

REPUBLIC OF KENYA
PUBLIC PROCUREMENT AND ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 63/2017 OF 13TH JULY, 2017

BETWEEN

TRANSCEND MEDIA GROUP LIMITED.....APPLICANT

VS

THE INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION (I.E.B.C).....PROCURING ENTITY

SCANAD KENYA LIMITED.....INTERESTED PARTY

BOARD MEMBERS PRESENT

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

IN ATTENDANCE

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

PRESENT BY INVITATION

Applicant - Transcend Media Group limited

1. Paul Maingi - Advocate, Maingi Musyimi & Associates

Procuring Entity - IEBC

1. E. L. Lubullellah - Advocate, Lubullellah & Associates
2. Charity Okumu - Advocate
3. Nancy Koros - Advocate

Interested Party - Scanad Kenya Limited

1. Catherine Ngunjiri - Advocate, KTK Advocates
2. Reuben Mwangi - Advocate

THE REQUEST FOR REVIEW

The Applicant filed this Request for Review on 13th July, 2017 challenging the Procuring Entity's decision to award the tender for the provision of strategic communication and integrated media campaign consultancy services under Tender No. IEBC/45/2016-2017 to the interested party herein M/s Scanad Kenya Limited.

The Applicant set out a total of five grounds on the basis of which it sought to have the Procuring Entity's decision annulled. The five grounds were namely that:-

1. *The Procuring Entity erred in awarding the tender to Scanad Kenya Limited in contravention of the procedure contemplated in the Public Procurement and Asset Disposal Act (2015).*
2. *The Procuring Entity, while conducting competitive negotiations, contravened Article 227 of the Constitution, Sections 3, 132(2)(a) of the Public Procurement and Asset Disposal Act (2015) by failing to reveal the tender budget to the Applicant thereby exposing the process to manipulation and unfairness.*
3. *The Procuring Entity contravened Section 132(5) of the Public Procurement and Asset Disposal Act (2015).*
4. *The Procuring Entity in determining the successful proposal, contravened clause 2.8.4 of the Tender document and Sections 86(2), 155 and 157(8)(b) of the Public Procurement and Asset Disposal Act (2015) on preferential bias in pricing thereby unfairly awarding Scanad Kenya Limited.*
5. *The Applicant is therefore prejudiced by the breaches perpetrated by the Procuring Entity as they resulted into award of the tender to the Scanad Kenya Limited through an unfair and compromised process.*

The Applicant sought for the following orders from the Board based on the above five grounds:-

1. *The Board be pleased to annul the decision of the Procuring Entity awarding the tender to Scanad Kenya Limited.*

2. *The decision declaring the Applicant's tender as unsuccessful as communicated vide the Procuring Entity's letter dated 29th June, 2017 be set aside and/or annulled.*
3. *The tendering process be annulled and the Board be pleased to order that the procurement process starts afresh.*
4. *The Board be at liberty to make any other order as may be applicable so that the interests of justice are met.*
5. *The costs of this Review be awarded to the Applicant.*
6. *The Board be pleased to direct the Procuring Entity to evaluate the Tender afresh by considering or taking into account the preferential pricing provided for in the Public Procurement and Asset Disposal Act (2015).*

Upon being served with the Request for Review both the Procuring Entity and the Interested Party filed their responses to the Request for Review which were served on Counsel for the Applicant.

In addition to opposing the substantive grounds set out in the Request for Review, Counsel for the Procuring Entity also raised a preliminary objection to the Applicant's Request for Review on the ground that the same was *Res-judicata* since the issues raised in the Request for Review had been considered and determined by the Board in Review Application No. 50 of 2017 between the same parties.

The appearances

During the hearing of the Request for Review, the Applicant was represented by Mr. Paul Maingi Musyimi advocate from the firm of Maingi

Musyimi & Associates while the Procuring Entity was represented by Mr. E. L. Lubullellah Advocate from the firm of M/s Lubullellah Associates. The Interested Party on the other hand was represented by M/s Catherine Ngunjiri Advocate from the firm of M/s KTK Advocates.

The Applicant's submissions

In his submissions made on behalf of the Applicant, Mr. Paul Maingi Musyimi, Advocate relied on the Request for Review dated 13th July, 2017 together with the supporting and the supplementary affidavits sworn by Mr. Lai Muthoka, the Applicant's Executive Director on 13th July, 2017 and 20th July, 2017 respectively.

Counsel for the Applicant condensed the five grounds set out in the Applicant's Request for Review into the following three grounds:-

- a) The Procuring Entity breached the provisions of Section 132(2)(a) of the Public Procurement and Asset Disposal Act 2015 by failing to disclose its budget for this procurement to the Applicant at the negotiation stage.
- b) The Procuring Entity breached the provisions of Sections 3, 86(2), 155 and 157(8) of the Public Procurement and Asset Disposal Act and Regulation 50(1)(f) of the Public Procurement and Disposal Regulations by failing to apply a margin of preference in favour of the Applicant.
- c) The Procuring Entity breached the provisions of the Act by allowing a committee other than the tender evaluation committee appointed to

evaluate the subject tender to carry out negotiations with the Applicant.

It was the Applicant's case in support of the first ground of review that on or about 17th April, 2017, the Procuring Entity advertised the subject tender and that upon carrying out the preliminary and technical evaluation of the tenders submitted to it by both the Applicant and the Interested Party, the Applicant attained a technical score of 82% and were invited for financial opening on 5th May, 2017. It was the Applicant's case that upon opening the financial proposals submitted by the two parties the Procuring Entity invited both of them for competitive negotiations in order to obtain the best price.

Counsel for the Applicant further submitted that it was represented at the negotiations by several of its members but stated that at no point during the negotiations did the Procuring Entity disclose its budget for the procurement to the Applicant. Counsel for the Applicant additionally stated that the Procuring Entity's failure to disclose its budget was contrary to the Provisions of Section 132(2) of the Act and also brought about the possibility of the budget being leaked out to the Interested Party therefore giving it an upper hand in the negotiations.

On the second ground of review, it was the Applicant's case that under the provisions of clause 2.8.4 of the Tender Document as read together with the provisions of Article 227 of the Constitution and Sections 3, 86(2), 155 and 157(8) of the Act and Regulation 50(1) (f) of the Regulations, the Procuring Entity was under an obligation to apply a 20% margin of preference in favour of the Applicant since the Applicant was a fully Kenyan owned

company while the Interested Party was a substantially Foreign owned company.

Counsel for the Applicant relied on the CR 12 issued by the Registrar of Companies on 10th May, 2017 which was annexed to the supporting affidavit of Lai Muthoka sworn on 13th July, 2017 as annexure LM6 and the Annual Report of WPP Scangroup Limited marked as annexure LM8 to the supplementary affidavit sworn by the same deponent on 20th July, 2017.

It was the Applicant's further contention based on the two documents that foreigners held a 71.48% shareholding in WPP Scangroup Limited effectively making the said company a foreign company as defined by the provisions of Section 3 of the Companies Act.

Counsel for the Applicant additionally submitted that had the Procuring Entity applied the 20% margin of preference in favour of the Applicant, its tender price would have emerged as the lowest evaluated price and would have therefore entitled the Applicant to the award of the tender.

The Applicant relied on the decisions in the cases of the **Republic -vs- Public Procurement Administrative Review Board & 2 Others, Exparte Akamai Creative Limited, Republic -vs- The Public Procurement Administrative Review Board & Others Exparte KRA (2008) eKLR** and the case of the **Republic -vs- Public Procurement Administrative Review Board & 2 others Exparte Coast Water Services Board & Another (2016) eKLR** in support of its submissions that a Procuring Entity is bound to consider the law on preference while evaluating tenders. The Applicant however

contended that the Procuring Entity breached the provisions of the law and the contents of the tender documents by failing to grant the Applicant preference.

On the final ground of Review, Counsel for the Applicant submitted that the Procuring Entity breached the provisions of the Public Procurement and Asset Disposal Act while undertaking negotiations with both the Applicant and the Interested Party in that the negotiation process was undertaken by people who were not members of the Procuring Entity's tender evaluation committee appointed by the Procuring Entity to evaluate the tender in question.

Based on all the above grounds, the Applicant urged the Board to allow its Request for Review annulling the award of the tender made in favour of the Interested Party by the Procuring Entity and instead substitute the award of the tender in favour of the Applicant.

The Procuring Entity's submissions

Mr. E. L Lubullellah, Advocate who appeared on behalf of the Procuring Entity opposed the Applicant's Request for Review and submitted that the same lacked merit and ought to be dismissed.

His first ground of attack against the Applicant's Request for Review was that the issues which the Applicant was now raising had been raised and determined by the Board in Request for Review No. 50 of 2017 which had been heard and determined by the Board. Counsel for the Procuring Entity submitted that the Applicant in the earlier application challenged the

propriety of the negotiation process that had been undertaken by the Procuring Entity and that the Board had fully considered and determined all the issues that were placed before it for consideration in the earlier Request for Review in a decision given on 16th June, 2017. Counsel for the Procuring Entity consequently submitted that the issues raised by the Applicant in this Request for Review were therefore *Res-judicata*.

Turning to the other grounds of Review raised the Applicant, Counsel for the Procuring Entity submitted that the Procuring Entity did not breach the Provisions of Article 227 of the Constitution or the provisions of Sections 3, 86(2), 155 and 157(8) of the Public Procurement and Asset Disposal Act and stated that the Procuring Entity took into account all the provisions of the law while evaluating the tenders submitted to it by the Applicant and the Interested Party. He stated that the provisions of Section 132(2)(a) of the Act were irrelevant to the evaluation of the said tenders and that if there was any breach of the said Provision of the Act by the Procuring Entity, then the alleged breach ought to have been raised in Review Application No. 50 of 2017 and not in the present Request for Review.

On the issue of preference, it was the Procuring Entity's case that it was clear from the CR 12 relied upon by the Applicant and the Certificates of Registration annexed to the Replying affidavit sworn by Mr. Reuben Mwangi on 19th July, 2017 in support of the Interested Party that the Interested Party was a fully owned Kenyan Company and that as such, both the Applicant and the interested party were not entitled to the benefit of the application of any margin of preference.

Counsel for the Procuring Entity further submitted that the provisions of the law relating to the application of the margin of preference were not applicable in tenders for the provision of services such as the tender which was the subject matter of the Request for Review now before the Board. He therefore submitted that the provisions of Sections 86(2), 155 and 157(8) of the Act referred to by the Applicant were irrelevant.

Finally on the third ground of review, Counsel for the Procuring Entity submitted that the Applicant had not produced any evidence to show that the members of the committee which carried out negotiations between the Procuring Entity and the Applicant and the Interested Party were not members of the Procuring Entity's tender evaluation committee. He therefore stated that this ground of Review was merely based on speculation and urged the Board to dismiss it as lacking basis.

Counsel for the Procuring Entity therefore urged the Board to dismiss the Applicant's Request for Review with costs.

The Interested Party's submissions

M/s Catherine Ngunjiri, Advocate who appeared on behalf of the Interested Party opposed the Applicant's Request for Review and fully associated herself with the submissions made by Counsel for the Procuring Entity. The Interested Party relied on its response and submissions dated 19th July, 2017 together with the Replying Affidavit sworn by Mr. Reuben Mwangi the Head of the Interested Party's legal department on 19th July, 2017.

Counsel for the interested party disputed the Applicant's contention that the Interested Party was a substantially Foreign owned Company and stated that the Interested Party was a fully owned Kenyan company whose shareholders were Mr. Bharat Thakrar and M/s WPP Scangroup Limited who owned 1 and 249,999 shares respectively. Counsel for the interested party stated that contrary to the assertion made by the Applicant, WPP Scangroup Limited was a public company incorporated in Kenya under the provisions of the Companies Act. She stated that the said company previously traded as Media Initiative East Africa Limited before changing its name to Scanad Group Limited and thereafter to WPP Scangroup Limited.

The Interested Party produced the registration certificates for Media Initiative East Africa Ltd, Scangroup Limited and WPP Scangroup Limited as annexure RB1 to the Replying affidavit sworn by Mr. Reuben Mwangi on 19th July, 2017 in opposition to the Applicant's Request for Review.

Still on the issue of preference, it was the Interested Party's alternative submission that even if the Procuring Entity was bound to apply a 10% margin of preference in favour of the Applicant, the Applicant's final financial proposal of Kshs. 423,525,836 would have come down to the sum of Kshs. 381,173,252 which would still be higher than the Interested Party's financial proposal of Kshs. 350,003,746 and such an application of a margin of preference of 10% would therefore not have resulted in the Applicant being declared the lowest evaluated bidder in terms of price.

On the issue of the composition of the negotiation committee, Counsel for the Interested Party stated that the Applicant had not produced any evidence to show that the Procuring Entity had appointed strangers who were not members of the tender evaluation committee as members of the negotiation committee.

Counsel for the interested party therefore urged the Board to dismiss the Applicant's Request for Review with costs.

The Applicant's response to the submissions made by the Procuring Entity and the Interested Party.

In a short response to the submissions made by the Counsel for the Procuring Entity and Counsel for the Interested Party, Counsel for the Applicant denied that the issues raised by the Applicant were *Res-judicata* by virtue of the Board's decision in Request for Review No. 50 of 2017.

Counsel for the Applicant stated that the issues which were the subject matter of the present Request for Review were substantially two, namely, whether the Procuring Entity had disclosed its budget to the Applicant during the negotiations undertaken by it with the Applicant and secondly whether the Procuring Entity had applied a margin of preference in favour of the Applicant while evaluating its financial proposal as required by the provisions of the Constitution, the Act, the Regulations and the Tender Document.

Counsel for the Applicant submitted that the above two grounds were not grounds of challenge in application No. 50 of 2017 and that they were not therefore considered and determined by the Board in that application.

Counsel for the Applicant further stated while relying on the case of **LawiDuda& Others -vs-Bamburi Cement Limited [2006] eKLR** that in order for the doctrine of *Res-judicata* to come into play, the issue or issues sought to be raised in the second application ought to have been raised and determined by the Board in it's earlier decision. He however submitted that the issues that the Applicant was raising in this Request for Review were not raised and determined in application no. 50 of 2017.

To further demonstrate that this Request for Review was not Res-judicata, Counsel for the Applicant stated that the Board at page 15 of it's decision delivered on 16th June, 2017 in application no. 50 of 2017 had held that the process of financial evaluation was still on going and declined to comment on the extent or the outcome of the negotiations in order not to pre-empt any decision that may be made by the Procuring Entity upon the conclusion of the financial evaluation exercise.

Turning to the issue of preference, Counsel for the Applicant stated that the provisions of the law on preference was applicable to both goods and services sought to be procured by a Procuring Entity contrary to the submissions made by Counsel for the Procuring Entity that the law on preference was not applicable to a tender for the provisions of services. He further reiterated that WPP Scangroup Limited was a substantially foreignowned company as defined by Section 3 of the Companies Act a fact

that made the Applicant be entitled to the application of the 20% margin of preference on its financial proposal.

He therefore urged the Board to allow the Applicant's Request for Review as prayed.

THE BOARD'S DECISION

The Board has carefully considered the Applicant's Request for Review together with the Supporting and the Supplementary Affidavits sworn by Mr. Lai Muthoka on behalf of the Applicant on 13th and 20th July, 2017 respectively. The Board had also considered the memorandum of response filed by the Procuring Entity on 19th July, 2017 and the memorandum of response and submissions and the Replying affidavit sworn by Mr. Reuben Mwangi on behalf of the Interested Party on 19th July, 2017 in opposition to the Applicant's Request for Review.

The Board has also considered the contents of the negotiation report dated 19th May, 2017 together with all the other documents which were submitted to it by the Procuring Entity pursuant to the provisions of Regulation 74(3) of the Public Procurement and Disposal Regulations 2006.

It is clear from all the above documents and from both the written and the oral submissions made before it by all the parties that this Request for Review raised the following four issues for the Board's determination:-

- a) Whether the Request for Review now before the Board is Res-judicata by virtue of the Board's decision in Request for Review No. 50 of 2017.*

- b) *Whether the procuring Entity breached the provisions of Section 132(2)(a) of the Public Procurement and Asset Disposal Act 2015 by failing to disclose its budget for this procurement to the Applicant at the negotiation stage.*
- c) *Whether the Procuring Entity breached the provisions of Sections 3, 86(2), 155 and 157(8) of the Public Procurement and Asset Disposal Act (2015) and Regulation 50(1)(f) of the Regulations by failing to apply a 20% margin of preference in favour of the Applicant.*
- d) *Whether the Procuring Entity breached the provisions of the Act by allowing persons who were not members of the Procuring Entity's tender evaluation committee to carry out negotiations with the Applicant and the Interested Party.*

The Board will therefore proceed to consider and determine each of the above issues in the order they appear above.

ISSUE NO. 1

Whether the Request for Review now before the Board is Res-judicata by virtue of the Board's decision in Request for Review No. 50 of 2017.

The Board has considered the submissions made for and against the objection raised by the Procuring Entity to the effect that the Request for Review now before it is *Res-judicata* by virtue of the Board's decision given on 16th June, 2017 in the Request for Review No. 50 of 2017 and finds that before the doctrine of *Res-judicata* can come into effect, the party seeking to rely on it must *inter-alia* establish that the issue sought to be raised before it for the second time was raised and determined by the Board in the first

application. The Board must therefore refer to the pleadings placed before it in the first and the second applications and the decision made by it in the first application in order to determine the issue.

Based on the above test, the Board has looked at the Request for Review No. 50 of 2017 together with all the responses filed in opposition thereto and the decision made by it on 16th June, 2017 and finds that what the Applicant was challenging in that Request for Review was the Procuring Entity's action of concurrently calling both the Applicant and the Interested Party for negotiations.

It was the Applicant's case at the time that the Procuring Entity ought not to have called both parties for negotiations and that instead, the Procuring Entity ought to have only negotiated with the Applicant which in its opinion was the successful bidder.

Upon considering the Request for Review in Application No. 50 of 2017, the Board held that the Procuring Entity was entitled to undertake competitive negotiations with both parties under the provisions of Section 131 of the Public Procurement and Asset Disposal Act (2015) which entitled the Procuring Entity's Accounting Officer to conduct competitive negotiations with both parties before awarding the tender.

It is also clear from the decision given on 16th June, 2017 in Review no. 50 of 2017 that the issue of the Procuring Entity failing to disclose its budget at the negotiation stage or the issue that the Procuring Entity failed to properly apply the law relating to the application of the law relating to preference or

the issue that the Procuring Entity's negotiation committee was not properly constituted were not raised or determined by the Board in Request for Review number 50 of 2017.

The Applicant was therefore entitled to raise the said issues in this Application which cannot in law be held to be barred by the doctrine of *Res-judicata*.

A reading of the decision given by the Board on 16th June, 2017 in Request for Review No. 50 of 2017 also shows that the Board notably held that the process of financial evaluation was still ongoing and therefore declined to comment further on any aspect of financial evaluation in order not to preempt any decision that may have been arrived at by the Procuring Entity upon carrying out financial evaluation of the financial proposals submitted to it by the Applicant and the Interested Party.

The Board stated as follows at paragraphs 2 and 5 appearing at pages 15 and 16 of its decision given on 16th June, 2017.

"The Board wishes to further note without determining or pre-empting the financial evaluation process or any other evaluation process that may still be outstanding that no final award has been made in this procurement. It is however clear that the financial proposal submitted by the Applicant and that submitted by the Interested Party both exceeded the available budget allocated for this procurement"

“Finally and as the Board has already noted above, the process of evaluation herein is still ongoing. The Board will not therefore comment on the extent or the outcome of the negotiations in order not to pre-empt any decision that may be made by the procuring entity whose sole duty it is to evaluate tenders”.

Based on all the foregoing findings, the Procuring Entity’s preliminary objection on the ground that the Applicant’s Request for Review is barred by the doctrine of *Res-judicata* therefore fails and the same is disallowed.

ISSUE NO. II

Whether the procuring Entity breached the provisions of Section 132(2)(a) of the Public Procurement and Asset Disposal Act 2015 by failing to disclose its budget for this procurement to the Applicant at the negotiation stage.

The second ground of review which was raised by the Applicant was that the Procuring Entity breached the provisions of Section 132(2) (a) of the Public Procurement and Asset Disposal Act (2015) in that it did not disclose its budget for this procurement when it undertook negotiations with the Applicant.

The Board has had the benefit of looking at contents of the original negotiation report prepared on 19th May, 2017 and which was availed to it by the Procuring Entity detailing the events which took place during the course of the negotiations between it and the Applicant.

It is clear from the negotiation report which speaks for itself that the Applicant was invited and attended a negotiation meeting with the Procuring Entity.

The report further shows that both parties held discussions during the said negotiations which commenced by the Procuring Entity disclosing the basis for inviting the Applicant for the negotiations. The explanation of this basis is contained at page 2 of 4 of the negotiation report where the Procuring Entity's negotiation committee is recorded to have disclosed the following fact to the Applicant.

- i. It was established that the available budget for consultancy services for provision of strategic communication and integrated Media campaign was estimated at Kshs. 350,000,000.*

The negotiation report further shows that upon the disclosure of the above fact to the Applicant's negotiation team, the two teams carried out competitive negotiations that resulted in the Applicant scaling down its price to the sum of Kshs. 423,525,836 as its final financial offer.

The Board is therefore unable to agree with the Applicant's contention that the budget for the subject procurement was not disclosed to the Applicant during the negotiations in view of the clear evidence in the negotiation report that the Procuring Entity's budget was disclosed to the Applicant before the negotiations took place.

In addition to the above finding, the Board has also looked through all the documents submitted to it by the Applicant and the Procuring Entity and

did not come across any correspondence to show that the Applicant raised the issue of Procuring Entity's alleged failure to disclose its budget as an issue at any stage before, during or after the negotiations. The Board therefore finds that the complaint by the Applicant in this Request for Review is an afterthought.

In view of the above findings, the Board holds that this ground of the Applicant's Request for Review lacks merit and is disallowed.

ISSUE NO. III

Whether the Procuring Entity breached the provisions of Sections 3, 86(2), 155 and 157(8) of the Public Procurement and Asset Disposal Act (2015) and Regulation 50(1)(f) of the Regulations by failing to apply a 20% margin of preference in favour of the Applicant.

The second ground of review on the basis of which the Applicant sought to have the decision of the Procuring Entity annulled and which has been captured in issue (c) above is the contention that the Procuring Entity ought to have applied a margin of preference of 20% on the Applicant's negotiated tender price.

The basis for the above assertion was that the Applicant was a wholly owned Kenyan company whereas the majority of the Interested Party's shareholders were foreigners.

The Board has perused all the documents which were submitted to it by all the parties and finds that in order to be entitled to the application of a 20% margin of preference, the Applicant was under a duty to produce evidence

to show that it was entitled to the benefit of the application of the provisions of the law relating to preference in it's favour.

This requirement was stated as follows by the High Court in the case of **Republic -vs- The Public Procurement Administrative Review Board Ex-parte Athi Water** (Nai HC JR Misc. Appl. No. 402 of 2016 consolidated with Misc. Appl. No. 405 of 2016).

“200: In other words the spirit of the procurement legalization must of necessity reflect the Constitutional principles relating thereto hence the stipulation that the successful tender shall be the tender with the lowest evaluated price requires that an evaluation be first undertaken and only after the tender passes all the stages of evaluation does the consideration of the lowest tender come into play. Similarly the consideration of preference can only come into play after an evaluation has shown that the tenderer has surmounted the hurdles under Article 227 of the Constitution. To jump to the preference before satisfying oneself that the Constitutional threshold has been met should render the decision to be tainted with illegality which is one of the grounds of issuance of judicial review relief”.

The Board has perused all the documents relied upon by the Applicant in an attempt to show that the majority shareholders of the Interested Party were foreigners and finds that the only acceptable evidence for establishing the directorship and the shareholding of a company which is registered under

the provisions of the Kenyan Companies Act is that contained in the documents held by the Registrar of Companies but not that which is contained in Annual Reports, Journals or such other similar documents.

The CR 12 issued by the Registrar of Companies and which was produced by the Applicant as annexure LM6 shows that the following were listed as the Directors and Shareholders of the Interested Party:-

<u>Names</u>	<u>Address</u>	<u>Nationality</u>	<u>shares</u>
Bharat Thakrar	P. O. Box 34537-00100, Nairobi	Kenyan	1
Jonathan Neil Egger	P. O. Box 34537-00100, Nairobi	British	Nil
AyubIssaq Ahmed	P. O. Box 34537-00100, Nairobi	Kenyan	Nil
Non Director Shareholder			
WPP Scangroup Limited	P. O. Box 34537-00100, Nairobi		249,999
Total			250,000

In addition to the CR 12 produced by the Applicant, the Interested Party in the Replying Affidavit sworn by Mr. Reuben Mwangi the Head of its Legal Department on 19th July, 2017, the Interested Party produced a Certificate of Registration of WPP Scangroup Limited showing that the said Company was registered under the provisions of the Kenyan Companies Act on 15th June, 2015.

It is therefore plainly evident from the above two documents that the Interested Party which was the bidder in this tender is a private limited liability company duly incorporated in the Republic of Kenya and that the

said company is owned by one Mr. Bharat Thakrar who holds 1 share and M/s WPP Scangroup Limited which holds 249,999 shares.

It is additionally evident from the two documents that WPP Scangroup Limited is a Public Company registered in Kenya under the Provisions of the Companies Act.

The Board wishes to observe that it is a principle of basic company law that under the provisions of the Kenyan Companies Act, a company is a separate legal entity from its shareholders and is entitled in its own right to own and hold shares in another company. Where such a company is registered in Kenya, the company is deemed to be a resident and a citizen of Kenya for all intents and purposes and the shares owned or held by it are deemed to be owned or held by a citizen of the Republic of Kenya.

The legal principle that a company is a separate legal entity from its shareholders has been recognized and upheld in several decisions as illustrated by the case **Victor Mabachi & Anor -vs- Nurtun Bates Ltd (Nai CA 247 of 2005)** where the Court of Appeal held that a company as a body corporate is a **persona juridicae** with a separate independent identity in law, distinct from its shareholders, directors and agents.

Where a company registered in Kenya holds share in another company, it is entirely irrelevant to establish who the shareholders of the company owning or holding shares in another company are for the purposes of applying the law on preference.

It was therefore not necessary for the Procuring Entity to lift the veil and find out who the shareholders of WPP Scangroup Limited were for the purposes of determining whether the Interested Party was a wholly or substantially foreign owned company.

The Board therefore finds based on the undisputed evidence set out above that both the Applicant and the Interested Party companies are wholly owned and controlled by persons who are citizens of the Republic of Kenya and that both fall within the definition of citizen contractors under the definition contained in Section 2 of the Public Procurement and Asset Disposal Act (2015). None of the two companies was therefore entitled to be given preferential treatment over the other and the Procuring Entity was well within its right to declare the Interested Party's bid as the successful bid.

The second ground of the Applicant's Request for Review as framed under issue number III therefore fails and is disallowed.

ISSUE NO. IV

Whether the Procuring Entity breached the provisions of the Act by allowing persons who were not members of the Procuring Entity's tender evaluation committee to carry out negotiations with the Applicant and the interested party.

The third ground of the Applicant's grounds of review as set out under the above issue was to the effect that the Procuring Entity breached the provisions of the Act by allowing persons other than members of the

Procuring Entity's tender evaluation committee to participate in the competitive negotiations between the Procuring Entity and the Applicant.

The Board has examined the above allegations against the evidence placed before it by all the parties and finds that the Applicant did not provide any evidence to prove the above allegation.

The Applicant ought to have provided evidence to show who the members of the Procuring Entity's tender evaluation committee were and who the members of the negotiation committee were and thereafter proceed to show the difference in the composition.

However, other than making a general statement that the members of the two committees were different; the Applicant did not provide any evidence to establish the said allegation during the hearing of the Request for Review.

The Board therefore finds that the above ground of review was not proved and the same is disallowed.

In view of all the forgoing findings and particularly the findings under issues no. II, III & IV above, the Applicant's Request for Review dated 13th July, 2017 and which was filed with the Board on the same day therefore fails and the same is dismissed in terms of the following orders:-

FINAL ORDERS

Pursuant to all 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, the Board makes the following orders on this Request for Review.

- a) The Applicant's Request for Review dated 13th July, 2017 challenging the award of tender no. IEBC/45/2016-2017 for the Provision of Strategic Communication and Integrated Media Consultancy Services to the interested party herein be and is hereby dismissed.
- b) In view of the urgency involved in this matter, the Procuring Entity is directed to immediately conclude the Procurement Process herein by entering into a contract with the interested party for the purposes of ensuring that the services sought to be procured through this procurement process are made available to the public before the date set for the next general election.
- c) In view of the fact that the Applicant was successful in resisting the first issue framed for determination, the Board orders that each party shall bear its own costs of this Request for Review.

Dated at Nairobi on this 24th day of July, 2017.

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CHAIRMAN
PPARB

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SECRETARY
PPARB