

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO 6/2014 OF 4TH MARCH, 2014

BETWEEN

TRANSEND MEDIA GROUP LIMITED.....APPLICANT

AND

KENYA AIRPORTS AUTHORITYPROCURING ENTITY

Review against the decision of Kenya Airports Authority in the matter of Tender No KAA/215/2013-2014 for Provision of Advertising Agency and Public Relations Services.

BOARD MEMBERS PRESENT

Mrs. Josephine Wambua Mong'are	- Member (in the Chair)
Mr. Paul Ngotho	- Member
Mrs. Gilda Odera	- Member
Mr. Hussein Were	- Member
Mr. Nelson Orgut	- Member



IN ATTENDANCE

Pauline Opiyo - Secretary
Stanley Miheso - Secretariat
Judy Maina - Secretariat

PRESENT BY INVITATION

Applicant -Transcend Media Group Limited

Mwaniki Gachuba -Advocate
Lai Muthoka -Director
Tony Gacheca -Director

Procuring Entity -Kenya Airports Authority

Victor Arika - Ag. Company Secretary
Orora Obadiah - Ag. G.M, Procurement and Logistics
Margaret Muraya - Projects Manager
Debra Ondaba - B & A
Bernard Bosire - Procurement Officer

Interested parties

Austin Ayisi - Advocate, Mnan Advocates
Dunstan Wambua - Advocate, B. Mbai & Associates
Edward Njuguna - Manager, Brett Communications Ltd.
Peter Icharia - Director, Spread Marketing Consultancy
Daniel Gachathi - A.E -Spread Marketing
Lamu Mandu - General Manager, Blueprint U.

BOARD'S DECISION

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

BACKGROUND

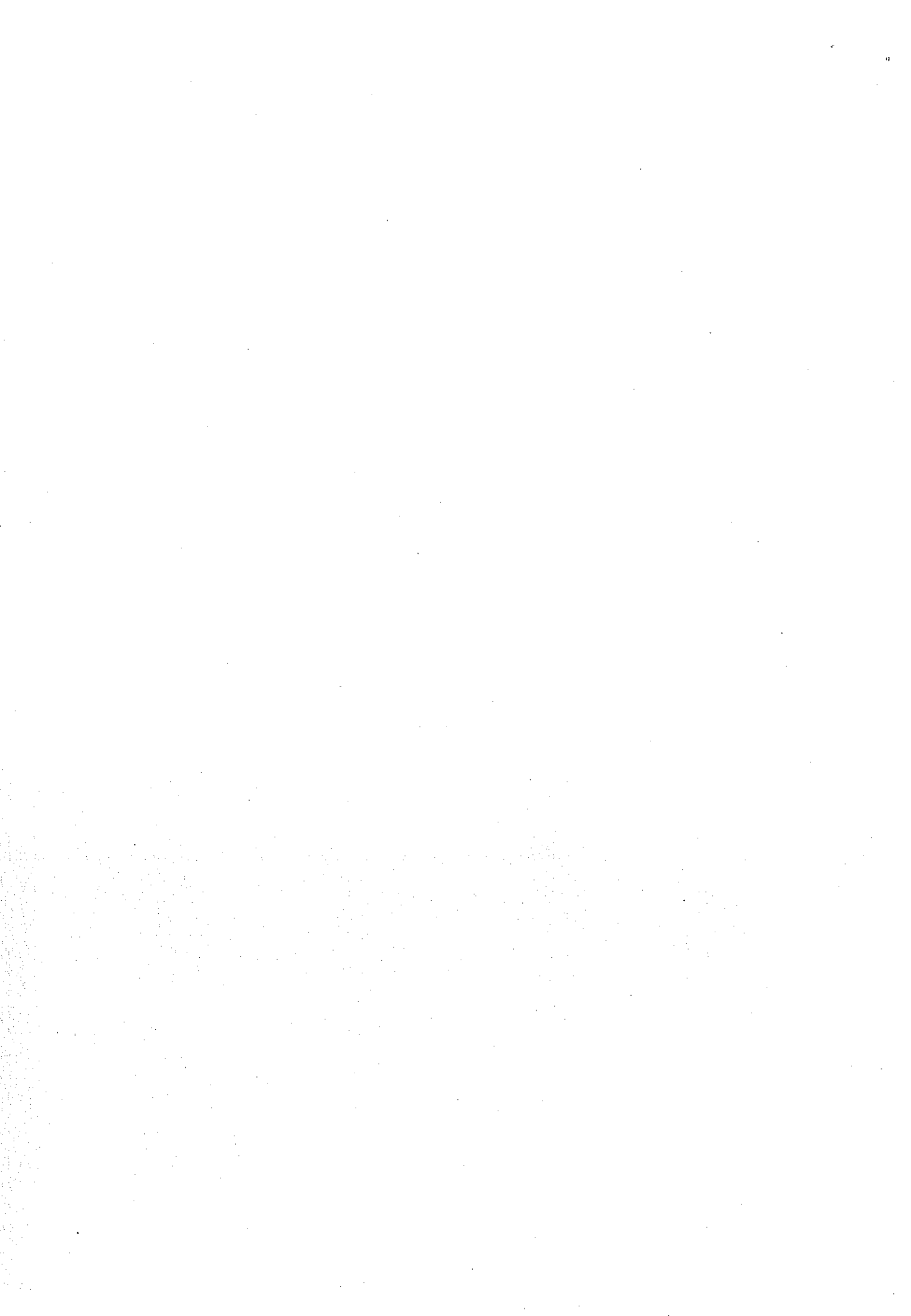
The Procuring Entity advertised the tender in the *Daily Nation* of 18th February, 2014 and *The Standard* of 19th February 2014. The Tender No. KAA/215/2013- 2014 was for Provision of Advertising Agency and Public Relations Services. It was closed and opened on 5th March, 2014 at the Procuring Entity headquarters in the presence of bidders.

A total of 21 bid documents were purchased by prospective bidders. The Procuring Entity (PE) subsequently issued Addendum No. 1 Ref: KAA/215/2013-2014 dated 19th February, 2014 to all bidders clarifying that the contract was to be for a period of three years. The PE again issued Addendum No. 2 Ref: KAA/215/2013-2014 dated 28th February to all bidders with the following clarification:

- that at the point of submission of the tender, bidders will be required to submit a certificate from the Advertising Practitioners Association (APA), the Public Relations Society of Kenya (PRSK) or internationally recognized bodies; and
- for consortia, each agency will be evaluated on their individual capabilities hence no consortia will be considered.

Seven bids were submitted and opened as scheduled on 5th March, 2014 and the following results were recorded as follows:-

No.	Bidder's Name	Amount Quoted	Tender Security
1.	Ogilvy (K) Ltd	B.Q. duly filled	Provided
2.	Transcend Media Group Ltd	1,208,152,924	Provided
3.	Spread Marketing Consulting Agency Ltd	165,964,100	Provided
4.	J. Walter Thomson (K) Ltd.	B.Q. duly filled	Provided CFC (2) Security
5.	Brett Communication Ltd	31,320,000	Provided
6.	Nuturn Ltd	No offer	Not Provided
7.	Media Edge Interactive	B.Q. duly filled	Provided



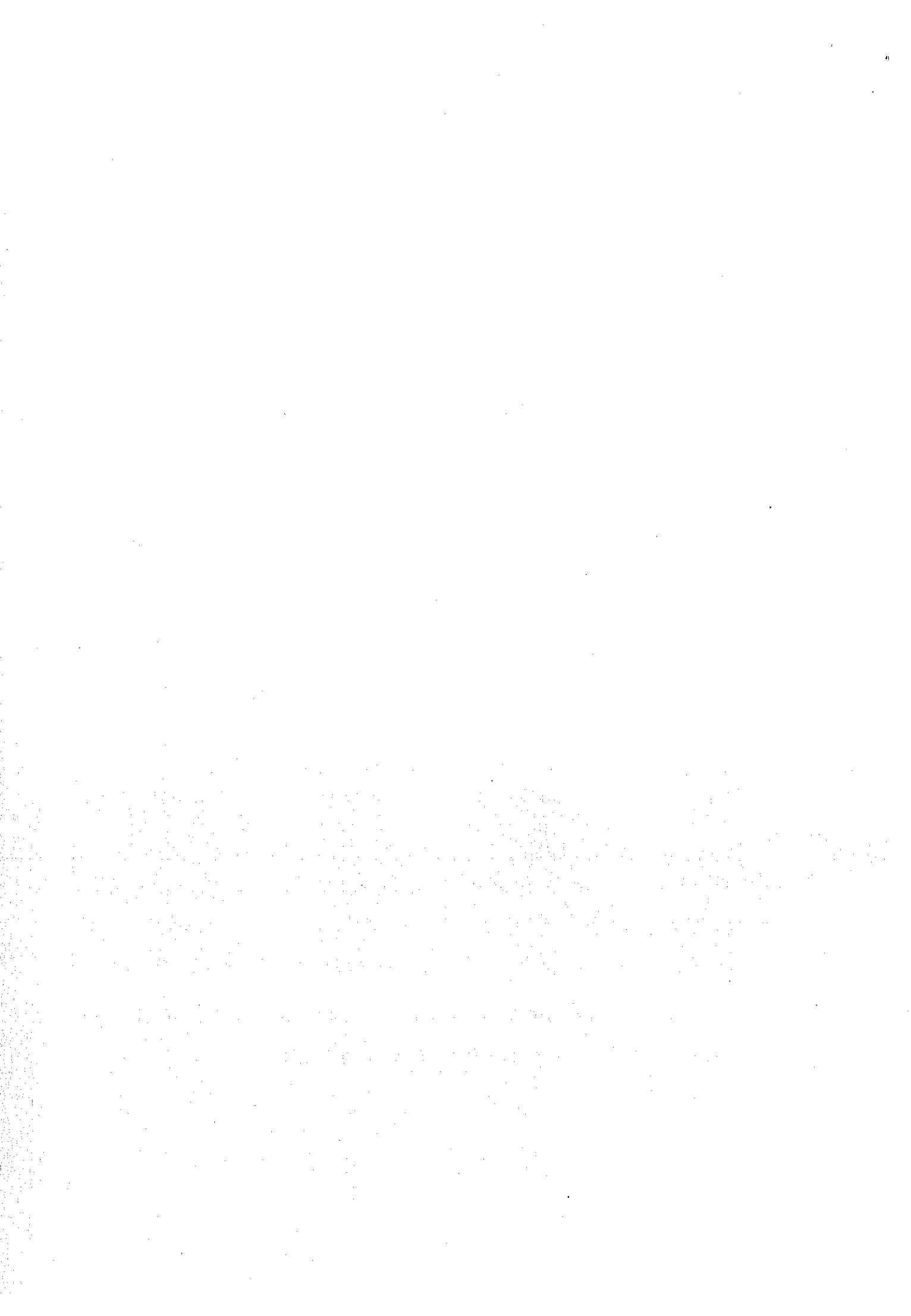
THE REVIEW

The Request for Review was lodged by Transcend Media Group Limited on 4th March, 2014 in the matter of Tender No: KAA/215/2013 – 2014 for Provision of Advertising Agency and Public Relations Services. The Applicant was represented by Mr. Mwaniki Gachuba, Advocate while the Procuring Entity was represented by Mr. Victor Arika, Acting Company Secretary and Mr. Hobadiah Orora, Acting General Manager, Procurement and Logistics.

The Applicant's Request for Review revolved around the decision of the Procuring Entity to include Clause 2.11.1(a)(1) in its Tender Documents that required bidders to demonstrate their *membership in Advertising Practitioners Association for Advertising Agencies or the Public Relations Society of Kenya in good standing for the last 5 years or, in internationally recognized bodies.*

The Applicant raised six grounds of review and sought the following orders:

- 1. That Clause 2.11.1(a)(1) of the Tender Document is in violation of the Public Procurement and Disposal Act, 2005 and the Constitution of Kenya, 2010 and is therefore illegal, null and void and of no effect.*
- 2. That the Procuring Entity do issue an addendum to delete clause 2.11.1(a) (1) of the Tender Document in its entirety.*



3. *That the Procuring Entity to extend the time for submission of tender documents to enable the Applicant to prepare and submit its tender.*
4. *That the costs plus interest of the Application be borne by the Procuring Entity.*

At the hearing, the Applicant collapsed the six grounds for Review into 4 issues that it requested the Board to determine. It argued Ground 1 together with Ground 3 as Issue No. 1 on whether the Clause 2.11.1(a) (1) inhibits participation in the tendering process.

The second issue the Applicant wanted the Board to determine is whether that clause is discriminatory against it. The third issue was, whether the decision not to delete or review Clause 2.11.1(a)1 constitutes a breach of a fair administrative action on the part of the Procuring Entity while the fourth one is whether the requirement violates the Applicant's rights of freedom of association provided by the constitution.

The Applicant submitted in Issue No. 1 (Grounds 1 and 3) that Article 227(1) of the Constitution of Kenya, 2010 provides that public entities must procure goods and services in a system that is *inter alia* fair, equitable, transparent and cost effective. It stated that Section 2 of the Public Procurement and Disposal Act, 2005 (hereafter referred to as "the Act") establishes the procedures for procurement to achieve the following objectives:

- (a) to maximize economy and efficiency;

- (b) to promote competition and ensure that competitors are treated fairly;
- (c) to promote the integrity and fairness of those procedures;
- (d) to increase transparency and accountability in those procedures;
- (e) to increase public confidence in those procedures, and
- (f) to facilitate the promotion of local industry and economic development

The Applicant submitted that the mandatory qualifications and experience required by the Procuring Entity under Clause 2.11.1(1) (a) of the Tender Document are unlawful and unnecessary and only serve to inhibit fair and open competition. To buttress its argument the Applicant cited various sections of the law including Sections 2(b), 31(1)-(3), 34(1) & (2) and 52(1), (2)&(3)(a) of the Act and Article 227(1) of the Constitution of Kenya, 2010 (hereafter referred to as "the Constitution". It argued that Section 31(6) provides that no person shall be excluded from submitting a tender, proposal or quotation in procurement proceedings except under this Section and under Section 39 of the Act.

The Applicant submitted that the operative word is that procuring entities must allow fair and open competition. It argued that Clause 2.11.1(a) (1) of the Tender Documents does not allow fair and open competition for the reason that, firstly, the said Public Relations Society of Kenya (PRSK) is neither a statutory body nor mandated to accredit Public Relations

organizations to which extent the requirement of its membership is not a necessary qualification for purposes of the Act. It further argued that PRSK had confirmed to it that it had no corporate memberships and its membership is only open to individual professionals either as Full Membership or Associate Membership or Student Membership. It termed as preposterous the requirement by the Procuring Entity to make it mandatory that Tenderers submit proof of membership thereof.

With respect to Advertising Practitioners Association (APA), the Applicant submitted that APA is an amorphous body and, just like the PRSK, it is neither a statutory body nor is it mandated to accredit advertising agencies in this country. It also argued that APA has no registered office and that it is currently housed in the office of the chairman of a company called Express DDB which is an advertising firm, itself a competitor in the advertising business. It was therefore the Applicant's argument that to insist on membership thereof, the Procuring Entity was deemed to promote conflict of interest and collusive practices in public procurement in violation of the letter and spirit of Section 42(1) (b) of the Act as read together with Article 46(1)(c) of the Constitution.

The Applicant submitted in Issue No. 2 that the requirement that the Applicant must have been a member of good standing for five years in these associations was inhibitory in nature and it was intended for the Applicant not to participate in the tender. It argued that the requirement was discriminatory against the Applicant since any person who registers a

public relations and / or advertising company must wait for five years before they could participate in a tender notwithstanding the company's technical and financial capacity to provide the services. The Applicant further argued that all that it ought to have been required to do is to demonstrate the technical and financial capacity to provide services required by the Procuring Entity. The Applicant also argued that public procurement in this country is standardized and that it has in the past provided similar services to other public bodies without necessarily being a member of PRSK and APA.

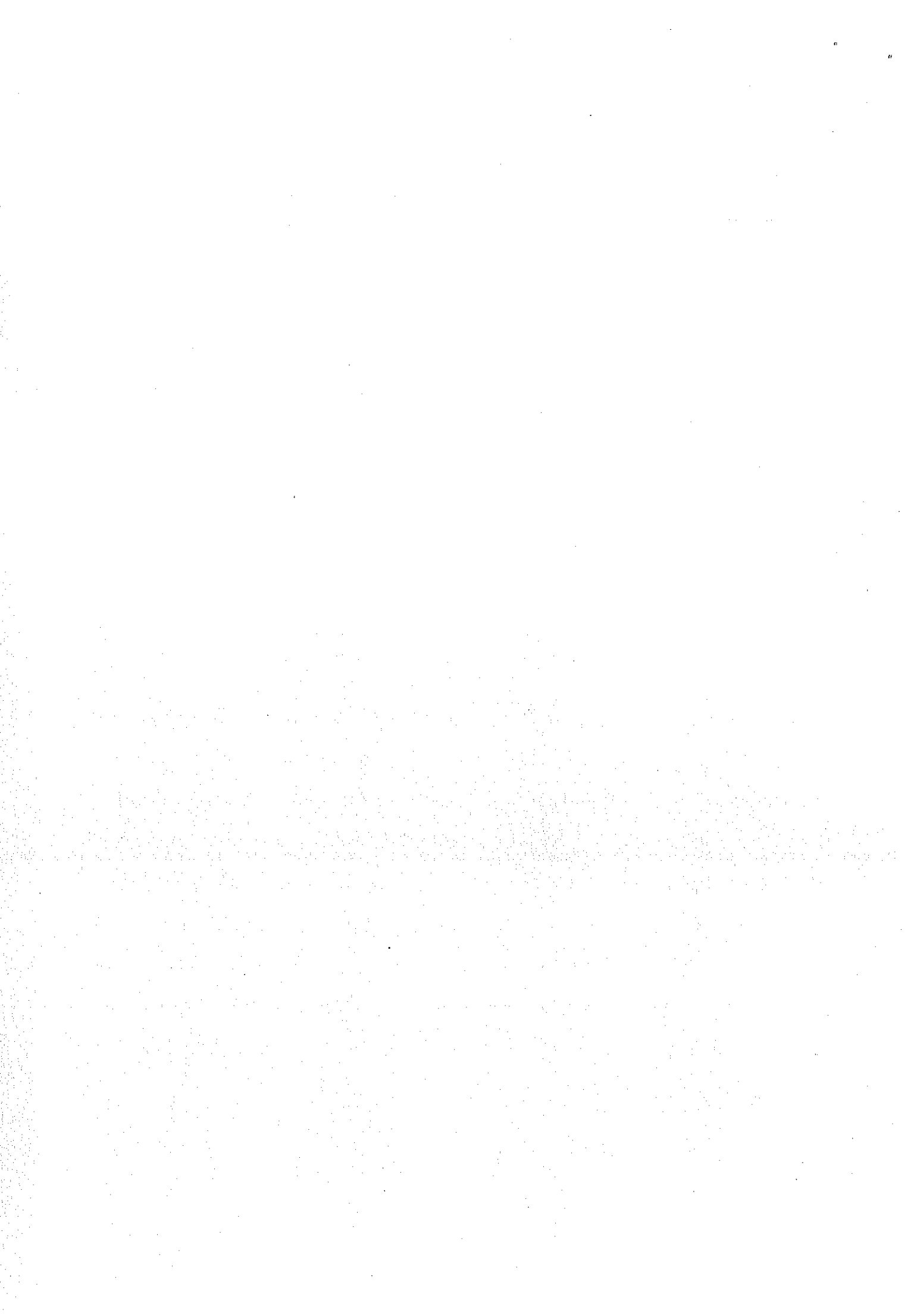
The Applicant submitted that the Act abhors discrimination in that Section 39(1) of the Act provides that candidates shall participate in procurement proceedings without discrimination, except where participation is limited in accordance with this Act and the Regulations. It cited Article 10(2) (b) of the Constitution on national values and principles of governance which binds the Procuring Entity and Article 27(4) & (5) of the Constitution which expressly outlaws discrimination on any ground, directly or indirectly. It argued that requirement of 5 years good standing is discriminatory against the Applicant and called upon the Board to annul that provision.

The Applicant submitted on the 3rd Issue (Ground No. 5) premised on provisions of Section 53(1) & (2) of the Act as read together with Article 47(1) of the Constitution and Clause 2.5 of the Tender Documents that the Law under Section 43 provides that where a Tenderer requests a Procuring Entity to amend a tender document under Sub-section 2, they are bound to



do so. It argued that it did demonstrate to the Procuring Entity that the requirement was discriminatory and needed to be amended or deleted altogether. The Procuring Entity instead was *unequivocal* in reply to the Applicant in their letter dated 28th February, 2014 stating that the IT was not going to amend the Clause and that all the Tenderers must submit evidence of membership for the last 5 years. The Applicant sought the determination of the Board whether the Applicant, upon it becoming a member of APA or PRSK it would have to wait for 5 years in order to participate in a tender. The Applicant contended that it is not administratively fair to the Applicant and the Clause is offensive and the Procuring Entity ought to have reviewed it.

On issue No. 4 the Applicant submitted that the requirement that the Applicant must be a member of five years good standing in PRSK and APA is not in compliance with Article 36(2) of the Constitution which gives the Applicant the freedom to choose whether to join or not to join any associations. The Applicant argued that it is unfair administrative action on the part of the Procuring Entity to compel the Applicant to join associations not of the Applicant's choice. The Applicant further argued that whereas it is alive to the provisions of Article 24 and 25 of the Constitution to the extent that freedom is limited or can be limited by the Constitution or a law enacted in a democratic manner, there is no law in this country that requires the Applicant or any other service provider in this tender to join any of these associations.



The Applicant averred that the Procuring Entity is attempting to limit the rights of the Applicant that are guaranteed in the Constitution in an unfair manner and that this should not be left to stand because the Constitution is the basis of all decisions and policies made by any person in this country. The Applicant finally averred that the Procuring Entity cannot be heard to impose such a requirement on the Applicant and urged the Board to allow the Request for Review and delete the offensive Clause.

An Interested Party M/s. Professional Marketing Services Ltd in support of the Applicant submitted that membership of APA is indeed restrictive and does not offer fair grounds for firms intending to participate in the tender. It argued that, from its experience, it is practically impossible to join as a new member due to various impediments and inefficiencies at the APA Board. The Interested Party submitted that APA does not have a secretariat or a full time staff but operates from a competing firm's office.

In response the Procuring Entity submitted that this was an open tender where interested and eligible firms were free to bid subject to fulfillment of the requirements of the tender document. It avers that the said criterion does not discriminate nor violate the Act and the Constitution. The Procuring Entity states that the Applicant willingly purchased the tender document after familiarization with the contents and requirements of the tender.

The Procuring Entity submitted that this application is premature. The tender opening was on the 5th of March 2014 and the evaluation is still going on. With regard to the jurisdiction of the Board, the Procuring Entity

cited Section 93 (1) of the Act and sought that the Applicant demonstrates that it is a candidate and that it is likely to suffer damage.

The Procuring Entity averred that the Applicant ought to know that Section 96 of the Act defines the parties who qualify to apply for a review. The Applicant has not demonstrated that it is likely to suffer any loss or damage, as required by Section 93(1). For a party to bring an appeal, the Procuring Entity invited the Board to Section 96 of the Act which defines the parties to an appeal. The Procuring Entity has not notified any party that its tender was successful. Without this element the application for review is premature. The Procuring Entity contends that from beginning to deliberate before the Board on the mandatory requirements of the tender is tantamount to inviting the Review Board to play a role in the process of tender evaluation which is not the mandate of the Board.

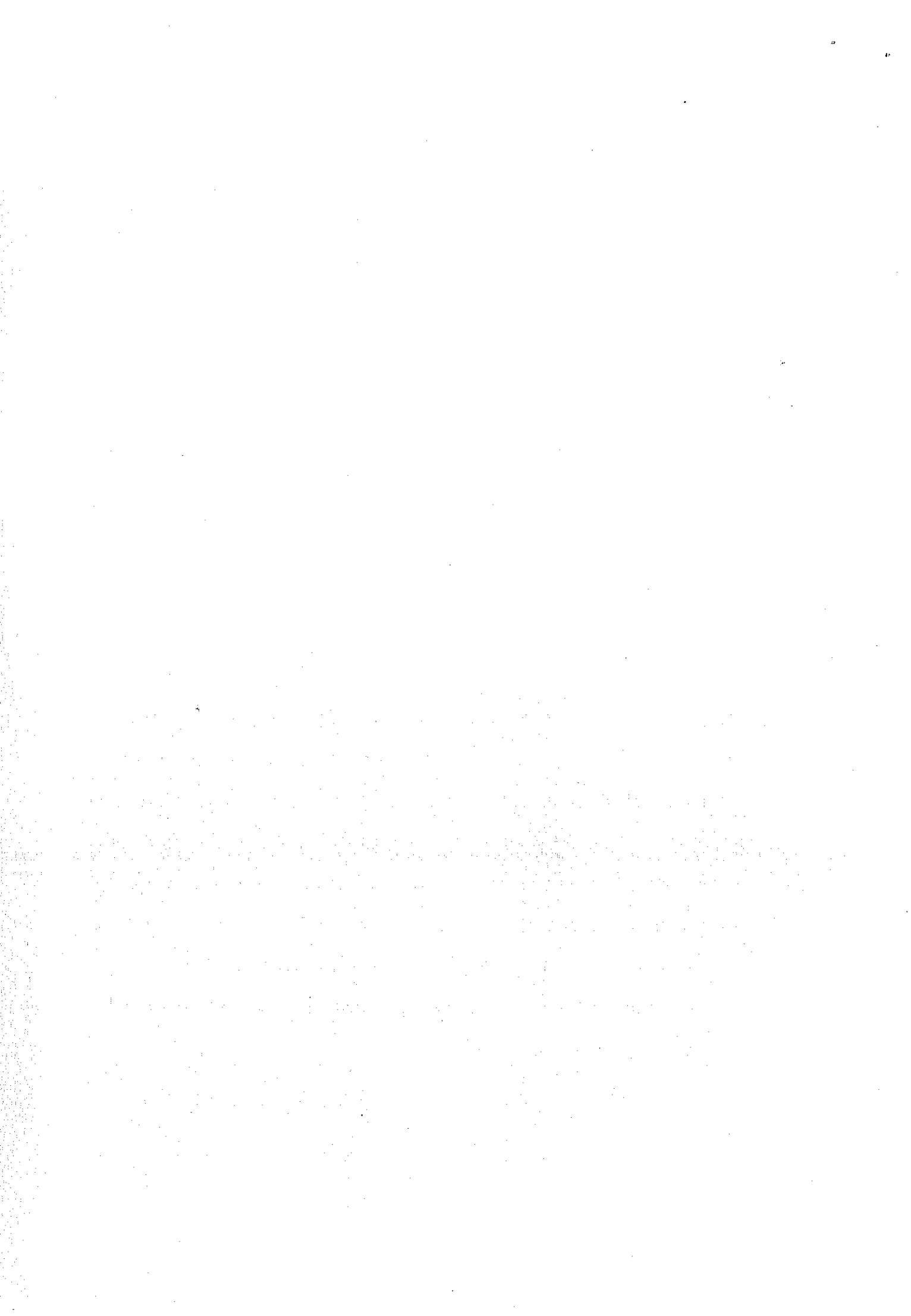
The Procuring Entity submitted that it is the mandate of the Procuring Entity to come up with the evaluation criteria. The fact that the Applicant requested for amendment to the tender document does not demonstrate that the Procuring Entity breached any section of the law. It argued that the Applicant has not pointed out which section of the Law the Procuring Entity breached in coming up with the evaluation criteria. It submitted that is not the mandate of the Tenderers to come up with mandatory requirements that suit them, for to allow that will invite anarchy in procurement.

The Procuring Entity further submitted that the Request for Review is premature, frivolous and intended to create unnecessary delays in the procurement process. It further contended that the Request should not be entertained under Section 93(2) of the Act and ought to be dismissed.

In reply the Applicant argued that Regulation 73 is premised on Section 93(1) of the Act which provides that:

"Subject to the provisions of this Part, any candidate who claims to have suffered or risk suffering, that sounds futuristic, loss or damage due to a breach imposed on a procuring entity by this Act or the regulations may seek administrative review as in such manner as may be prescribed".

The Applicant termed the 'risk suffering' in Section 93(1) as futuristic. It averred that the prescription referred to in Section 93(1) is Regulation 73 and provides that it shall be done as prescribed in form RB1 which the Applicant had done. The Applicant argued that the situation the Procuring Entity was referring to was properly addressed under Regulation 73(2) (c) (ii) which talks of the notification under Section 67 or 83 in the case of request for proposals. It further argued that the Board has jurisdiction to hear this application and it is lawful for an applicant to come before the Board before an award has been made.



The Board has carefully considered the submissions of the parties and examined all the documents that were submitted and notes as follows:

On the issue of jurisdiction, Regulation 73(2) (c) (i) and Section 93 of the Act allows for a party to come before the Board even when the tender process is still ongoing. The Board therefore holds that it has jurisdiction to hear this Request for Review as filed on merit.

Turning to the grounds raised by the Applicant, the Board has narrowed the grounds to one. The issue is whether Clause 2.11.1(a) (1) of the Tender Document is discriminatory or not.

In determining this issue the Board notes various pertinent sections of the Act which provide as follows:

Section 39:- *Participation in procurement.*

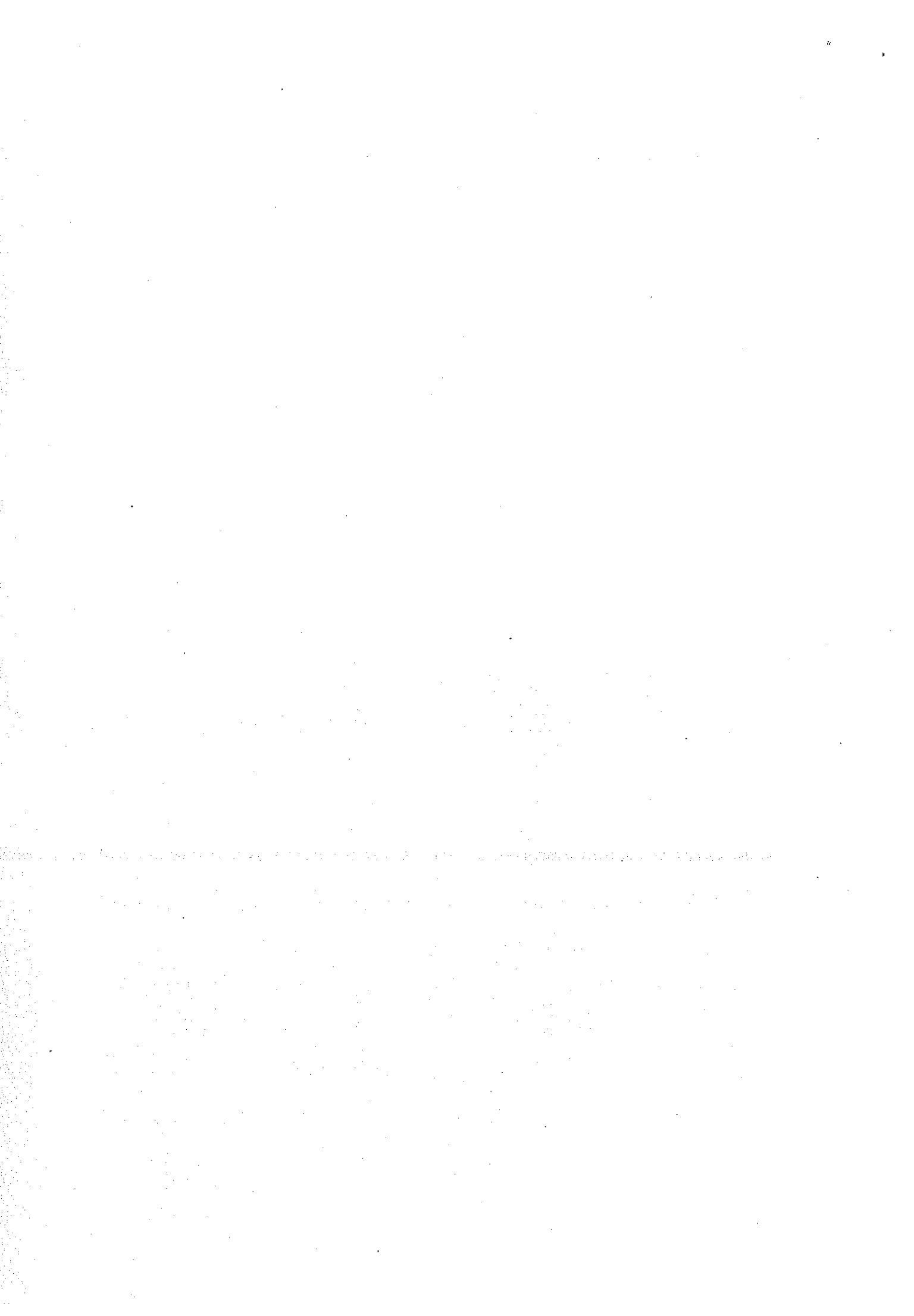
(1) Candidates shall participate in procurement proceedings without discrimination except where participation is limited in accordance with this Act and the regulations.

Section 52:- *Tender documents.*

(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 fair competition among those who may wish to submit tenders.

(3) The tender documents shall set out the following:



(e) instructions for the preparation and submission of tenders including; -

(iv) any requirement that evidence be provided of the qualifications of the person submitting the tender

From the foregoing, the Board observes that the Procuring Entity inserted the clause to satisfy itself that all bidders who participated in the tender were qualified and to ensure a level of professionalism as per the requirement of Section 52(3) (e) (iv) of the Act. The Board finds that this requirement was in compliance with Section 39(1) of the Act and was neither restrictive nor discriminatory, more so because the clause was applicable to all parties who wished to participate in this tender and not just the Applicant.

The Board finds that the Clause did not breach the Applicant's freedom of association since bidders were free to join both the local associations (APA and PRSK) and/or any internationally recognized bodies. Further, the Clause did not compel the Applicant to join any particular association. The Board notes that bidders had an option to join APA or PRSK or internationally recognized bodies or even form their own association and belong to it. The Board finds the provision to be a wide enough margin which allowed bidders many options.

The Board finds that associations of like-minded professionals are good for the promotion of good conduct by members, standardization, and professionalism in service delivery. Section 91 of the Act allows Procuring

Entities to come up with requirements and evaluation criteria in the tender documents. The requirement for a Tenderer to belong to a body or association is a necessary qualification in the tender. The Board finds the requirement is neither discriminatory nor against the law.

The Board made similar findings in the past. In the case of **Samo Security Vs Masinde Muliro University of Science and Technology (Application for Review No.40 of 2013.)**, the Board found that it was prudent and lawful for the Procuring Entity to require Tenderers to belong to a professional security association in order to reap the benefits available to members through such associations. It further found that the Procuring Entity, by not requiring membership of a specific association, did not breach the Applicant's freedom of association.

The Board however finds that the requirement that a party must be a members in 5 years good standing in any of the associations or bodies in order to participate in a tender is oppressive and restrictive. Such a requirement locks out practitioners who may have not attained the 5 year threshold and yet are otherwise technically and financially capable.

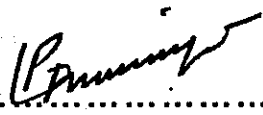
In view of the foregoing, the Board directs, under the powers bestowed upon it by Section 98 of the Act, as follows:

1. That the request for review is hereby dismissed.
2. That the Procuring Entity shall waive the requirement that Tenderers be in five(5) years good standing in membership of any association and proceed to complete the evaluation process of the tender.
3. That since the Applicant actually submitted a bid, the Board takes cognizant of this fact and therefore makes no orders on the Applicant's request to be allowed to submit a new tender. The tenders as submitted on 5th of March, 2014, when the tender closing/opening was conducted shall be evaluated.
4. That the Procuring Entity shall make necessary arrangement to extend the validity period of the tenders and the Tender Securities thereof to allow for the evaluation within the tender validity period.
5. The Board will not make any orders as to costs.

Dated this 18th day of March, 2014


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CHAIRMAN, PPARB


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SECRETARY, PPARB

