SCHEDULE 1

FORM 4

REPUBLIC OF KENYA

PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND APPEALS BOARD

APPLICATION NO. 49/2006 OF 19TH OCTOBER, 2006

BETWEEN

MOHAMED & MUIGAI, ADVOCATES/ANJARWALLA & KHANNA ADVOCATES CONSORTIUM (In consultation with Lovells, Paris)

(APPLICANTS)

AND

1. **INVESTMENT SECRETARY/PRIVATISATION STEERING COMMITTEE, MINISTRY OF FINANCE**

2. **KENYA REINSURANCE CORPORATION (PROCURING ENTITY)**

CONCURRENT WITH

APPLICATION NO. 53/2006 OF 3RD NOVEMBER, 2006

BETWEEN

DALY & FIGGIS ADVOCATES/MURIU MUNGAI ADVOCATE CONSORTIUM

(APPLICANTS)

AND

1. **INVESTMENT SECRETARY/PRIVATISATION STEERING COMMITTEE, MINISTRY OF FINANCE**

2. **KENYA REINSURANCE CORPORATION (PROCURING ENTITY)**

Appeal against the decision of the Investment Secretary/Privatisation Steering Committee of the Ministry of Finance and the Kenya Reinsurance Corporation dated 12th October, 2006 in the matter of the Tender for Provision of Legal Advisory Services for the Kenya Reinsurance Corporation Limited Initial Public Offering 2006.

BOARD MEMBERS PRESENT

Mr. Richard Mwongo	-	Chairman
Eng. D. W. Njora	-	Member
Mr. John W. Wamaguru	-	Member
Ms. Phyllis N. Nganga	-	Member
Mr. P. Mwaniki Gachoka	-	Member
Mr. J. W. Wambua	-	Member
Mr. Kenneth Mwangi	-	Secretary

IN ATTENDANCE

Mr. P. M. Wangai	-	Secretariat

PRESENT BY INVITATION FOR APPLICATION NOS. 49 AND 53/2006

Applicant: Mohamed & Muigai/Anjarwalla & Khanna

1. Mohammed Nyaoga
2. Prof. Githu Muigai

Procuring Entity: Kenya Re

1.	Joe Okwach		
2.	J. F. Kinyua		
3.	J. F. Otieno	-	Kenya Re
4.	S. W. Njuguna	-	Kenya Re
5.	Festus W. Kingori	-	DGIPE/Treasury

Interested candidates

Muriu Muigai/Dally & Figgis

1. Muthaura Mugambi
2. Crispine Odhiambo
3. Ann Githinji
4. Njeri Thuku
5. Anthony Njogu
6. John Nyandieka

Hamilton Harrison & Dentonwilde

1. Kiragu Kimani
2. Aleem Tharam
3. Paras Shah

BOARD'S DECISION

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

BACKGROUND

This was an open tender advertised by the Procuring Entity on 11th August, 2006. It was floated by way of Request for Proposal (RFP) for the Provision of Legal Advisory Services for the Initial Public Offering, 2006 by the Kenya Reinsurance Corporation. The seven bidders who responded before the closing date were as follows:

1. Simba & Simba Advocates

2. Walker Kontos Advocates, Wambugu Motende & Company Advocates and Deneys Reitz Inc. Attorneys, Consortium

3. Hamilton Harrison & Mathews Advocates, Rachier & Amollo Advocates and Denton Wilde Sapte ("Dentons") UK, Consortium

4. Mohammed Muigai Advocates, Anjarwalla & Khanna Advocates and Lovells, France, Consortium

5. Muthoga Gaturu & Company Advocates, Mkono & Co Advocates Tanzania, B. M. Musau & Co. Advocates, Consortium

6. Kipkorir, Titoo & Kiara Advocates, Muthaura Mugambi Ayugi & Njonjo Advocates, Consortium

7. Muriu Mungai & Co. Advocates and Daly Figgis Advocates Consortium

Evaluation

The evaluation of the RFP was carried out in two stages, firstly by a technical evaluation followed by a financial evaluation.

The technical evaluation was based on the following criteria:

Points

(i) The firm's general experience in the field of assignment.....20

- General experience.....10
- Experience in relevant assignment.....10

(ii) Adequacy of the proposed work plan and approach in the TOR 30

- Methodology.....20
- Work Plan.....10

(iii) The qualifications and competence of the personnel proposed for the assignment 50

- Qualifications.....10
- Competence and experience.....30
- Local experience.....10

Total **100**

The summary of the technical evaluation report was as follows:

	Bidder	Technical Score (%)
1	Muthoga Gaturu /Mkono/ Musau	64
2	Walker Kontos/Wambugu Motende Deneys Reitz	73
3	Mohammed Muigai Advocates/ Anjarwalla & Khanna Advocates/Lovells	86
4	Muthaura Mugambi Oyugi & Njonjo/Kipkorir Titoo & Kiara	65
5	Muriu Mungai & Co. Advocates/Daly & Figgs & Co. Advocates	87
6	Simba & Simba Advocates	62
7	Hamilton Harrison & Mathews/Rachier & Amollo Advoctaes/ DentonWilde Sapte	89

Arising from the technical evaluation, three firms namely Mohammed Muigai Advocates/Anjarwalla & Khanna Advocates/Lovells, (hereinafter "MAL Consortium") Muriu Mungai & Co. Advocates/Daly & Figgs (hereinafter "DFM Consortium") and Hamilton Harrison & Mathews/Rachier & Amollo Advocates/ Denton Wilde Sapte (hereinafter HRD Consortium) qualified for financial evaluation having attained the cut-off score of 75 points.

The financial proposals were opened on 28th September, 2006 in the presence of bidders' representatives and both technical scores and tender prices were read out as follows:

Bidders name	Technical scores	Price (Kshs)
Hamilton Harrison & Mathews/Rachier & Amollo Advoctaes/ DentonWilde Sapte (HRD)	89	9,581,600.00
Muriu Mungai & Co. Advocates/Daly & Figgs & Co. Advocates (DFM)	87	9,314,800.00
Mohammed Muigai Advocates/Anjarwalla & Khanna Advocates/Lovells (MAL)	86	9,000,000.00

Thereafter, the financial evaluation was conducted using the following formula, as contained in the Request for Proposals

$$Sf = \frac{\text{lowest cost} \times 30}{\text{Proposal's cost}}$$

The total score was calculated using the combined technical and financial scores, applying the weight of 0.7 and 0.3 for technical and financial scores respectively.

The evaluated combined total technical and financial scores were as tabulated below.

	Combined Evaluation Report							
	Technical Evaluation Results			Financial Evaluation Results			Combined Results	
Firm	Technical scores (%)	Weighted scores (%)	Rank	Financial scores (%)	Weighted scores (%)	Rank	Combined scores (%)	Rank
HRD	89.00	62.30	1	100.00	30.00	1	92.30	1
DFM	87.00	60.90	2	97.97	29.39	3	90.29	2
MAL	86.00	60.20	3	99.84	29.95	2	90.15	3

Based on this ranking, the bid evaluation team recommended that HRD Consortium be invited for contract negotiation and subsequent award of the tender for having scored the highest combined score of 92.30.

In its meeting held on 6th October, 2006, the Privatization Steering Committee concurred with the recommendations of the bid evaluation team and requested the Secretary to write to the winning bidder and invite it for informal consultations on 11th October, 2006.

Letters of notification of award to the successful and unsuccessful bidders were written on 12th October, 2006.

THE APPEALS

The Applicants in Application No. 49/2006 filed their Memorandum of Appeal against the Procuring Entity's decision on 19th October, 2006. The Procuring Entity filed its Memorandum of Response and accompanying documents on 3rd November, 2006. On its part, the interested candidate, namely DFM Consortium, filed its Memorandum of Information and Arguments pursuant to Reg. 42(4) of the Public Procurement Regulations on 1st November, 2006 through M/S Muthaura Mugambi Ayugi & Njonjo Advocates.

The DFM also filed a preliminary objection to the hearing of the appeal in Application No. 49 on the grounds that the Applicant and the successful bidder were not entitled to participate in the Request for Proposal as their respective consortia included members who did not have valid practising certificates.

In addition, DFM also filed a substantive appeal namely, Application No. 53/2006 on 3rd November, 2006. The Procuring Entity filed its Memorandum of Response thereto on 13th November, 2006.

At the hearing on 15th November, 2006, all parties and interested candidates agreed that a concurrent hearing of both cases be held on account of the following factors:-

- The tender in dispute was the same in both appeals
- The parties to the tender were all the same and were all interested candidates in the subject tender
- Although the grounds of appeal in both appeals were not identical, they were cross-referenced in each of the appeals
- There would be a saving of time and non-repetition of evidence and arguments, if parties were heard concurrently

- Concurrent hearings would allow for consistency of the decision issued by the Board.

Accordingly, it was also agreed by consent that the preliminary objection by DFM Consortium, which was the main ground in its own appeal in Application No. 53, and the decision thereon be rendered together with the decision on the merits of Application 53. Consequently, the appeals were heard in order of filing precedence, and are dealt with by the Board in the same order.

In Application No. 49, the Applicants, MAL Consortium were represented by Mohammed Nyaoga Advocate, and Githu Muigai Advocate, and the Procuring Entity was represented by Joe Okwach SC. The interested candidates, DFM consortium were represented by Mugambi Muthaura Advocate, while HRD Consortium were represented by Kimani Kiragu Advocate.

In Application No. 53, the Applicants, DFM Consortium were represented by Mugambi Muthaura Advocate, and the Procurement Entity by Joe Okwach SC. The interested candidates, HRD consortium were represented by Kiragu Kimani advocate and MAL Consortium was represented by Mohamed Nyaoga Advocate..

APPLICATION NO. 49 OF 2006

This appeal was heard on 15th November, 2006.

The Applicant raised six grounds of appeal in its Memorandum of Appeal. At the hearing, the Applicant abandoned ground No. 4. The Board has dealt with the remaining grounds as follows:-

Grounds One and Two

These two grounds have been merged at the instance of the Applicant, who argued them together as they raised the same concerns with regard to the evaluation and the award of the tender. In these grounds, the Applicant complained that the Procuring Entity breached Regulations 30(7), (8) and (9). The Applicant claimed that the Procuring Entity acted illegally by making an award that contradicted the outcome of the technical and financial

bids. By so doing, the Procuring Entity acted in a manner that was inconsistent with the express terms of the Request for Proposal.

The Applicant pointed out that going by the record in the minutes of the opening of the financial proposal dated 28th September, 2006 the prices quoted by the three bidders were :-

HRD Shs, 9,581,600.00
DFM Shs. 9,314,800.00
MAL Shs. 9,000,000.00

Accordingly, as the Applicant was the lowest priced, it should have been accorded the 30 points under the formula stated in the RFP, and its combined technical and financial score would have been the lowest. Instead, it argued, the Procuring Entity used a criteria and figures that had not been specified in the RFP.

In this regard, Counsel cited the Board's findings in Application No. 10/2005 Precision Tubes and Kengen, where the Board held that applying a criteria other than that in the tender documents amounts to a breach of both the tender document and the Regulations.

In response, the Procuring Entity submitted that the Applicant contravened Regulation 42(2) by failing to identify with some degree of particularity the shortcomings, breaches or any acts of omission by the Procuring Entity. It further stated that the Applicant failed to provide reasons for the complaints and the ensuing loss and damage. Consequently, the Procuring Entity contended that it was unable to respond to these grounds, and such grounds should therefore be dismissed for lack of particulars.

The foregoing, notwithstanding, the Procuring Entity indicated that having heard the grounds enumerated at the hearing, it would respond thereto. Counsel pointed out that the RFP clearly indicated under Financial Proposal on page 10 as follows:-

> ***" The contract price shall be a fixed lumpsum***
>
> ***(i) The Financial proposal .....should list all costs associated with the assignment including (a) remuneration for staff, and (b) reimbursable expenses.***

(ii) ***The Financial Proposal should clearly estimate as a separate amount, the local taxes duties, fees levies and other charges imposed under the Laws of Kenya'*** (emphasis added)

Counsel argued that the figures used in the evaluation were less taxes, which apply equally to all bidders. Further, there were variations between bidders on the tax element, but as these were in any event estimates, they could not be used in the final computations.

We have examined the documents submitted by the Procuring Entity. In particular, we have perused the minutes of the opening of financial proposals, the summary of the evaluation report, and the original Requests for Proposal submitted by each bidder. Each bidder confirmed, at the hearing, their prices as indicated in their original RFP bid document. We have noted that the Applicant's tender price of Kshs 9,000,000.00 was the lowest as recorded in the minutes of the opening of the financial proposals dated 28th September, 2006. The prices of the other two firms, HRD Consortium and DFM Consortium, were Kshs. 9,581,600.00 and Kshs. 9,314,800.00, respectively. In order to arrive at the lowest evaluated bidder, the financial proposals were evaluated using the formula indicated below to obtain the financial scores:

$$\frac{\text{Lowest cost} \times 30}{\text{Proposal's cost}}$$

We noted that the tender prices used for calculation of financial scores were exclusive of the taxes which had been indicated separately by each bidder. The financial scores and technical scores were then combined. The weights allocated to the technical and financial proposals were 0.7 and 0.3, respectively. The combined technical and financial scores were as tabulated below:

Combined Evaluation Report								
Firm	**Technical Evaluation Results**			**Financial Evaluation Results**			**Combined Results**	
	Technical Scores (%)	**Weighted Scores (%)**	**Rank**	**Financial Scores (%)**	**Weighted Scores (%)**	**Rank**	**Combined Scores (%)**	**Rank**
HRD	89.00	62.30	1	100.00	30.00	1	92.30	1
DFM	87.00	60.90	2	97.97	29.39	3	90.29	2
MAL	86.00	60.20	3	99.84	29.95	2	90.15	3

Based on this evaluation, the HRD consortium had the highest combined score of 92.3%, and were therefore declared the winning bidders by the Privatisation Steering Committee in its meeting held on 6th October, 2006.

In addition, even if the Board was to adopt the Applicant's arguments we note that if the total prices (inclusive of taxes), were used with the Applicant being allotted 30 points, the outcome would have been as follows:-

NO	FIRM	TECHNICAL SCORE	FINANCIAL SCORE	TOTAL COMBINED SCORE	RANK
1	HRD	89 x 0.70 = 62.30	9,000,000 x 0.30 9,581,600 = 28.18	90.48	1
2	DFM	87 x 0.70 = 60.90	9,000,000 x 0.30 9,314,880 = 28.99	89.89	3
3	MAL	86 x 0.70 = 60.20	9,000,000 x 0.30 9,000,000 = 30.00	90.20	2

From the above table it is clear that the ranking changes only in respect of the second and third bidding consortia and does not affect the outcome of the award. That is, HRD would still have been the highest ranked bidder. In the result, we find that the evaluation carried out by the Procuring Entity in this respect was in order.

Accordingly, this ground of appeal fail.

Ground 3

This is a complaint that the Procuring Entity breached Regulation 10(2) by failing to provide a copy of the evaluation proceedings. This led to the process being non-transparent contrary to the objects of public procurement.

In response, the Procuring Entity stated that the relevant and lawful information was provided to the Applicants through a letter dated 18th October, 2006 and therefore it was not entitled to any further information. The Procuring Entity further stated that the information sought by the Applicant in its letter of 13th October, 2006 was information which could not be disclosed pursuant to Reg. 10(2)(b). Having supplied the Applicant with the combined evaluation results, there was no breach of the Regulations.

We have reviewed the documents submitted by the Procuring Entity. We found that letters of notification of award were dated 12th October, 2006 following the award of the tender on 6th October, 2006 by the Privatization Steering Committee. The Applicant wrote to the Procuring Entity on 11th and 13th October, 2006 requesting for the records of the full evaluation proceedings. On the contrary, Reg. 10(2) permits disclosure of only the information specified therein. We have also noted that the Procuring Entity had indicated in its response to the Memorandum of Appeal that the information allowed by the Regulation was availed to the Applicant through a letter dated 18th October, 2006. However, at the hearing, it was disclosed that the Procuring Entity had delivered the combined evaluation results to the Applicant and interested candidates vide their letter of 18th October, 2006.

Reg. 10(2) permits disclosure of limited information specified therein and gives no time frame for its release. Further, as the Applicant sought the full evaluation to which it was not entitled, no breach of the Regulations occurred.

Accordingly, this ground of appeal also fails.

Ground 5

This is a complaint that the Procuring Entity breached Regulation 33(1) by failing to notify the Applicant that it had accepted the tender from another bidder.

In response, the Procuring Entity denied that it breached the said Regulation. It argued that the Applicant was notified that it was not successful by a letter dated 12th October, 2006 in accordance with Regulation 33(1). In addition, Regulation 33(1) did not require the Procuring Entity to inform the Applicant the identity of the successful bidder.

Regulation 33 (1) provides as follows:

> *"Prior to expiry of the period of tender validity ..., the procuring entity shall notify the successful tenderer that its tender has been accepted and shall simultaneously notify other tenderers of the fact...'*

In our view, that Regulation only requires the Procuring Entity to simultaneously notify both the successful and unsuccessful tenderers the outcome of the tender once it is awarded. This Regulation does not require the Procuring Entity to notify the unsuccessful tenderer(s) the name of the successful tenderer(s).

This ground of appeal therefore fails.

Ground 6

This is a statement of losses that the Applicant had suffered or stood to suffer due to the irregularities cited in the grounds of appeal.

The Procuring Entity submitted that ground six of the Memorandum of Appeal contravened Regulation 42(2). Further, the Applicant had conceded at page 13 of the Memorandum of Appeal the condition that '... the cost of preparing the proposal shall be borne by the bidder' and that the Procuring Entity was not bound to accept any proposal received as indicated in its financial proposal submission form dated 11th September, 2006. It was also not demonstrated that the Applicant would have made the profit indicated in the Memorandum of Appeal.

In our view, this being an open tender, there was no guarantee from the outset that the Applicant would be awarded the tender. Consequently, all the costs that the Applicant claimed to have suffered or stood to suffer are normal business costs that are borne by the bidders. Further, it was clearly indicated in the Data Sheet that '...the cost of preparing the proposal shall be borne by the bidder' and that the Procuring Entity was not bound to accept any proposal received.

Due to time constraints, it was agreed by consent of all the parties that the hearing be adjourned to 16th November, 2006.

APPLICATION NO. 53 OF 2006

This appeal was heard on 16th November, 2006.
In this appeal the main complaint of the Applicant, which constituted its preliminary objection in Application No. 49, was that the MAL Consortium and HRD Consortium were not entitled to participate in the Request for Proposal on the ground that each of the consortia had members who did not have valid practising certificates as required under the Advocates Act (Cap 16) Laws of Kenya. Consequently, the proposals of MAL and HRD were in beach of Regulations 4, 13 (1), 14, 24, 26, 30 (1) and 30 (5), and therefore could neither qualify nor be responsive.

The Applicant's argument was essentially that the two foreign firms, namely, Denton Wilde Sapte in the HRD Consortium, and Lovells, of Paris in the MAL Consortium, could not possibly have complied with the requirement of the Request for Proposal which required, under Section 3 of the Terms of Reference under the title Professionalism and Experience, as follows:-

"(c) The team members should each have a valid practicing certificate and a suitable professional indemnity cover....."

The Applicant argued that, as far as Kenya was concerned, the definition of practicing certificate could only mean a practicing certificate issued by the Registrar of the High Court of Kenya under Sec 21 the Advocates Act. For such a certificate to be issued, the prospective holder has to be qualified under Sec. 9 of the Advocate Act, which provides that no person:-

"shall be qualified to act as an Advocate unless :-

(a) he has been admitted as an Advocate; and
(b) his name is for the time being on the roll; and
(c) he has in force a practicing certificate

Counsel further argued that Sec. 34 of the Advocates Act prohibited unqualified persons from practising as advocates in Kenya. He pointed out that the only way in which a foreign advocate could practice in Kenya was if

such advocate had been so admitted to practice by the Attorney-General in his absolute discretion under Sec. 11 of the Act.

Counsel argued that the issue at hand was a question of interpretation and cited **Odgers, Construction of Deeds and Statutes, by G D Workin,** Third Indian Reprint, 2003 which provided guidance on the rules of interpretation of documents. At Pg 27 therein the following passage is found:

> ***".... What does the deed mean? It must be noticed that this is not necessarily the same as what did the parties intend when they executed the document? They are presumed to have intended to say that which they have in fact said, so their words as they stand must be construed. The question is not what did the parties intend to say? That is precluded by the presumption that they have said what they intended to say. The question to be solved is, what have they said. What meaning is to be attached to the expressions they have used?***

Counsel went on to highlight Rules 1 and 8 on construction of documents as set out at pages 28 and 51 of Odgers, on Construction of Deeds and statutes which are stated as follows:-

Rule 1 - **"the intention of the parties must be discovered, if possible from the expressions they have used;** and;

Rule 8 - **"Technical Legal terms, or words of well known legal import used by lawyers, especially conveyances, will have their technical legal import. 'though the testator uses inconsistent terms or gives repugnant or impossible directions. So if the executant of a document uses legal terms which have an established meaning in the law, he will usually be taken to have used them in that established meaning, though the result may appear to be not one which he intended."** (emphasis ours)

Counsel therefore argued that the requirement for a practicing certificate, as used in the Request for Proposal, could only mean that the team members were each required to hold a valid certificate to practice law as Advocates in Kenya.

In addition, Counsel pointed out that Sec. 34 (1)(e) of the Advocates Act precluded unqualified persons from taking any instruction or drawing documents for which a fee is prescribed by the Chief Justice, under the Advocates Remuneration Order. Counsel queried whether the Initial Public Offering (IPO) as contemplated under the Request for Proposal was the subject of the Advocates Act and the Remuneration Order. In his view, the IPO essentially involved a floatation of a company, which is the subject of Paragraph 18 of the Advocates Remuneration Order. In other words, counsel considered that an IPO falls under the category described "Non-Contentious Matters", in Part II of the Order which regulates, inter alia, advocates' remuneration as follows:.

> ***"in respect of business in connection with floatation of companies and the issue of debentures, (for which) the remuneration is to be that prescribed in Schedule III;".***

Counsel therefore submitted that the Procuring Entity breached the various cited Regulations, by regarding as responsive and qualified the two foreign firms which could not legally practice law in Kenya without the Attorney General's consent.

Finally, Counsel argued that the RFP was not an Open International Tender as it did not expressly state so, and in any case would be in breach of the Advocates Act.

With regard to the Financial Evaluation, Counsel argued that the bid prices used by the Procuring Entity in arriving at the combined final score for their bid, was a figure other than that quoted by them. The Applicant further elaborated that the Procuring Entity used different percentages in calculating the tax component to be deducted. This complaint was similar to that earlier argued *in extenso* by the Applicant in Application No. 49. As we have already disposed with that argument, we need not dwell on it again here.

In response, Counsel for the Procuring Entity argued that the rule of law in interpretation of documents is that an interpretation must not be given to a document that itself defeats the whole intent, purpose and object of the document. Counsel pointed out that the RFP document must be construed in its proper context and in this regard the object of the IPO must be taken into account.

Counsel therefore described the business of the Kenya Reinsurance Corporation; the scope of its local and international business linkages, the object of the IPO as a divestiture of part of the shareholding of the government; and the need for compliance with the best international practices in undertaking such an IPO.

Counsel directed the Board to the divestiture objectives as stated in the RFP in Section 2 as follows:

> ***"GOK wishes to conduct this exercise in a transparent and fair manner in pursuit of the following objectives:-***
>
> ***a)*** ***.....***
>
> ***b)*** ***realize a fair return and raise revenue for the Exchequer***
>
> ***c)*** ***ensure as wide an ownership as possible***
>
> ***d)*** ***....."***

He pointed out that under the Terms of Reference, the divestiture strategy involved the sale of 40% of the Government's shareholding in Kenya Reinsurance Corporation.

Counsel submitted that in the Scope of Work in the RFP, under the title, "Planning", a Legal Advisor was sought with the key mandates to do the following:-

"a) Conduct legal due diligence

b) Provide a legal opinion on the likely effect of the transaction with respect to the continued existence of treaty cessions under the legal regime

c) Provide legal advice on the sale in respect to the applicable law,, regulation and processes governing the transaction. This should include, among other review of any material contingent liabilities relating to Kenya Re's past and current operations as may be relevant under the Laws of Kenya....."

With regard to the issue on practising certificates, Counsel stressed that under the "Terms of Reference, Professionalism and Experience" the RFP merely required the following: that the Legal Advisor be a reputable law firm or consortium of law firms with experience and knowledge in insurance, reinsurance, privatization and commercial law transactions, and that its members should be able to show they practice law in their jurisdiction. Counsel argued that there is nothing in the RFP that limits it to advocates practising in Kenya.

Finally, on the question of lack of qualification of foreign law firms, Counsel pointed out that it would be absurd to apply the Advocates Act in interpreting the RFP documents, as it is common ground that no one can come into Kenya and render services regulated under the Advocates Act without a practising certificate, or admission by discretion of the Attorney General. Counsel argued that it had not been demonstrated that the Legal Advisor under the RFP would perform any of the services under the Advocates Act. There could, therefore, be no breach of the Regulations on technical and professional qualifications.

Counsel finally argued the Procuring Entity's rejoinder on the issue of financial evaluation, but, as earlier stated, since this issue has already been disposed of in Application No. 49/2006, there is no need to repeat the arguments here.

The interested candidates made their submission as follows:

Counsel for the MAL Consortium argued that the Legal Advisory services contemplated in the RFP were not legal proceedings as known to Kenyan law and would therefore not require the services of advocates holding practicing certificates. Counsel pointed out that Section 34(4)(b) of the Advocates Act provided an exception by which unqualified persons were not prohibited from doing the following business:

" ***(a)*****.....**

(b) a transfer of stock or shares containing no trust or limitation thereof"

He argued that the RFP of the Kenya Reinsurance IPO did not anywhere require that the participants should have a valid Kenya practicing certificate, and if that had been intended, nothing was easier than for the procuring Entity to provide for it.

Counsel for HRD Consortium, the successful bidder, agreed that there was no requirement in the RFP that only Kenyan advocates could participate in the RFP. Counsel pointed out that under Reg.13(1) participants in a tender must qualify by meeting the criteria thereunder and such other criteria that the Procuring Entity considers appropriate under the circumstances.

Counsel referred to the covering letter in the RFP which sets out the basis of the proposals at paragraph 4 as follows:-

"4. Kenya Re now invites proposals to provide legal advisory services for this IPO transaction' (emphasis added)

Counsel argued that if there was any confusion or need to clarify what was required by the RFP, Regulation 26 should have been invoked by the interested bidders to seek clarification. That regulation allows bidders to seek clarification from the Procuring Entity which would then issue an addendum to clarify the querry.

Counsel further argued that the requirement for members to have a practicing certificate did not mean that what was called for was a certificate issued by the High Court of Kenya. The foreign members in the HRD Consortium did have practicing certificates issued by the Law Society in their jurisdiction. Since the RFP merely required the Legal Advisor to be responsible for the IPO's overall legal advice, it was not reserved to only Kenyan advocates to offer such advice. Accordingly, Counsel argued that the cardinal principle of interpretation is that you must not imply words into a document, as had been done by the Applicant, unless they were necessary to give it business efficacy. In this case, Counsel argued that what is not prohibited must be deemed as permitted.

Finally, Counsel pointed out that in several IPO's in Kenya, such as that of Kengen, foreign lawyers had participated in offering legal advice.

We have carefully considered the various forceful arguments of the parties and interested candidates and also all the documents submitted to the Board.

Before we enter into an analysis of the various arguments in light of the law, it is necessary to highlight two important points.

The first is that it is common ground between the parties that matters and business reserved to advocates under the Advocates Act, Cap 16, can only be carried out by a qualified person holding a practicing certificate or duly admitted by permission of the Attorney General under Section 11 of the Advocates Act. The Board fully agrees with this position.

The second, is that we consider the only issue raised for determination to be whether the RFP document limits participation in the provision of legal advisory services for the IPO to persons holding a practicing certificate under the Advocates Act, Cap 16 of the Laws of Kenya. If yes, the Applicant's preliminary objection in Application 49/2006 and, simultaneously the Applicants appeal in Application No. 53/2006 must both succeed. In that event, the Procuring Entity's decision must stand annulled for fundamental breach of the requirements as to qualification.

In order to come to an understanding of the matter, a consideration of the law and circumstances surrounding this procurement is essential. The Public Procurement Regulations, 2001 were established under Sec. 5A of the Exchequer and Audit Act, as part of the measures by the Government to regulate and control the expenditure of public funds through procurement, and for the protection of public property. By Sec.5A(1) Parliament enacted as follows:-

"Notwithstanding any other provision of this Act or any other written law to the contrary, the Minister may, in Regulations prescribe the procedure to be followed by any public entity in procuring goods and services out of public moneys....." (emphasis added)

That provision reflects an all-encompassing characteristic that evidences the fact that Parliaments intention was to enable the Minister to prescribe by regulations, procedures to be followed by public entities engaging in public procurement. Such regulations inhere, notwithstanding any other written law to the contrary, in respect of Public Procurement.

In making the Regulations, pursuant to the all-encompassing provisions of Sec. 5A of the Exchequer and Audit Act, the Minister prescribed different methods or procedures of procurement that may be adopted by procuring entities in public procurement. These are Open National Tendering as set out in Part V; Restricted Tendering; Direct Procurement; Request for Proposals and Request for Quotations, all as set out in Parts IV and VI of the Regulations; and finally Open International Tendering as set out in Part VII of the Regulations. Other special procedures may be applied as may be determined by the Minister pursuant to Reg.3(2).

Nevertheless, Procuring Entities are required by Reg. 17 to use open tendering method as the preferred procedure of procurement. Upon making a choice as to which procurement process to apply and considering its needs, the procuring entity's choice is not open to administrative review by the Board as clearly provided for in Reg. 40(2)(a).

The Procuring Entity, in this case opted to use Request for Proposals (RFP) procedures. It's choice of procedure is not under attack. However, it is important to note the conditions under which the RFP procedure is permitted. This is provided for by Reg. 20, which states as follows:-

"The Procuring Entity may engage in procurement by means of request for proposals in accordance with Regulation 36 when it seeks to obtain consulting services or combinations of goods and services for which open or restricted tendering is not suitable because of the difficulty in defining precisely the services." *(emphasis added)*

We would highlight the fact that RFP procedure is resorted to for consultancy services when there is difficulty of defining precisely the services desired by the procuring entity. Nevertheless, the procuring entity is required under Reg. 36 to ensure that the following minimum information is contained in the RFP. Reg. 36 (2)(a) reads as follows:-

" 'A request for proposals shall contain at least the following information....

b) a description of the services required normally through terms of reference."

The Procuring Entity in this case included in its RFP under Section 3 the Terms of Reference which have been extensively referred to by all counsel. The "Terms of Reference" section has the following parts: "Scope of Work, (Planning and Implementation); Professionalism and Experience; Time Schedule and Reporting Requirements; and Deliverables".

The only contentious item is that under "Professionalism and Experience", at paragraph (c) which after setting out that the Legal Advisor should be a reputable law firm or consortium of law firms with a Team Leader, provides as follows:

"(c) The team members should each have a valid practicing certificate