

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 44/2017 OF 9TH MAY, 2017

BETWEEN

ROSECATE PROMOTIONS & SUPPLIES LTD.....APPLICANT

AND

INDEPENDENT ELECTORAL & BOUNDARIES

COMMISSION.....PROCURING ENTITY /RESPONDENT

AND

UNIPRINT LIMITED.....1ST INTERESTED PARTY

AFRICA INFRASTRUCTURE COMPANY LTD.....2ND INTERESTED PARTY

OKIYA OMTATAH OKOITI.....3RD INTERESTED PARTY

BOARD MEMBERS PRESENT

- | | |
|------------------------------|------------|
| 1. Mr.Paul Gicheru | - Chairman |
| 2. Mrs. Rosemary Gituma | - Member |
| 3. Mr. Peter B. Ondieki, MBS | - Member |
| 4. Mr. Nelson Orgut | - Member |
| 5. Mr. Hussein Were | - Member |

IN ATTENDANCE

- | | |
|-------------------|-------------------------------|
| 1. Philip Okumu | - Holding Brief for Secretary |
| 2. Maureen Namadi | - Secretariat |

PRESENT BY INVITATION

Applicant - Rosecate Promotions & supplies Ltd

- | | |
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| 1. Anthony E. Kiprono | - Advocate, |
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Procuring Entity - IEBC

- | | |
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| 1. Kamau Karori | - Advocate |
| 2. Milly Odari | - Advocate |
| 3. Ken Melly | - Advocate |
| 4. Moris Imbwaga | - staff IKM advocates |
| 5. Christine Mugenyu | - Pupil,IKM |

Interested Parties

- | | |
|------------------------|--|
| 1. Moses Kurgat | - Advocate Unprint Ltd |
| 2. Dr.Shailesh Patel | - Africa Infrastructure Development Ltd |
| 3. Benedict Munami | - Africa Infrastructure Development Ltd |
| 4. Okiya Omutata Okoit | - Kenyans for Justice & Development
Trust |
| 5. Michael Kojo Otieno | -Kenyans for Justice & Development
Trust |
| 6. Nancy Wamalwa | -Baitijas Banknote Ltd |
| 7. Paul Ogemba | -Standard Media,Journalist |

THE BOARD'S DECISION

BACKGROUND

This is the second time that the Procuring Entity is seeking to procure Ballot papers, election declaration forms and the poll registers for the elections which are due on 8th August, 2017. The tender was first advertised through an invitation to tender published on 17th August, 2016 under Tender No. IEBC/01/2016-2017 which invited bidders to supply the said materials on a "as and when required" basis for a period of two years (2016 - 2018). The first tender went through the entire evaluation process leading up to the award of the said tender to the firm of M/s Al Ghurair Print and Publishing Company Limited of Dubai.

The award of the tender to the said firm was however challenged before the Board on 7th November, 2016 by one of the bidders namely M/s Pearl Media (PTY) Ltd in the Public Procurement Administrative Review Board Review Application No. 93 of 2016. During the hearing of the Request for Review filed before the Board on 7th November, 2016, two interested parties namely The Coalition for Reforms and Democracy (Cord) and The Jubilee Party applied to and were enjoined as interested parties to the said proceedings.

The dispute between the parties thereafter proceeded to full hearing leading upto a decision which was given by the Board on 28th November, 2016. In it's said decision, the Board dismissed the Request for Review and allowed the procurement process to proceed but one of the interested

parties in the said matter, namely the Coalition for Reforms and Democracy was dissatisfied with the Procuring Entity 's decision to award the subject tender to M/s Al Ghurair Print and Publishing Limited and lodged a Judicial Review Application namely Nairobi High Court Judicial Review Misc. application number 637 of 2016 **Republic -vs- The Independent Electoral and Boundaries Commission Ex-parte The Cord Coalition and 2 others** under the Provisions of Order 53 of the Civil Procedure Rules and Section 8 of the Law Reform Act. The Applicant in the above case sought to inter-alia quash the decision of the Procuring Entity awarding the said tender to the firm of M/s Al Ghurair Print and Publishing Company Limited.

The application for Judicial Review proceeded to full hearing and in a judgment delivered by the High Court on 13th February, 2017, the Court made the following orders:-

- a) An order of certiorari removing into the High Court for the purposes of being quashed the decision of the Procuring Entity to award Tender Number IEBC/01/2016-2017 for the supply and delivery of ballot papers for elections, election result declaration forms and poll register's to M/s Al Ghurair Print and Publishing Company Limited of Dubai which decision is hereby quashed.
- b) The Procuring Entity was given the liberty to restart the tender process for the supply and delivery of ballot papers for elections, election result declaration forms and poll registers afresh and was directed to do so in compliance with the Constitution, the

provisions of the Public Procurement and Asset Disposal Act 2015 and the other relevant election laws.

- c) The Court however declined to issue the orders sought against the 2nd Respondent the Public Procurement Administrative Review Board and at the conclusion of it's judgment, the High Court ordered that each party bears it's own costs of the Judicial Review Application.

The successful bidder in the first procurement namely M/s Al Ghurair Printing and Publishing Company LLC was however dissatisfied with the decision of the High Court given on 13th February, 2017 in Judicial Review Miscellaneous Application No. 637 of 2016 and lodged an appeal in the Court of Appeal being Civil Appeal No. 63 of 2017 M/s Al Ghurair Printing and Publishing LLC -vs- Coalition for Reform and Democracy Independent Electoral and Boundaries Commission and The Public Administrative Review Board. The Court of Appeal considered the appeal and in a majority decision delivered on 26th April, 2017, the court of appeal upheld the decision of the High Court and dismissed the appeal lodged by the successful bidder thereby paving the way for the restart of the tender process as ordered by the High Court.

In an apparent attempt to comply with the High Court's decision given on 13th February, 2017, the Procuring Entity prepared what appears to be a fresh tender document and an invitation to tender dated 18th April, 2017 under tender reference Number IEBC/48/201-2017 being a tender for the supply and delivery of Ballot papers for elections, statutory election results

declaration forms to be used at the polling station and statutory election results declaration forms to be used at the Constituency, County and the National Level.

It is apparent from the evidence placed before the Board and more particularly from the tender opening minutes of the meeting held on 4th May, 2017 at the procuring entity's premises at Anniversary Towers that the Procuring Entity sent out the invitations to tender together with the tender document to the following thirteen (13) firms:-

BIDDER INVITED TO THE TENDER

S/No	Name of Bidder	Email Address
1.	KL Hi Tech Secure Print Limited	abhisheks@indiamart.com
2.	Ellams Products Ltd	sales@ellams.co.ke nayan@ellams.co.ke
3.	Manipal Technologies Limited	info@manipaltechnologies.com info@manipalgroup.info
4.	United Printing & Publishing	info@upp.ae info@upp.ae
5.	Baltijas Banknote Ltd	info@balticbanknote.lv lvbaiju@telemedia.co.ke , info@balticbanote.lv
6.	Digiprint Supplies Europe	inquiry@digiprint-supplies.com inquiry@digitpirnt-supplies.com
7.	Al Ghurair Printing And Publishing Llc	printing@al-ghurair.com rajeer.tyagi@al-ghurair.com lakshmana.ganapathy@al-ghurair.com
8.	Tall Security Print Lintied	enquiries@tallgroup.co.uk export@tallgroup.co.ke
9.	Pearl Media (Pty) Ltd/Novus Holdings	Info.cape@paarlmedia.co.za Infor.cape@paarlmedia.co.za
10.	Lantrade Global Supplies Limited	global@lantrade.com
11.	Uniprint Limited	vik@unprint.co.ke bharatmelta@uniprint.co.za
12.	Gi Solutions Group	bimalpatel@lpgi.co.uk

		info@lpgi.co.uk
13.	Novus Holdings Limited	'louise.mccullough@novus.holdings'

Out of these thirteen (13) firms, the following eight (8) firms responded to the invitation and submitted their tenders to the Procuring Entity by the closing date of the 4th May 2017:-

Bidder No.	Company Firm
1.	M/S Baltijas Banknote Ltd
2.	M/S Unprint Ltd
3.	M/S Tall Security Print Ltd
4.	M/S Al Ghurair Print And Publishing Ltd
5.	M/S Ellams Products Ltd
6.	M/S G. I Solutions Group
7.	M/S Rose Kett Promotions & Supply Limited
8.	M/S Africa Infrastructure Development Co.

The further evidence placed before the Board shows that in addition to sending out the invitations to tender and the tender documents to specific bidders whose names have already been set out above, the Procuring Entity caused the invitation to tender together with the tender document to be uploaded on to it's website on 28th April, 2017.

The Appearances

During the hearing of this Request for Review, the Applicant was represented by Mr. Anthony E. Kiprono advocate while the Procuring Entity was represented by Mr. Kamau Karori and M/s Milly Odari advocate, respectively. The interested party M/s Uniprint Limited was

represented by Mr. Moses Kurgat Advocate while Dr. Shailesh Patel represented the 2nd interested party herein M/s Africa infrastructure Company Limited.

On 16th May, 2017 and before the commencement of the hearing of the Request for Review, the 3rd interested party herein Mr. Okiya Omtatah Okoiti applied to be enjoined as an interested party in the Request for Review an application which was allowed by the consent of all the parties to the Request for Review. Mr. Omtatah acted in person during the hearing of the Request for Review before the Board.

In addition to all the appearance by the parties who have been named above, one M/s Nancy Wamalwa appeared on behalf of the bidder M/s Baltijas Banknote Ltd but she opted not to make any submissions at the hearing.

The dispute

It was the Applicant's case as contained in its Request for Review and more particularly at paragraph 3 of the statement in support of the Request for Review that the Applicant's participation in this tender was prompted by the invitation to tender which was uploaded on to the Procuring Entity's website on 28th April, 2017. The Applicant produced and annexed the extract copy of the Procuring Entity's website page showing when the tender document was uploaded on its website as annexure "RPSL2" to the statement in support of the Request for Review signed by one Mr. Elias Mwangi Mugwe, the Applicant's General Manager.

The Applicant stated that upon noticing the existence of the invitation to tender and the tender document on the Procuring Entity 's website, the Applicant learnt that the closing date for the tender was 4th May, 2017 and in order to participate in the tender, the Applicant bought the tender document on 3rd May, 2017. The Applicant produced the receipt dated 3rd May, 2017 which was issued to it by the procuring entity upon purchasing the tender document which it produced and annexed as annexure "RPSL 4" to the statement in support of the Request for Review.

It was the Applicant's further case that it was unable to submit a meaningful tender as a result of the short notice between the date it learnt of the existence of the tender and the closing date for the tender but stated that one of it's representatives attended the tender opening meeting held on 4th May, 2017 where it learnt that though the firms which have been listed at page 6 of this decision had received written invitations to tender on various dates beginning from 18th April, 2017, the Procuring Entity did not upload the invitation to tender and the tender document on to it's website until 28th April, 2017.

Owing to the above facts, events and circumstances, the Applicant was dissatisfied with the entire procurement process and the contents of the tender document which led to the filing of the present Request for Review.

The Applicant set out a total of nine (9) in it's Request for Review dated 9th May, 2017 on the basis of which it sought to challenge the procurement process the subject matter of this Request for Review and the contents and

the criteria set out in the tender document. The 9 grounds of review were as follows:-

- 1. The tender is in breach of Section 89(c) of the Public Procurement and Asset Disposal Act, 2015 (the Act) read together with regulation 36 of Public Procurement & Disposal Regulations, 2006 (the Regulations) in that the time between the invitation to tender and the deadline for the submissions of tenders (an international tender) is less than the prescribed period of 30 days.*
- 2. The Respondent is in breach of Section 96 of the Act which enjoins its accounting officer to take steps to bring the invitation to the attention of all those who may wish to submit tenders.*
- 3. In addition to paragraph 2 above, the Respondent's decision to send invitations to various tenderers at different times is discriminatory and therefore contrary to Section 3(b) of the Act, Articles 27(1) and 227(1) of the Constitution.*
- 4. The evaluation criteria set out in the tender document and in particular item 2.27.4 of the financial evaluation criteria provides that the tender will be awarded to the bidder with the lowest total cumulative unit price for all or part of elective positions is neither objective nor quantifiable as required under Section 80(3)(a) of the Act.*
- 5. The tender document further fails the objective and quantifiable test for being contradictory and confusing. Clause 2.27.4 provides that the Procuring Entity will award the contract to the successful tenderer(s) whose tender has been determined to be substantially*

responsive and has been determined to be the lowest evaluated tender. However item 2.27.4 of the financial evaluation criteria provides that the tender will be awarded to the bidder with the lowest total cumulative unit price for all or part of elective positions.

- 6. Item 2.27.4 of the financial evaluation criteria is subjective as it provides an alternative award "for all or part of the elective position". The same will confuse the tender processing committee as it provides two distinct award criteria.*
- 7. The possibility of a partial and/or split award is undesirable due to the security nature of the goods being procured. This is contrary to the minimum standards set out under Article 86(a) of the Constitution which requires that the voting system used should be simple, accurate, verifiable, secure, accountable and transparent.*
- 8. The tender document as presently issued by the Respondent is contrary to the Court's judgment in R -vs- Independent Electoral and Boundaries Commission & Another Ex-parte Coalition for Reform and Democracy & 2 Others which directed the Respondent to re-tender for the ballot papers in compliance with the Constitution, the Act and all the relevant election laws.*
- 9. In view of the foregoing glaring flaws in the tender document and the tendering process the Applicant risks suffering, loss or damage due to the Respondent's breach of the Constitution, the Act and the regulations.*

The Board has considered the Applicant's Request for Review dated 9th May, 2017 together with the statement in support of the Request for Review signed by Mr. Elias Mwangi Mugwe in support of the said Request for Review together with all the annexures annexed thereto.

The Board has also considered the procuring entity's Replying Affidavit which was sworn by Mr. Ezra Chiloba on 15th May, 2017 in opposition to the Applicant's Request for Review together with all the annexures annexed thereto. The Board has additionally considered the following documents which were filed by the Applicant, the procuring entity and the interested parties who appeared before it during the hearing of this Request for Review:-

- a) The notice of preliminary objection dated 16th May, 2017 filed by the firm of M/s Kurgat & Associates on behalf of the bidder Uniprint Limited.*
- b) All the correspondences addressed to the Board by the interested party M/s Africa Infrastructure Development Company Ltd.*
- c) The request to be enjoined as an interested party and the affidavit supporting the request both of which were signed by Mr. Okiya Omtatah Okiiti on 16th May, 2017.*
- d) The grounds of opposition dated 18th May, 2017 and which were signed and filed by the 3rd interested party.*
- e) The submissions filed before the Board by the Applicant and the Procuring Entity pursuant to the orders made by the Board on 16th May, 2017.*

f) The original tender documents and the tender opening minutes supplied to the Board by the Procuring Entity pursuant to the provisions of Regulation 74(3) (b) of the Public Procurement and Disposal Regulation 2006 as amended by L. N. No. 106 of 18th June, 2013 and which are still in force.

The Board has also considered the oral submissions made before it by the Advocates who appeared on behalf of various parties and those made by Dr. Shailesh Patel and Mr. Okiya Omtatah Okoiti on behalf of the 2nd and the 3rd interested parties herein respectively.

It is clear from the documents and the submissions made by all the parties that several issues arose for determination in this Request for Review. Some of the issues touched on the jurisdiction of the Board to hear and determine the dispute before it while the remaining issues relate to the Applicant's challenge of the entire procurement process and the contents of the tender document. The issues that touch on the Board's jurisdiction to hear and determine the Applicant's Request for Review arose from paragraph 3 of the Replying affidavit sworn by Mr. Ezra Chiloba the Procuring Entity 's Chief Executive Officer on 15th May, 2017, the notice of preliminary objection filed on 16th May, 2016 by the firm of M/s Kurgat & Associates on behalf of 1st interested party, the oral submissions made by Mr. Kamau Karori and M/s Milly Odari and the grounds of opposition dated 18th May, 2017 filed by Mr. Okiya Omtatah Okoiti. Going by the nature and the legal priority for the consideration of the grounds of preliminary objection and those in the substantive Request for Review, the

Board determines that the following issues/grounds fell for determination in this Request for Review:-

The issues for determination

1. *Whether the Board lacks the jurisdiction to hear and determine the Applicant's Request for Review on the ground that the Request for Review sought to challenge the procuring entity's choice of a procurement method.*
2. *Whether the Applicant had the locus standi to institute this Request for Review based on the alleged ground that the Applicant was not a bidder and or because it was not specifically invited by the Procuring Entity to participate in the procurement process herein.*
3. *Whether the grounds relied upon by the Applicant in the Request for Review were time barred by virtue of the provisions of Section 167 of the Public Procurement and Asset Disposal Act 2015.*
4. *Whether the Board has the jurisdiction to hear and determine any of the fresh complaints and or grounds raised by the 2nd interested party and which do not relate to the grounds of review raised by the Applicant in it's Request for Review.*
5. *If the Board has the jurisdiction to hear and determine this Request for Review:-*
 - a) *Grounds 1, 2, 3 and 8 of the Request for Review- whether the Procuring Entity acted in breach of the provisions of Sections 89(c) and 96 of the Public Procurement and Asset Disposal Act 2015 as read together with Regulation 36 of the Public Procurement and Disposal Regulations 2006, Articles 27(1) and*

227(1) of the Constitution and the decision of the High Court in the case of Republic -vs- The Independent Electoral and Boundaries Commission Ex-parte the Cord Coalition [Nai HC JR Misc. Appl. No. 637 of 2016].

- b) Grounds 4, 5, 6 & 7 – whether the award criteria set out in clause 2.27.4 of the financial evaluation criteria which provides that the tender will be awarded to the bidder with the lowest cumulative unit price for all or part of the elective positions is neither objective nor quantifiable as required by the provisions of Section 80(3)(a) of the Act and whether the said criteria also fails the test of being objective and quantifiable and or is contradictory, confusing and or undesirable due to the security nature of the goods and therefore contrary to the provisions of Article 86(a) of the Constitution which requires that the voting system used be simple, accurate, verifiable, secure, accountable and transparent.*
- c) Who should pay the costs of this Request for Review.*

Having identified the issues, the Board will now proceed to consider and determine each of the issues and the grounds set out in the Request for Review in the order they appear above.

ISSUE NO. 1

Whether the Board lacks the jurisdiction to hear and determine the Applicant's Request for Review on the ground that the Request for Review sought to challenge the Procuring Entity's choice of a procurement method.

The above preliminary issue was raised by the Procuring Entity in paragraph 3(a) of the Replying Affidavit sworn by Mr. Ezra Chiloba the Procuring Entity's Chief Executive Officer on 15th May, 2017.

Mr. Kamau Karori learned Counsel for the procuring submitted that the Board did not have the jurisdiction to hear and determine the dispute before it since what the Applicant was seeking to challenge was the choice of a procurement method by the procuring entity.

Mr. Karori argued that the Board was precluded from hearing the dispute under the provisions of Section 167(4) (a) of the Public Procurement Asset Disposal Act 2005 which expressly bars the Board from hearing and determining a dispute relating to the choice of a procurement method by the Procuring Entity.

It was Mr. Karori's further contention that the procuring entity had elected to use the restricted tender method of procurement and that it was not therefore open for the Applicant to question the choice of the method the Procuring Entity had elected to use for the purposes of procuring the election materials which were the subject matter of this Request for Review.

He therefore urged the Board to strike out the Applicant's Request for Review for being incompetent.

The Procuring Entity's submissions on this objection were supported by Mr. Kurgat learned Counsel for the Procuring Entity and the 3rd interested party herein Mr. Okiya Omtatah Okoiti who concurred with the Procuring

Entity's contention and added that having elected to use the restricted tendering method, the Procuring Entity's choice of this procurement method could not be challenged under the provisions of Section 167(4) (a) of the Public Procurement and Asset Disposal Act 2016.

It was their common position that the Applicant's Request for Review was incompetent and ought to be struck out.

Mr. Anthony Kiprono advocate for the Applicant and Dr. Shailesh Patel who appeared on behalf of the 2nd interested party however opposed the position taken by the Procuring Entity and the 1st and the 3rd interested parties and maintained that the Procuring Entity's objection on this ground had no merit.

Mr. Kiprono stated that nowhere in the Request for Review or in the orders sought by the Applicant in the Request for Review was the Applicant challenging the choice of the procurement method adopted by the Procuring Entity. Mr. Kiprono submitted that the Applicant's position was all along that the procurement method adopted by the Procuring Entity was that of an International open tender and that at no stage of the Application did the Applicant contend otherwise.

To the contrary, Mr. Kiprono stated that what the Applicant was challenging was the manner in which the Procuring Entity had gone about in observing the law and the procedures relating to the procurement using the International open tendering method of procurement. He further

stated that the Applicant's second area of challenge related to the contents and the criteria set out in the tender document.

He therefore urged the Board to dismiss the Procuring Entity's objection on this ground.

Dr. Shailesh Patel adopted the submissions made by Mr. Kiprono and asserted that a look at the tender document which spoke for itself showed that the procurement method used by the Procuring Entity in inviting the tender for electoral materials in question was that of an International open tender. He further stated that he did not know how and when a tender which was an open tender on the face of the tender document was converted into a restricted tender.

He therefore equally urged the Board to dismiss the objection by the Procuring Entity as supported by the 1st and the 3rd interested parties.

The Board has considered the submissions made by all the parties on the first issue framed for determination. The Board finds that whereas it is true that it does not have the jurisdiction to entertain a dispute relating to the choice of a procurement method by the Procuring Entity, the only way to determine whether the dispute relates to the choice of a procurement method is by looking at the pleadings, the prayers sought and at the contents of the tender document which in law speaks for itself. The Board must in addition look at the steps taken by the Procuring Entity prior to and after the invitation to tender inviting bidders to submit their bids.

The Board has in this particular case perused the grounds and the prayers sought by the Applicant in the Request for Review dated 9th May, 2017 and the statement in support of the Request for Review.

It is clear from the Request for Review and the statement in support thereof that the Applicant is not in any way challenging the choice of the procurement method adopted by the Procuring Entity. A look at the entire Request for Review shows that the Applicant considers and was consistent both in the Request for Review, the statement in support of the Request for Review that tender floated by the Procuring Entity was an International open tender. It's main complaints were however that the Procuring Entity did not follow the Constitution and the provisions of the Public Procurement and Asset Disposal Act 2015 in conducting the procurement process using the procurement method adopted by the Procuring Entity which was in this case the International open tender method. The Applicant's additional complaint was that the tender document used in the tender process and how the process was undertaken was so flawed that it could not pass the Constitutional and the statutory thresholds for procurement using the International open tender method of procurement.

The Board further notes that nowhere in the body of the Request for Review is the Applicant contending that the Procuring Entity chose to procure electoral materials through a method other than the International open tender method and in none of the four prayers sought by the Applicant is it asking the Board to declare, nullify or in any other way interfere with the procurement method used by the Procuring Entity in

this tender which in the Applicant's view was an International open tender.

The Board has read through the Procuring Entity 's Replying Affidavit which runs into 23 paragraphs and appreciates that whereas the Applicant contends that the method of procurement used by the Procuring Entity was that of an International open tender, the Procuring Entity and the 1st and 3rd interested parties insisted that this procurement was being undertaken through the restricted tendering method of procurement under the provisions of Sections 92 and 102 of the Public Procurement and Asset Disposal Act 2015 and further that the Procuring Entity had complied with the provisions of Section 74 of the Act.

The Board is however of the respectful view that a divergence of opinion as to what method of procurement was used by the Procuring Entity does not of itself mean that an Applicant is challenging the procurement method used in undertaking a particular procurement and that in order for the Board to be divested of the jurisdiction to hear and determine a dispute on account of the provisions of Section 167(4)(a) of the Act, an Applicant has to expressly challenge the choice of the use of a particular procurement method both in the grounds relied upon in the Request for Review, the statement in support thereof and in the reliefs sought in the Request for Review.

Where the issue relates to a divergence of opinion as to the method of procurement used between two or more contesting parties, the ultimate duty to resolve the dispute on what procurement method has been adopted

by the Procuring Entity for the purposes of determining whether the provisions of the Constitution and or the Public Procurement and Asset Disposal Act 2015 have been complied with lies with the Board which must make that determination on the strict basis of the facts, the evidence placed before it and the law.

Based on the above findings, the Board holds that the Applicant in this Request for Review is not challenging the choice of the procurement method used by the Procuring Entity and the Procuring Entity's objection to that effect therefore lacks merit and is disallowed.

ISSUE 2

Whether the Applicant had the locus standi to institute this Request for Review based on the alleged ground that the Applicant was not a bidder and or because it was not specifically invited by the Procuring Entity to participate in the procurement process herein.

The second preliminary issue raised by Counsel for the Procuring Entity and Counsel for the 1st interested party M/s Unprint Limited and which was supported by the 3rd interested party was that the Applicant did not have the *locus standi* to institute the Request for Review now before the Board on the grounds that the Applicant was not a bidder and or that the Applicant was not specifically invited by the Procuring Entity to participate in the tender process the subject matter of this Request for Review which all the above three parties consider to be a restricted tender.

Mr. Kamau Karori advocate while relying on the provisions of the definition of the words a “candidate” and a “ tenderer” as defined by the provisions of Section 2 of the Act and while also relying on the provisions of Section 167 of the Act which confers parties with the right to institute proceedings before the Board, Counsel for the Procuring Entity submitted that since this was a restricted tender where specific bidders were invited to submit bids and the Applicant having not been one of the bidders which was invited to submit it’s tender by the Procuring Entity , the Applicant did not fit into the definition of a “candidate” and or a “tenderer” for the purposes of Section 167(1) of the Act and that it did not therefore have the *locus standi* to institute the Request for Review before the Board.

Mr. Karori emphasized that before submitting a bid to the Procuring Entity, any interested member of the public had to be specifically invited where the procurement process was being undertaken pursuant to the restricted method of procurement.

He therefore urged the Board to find that the Applicant did not have the *locus standi* to institute this Request for Review having not been specifically invited to submit a tender by the Procuring Entity.

Mr. Kurgat on behalf of the 1st interested party adopted the submissions made by Mr. Karori and stated that in addition to not being invited to submit a bid, the Applicant was not a bidder as it had not purchased or submitted a tender to the Procuring Entity .

Mr. Okiya Omtatah who was contended with reading out his grounds of opposition dated 18th May, 2017 one after another during the hearing of the Request for Review concurred with the submissions made by Counsel for the Procuring Entity and Counsel for the 1st interested party and raised the issue of lack of the *locus standi* of the Applicant in ground 1 of his grounds of opposition. He urged the Board to uphold the objection.

Both Counsel for the Applicant and Dr. Shailesh Patel who appeared on behalf of the 2nd interested party opposed the Procuring Entity and the 1st interested party's objection on the issue of *locus standi* both maintained that the Applicant had the *locus standi* to institute the Request for Review before the Board.

Mr. Kiprono advocate for the Applicant stated that upon noticing the existence of the subject tender on the Procuring Entity's website the Applicant proceeded to purchase the tender document on 3rd April, 2017 and thereafter submitted the tender to the Applicant by the closing date of 4th April, 2017. The Applicant stated that the Procuring Entity accepted the payments made by and the tender submitted by the Applicant without protest.

It was the Applicant's contention that the Applicant was therefore not only a candidate but it was also a tenderer within the meaning of Section 2 of the Act and therefore had the *locus standi* to institute the Request for Review under the Provisions of Section 167(1) of the Act.

The 2nd interested party adopted the position taken by Counsel for the Applicant and stated that the Applicant was both a candidate and a tenderer under the provisions of the Act and added that having uploaded the invitation to tender and the tender document on its website on 28th April, 2017, the Procuring Entity had made an invitation to any company to bid. He therefore stated that the Procuring Entity and the 1st and the 3rd interested parties objection lacked merit.

The Board has considered the submissions made by all the parties who appeared before it on the second preliminary issue framed for determination. The issue as framed raised two issues that are relevant to the question of *locus standi* and they are firstly whether the Applicant lacks the *locus standi* to institute the present application on the ground that it was not a " candidate" or a " tenderer" and secondly whether the Applicant lacks the *locus standi* to institute the application on the ground that it was not specifically invited by the Procuring Entity to participate in this procurement process which the Procuring Entity and the 1st and the 3rd interested parties consider as a restricted tender. The first limb of the objection was raised by the 1st interested party while the second limb was raised by the Procuring Entity and the 3rd interested party.

As the Board has often stated, the question of who can institute proceedings before it and the Board's jurisdiction to hear and determine a dispute lodged before it is conferred upon the parties and the Board by the provisions of Section 167(1) of the Public Procurement and Asset Disposal Act 2015.

The said Section 167(1) of the Act provides as follows:-

167(1): Subject to the provisions of this part, a candidate or a tenderer, who claims to have suffered or risks suffering, loss or damage due to the 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 the award or the 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".

In order for an applicant to have the necessary standing to present a grievance before the Board, all that the Applicant needs to demonstrate is that it is either a "candidate "or a "tenderer "as defined by Section 2 of the Act.

Section 2 of the Public Procurement and Asset Disposal Act 2015 defines a candidate and a tenderer as follows:-

"Candidate "means a person who has obtained tender documents from a public entity pursuant to an invitation notice by a Procuring Entity.

"Tenderer "means a person who submitted a tender pursuant to an invitation by a public entity.

All that the Applicant therefore needs to demonstrate in order to have *locus standi* and therefore be entitled to make any application before the Board is that it must demonstrate that it either obtained tender document

by way of purchase or otherwise and or that it submitted a tender to the Procuring Entity pursuant to an invitation by the Procuring Entity .

In the case of **Cathy International Limited -vs- Office of the President, Police Department (PPARB APPL. No. 31 of 2009)** which dealt with a similar provision contained in the Public Procurement and Disposal Act 2005 (now repealed) the Board summarized the above requirement as follows:-

"A procurement process is a race governed by rules set out in the Act, the Regulations and the Tender document. A bidder enters the race by buying the tender documents and submitting the tender documents before the set deadline. It is only a bidder who has entered the race in accordance with the rules and the required format, who can lodge a complaint. A complaint by any person standing on the sidelines cannot be properly lodged before the Board. The Board is a creature of statute and it can only exercise the powers donated by the Act and the Regulations. The Applicant may well have genuine grievances but it failed to return its tender documents therefore locking itself from the race".

The Board has considered the law as set out above and all the evidence placed before it in order to determine whether the Applicant falls within the definition of the words "candidate "or a "tenderer". The evidence contained in the Request for Review the statement in support thereof and the annexures annexed thereto and more particularly annexures RPSL2 and RPSL4 show that the Procuring Entity of it's own volition uploaded

the invitation to tender dated 18th April, 2014 together with the tender document for this tender onto it's website on 28th April, 2017 and that upon becoming aware of the existence of the invitation, which the Board considers to have been an invitation to the whole World, the Applicant purchased the tender document from the Procuring Entity .

The Applicant paid the requisite fees of Kshs. 1,000 and was issued with a receipt dated 3rd May, 2017 by the Procuring Entity which accepted the money paid to it by the Applicant without protest. The Procuring Entity did not refund the purchase price for the tender document to the Applicant and has not done so to date.

The Tender opening minutes of the meeting held on 4th May, 2017 which were supplied to the Board by the Procuring Entity together with the tender documents forwarded to the Board through a letter dated 15th May, 2017 which was signed by One Lawy N. Aura on behalf of the Commission Secretary both show that the Applicant returned it's tender document to the Procuring Entity and according to the tender opening minutes signed on 5th May, 2017, the Applicant was assigned the number bidder No. 7.

Turning to the test of whether the Applicant was a "candidate" or a "tenderer" as defined by the provisions of Section 2 of the Act and without going into the questions of whether the Applicant's tender was complete and or responsive which are not relevant at this stage the dispute, the applicant was clearly both a "candidate" and a "tenderer" for purposes of Section 167(1) of the Act and therefore has the *locus standi* to institute the present Request for review before the Board.

The Board therefore finds and holds based on the above evidence that the objections by the Procuring Entity and those by the 1st and the 3rd interested parties lack merit and the same are therefore disallowed.

ISSUE NO. 3

Whether the grounds relied upon by the Applicant in the Request for Review were time barred by virtue of the provisions of Section 167 of the Public Procurement and Asset Disposal Act 2015.

The third ground of objection to the Applicant's Request for Review was raised by the 1st interested party and was supported both by the Procuring Entity and the 3rd interested party. It was to the effect that the grounds relied upon by the Applicant in the Request for Review were time barred by virtue of the Provisions of Section 167(1) of the Public Procurement and Asset Disposal Act 2015.

Mr. Moses Kurgat learned Counsel for the 1st interested party submitted on the basis of ground 2 of his notice of grounds of preliminary objection dated 16th May, 2017 that the grounds raised by Counsel for the Applicant were time barred and were sought to be raised outside the period of 14 days set out under the provisions of Section 167(1) of the Public Procurement and Asset Disposal Act 2015.

Mr. Kurgat submitted based on the averments contained in paragraph 3 of the statement in support of the Request for Review signed by Mr. Elias Mwangi Mugwe on behalf of the Applicant, that the Applicant had learnt of the breaches it sought to rely upon in this Request for Review on 28th

April, 2017 when the invitation to tender and tender document were uploaded onto the Procuring Entity 's website and that the Applicant therefore ought to have filed it's Request for Review within a period of fourteen (14) days from the said date.

The position taken by Counsel for the 1st interested party was supported by Counsel for the Procuring Entity who adopted the line of argument taken by Counsel for the 1st interested party. Mr. Karori additionally contended that the Applicant's Request for Review was time barred for the same reasons and urged the Board to strike out the Applicant's Request for Review.

The 3rd interested party also supported the objection and associated himself with the submissions made by both Counsel for the 1st interested party and Counsel for the Procuring Entity. He further contended at ground 5 of his grounds of objection dated 18th May, 2017 that the Board did not have the jurisdiction to hear and determine grounds 4-7 of the Applicant's Request for Review since the Applicant did not exhaust the procedure provided for under the provisions of Section 75(2) of the Act.

Both Counsel for the Applicant and the 2nd interested party opposed the objection by the 1st interested party which was supported by Counsel for the Procuring Entity and the 3rd interested party. They contended that the Applicant came to know about this procurement process on 28th April, 2017 when it learnt of the existence of the invitation to tender and the tender document when the two documents were uploaded onto the Procuring Entity's website.

Counsel for the Applicant submitted that upon learning of the existence of the invitation to tender and the tender document, the Applicant moved with expedition and purchased the tender document and also obtained the invitation to tender on 3rd May, 2017.

Counsel for the Applicant further submitted that it is upon learning of the contents of the tender document that the Applicant discovered of the defects in the procurement process and the defects in the tender document leading to the filing of the Request for Review on 9th May, 2017 which was within the statutory period of 14 days from 3rd May, 2017 when it purchased the tender document.

He therefore urged the Board to dismiss this objection.

Dr. Shailesh Patel on behalf of the 2nd interested party associated himself with the submissions made by the Counsel for the Applicant and urged the Board to dismiss the objection by the 1st interested party, the Procuring Entity and the 3rd interested party.

The Board has considered the evidence placed before it and finds that although the Procuring Entity send out invitations to tender and the tender documents to several selected firms on separate dates between 18th April, 2017 and 28th April, 2017, no such special invitation was send to the Applicant which only became aware of the invitation to tenderer when the same was uploaded onto the Procuring Entity's website on 28th April, 2017. The evidence which the Board has already referred to above shows that the Applicant purchased the tender document and was issued with an

official receipt by the Procuring Entity on 3rd May, 2017. It is the Board's view that the Applicant therefore became a "candidate" and a "tenderer" in this procurement process on 3rd May, 2017 when it obtained the tender document from the Procuring Entity and the Applicant could therefore not have been in a position to file a Request for Review or raise any grounds of challenge to the process under the provisions of Section 167(1) of the Act on or before 3rd May, 2017 because the Applicant was not aware of the contents of the invitation to tender or the contents of tender document before then.

The Board further notes that this Request for Review was filed on 9th May, 2017 which was barely a period of Six (6) days after the Applicant purchased the tender document. The Applicant's Request for Review was therefore filed within the Fourteen (14) days period prescribed by law for the filling of a Request for Review and on this ground alone the objection by the 1st interested party as supported by the Procuring Entity and the 3rd interested party cannot stand.

Further and in addition to the above, under the provisions of Section 167(1) of the Public Procurement and Asset Disposal Act 2015, a "tenderer" or "candidate" can approach the Review Board at any stage of the proceedings before or within a period of fourteen (14) days after the notification of the outcome of its tender after evaluation. The Board notes that in this particular case, the tenders submitted by the various bidders have not been evaluated and no award has been made yet. Nothing

therefore precluded the Applicant from approaching the Board as early as it did.

The Board finds that the action by the Applicant to approach the Board before the final award was a prudent one since it avoided the prospect of the Applicant lodging its complaints before the Board after a final award of the tender had been made by the Procuring Entity which would probably have been too late in the day in view of the fact that the General Elections are due to be held on 8th August, 2017.

Finally on this objection the Board wishes to comment on Mr. Omtatah's assertion that the Board has no jurisdiction to hear and determine grounds 4-7 of the Applicant's Request for Review because the Applicant did not exhaust the procedure under Section 75(2) of the Act.

The Board has read the provisions of Section 75(2) of the Act and finds that the same relate to the amendment of the tender document through the issuance of an addendum.

The Board finds that this clause cannot deprive the Board of the jurisdiction to hear a procurement dispute where the process and the contents of the tender documents are being challenged as no such prohibition exists in law.

The Board further finds that the nature of this dispute is such that Section 75(2) of the Act could not have denied the Applicant the right to come before the Board for relief.

One of the complaints in this Request for Review was that owing to the Procuring Entity's failure to publish the invitation to tender in any newspaper or other media, the Applicant obtained the tender document only one day before the closing date for the tender. One therefore wonders what time the Applicant had to seek for clarification leading upto the issuance of an addendum which would in law have the effect of amending the tender document.

In addition to the above example the Board also wonders how an addendum could have precluded the Board from entertaining a complaint such as the one to the effect that the Procuring Entity used a procedure purportedly reserved for use in a restricted tender while the tender document and the entire procurement process is stated by the Applicant to have been conducted through an International open tender.

For all the above reasons this ground of objection by the 1st interested party, the Procuring Entity and the 3rd interested party is also disallowed.

ISSUE NO. 4

Whether the Board has the jurisdiction to hear and determine any fresh complaints and or grounds raised by the 2nd interested party and which do not relate to grounds of review raised by the Applicant in its Request for Review.

The fourth preliminary issue which was raised by Mr. Kamau Karori advocate for the Procuring Entity is that the 2nd interested party herein while supporting the Applicant's Request for Review had raised new

additional grounds outside those raised by the Applicant in its Request for Review.

Counsel for the Procuring Entity submitted that it was not open for the 2nd interested party to raise any new grounds of review as the 2nd interested party had not filed its own independent Request for Review and had in any event raised those grounds with the Director General of the Authority.

Mr. Karori was supported in his submissions by Counsel for the 1st interested party and the 3rd interested party.

Both Counsel for the Applicant and Dr. Shailesh Patel who represented the 2nd interested party however stated that noting precluded the 2nd interested party from raising or addressing any new grounds so long as they were relevant to the procurement process since the 2nd interested party was a bidder in the process and had been invited to participate in the proceedings before the Board under the provisions of Section 170 of the Public Procurement and Disposal Act, 2015. They further submitted that Section 40 of the Act prohibited the Director General of the Authority from undertaking any investigation where the dispute was pending before the Review Board.

The Board has perused the Request for Review and the responses thereto together with the submissions filed by the 2nd interested party in support of the Applicant's Request for Review. The Board notes that in addition to the grounds of review which were raised by the Applicant, the 2nd interested party raised several other complaints relating to the alleged

flaws and defects in the procurement process. The 2nd interested party set out a whole list of clauses in the tender document it thought were defective together and also listed several inquiries or questions it raise with the Procuring Entity and the Director General of the Public Procurement Authority regarding the tender process generally.

Having looked at those new grounds, the Board agrees with Mr. Karori's objection to the extent that the 2nd interested party which was a "candidate" and the "tenderer" in the procurement process herein ought to have filed it's own Request for Review since the Board cannot entertain or grant relief to a party which has not filed it's own independent Request for Review.

The objection by Counsel for the Procuring Entity on this ground is therefore allowed and the Board will consider the 2nd interested party's submissions/contribution in so far as the same are relevant to the a grounds of review raised by the Applicant.

Having disallowed all the grounds that challenged the Board's jurisdiction to hear and determine the Request for Review, the Board will now proceed to consider and determine the 9 grounds of review raised by the Applicant together with any other relevant issues that arose in the course of the responses to the 9 grounds of review.

ISSUE NO. 5

- a) Grounds 1, 2, 3 and 8 of the Request for Review- whether the Procuring Entity acted in breach of the provisions of Sections 89(c)*

and 96 of the Public Procurement and Asset Disposal Act 2015 as read together with Regulation 36 of the Public Procurement and Disposal Regulations 2006, Articles 27(1) and 227(1) of the Constitution and the decision of the High Court in the case of Republic -vs- The Independent Electoral and Boundaries Commission Ex-parte the Cord Coalition [Nai HC JR Misc. Appl. No. 637 of 2016].

Grounds 1, 2, 3, and 8 of the Applicant's Request for Review have been consolidated since they relate to the issue of whether the Procuring Entity complied with the provisions of the Constitution, the Public Procurement and Asset Disposal Act 2015, the Public Procurement and Asset Regulations and the decision of the High Court in Nai Misc. JR Appl. No. 637 of 2016 Republic -vs- Independent Electoral Commission Ex-parte the Coalition for Reforms and Democracy & 2 Others.

The thrust of the Applicant's submissions relating to all the above grounds of review were that this was the second time that the Procuring Entity was advertising the tender for the supply and delivery of ballot papers for elections, statutory election result declaration forms to be used at the polling station and statutory election result declaration forms to be used at the Constituency, County and the National level.

Counsel for the Applicant submitted based on the Request for Review, the statement in support of the Request for Review, the annexures thereto and the averments set out in the Procuring Entity's replying affidavit sworn by Mr. Ezra Chiloba on 15th May, 2017 in opposition to the Request for Review

that the tender for the said electoral materials was first advertised through an invitation for International open tenders under tender number IEBC/01/2016 – 2017 which was placed on it's website and the local Newspapers on 17th August, 2016.

Counsel for the Applicant further submitted that pursuant to the said advertisement, several bidders submitted their tenders which were evaluated leading into the award of the first tender to one of the bidders M/s Al Ghurair Printing and Publishing Company Ltd of Dubai. The Applicant further stated that the said award was challenged severally and more significantly in the High Court of Kenya at Nairobi vide **Nai HC JR Misc. Appl. No. 637 of 2016 Republic -vs- Independent Electoral Commission Ex-parte the Coalition for Reforms & Democracy and 2 Others** a case that was heard to conclusion and that in a decision given on 13th February, 2017 by the Honorable Justice G. V. Odunga who heard the dispute the High Court quashed the entire procurement process giving rise to the award of the tender made to M/s Al Ghurair Printing and Publishing Company Ltd and directed that the Procuring Entity restarts the tender process afresh in compliance with the provisions of the Constitution, the Public Procurement and Asset Disposal Act and the relevant elections laws.

It was the Applicant's further case that the successful bidder in the first procurement was dissatisfied with the decision of the High Court and lodged **Civil Appeal No. 63 of 2017 – Al Ghurair Printing and Publishing LLC -vs- Coalition for Reforms and Democracy & 2 Others** in the court of

Appeal which upheld the decision of the High Court in a majority decision which was delivered by the Court of Appeal on 26th April, 2017.

It was the Applicant's further case as contained in its written and oral submissions that pursuant to the High Court decision given on 13th February, 2017, the Procuring Entity commenced afresh process of procurement of the electoral materials in question under a new tender number IEBC/48/2016-2017 using the open International tender method but argued that in commencing and conducting the new procurement process, the Procuring Entity breached the provisions of the Constitution, the public Procurement and Asset Disposal Act, the Public Procurement and Disposal Regulations and the decision of the High Court given in JR. Misc. Appl. No. 637 of 2016.

Counsel for the Applicant submitted that in floating the said second tender, the Applicant breached the provisions of Sections 89(c) and 96 of the Public Procurement and Asset Disposal Act as read together with the provisions of Regulation 36 of the Public Procurement and Disposal Regulations 2006 as amended in 2013 in that the Chief Executive Officer of the Procuring Entity did not take steps to bring the invitation to tender for the second tender process to the attention of the public and to the attention of all those who may have wished to submit tenders.

Mr. Kiprono advocate for the Applicant while relying on the statement in support of the Request for Review dated 9th May, 2017 signed by Mr. Elias Mwangi Mugwe together with the annexures thereto submitted that being one of the bidders that was desirous of participating in the tender process,

the Applicant visited the Procuring Entity 's website and noticed that the Procuring Entity had uploaded the invitation to tender and the tender document on to it's website on 28th April, 2017 and further noticed that the closing date for the tender was 4th May, 2017.

The Applicant further submitted that owing to the reality that there was no enough time between the date of this discovery and the closing date for the submission of the tenders, the Applicant made all frantic efforts and purchased the tender document on 3rd May. 2017 which was only a day before the closing date. The Applicant stated that owing to the Applicant's default in complying with the law and owing to the short notice given, it submitted it's tender but it was not able to submit a meaningful tender owing to the short period of time between when it learnt of the existance of the invitation to tender and the tender document and the date when it purchased the tender document and the closing date.

The Applicant produced the invitation to tender, the tender document, an extract from the Procuring Entity's website and the receipt issued to it by the Procuring Entity upon purchasing the tender document as annexures RSL1, 2 and 4 to the statement in support of it's Request for Review.

The Applicant stated that it attended the tender opening meeting held on 4th May, 2017 where it learnt that though other firms had received written invitations to submit their tenders on various dates between 18th April, 2017 and date of tender opening it did not know what criteria was used by the Procuring Entity in identifying and inviting the said specific firms to submit their tenders since no invitation to the tender in respect of the new

tender was advertised in any Newspaper or other media and that the only evidence of the existence of the tender was through the invitation to tender and the tender document uplifted on to the Applicant's website on 28th April, 2017.

The Applicant further submitted that upon learning of the existence of the tender on 28th April, 2017, the Applicant immediately called the Respondent to make further inquiries on the tender and that during the said inquiry the Procuring Entity 's staff informed the Applicant that the pre-bid tender conference had been held on the same day namely on 28th April, 2017 and the Applicant was supplied with the register of all those who attended the pre-bid conference which it produced and annexed to the statement in support of the Request for Review as annexure RPSL4.

Counsel for the Applicant submitted that the entire new procurement process was carried out in contravention of the law and in an opaque and secretive manner and was discriminatory and therefore contravened the provisions of Article 27 and 227 of the Constitution and Section 3(b) of the Act.

He further stated that it was clear on the face of the tender document which spoke for itself that the tender in issue was an International open tender and that going by the law as it stood, the Procuring Entity ought to have restarted the process by issuing a new and separate invitation of not less than 30 days between the date of invitation and the submission of tenders in order to enable all the parties who desired to participate an opportunity to put in their tenders.

On the issue of opaqueness of the process, Counsel for the Applicant submitted that in the absence of an invitation to tender which published to all members of the public inviting them to submit tenders, it was not clear how the Procuring Entity had come up with the list of who should or should not have participated in the new tender which process was contrary to the letter and the spirit of the Constitution and the law. He therefore urged the Board to allow grounds 1, 2, 3 and 8 of the Applicant's Request for Review.

Mr. Kamau Karori and M/s Milly Odari who made joint submissions on behalf of the Procuring Entity opposed grounds 1, 2, 3 and 8 of the Applicant's Request for Review and in doing so they relied on the Procuring Entity's Replying Affidavit sworn by Mr. Ezra Chiloba on 15th May, 2017 together with the written and the oral submissions made by both Counsel for the Procuring Entity .

As a starting point and while relying on the averments contained in paragraphs 4(a) to (k) of the Replying Affidavit sworn by Mr. Ezra Chiloba on 15th May, 2017, Counsel for the Applicant admitted that this was the second time that the Procuring Entity was seeking to procure the materials the subject matter of this Request for Review.

They submitted that the Applicant advertised the tender for the first time on 17th August, 2016 under tender No. IEBC/01/2016-2017 through an invitation to tender published in the Procuring Entity 's website and the local Newspapers. They further admitted that the tender as advertised on

17th August, 2016 was an International open tender which targeted and invited the entire World to participate in the tender process.

Mr. Chiloba stated in paragraph 4(b) of his replying affidavit that pursuant to the advertisement of 17th August, 2016, the tender attracted nine (9) entities which submitted their bids which were then evaluated resulting into the award of the first tender to the firm of M/s Al Ghurair Printing and Publishing Company Ltd of Dubai.

Both Counsel for the Procuring Entity and Mr. Chiloba at paragraph 4(a) and (d) of his replying affidavit admitted that the first tender was challenged before the Review Board in Review application No. 93 of 2016 and in the High Court in Nai HC JR Misc. Appl. No. 637 of 2016 and that in a judgment delivered by the High Court (Hon. Justice G. V. Odunga) on 13th February, 2017, the High Court quashed the award made to M/s AL Ghurair Printing and Publishing Company Ltd and directed the Procuring Entity to restart the tender process afresh in compliance with the Constitution, the provisions of the Public Procurement and Asset Disposal Act and the relevant election laws.

The Procuring Entity stated in paragraphs 4(e), (f), (g) and (h) of the Replying Affidavit of Mr. Chiloba that owing to the High Court's judgment and in order to expedite and conclude the procurement process before 28th May, 2017 and in order to avoid further delay, the Procuring Entity purportedly acting in compliance with the direction of the High Court commenced the procurement process afresh using the restricted tender

method of procurement in accordance with the provisions of Sections 74, 92 and 102 of the Act.

More significantly, Mr. Chiloba stated in paragraph 4(h) of the Request for Review that in order to ensure transparency, the Procuring Entity invited all the nine (9) bidders who had responded to the invitation to tender for the International open tender number IEBC/01/2016 -2017 advertised on 17th August, 2016 in respect of the quashed tender and also invited the four (4) entities which had made enquiries in relation to the invitation published on 17th August, 2016.

The Procuring Entity produced the list of the firms which submitted their tenders pursuant to the first invitation published on 17th August, 2016 and the (4) four which made inquiries pursuant to the first invitation to tender published on 17th August, 2016 which he annexed as annexure EC -1 to his Replying Affidavit. The said list indicates that the following nine (9) and four (4) firm's respectively allegedly submitted tenders or made inquiries pursuant to the invitation to tender dated 17th August, 2016.

Names of the nine (9) firms which submitted tenders pursuant to the invitation dated 17th August, 2016:-

- i. Ellams Products Limited
- ii. Manipal Technologies Ltd
- iii. Pearl Media (PTY) Ltd
- iv. KL Hitech Secure Print Ltd
- v. AL Ghurair Printing and Publishing LLC

- vi. Baltijas Banknote Ltd
- vii. DPS Print Supplies (Digital Processing systems)
- viii. Tall Security Print Limited.
- ix. United Printing and Publishing.

The representatives of the four (4) bidders who allegedly made inquiries pursuant to the invitation dated 17th August, 2016.

<u>Name of person.</u>	<u>Organization/Firm.</u>
i. Kandadi J. Reddy	- Ellams Products Ltd
ii. Louise McCullough	- Pearl Media (PTY) Limited
iii. Sandeep J Joshi	- KL HI Tech Secure Print Limited
iv. Noel Munyae	- Baltijas Banknote Ltd

Counsel for the Procuring Entity further submitted that the fresh tender having been undertaken through the restricted tender method and the Procuring Entity having only invited the nine (9) bidders who submitted tenders pursuant to the first invitation to tender and the four (4) who made inquiries, there was no further obligation on it's part to issue a fresh invitation to tender but qualified this by stating that it prepared the invitation dated 18th April, 2017 under the fresh tender number IEBC/48/2016-2017 which it uploaded onto it's website on 28th April, 2017 for purposes of transparency.

The Procuring Entity therefore submitted that it had complied with the law while inviting the second tender and denied any accusations of illegality,

breach of the Constitution and or breach of the order issued by the High Court in Nai HC JR Misc. Application No. 637 of 2016.

Both Mr. Kurgat Advocate for the 1st interested party and the 3rd interested party supported the Procuring Entity 's submissions. Mr. Kurgat identified himself with the position taken by the Procuring Entity that the tender in issue was a restricted tender and that the Procuring Entity had complied with the law relating to procurement through restricted tendering. Mr. Kurgat stated that even if there were omissions and errors in the process, the Board should treat such omissions and errors as minor since they did not affect the substance of the procurement process. He urged the Board to allow the Procuring Entity to conclude the exercise.

The 3rd interested party similarly concurred with the submissions made by the Procuring Entity and submitted that the Procuring Entity had complied with all the legal provisions relating to restricted tendering and had to that end complied with the provisions of Regulation 40 of the Public Procurement Disposal Regulations 2013 which set the minimum time for submission of tenders as 14 days and that the tender was also advertised in accordance with the provisions of Section 102(d) of the Act. Mr. Omtatah additionally submitted that the Applicant did not suffer any prejudice as a result of any omissions or errors that may have been committed by the Procuring Entity and finally submitted that if there had been a breach of the orders of the High Court in Nai HC JR Misc. Appl. No. 637 of 2016, then the breach amounted to contempt of court that was only punishable under the contempt of court Act 2016.

The Procuring Entity and the 1st and the 3rd interested parties therefore urged the Board to dismiss grounds 1, 2, 3 and 8 of the Applicant's Request for Review.

The 2nd interested party was however of a different view. The 2nd interested party supported the submissions made by the Applicant. He stated that the Procuring Entity had confirmed through its submissions and the Replying affidavit of Mr. Ezra Chiloba that the Procuring Entity relied on the invitation to tender relating to the quashed tender in selecting the list of bidders who would participate in the fresh tender and wondered how a quashed invitation to tender could be used in inviting tenders. He submitted that the Procuring Entity ought to have issued a fresh invitation to tender for the new process and if it opted to procure the materials through a restricted tender both the invitation to tender and the tender document ought to have expressly stated that the Procuring Entity intended to use the restricted tender method of procurement in which event it ought to have published the invitation to tender in its website and also advertise it in the mass media. The 2nd interested party additionally stated that the Procuring Entity ought to have provided for a minimum period of 7 days between the date of the invitation and the submission date for the tenders if the method of procurement used was that a restricted tender.

In a short response to the submissions made by Counsel for the Procuring Entity, and those of the 1st, 2nd and the 3rd interested parties, Counsel for the Applicant submitted that the submissions by the Procuring Entity had

confirmed the Applicant's fears. He stated that the Procuring Entity had used the invitation to tender for the first tender for the purposes of identifying possible suppliers and that the Procuring Entity's assertion that it had used the nine (9) names of the firms which submitted bids in the first tender and the four (4) who had made inquiries pursuant to the invitation to tender published on 17th August, 2016 was not correct. He stated that contrary to the Procuring Entity's assertion, several bidders who did not submit bids or make inquiries in the first tender such as the firm of M/s G. I Solutions Group had been invited to submit its bid during the new process and wondered what criteria the Procuring Entity used in inviting the new bidders to the exclusion of the Applicant and all the other eligible firms which desired to participate in the new procurement process.

Counsel for the Applicant therefore urged the Board to find that the new tender process was incurably flawed and terminate it forthwith. He further added that it would be in the interest of the public and all the concerned parties if the process was terminated at the earliest possible opportunity as allowing the submitted tenders to be evaluated and an award made pursuant to the said evaluation could lead to the possible challenge of the process at the end which would leave the Procuring Entity with no time to conduct a fresh process thereby jeopardizing the next General Elections to the detriment of the public.

The Board has considered the submissions made by the parties regarding grounds 1, 2, 3, and 8 of the Applicant Request for Review and finds that the starting point for the determination of the above grounds is to first

identify the procurement method used by the Procuring Entity in this procurement.

The Board notes that whereas the Applicant submitted that the fresh tender was an International tender open, the Procuring Entity and the 1st and the 3rd interested parties insisted that the procurement method used was that of a restricted tender.

The Board has looked at the invitation to tender and the tender document which were produced by the Applicant as annexure RPSL1. It is abundantly clear from the provisions of clause 2.1.1 of the Instructions To Tenderers appearing at the printed page 4 of the tender document and clause 2.1.1 of the particulars of the Appendix To Instructions To Tenderers appearing at page 17 of the tender document under the heading the Appendix to Instructions To Tenderers that the procurement method used in this tender was that of an International open tender.

Clause 2.1.1 of the tender document at page 4 headed Instructions To Tenderers reads as follows:-

2:1 Eligible Tenderers

2.1.1: This invitation to tender is open to all tenderers eligible as described in the invitation to tender. Successful tenderers shall complete the supply of goods by the intended completion date specified in the schedule of requirements Section VI.

While clause 2.1.1 of the particulars of the Appendix To The Instructions To Tenderers appearing at page 17 of the tender document provides as follows:-

2.1.1: "Open to all tenderers with ISO 9001 and ISO 27001 (ISM) certified or equivalent".

It is a matter of basic law that a tender document speaks for itself and it is evident from the above clauses that the tender in question was a tender which was open to all tenderers so long as they were ISO 9001 and ISO 27001 (ISM) certified or were the holders of an equivalent certification.

The tender was therefore an International open tender and not a restricted tender and no amount of interpretation or the description of the events preceding the invitation to tender or the preparation of the tender document could change that fact.

The Board has considered the arguments put forward by the Procuring Entity in the Replying Affidavit sworn by Mr. Chiloba on 15th May, 2017 in an attempt to show that the tender the subject matter of this Request for Review was a restricted tender and in justifying the criteria for the selection of the bidders who were invited to participate in the tender. The Chief Executive Officer of the Procuring Entity averred as follows at paragraphs 4(a) to (k) of the Replying Affidavit sworn on 15th May, 2017.

a) The Respondent is entrusted with the exclusive Constitutional mandate of inter alia conducting or supervising referenda and elections to various elective bodies and offices established by the

Constitution of Kenya. One of the key components of the Respondent's mandate involves the procurement of diverse election material and equipment including, for the purposes of these proceedings, ballot papers and statutory election result declaration forms.

- b) On or about 17th August, 2016 the Respondent published an international open tender number IEBC/01/2016- 2017 on its website and in the local newspapers inviting bids from eligible bidders for the supply of ballot papers and statutory election result declaration forms. Although this was a tender that targeted and invited the entire World, the Respondent received bids from only nine (9) entities. An extract of the tender opening register and opening confirmations dated 7th September, 2016 containing a list of the said bidders is annexed hereto and marked "EC-1".*
- c) Following the evaluation of the said bids, the tender was awarded to AL Ghurair Printing and Publishing Company Limited of Dubai. The award was however challenged in Request for Review No. 93/2016 and thereafter in High Court Misc. Judicial Review Application No. 637 of 2016.*
- d) By a judgment delivered on 13th February, 2017, the High Court (Hon. Mr. Justice Odunga) quashed the award of the said tender to AL Ghurair Printing and Publishing Company Limited and directed that the Respondent was at liberty to restart the tender process in accordance with the Constitution and applicable laws. Annexed hereto and marked "EC-2" is a copy of the Court's judgment.*

- e) *The aforesaid judgment of the High Court was issued less than six (6) months to the constitutionally provided date for the General Election. The effect of this is that the Respondent was now behind schedule and had a much shorter period within which to procure the ballot papers and the statutory election result declaration forms so as not to interfere with the fixed Constitutional timelines for the General Elections.*
- f) *In order achieve the said objective, it was critical that the tender process in relation to the procurement of all elections materials be expedited and concluded before 28th May, 2017. By this date, the Respondent would have received the final lists of candidates and symbols which are required for purposes of the artwork and design for the ballot papers. The Respondent would then require sufficient time to conduct ballot proofing (cross checking of the samples for accuracy and confirming security features), production time (printing, cooling and packaging as per constituencies) and transportation, being key deliverables for the General Elections. A sample ballot paper showing the security features that need to be incorporated and the ballot proofing required is annexed hereto and marked "EC-3".*
- g) *For the above reasons and in order to avoid further delay, the Respondent, acting in compliance with the direction of the High Court, commenced the procurement process a fresh in accordance with the law relating to restricted tendering, a method of procurement available under Sections 92 and 102 of the Act.*

- h) In order to ensure transparency the Respondent invited all the nine (9) bidders who had responded to the international open tender number IEBC/01/2016-2017 and also the four (4) entities which had made enquiries in reaction to the said invitation. Copies of the relevant invitations are annexed hereto and marked "EC - 4".*
- i) The tender document which was prepared in accordance with Section 74 of the Act was subsequently published on the Respondent's website on 28th April, 2017. This publication was merely for general information to the public in fulfillment of transparency obligations attaching to public entities. The publication was not intended to and did not constitute an invitation to tender as alleged by the Applicant since the invitations had already been issued by way of email to the participating bidders set out in clause (h) above.*
- j) A pre-bid conference was thereafter organized and held on 28th April, 2017 in which various queries and concerns of the participating bidders were answered.*
- k) None of the participating parties have taken issue with any aspect of the restricted tendering process.*

Simply put therefore, the fresh tender which is the subject matter of this Request for Review in the Procuring Entity 's view mutated from an International open tender under tender number IEBC/01/2016-2017 pursuant to the invitation to tender published on 17th August, 2016 to a restricted tender under Tender No. IEBC/48/2016-2017.

The Board has considered the arguments put forward by the Procuring Entity explaining how this happened and finds that the arguments advanced to support the Procuring Entity's contention that the tender was a restricted tender are not only legally untenable but also defy logic for the simple reason that the invitation to tender which was published on 17th August, 2016 was for tender number IEBC/01/2016-2017. This tender was fully evaluated and awarded to M/s Al Ghurair Printing and Publishing Company Limited of Dubai but the said award was quashed by the High Court on 13th February, 2017 in Nai HC Misc. JR Application No. 637 of 2016 a decision that was upheld by the court of appeal in Civil Appeal No. 63 of 2017.

The Board finds that it is a matter of basic procurement law that every open tender must commence with the issuance of an invitation to tender which must be published to the whole World and that an invitation to tender can only relate to a particular procurement process. Once that process is quashed by the court as happened in respect of tender number IEBC/01/2016 - 2017, the invitation to tender issued to commence the process stand also quashed and ceases to exist for all intents and purposes. The invitation to tender published on 17th August, 2016 was therefore quashed and obliterated by the High Court judgment and ceased to be of any legal effect as from 13th February, 2013 when the High Court judgment was delivered.

The said invitation to tender could not therefore be lawfully used to invite fresh tenders or be used to identify the list of bidders who could participate in a fresh tender process no matter the method procurement used.

In any event, the invitation to tender published on 17th August, 2016 related to the International open Tender Number IEBC/01/2016 – 2017 and could not be deemed to be an invitation to tender for the new Tender Number IEBC/48/2016 – 2017 since the two tenders are distinct tenders both in law and fact.

The admission by the Procuring Entity in paragraph 4 of the Replying affidavit of Mr. Ezra Chiloba and in the rest of the said affidavit to the effect that the Procuring Entity deemed the invitation to tender published on 17th August, 2016 as part of the tender process for Tender Number IEBC/48/2016-2017 therefore means that the Procuring Entity did not publish any invitation to tender in respect of the new International open tender and the only attempt that the Procuring Entity made in bringing the current invitation to tender to the attention of the Public for what it called “purposes of transparency” was by uploading the invitation to tender dated 18th April, 2017 and the tender document relating thereto on to its website on 28th April, 2017 a fact that was admitted by the Procuring Entity in its Replying Affidavit and which was not disputed by any of the three interested parties.

It is clear from the invitation to tender dated 18th April, 2017 which was uploaded onto the Procuring Entity's website and which was produced by the Applicant as annexure **RPSL1** that this tender closed/opened on 4th

May, 2017 and taking into account the fact that the tender document was uploaded on to the Procuring Entity 's website on 28th April, 2017, the existence of the invitation to tender and the contents of the tender document became known to the public and the whole World for a period of less than Seven (7) days which was contrary to the provisions of Sections 89(c)(a), 74 and 96 of the Public Procurement and Asset Disposal Act 2015 as read together with Regulation 36 of the Public Procurement and Disposal Regulations 2006 as amended by Regulation 10 of the Public Procurement and Disposal (Amendment) Regulations 2013 which are in force.

Sections 74 and 96 of the Public Procurement and Asset Disposal Act require the Accounting Officer of a Procuring Entity to take steps to bring the invitation to tender to the attention of all those who may wish to submit tenders.

The Procuring Entity in the Replying Affidavit sworn by Mr. Chiloba stated that the Procuring Entity had complied with the provisions of Regulation 16 and Sections 74, 92 and 102 of the Public Procurement and Asset Disposal Act, 2015 and that it had brought the invitation to tender dated 18th April, 2017 which was the subject matter of this Request for Review to the attention of those who may have wished to submit tenders.

The Procuring Entity stated while relying on the provisions of Regulation 16 of the Regulations that it allowed all bidders more than seven (7) days which was the prescribed minimum number of days for the preparation of tenders this being a restricted tender but qualified this by stating that the

invitation to tender was uploaded on to its website for purposes of transparency.

Mr. Okiya Omtatah Okoiti the 3rd interested party herein supported the Procuring Entity's submissions in grounds 2 and 3 of his grounds of opposition by stating that the Procuring Entity had advertised the tender as per Section 102(d) of the Act and that the Procuring Entity had given the minimum time of 14 days for the submission of tenders under the Regulations.

The Board is however unable to accept the position taken by the Procuring Entity and the 3rd interested party since it has already found that the method used for the purposes of this procurement was that of an International open tender but not a restricted tender. The provisions of Regulation 16 of the regulations which the Procuring Entity cited provide for the giving of a period of 7 days and not the minimum period for 14 days referred to by Mr. Omtatah. The provisions of the said Regulation are therefore not relevant to this case and as regards the period of 14 days referred to by Mr. Omtatah, the Board wonders where he got the period of 14 days from since the minimum period of invitation for a restricted tender is 7 days but not 14 days under the provisions of the Public Procurement and Disposal Regulations 2006 as amended by Regulation 16 of the Public Procurement and Disposal (Amendment) Regulation of 2013.

Having established that this was an open International tender, the Procuring Entity ought to have prepared and published an invitation to tender which was in accordance with the provisions of Section 74 of the Act

and ought to have complied with the provisions of Section 89(c) of the Act as read together with Regulation 36 of the Public Procurement and Disposal Regulations as amended by Legal Notice No. 106 of 18th June, 2013.

Section 74 of the Public Procurement and Asset Disposal Act 2015 provides as follows:-

74. (1) the accounting officer shall ensure the preparation of an invitation to tender that sets out the following—

- (a) The name and address of the Procuring Entity;*
- (b) The tender number assigned to the procurement proceedings by the Procuring Entity;*
- (c) A brief description of the goods works or services being procured including the time limit for delivery or completion;*
- (d) An explanation of how to obtain the tender documents, including the amount of any fee, if any;*
- (e) An explanation of where and when tenders shall be submitted and where and when the tenders shall be opened;*
- (f) A statement that those submitting tenders or their representatives may attend the opening of tenders;*
- (g) Applicable preferences and reservations pursuant to this Act;*

(h) a declaration that the tender is only open to those who meet the requirements for eligibility;

(i) Requirement of serialization of pages by the bidder for each bid submitted; and

(j) Any other requirement as may be prescribed.

(2) All tender documents shall be sent out to eligible bidders by recorded delivery.

Section 89(c) of the same Act as read together with Regulation 36 of the Public Procurement and Disposal Regulations as amended in 2013 on the other hand requires that the time between the invitation to tender and the deadline for submission of tenders where the method used is that of an international open tender must not be less than twenty one (21) days.

Regulation 36 of the Public Procurement and Disposal Regulations 2006 provides as follows:-

"36: For the purposes of Section 71(c) of the Act, the minimum period of time between advertisement and deadline for submission of international tenders shall be thirty (30) days".

Regulation 36 of the Public Procurement and Disposal Regulations 2006 was amended by Regulation 10 of the Public Procurement and Disposal (Amendment) Regulations 2013 vide legal notice No. 106 of 18th June, 2013.

Regulation 10 of the amended Regulations provides as follows:-

"10: Regulation 36 of the principal Regulations is amended by deleting the word "thirty" and substituting therefore the words "twenty one".

The Board therefore finds on the basis of the facts and the law as set out above that the period between the date when the invitation to tender dated 18th April, 2017 was uploaded onto the Procuring Entity's website namely on 28th April, 2017 and the date when the tender closed on 4th May, 2017 was a period of less than Seven (7) days. Alternatively and even if the Board were to take the date of the invitation to tender indicated on the invitation to tender, namely 18th April, 2017 as the date when the invitation was issued, the period of time between 18th April, 2014 and 4th May, 2017 when the tender closed/opened was only a period of 17 days which was less than that the period of twenty one (21) days required by law.

The Board has already determined that the procurement method used in this tender was that of an open International tender but for the purposes of completeness, the Board wishes to observe that this tender was not and could not pass the test of a restricted tender as contended by the Procuring Entity and by the 1st and the 3rd interested parties herein.

The procurement of goods and services using the restricted tender method is governed by the provisions of Section 102 of the Public Procurement and Asset Disposal Act 2017 as read together with the Provisions of Section 74 and 92 of the Act as admitted by the Procuring Entity in its Replying Affidavit.

The said Sections 102 of the Act provides as follows:-

Section 102:" An accounting officer of a Procuring Entity may use restricted tendering if any of the following conditions are satisfied.

- a) Completion for contract, because of the complex or specialized nature of the goods, works or services is restricted to prequalified tenderers resulting from the procedure under Section 94;*
- b) The time and costs required to examine and evaluate a large number of tenders would be disproportionate to the value of the goods, works or series to be procured; or*
- c) If there is evidence to the effect that there are only a few known suppliers of the whole market of the goods, works or services;*
- d) An advertisement is placed, where applicable on the Procuring Entity website regarding the intention to procure through limited tender.*

(2) An accounting officer of a Procuring Entity may engage in procurement by means of restricted tendering in such as may be prescribed.

Based on the above provisions of the law, it is therefore mandatory that before a Procuring Entity can embark on using the restricted tender method it must satisfy the threshold set out in Section 102 of the Act and observe the procedure set out in Section 74 and 93 of the said Act. The Procuring Entity must bring the invitation to tender to the attention of the general public and all those who may wish to participate in the restricted tender process.

It is this invitation that in turn would prompt bidders who are eligible to submit their bids and it is from the list of the bidders identified after the invitation to tender has been published that the Procuring Entity can then invite the pre-qualified bidders to submit their bids.

The provisions of Section 102(c) which the Procuring Entity heavily relied upon allows a Procuring Entity to use the restricted tender method if there is evidence to the effect that there are only a few known suppliers in the whole market for the goods, works or services.

The only way which can enable the Procuring Entity to obtain the evidence of who the bidders are is an invitation to tender published to the whole World inviting those who are eligible to submit their tenders.

The invitation to tender as published must contain all the ingredients set out in Sections 74 and or 93(3) (a-e) of the Act and must be made public. A Procuring Entity cannot therefore wake up one day and decide that it shall send out the invitation to tender and the tender documents to a selected group of firms which are invited to bid on the basis of no known criteria or on the basis of bids submitted pursuant to a non-existent invitation to tender which has been quashed by the court.

The Board has read through the Replying Affidavit sworn by Mr. Ezra Chiloba on 15th May, 2015 and notes that the Procuring Entity did not publish any invitation to tender to the public under the provisions of Section 102(d) of the Act as alleged by Mr. Okiyah Omtatah. What the Procuring Entity instead did was to use the invitation published on 17th

August, 2016 which was in respect of the quashed tender and allegedly picked bidders who participated in the said tender or made inquiries after the invitation to tender in respect of the first tender had been advertised and deemed them the pre-qualified bidders for the purposes of the second tender.

The invitation to tender dated 18th April, 2017 which the Procuring Entity uploaded on to its website on 28th April, 2017 does not also meet the test of Section 102(d) as contended by the Procuring Entity and the 3rd interested party as it did not state that the tender in issue was a restricted or a limited tender.

Based on all the above findings, it is the Board's view that the procedure adopted by the Procuring Entity was highly irregular and was in total disregard of the simple but elaborate procedure set out in the Act and in the Regulations for inviting bidders to submit tenders using the international open tender and restricted tenders. A new process would have required the issuance of a fresh invitation for tender and the preparation of an entirely new tender document clearly stating that the tender was a restricted tender.

To compound the serious flaws in this process, the Procuring Entity instead of publishing and bringing the invitation to tender for the new fresh tender to the attention of the public it instead decided to invite the selected bidders set out at page 6 of this decision to submit their tenders to the Procuring Entity.

The Procuring Entity in its Replying Affidavit sworn on 15th May, 2017 produced a list of nine (9) firms which allegedly submitted tenders pursuant to the invitation to tender published on 17th August, 2016 and a list of four (4) firms which allegedly made inquiries pursuant to that invitation and informed the Board that the total of 13 bidders who were invited to bid in the fresh tender were sourced from the list of those who submitted bids or made inquiries pursuant to the first tender which it produced as annexure EC-1.

The Procuring Entity also produced a bundle of email invitations sent out to the alleged bidders by one Mr. Lawy Aura the Head of the Procuring Entity's Procurement Department.

The Board has gone through the list marked as annexure EC-1 to the Replying Affidavit of Mr. Ezra Chiloba, the bundle of email invitations sent out by Mr. Aura marked as EC-4 and against the minutes of the tender opening meeting held on 4th May, 2017 and which were signed on 5th May, 2017 and has established that the explanation given by the Procuring Entity is not correct in several respects.

The Board has established that there were only nine (9) bidders who submitted bids in the first tender and the four (4) people who made inquiries were from four (4) of the nine (9) firms which submitted bids. The four (4) people and the firms they were representing were:-

- i. Kandadi J Reddy from the firm of Ellams Products Ltd which was a bidder.

- ii. Lousie McCullough from the firm Pearl Media (PTY) Ltd which was among the nine bidders.
- iii. Sandeep P. Joshi from the firm of KL Hi Tech Secure Print Ltd which was one of the nine bidders.
- iv. Noel Munyae from the firm of Baljitas Banknote Ltd which was also one of the nine (9) bidders.

Contrary to what the Procuring Entity sworn in the Replying Affidavit therefore there were only nine (9) bidders who submitted bids and the four people who made inquiries were all from some of the nine (9) firms. The bidders were not therefore thirteen (13) as alleged by the Procuring Entity in the Replying Affidavit.

A comparison of the tender documents, tender opening minutes, annexure EC-1 and the email invitations by Mr. Aura show that the following firms were invited to submit their bids notwithstanding the fact that they did not participate in the first tender:-

- i. Lantrade Global Supplies.
- ii. Unprint Limited
- iii. GI Solutions Group.
- iv. Novus Holdings Limited.
- v. Digiprint Supplies Europe.

While the bidder M/s DPS Print Supplies (Digital Processing Systems) which was one of the nine (9) bidders in the first tender was not invited to

submit its tender in the new tender process which is the subject matter of this request for review.

The email invitations marked as annexure EC-4 also show that an invitation to tender was sent by Mr. Lawy Aura to a firm known as Aero Vote Limited at 8.06 a.m. on 20th April, 2017 vide email address mkumah@aero-vote.com notwithstanding the fact that it did not participate in the first tender which was quashed.

Based on all the above facts the explanation given in paragraph 4(h) of the Replying Affidavit of Ezra Chiloba explaining the basis for inviting 13 firms to bid was false and it is clear that the decision on who to invite or not to invite to bid was entirely left in the hands and at the discretion of the Head of the Procuring Entity's procurement department or to members of the procurement department and such action was not only discriminatory but was also in contravention of the basic tenets and the objectives of procurement as set out under Articles 27(1) and 227 of the Constitution, Section 3(b) of the Public Procurement and Disposal Act 2015 and the decision of the High Court in HC Misc. JR Appl. No. 637 of 2016.

In addition to the above, the Board finds that the Procuring Entity's decision to select the bidders on the basis of the tenders submitted pursuant to the invitation to tender published on 17th August, 2016 was improper on the ground that all the said firms were evaluated during the first procurement and all except one was found to be responsive at the preliminary, technical and financial evaluation stage and that is why only one firm was awarded the tender.

Having found all the other firms not to have been responsive for various reasons during the first procurement process, the Procuring Entity could not therefore confine its list of potential bidders who would participate in the new process to bidders who submitted tenders pursuant to the invitation to tender published on 17th August, 2016.

The Court held at the holding No. 197 in the case of **Republic -vs- Independent Electoral and Boundaries Commission & 3 Others** [Nai HC JR Misc. Appl. No. 637 of 2016] that Article 227 of the Constitution provides the minimum threshold and that the starting point in considering whether that threshold has been achieved is the Constitution. The court further held that any procurement must therefore before considering the requirements of any legislation, rules and regulations meet the Constitutional threshold of fairness, equity, transparency, competitiveness and cost effectiveness and that any enactment or provisions in the tender document can only be secondary to the said Constitutional dictates.

Article 27(1) of the Constitution as read together with Section 3(b) of the Public Procurement and Disposal Act further provide that Public Procurement and Asset Disposal by state organs and public entities shall be guided by among other values and principles the right to equality and freedom from discrimination as provided for under Article 27 of the Constitution.

Looked at against the provisions of the Constitution and the Act a procurement process which leaves the decision on which bidder shall participate or not participate in a particular procurement process to the

whims of a Procuring Entity 's Chief Executive Officer, the Director or the Head of Procurement or to any organ of the Procuring Entity is not only fundamentally flawed but is also in breach of the provisions of Article 27 and 227 of the Constitution and the provisions of Section 3(b) of the Public Procurement and Asset Disposal Act 2017.

The upshot of all the foregoing findings is therefore that the procurement process in respect of tender No. IEBC/48/2016-2017 for the supply and delivery of ballot papers for elections, statutory election result declaration form and the statutory result declaration forms was fundamentally flawed and was undertaken in contravention of the provisions of Articles 27 and 227 of the Constitution and Sections 3(b), 89(c), 93, 94, 95, 92 and 102 of the Public Procurement and Disposal Regulations as amended in 2013 and the decision of the court in Nai HC JR Misc. Appl. No. 637 of 2016.

Ground 1, 2, 3 and 8 of the Applicant's Request for Review which was filed on 9th May, 2017 are therefore allowed.

ISSUE NO. 5(b)

Grounds 4, 5, 6 & 7 - whether the award criteria set out in clause 2.27.4 of the financial evaluation criteria which provides that the tender will be awarded to the bidder with the lowest cumulative unit price for all or part of the elective positions is neither objective nor quantifiable as required by the provision of Section 80(3)(a) of the Act and whether the said criteria also fails the test of being objective and quantifiable and or is contradictory, confusing and or undesirable due to the security nature of

the goods and therefore contrary to the provisions of Article 86(a) of the Constitution which requires that the voting system used be simple, accurate, verifiable, secure, accountable and transparent.

Grounds 4, 5, 6 & 7 of the Applicant's Request for Review have been consolidated since they challenge the award criteria set out under clause 2.27.4 of the financial evaluation criteria.

It was the Applicant's case as set out in grounds 4, 5, 6 & 7 of the Applicant's Request for Review as highlighted by Counsel for the Applicant in his submissions before the Board that clause 2.27.4 of the financial evaluation criteria provided that the tender would be awarded to the bidder with the lowest total cumulative unit price for all or part of the elective positions and that the said criteria was neither objective nor quantifiable as required by the provisions of Section 80(3) (a) of the Public Procurement and Asset Disposal Act 2015. The Applicant further contended that the said criteria failed the test of being objective, quantifiable and was contradictory and confusing and could lead to the possibility of a partial and/or a split award which was undesirable due to the security nature of the goods sought to be procured.

Counsel for the Applicant stated that the wording and the possible effect of Clause 2.27.4 of the financial evaluation award criteria was contrary to the minimum standards set out under Article 86(a) of the Constitution which requires that the voting system used in an election should be simple, accurate, verifiable, secure, accountable and transparent.

The Applicant therefore urged the Board to find that the said criteria contravened the provisions of the Constitution and the Public Procurement and Asset Disposal Act of 2015.

Counsel for the Procuring Entity and the 1st and the 3rd interested party opposed the position taken by the Applicant and while relying on the averments set out in paragraphs 14, 15, 16 and 17 of the Replying Affidavit sworn by Mr. Ezra Chiloba the Procuring Entity 's Chief Executive Officer Counsel for the Procuring Entity submitted that there was only one award criteria in the tender document and that the same was unlikely to cause confusion as contended by the Applicant since the Procuring Entity had clarified at the pre-bid conference held on 28th April, 2017 that the tender would be awarded to one bidder meaning that it was not to be split. It was the Procuring Entity's further case that it also clarified that in case bidders wished to subcontract the entity subcontracted would have to qualify separately.

It was the Procuring Entity's further contention that clause 2.27.4 of the financial evaluation award criteria was not contradictory or confusing and met both the threshold of being objective and quantifiable.

Counsel for the Procuring Entity submitted that in the alternative that even if the allegation that the said clause was contradictory and confusing was found to be true or if there were any errors in the criteria by the use of the statement "all or part" in clause 2.27.4 of the financial evaluation award criteria in the tender document then such contradiction or confusion could be cured by the introductory paragraph to the Appendix to the Instruction

To Tenderers which in the Procuring Entity 's view stipulates that in the event of any conflict between clauses in the Instructions To Tenderers and the Appendix, the provisions in the Appendix would prevail.

As regards the alleged existence of any error or confusion through the use of the statement "all or part" in clause 2.27.4 of the Financial Evaluation award criteria Counsel for the Procuring Entity submitted that such error or confusion could be corrected pursuant to the provisions of Section 79(2)(b) of the Act without affecting the substance of the tender.

Based on the above submissions Counsel for the Procuring Entity therefore urged the Board to dismiss grounds 4, 5, 6 and 7 of the Applicant's Request for Review.

The Board has considered all the submissions made by the parties regarding the above grounds of review and has also perused the entire tender document. The Board notes that the tender document set out two award criteria one appearing at page 13 of the Tender Document under the heading the Instruction to tenderers and the other at page 25 of the same under the heading Financial Evaluation.

The criteria at pages 13 and 25 respectively provides as follows:-

a) Award criteria at page 13 of the tender document.

2.27.4: "The Procuring Entity will award the contract to the successful tenderer (s) whose tender has been determined to be substantially responsive and has been determined to be the lowest evaluated

tender provided further that the tender is determined to be qualifies to perform the contract satisfactorily”.

b) Financial award criteria at page 25 of the tender document.

2.27.4: The tender will be awarded to the bidder with the lowest total cumulative unit price for all or part of elective positions. The supply will be for a period of two (2) years on a need basis (As and when required August 2017 – July 2019).

It is clear from the above clauses that the tender document prepared by the Procuring Entity contains two award criteria which are on the face of it contradictory. Whereas the clause in the instructions to tenderers contemplates the award of tender of the one tenderer the clause under the financial evaluation criteria contemplates the possibility of the award of the tender for the supply of polling material for the various elective posts to different bidders whose number may be as many as there are the contested positions. This possibility is infact made more real by the ambiguous nature of the provisions of the award criteria at page 13 of the tender document and particularly through the use of the singular terminology “tenderer (s)” instead of the definitive word “tenderer”.

Both award criteria as worded therefore leave a real possibility that the tender to supply the Presidential, Gubernatorial, the Senatorial, the Women Representative, the Area Member of Parliament and the Member of the County Assembly may be awarded to different companies from different

geographical locations so long as such a company submits the lowest cumulative unit price for **all or any part** of the elective positions.

The Board therefore finds that the fear put forward by the Applicant is not without merit and that an award criteria which leaves the possibility of ballot papers for different positions being supplied by any number of bidders is not only not objective and quantifiable but is likely to present a logistical and security nightmare besides compromising the quality and quantity of the voting material. This is particularly so because all polling material must be supplied to all polling stations on the same day and at the same time.

The said two clauses therefore contravene the provisions of Section 80(3) of the Public Procurement and Asset Disposal Act which provides as follows:-

“80(3): The following requirements shall apply in respect to the procedures and criteria referred to in subsection 2-

a) The criteria shall to the extent possible be objective and quantifiable.

The Board has considered the explanations and the defense offered by the Procuring Entity and is of the respective view that the said explanations and defenses are simply not tenable.

One of the defenses offered by the Procuring Entity was that if the provisions of Clause 2.27.4 are contradictory and may cause confusion then the contradiction and the confusion can be cured by the introductory paragraph to the Appendix to the Instructions to Tenderers which in the

Procuring Entity's view stipulates that in the event of any conflict between the clauses in the instructions to tenderers and the Appendix, the provisions in the Appendix would prevail.

The Board has perused the tender document and finds that the Procuring Entity's contention is not entirely correct. A casual glance at clauses 2.27.4 at page 13 and Clause 2.27.4 headed Financial Evaluation criteria at page 25 of the tender document are what can be described as stand alone clauses. None of the two provisions appear under the Appendix to instructions to tenderers and cannot therefore come in to aid the Procuring Entity.

The other defence offered by the Procuring Entity was that if there are any errors in the award criteria by the use of the word "all or part" in clause 2.27.4 of the tender document then the error or errors in the financial evaluation award criteria can be corrected pursuant to the provisions of Section 79(2) (b) of the Act without affecting the substance of the tender.

The Board is however afraid that this defence is also not available to the Procuring Entity. The provisions of Section 79(2) (b) of the tender document relates to the issue of the responsiveness of a tender and comes into play in the event of the existence of errors or oversights.

The said Section 79(1) & (2) (b) of the Act provide as follows:-

79(1): A tender is responsive if it confirms to all the eligibility the eligibility and other mandatory requirement in the tender documents.

(2) A responsive tender shall not be affected by:-

- a) Minor deviations that do not materially depart from the requirements set out in the tender document; or*
- b) Errors or oversight that can be corrected without affecting the substance of the tender.*

The Board however finds that the above provisions cannot be used to amend a substantive award criteria in the tender document such as the provisions of criteria 2.27.4 of the tender document.

The Board further finds that it is now too late in the day for the Procuring Entity to amend the tender document since it has already received tenders pursuant to the tender advertisement and all that now remains is the process of evaluation of those tenders using an evaluation criteria and a tender document which still contain the provisions of clause 2.27.4 as part of the tender document.

The third explanation/defence offered by the Procuring Entity and which in it's view addressed the error in the award criteria is found at paragraph 17 of the Replying affidavit sworn by Mr. Ezra Chiloba on 15th May, 2017 and it was to the effect that the issue of the error in the award criteria was raised and addressed at the pre-bid conference held on 28th April, 2017 and whose minutes were produced as annexure EC-5 that was annexed to Mr. Chiloba's Replying Affidavit.

The Procuring Entity stated that it was clarified at the said meeting that there would be no splitting of the tender.

The Board has considered the above argument against the provisions of the law and is of the respectful view that the proceedings of a pre-bid meeting and any questions and answers offered at such a pre-bid meeting cannot amend or modify the contents of a tender document.

Under the provisions of the law as it now exists, a tender document can only be modified or amended before the deadline for the submission of tenders under the provisions of Section 75 of the Act through an addendum issued by the Procuring Entity on condition that the said addendum does not materially alter the substance of the original tender document.

The modification or the amendment under the provisions of Section 75 of the Act can be made by the Procuring Entity on its own initiative or in response to an inquiry by a candidate or a tenderer.

The Act requires that where the modification or amendment is done pursuant to an inquiry such an inquiry and the response to the inquiry shall be in writing.

Section 75(3) of the Act further stipulates that the Procuring Entity shall promptly provide a copy of the addendum to each person to whom the Procuring Entity provided copies of the tender documents while Section 75(4) of the Act states that the addendum shall be deemed to be part of the tender document.

Section 75(5) of the Act finally but importantly provides that if the tender documents are amended when the time remaining before the deadline for

submitting tenders is less than one third of the time allowed for the preparation of the tenders or the time remaining is less than the period indicated in the instructions to tenderers, the accounting officer of a Procuring Entity shall extend the deadline as necessary to allow the amendment of the tender documents to be taken into account in the preparation or amendment of tenders.

The Board has gone through the replying affidavit filed by the Procuring Entity and the bundle of the documents supplied to it by the Procuring Entity and all the interested parties who appeared before it and did not come across any inquiry, response or an addendum issued pursuant to the provisions of Section 75 of the Act. Mr. Karori and M/s Odari who appeared before the Board infact conceded that no addendum in respect of this tender was issued by the Procuring Entity.

In the absence of an addendum issued under the provisions of Section 75 of the Act therefore, clause 2.27.4 of the tender document as originally issued by the Procuring Entity to bidders remained unamended a fact that is borne out by all the eight tender documents which were submitted by the bidders who opted to return their tender documents to the Procuring Entity.

Inview of the Board's findings under grounds 4, 5, 6 & 7 of the Applicant's request therefore succeed and are allowed.

Owing to the nature and the importance of the tender at hand, the Board has gone through the invitation to tender, the tender document itself and

the tender opening minutes for the meeting held on 4th May, 2017 and which are dated 5th May, 2017. All these document disclose several other fundamental flaws in addition to the flaws which the Board has already pointed out above. Some of these flaws are as follow:-

- i. Whereas this tender was an International open tender, the Procuring Entity opted to use a two envelope system of procurement where the Procuring Entity required bidders to submit Technical and the financial bids separately under clause 2.17.1 of the tender document. This mode of submission is usually adopted where the method used is that of a Request for Proposals but not an open tender where a bidder is supposed to submit the tender document at as one. This therefore made it virtually impossible for the Procuring Entity to comply with the provisions of Section 78 of the Act relating to open tendering.

The Procuring Entity could not for example comply with the provisions of Section 78(6) of the Act which provides as follows:-

78(6): As each tender is opened, the following shall be read out aloud and recorded in a document to be called the tender opening register.

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

(b)The total price, were applicable including any modifications or discounts received before the deadline for submitting tenders except as may be prescribed; and

(c) If applicable, what has been given as tender security.

The provisions of Section 78 of the Act are meant to enhance transparency and fairness in an open tender process and the failure to comply with the said provision obviously compromised these two objectives.

- ii. The author of the tender document appears to have included several clauses in the tender document which are entirely unrelated a tender for the supply of ballot papers for elections and statutory election result declaration forms. One such clause is clause 2.12.3(c) which stipulates as follows:-

"Clause 2.12.3(c): that in case of a tenderer doing business within Kenya, the tenderer is or will be (if awarded the contract) and is represented by an agent in Kenya be equipped and able to carry out the tenderers maintenance, repair and spare parts-stocking obligations prescribed in the conditions of contract and or technical specifications".

It is evident from a reading of this clause that the Clause leaves one wondering what the issue of maintenance, repair or spare parts or spare parts stocking has to do with a tender for the procurement of ballot papers and printing materials.

- iii. Whereas clause 2.12.3 appearing at page 7 of the tender document which has been set out above recognizes the participation of agents in the procurement process, clause 2.12.3 appearing at page 18 of the tender document under the heading particulars of Appendix to instructions to tenderers expressly states that the commission shall deal

with security printers directly but not through appointed agents or dealers.

- iv. During the course of the hearing of the Request for Review, the 3rd interested party Mr. Okiya Omtatah Okoiti sought to and was enjoined as an interested party in the proceedings pending before the Board.

One of the grounds raised by Mr. Omtatah and which was set out under ground 4(b) of the request to be enjoined filed by him stated that he was aware that the Applicant had submitted it's bid but stated that it returned a blank bid form and that it's Certificate of Compliance was not valid and finally that the Applicant did not submit any samples.

It is clear from the facts stated by Mr. Omtatah that he was privy to the contents of the Applicant's tender document which had not been evaluated and while he was not an employee of the Procuring Entity or a member of the tender processing committee.

When asked for the source of his information, Mr. Omtatah stated that this information had been availed to him by a "whistleblower" who he refused to name but confirmed that the "whistleblower" was an employee of the Procuring Entity.

The import of the above state of affairs is that the contents of one of the bidder's tender document were disclosed to a third party who was not a candidate or a tenderer.

The Board finds that this was in gross violation of the provisions of Section 67 of the Public Procurement and Asset Disposal Act 2017on

confidentiality. The said action contaminated and compromised the entire procurement process and even Mr. Kamau Karori who appeared on behalf of the Procuring Entity conceded that if proved, the disclosure of information contained in a bidder's tender document could amount to the commission of a criminal offence.

Further and based on this single incident, the Board is unable to ascertain how much more information regarding the contents of any other bidder's tender document was disclosed to strangers. The admission by Mr. Omtatah is in itself an indictment on the staff of the Procuring Entity and the Board is unable to sustain a process which is so flawed to the extent that a Procuring Entity through its staff can disclose confidential information to third parties.

The Board is disturbed by the fact that confidential information relating to one bidder, namely the Applicant was disclosed to a third interested party by a member of the Procuring Entity who the 3rd Interested Party described as a "whistleblower" but whose name and other particulars he refused to disclose. The Board has consistently held that the Procurement Process is sacrosanct and that there is no room for the disclosure of confidential information to third parties either by "whistleblowers" or by known members of the Procuring Entity.

The Board stated as follows when faced with a similar situation in the case of *Thwama Building Services Ltd =Vs= Tharaka Nithi County Government [PPARB Appl.No.21 Of 2015]*

"As the Board has always stated, procurement proceedings are sacrosanct and are confidential in nature and that is why the law prohibits the disclosure of certain information under the Provisions of Section 44 of the Act. This is meant to enable parties in a tender process to have an equal playing field for the purposes of ensuring fairness and for the Procuring Entity to evaluate tenders without any interference.

Section 44 of the Act requires a Procuring Entity or an employee of a Procuring Entity not to disclose any confidential information save for the specific items of disclosure set out in the Act Section 44 (1) (c) and (d) of the Act . The Act expressly bars the disclosure of information relating to evaluation, comparison or clarification of tenders, proposals or quotations or the contents of the tenders, proposals or quotations of any bidder.

Section 44 (4) of the Act further criminalizes such a disclosure and states that any person who contravenes the Provisions of Section 44 of the Act shall be guilty of an offence.

Under the Provisions of Section 137 of the Act, a person who is guilty of committing an offence under the Provisions of Section 44 of the Act shall, if convicted be liable to a fine not exceeding four Million Shillings or to imprisonment for a term not exceeding ten years or to both."

Although the Board was dealing with the provisions of Section 44 and 137 of the Public Procurement and Disposal Act, 2005 (now repealed) the

provisions of Section 67 and 176 of new Act namely the Public Procurement and Asset Disposal Act, 2015 are to the same effect.

In view of the above breaches of the law it may be necessary for the Procuring Entity to carry out an investigation to establish how confidential information which is meant to be in it's sole possession came into the hands of a third party or third parties.

- v. The final example that the Board wishes to refer to show that the procurement process herein was flawed is contained in the minutes of the tender opening meeting held on 4th May, 2017. A look at the said minutes and more particularly minute number 3 shows that during the tender opening, the Procuring Entity opened the Technical and Financial submissions at once. The tender opening committee thereafter proceeded to return the financial bids back to the tender box after it had opened the same.

The tender opening committee did not however stop there; it proceeded to carry out what in the Board's view amounts to an evaluation of the tenders for bidder's numbers 7 and 8.

The tender opening committee determined as follows at page 14 of the tender opening minutes.

"The committee noted that bidder No. 7 M/s Rosecate Promotions and Supply Limited did not submit any sample.

The committee also noted that bidder No. 8 M/s Africa infrastructure Development Co. did not submit a bid document but only a form of tender and a document containing email communications. The bidder did not submit any sample nor financial bid".

It's the Board's view that what the Procuring Entity 's tender opening committee did amounted to an examination of the two bidders tender documents which was an issue that it did not have jurisdiction to do as it related to the responsiveness of the said bidders tender documents. The duty to carry out an examination of a tenderer's bid with the aim of determining it's responsiveness is however vested by law on the Procuring Entity's tender processing committee and must be carried out based on the criteria contained in the tender document.

The law on the effect of making an award of a tender based on a defective tender document is now well established and it is that where the Board or the Court finds that the tender document is defective, the defective tender document such as the one now before the Board cannot form the basis for making of a tender award.

The following decision by the High Court illustrates this legal position **JGH Marine A/S Western Marine Services Ltd CNPC Northeast Refining & Chemical Engineering Co. Ltd/Pride Enterprises vs. Public Procurement Administrative Review Board & 2 others [2015] eKLR:** where the High Court stated as follows:-

" If indeed the Review Board had found that there was a problem with the Tender Document, it ought to have asked the PE to retender. You cannot use a faulty Tender Document to award a tender..."

A Procuring Entity which proceeds to evaluate and award a tender based on a defective tender document therefore stands the risk of the procurement process and the eventual award being annulled if challenged at the end of the process after the award has been made.

The overriding public interest consideration

At the conclusion of their submissions both Mr. Kamau Karori, M/s Milly Odari, Mr. Moses Kurgat and Mr. Okiyah Omtatah Okoiti stated that the Procuring Entity was a Constitutional Commission with the mandate of inter-alia conducting or supervising referenda and elections to various elective bodies and offices established by the Constitution of Kenya.

They further argued that the date of the general elections is expressly set out in the Constitution of Kenya, 2010 as the second Tuesday in the month of August after every five years and that in addition to the Constitutional underpinning; the Respondent's mandate includes the taking of various key steps within strict timelines set out in the Elections Act and the Regulations made thereunder.

All the three advocates and Mr. Omtatah further submitted that it was now eighty (80) days to the general election and if the Procuring Entity is ordered to float a fresh tender for the election materials it would not have sufficient time to prepare fresh tender documents invite bids, evaluate the

bids award the tender, enter into a contract with the successful bidder, procure and transport the election material to the various polling stations before 8th August, 2017.

In view of the time constraints, Counsel for the Procuring Entity and the 1st and the 3rd interested parties urged the Board not to annul the procurement process even if it found that the same was flawed owing to the urgency and the public interest involved in the matter.

Mr. Moses Kurgat advocate for the 1st interested party additionally submitted that the errors, if any in the procurement process were of a minor and trivial nature and could not warrant the nullification of the award.

Counsel for the Procuring Entity relied on the decision in the case of **Republic =vs= The Public Procurement Administrative Review Board and Another Ex-parte Avante International Technology Inc. (Nai HC JR Appl. No. 451 of 2012 (2013) Eklr** in support of the proposition that the Board can allow a procurement process to proceed in case there was a conflict between public interest and the private interest of an individual.

Based on the above decision, the three parties submitted that General Elections were emotive and were a matter of tremendous public importance and could not be left to the whims of the commercial aspirations of bidders or the tendering process. They submitted that the wider public interest in holding elections in accordance with the

Constitution and thereby maintaining public order far outweighs the private commercial interests of bidders seeking to be awarded the tender.

Counsel for the Applicant and Dr. Shailesh Patel who appeared in the proceedings on behalf of the 2nd interested party opposed the contention by the Procuring Entity and the 1st and the 3rd interested parties and submitted that the tender process herein and the contents of the tender documents were so flawed and that not even a plea of public interest could cure the defects in the entire process and the contents of the tender documents.

Counsel for the Applicant additionally submitted that it would be in fact in the interest of the Procuring Entity and the general public if the procurement process was terminated at the earliest possible opportunity so as to enable the Procuring Entity to get it's act together by conducting afresh procurement process which was in compliance with the Constitution and the law.

The Applicant and the 2nd interested party submitted that it would be far much better to stop and terminate the procurement process at this early stage to avoid the prospect of unsuccessful bidders challenging and having the procurement process annulled at the end of the process after the evaluation and an award of the tender had been made to a bidder since at that point in time there would be virtually no time to conduct a fresh procurement process for the ballot papers and the statutory result declaration forms as this would result into a national catastrophe.

The Applicant and the 2nd interested party while relying on the judgment of the High Court in **Republic -vs- The independent Electoral Commission Ex-parte the Cord Coalition & 3 Others** (Nai HC Misc. JR Appl. No. 637 of 2016 and the majority decision by the court of Appeal in the case of **Al Ghurair Printing and Publishing LLC -vs- The Coalition for Reforms and Democracy, The Independent Electoral and Boundaries Commission and the Public Procurement Administrative Review Board** Nai CA Appeal No. 63 of 2017 stated that public interest could not be invoked by a party who had acted in violation of the Constitution and the law and that there was no greater public interest than upholding the provisions of the Constitution and the Act.

The Board has considered the submissions made by the parties regarding the issue of public interest and while the Board appreciates that the next General Elections are due to be held on 8th August, 2017 which is a period of around (80) days from today's date that fact alone cannot justify the Board into allowing this procurement process to proceed to conclusion.

As already adverted to in the body of this decision, the procurement process and the tender document used in this case are so fundamentally flawed that the same cannot pass the test set out in the Constitution and the Public Procurement and Asset Act 2015. Mildly put, the Board is afraid that the process which was conducted by the Procuring Entity cannot be termed as a procurement process as known to the Constitution and the Act. The process was to say the least a sham and embarrassing and was conducted with such casualness, and lack of diligence to the level that

leaves the Board wondering whether the Procuring Entity's procurement department appreciated the enormity of the assignment and the gravity of the matter at hand.

The defects and the several contradictions in the tender document also leave a considerable amount of doubt in the Board's mind as to whether the Head of the Procuring Entity's Procurement Department or the Procuring Entity's staff charged with the procurement function ever read and carefully considered the contents of the tender document before the same was released to the selected bidders and eventually to the public when it was uploaded onto the Procuring Entity's website on 28th April, 2017.

The Board further finds that it would amount to a dereliction of its duty under the provisions of the Constitution and the Act if it were to allow a tender process where potential tenderers are selected on the basis of an advertisement/an invitation to tender which has already been quashed by the court and where the decision on who should or should not submit a tender is left to the whims of the Head of the Procuring Entity's procurement department or where the tender document is fundamentally flawed or where the contents of confidential tender documents are leaked to third parties who are not tenderers or members of the Procuring Entity's Tender Processing Committee like it happened in the case of the 3rd interested party herein.

The Board therefore finds that in view of the possibility of these several flaws and breaches which may affect the outcome of the general elections

and therefore give rise to the further possibility of future electoral disputes and in further view of the possibility of the award given pursuant to the flawed procurement process being challenged before the Board or the Court at a time when there is little or no time to conduct a fresh procurement process, it would be in the interest of the general public and the Procuring Entity itself if this procurement process was annulled and terminated at this stage to enable the Procuring Entity put it's act together.

The Board also importantly wishes to note that this is the second time that the Procuring Entity is making a false start in respect of the procurement process for ballot papers and statutory election declaration forms. It is evident from the information in the public domain that owing to the large number of candidates sponsored by political parties and independent candidates that have offered themselves for elective positions that some ballot papers for various elective positions may take the length/size of what was at one time figuratively described in an election held in Australia as a "ballot paper which was the size of a small child".


Faced with such prospect and owing to the magnitude of the issue at hand, the Procuring Entity cannot afford to make a third false start in the procurement process for the materials which are the subject matter of this Request for Review. The Board therefore urges the Procuring Entity to firmly focus on conducting a proper procurement process by whatever method that it may elect to use after taking into account the limited amount of time left between now and 8th August, 2017 and all the other relevant considerations.

The Board has finally considered the Procuring Entity's and the 1st and the 3rd interested parties submissions that there is no sufficient time remaining to enable the Procuring Entity conduct a proper procurement process for election materials. The short answer to this concern is that the provisions of the Public Procurement and Asset Disposal Act, 2015 contemplate that a situation may arise where a Procuring Entity needs to procure goods or materials urgently and has addressed such a situation in various sections of the Act.

In view of the limitation placed on the Board's jurisdiction by the provisions of Section 167(4) (a) of the Act, the Board is hesitant to suggest or direct the Procuring Entity to adopt a particular procurement method in order to procure election materials in time for the purposes of conducting a credible, free and fair election.

The best that the Board can do in the circumstances of this case is to urge the Procuring Entity to carefully read the extract under the finding No. 209 appearing at page 48/57 of the judgment of the High Court in the case of **Republic vs= The Independent Electoral and Boundaries Commission Ex-parte the Cord Coalition and 3 Others**(Nai HC JR Appl. No.637 of 2016) which was upheld by the Court of Appeal in civil appeal No.63 of 2017 where the judge(the Honorable G.V .Odunga) stated as follows:-

209: "In this case there are two competing public interest. The first is the necessity to comply with the timelines while the second is the Constitutional requirement that the election system must be free and fair; and administered in an impartial, neutral, efficient,



accurate, verifiable, secure, accountable and transparent manner. It has not been contended that if this Court was to grant the orders sought herein it would be impossible to conduct the elections on 8th August, 2017. To the contrary the Public Procurement and Asset Disposal Act, itself provides for circumstances under which restricted and direct tendering processes may be resorted to where applicable as long as the law is complied with".

The upshot of all the foregoing findings is that this Request for Review succeeds and is allowed on the following terms:-

FINAL ORDERS

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

- a) The Applicant's Request for Review dated 9th May, 2017 and which was filed with the Board on the same date be and is hereby allowed.
- b) A declaration be and is hereby issued declaring that the Procuring Entity's tender document and the entire procurement process commenced by the Procuring Entity in respect of Tender No. IEBC/48/2016-2017 for the supply and delivery of ballot papers for elections, statutory elections result, declaration forms to be used at the various polling stations and the statutory result declaration forms to be used at constituency, County and National level are

incurably flawed and that the entire procurement process is therefore declared void and is annulled and the tender process terminated forthwith.

- c) An order be and is hereby issued directing the Procuring Entity to immediately re-tender and or procure afresh the election materials which are the subject matter of this Request for Review using such method as it may consider appropriate taking into account the time left between now and 8th August, 2017 and all such other factors as it may consider necessary.
- d) The Board further orders that in carrying out the retender and or fresh procurement using whatever method of procurement that it may adopt, the Procuring Entity shall prepare a fresh tender document that shall set out clear and unambiguous provisions and criteria and which shall take into consideration the nature of the procurement in question.
- e) Owing to the public nature and the interest involved in this litigation, the Board orders that each party shall bear it's own costs of this Request for Review.

Dated at Nairobi on this 19th day of May, 2017.



CHAIRMAN
PPARB



SECRETARY
PPARB