REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 47/2014 OF 21st NOVEMBER, 2014

BETWEEN

NATIONAL BANK OF KENYA LIMITED.....Applicant

AND

MINISTRY OF DEVOLUTION& PLANNING .....Procuring Entity

Review against the decision of the Ministry of Devolution and Planning in the matter of Expression of Interest (EOI) No: MDP/EOI/1/2014-2015 for the Selection of Proposed Huduma Kenya Smart Service and Payment Card Financial Institutions.

BOARD MEMBERS PRESENT

1. Mr. Paul Gicheru - Chairman

2. Mrs. Josephine WambuaMong'are - Member
3. Mrs. Gilda Odera - Member
4. Mr. Nelson Orgut - Member
5. Mr. Peter Ondieki, MBS - Member

IN ATTENDANCE

1. Mr. Stanley Miheso - Holding Brief for the Secretary
2. Ms. ShelmithMiano - Secretriat

PRESENT BY INVITATION

Applicant –National Bank of Kenya Limited.

1. WambuaKilonzo - Advocate
2. Gideon Kibet - Advocate
3. George Irungu - Manager
4. KithureMutua - Clerk
5. Patricia Musyoka - Intern

Procuring Entity –Ministry of Devolution and Planning

1. Dennis Mutuku - Secretary/ CEO HudumaCenters
2. Prisca Wambui - Senior Supply Chain Management Officer
3. Martin Mugambi - Program Officer
4. KennedyOdero - Program Officer

Interested Party

1. Omar Kemel Amin - Advocate, Safaricom Limited.
2. Alexander Muoki - Advocate, Safaricom Limited.
3. Olive Rotich - Advocate, Equity Bank Limited.
4. Irene Kashendi - Advocate, KCB Limited

5. Johnson Ondicho - E-payment Manager, KCB Limited
6. Dennis Njau - Head of Channels, KCB Limited
7. Richard Ndambuki - Manager Channels, KCB Limited
8. Alex Musyoki - Product Manager, CBA
9. Eric Muriuki - GM-NBV, CBA
10. George Kimani - Brand Manager, Symbion

BOARD'S DECISION

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

BACKGROUND OF AWARD

INTRODUCTION

The Government intends to commence the use of Electronic payments for all Public services. The Ministry of Devolution and Planning has developed a Smart Service and Payments solution called Huduma Smart Service and Payments Card as an innovation to comply with this intention. The Huduma Smart Service and Payments Card will be integrated with the Posta Pay System from Postal Corporation of Kenya to receive payments from the Public for Government services and to disburse various types of payments to social groups.

The Ministry intends to select firms, which inter alia must be licensed financial service providers with a national distribution network to develop innovative solutions, systems and platforms for providing registration and issuing of Europay, MasterCard and Visa (EMV) cards

to users and facilitate cashless transaction services which will be herein after be referred to as the **"Huduma Smart Service and Payments Card"**

The electronic Huduma Smart Service and Payments Card will be a Government of Kenya owned transaction platform to provide a variety of electronic services and facilitate electronic processing of payments by card users for both public and private sector services.

The card will conform to the following technical standards:

a) Magnetic strip
b) Europay, MasterCard and Visa (EMV) chip
c) Near Field Communication
d) Ensure secure authentication of the cardholder
e) Enable secure online transactions

The selected firm should meet the following requirements

a) Proof that the financial institution meets statutory, regulatory and industry requirements to perform the stated services
b) Financial institution's capability in deployment of Smart Card Services including issuance of cards
c) Previous experience in development and roll-out of smart card based projects
d) Demonstrate skills and competencies to support project requirements
e) National distribution branch/agency network of institution's financial services

To this end

1. A Request for Expression of Interest EOI NO: MDP/EOI/1/2014-2015 (Procurement of Proposed Huduma Kenya Smart Service and Payment Card Financial Institutions) was advertised in the dailies;
2. Bids were received and opened on 16th September 2014;
3. The following 11 firms were indicated as having responded.

No.	Firm
B1	M/S Commercial Bank of Africa Mara and Ragati Roads, Upper Hill P.O. Box 30437 – 00100, Nairobi, Kenya
B2	Kenya Post Office Savings Bank PostBank House, Banda Street P.O. Box 30311 – 00100, Nairobi, Kenya
B3	M/S I & A Capital and Commerce (K) Limited P.O. Box 8065 – 00300 Nairobi, Kenya
B4	M/S National Bank of Kenya Ltd P.O. Box 72866 Nairobi - Kenya
B5	M/S Web Tribe Limited 12th Floor View Park Towers P.O. Box 15478 – 00100 Nairobi, Kenya
B6	M/S Safaricom Business P.O. Box 66827 – 00800, Nairobi Kenya
B7	M/S Jamii Bora Bank Limited. 18, Koinange Street P.O. Box 22741 Nairobi-Kenya
B8	M/S Co-operative Bank Limited. P.O. Box 48231 – 00101 Nairobi Tel. 020-3276000 Co-operative Bank House L.R. No. 209/4290 (IR No. 27596)
B9	M/S Equity Bank Ltd

	Equity Centre P.O. Box 75104 – 00200 Nairobi Kenya
B10	M/S Attain Enterprise Solutions Limited P.O. Box 18286 – 00100 Tel. +254(020) 2715680 Nairobi, Kenya email: admin@attain-es.com
B11	M/S Kenya Commercial Bank Ltd Kencom House 7th Floor Tel 0711087000/0732187000 email: contactcentre@kcb.co.ke

TENDER EVALUATION

A tender evaluation committee which was appointed by the Principal Secretary on 10th October 2014 was asked to carry out technical evaluation on the Expression of Interest for Proposed Huduma Kenya Smart Service and Payment Card Financial Institutions;

The objective of this evaluation was to select firms, which inter alia were licensed financial service providers with a national distribution network to develop innovative solutions, systems and platforms for providing registration and issuing of EMV cards to users and facilitating cashless transaction services namely **"Huduma Smart Service and Payments Card"**.

The Technical Evaluation Process subjected the proposals to scrutiny to confirm their responsiveness to the specifications against the following technical evaluation criterion as indicated in the tender documents.

Evaluation Report Expression of Interest – Selection of Proposed Huduma Kenya Smart Service and Payment Card Financial Institutions		**Bidders**										
Item	**Requirements**	**B1**	**B2**	**B3**	**B4**	**B5**	**B6**	**B7**	**B8**	**B9**	**B10**	**B11**
Proof that financial institution	Bank License	Y	N	N	Y	N	N	N	N	Y	N	Y

meets statutory, regulatory and industry requirements to perform stated services												
Technical Compliance	Financial Institution's capability in deployment of Smart Card Services including issuance of cards. Cards should include: Magnetic strip • Europay, Mastercard, Visa (EMV) chip • Near Field Communication • Ensure secure authentication of the cardholder • Enable secure online transactions	Y	Y	N	Y	N	N	N	Y	Y	N	Y
	Previousexperience in development and roll-out of smart card based projects	Y	N	N	Y	N	N	Y	Y	Y	N	Y
	Demonstrate skills and competencies to support project requirements	Y	Y	N	Y	N	N	N	Y	Y	N	Y
	National distribution branch/agency network of institution's financial services	Y	Y	N	Y	N	N	N	Y	Y	N	Y
RESPONSIVE		Y	N	N	Y	N	N	N	N	Y	N	Y

KEY: B=Bidder, Y= Responsive, N=NOT Responsive

OBSERVATIONS AND RECOMMENDATION:

- The technical evaluation team found that **Bidders B1, B4, B9 and B11** met the requirements set out and were therefore declared

responsive and hence they were recommended to proceed to the next stage of the procurement process

- **Bidders B2, B3, B5, B6, B7, B8 and B10** did not meet the requirements.

In view of the foregoing analysis, general observations and the conditions of tendering, the following firms were recommended to proceed to the second stage of the bidding process:

BIDDER NO.	BIDDER NAME
B1	M/S Commercial Bank of Africa Mara and Ragati Roads, Upper Hill P.O. Box 30437 - 00100, Nairobi, Kenya
B4	M/S National Bank of Kenya Ltd P.O. Box 72866 Nairobi - Kenya
B9	M/S Equity Bank Ltd Equity Centre P.O. Box 75104 - 00200 Nairobi Kenya
B11	M/S Kenya Commercial Bank Ltd Kencom House 7th Floor Tel 0711087000/0732187000 email: contactcentre@kcb.co.ke

TENDER COMMITTEE

The Ministerial Tender Committee at its meeting No.13/2014-2015 held on 29th October, 2014 vide minute No.13/2014-2015 approved the issuance of RFP's to the following financial institutions:

1. M/s Commercial Bank of Africa
2. M/s National Bank of Kenya Ltd.
3. M/s Equity Bank Ltd
4. M/s Kenya Commercial bank Ltd.

Opening of Tender No. MDP/DPSM/HK/07/2014-2015 for the Selection For Proposed Huduma Kenya Smart Service and Payment Card Distribution Network Via Financial Institutions

The following firms were then invited to participate in the Request for Proposal (RFP) for the Selection of the Distribution Network for the Huduma SmartCardthroughFinancialInstitutions.

1. M/s Commercial Bank of Africa
2. M/s National Bank of Kenya Ltd
3. M/s Equity Bank Ltd
4. M/s Kenya Commercial Bank

In response to the same, only M/s Equity Bank Ltd submitted purportedly its bid (2 Technical Proposals and 1 Financial Proposal) by the stipulated date and time of10thNovember2014 by 10.00 am.

THE REVIEW

This Request for Review was lodged by M/s National Bank Of Kenya Limited (Applicant) on 21st November, 2014 against the decision of the Ministry of Devolution and Planning in the matter of a Request for Expression of Interest EOI NO: MDP/EOI/1/2014-2015 for Procurement of Proposed Huduma Kenya Smart Service and Payment Card Financial Institutions.

The Applicant was represented by Mr. Wambua Kilonzo, Advocate from the firm of M/s. SisuleMunyiKilonzo& Associates Advocates while the Procuring Entity was represented by Mr. Dennis Mutuku, Secretary/ CEO, Huduma Center Secretariat. The interested parties Equity Bank

Limited and Co-operative Bank of Kenya Limited were represented by M/s Olive Rotich, Advocate from the firm of M/s Ochieng, Onyango, Kibet & Ohaga Advocates, while Safaricom Limited by Mr. Omar Kemel Amin from the firm M/s Amin & Company Advocates. The Kenya Commercial Bank Limited was represented by M/s Irene Kashendi Advocate from the firm M/s Hamiltom Harrison & Mathews (incorporating Oraro & Co.) Advocates while the Commercial Bank of Africa appeared through its representative Mr. Eric Muriuki.

The Applicant requested the Public Procurement and Administrative Review Board (hereafter referred to as the Board) to review the decision of the Procuring Entity and sought for the following orders:

1. *That the Respondent's decision made on 10th November, 2014 declining to accept the Applicant's Request for Proposal documents in respect of tender No. MDP/DPSM/HK/07/2014-2015 FOR PROPOSED HUDUMA KENYA SMART SERVICE AND PAYMENT CARD DISTRIBUTION NETWORK VIA FINANCIAL INSTITUTIONS be set aside and nullified.*
2. *That the Board do review the entire decision of the Respondent, and do substitute the said decision and direct the Respondent to accept the Applicant's Request for Proposal.*
3. *That any such entities that did not participate at the request for expression of interest stage No.MDP/EOI/1/2014-2015 as at 16th September, 2014 be excluded from the request for proposal Tender No.MDP/DPSM/HK/07/2014-2015.*
4. *The Respondent be ordered to pay the costs of and incidental to these proceedings; and*

5. *This Honourable Board be pleased to issue such further or other orders as it may deem just.*

Though the hearing of this Request for Review attracted the participation of a total of Seven (7) parties namely the Applicant, the Respondent and the five Interested Parties whose particulars have already been set out above, the Request for Review revolved around the determination of only one ground after the Applicant opted to abandon it's second ground of review. The remaining ground raised the following issue which the parties addressed the Board at the hearing:-

"Whether or not the Respondent breached the provisions of Sections 37 (1), 51, 52, and 81(2) (d) of the Public Procurement and Disposal Act (2005) as read together with clauses 2.5.3 and 2.5.4 of Addendum No. 1 to the Request for the Proposal Tender No. MDP/DPSM/HK/07/2014 – 2015 dated 4th November, 2014 by falling to communicate in writing the change of the venue for the submission and the opening of the tender the subject matter of this Request for Review"

Mr. Wambua Kilonzo who appeared on behalf of the Applicant while relying on the Request for Review dated 21st November, 2014 which was supported by the Supporting Affidavit sworn by one **Rueben Koech** on the same day argued that the Respondent first advertised an invitation for an expression of Interest **No. MDP/EO1/1/2014-2015** from licensed financial institutions to provide registration and issuance of the Huduma Kenya smart service and payment card to users and members of the Public in an advertisement published in the People Daily Newspaper of 5th September, 2014.

The Applicant stated that pursuant to the invitation referred to above, it submitted an expression of interest to the Respondent at the Respondent's Headquarters located on the 9th Floor, Treasury Building, Harambee Avenue, Nairobi, in terms of the advertised expression of interest. According to the evidence placed before the Board by the Applicant and which was uncontroverted by the Respondent, the Applicant was invited to collect the tender document in the form of a Request for Proposals Ref. **No. MDP/DPSM/HK/07/2014 - 2015** which it did on 3rd November, 2014 from the 2nd Floor of the Teleposta Towers.

The Applicant produced and annexed both the advertisement dated 5th September, 2014 and the Request for Proposal as annextures **"RK1"** and **"RK 2"** to the affidavit sworn by **Reuben Koech** on 21st November, 2014.

Mr. Wambua submitted that though clauses 2.5.3 and 2.5.4 provided that the completed tender proposal must be submitted at the submission address on or before the time and date of the submission indicated in the instruction to firms the tender document did not state when and where the Request for Proposals was to be submitted.

The Applicant argued that in an attempt to correct/clarify this omission, the Respondent issued an addendum No. 1 dated 4th November, 2014 headed clarifications in which it reiterated the provisions of clause 2.5.3 of the Request for Proposal and clarified that the proposal submission address for the purposes of the Request for Proposals was **P. O. Box 30050-00100 Nairobi** and that the tender documents should be deposited

in the Tender Box situated at **Harambee House 8th Floor so as to be received on or before Monday 10th November, 2014 at 10.00 a.m.**

Counsel for the Applicant while referring to addendum No. 1 dated 4th November, 2014 and which was annexed to the Supporting Affidavit sworn by **Robert Koech** invited the Board to find that the addendum did not set out the place and time when the subject tender was to be opened upon submission.

The Applicant contended on the basis of items (m), (n), (o), (p) and (q) set out under ground 1 of it's Request for Review and which were restated in paragraphs 16, 17, 18, 19, 20 and 21 of the Supporting Affidavit of sworn by **Reuben Koech** that in an attempt at submitting it's tender documents at the place and time set out in the Addendum dated 4th November, 2014, the Applicant dispatched one **Pascaline Mugo** to represent it and submit it's tender/Request for proposal at the appointed venue located on the 8th Floor, Harambee House. It was the Applicant's case that the Applicant's representative proceeded to the appointed venue armed with the Applicant's Request for Proposal ready for submission at 9.00 a.m. and also to witness the tender opening at 10.00 a.m..According to the Applicant it's representative was however informed that the tender opening team had proceeded to the Procrument Office in Teleposta Plaza, in Nairobi for the opening of the tenders and she was directed to join the tender opening team there. It was the Applicant's further evidence that **Pascaline Mugo** arrived at the 2nd Floor of the Teleposta Plaza in Nairobi at 9.45 a.m. and upon inquiry at the Procurement office, she was again verbally informed by persons

maning the office that the tender opening team had relocated to the 15th of the Lonrho Africa House, Nairobi where she was re-directed to pursue the tender opening committee.

It was deponed in paragraphs 19, 20 and 21 of the Supporting Affidavit of **Reuben Koech** that **Pascaline Mugo** rushed to the 15th Floor of the Lonhro Africa House and arrived there shortly after 10.00 a.m. and that when she arrived at the venue she luckily found the tender opening team in the process of opening the tender box but she nonetheless pleaded with them to allow her submit the Applicant's Request for Proposal in view of the change in the tender submission and opening venues, but the Respondent's tender opening committee could not hear any of this. At the outcome of the process, the Applicant established through its said representative that it is only the 1st Interested Party which had submitted it's Request for Proposal.

Counsel for the Applicant submitted that inview of the above set of facts and circumstances, the Respondent had acted in contravention of the law and more particularly the Provisions of Section 37(1) of the Act which requires that all communications relating to the tender process between the Procuring Entity and prospective tenderers seeking a contract for procurement shall be in writing and Section 81 (2) (d) of the Act which requires that the tender document should set out an explanation of where and when tenders must be submitted.

The Applicant additionally submitted that the procedure adopted in this procurement lacked transparency as it denied the Applicant it's right to

a fair opportunity to compete with other tenderers on a level playing field and effectively contravened the objectives set out in Article 227 of the Constitution and Section 2 of the Public Procurement and Disposal Act (2005).

Mr. Wambua finally submitted that though his client was aware that it is only the 1st Interested Party, Equity Bank Ltd which had managed to submit and have it's tender/Request for proposal submitted and opened he stated that it was not his client's intention, in his own words, to **"shed blood"** and all that his client was Interested in was fair competition and that this was the reason why he had abandoned ground 2 of the Request for Review. He nonetheless submitted that rules in a Procurement process must be set in advance and all parties to a procurement were bound to observe the rules as set. He further stated that where there was a change of the rules, the change had to be notified to all the parties in advance and that upon such notification all the parties to the process had to abide by and act by the rules as notified.

He therefore urged the Board to set aside and nullify the entire Procurement process and give such directions as it deemed fit under the Provisions of Section 98 of the Act in the interest of justice and fairness to enable it and all the tenderers who participated or desired to participate in this Procurement process on an equal footing.

Mr. Dennis Mutuku who appeared and made presentations in this Application on behalf of the procuring Entity relied on the Response

dated 27th November, 2014 and which was signed by one **Katee Mwanza** on behalf of the Procuring Entity. **Mr. Mutuku** confirmed as submitted by the Applicant that both the Request for Proposal and Addendum No. 1 had been issued by the Procuring Entity in writing as required by law and that the addendum dated 4th December, 2014 set out the date and time for the submission of tenders and that at no time was the venue and the time for the submission changed.

The Procuring Entity while relying on item 5 at page 4 of it's response contended that after the closure of the tender box allegedly at Harambee House it was agreed between the representative of the Procuring Entity at Harambee House, 8th Floor and the bidders who were present that the opening be done at Lonhro Africa Towers as there was no venue for opening and marking the tenders at Harambee House. The Respondent stated that the decision to change the venue to Lonhro Africa Towers was also occasioned by the fact that that is where the Huduma Kenya Secretariat which was the consumer department of the Service the subject matter of this tender is housed.

Mr. Mutuku at first informed the Board that as at the closing time, it is only the Procuring Entity and three other bidders who were allegedly present who agreed to move the tender opening venue from Harambee House to Lonhro Africa House but later changed this statement by confirming that it was only representatives of the Procuring Entity and one bidder namely the 1st Interested Party who made the decision.

Mr. Mutuku confirmed that the only Request for Proposal that was opened at Lonhro Africa House was that submitted by the 1st Interested Party. He however conceded that addendum No. 1 did not set out where and when the tenders would be opened and that there was no written instructions of the change of the venue for the submission of tenders or of the place and time when the opening of the tenders was to take place.

Mr. Mutuku in conclusion referred the Board to bullet No. 2 under item 2 of the answer dated 27/11/2014 and stated that at the conclusion of the exercise, the matter was referred to the Procuring Entity's Ministerial Tender Committee for advice since there was only one bidder remaining after the tender opening exercise and that the committee had determined that the exercise had not been responsive and competitive and recommended that the exercise be repeated on condition that it was only to be confined to the four bidders who had been shortlisted at the expression of interest stage. He however submitted that the process had not been repeated since the Applicant had filed a Request for Review before this Board which in his view operated to stay the repeat exercise.

The Procuring Entity therefore urged the Board to dismiss the Applicant's Request for Review which in the Procuring Entity's view was frivolous, malicious and an abuse of the due process.

All the advocates who appeared on behalf of the Interested Parties except Counsel for the 1st Interested Party, associated themselves with

the submissions made by Counsel for the Applicant and all concurred that this was a proper case that cried out for the Board's intervention by annulling the entire Procurement process.

Mr. Omar Amin Counsel for the 2nd Interested Party stated that the entire Procurement process was carried out by the Procuring Entity in contravention of the Provisions of Sections 2, 80 and 81 of the Act in that it had deprived his client the opportunity to present it's proposal inspite of having been aware of the 2nd Interested party's extensive experience and qualifications through the expression of interest including the fact that the 2nd Interested Party had successfully operated the award winning Mpesa Platform since 2007 and had thereby denied the taxpayer the opportunity to discover whether Safaricom Limited could have presented the most efficient and economical proposal. This, he submitted had inhibited competition and had resulted in his client being treated unfairly. He further stated that the entire process had failed to increase Public confidence in the Procurement process in contravention of the express spirit and the letter of the Constitution and Public Procurement and Disposal Act (2005).

Mr. Eric Muriuki who addressed the Board on behalf of the commercial Bank of Africa Limited, the 4th Interested Party herein confirmed that the process adopted by the Procuring Entity in this procurement process did not inspire Public confidence in the Procurement process and confirmed that just like the Applicant, the 4th Interested Party's representative was present at Harambee House as notified in the

addendum No. 1 before the tender closing time of 10.00 a.m. but to it's utter surprise was denied the opportunity to submit it's Request for proposal because there was no tender box at the venue and because the venue for the opening of the tenders had been moved to another different venue without any written notification of the change of venue or any written indication of the place and time when the tenders were to be opened.

M/s Irene Kashendi on behalf of the 5th Interested Party, the Kenya Commercial Bank Ltd, generally supported the Applicant's application but urged the Board to find that her client was equally affected by the change of venue. She urged the Board not to treat her client differently on the basis of the allegation that her client had not participated in the initial expression of interest. Counsel for the 5th Interested Party further submitted that the register submitted by the Procuring Entity indicated that her client was listed as participant number 11.

She referred the Board to a letter of complaint dated 27th November, 2014 addressed to the Procuring Entity as evidence that her client complained about the change of venue, a fact that had denied her client the opportunity to submit it's Request for Proposal just like it did to the other bidders save for the 1st Interested Party. The Procuring Entity through **Mr. Mutuku** confirmed that it had received the letter of complaint from the 5th Interested Party.

On her part, **M/s Olive Rotich** who appeared before the Board on behalf of the 1st Interested Party opposed the Applicant's Request for Review and submitted that her client complied with all the requirements set out in the Request for Proposal and Addendum No. 1 and dutifully appeared at Lonrho Africa House through it's representatives at 10.20 a.m. where it was confirmed that the 1st Interested Party's Request for proposal was the only Request for Proposal which had been submitted to the Procuring Entity as at the closing date and time.

Counsel for the 1st Interested Party submitted that there was nothing wrong or unoutword about the procedure adopted by the Procuring Entity in this Procurement and urged the Board to dismiss the Applicant's Request for Review with costs.

In his reply to the submissions made by the 2nd to the 5th Interested Parties, **Mr. Mutuku** re-affirmed that the process adopted by the Procuring Entity was proper and that the parties affected by any change of venue ought to have complained or sought clarification. He insisted that all the tenderers received addendum No. 1 which was clear on the date and place where the tenders were to be deposited. He however, reiterated that the Procuring Entity's Ministerial tender committee had determined that the Procurement process was not competitive and had decided that the process be repeated on condition that only the four bidders determined to have been successful at the Expression of Interest stage were open to participate in it.

The Applicant in it's final submissions stated that the law required that every tender sets out the time and place where such a tender was to be submitted and opened and contented that the Procuring Entity had not demonstrated that the Provisions of the law on this issue had been complied with. The Applicant therefore prayed that the Applicant's Request for Review be allowed.

On the issue of costs, counsel for the Applicant stated that his client would not be asking for the costs of the application since his client was engaged in a commercial process and all that it wanted to achieve by this application was a fair opportunity to participate in the Procurement process just like anyother tenderer/commercial Entity.

The Board has carefully considered the Applicant's Request for Review, the two responses relied upon by the Procuring Entity setting out the Background information and it's response to the substantive Request for Review dated 27th November, 2014 and the response filed by the firm of M/s Amin & Company Advocates on behalf of Safaricom Limited, the 2nd Interested Party herein.

The Board has also perused and considered the only original technical proposal submitted by the 1st Interested Party to the Procuring Entity and has heard, carefully considered and also taken into account the submissions made by the advocates and the parties who appeared before it during the hearing of the Request for Review.

As the Board has already observed in this decision, the Applicant opted to only argue one out of the two grounds presented to the Board for consideration. As the first step to the determination of the issue framed for determination the Board must isolate and weigh the contested facts in order to arrive at it's final decision.

It was generally agreed by all the parties to this application that this procurement process commenced through an invitation to licensed financial institutions to submit expressions of interest for the purposes of collaborating with the Procuring Entity through the Huduma Kenya Secretariat to provide registration and issuance of the Huduma Kenya Smart Service and payment card to users and members of the public.
This service according to the advertisement appearing in the People Daily Newspapers edition of 5th September, 2014 was aimed at among other things providing a multichannel single window Citizen access to transactional services using a variety of channels such as:-

a) One stop shop Huduma Citizen Service centres,
b) Online Huduma web portal,
c) A mobile phone Huduma platform
d) A Huduma call centre and an intergrated Huduma payment gateway including a Smart Card.

It was also generally agreed that pursuant to this invitation, several financial institutions submitted their respective expressions of interest for the project. There was initially a dispute as to whether Equity Bank Limited and the Kenya Commercial Bank Ltd submitted an expressions

of interest pursuant to the advertisement dated 5th September, 2014. The Board however finds that the issue of who did or did not submit an expression of Interest formed part of ground 2 of the Applicant's Request for Review which was abandoned and therefore finds it unnecessary to determine the issue of who was or was not prequalified to submit a Request for proposal to participate in the tender.

It was further evident from the documents placed before the Board and the submissions made by the parties that the Respondent issued a Request for Proposal a copy of which the Applicant produced as annexture **"RK 2"**. The Board has examined the Request for Proposal and it is apparent from the Request for Proposal which is in law the tender document used for the purposes of this Procurement that the same did not contain an express statement of where and when the proposals were to be submitted.

In an apparent attempt at correcting this glaring omission, the Procuring Entity issued an addendum dated 4th November, 2014 which the Applicant produced attached and marked as annexture number **"RK 3"** to the affidavit of **Reuben Koech.** This addendum which the Board wishes to reproduce below owing to it's importance stipulated as follows:-

Date: 4th November, 2014

TO ALL TENDERERS,

ADDENDUM NO. 1

TENDER NO. MDP/DPSM/HK/07/2014 -2015 – SELECTION OF PROPOSED HUDUMA KENYA SMART SERVICE AND PAYMENT CARD DISTRIBUTION NETWORK VIA FINANCIAL INSTITUTIONS.

CLARIFICATIONS

Pursuant to clause 2.5.3 and 2.5.4 of the Information to Consultants in Request for Proposal, we wish to make the following clarification;

2.5.3: The original and all copies of the Technical Proposal shall be placed in a sealed envelope clearly marked **"TECHNICAL PROPOSAL"** and the original and all copies of the Financial Proposal in a sealed envelope clearly marked **"FINANCIAL PROPOSAL"** and warning **"DO NOT OPEN WITH THE TECHNICAL PROPOSAL"** both envelopes shall be placed into an outer envelope and sealed. This outer envelope shall bear the Procuring Entities address and other information indicated and clearly marked **"DO NOT OPEN** before Monday, 10th November, 2014 10.00 a.m.

2.5.4: The Proposal submission address is **P. O. BOX 30050 -00100, NAIROBI** completed tender documents are to be enclosed in plain sealed envelopes, marked with the tender number and name and be deposited in the Tender Box situated at Harambee House 8th Floor so as to be received on or before **Monday, 10th November, 2014 at 10.00 a.m.**

Please note that this addendum shall form part of the Tender Document.

Head/Supply Chain Management Services

FOR: PRINCIPAL SECRETARY

The Board has examined the addendum which speaks for itself. The substance of the addendum was to therefore clarify the address, the place and the time when and where the proposals by the bidders were to be submitted which according to the addendum were at **P. O. BOX 300050 - 00100** Nairobi and the proposals were to be deposited in the **Tender Box situated at Harambee House, 8th Floor so as to be received on or before Monday 10th November 2014 at 10.00 a.m.**

It is clear from the above that Addendum No. 1 did not state when and where the Requests for proposal would be opened.

It is apparent form the Applicant's Request for Review and the Supporting Affidavit sworn by **Reuben Koech** on 21st November, 2014 and the submissions made by all the Interested parties who made Submissions in support of the Applicant's Request for Review that all was quiet until 10th November, 2014 this being the date when the Request for Proposals were to be submitted.

The Applicant's case which is set out in paragraphs 16, 17, 18, 19, 20 and 21 of the Supporting Affidavit of **Reuben Rotich** which the Board set out earlier that in an attempt to submit it's Request for Proposal, the Applicant send one **Pascaline Mugo** to the designated venue for delivery of the Request for Proposals as notified in Addendum No. 1, namely Harambee House, 8th Floor and that she arrived at the venue at 9.00 a.m. in the morning while armed with the tender documents for

submission and where she was to also witness the tender opening at 10.00 a.m.

The Applicant however deponed that its representative was informed that the tender opening team had proceeded to the 2nd Floor Teleposta Plaza where she was again verbally informed by persons manning the Procurement office that the tender opening team had relocated to the 15th Floor of the Lonhro Africa House Nairobi and she was advised to proceed and join them there. It was the Applicant's case as set out in paragraphs 19, 20 and 21 of the Supporting Affidavit that it's representative finally caught up with the tender box and the tender opening committee at Lonrho Africa House shortly after 10.00 a.m. and found the tender opening team in the process of opening the tender box but her plea to be allowed to submit the Applicant's Request for Proposal/tender fell on deaf ears and so the Applicant did not submit it's tender document after all this effort.

In answer to the above allegations, the Procuring Entity maintained that the tender submission was done and the tender box closed at 10.00 a.m. at Harambee House as stated in addendum No. 1. The Procuring Entity further stated that upon the closure of the tender box, the Procuring Entity and what it described as other bidders agreed that the tender opening process be done at Lonrho Africa House as there was no venue at Harambee House to open and mark the tenders.

The Board has considered the documents and the oral submissions made by the Applicant and the procuring entity/Respondent on this issue and has weighed the evidence placed before it by both parties and finds it difficult to believe the version of events put forward by the Procuring Entity/Respondent. While the Applicant swore an affidavit under oath to support it's version of the events which took place, the Procuring Entity/Respondent did not swear any affidavit under oath to rebut the same. The Board further wishes to observe that the Applicant's complaint that it's representative arrived at the appointed venue at Harambee House before the tender closing time was also corroborated by **Mr. Eric Muriuki** from the Commercial Bank of Africa who personally appeared before the Board and informed the Board that he was present at Harambee House before 10.00 a.m. but did not see any tender box and was therefore unable to submit his employer/principals Request for Proposal just like the 5th Respondent whose representative was also unable to do so leading to the letter of complaint dated 27th November, 2014.

On the issue of the veracity of the Respondent's contentions, the Board has taken into account **Mr. Mutuku's** submissions on the purported agreement by the Respondent and the so called several bidders to move the venue of the tender opening from Harambee House to Lonhro Africa House. While **Mr. Mutuku** at first told the Board that this decision was arrived at in the presence of several bidders, he later changed this version of his submission and admitted that only one bidder, namely,

the 1st Interested party was the only bidder who was present at Harambee House when the said decision was made.

The Board is suprised that out of the four shortlisted bidders, it is only one bidder who managed to place it's Request for Proposal in the tender box leaving out the majority of the other bidders. The Board finds that the Applicant and all the other Interested Parties which are undoubtedly companies of repute could not all be wrong on such elementary issues such as time and the venue. It is unusual that 75% out of those shortlisted could fail to submit their bids at the appointed place and time after going through the entire tender process starting with the expression of interest.

The Board sympathises with **Pascaline Mugo** the Applicant's representative who was taken through an entirely unnecessary and inevitably energy draining process of pursuing what appears to have been a wild goose chase for a **"mobile tender box"** all over the city and regrets that even after this pursuit, her efforts turned out to be futile.

The Board therefore has no difficulty in arriving at the conclusion that the **"mobile tender box"** was moved from the designated venue at Harambee House before the appointed tender submission time thereby denying the Applicant and several other tenderers an opportunity to participate in the Procurement process to the end. The reason given for the change of venue is also not reasonable and justifiable in view of the fact that there were only four bidders who were shortlisted for the

purposes of submission of Requests for Proposals. The presence of four bidders, who the Board finds to be a small number of bidders could not have justified the change of venue and the several movements that were made in the search of **"a suitable"** venue for the opening of the tender box.

The Board additionally finds that under the Provisions of Clause 2.5.5. of the Request for proposals that the tenders submitted ought to have been opened immediately upon submission. The use of the word immediately cannot bear any other meaning other than that the bids ought to have been opened immediately after the tender closed at the venue where the tenders were submitted. It was not therefore proper or necessary to shuttle the tender box under the guise of searching for a conventent venue because of the participation of four bidders.

The Board also finds that by admitting that the tender process resulted in a process that was not competitive and by ordering a repeat of the process the Procuring Entity's ministerial tender committee was admitting that the process was flawed. This decision which was expressly admitted by the Procuring Entity at the hearing and in it's reply confirms that the complaints by the Applicant and the other bidders argument that the procurement process was irredeemably flawed was well founded and the Board finds that this admission alone is sufficient to justify the prayers sought by the Applicant.

It is also clear from the chronology of events which the Board has set out above that this Procurement process was undertaken in breach of

Provisions of the Public Procurement and Disposal Act, (2005) and that the process did not meet the objectives set out in Section 2 of the Act and Article 227 of the Constitution.

In arriving at this decision the Board has considered the following provisions of the Act.

Section 51. The procuring entity shall prepare an invitation to tenderers that sets out the following –

a.....

b.....

e. an explanation of where and when tenders must be submitted and where and when the tenders will be opened;

Section 52

52.(1) The procuring entity shall prepare tender documents in accordance with this section and the regulations.

(2) The tender documents shall contain enough information to allow for fair competition among those who may wish to submit tenders.

a.....

b.....

f) an explanation of where and when tenders must be submitted, a statement that the tenders will be opened immediately after the deadline for submitting them and an explanation of where the tenders will be opened;

Section 78

78.(1) The procuring entity shall prepare a notice inviting interested persons to submit expressions of interest.

(2) The notice inviting expressions of interest shall set out the following –

a.....

b.....

d. an explanation of where and when expressions of interest must be submitted.

Section37:Form of communications.

"Section.37.(1) *If the procurement procedure used is open or restricted tendering or a request for proposals, communications between the procuring entity and a person seeking a contract for the procurement shall be in writing."*

Section 81: Request for proposals to qualified persons.

"Section 81(2) *The request for proposals shall set out the following –*

.....

(d)*an explanation of where and when proposals must be submitted;"*

For the purposes of completeness, the Board notes that this procurement process was flawed from the outset in that even the advertisement in the People Newspaper edition of 5th September 2014 omitted to clearly indicate when the submission process for the Expression of Interest would be completed thereby allowing some bidders to submit

expressions of Interest before 10.00 a.m. on the material date instead of at 11.30 a.m. while others submitted their expression of interest as late as 4.00 pm in the evening. This conduct was in breach of the basic requirement that such a process must be fair, equitable and transparent and one that creates a level playing ground for all bidders.

From all the foregoing, the Board finds that the entire procurement process was flawed and not above board. The Board cannot therefore adopt all the recommendations of the Ministerial tender Committee and more particularly the recommendation that the repeat process be confined to only the four bidders who were found responsive at the Expression of Interest stage as that process was also opaque and not transparent. The Board is therefore persuaded that this Request for Review has merit and is allowed. The Board finally commends the Applicant which was magnanimous enough to abandon its claim for costs in this matter in order to enhance and promote the objective of fairness and a good working relationship with the Procuring Entity.

Accordingly and for the above reasons and in the exercise of the powers conferred upon it by Section 98 of the Act, the Board makes the following orders;-

1. **That the Request for Review dated 21st November 2014 in respect of Tender No. MDP/DPSM/7/2014-2015 for the selection of the proposed Huduma Kenya Smart Service Payment Card Distribution Network is herby allowed and the entire procurement process the subject matter of this procurement is hereby annulled.**

2. Pursuant to the powers conferred upon the Board under the Provisions of Section 98 of the Public Procurement and Disposal Act, (2005) the Board directs the Procuring Entity to commence the procurement process afresh ab-initio and to ensure that the initial advertisement for expression of interest is placed in two Daily Newspapers having a National Circulation to allow all the interested bidders an opportunity to participate in the tender process.

3. In carrying out the fresh Procurement process, the Procuring Entity is directed to ensure that the tender document contains provisions indicating the place and time where tenders should be submitted and opened and also comply with the provisions of the Public Procurement and Disposal Act and the Regulations made thereunder.

4. The Board makes no order as to costs on this Request for Review in view of the position taken by the Applicant herein.

Dated at Nairobi on this 18th day of December, 2014

.....	.....
CHAIRMAN	SECRETARY
PPARB	PPARB