Bidder to support its tender, which in its view were forgeries, the Board was under duty to look at them. It reiterated that the whole process was manipulated from the beginning as exemplified by the fact that the Procuring Entity had now admitted that it had sent the notification to the wrong address, which in the view of the Applicant, was intended to deny it an opportunity to lodge a request for review.

The Board considered the submissions by the parties and perused the documents before it and makes the following findings and decision.

The Board notes that:

1. After the closure of the tender, the Procuring Entity conducted tender evaluation in three stages, namely: Preliminary, Technical and Financial Evaluations.
2. That the Applicant's tender was evaluated in the Preliminary, Technical and Financial stages of evaluation.
3. After concluding the technical evaluation, out of which the Successful Bidder, scored 115 marks, and the Applicant, who scored 89 marks, (which happened to be the pass mark), were considered responsive to the critical parameters, and thus both proceeded to the financial evaluation stage.
4. That the critical parameters solar lanterns and the marks were as follows:-

*Critical Parameters*

3.1.1. <i>Minimum lightening</i>	(10)
3.1.2 <i>Life expectancy</i>	(25)
3.1.4 <i>Life performance</i>	(10)
4.1.1 <i>PVC module</i>	(5)
4.2.1 <i>Battery</i>	(5)
4.3.2 <i>lamp mounting</i>	(5)
4.7 <i>switch</i>	(5)
5.0 <i>construction</i>	(15)
6. (B) <i>Operation</i>	(2)
7. <i>Marking</i>	(9)
8 <i>Packaging</i>	(5)



5. Upon scrutiny of Tender Document and more specifically Solar Lantern – Performance Specification, there is nowhere where the 89 pass mark is indicated or any provision on how the marks are to be allocated/apportioned to the critical parameters during the Technical evaluation.

6. According to Clause 2.11.3 bidders were required to provide with their tenders the following:

- (a) A copy of the audited accounts for the previous 3 years.
- (b) .....
- (c) A Valid Tax Compliance Certificate.
- (d) A Certificate of Registration/Incorporation.
- (e) .....
- (f) .....

8. According to the Tender Opening Register, the Successful Bidder quoted Ksh. 4,550 per unit totalling Ksh.127, 400,000 for the 28000 units.

9. The bid bond submitted by the Successful Bidder was for Ksh. 2,548,000 which is 2% of the bid amount, as required by the Tender Document.

Arising from the above noted facts, the question for determination by the Board under these grounds is whether the Procuring Entity breached Section 66(4) of the Act, by awarding the tender to a bidder whose bid was not the lowest evaluated price.

Section 60 of the Act deals with opening of tenders. Whereareas Section 60(5) of the Act provides that:

*"As each tender is opened, the following shall be read out loud and recorded in the document to be called tender opening register-*

- (a) The name of the person submitting the tender;*

*(b) The total price of the tender including any modifications or discounts received before the deadline for submitting tenders except as may be prescribed.*

*(c).....*

As already intimated under item 8 above, there was, indeed a tender opening register which was opened by the Procuring Entity in compliance with this Section of the Act. The purpose of this Section is to ensure transparency and accountability in the procuring process as set forth in Section 2 of the Act for the benefit of all parties involved in the process, by requiring a Procuring Entity to keep a record of the tender opening. It is human nature that differences of opinion will, more often than not, arise in any process or activity which involves competition, and in which a winner must be determined. Where such differences arise their resolution can only be satisfactorily determined if there is some objective way of measuring the veracity of the points of view advanced by the parties in dispute. It is for this reason that in the case of our procurement law, a specific provision which aims at protecting procuring entities from any claims about what was said or done in the course of a procurement process, that they are required to record their actions and decisions. Towards this end, Section 45 of the Act enjoins all Procuring Entities to keep procurement records so that should any dispute arise as to what transpired at any stage during the procurement process, a Procuring Entity can point to the records.

In this particular case the records of the procurement process at the tender opening stage were kept by the Procuring Entity. A dispute has now arisen between the Procuring Entity and the Applicant as to what price the Successful Bidder quoted so as to have formed a basis for the decision by the Procuring Entity to declare the Successful Bidder as the winner. These records indicate that the price for the supply of 28000 solar lanterns was Ksh. 4,550 per unit and the total came to Ksh.127, 400, 0 00.The records also indicate that the Applicant quoted a bid price of Ksh. 3,850 per unit for the supply of 28000 solar lanterns for a total price of

Kshs. 107,800, 000. The question therefore is, why did the Procuring Entity award the tender to the Successful Bidder at the price of Kshs. 107,800,000, when the tender sum quoted by the Successful Bidder as recorded in the Tender Opening Register, was Kshs. 127,400,000?

It is the contradiction between the tender sum quoted by the Successful Bidder of Kshs. 127,400,000 and the amount of Kshs. 105,000,000 at which the tender was awarded to the Successful Bidder, which partly gave rise to the suspicion by the Applicant that the process was manipulated. When shown the Tender Opening Register during the hearing, and asked for an explanation for this contradiction, a representative of the Procuring Entity, Mr. Abdi who was a member of the tender opening committee, and who also stated that he was responsible for reading out loud the details of the submissions by the tenderers, stated that *"usually when we open the tender, we have a team of people one announces, one records and the opening committee members sign and the price stated. In this case I was the person announcing the price and somebody else was recording. I don't know what could have happened. I cannot remember what I announced."* He further stated that *"...in this case what might have happened is the person announcing might have announced the right price, the person recording might have recorded the wrong price...."*

The Board is not persuaded by this explanation for the simple reason that, whereas it is conceivable that a miscommunication could occur between the announcement and the recording, it is inconceivable that the tender security sum, which was to be 2% of the bid amount, would coincide exactly with the quoted amount of Kshs. 127,400,000. This coincidence between the announced tender price and the value of the bid bond, suggests that the recorded price was that which was announced, further the Board notes that Tender Opening Committee members including the said Mr Abdi signed the minutes with the figure of Ksh127, 400,000. This gives rise to the question as where the figure of Ksh.105, 000,000 came from.

According to the documents presented to the Board by the Procuring Entity after technical evaluations were completed, the financial evaluations were done in which, according to the minutes dated November 2012, the Successful Bidder was awarded the contract for the supply of solar lanterns at the unit price of Kshs. 3,750 for the total contract sum of Kshs. 105,000,000. The figure of Ksh. 105,000,000 appears to have just been manufactured. It is thus clear that when the Procuring Entity realised that the price quoted by the Successful Bidder was higher than that quoted by the Applicant, it simply decided to alter that Successful Bidders price in order to ensure that its preferred bidder won the tender. Turning to the claim by the Applicant that the Successful Bidder presented a forged Tax Compliance Certificate, the Board notes that the Successful Bidder submitted a tax Compliance Certificate dated 16<sup>th</sup> October, 2012, purportedly issued by KRA.

The Board took cognisance of the Procuring Entity's objection to the admission of evidence tendered by the Applicant on the ground that the Board should not engage in the investigation of claims made by parties. However, because of the following reason, the Board found it expedient, and indeed necessary, to make further independent enquiries in order to satisfy itself about the veracity of the claim. The reasons is that since the information on which the allegations are based could easily be obtained from state institutions, which are the custodian, and because such information is in the public domain, the Board felt that it should obtain it, if possible, and share it with the parties for their comments. As this approach applies as well to the other allegation made by the Applicant, namely, the authenticity of the Certificate of Incorporation of the Successful Bidder, suffice it to say that the reason for the Board making inquiries apply equally to that allegation.

First, it should be recalled that the allegation is based on the provisions of Clause 2.11.3(c) Of the Tender Document, which required bidders to obtain a Tax Clearance Certificate. This was a mandatory qualification criteria, thus failure to provide it would be fatal to acceptance of the bid. The Successful Bidder provided a certificate purporting to be a valid Tax Clearance Certificate and it is the authenticity of this certificate which the Applicant has challenged. In

order to satisfy itself of the veracity of this claim by the Applicant, the Board wrote to the Commissioner-General of the Kenya Revenue Authority on 7th January 2013, seeking his assistance by way of confirming or refuting the authenticity of the certificate submitted by the Successful Bidder. On 11th January instant, the Commissioner responded to the said letter in which he states, inter alia, as follows:

*"We hereby confirm that Solarmak Technologies was complaint from the period of its existence in our data base i.e. 8<sup>th</sup> November, 2012"*

Based on the above, it is clear that the certificate was indeed not authentic, as claimed by the Applicant. The consequence of this fact is that the Successful Bidder failed to meet the requirements set forth in Clause 2.11.3(c) of the Tender Document, and ipso facto, should have been disqualified at the Preliminary Evaluation stage.

Turning to the allegation by the Applicant that the Successful Bidder presented a forged Certificate of Incorporation, the Board decided to seek further clarification on the claim for the reason stated hereinabove. Towards this end, it wrote a letter to the Registrar-General on 7th January 2013, annexing the Certificate of Incorporation submitted by the Successful Bidder with its tender. By a letter dated 8th January 2013, the Registrar-General responded to the inquiry by the Board by stating at paragraph 2 of the letter that **"This Company was registered on Aug 2 2012 as registration number CPR/2012/80722."** The following three paragraphs are word for word the same as those in the letter dated 3rd January, 2013, written to Koome & Mesa, Advocates by the Registrar-General, which the Applicant presented to the Board in support of its claim that the company was registered on 2nd August 2012, and not in 2008, as claimed by the Successful Bidder as per the Certificate of Incorporation submitted by it with its tender.

The last paragraph of the letter addressed to the Board by the Registrar-General referred to above states that **"Kindly note that the annexed certificate of incorporation, CPR/2008/14011 dated 2nd August 2008 does not originate from our office."**

On 11<sup>th</sup> January 2013, the Board wrote to the Advocates on record for the Procuring Entity and the Successful Bidder attaching the said letter from the Registrar-General and seeking their comments thereon. The Board took this action in the interest of fairness to the respective clients of the said advocates on the ground that, having not been privy to it before or during the proceedings, it would be unfair to their clients if the Board were to make its decision in this Application on the basis of the letter, among other things, without their knowledge of it. After considering the matter, both Counsel have responded in writing by challenging this procedure

After carefully examining the comments by both Counsel the Board finds that pursuant to Regulation 86, the Board is not bound by the rules of evidence, hence its decision to seek clarification from the Registrar General and the Commissioner General respectively is within the powers of the Board. The regulations states that

*“The Review Board shall not be bound to observe the rules of evidence in the hearing of a request under these Regulations”*

Having examined the letter from the Registrar-General addresses to the firm of Koome & Mesa, Advocates, and the letter addressed to the Board by the Registrar-General cited above, the Board is of the view that the Certificate of Incorporation dated 2nd August, 2008 submitted by the Successful Bidder with its tender attesting to its incorporation in 2008, is not authentic as the Successful Bidder was incorporated on 2nd August, 2012. The purpose for submitting the Certificate of Incorporation was to fulfil the mandatory requirement of Clause 2.11.3(a) of the tender document, which required bidders to provide copies of the audited accounts for the previous 3 years. It is clear to the Board that, because the Successful Bidder could not fulfil this requirement, it decided to falsify the date of its registration by manufacturing a certificate purporting that it was incorporated in 2008, and purporting the certificate to have been issued by the Registrar-General.

The tender submitted by the Successful Bidder contains purported audited accounts for the previous three years, as required under Clause 2.11.3(a) of the tender document. These accounts were purportedly prepared by the firm of Ken Simiyu & Associates, Certified Public Accountants, of P.O. Box 49623, Nairobi. These accounts are a forgery as the Successful Bidder did not exist until August 2012.

In observing the length to which the Successful Bidder went in trying to win this tender, first, by creating itself before it was born through a forged birth certificate; secondly, by trying to legitimise its false age by manufacturing audited accounts; thirdly, by conjuring a Tax Compliance Certificate, suggests to the Board that this company was a special purpose vehicle, which was designed, engineered and constructed with the sole aim of rustling the public purse. If this was not the case, then why go through this elaborate scheme of uttering falsified documents? The scheme appears to have been carried out with the connivance of people within the Procuring Entity, for if not so, why alter the price quoted by the so-called winning bidder?

This being the case the Board finds that the Successful Bidder should have been disqualified at the preliminary evaluation stage for failing to comply with the mandatory requirement set out in Clause 2.11.3(a)(c) and (d) of the Tender Document.

Having made this finding, the Board finds it unnecessary to make any determination on the question as to whether the award was properly made in light of the fact that a company called "Solar Mart" which did not participate in the tender won the award, whereas a company called "Solar Mak," is the one which participated in the tender.

Turning to the claim by the Applicant that the Procuring Entity breached Section 67(2) of the Act by failing to notify the Applicant at the same time as the Successful Bidder, due to fact that the letter to the Applicant was wrongly addressed, the Board finds that the Applicant

has not been prejudiced as it was able to file this request for review within the statutory period.

Taking all the above matters into account the Board finds that the Procuring Entity breached Section 66(4) by awarding the tender to a bidder whose tender was not the lowest evaluated price.

### **Ground 2: - Breach of Sections 59 of the Act**

The Applicant submitted that the Procuring Entity breached Section (59) of the Act by changing the substance of the winning bidders' price from ksh.4, 550 to Kshs. 3,750 at which the tender was awarded. The Applicant further alleged that during the tender opening held on 22<sup>nd</sup> October, 2012 prices were read out and the winning bidder's prices was Kshs. 4,550 while it's quoted price is Kshs. 3,850/=.

In response the Procuring Entity stated that it never changed nor interfered with the winning bidder's price as claimed by the Applicant. The winning bidder's tender document was presented with a price of Kshs. 3,750- and as required by the law, the Tender Opening Committee members signed the price schedule of each bidder at the opening stage of the tenders. The Procuring Entity further stated that the Applicant did not present any documentary evidence to show that the price of the Successful Bidder was changed or interfered with in breach of Section 59 of the Act.

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

As already stated in this decision the Procuring Entity created a Tender Opening Register in which it recorded, among other things, the prices of tenders and bid bonds which were read out loud in accordance with Section 60(5) of the Act.



From above Tender Opening Register the Price/Cost Quoted and recorded for the Applicant is Ksh.344, 142,600 with bid bond of Ksh.11, 970,810.40. This included many other items for which the applicant quoted. The price captured per unit by the tender evaluation committee for the Applicant on the item under review was Ksh.3850/-totalling Ksh. 107,800,000 which is also same with what is quoted in the price schedule which has many items. For the Successful Bidder, on the other hand, the Price/Cost recorded is ksh.127, 400,000 with a bid bond of ksh.2, 548,000. As already noted hereinbefore, the Evaluation Committee changed these figures for the Successful Bidder to Kshs. 105,400,000 and awarded the tender to for this sum

This being the case the Board finds that these changes are in made in breach of Section 59(3) of the Act which states that "*The procuring entity shall not attempt to have the substance of a tender changed.*"

Accordingly, this ground of request for review succeeds.

As noted earlier in this decision, the Procuring Entity vigorously argued that the Board should not grant the prayers sought by the Applicant should the Board find that there were breaches of the Act, the Regulations and the tender document, on the ground that this tender is of national interest insofar as it concerns impending general elections, which are due on 4th March, 2013. This argument was supported by the Successful Bidder, who cited the cases of *AVANTE, LITHOTECH SMARTMATIC AND INDEPENDENT, ELECTORAL COMMISSION, [Application Nos. 59, 61 and 62 of 2012]* in support of this plea.

The pith and substance of the argument in favour of a finding for the national interest is basically this: that when there is a clash between the national interest and the individual interest, the national interest must of necessity hold the casting vote. This argument proceeds from the assumption that the claim that a matter is of national interest is always

based on good and noble intentions of institutions or individuals who seek to take shelter in it. To assume that institutions or individuals are always driven by good and noble intentions in acts or deeds which they commit, supposedly for the public good, is the most dangerous of assumptions.

As this Board has said many times before when the question of public interest has been invoked, there is no provision in our procurement system that recognizes public interest as a ground for deviation from the provisions of the Act. When it has been invoked as a general principle in our jurisprudence, the Board has always resisted its application in our procurement system as can be gleaned from the cases of *LANTECH (AFRICA) LIMITED V. THE MINISTRY OF FINANCE [APPLICATION NO. 2/2007]* and *IMPRIMERI NATIONALE v. MINISTRY FOR IMMIGRATION REGISTRATION OF PERSONS [APPLICATION NO 25/2012]*. The Board has only sanctioned its application once in the recent case of *AVANTE, LIHOTECHSMARTMATIC vs. IEBC* cited above. However in sanctioning the argument for public interest the Board was constrained to warn that "*The argument that a matter is of national interest, and thus a procurement decision which either circumvents the proper procedures set forth in our procurement law, or that breaches these procedures, should be sanctioned is, to the mind of the Board, to offer a carte blanche to procuring entities to return to the days of unregulated procurement.*" [Page 59].

The circumstances surrounding this case amply illustrate the dangers of allowing the application of public interest as ground for deviation from our procurement Act. It is clear from this case that not only has the law been breached through and through, but that acts which are clearly of a criminal nature have been perpetrated, seemingly with the connivance of the Procuring Entity. The Board has been fully vindicated in expressing its concern in the case of Avante cited above that, given leeway, procuring entities are likely to backslide into the bad old days of unregulated procurement. In these circumstances how could the Board justify upholding the procurement decision on the ground of public interest when the

decision itself is riddled with fraud, which is expressly outlawed by Section 41 of the Act? Which states as follows:-

*Section 41. (1) No person shall be involved in a fraudulent practice in any procurement proceeding.*

*(2) If a person contravenes subsection (1) the following shall apply –*

*(a) The person shall be disqualified from entering into a contract for the procurement; or*

*(b) If a contract has already been entered into with the person, the contract shall be voidable at the option of the procuring entity.*

To the mind of the Board, to do so would be to validate an offence which is prohibited under Section 41(4) of the Act which states that "*A person who contravenes subsection (1) is guilty of an offence.*"

In the words of an anonymous poet "*Some herbs are scentless when entire, but produce fragrance when bruised.*" The Board has been accommodating to the Procuring Entity recently, given the impending General elections and their sensitivity to the peace, security and international image to the country. However, in this case the Procuring Entity has completely stepped outside the norms expected of an institution which must not only be fair, but must also be seen to be so.

Taking all the above matters into account, the Request for Review succeeds.

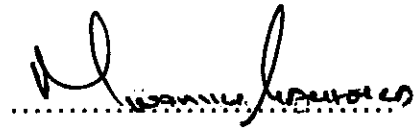
The Board orders pursuant to section 98(a) that the award with respect to the tender for the supply of Solar Lanterns is hereby annulled.

The Board further orders pursuant to Section 98(b) the Procuring Entity to re-evaluate the responsive tenders and award to the lowest evaluated bidder with the all expedience.

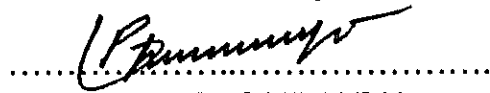
The Board has, on several occasions, held that costs incurred by tenderers at the time of tendering are commercial risks borne by people in business and therefore each bidder carries its own costs.

The Board further orders that the Director-General to carry out investigations into this matter pursuant to the power conferred on him by Section 102 of the Act.

Dated at Nairobi on this 14<sup>th</sup> day of JANUARY, 2013



CHAIRMAN  
PPARB



SECRETARY  
PPARB