

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

**APPLICATION NO. 3/2014 OF 13TH FEBRUARY, 2014 AND
APPLICATION NO. 4/2014 OF 14TH FEBRUARY, 2014**

BETWEEN

**HEWLETT-PACKARD EUROPE BV,
AMSTERDAM, MEYRIN BRANCH.....1ST APPLICANT**

&

**HAIER ELECTRICAL APPLIANCES
CORPORATION LIMITED.....2ND APPLICANT**

AND

**MINISTRY OF EDUCATION,
SCIENCE & TECHNOLOGY PROCURING ENTITY**

Review against the decision of the Tender Committee of the Ministry of Education, Science & Technology dated 7th February, 2014 in the matter of Tender No. ICB NO. MOEST/7/2013 - 2014 for Supply, Delivery, Installation and Commissioning of ICT Integration in Education Devices and Solutions for Primary Schools in Kenya: Lot 1 Supply of Laptops for Learners and Teachers.

BOARD MEMBERS PRESENT

Mrs. Josephine W. Mong'are	- Member (in the chair)
Mr. Paul Gicheru	- Member
Mrs. Rosemary K. Gituma	- Member
Mr. Hussein Were	- Member
Mr. Paul Ngotho	- Member
Mrs. Gilda Odera	- Member
Mr. Nelson Orgut	- Member

IN ATTENDANCE

Ms. Pauline O Opiyo	- Secretary
Mr. Philip Okumu	- Secretariat
Mr. Stanley C. Miheso	- Secretariat
Ms. Judy Maina	- Secretariat
Ms. Lucy Barno	- Manager Corporate Services, PPOA
Ms. Sharon A. Odeny	- Intern (PPARB)
Ms. Ndinda Kinyili	- Legal Consultant, PPOA

PRESENT BY INVITATION

Applicant No. 3/2014 - Hewlett-Packard

Kamau Karori	- Advocate
Milly J.Odari	- Advocate
Ken Melly	- Advocate
Andre Bodson	- V. P.
Suresh Subramanian	- V.P.

Paulos Veritztogiou	- Sales Manager
David Hill	- Director
Antoine Simonet	- Supply Chain
Eno Ebong	- Country Counsel
Livingstone Indetie	- Account Manager

Applicant No. 4/2014 - Haier Electrical Appliances

Alex Musangi	- Advocate
J. Singh	
Amit Mohindra	- Director
S. Xlasher	- Director
Stephen Nguitui	- Pupil
Rachael Nderu	- Pupil

Procuring Entity - Ministry of Education, Science & Technology

Kiragu Kimani	- Advocate
I. Kashindi	- Advocate
Phoebe Wahome	- Advocate
Jesse Mwiti	- Advocate
Edith Torome	- Legal Officer
Kenneth Mwangi	- Head of Procurement
John Temba	- ICT Officer
Peter K. Tanui	- SSCMO
Elijah Omwenga	- Technical Consultant

Interested Parties

- Mohammed Nyaoga - Advocate, Olive Telecommunications PVT Ltd
- Guto Mogere - Advocate, Olive Telecommunications PVT Ltd
- Munabi Okubasu - Advocate, Olive Telecommunications PVT Ltd
- Rodney Amollo - Advocate, Olive Telecommunications PVT Ltd
- Rashid Sheilla - Advocate, Olive Telecommunications PVT Ltd
- Ajay Jain - Director, Olive Telecommunications PVT Ltd
- Eliud Siguda - Manager, Vivibright Co. Ltd
- Danny Solanki - Director, Kyocera
- Bosire Kennedy - Advocate, Kyocera & Vivibright
- Sarah Okimani - Advocate Kyocera & Vivibright
- Philip R. Mutungi - MD,Energy Business Tech. Ltd.

BOARD'S DECISION

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

BACKGROUND

This decision relates to two Requests for Review namely Review No. 3 of 2014 and No. 4 of 2014. The two Requests for Review were lodged before the Board by Hewlett Packard Europe BV, Amsterdam, Meyrin Branch (Hereinafter referred to as the first Applicant) and Haier Electrical Appliances Corporation Limited (Hereinafter referred to as the second Applicant). Both Requests are against the decision of the Ministry of Education Science and Technology dated 7th February 2014 awarding Tender **No. ICB No. MOFST/7/2013 - 2014** for the supply delivery installation and the commissioning of ICT Integration in Education devices and Solutions for Primary School in Kenya- Lot 1 (Laptop for Learners and Teachers) by the Procuring Entity to M/s Olive Telecommunications PVT Ltd, the Interested Party herein.

When the two applications came up for hearing before the Board for the first time on 5th March 2014, the Board directed with the consent of all the parties that the two applications be consolidated and be heard together since the issues raised in both applications were substantially similar. The hearing of the applications thereafter commenced and proceeded for two days. The parties to the Applications for Review were represented by their respective advocates who made very helpful submissions in support and/or in opposition to the Applications for Review.

It was generally agreed by the parties that the matter for consideration was one of great public importance that not only required a detailed consideration of the grounds raised but also an expeditious determination.

The Board on its part has no doubt that the matters before it are indeed of great Public importance involving the children and the youth of the Republic of Kenya.

The Board notes that the value and the importance of Education for the children and the youth of the Republic of Kenya is underpinned in the provisions of The Constitution of Kenya 2010 which provides that every child has a right to free and compulsory basic education.

It is apparent that in an attempt to fulfill the above constitutional obligation, the Ministry of Education Science and Technology set in motion a process that would provide the children of Kenya with equal access to quality education irrespective of their socio -economic status in obvious recognition that education has a critical role in the preparation of the children who would inevitably translate into the productive class of Citizens of this Republic in order for the Country to meet the requirement of a middle knowledge based economy in future.

Toward this end and in an action that the Board upholds, the Government identified a goal to facilitate ICT integration in Primary Education and support youth engagement in ICT support services and digital content development and established a budget line towards supply, delivery installation and commissioning of ICT integration in education computing devices for Public Primary Schools in Kenya.

In an attempt at upholding the provisions and the spirit of Section 31(7) of the Public Procurement and Disposal Act, 2005 that requires Procuring Entities to use creative approaches and enhance efficiency in the

procurement process the Procuring Entity sought for permission from the Director General of The Public Procurement Oversight Authority to be allowed to use the Specially Permitted Procurement Procedure in the Tender the subject matter of this dispute. The Board notes that this was a well intended first step by the Procuring Entity.

In a nutshell, the Principal Secretary of the Procuring Entity Dr. Belio R. Kipsang in a letter dated 28th October, 2013 addressed to the Director-General of the Public Procurement Oversight Authority sought permission to be allowed to use the specially permitted procedure on the grounds that:-

- i) There was no adequate time to procure the devices using the Conventional Procurement methods.
- ii) Due to budgetary constraints, the Ministry would get better value for money by subjecting the bidders to competitive negotiations.
- iii) The manufacturing and the distribution of the devices was complex and that it is a partnership approach for mutual benefit between the Government and the manufacturer.
- iv) And that the Ministry was bound to get a better specified project which would result into a better contract.

By a letter dated 29th October 2013 the Director General of the Public Procurement Oversight Authority while acknowledging that what the Procuring Entity had requested for was in line with the Provisions of Section 31(7) of the Public Procurement and Disposal Act 2005 granted

permission to the Procuring Entity to proceed with the procurement under the provisions of Section 92 of the Act. The Director General in his letter allowed the use of the Specially Permitted Procurement Procedure which was to proceed as follows:-

Stage One - Technical offers

- (i) Advertisement for ICB - International Competitive Bidding.
- (ii) Tender opening - Only technical offer (one day)
- (iii) Evaluation of technical offers (6) (days).
- (iv) Adjudication by Ministerial Tender Committee (one day)

Stage Two - Financial offers

- (i) Financial offers opening for technically qualified bidders (one day)
- (ii) Financial evaluation (one day)

State Three - Competitive Negotiations

Competitive negotiations with technically and financially qualified bidders this will cover:-

- (i) Negotiate on prices and total cost of ownership
- (ii) Phasing of the project - to allow the bidders to deliver in batches.
- (iii) Contract implementation.

Stage four - Best and final offer

- (i) Submission of the BAFO - two (2) days.
- (ii) Opening of the BAFO - One (1) day.
- (iii) Recommendation for award to the most advantageous bidder - one (1) day.
- (iv) Award of bid by the MTC and preparation of letter of acceptance and a regret one (1) day.
- (v) Preparation of contract documents - Seven (7) days.
- (vi) Return financial offers to those who are not technically qualified - One (1) day.

The Director-General finally advised the Procuring Entity to ensure that the Procurement process adopted should be fair, transparent and competitive as required by the Act and that the Procuring Entity should first incorporate the adjustments in clause 21 of the Tender Data Sheet of the Tender document before proceeding with the Procurement process.

Having obtained permission, bids for the Tender were invited on Wednesday 30th October, 2013 and closed on 21st November 2013 at 10.00 am. A total number of 69 firms bought the Tender documents. The submitted bids were opened at a public session held at the Main Conference Room Jogoo House "B" 10th Floor on 21st November 2013 at 10.00 O'clock in the presence of Thirty Six (36) bidders/their representatives who wished to witness the process. The following Sixteen (16) bids were submitted and opened.

Bidder No.	Bidder Identification	Bidder Location			Modifications
		City /State or Province	County	Lot	Comments
1.	ZTE Corporation	Shenzhen	China	1,2,3	Nil
2.	Nairobi Projector Services Ltd	Nairobi	Kenya	3	Nil
3.	Kyocera Documents Solutions	Hoofdorpb	Netherlands	2	Nil
4.	Hedy Holdings Company	Guangzhou	China	1	Nil
5.	Jomo Kenyatta University of Agriculture and Technology	Nairobi	Kenya	1	Nil
6.	AGC.Networks Ltd	Nairobi	Kenya	3	Nil
7.	JP Sa Couto, SA	RaudaGuarda	Portugal	1	Nil
8.	Tsinghua Tongfang Company Ltd	Beijing	China	1	Nil
9.	Haier Electrical Appliances	Oingdao	China	1,2,3	Nil

	Corp. Ltd				
10.	Emerging Business Technologies Ltd.	Nairobi	Kenya	1	Nil
11.	Vivibright	Shenzhen	China	3	Nil
12.	Samsung Electronics	Nairob	Kenya		
13.	RLG Communications Ltd	Accra	Ghana		
14.	Mustek East Africa Ltd	Nairobi	Kenya		
15.	Hewlett-Parkard Europe Bv	Amsterdam	Netherlands		
16.	Olive Telecommunications PVT Ltd	Haryana	India		

The following is a summary of the bids submitted per lot:-

<u>Lot</u>	<u>Bids Submitted</u>
Lot 1 – Laptops for learners and teachers	11 No.
Lot 2 – Printers	5 No.
Lot 3 – Projectors	6 No.

The Tender then proceeded to the preliminary, technical and financial evaluation before being subjected to the fourth stage of the process in order to determine the Best and Final Offer (hereinafter referred to as BAFO).

According to the evidence placed before the Board, the Procuring Entity ostensibly carried out preliminary, technical and financial evaluation and determined that the 1st Applicant, the 2nd Applicant and the Interested Party had successfully passed through all the three stages set out above and that the three bidders were therefore qualified to proceed to the next stage of evaluation namely, the negotiation and the submission of the BAFO.

The Board wishes to note that the following was the result of the financial evaluation before the process of negotiation and the submission of the BAFO.

Bid No.	Bidder (A)	Currency of Bid (B)	Corrected/Discounted Exchange Rate (D)	Applicable Exchange Rate (D)	Evaluation Currency Bid Price Kshs. (E) + (C) X (D)	Ranking Total Bid Price (F)
9	Haier Electrical Appliances Corp. Ltd	USD	324,112,708.11	86.4886	28,032,054,366,64255	3
15	Hewlett-Packard Europe BV	USD	289,836,733.24	86.4886	25,067,573,286.50	1
16	Olive Telecommunications PVT Ltd	USD	313,143,822.00	86.4886	27,083,370,763.4292	2

The undisputed evidence placed before the Board shows that soon after the financial evaluation, the bidders were invited for what the parties collectively referred to as competitive negotiations which according to available records were held at the Windsor Golf and Resort Hotel Nairobi on 10th December, 2013 starting at 10.00 a.m. The 1st Applicant, the 2nd Applicant and the Interested Party attended the meeting whose proceedings are contained in the competitive negotiations report dated 10th December, 2013 which sets out inter-alia the terms of reference, the methodology, the process and the financial effect of any extra cost of the negotiations on the BAFO Tender price.

According to the available minutes, the three bidders were invited to and did submit their BAFO's as required by the letter of permission for the use at of the Specially Permitted Procurement Procedure. The BAFO's were opened at a public session held at the Procuring Entity's offices on 13th

December 2013 in the presence of ten (10) bidders where the BAFO prices were read out in public.

Upon the opening of the BAFO's, the Procuring Entity determined that the Interested Party was the lowest bidder and then proceeded to carry out what it termed as due diligence on the said Interested Party in an ostensible compliance with the provisions of the Tender Documents. This resulted in a due diligence report, which was signed by eight (8) members of the team that allegedly conducted the due diligence exercise.

It is clear from the evidence before the Board that at the conclusion of the exercise, the Procuring Entity in a letter of award dated 7th February 2014 addressed to the Managing Director of Olive Telecommunications PVT Limited awarded the Tender for the supply, delivery, installation and commissioning of ICT Integration in Education devices and solutions for primary schools Lot 1 to the Interested Party at a contract price of Two Hundred and Eighty Four Million, Eight Thousand and Thirteen, Nine Hundred and Fifty Seven US Dollars (USD 284,813,957).

THE REQUEST FOR REVIEW

As would be expected in a Tender of this magnitude, the 1st and the 2nd Applicants were not happy with the award of the Tender to the Interested Party and lodged two separate Requests for Review before the Board challenging the Procuring Entity's decision to award the Tender to the

Interested Party. The Request for Review by the 1st Applicant dated 12th February 2014 and which runs upto 203 pages was lodged before the Board on 13th February 2014 while the Request for Review by the 2nd Applicant dated 14th February 2014 was lodged before the Board on the same day, namely 14th February 2014.

The Requests for Review were based on several but substantially similar grounds as will become clear in the course of the Board's decision.

The 1st Applicant sought the following reliefs against the Procuring Entity:-

1. *That the Procuring Entity's decision to award the Tender No. ICB/MOEST/7/2013 -2014 for the supply, delivery, installation and commissioning of ICT integration in education devices and solutions for primary schools in Kenya to Olive Telecommunications be set aside and/or nullified.*
2. *That subject to due diligence, the Tender No. ICB/MOEST/7/2013 - 2014 in respect of the supply, delivery, installation and commissioning of ICT integration in education devices and solutions for primary schools in Kenya, be awarded to Applicant being the most advantageous bidder in conformity with the provisions of the Public Procurement and Disposal Act 2005, the Public Procurement and Disposal Regulations, 2006 and in conformity with the evaluation criteria set out in the Tender documents.*
3. *In the alternative and without prejudice to prayer No. 2 above, the Procuring Entity do properly and correctly evaluate the bids submitted by the bidders in respect of Tender No. ICB/MOEST/7/2013*

- 2014 for supply, delivery installation and commissioning in ICT integration in education devices and solutions for primary schools in Kenya, in conformity with the Public Procurement and Disposal Act 2005, the Regulations and the Tender documents and using objective, transparent evaluation criteria and in particular by taking into account the value additions.*
- 4. The Procurement Entity be ordered to pay the costs of and incidental to these proceedings on a full indemnity basis.*
 - 5. This Honourable Board be pleased to issue such further or other orders as it may deem just.*

The Applicant in Review No. 4 of 2014 on the other hand sought for the following Reliefs:-

- 1. That the Procurement award announced on 7th February 2014 be annulled in its entirety.*
- 2. That the Procuring Entity be ordered to transparently re-evaluate the Tenders of only the compliant Tenderers for purposes of the Award of this Tender.*
- 3. Alternatively, that the entire procurement proceedings herein be annulled and the Procuring Entity be ordered to re-Tender for the procurement afresh in full compliance with the law.*
- 4. That Olive Telecommunications PVT Limited be debarred from participating in any re-evaluation or re-Tender relating to this Procurement.*
- 5. That the Procurement Entity be ordered to pay the costs of this Administrative Review.*

The Board wishes to observe, that although the two Requests for Review were filed by two different Applicants, there were several points of concurrence between the Applicants. The Applicant in Review No. 4 of 2014 acknowledged this fact in paragraph 3 of its Replying Affidavit sworn on 26th February 2014.

The Board has perused the Requests for Review, the responses filed in opposition thereto, the Replying Affidavits, the oral submission Tendered at the hearing and the written skeleton submissions lodged with the Board and it is evident that the two Requests for Review were fought on several primary but related grounds.

All the parties to the Requests for Review were ably represented. The First Applicant was represented by Mr. Kamau Karori, while the Second Applicant was represent by Mr. Mukite Musangi. The Procuring Entity on the other hand was represented by Mr. Kimani Kiragu while the Interested Party was represented by Mr. Mohammed Nyaoga.

Mr. Kamau Karori who was the first to go argued that the Procuring Entity erred in allowing the Interested Party's bid to pass through the preliminary evaluation stage despite the fact that the Interested Party did not meet several eligibility requirements.

The 1st Applicant cited several aspects of the preliminary requirements which in its view were not met, the first one being that the Interested Party was not an **Original Equipment Manufacturer** (OEM) as required by the provisions of Clause 3 of the invitation to Tenders as read together with Clause 3.2 of the instruction to Tenderers and Clause 3 of the Tender Data

Sheet which in his view set out the requirement that only Original Equipment Manufacturers were eligible to bid under this Tender.

The 1st Applicant stated that it understood on Original Equipment Manufacturer in the context of this Tender to mean a company which manages the various stages of the life cycle of various products directly or through qualified contactors with the intention of distributing the resultant product either directly or through distribution and that it is not just someone who designs a product. In its view, this also included procuring the parts, production planning, factory process, logistics, warranty and support e-waste management and social responsibility. It was not therefore enough for one to go and get a gadget stick its name on it and say it was an Original Equipment Manufacturer. Counsel argued that the Interested Party did not explain why it was an Original Equipment Manufacturer and that by attaching an ISO certification, did not qualify it as an Original Equipment Manufacturer.

The second point raised by the 1st Applicant in support of the challenge to the Interested Party's lack of capacity to proceed beyond the preliminary evaluation stage was that in addition to not being an Original Equipment Manufacturer, the Interested Party had not fulfilled the requirements of Clause 14.3 b of the Instruction to Tenderers (ITT) and Clause 11 of the Tender Data Sheet (TDS) which required every Tenderer to demonstrate financial, technical and production capability necessary to perform the contract. Mr. Karori argued that in order to meet the qualifications set out in Clause 11 of the Tender Data Sheet, every Tenderer was to demonstrate:-

- (i) A minimum annual turnover of 8 Billion Kenya Shillings or US Dollar equivalent for Lot 1, calculated as the total certified payments received for contracts in progress and completed within the last three (3) years.
- (ii) Prove ability to access the availability of financial resources and to have an annual cash flow of Kshs. 3 Billion in respect of Lot 1 (laptops) for the last three (3) years.
- (iii) Prove an experience as a supplier in at least three (3) contracts within the last five (5) years with an average value of at least Five Hundred Million Kenya Shillings (Kshs. 500,000,000) in respect of items that have been successfully completed and that are similar to the proposed goods and related services.

On the issue of experience, Counsel urged the Board to look at the Procuring Entity's response and that of the Interested Party both of which showed that the Interested Party had only acquired ISO certification in 2013 and based on that evidence alone could not meet the criteria for an experience of five years required under item (iii) above.

The 1st Applicant therefore urged the Board to find and hold that the Procuring Entity therefore acted in breach of the Provisions of Sections 31, 34 and 39 of the Public Procurement and Disposal Act, 2005 and also contravened the provisions of Clause 3 of the invitation for Tenders as read together with the provisions of Clause 3.2 of the instruction to Tenderers.

The 1st Applicant further urged the Board to find that the Interested Party had not demonstrated that it had the necessary financial, technical and production capacity to perform the contract and had not therefore also demonstrated that it had met the qualifications set out in Clause 11 of the Tender Data Sheet.

The above arguments by the 1st Applicant appear in paragraphs 6 (a) to (e) of the 1st Applicant's Replying Affidavit sworn by **LIVINGSTONE INDETIE** on 27th February 2014 in reply to the 2nd Applicant's Request for Review.

The next argument by Mr. Karori was that the evaluation process involved the preliminary, technical and thereafter the financial evaluation where in his view his client was the lowest bidder. This was before the evaluation entered the stage of the BAFO. It was therefore the 1st Applicant's case that it is only his client which was entitled to have due diligence conducted on it by the Procuring Entity.

The 1st Applicant finally argued grounds 2, 3 and 4 together. The 1st Applicant's complaint arising from these grounds of Review was that the Procuring Entity had breached the provisions of Article 227 of the Constitution and Section 44 (1), (b) (c) and (d) of the Act and clause 27 of the instruction to Tenderers by disclosing information regarding the unit prices submitted by the bidders to everyone at the financial opening. The 1st Applicant lamented that the information on unit prices was released with the full knowledge that there was to be a further negotiation on the price. This in the 1st Applicant's view affected its ability and competitive

position as it allowed the 1st Applicant's competitors to exploit the 1st Applicant's bid and manipulate the Tender price thereby contravening the requirement for competitiveness, integrity and fairness of the whole procurement process contrary to the provisions of Article 227 of the Constitution as read together with Section 2(b) and (c) of the Act.

Mr. Mukite Musangi learned Counsel for the 2nd Applicant largely supported the 1st Applicant's submissions on the issue of the Procuring Entity's non compliance with the criteria for preliminary evaluation of Tenders as set out in the Act, the Regulations and the Tender Document.

In addition to supporting the 1st Applicant's case, the 2nd Applicant submitted that the Tender in contention was only open to Original Equipment Manufacturers. In ground 4 of its Request for Review headed **Non - compliance**, the 2nd Applicant argued that the Interested Party was not only not an Original Equipment Manufacturer as required by the various provisions of the Tender Document but further that there was no evidence whatsoever to demonstrate that the Interested Party had the requisite demonstrable experience as a manufacturer and supplier of the proposed goods and services.

The 2nd Applicant also submitted that the Interested Party did not participate in this contract as a joint venture with other entities and that the Procuring Entity breached the provisions of Section 66 of the Act in failing to find that the Interested Party had not established the existence of a joint venture between it and any other company led by an Original Equipment Manufacturer.

On the issue of the requirement for an entity to be an Original Equipment Manufacturer, it was the 2nd Applicant's case that under the provisions of the Tender Document, this Tender was only open to Original Equipment Manufacturers. According to the 2nd Applicant, an Original Equipment Manufacturer simply meant an Original Equipment Manufacturer and not a Secondary Equipment Manufacturer.

The 2nd Applicant attached to its Replying Affidavit sworn on 26th February 2014 a computer extract that sought to define what an Original Equipment Manufacturer was as distinguished from an Original Design Manufacturer (ODM).

According to this definition, an Original Equipment Manufacturer (OEM) was defined as follows:-

"OEM refers to accompany or a firm that is responsible for designing and building a product according to it's own specifications and then selling the product to another company or firm which is responsible for its distribution while the same documents defines an ODM as follows:-

"An ODM Company or firm on the other hand is responsible for designing and building a product as per another company's specifications."

Mr. Musangi in an apparent response to the Procuring Entity's and the Interested Party's responses dismissed the suggestion of the existence of a joint venture between the Interested Party and any other company and reiterated his earlier submission that both the Procuring Entity and the

Interested Party had not produced any evidence of the existence of a joint venture and that the Tender the subject matter of this dispute was submitted by the Interested Party alone and not by any consortium of companies or companies acting in joint venture.

One ground that was so passionately argued by Counsel for the 2nd Applicant was ground 2 of its Request for Review. The Second Applicant submitted that when the three Tenderers were invited to submit their BAFO's, the following results were read out in public to the parties who were present.

	US Dollars	Kenya Shillings Equivalent @ 86.60
HAIER	\$289,843,995.37	Kshs. 25,100,489,999/00
HP	\$279,871,913.00	Kshs. 24,236,907,665/80
OLIVE	\$268,899,669	Kshs. 23,286,711,335/40

The 2nd Applicant was however shocked to hear a public announcement made by the Procuring Entity through its Cabinet Secretary that the Tender had been awarded to the Interested Party at the sum of US Dollars 284,813,957 representing a price addition of about 1.4 Billion Kenya Shillings over and above the declared BAFO price. Counsel for the 2nd Applicant urged the Board to pause for a second and appreciate the magnitude of what had been done by both the Procuring Entity and the Interested Party.

Counsel for the 2nd Applicant further submitted before the Board that the winning Tenderer declared a bid that was inflated by Kshs 1.4 Billion but the net effect of Kshs 24.6 Billion was to keep it just below the next

Tenderer which was HPs at about Kshs 24.8 and just below Haier's bid at Kshs 25 Billion.

Counsel termed this as fraudulent and an attempt to defraud members of the public.

Mr. Kimani Kiragu learned Counsel for the Procuring Entity was the first one to address the Board in response to both Applications for Review. Mr. Kimani gave the Board the genesis and the background of how the Government of Kenya conceived the project the subject matter of the dispute before the Board. Mr. Kimani informed the Board and rightly so in the Board's view, that the Government of Kenya was trying to move Kenya to the next level with a view to embracing technology that would in turn enhance the welfare of the children of Kenya through the facilitation of ICT integration in primary education.

Counsel for the Procuring Entity also reminded the Board that it was critical for the Board to note that the Government was funding this project and the money that was being used for the project was money from taxpayers and reminded the Board that the Government could easily have taken the easier route by sourcing for donor funds and taking advantage of the protection of the provisions of Sections 6 and 7 of the Public Procurement and Disposal Act. Counsel also submitted and again quite rightly so that the matter before the Board was therefore one of great public importance and that the Board should take into account this factor while considering the dispute before it.

On the substantive response to the two Requests for Review, Counsel for the Procuring Entity urged the Board to first remind itself of the scope of its jurisdiction. The Procuring Entity's submissions went as follows:-

On the issue of the Board's jurisdiction, Counsel cited two authorities in support of his submission that the Board's jurisdiction under Section 93 was limited to hearing complaints by candidates who had suffered or were likely to suffer loss or damage by reason of the Procuring Entity's breach of the provisions of the Act and the Regulations.

He cited the case **Mohamed & Mugai Advocates V Nairobi Water Services Board, Application No. 25 of 2005**, where it was held that for a bidder to have standing before the Board and for the Board to be entitled to conduct a Review or a complaint, there must be an alleged breach of duty imposed on the Procuring Entity by the Act and the Regulations and that if the request was frivolous, the Board had a duty under Section 93(2) (c) to reject it.

Learned Counsel also cited the case of **Alliance Media (K) Ltd v University of Nairobi - Application No. 67 of 2007 , Sanitam Services (EA) Ltd v Kenyatta University Application No. 26 of 2008** and argued that the case was on all fours with the Requests for Review before the Board. He submitted that in the above decisions, the Board held that it had no jurisdiction to deal with intellectual property matters. The Board further held that where no breach of duty imposed by the Act or the Regulations is disclosed, there can neither be a proper review nor an entitlement to the same.

A party making a request for administrative review under Section 93 of the Act, so Mr. Kiragu argued, had to meet certain thresholds, namely that:-

- a) He has to be a candidate who claims to have suffered or risks suffering loss or damage and that:-
- b) Such loss or damage has to arise from the breach of a duty imposed on the Procuring Entity by the Act or the Regulations.

The Procuring Entity consequently argued that the two Applicants had not met the threshold set out in Section 93 of the Act because the Applicants were questioning the process but were not claiming that they had suffered or risked suffering loss or damage and that such loss or damage had been due to the breach of a duty imposed on the Procuring Entity by the Act or the Regulations.

The Procuring Entity urged the Board to find that all the complaints made by the Applicants in the two Requests for Review were frivolous and that the Applicants had not discharged the burden of proof as regards the allegations made in each application.

Counsel then took the Board through the three remedies that he considered available to an aggrieved Tenderer namely, the choice whether:-

- a) To refer the matter to the Public Procurement Oversight Authority (under Part VIII of the Public Procurement and Disposal Act (PPDA)).
- b) To make a request for administrative review under Part VII of the PPDA which is what had been done here.
- c) To go directly to the High Court on a Petition under the Bill of Rights chapter for orders of Judicial Review.

He argued that the third choice will normally only be permitted in exceptional cases as one is ordinarily expected to take advantage of the first two avenues.

He argued that the only reason why the Applicants had elected to come before the Board on an Application for Review rather than through any of the other available avenues was because, *"a Request for Review presents them with a platform for making all manner of allegations against the Procuring Entity to the Board which does not investigate but hears. Put differently the idea is to throw as much mud as possible on the Procuring Entity and hope that some of it sticks"*.

The Procuring Entity however qualified the above statement by stating that the two Applicants were exercising a right to apply for Review which is a right provided to them by law and that the Board was therefore within its powers to hear and determine the Requests for Review and that the Procuring Entity would therefore not be asking the Board to strike out the requests but urged it to look at the merits and dismiss the two applications on merit since they were not well founded.

The Procuring Entity, through learned Counsel Mr. Kimani while answering Mr. Musangi's submission that he had been thrown into the boxing ring with one hand tied behind his back by reason of the Procuring Entity's failure to provide the Applicants with the evaluation report, urged the Board to look at the entire process and that if it did it would come to the inevitable conclusion that the Procuring Entity not only acted above

Board in all material aspects but that it had also acted consistently and within the law.

One of the Procuring Entity's most reiterated argument was that under the provisions of the Public Procurement and Disposal Act, the Board had wide powers to look at the entire Tender process and was legally bound to look at all the documents submitted to it by the Procuring Entity by virtue of the provisions of Section 45 (2) (c) of the Act in order to determine the veracity of any complaints. Mr. Kimani therefore invited the Board to thoroughly scrutinize the Tender Documents and all the documents submitted to it in order to determine whether the Procuring Entity had acted lawfully.

Pursuant to Mr. Kimani's admission of the scope of the powers conferred upon the Board while hearing an Application for Review and in view of the seriousness of the complaint made by the two Applicants about the difference between the Interested Party's BAFO and the final figure contained in the letter of award that represented a difference of Kshs. 1.4 Billion, the Board asked Mr. Kimani whether he had any objection if the Board looked at the documents submitted to it by the Procuring Entity in order to ascertain the genesis of that additional figure.

Learned Counsel indicated that he had no objection just as did Mr. Musangi, Mr. Kamau Karori and Mr. Mohammed Nyaoga.

The Procuring Entity was referred to page 114 of the successful bidder's BAFO which contained the disputed figure of US 15,914,288 which converted into Kenya Shillings 1.4 Billion and which was the genesis of the

price increase. The Procuring Entity confirmed that there was a difference between the prices read at BAFO and that contained in the notification of award.

The Board wishes to reproduce the contents of the table verbatim before setting out the nature of the inquiry that was conducted:-

S.No	Description	Price per unit (USD)	Quantity	Total price (USD)
1.	Standard Warranty one Year.	6	1224176	7345056
2.	Freight cost from Mombasa To Nairobi warehouse	1	1224176	1224176
3.	Customs Clearance Charges.	0.5	1224176	612088
4.	Insurance from Warehouse to End User.	0.5	1224176	612088
5.	Local Logistics, Warehousing & Distribution Costs.	2	1224176	2448352
6.	Microsoft Operating system	1	1224176	1224176
7.	Microsoft MS Office	2	1224176	2448352
Total Additional Services price to be added to the total Bid Price				15914288

(United States Dollars Fifteen Million Hundred Fourteen Thousand Two Hundred Eighty Eight Only).

The Board also referred the parties to the BAFO opening register which showed that the following Tenders were opened at the BAFO on 13th December 2013 in the presence of the Tenderers and their representatives.

TENDER NO. MOEST/7/2013 - 2014

LOT 1 - LAPTOPS FOR LEARNERS AND TEACHERS

No.	NAME FIRM		CURRENCY	UNIT COST	TOTAL COST	COMMENTS
9	HAIER ELECTIRCAL	Learners	USD	220.96	289,843,995.37	

	APPLIANCES CORPORATION LTD	Teachers	USD	399.42		
15	HEWLET - PACKARD EUROPE BV	Learners	USD	226.80	279,871,913.00	
		Teachers	USD	334.80		
16	OLIVE TELECOMMUNICATION PVT LTD	Learners	USD	217.29	268,899,669.00	
		Teachers	USD	357.74		

The Board also referred the parties to the minutes of the competitive negotiations Report which at the concluding paragraph stated as follows:-

“The bidders were taken step by step through the negotiations template and they were requested to note that the Government was keen on lowering the price of the devices. The bidders were also requested not to disclose their prices during negotiations. The price was only to be included in their best and final offer. They were reminded that the value of added services were to be free of charge i.e. they were to be offered at no extra cost to the Procuring Entity”.

The parties were also referred to the Form of Tender submitted by the Interested Party to the Procuring Entity.

It was clear at the conclusion of the exercise that the BAFO price for the Interested Party that was read out to the parties and entered in the register which was endorsed by the parties Present was **USD 268,899,669.00**. It was also clear that this price was different from that contained in the notification of award namely the sum of **USD 284,813,957**.

The Procuring Entity through its Advocate and Officers present also admitted that the requirement in competitive negotiation report that stated services submitted at BAFO were to be offered at no extra cost to the Procuring Entity was accurate and that the intention of the BAFO was to give the Procuring Entity value adds which were free.

At the conclusion of the exercise, the record of the Board shows that Mr. Kimani acknowledged that the Board members had raised pertinent questions and that if the Board found that there was a price wrongly added to the lowest bidders Tender sum as read out at the BAFO it would be draconian to cancel the Tender in view of the provisions of Section 98(b) of the Act which gives the Board wide powers to give directions including directions for the removal of the erroneous figure from the award.

Turning to the issue of an Original Equipment Manufacturer, the Board did not hear any denial from the Procuring Entity that this Tender was only open to Original Equipment Manufacturers. What was however in contention was who an Original Equipment Manufacturer for the purposes of the Tender was.

According to the Procuring Entity, in order for one to qualify as an Original Equipment Manufacturer one should have a department with human resource and the capacity to evaluate the various designs that are produced. An Original Equipment Manufacturer in the Procuring Entity's view must have capacity to be able to distribute the products by its contract

manufacturer and that if an Original Equipment Manufacturer had a factory that was well and good.

On whether there was any distinction between an Original Equipment Manufacturer (OEM) and an Original Design Manufacturer (ODM), it was the Procuring Entity's position that such a distinction existed. It was the Procuring Entity's further submission that there is no requirement that one had to be the one manufacturing everything in order to be termed as an Original Equipment Manufacturer.

The Procuring Entity informed the Board that in order to determine whether a bidder was an Original Equipment Manufacturer the first thing that it looked for was whether the bidder was ISO certified.

On the contention that the Procuring Entity had breached the provisions of Sections 44 and 45 on confidentiality and disclosure, the Procuring Entity argued that the provisions of Sections 44 and 45 of the Act are clear on what can and cannot be disclosed and that the Applicants were not entitled to be supplied with the evaluation report because they are legally not entitled to it under the law.

Finally Mr. Kimani urged the Board to find that the matter at hand was a matter of great national interest and importance and urged the Board to be guided by the Board's decision in the case of **Mea Ltd -vs - The National Cereals and Produce Board, Application No. 4 of 2012** where the Board declined to cancel an award of Tender on the ground that the matter was of national interest despite having found that the Applicant had established several breaches of the Act and the Regulations.

Mr. Mohammed Nyaoga, Counsel for the Interested Party, opposed both Requests for Review in a condensed but brief submission.

The first issue that Mr. Nyaoga addressed was the one relating to the release of information under the provisions of Sections 44 and 45.

Mr. Nyaoga argued that Section 44(1) and (2) of the Act contained a general prohibition on disclosure while section 45 also prohibited the disclosure of information subject to the exception created by Section 44(2) of the Act. One of the exceptions was that information could be disclosed for the purposes of a Review and that since it is only the Board which is the body that is empowered to conduct a Review under the Act, therefore the information could only be disclosed to the Board but not to the candidate seeking and/or opposing the Request for Review. Mr. Nyaoga further submitted that disclosure was not withheld because it is shameful but because it is something that the law prohibits and that being the position, the Board could not annul the award because of none disclosure or none supply information.

On the requirement that Tenderers be Original Equipment Manufacturers, Mr. Nyaoga submitted that the Interested Party was an Original Equipment Manufacturer. He argued that no definition or evidence was given by any of the Applicants to show that the Interested Party was not an Original Equipment Manufacturer. Mr. Nyaoga provided extracts from the *PC Magazine Encyclopedia* and the *Webopedia Computer Dictionary* in an attempt explain the meaning of the term an *Original Equipment Manufacturer*.

The extracts from the two dictionaries define an Original Equipment Manufacturer as follows respectively:

(Definition of OEM

a) Original Equipment Manufacturer) the rebranding of equipment and selling it. The term initially referred to the Company that made the products (the "original" manufacturer), but eventually became widely used to refer to the organization that buys the products and resells them. However, the OEM reseller is often the designer of the equipment, which is made to order.

Added Value or not

The reseller often does not add extra value to the equipment, but merely brands it with its own logo. The reseller's name is either placed on the devices by the contract manufacturer that makes the equipment or by the reseller itself. However, a reseller may indeed add value. For example, it might purchase a computer, add its own hardware and software and sell it as a turnkey system (see VAR)."

There are numerous companies that specialize in OEM manufacturing and never sell anything under their own brand (see contract manufacturer). Many companies do both, they manufacturer and sell retail, but also have separate OEM division for goods that are privately labeled.

b) OEM (Pronounced as separate letters) is short for Original Equipment Manufacturer, which is a misleading term for a company's product under their own name and branding.

While an OEM is similar to a VAR (value -added reseller), it refers specifically to the act of a company rebranding a product to its own name and offering its own name and offering its own warranty, support and licensing of the product. The term is really a misnomer because OEMs are not the original manufacturer; they are the customizers.

See also "What is an OEM Company " in the Quick Reference Section of Webopedia contrast with IHV (Independent Hardware Vendor).

Mr. Nyaoga therefore argued on the basis of that definition that his client was an Original Equipment Manufacturer because it works with customers, manufacturers and it gives end to end solutions. The Counsel for the Interested Party submitted that his client provided an ISO Certificate as required in the Tender Document but his client was not saying that it was an Original Equipment Manufacturer because it has an ISO Certificate which ordinarily works as a mark of quality.

On the issue that the Interested Party had not demonstrated past experience and financial capability, the Interested Party asserted in its submission that the allegation by the Applicants was not correct because the Interested Party participated in the Tender under a joint venture that met all the requirements and that the Interested Party and the joint venture met all the qualifications under Clause 11 of the Tender Date Sheet.

Mr. Nyaoga confirmed that the financial statements supplied by the Interested Party and the amounts set out therein were in Indian Rupees.

THE ISSUES FOR DETERMINATION BY THE BOARD

The Board having read all the documents submitted by all the parties to the two Requests for Review and having considered the oral and written submissions lodged with the Board, has framed the following issues for determination.

- (i) Whether or not the two Requests for Review meet the threshold set out in Section 93 of the Act and consequently whether the Board has jurisdiction to consider and determine the issues raised in the two Requests for Review.*
- (ii) Whether or not the Interested Party demonstrated that it had the financial, technical and production capability necessary to perform the contract as required by the provisions of Section 66 of the Act Clause 14.3 (b) of the ITT and Clause 11 of the TDS.*
- (iii) Whether or not the Interested Party submitted its Tender as a joint venture.*
- (iv) Whether or not the Interested Party was an Original Equipment Manufacturer and whether by allowing the Interested Party to participate in the Tender process beyond the preliminary evaluation stage the Procuring Entity breached the provisions of sections 31, 34 and 39 of the Public Procurement and Disposal Act by failing to comply with the criteria set out in the Tender Document.*
- (v) Whether or not the Procuring Entity awarded the Tender the subject matter of this dispute to the Interested Party at a price higher than that set out in the Form of Tender and whether such*

action, if any, was lawful or breached the provisions of Sections 2, 59, 62, 63 and 66 of the Act as read together with the provisions of Clause 6.3 and 16.8, 26.4, 28 and 29 of the ITT and Clauses 12 of the Tender Data Sheet of the Tender Document.

- (vi) Whether the notification of award was proper both in form and substance or was in breach of the provisions of Section 67 (2) of the Act, Regulations 66 of the Public Procurement and Disposal Regulations 2006, Regulation 19 of the Public Procurement and Disposal (Amendment) Regulations 2013 and Clauses 38 (3) and (4) of the ITT.*
- (vii) Whether or not the Procuring Entity failed to comply with the provisions of the evaluation criteria set out in Clause 29 of the ITT as read together with Clauses 22, 29 and 34 of the Tender Data Sheet and more particularly with respect to the 1st Applicant's contention that it was the Tenderer entitled to be given the first preference in undertaking a financial negotiation with the Procuring Entity after financial evaluation.*
- (viii) Whether or not the Procuring Entity breached the provisions of Article 227 of the Constitution of Kenya 2010 and Sections 44 and 45 of the Act.*
- (ix) What orders should the Board make in the regard to the two applications for Review?*
- (x) Who should pay the costs of the Requests for Review?*

The Board proceeded to Tender its decision, on each of the issues identified above in the order in which they are visited.

ISSUE (I)

- (i) **Whether or not the two Requests for Review meet the threshold set out in Section 93 of the Act and consequently whether the Board has jurisdiction to consider and determine the issues raised in the two Applications for Review.**

In its oral and written submissions the Procuring Entity invited the Board to examine the provisions of Section 93 and find that the Board did not have jurisdiction to hear and determine the Requests for Review since the Applicants for the Requests for Review questioned the process through which the Tender was awarded and that none of their complaints met the threshold under Section 93 of the Act, namely that the Applicants were candidates who had suffered or were likely to suffer loss or damage. While urging the Board to find that it has no jurisdiction to hear the dispute Mr. Kimani on the other hand urged the Board not to strike out the Application for Review and urged the Board to instead hear and determine the dispute on the merits since the Board had jurisdiction to do so. Mr. Kimani also readily conceded that the Applicants had the right to apply for Review to the Board in spite of the other remedies available to the Applicants.

The Board has examined all the complaints raised by the Applicants and notes that all relate to allegations of specific breaches of the Act and the Regulations.

The Board therefore has no difficulty in finding and holding that it has jurisdiction to hear and determine the two Requests for Review.

ISSUE NO. 2

(ii) **Whether or not the Interested Party demonstrated that it had the financial, technical and production capability necessary to perform the contract as required by the provisions of Section 66 of the Act Clause 14.3 (b) of the ITT and Clause 11 of the TDS.**

On this second issue framed for determination, the Board wishes to observe that the 1st and the 2nd Applicants alleged that the Interested Party did not have the requisite financial, technical and production capability necessary to perform the contract as required by the provisions of Clause 14.3 (b) of the Instructions to Tenderers and Clause 11 of the Tender Data Sheet. The Board notes with concern that while the Applicants took considerable time and effort on this fundamental issue, both the Procuring Entity and the Interested Party made general statements in answer to the allegations by the Applicants. It is noteworthy that neither the Procuring Entity nor the Interested Party filed any affidavits, audited accounts and or replying affidavits to deny the Applicants' assertions.

As earlier observed the issue of non compliance was principally raised by the 2nd Applicant underground 4 of its Request for Review and emphasized by the 1st Applicant in paragraph 6 of the Replying Affidavit sworn on 27th February, 2014 in Review No. 4 of 2014.

The answer from the Procuring Entity was a general statement at paragraph 14 of its Response to the Requests for Review No. 4 of 2014 where it stated as follows:-

“12 The Procuring Entity avers that the pre conditions of the Tender Data Sheet were met by all the technically and financially qualified bidders. The Review Board may refer to the Technical Evaluation Report”.

“13 A bid that did not comply with any requirement including the requirement mentioned in paragraph 4 of the Request for Review was disqualified from proceeding to the next stage”.

“14 under clause 11 of the TDS, the qualification criteria were met by either single entity or by all the partners combined in a JV, Consortium or association”.

The Interested Party which would have been the custodian of any evidence of compliance provided the following answers at paragraph 13 (viii) and (ix) of its Response to the Requests for Review No. 4 of 2014.

“13 (viii) in any case, the Interested Party has participated in the bid in joint venture with New Century Optonics, a Chinese top 500 enterprises and this JV fully met the criteria and the Tender documents and Clause 3 and 11 of the Tender Data Sheet”.

(ix) During the visit of the team of officials from the Procuring Entity to the manufacturing sites and offices in China and India it was verified that the experience of Olive JV and its contract

manufacturers facilities satisfy the criteria mentioned in the Tender Data Sheet."

There were no affidavits filed by either the Procuring Entity or the Interested Party to deny the claims by both Applicants, none either annexed financial statements or audited accounts to support compliance with the provisions of Clause 3 and 11 of the Tender Data Sheet to their responses.

The Board wishes to observe that under the provisions of Section 31 (4) of the Act, the Procuring Entity is required to determine whether a person is qualified. The Act further enjoins the Procuring Entity to carry out that determination using the criteria and the requirements set out in the Tender Documents described under Clause 34.3 which provides as follows:-

"34.3 - The determination will take into account the Tenderers financial, technical and production capabilities. It will be based upon an examination of the documentary/physical evidence of the Tenderers qualifications submitted by the Tenderer as well as such other information as the Procuring Entity deems necessary and appropriate factors not included in these Tender documents shall not be used in evaluation of the Tenders qualification".

Clause 29 of the ITT which is relevant to this issue provides that; *"the Tenders would be evaluated systematically by being submitted to (a) A preliminary evaluation (b) technical evaluation (c) Financial evaluation (d) post qualification where specified TDS.*

As rightly conceded by all the parties all Tenderers were required to comply with the following financial criteria under the provisions of Clauses 11 of the TDS and 14.3 (b) of the Instructions to Tenders (ITT).

- (i) Submit audited balance sheets or if not required by the law of the bidders country, other financial statements acceptable to the purchaser for the last three (3) years to demonstrate current soundness of the bidders financial position and its prospective long term profitability”.
- (ii) Minimum average annual turnover of 8 Billion Kenya Shillings or US\$ equivalent for or calculated as total certified payments received for contracts in progress or completed within the last three (3) years.
- (iii) The bidder must demonstrate access to or availability of financial resources such as liquid assets, unencumbered real assets lines of credit and other financial means other than any contractual advance payments to meet the following cash flow requirement.
Have an annual cash flow for Lot 1 in the sum of Kenya Shillings Three Billion (Kshs. 3,000,000,000).
- (iv) Demonstrate experience as a supplier in at least three(3) contracts within the last five (5) years with an average value of at least Kenya Shillings Five Hundred Million (Kshs. 500,000,000) that have been successfully and substantially completed and that are similar to the proposed goods and related services.

As was rightly submitted by Mr. Kimani on behalf of the Procuring Entity on the issue of the Board’s power to examine all the documents supplied to

it by the Procuring Entity, the Board has examined all the three bidders' original Tender documents and observes as follows:-

The Successful Bidder did submit Audited Balance Sheets and Accounts for the years 2010, 2011 and 2012, as was the requirement under Clause 11 of the TDS.

Upon further perusal of the bidders' original Tender documents, the Board observes that for the Successful Bidder, the audited accounts for the years 2010, 2011 and 2012 show an annual turnover of Indian Rupees 5,334,820.00, IR. 10,965,858.00, and IR. 590,046,579.00 respectively. When converted to Kenya Shillings at a rate of 1.00 Rupee to 1.30 Kenya Shillings, these would be KES 6,935,266.00, KES 14,255,615.40 and KES 767,060,552.70. These do not constitute a "*minimum average annual turnover of 8 billion Kenya Shillings or US\$ equivalent for Lot 1....., calculated as total certified payments received for contracts in progress or completed, within the last three (3) years.....*" as was the requirement in the Tender document under Clause 11 of the TDS.

The Successful Bidder had indicated in its attached "Statement of Compliance of Qualification Criteria mentioned in ITT Clause 14.3 (b) Read with TDS Clause 11" that they complied with the requirements of that Clause and that "*the average annual turnover of Olive and New Century Optronics (the purported Joint Venture Partners for this Tender) are attached herewith which should be read together*". However, the "combined" total revenue for both firms averages an amount of USD 18,188,000 (equivalent of KES 1,636,920,000) which is less than the required average of KES

8,000,000,000 annually. The bid therefore, ought to have failed to pass the preliminary evaluation stage.

The Experience Form submitted by the Successful Bidder indicated total contract amounts adding up to USD 4,167,899.50 which when converted to Kenya Shillings (at the conversion rate of USD 1 = KES 86.4886) amounts to KES 360,475,792.6957, which was below the required amount of KES 500,000,000 for Lot 1.

The Financial Resources Form filled by the Successful Bidder indicated a total amount of USD 75 million (equivalent to KES 6,486,645,000) which was above the minimum threshold of KES 3,000,000,000 for Lot 1.

On scrutiny of the Tender documents submitted by the Applicants (HP) and (M/s Haier Electrical Appliances Corp., Ltd) the Board observes that the bidders complied with the requirements of Clause 11 of the TDS by providing the required documents and, upon analysis, by fulfilling the conditions set under the said Clause 11 of the TDS on submission of audited balance sheets, minimum average annual turnover, financial resources and average value of at least three contracts in the last five years. The two bidders thus rightly qualified to proceed to the next stage of evaluation.

The Board further notes that the audited financial statements submitted by the Successful Bidder belonged to four different companies namely:-

- (i) Olive Global Holding private Limited
- (ii) Olive Telecommunications (Hongkong) Ltd.
- (iii) Olive Telecommunication PVT Ltd.

(iv) New Century Optronics Co. Ltd

This fact is confirmed by the due diligence report submitted to the Board by the Procuring Entity under item 3 headed **FINANCIAL DUE DILIGENCE**.

The submission of audited accounts was based on the Procuring Entity's and the Interested Party's contention that the Interested Party had submitted its Tender as a joint venture. The allegation of a joint venture appears both in the Procuring Entity's and the Interested Party's responses and the Board shall therefore proceed to examine the issue framed by it for determination on whether the Interested Party tendered as a joint venture.

One final issue on the issue of eligibility is that under this Tender a Tenderer was required to show experience in providing similar services over a period of the (5) years. The ISO Certificate provided by the Interested Party was only for one year, namely 2013. There was no certification adding upto a total of five years or any other evidence to show the experience of five (5) years.

The Board therefore finds that the Interested Party did not meet the mandatory requirements at the preliminary evaluation and therefore ought not to have been evaluated further beyond that stage.

ISSUE NO. III

(ii) Whether or not the Interested Party submitted its Tender as a joint venture.

Under the provisions of Clause 3 of the TDS, the Procuring Entity allowed a joint venture, consortium or an association of companies to participate in the bidding process.

Under the requirements set out in Clause 3.6, the joint bidders were enjoined to provide inter-alia the following information:-

- (i) The consortium must be registered in any country with the physical office and location of operation and attach a certificate of registration.
- (ii) In the case of a consortium assigned Memorandum of Understanding (MOU) or agreement between partners was to be produced.

The Board has examined the original Tender documents and all the documents filed by all the parties and found no evidence to prove that the Interested Party participated in this Tender as part of a consortium or a joint venture with any other company.

The Board's decision has been arrived at on the basis of the following reasons:-

- (i) It is clear on the face of the Interested Party's Tender that the Tender was solely submitted by M/s Olive Telecommunications PVT Limited which is in law a distinct and separate legal entity from any other company whatever its trading relationship may be with such other company.
- (ii) The letter of notification of award was made to M/s Olive Telecommunications PVT Limited and not to any joint venture or consortium of companies.

- (iii) Both the Procuring Entity and the Interested Party did not produce any affidavit and or other documentary evidence to prove the existence of any joint venture.

In view of the Board's findings under issues (ii) and (iii) above it is clear that the Interested Party not only failed to meet the mandatory threshold stipulated in the Tender Document but also that there was no joint venture between it and any other Company.

ISSUE NO. IV

(iv) Whether or not the Procuring Entity awarded the Tender the subject matter of this dispute to the Interested Party at a price higher than that set in the Form of Tender and whether such action if any was lawful and or breached the provisions of sections 2, 59, 62, 63 and 66 of the Act as read together with the provisions of Clause 6.3 and 16.8, 26.4, 28 and 29 of the ITT and Clause 12 of the Tender Data Sheet of the Tender document.

The 2nd Applicant in its Application for Review argues that the Procuring Entity acted contrary to the law by altering the Interested Party's bid announced at the opening of the BAFO by awarding the Interested Party an amount equivalent to Kshs. 1.4 Billion over and above what it had submitted in its BAFO.

It is clear from the evidence produced before the Board and particularly from the BAFO opening register and the notification of award dated 7th

February 2014 that whereas the Interested Party bidder had submitted a best and final offer of USD 268,899,669.69, the Procuring Entity awarded the Interested Party the Tender at a Tender sum of USD 284,813,957.69 reflecting an additional figure of USD 15,914,288 or an equivalent of 1.4 Billion Kenya Shillings over and above the figure announced at the opening of the BAFO.

The Board heard the arguments in support and opposition to this ground for review and has no hesitation whatsoever in arriving at the conclusion that the award of this bid to the Interested Party at a price higher than that contained in the Interested Party's Form of Tender as announced at the BAFO was in contravention of the Act, the Regulation and the Tender Documents.

Clause 16.3 of the ITT required that the price to be quoted in the Form of Tender be the total Tender price while Clause 16.8 of the ITT provided that the prices quoted by the Tenderer were to be fixed during the Tenderer's performance of the contract and was not subject to variation on any account other than as per Clause 12 of the TDS which recognized that the prices quoted were negotiable at the competitive negotiation stage and before submission of the Best and final offer.

The Board further finds that the following provisions of law are relevant for the consideration of this issue.

Section 59(3) of the Act provides that:-

“(3) The Procuring Entity shall not attempt to have the substance of a Tender changed.”

Section 62 of the Act on clarification of Tenders further provides that:-

“(1) The Procuring Entity may request a clarification of a Tender to assist in the evaluation and comparison of Tenders.

“(2) A clarification may not change substance of the Tender.”

Section 63 of the Act on Correction of arithmetic errors reads as follows:-

“(1) The Procuring Entity may correct an arithmetic error in a Tender.

“(2) The Procuring Entity shall give prompt notice of the correction of an error to the person who submitted the Tender.

“(3) If the person who submitted the Tender rejects the correction, the Tender shall be rejected and the person’s Tender security shall be forfeited.”

Section 66 of the Act on Evaluation of Tenders additionally provides as follows:-

“(1) The Evaluation and comparison shall be done using the procedures and criteria set out in the Tender documents and no other criteria shall be used.

“(2) The following requirements shall apply with respect to the procedure and criteria referred to in subsection (2) –

a) The criteria must, to the extent possible, be objective and quantifiable; and

b)

Clause 16.6 of the ITT is to the following effect:-

"16.6 prices indicated on the price schedule shall be entered separately in the following manner:

a) For goods offered from within Kenya:

(i)

b) For goods offered from Abroad:

(i) The price of the goods shall be quoted using the INCOTERM specified in Clause 12 of the TDS; and

(ii) The price for inland transportation, insurance, and other local costs incidental to delivery of the good from the port of entry to their final destination, if specified in Clause 12 of the TDS."

ITT Clause 26.4:- Financial Evaluation states as follows:-

"Tenders or modifications that are not opened and not read out at the Tender opening shall not be considered further for evaluation, irrespective of the circumstances. In particular, any discount offered by a Tenderer which is not read out at Tender opening shall not be considered further.

ITT Clause 32.1:- Financial Evaluation further states as follows:-

"Tenders determined to be substantially responsive will be checked for any arithmetic errors. Errors will be corrected as follows:-

- a) *If there is a discrepancy between unit prices and the total price that is obtained by multiplying the unit price and quantity, the unit price shall prevail, and the total price shall be corrected;*
- b) *If there is an error in a total corresponding to the addition or subtraction subtotals, shall prevail and the total shall be corrected and*
- c) *Where there is a discrepancy between the amounts in figures and in words, the amount in words will govern."*

The Interested Party sought to justify this astronomical inclusion into its Tender sum by arguing that the items giving rise to this figure were for additional services. When the Board took him through several of the items set out in the list of additional services such as the item on the one year, warranty, the cost of transport and many other items, Mr. Ajay from the Interested Party confirmed that these items had been provided for in the original Tender document and amounted to a repetition.

In view of the foregoing, the Board finds and holds that the inclusion of the figure of 1.4 Billion Shillings was unjustifiable and also contrary to the parameters set out and agreed upon by the parties at the BAFO negotiations namely that *the value of added services was to be free of charge and any services were to be offered at no extra cost to the Procuring Entity*. The Board also noted that the table containing these so called extra cost items was not signed or initialed against by the Procuring Entity.

ISSUE_NO. V

(v) Whether or not the Interested Party was an Original Equipment Manufacturer and whether by allowing the Interested Party to participate in the Tender process, the Procuring Entity breached the provisions of Sections 31, 34 and 39 of the Public Procurement and Disposal Act by failing to comply with the criteria set out in the Tender document.

It was generally agreed that this Tender was only open to Original Equipment Manufacturers (OEM's) and at no point during the submission by the parties did the Board hear any argument that this was not a mandatory requirement in this Tender.

It is plain from a reading of Clause 3 of the invitation to Tenders as read together with Clause 3.2 of the instruction to Tenderer and Clause 3 of the Tender Data Sheet that the Tender Document provided that only Original Equipment Manufacturers of the proposed hardware gadgets were eligible to participate in the Tender process. These two Clauses provide as follows:-

Clause 3 of the Invitation to Tender stated that:-

- "
- ***Only Original Equipment Manufactures (OEM) are eligible to bid.***
 -"

Clause 3 of the Tender Data Sheet (hereinafter referred to as the TDS) stated that:-

"3 - 3.6 Specify the evidence and information required.

-
• ***Manufacturers Commitment Form***
-
• ***The bidder must be an Original Equipment Manufacturer (OEM) of the proposed hardware gadgets. The bidder must be in a position to provide support/maintenance/up-gradation of all.***

The Procuring Entity is the Addendum No. 1 appearing at page 107 of the 1st Applicant's Request for Review while answering an inquiry raised under item 1 stated that only Original Equipment Manufacturers (OEM), were eligible to bid for all the three lots. This emphasis runs through a substantial part of the Procuring Entity's documents starting from the advertisement appearing at the hand written page 2 of the 1st Applicant's document which stipulates that is ***only Original Equipment Manufacturers who (OEM) are eligible to bid***".

What was in contention and in dispute before the Board was who an Original Equipment Manufacturer is.

All the parties who appeared before the Board offered various versions of who an Original Equipment Manufacturer is and referred the Board to

various dictionary meanings of the word or meanings arising from research conducted from the internet.

According to the first Applicant on Original Equipment Manufacturer means a company which manages the various stages of a life cycle of various products directly or through qualified contractors with the intention of distributing the resulting product either directly or through distribution and the term did not therefore just mean someone who designs a product.

The 1st Applicants further defined an Original Equipment Manufacturer as one who is engaged in production planning, factory process, logistics, warranty and support of the e-waste management systems and offers social responsibility.

The second Applicant defined an Original Equipment Manufacturer as *just meaning that*. Mr. Musangi then offered a definition of who an original Manufacturer is in a document annexed to his client's replying affidavit sworn on 26th February 2014. The document defined and distinguished what an OEM is as opposed to an ODM.

The second Applicant's counsel provided the Board with definitions of both terms and these definitions appear at pages 16 and 17 of this decision. Mr. Nyaoga's argument on this issue was that there was no evidence placed before the Board to demonstrate the allegation that the Interested Party was not an Original Equipment Manufacturer.

He provided definitions of what an Original Equipment Manufacturer is in the definitions which appear at pages 28 and 29 of this decision.

The Procuring Entity on the other hand submitted that the only evidence it used in determining whether an Entity was an Original Equipment Manufacturer was the ISO certification and confirmed that when it perused the Interested Party's bid document it established that the Interested Party had produced an ISO Certificate for 2013 and was therefore satisfied that the Interested Party was an Original Equipment Manufacturer.

It was the Procuring Entity's further submission that the due diligence conducted by the Procuring Entity confirmed that the so called joint venture between the Interested Party and its so called partners established that the Interested Party had factories and therefore qualified as an Original Equipment Manufacturer for the purposes of this Tender.

The Board must state at the outset that it found a lot of difficulty in determining this issue owing to the different and apparently conflicting definitions attached to the term by the different parties.

The Board therefore decided that the best way of determining this matter is by ascertaining whether the Procuring Entity had attempted to set out any a definition of what an OEM is in any of its documents.

Upon perusal of the Tender documents and all the other documents provided to the Board, the Board established that the Procuring Entity had indeed provided a definition of what it envisaged an Original Equipment

Manufacturer, to be in the due diligence report. The Procuring Entity's definition in the report is as follows:-

"An Original Equipment Manufacturer is the Company that owns the brand or trademark or patent of the products produced".

While an Original Device Manufacturer is defined as follows:-

"An Original Device Manufacturer is the Company that manufactures devices or device components on behalf of OEM's".

After giving the above definitions the due diligence team visited factories allegedly owned by *China New Century Optronics Company Limited, Elite Group Computers Ltd and Build Your Dreams Company Limited (BYD)* and arrived at the conclusion that owing to the fact that the Companies had *"joint venture agreements"* with the Interested Party, then the Interested Party had established that it was an OEM. The due diligence team stated at page 8 of the report that it only visited the 3 factories and two offices one of which was the Interested Party's office.

The Board has already found that the Interested Party was not in a joint venture with any other Company and that the Interested Party is not an Original Equipment Manufacturer and could not qualify as one on the basis of either Equipment or Devices produced by any other parties.

The Board must also give a purposive meaning to definition. The Board finds that by consistently insisting on the bidder being an Original Equipment Manufacturer, the Procuring Entity sought to procure the services of an entity that would assure it that the goods provided were

goods of repute and quality and that would withstand the test of time and be suitable for the purpose for which they were procured.

It is for this reason that the Board accepts the definition given to the term by the second Applicant as being the correct one namely that an "***Original Equipment Manufacturer for the purposes of this contract means a Company or firm that is responsible for designing and building a product according to its own specifications and then selling the product to another Company or firm which is responsible for its distribution.***"

The Board holds that a firm that did not demonstrate that it had a factory at due diligence cannot by any stretch of imagination perform any of the above functions.

The Board therefore finds that the Interested Party was not an Original Equipment Manufacturer and therefore did not meet the criteria set out in the Tender Document.

ISSUE NO. VI

(vi) Whether the notification of award was proper both in form and substance and or was is breach of the provisions of Section 67 (2) of the Act, Regulations 66 of the Public Procurement and Disposal Regulations 2006, Regulation 19 of the Public Procurement and Disposal (Amendment) Regulations, 2013 and Clause 38 (3) and (4) of the ITT.

The notification of award to the Successful Bidder contains sums that represent a difference between the sums that were offered by the Interested Party at BAFO and the final figure awarded to the Interested Party which represented a variation of 1.4 Billion Kenya Shillings. The figure also varies with that set out in the Form of Tender: The notification of award therefore contains a figure that can only amount to a substantive variation in the contract sum and is therefore invalid. The Board notes that the notification to the other two bidders did not contain the same information as that of the successful bidder.

The Board however notes that on the issue of transmission of the notification of the letter of award, Section 67 of the Act requires the notification of an award to be given to both successful and the unsuccessful bidders at the same time which was done in compliance with Section 67 of the Act.

Regulation 66(2) confers the unsuccessful party with the right to be informed in the letter of notification by the Procuring Entity of the reasons as to why his Tender was unsuccessful subject to the limitation under Section 66 (3) of the Act.

The Board therefore finds that the Letters of Notifications to the Applicants were not in the proper form as set out in the Tender although this did not prejudice the Applicants from moving the Board for Review.

ISSUE NO. VII

(vii) Whether or not the Procuring Entity failed to comply with the provisions of the evaluation criteria set out in clause 29 of the ITT as read together with clauses 22, 29 and 34 of the Tender Data Sheet and more particularly with respect to the 1st Applicant's contention that it was the Tender entitled to be given the first preference in undertaking a financial negotiation with the Procuring Entity after financial evaluation.

It was argued on behalf of the 1st Applicant that having been established as the lowest bidder at the first financial evaluation then it ought to have been given the first opportunity to negotiation with the Procuring Entity at the Best and Final offer stage.

All the parties including the 2nd Applicant contested this contention and reiterated that this Procurement was Specially Permitted Procurement which was governed by the terms upon which it was permitted and the provisions of the Tender document.

The Board has perused the terms of the permission and the provisions of clause 34.2 and 34.4 of the Tender document and respectfully disagrees with the 1st Applicant's submission on this point.

Clauses 34.2 to 34.4 provide as follows:-

"34.2 -The Procuring Entity will determine to its satisfaction whether the Tenderer that is selected as having submitted the lowest evaluated responsive Tender is qualified to perform the contract

satisfactorily in accordance with the criteria listed in ITT Clauses 13 and 14.”

“34.3 - The determination will take into account the Tenderer’s financial, technical and production capabilities. It will be based upon an examination of the documentary/physical evidence of the Tenderer’s qualifications submitted by the Tenderer, as well as such other information as the Procuring Entity deems necessary and appropriate Factors not included in these Tender Documents shall not be used in the evaluation of the Tenderer’s qualifications.

34.4- An affirmative determination/due diligence will be a prerequisite for award of the contract to the Tenderer. A negative determination will result in rejection of the Tenderer’s Tender, in which event the Procuring Entity will proceed to the next lowest evaluated Tender to make a similar determination of that Tender’s capabilities to perform satisfactorily.”

The parties voluntarily submitted themselves to a final stage called the Best and Final Offer without any protest. The Board therefore finds that terms of the contract document the Procuring Entity was entitled and was indeed within its power to negotiate with the bidder who satisfied the criteria under clause 34.2 to 34.4 after the opening of the Best and final offer and after being satisfied about the matters set out under clauses 34.2 and 34.4. The Board therefore finds no breach of the law by the Procuring Entity in this regard.

ISSUE NO. VIII

(viii) Whether or not the Procuring Entity breached the provisions of Article 22 of the Constitution of Kenya 2010 and Sections 44 and 45 of the Act.

The first and the second Applicant lamented that they had sought for and had been denied information by the Procuring Entity under the provisions of Sections 44 and 45 of the Public Procurement and Disposal Act and that such denial had handicapped the Applicants in their presentation of their Application for Review before the Board. Infact Mr. Musangi complained that he had been invited into a boxing ring with his one hand tied behind his back.

Both the Procuring Entity and Mr. Mohammed Nyaoga opposed that submission and contended that the Appricants were in fact not entitled to the information sought under the provisions of Sections 44 and 45 of the Act. In Mr. Nyaoga's view, Section 44 of the Act contained a general prohibition on disclosure of information while Section 45 only permitted for disclosure of such information but limited the disclosure subject to the exceptions set out under Section 44 (2). The Interested Party gave one of such exceptions to the rule that required the disclosure for the purposes of a review under part VII of the Act and that since it is only the Board which is empowered to conduct a review then the disclosure could only be made to the Board.

The Board finds that the provisions of Section 44 and 45 of the Act do not entitle a party to be provided with the evaluation reports of other bidders before a contract has been entered into and the Applicants request for such information was therefore premature.

ISSUE NO. IX

(ix) What orders should the Board make in the regard to the two applications for Review.

It was agreed by all the parties to this review that the subject matter of both Applications for review was a great public importance. It was also not contested that the project for which the Tenders were invited was a noble one which ought to be concluded with expedition and though various arguments were made before the Board, most of the submissions and grounds revolved around the Successful Bidder's eligibility to participate in the Tender process from the preliminary evaluation stage.

The Board has already determined that the Interested Party was not eligible to participate in this Tender and that the notification of the award made to it was defective both in form and substance.

Mr. Kimani Kiragu while relying on the decision in the case of **MEA Limited - Vs The National Cereals And Produce Board (Review No. 4 of 2012)** urged the Board to look at the wider picture and the general public interest involved in this matter.

De. Smith, Woolf and Jowell in their book titled **Judicial Review of Administrative Action** have defined a matter of Public interest as one that

seeks to confer some collective benefit to the general public or a section of the public.

The Supreme Court of Kenya in the case of *Hermanus Phillipus Steryn - vs - Govann Gneach - Ruscome (Supreme Court of Kenya Application NO. 4 of 2012)* held that a matter of Public interest may take different forms and the determination of what public interest is at any particular time depends on the circumstances of each case.

While we agree with Mr. Kiragu's general statement of the law, the Board finds that to ignore the clear provisions of a statute and or the regulations and or the requirements as to eligibility to participate in a Tender process would not be one way of promoting public interest.

The Public interest would however be best served by upholding the law and allowing this Procurement to proceed.

THE BOARD'S RULING

Considering and taking into account all the circumstances of this case and the Public interest involved in this matter and especially to the children and the youth of Kenya, the Board makes the following orders on the two Requests for Review.

- a) The Requests for Review by the first and the second Applicants dated 12th February 2014 and 14th February 2014 and lodged with the Board on 13th February, 2014 and 14th February respectively be and are hereby allowed.

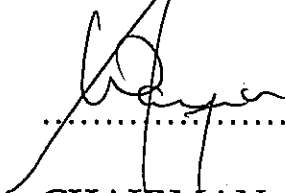
- b) The award of the Tender **NO: ICB/MOEST/7/2013 - 2014** for the supply, delivery, installation and commissioning ICT integration in devices and solutions for primary schools in Kenya Lot 1 to M/s Olive Communications PVT Ltd as contained in the Procuring Entity's notification of award dated 7th February, 2014 be and is hereby annulled.
- c) In Exercise of the Board's powers under Section 98 (b) the Board gives the following directions:
- (i) The Procuring Entity is directed to proceed with the Tender process from the point of the opening of the BAFO's and thereafter conduct due diligence in accordance with the criteria set out under Clauses 34.2, 34.3 and 34.4 of the Tender Document.
 - (ii) For the avoidance of doubt, the only parties that shall participate in the process in (ii) above shall be M/s Hewlett-Packard Europe, BV Netherlands and M/s Haier Electrical Appliances Corporation Ltd, the 1st and the 2nd Applicants in Application No 3 of 2014 and 4 of 2014 respectively.
 - (iii) The Procuring Entity shall complete the entire process including the making of an award within a period of 45 days from the date of this decision.

(iv) The Procuring Entity shall deduct any sum wrongly added onto the Tender sum of any of the two Applicants' best and final offers (BAFO's)

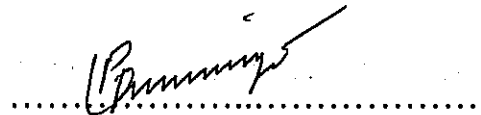
(v) The Procuring Entity shall take steps to extend the Tender validity period and extend the bid security for the two Tenderers for such period of time as is necessary to complete the process.

d) On costs, the matter under consideration was one of great public importance and the Board will in the circumstances therefore not make any orders as to costs on the two Applications.

Dated at Nairobi on this 11th day of March, 2014



CHAIRMAN
PPARB



SECRETARY
PPARB

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