

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 83 OF 2017 OF 13TH SEPTEMBER, 2017

BETWEEN

CESSCOLINA EAST AFRICA LIMITED.....APPLICANT

AND

**THE KENYA POWER AND LIGHTING
COMPANY LIMITED PROCURING ENTITY**

Review against the decision of the Kenya Power and Lighting Company Limited in the matter of Tender No. KP3/9A/OT/03/17-18 Tender for Supply of Motor Vehicles, Motor Cycles & Plant.

BOARD MEMBERS PRESENT

1. Mr. Hussein Were - In the Chair
2. Mr. Peter B. Ondieki, MBS - Member
3. Eng. Weche Okubo, OGW - Member
4. Mr. Nelson Orgut - Member
5. Mrs. Rosemary Gituma - Member
6. Mrs. Gilda Odera - Member

IN ATTENDANCE

1. Philemon Kiprop - Holding Brief for Secretary

PRESENT BY INVITATION

Applicant - Cesscolina East Africa Limited

1. Calvin Otieno - Advocate

Procuring Entity : The Kenya Power and Lighting Company Limited

1. Richard Otieno - Advocate
2. Gad Otieno - Advocate
3. Caroline Kiambi - Advocate
4. Christopher Murgor - Advocate
5. Odada Justus - Advocate

THE BOARD'S DECISION

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

BACKGROUND OF AWARD

In August, 2017, the Procuring Entity invited bids for a tender for supply of motor vehicles, motor cycles & plant: Tender No: KP3/9A/OT/03/17-18. The tender submission date was 13th September, 2017. The tender was advertised on 17th August, 2017 and the tender documents availed to the public made vide the Respondent's E-Procurement portal on 29th August, 2017. The subject tender was to be submitted online on or before 13th September, 2017 at 10.30 a.m.

The following firms submitted their bids as at the closing date of the tender on 13th September, 2017:-

No.	Bidders	Bid currency	Bid unit price
1	Engineering Development Limited	KES	4,000,000
2	CMC Motors Group Ltd	KES	1,228,652
3	Simba Corporation Ltd	KES	3,597,021
4	Achelis Material Handling Ltd	EUR	20,000
5	Sunuk Co.Ltd	KES	637,852.92
6	Isuzu EA Ltd	KES	3,880,000
7	Farm Engineering Industries Ltd	USD	5,101
8	Lion Capital Ltd	KES	4,000,000
9	DT Dobie & Co. Ltd	KES	750,000
10	Car & General (K) Ltd	KES	180,000

11	Toyota Kenya Ltd	KES	1,463,515
12	Transfrica Motors Ltd	KES	3,265,262

THE REVIEW

This Request for Review was lodged by **Cesscolina East Africa Limited** on 13th September, 2017, against the decision of the Kenya Power and Lighting Company Limited in matter of tender No. KP3/9A/OT/03/17-18 Tender for Supply of Motor Vehicles, Motor Cycles & Plant.

The Applicant sought for the following orders:-

- a) Pending the hearing and determination of the application for Review an Order do issue suspending the tendering process in respect to TENDER NO: KP3/9A/OT/03/17-18.*
- b) The Respondents be ordered to delete any clause that mandatorily requires tenderer to indicate with Evidence (in form of purchase documents) a minimum 10 or any units of the ton truck mounted lifting crane sold and serviced in Kenya.*
- c) The Respondents be ordered to delete any clause that mandatorily requires the tenderer be franchise holders and dealers with fully fledged workshop(s) equipment with adequate facilities*
- d) The Respondent be and is hereby ordered to pay costs of and incidental to these proceedings.*

During the hearing of this Request for Review, the Applicant was represented by Mr. Calvin Otieno Advocate from the firm of M/s COL Advocates LLP while the Procuring Entity was represented by Mr. Richard Otieno Osamba, and Gad Otieno.

The Procuring Entity in its response to the Request for Review filed a notice of Preliminary Objection on 19th September 2017, on the ground that the Board lacks jurisdiction to hear and determine this matter pursuant to the provisions of Section 167 of the Public Procurement and Asset Disposal Act, 2015 (herein after referred to as the Act) on the ground that the Applicant lacks the *locus standi* to institute the proceedings and that the Request for Review had not been filed within the required 14 days.

THE APPLICANT'S SUBMISSIONS

Counsel for the Applicant relied on the Request for Review and on the statement signed by Mr. Peter Mbela on behalf of the Applicant. He submitted that the Procuring Entity had prepared a tender document that favored other firms in the procurement process and that the Procuring Entity had acted in a discriminatory and unconstitutional manner. He states that under Clause 10 (d) and (e) at pages 105-106 of the tender document it was a mandatory requirement for a bidder to produce evidence of minimum 10 units of 6.0 ton (110 KnM) Capacity Lifting truck mounted knuckle boom crane complete with augur bit & hook sold and serviced in Kenya. He argued

that this clause locks out new entrants to tender for this item and favours established firms thus violating the provisions of Section 60 (6) of the Act which demands for fairness and competitiveness. He further submitted that the items being procured are not locally manufactured and can be sourced by agents from the manufacturing companies abroad. Counsel for the Applicant further averred that the Procuring Entity had sourced for the same items for several years from one supplier namely M/s Engineering Development Limited. He stated that the tender document prepared by the Procuring Entity contravened the provisions of Section 3 (i) and (j) of the Public Procurement and Asset Disposal Act 2015 which states as follows:

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

(a)

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

(j) promotion of citizen contractors

In its response to the Board's query as to how it knew that the Procuring Entity had sourced the item from one supplier for several years as it alluded, the Applicant conceded that it had no evidence but that it had heard the same from a Mr. Katoni who is an employee of the Procuring Entity. The Applicant further submitted that it had sought assistance from Mr. Katoni to get the tender document amended so as to remove the said clause to no

avail. Mr. Katoni was one of the three listed persons of contact in the tender document. The Board sought clarification on the mode of communication between the Applicant and Mr. Katoni and the Applicant confirmed that communications were verbal.

The Applicant further informed the Board that the Applicant did not download the tender document from the website but had instead collected a copy from the Procuring Entity's offices, one week before the tender closed, around 8th or 9th September 2017. He argued that taking this timing of collection into account, the Procuring Entity could not argue that the Applicant had filed the Request for Review out of time.

In conclusion, Counsel for Applicant submitted that that the Applicant opted not to participate in the tender as a result of the discriminatory mandatory requirements and was therefore appearing before the Board as a candidate but not as a bidder.

He requested the Board to order the Procuring Entity to remove the discriminatory clauses from the tender and order costs to be paid by the Procuring Entity.

PROCURING ENTITY'S SUBMISSIONS

The Procuring Entity through its Counsel, Mr. Richard Osamba opposed the request for review and filed a preliminary objection. In its preliminary objection, the Procuring Entity submitted that the Board lacked the

jurisdiction to hear the application pursuant to section 167 of the Act. It stated that the Applicant lacked the *locus standi* to institute the proceedings that the Applicant being a candidate and not a tenderer ought to have filed its request for review within 14 days from when the cause of action accrued. It stated that the Applicant was considered as a candidate and not a tenderer since it did not submit its bid as at the close of the tender. The Procuring Entity submitted that the 14 days required for lodging a complaint by the candidates lapsed on 12th September 2017 since the tender document was availed on the Procuring Entity's website on 29th August 2017. It stated that the tender closing date was 13th September 2017 at 10.30 a.m. and that the Applicant submitted its bid on 13th September 2017 after 10.30 a.m. It also confirmed that there was no fee payable towards the tender.

The Procuring Entity further submitted that the Applicant did not indicate the exact date he collected the tender document and stated that the tender was an e-tender hence the time was to be counted from the date the tender was availed online on the portal. It stated that given that the request for review was filed 15 days after it was availed online, the Applicant's application was filed out of time. The Procuring Entity argued that it is only tenderers whose time started to count from 13th September 2017 at the opening of the tenders and that the Applicant was a candidate and not a tenderer.

Further Counsel for the Procuring Entity submitted that the Applicant having not followed due process could not argue that the tender was

discriminatory yet it had a chance to present its grievances to the Procuring Entity which it did not.

On the merits of the application, Counsel for the Procuring Entity denied that the requirements set out in the tender document were discriminatory. He argued that the Applicant chose to make direct verbal contact with one of its employees as opposed to formally addressing its concerns. He referred the Board to the provisions of clause 3.6 of the Appendix to Instructions to Tenderers which states as follows:-

“3.6 ‘A prospective tenderer requiring any clarification of the Tender Document may notify the General Manager Supply Chain in writing and ensure receipt is acknowledged at KPLC’s Physical address indicated on the Tender document. KPLC will respond in writing to any request for clarification of the Tender documents, which it receives not later than seven (7) days prior to the deadline for the submission of Tenders, prescribed by KPLC. Written copies of KPLC’s response (including an explanation of the query but without identifying the source of inquiry) will be published and accessible to all prospective Tenderers on the KPLC’s tendering portal.’

Counsel for the Procuring Entity argued that the Applicant was in breach of Section 66 of the Public Procurement and Asset Disposal Act by communicating with Mr. Katoni rather than follow the official channel provided for in Clause 3.6 of the tender document.

Counsel for Procuring Entity further submitted that the Procuring Entity has the prerogative to set technical specifications in a tender document to ensure

value for money. It stated that the invitation to tender was open to manufacturers or agents and authorized suppliers and that the requirements were to ensure that the Procuring Entity would be supplied with genuine parts that can be maintained by skilled staff given that the items were specialized. The Procuring Entity argued that the tender was not discriminatory nor was it skewed in favour of any particular supplier and that it allowed a fair opportunity to both local companies as well. It referred the Board to the provisions of clause 3.3.1 of the Appendix to Instructions to Tenderers which states as follows:

"3.3.1 '1. This invitation to Tender is open to Manufacturers or Agents/Authorized suppliers. (Local Appointed Dealers and Agents of Motor Cycles & Plant). A manufacturer can quote directly OR authorize any number of Agents/Authorized suppliers to quote products from their factories).

Counsel for the Procuring Entity further argued that the purpose of clause 10 (d) and (e) of the tender document was to ensure that it complied with the principles of public finance as stipulated in the Finance Act as well as the principle of maximization of value for money set out under section 3 (h) of the Public Procurement and Asset Disposal Act. It argued that the Applicant had never participated in the procurement of such machinery and that it could not use this tender as a trial and error with public funds. Counsel for the Procuring Entity confirmed that at least ten companies had bid for the same tender. In closing Counsel for the Procuring Entity submitted that it did not receive any request for any clarification from the Applicant and that

the allegation by the Applicant that the Procuring Entity had sourced the item from one company since 1963 was false.

He therefore urged the Board to dismiss the Applicant's Request for Review with costs.

APPLICANT'S RESPONSE

In response, Counsel for the Applicant argued that it was a candidate and not a tenderer, hence Clause 3.6 was not applicable to it. He further submitted that Section 48(3) (b) of the Act confers the Procuring Entity with the mandate to certify items supplied and therefore the Procuring Entity can source for the items from non-franchise holders

Counsel for the Applicant relied on the provisions of Section 75 (2) which he said requires the Procuring Entity to amend discriminatory or biased clauses in a tender document.

Counsel for the Applicant stated that it is not a franchise holder as demanded in the tender document and it was thus discriminated against it. He also cited the provisions of Section 167 (1) of the Act which he submitted allows a candidate or a tenderer to lodge a Request for Review to challenge any offending clauses in a tender document.

Counsel for the Applicant finally submitted that the Request for Review was filed on time since time started running from the time a bidder knows that there is a breach in a tender document. In this case he stated that the

Applicant became aware of the defects in the tender on 30th September 2017 after reading the tender document.

BOARD'S DECISION

Upon hearing the representations of the parties and interested candidates before the Board and upon considering the information and all the documents before it, the Board has determined that the following issues fall for determination in this case.

Issues for determination

- 1. Whether the Applicant is a candidate and not a tenderer under the provisions of Section 167 of the Act, and whether the request for review was filed out of time*
- 2. Whether Clause 10 (d) and (e) of the tender document are discriminatory and or skewed towards a specific bidder(s).*

The Board now proceeds to determine the issues framed for determination as follows:-

ISSUE NO. I

Whether the Applicant is a candidate and not a tenderer under the provisions of Section 167 of the Act, and whether the request for review was filed out of time

Given that a preliminary issue has been raised by the Procuring Entity, the Board is duty bound to inquire into it and determine it before addressing the merits of the request for review.

The Board has heard the submissions by both the Applicant and the Procuring Entity and notes that it is not in dispute that the Applicant did not download the tender document from the Procuring Entity's portal but collected a hard copy from an employee of the Procuring Entity at the Procuring Entity's offices. The Board further notes that it is not in dispute that the Applicant did not submit its bid and that it is a candidate and not a tenderer.

The Board further observes that the dispute relates to item No. 5 KPLC=TPT=05-17-18 of Tender No. KP3/9A/OT/17-18 for the supply of Ton Truck Mounted Lifting crane, 110KNM capable of lifting 6.0 complete with augur bit and Hook. The tender was advertised on or about 17th August 2017 and was to be submitted online on or before 13th September, 2017 at 10.30 a.m.

The Procuring Entity submitted that the Applicant filed the request for review out of time given that it was a candidate and not a tenderer, having not submitted its bid. The Applicant however argued that time started running when it collected the hard copy of the tender document from the Procuring Entity's offices on or about 8th or 9th September 2017 and that it filed the request for review on 13th September 2017, which was less than 14 days. The Procuring Entity however started counting time from the date the

advertisement was availed online on its portal on 29th August 2017 and thus argued that 14 days had lapsed by the date of the Applicant filing of the request for review on 13th September 2017.

Section 2 of the PPDA defines a candidate as follows:-

"2 "candidate" means a person who has obtained the tender documents from a public entity pursuant to an invitation notice by a procuring entity

The Board also wishes to refer to the provisions of Section 167(1) of the Act which states as follows:-

"167 '(1) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed'.

Having heard the Applicant's submissions, the Board confirmed that the Applicant collected the hard copy of the tender on 8th or 9th September 2017. The Board also observed that the Procuring Entity did not have a means of tracking the time a candidate downloaded a copy of the tender documents from its portal. The Board further notes that there was no fee payable to the Procuring Entity for the tender. The Board therefore finds that time started running on the date the Applicant collected the tender documents given that that is the only way it could know that there was a breach in the tender documents. Section 167(1) of the Act requires that a candidate or tenderer

may seek administrative review within fourteen days of the date of occurrence of an alleged breach and in this case, the Board finds that fourteen days had not lapsed between the time the Applicant collected the tender documents on 8th or 9th September 2017 and the date of filing the request of review on 13th September 2017.

The preliminary objection therefore fails and the Board will now proceed to determine the case on merits.

ISSUE NO. II

Whether Clause 10 (d) and (e) of the tender document are discriminatory and or skewed towards a specific bidder(s).

The Applicant stated that clause 10(d) and (e) of the tender document were discriminatory and were skewed to awards a particular bidder or bidders. The said clauses of the tender document provide as follows:-

“10 (d) Evidence (in form of purchase documents) of minimum 10 units sold and serviced in Kenya *Yes (Mandatory)*

10 (e) Franchise holders and dealers who own fully fledged workshops equipment with adequate facilities *Yes (Mandatory) “*

The Board notes that the items being procured are specialized items as submitted by the Procuring Entity.

The Board wishes to refer to Section 60 of the Public Procurement and Asset Disposal Act which states as follows:

60" "An accounting officer of a procuring entity shall prepare specific requirements relating to the goods, works or services being procured that are clear, that give correct and complete description of what is to be procured and that allow for fair and open competition among those who may wish to participate in the procurement proceedings".

The Board notes that the following twelve organizations were able to bid for the tender:-

1. Engineering Development Limited
2. CMC Motors Group Ltd
3. Simba Corporation Ltd
4. Achelis Material Handling Ltd
5. Sunuk Co. Ltd
6. Isuzu EA Ltd
7. Farm Engineering Industries Ltd
8. Lion Capital Ltd
9. DT Dobie & Co. Ltd
10. Car and General (K) Ltd
11. Toyota Kenya Ltd

12. Transafrica Motors Ltd

Having observed that a high number of firms participated in the tender, the Board is of the opinion that the tender document was not discriminatory or skewed towards a particular organization as averred by the Applicant.

It is the Board's further opinion that the Procuring Entity's requirement for a bidder to have sold 10 units as illustration to the Procuring Entity of the bidder's capacity as an experienced and reliable supplier. It is important to note that the Procuring Entity is an organization providing essential services nationally and it cannot afford to have any inefficiencies. The provisions of clause 3.3.1 of the Appendix to Instructions to Tenderers provide as follows:-

"3.3.1 1. This invitation to Tender is open to Manufacturers or Agents/Authorized suppliers. (Local Appointed Dealers and Agents of Motor Cycles & Plant). A manufacturer can quote directly OR authorize any number of Agents/Authorized suppliers to quote products from their factories).

From the tenderers listed above, it is evident that the tender was open to all persons who qualified for the invitation and that there was no discrimination.

Section 70 (6) (a) of the Act requires the Procuring Entity to ensure they get the right goods and services that will guarantee performance and the said Section of the Act provides as follows:-

“70 (6) ‘The tender documents shall set out the following-

(a) the specific requirements prepared under section 60 relating to the goods, works or services being procured and the time limit for delivery or completion”

The Board also wishes to state that the Applicant had an opportunity to participate in the tender and raise any matters that were of concern to them as pertaining to clause 3.6 of the Instruction to Tenderers but instead opted not to participate in the tender.

Having considered the above, the Board finds the Procuring Entity did not Act in a manner which was discriminatory to the Applicant and that the tender document was not skewed in favour of any bidder or class of bidders.

FINAL ORDERS OF THE BOARD

In view of all the foregoing findings and in the exercise of the powers conferred upon it by the Provisions of Section 173 of the Public Procurement and Disposal Act, 2015 the Board makes the following orders on this Request for Review:-

- 1. The Request for Review filed by the Applicant on 13th September 2017 in respect of Tender Number KP3/9A/OT/17-18 for the Supply of Motor Vehicles, Motor Cycles & Plant for Kenya Power and Lighting Company Limited fails and is hereby dismissed.**
- 2. The Procuring Entity is therefore at liberty to proceed with the procurement process herein.**

3. Each party shall bear its own costs of this Request for Review.

Dated at Nairobi on this 4th day of October, 2017.

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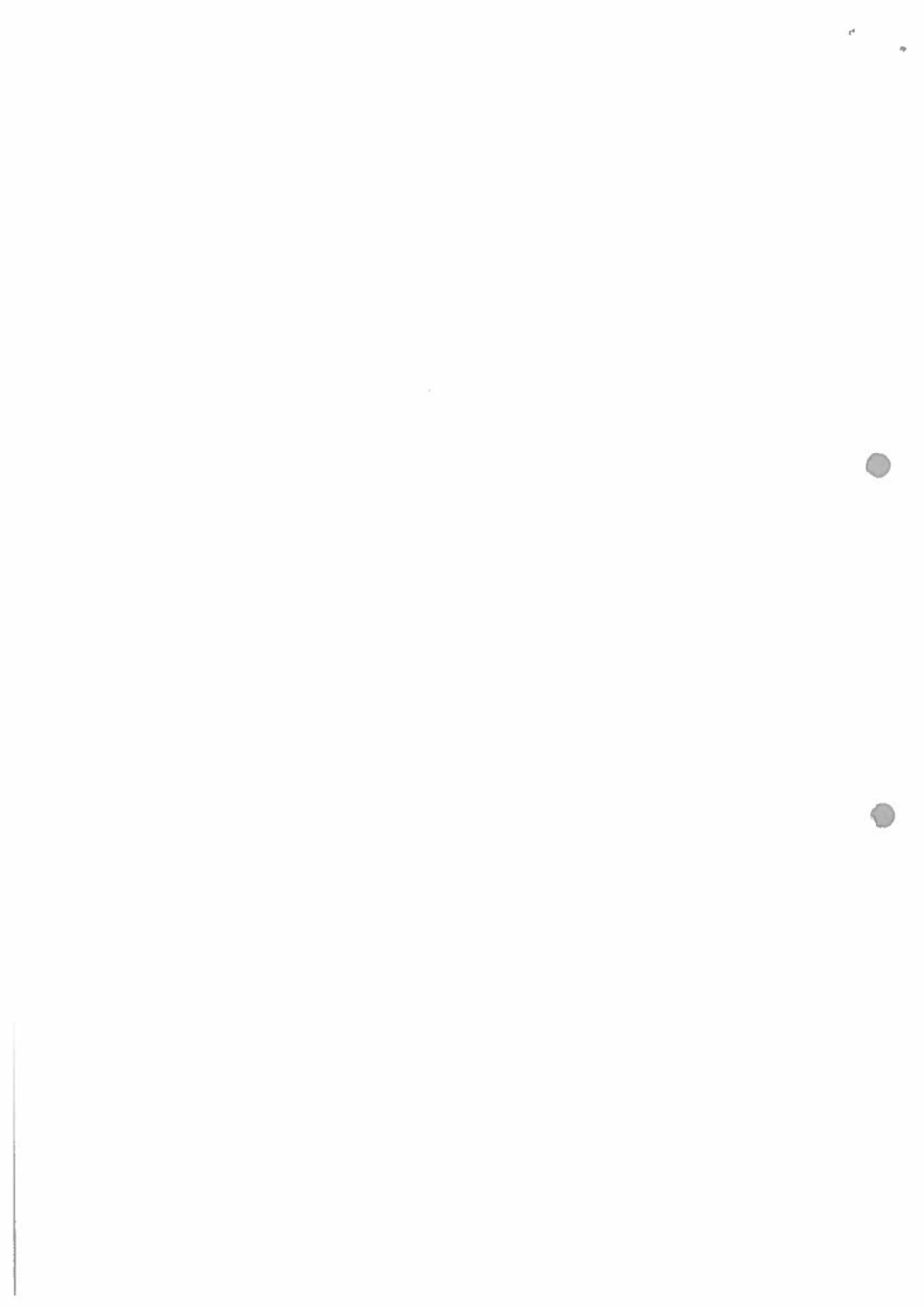
CHAIRMAN

PPARB

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SECRETARY

PPARB



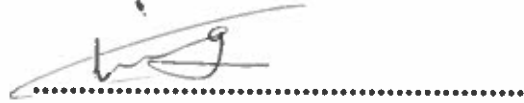
3. Each party shall bear its own costs of this Request for Review.

Dated at Nairobi on this 4th day of October, 2017.



CHAIRMAN

PPARB



SECRETARY

PPARB

