

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**APPLICATION NO. 44 / 2011 OF 29<sup>th</sup> NOVEMBER, 2011**

**BETWEEN**

**ERICK OTIENO NYAMBETHA.....APPLICANT**

**AND**

**MINISTRY OF GENDER, CHILDREN & SOCIAL  
DEVELOPMENT.....PROCURING ENTITY**

Review against the decision of the Tender Committee of Ministry of Gender, Children and Social Development dated 12<sup>th</sup> September, 2011 in the matter of Tender No. P111545 - Expressions of Interest for Provision of Consultancy Services for a Social Protection Advisor.

**BOARD MEMBERS PRESENT:**

Mr. Mwaniki Gachoka	-	Chairman
Eng. Christine Ogut	-	Member
Mr. Sospeter Kioko	-	Member
Mr. Akich Okola	-	Member

**IN ATTENDANCE:**

Mr. C. R. Amoth	-	Secretary
Ms. Shelmith Miano	-	Secretariat
Mr. Leonard Otieno	-	Secretariat

**PRESENT BY INVITATION:**

**Procuring Entity – Ministry of Gender, Children & Social Development**

Mr. Franklin Esipila - Director of Administration  
Mr. Ahmed Hussein - Director of Children Services  
Ms. Irene M. Ogamba - Senior State Counsel  
Ms. W. F. Mwasiagi - Assistant Director  
Mr. David Njoroge - Procurement Consultant  
Mr. Hendrick N. Pilisi - Principal Supply Chain Management Officer  
Ms. Lydia Ciira - Supply Chain Management Officer

**Applicant - M/s Erick Otieno Nyambedha**

Mr. Namada Simoni - Advocate  
Mr. Erick Otieno Nyambedha - Lecturer

**Interested Candidate**

Ms. Nancy Nelima Nafula - Analyst

## **BOARD'S DECISION**

The Board has carefully listened to the submissions by the parties, and considered the documents before it and makes the following decision.

### **BACKGROUND OF AWARD**

#### **Advertisement:**

A request for Expressions of Interest for Consultancy Services for a Social Protection Advisor was advertised in the Daily Nation of November 12, 2010. The Procuring Entity stated in the advert that a consultant will be selected in accordance with the procedures set out in the World Bank's Guidelines for Selection and Employment of Consultants by World Bank Borrowers (current edition). Expressions of interest together with CVs were to be delivered to the Procuring Entity's postal address provided in the advert or by e-mail to [mwasiajiwf@yahoo.com](mailto:mwasiajiwf@yahoo.com).

#### **Closing/Opening:**

The deadline for submission of Expressions of Interest (EOIs) was 25<sup>th</sup> November, 2010. The Expressions of Interest were opened on 17<sup>th</sup> December, 2010. The following was recorded during the closing / opening of Expressions of interest:

<b>No.</b>	<b>Name</b>	<b>Adress</b>
1.	Pascal Kizito Achatch Wambiya	P.O. Box 205-00242 Kitengela
2.	Eric Otieno Nyambedha	Private Bag, Maseno
3.	John Murimi Njoka	P.O.Box12815-00100, NRB
4.	Clifford Burkley	63917538163 - Phillipines
5.	Mary Kigasia Amuyunzu Nyamongo	P.O.Box5043-00100, NRB
6.	Lia Ghebreab	lidikibreab@yahoo.com
7.	Warren Andrew Benfield	<a href="mailto:wnbenfield@yahoo.co.uk">wnbenfield@yahoo.co.uk</a>

8.	Solomon Onyango	s_ochow@yahoo.com
9.	Saul Butters	saulbutters@yahoo.co.uk
10.	Eve Odete	eveodete@yahoo.com
11.	Nancy Nelima Nafula Mwange	P.O.Box 20107 -0010 NRB
12.	Juliet Jogole Oling	julietoling@yahoo.co,uk

### Technical Evaluation:

The candidates were evaluated by a committee based on the following criteria:

No	Selection Criteria	Weighting	Score	Comments
1	<b>Education Qualifications</b>	<b>30</b>		
	PHD	5		
	Master Degree with specialization in any of the following discipline sociology, social work community development economics or any other relevant social science	20		
	Any Additional short courses on social protection	5		
2	<b>Experience</b>	<b>20</b>		
	Experience in working on social protection, social policy core poverty programmes			
	10 years and above	20		
	5 to 9 years	10		
	4 years and below	5		
	0 Years	0		
3	<b>Experience coordinating and managing social protection programme of a mainstream government department, donor or reputable organization dealing in social protection</b>	<b>15</b>		
	10 years and above experience	15		

	5 to 9 years	10		
	4 years and Below	5		
	0 years	0		
4	<b>Experience in working with government, donors ,NGO'S, or government agencies</b>	<b>10</b>		
	Over 10 years experience	10		
	5 to 9 years	7		
	4 years and Below	5		
	0 years	0		
5	Knowledge in social protection	<b>5</b>		
6	Good understanding of the government of Kenya planning and budgeting frame work	<b>10</b>		
7	<b>Communication</b>	<b>10</b>		
	Over 5 publications	10		
	Below 5 publications	5		
	No publication	0		
8	Computer skills	<b>5</b>		
	<b>Total Scores</b>	<b>100</b>		

Two candidates were not evaluated for reasons indicated against their names in the table below:

No.	Name	Reason for Disqualification
1.	Mary Kigisia Amuyunzu Nyamomgo	Withdrew
2.	Juliet Jogole Oling	Holds a BA Degree in Social Science

The Summary of the average technical scores for the 10 candidates evaluated was as tabulated below:-

<b>No.</b>	<b>Name</b>	<b>Final Scores (%)</b>
1.	Eric Otieno Nyambedha	90
2.	Pascal Kizito Achatch Wambiya	82
3.	Warren Andrew Benfield	80
4.	John Murimi Njoka	75
5.	Clifford Burkley	75
6.	Nancy Nelima Nafula Mwange	75
7.	Eve Odete	68
8.	Saul Butters	60
9.	Lia Ghebreab	52
10.	Solomon Onyango	30

The pass mark was set at 80%.

Based on the foregoing, the following were shortlisted for further consideration and selection of the most suitable candidate for the award of contract for a Social Protection Advisor:

<b>No.</b>	<b>Name</b>	<b>Final Scores %</b>
1.	Eric Otieno Nyambetha	90
2.	Pascal Kizito Achatch Wambiya	82
3.	Warren Andrew Benfield	80

The three consultants shortlisted for further consideration for the position were requested to indicate their Financial Proposal and their availability considering the fact that they may be currently engaged in other consultancy activities.

## Financial Proposals:

The Financial Proposals of the shortlisted candidates were as follows:

No.	Name	No. of days per month	Currency	Amount	Comments
1.	Eric Otieno Nyambetha	22	KES	594,000	
2.	Pascal Kizito Achatch Wambiya	22	KES	480,000	Inclusive of tax
3.	Warren Andrew Benfield	22	KES	630,000 - 1.8mln	

The Technical Evaluation Committee found M/s Erick Otieno Nyambetha to be the best technically qualified for the award of the consultancy. The consultant was called for negotiations but was found not to be able to continuously avail himself for the period of the consultancy.

The Technical Evaluation Committee then agreed to consider the next technically qualified candidate, Dr. Pascal Kizito Achatch Wambiya for the award of the consultancy for the Social Protection Advisor.

The Technical Evaluation Committee therefore requested the Ministerial Tender Committee (MTC) to adjudicate appropriately.

### **TENDER COMMITTEE DECISION**

The Ministerial Tender Committee (MTC) in its meeting No. 02/2011-12 held on 25<sup>th</sup> August, 2011 discussed the item and made the following observations:

- That the Social Protection Secretariat under the Ministry was in the process of procuring a Social Protection Advisor / Consultant to assist

the government to institutionalize social protection interventions within the government.

- That the received CVs were subjected to technical evaluation by a committee appointed by the Accounting Officer.
- That the World Bank procurement procedures and guidelines applied in this procurement.
- That the Technical Evaluation Committee recommended the second ranked candidate, Dr. Pascal Kizito Achatch Wambiya, for consideration of award of contract at Kshs 480,000 per month for twenty-two days a month for a period of twenty-four months as the highest ranked consultant, Erick Otieno Nyambedha, indicated during the negotiation that he would not be physically available over the contract period.
- That the contract period was two (2) years.
- That the cost of the contract was inclusive of the applicable taxes.

In view of the above observations, the Ministerial Tender Committee concurred with the technical evaluation report and made the award as follows:

S/No.	Item Description	Days in a month	Cost per month (KES)	Contract Price (KES)	Awarded Consultant
	Proposed Social Protection Advisor /Consultant as per TORs	22	480,000	11,520,000	Dr. Pascal Kizito Achatch Wambiya

Candidates were notified of the Tender Committee decision via letters dated 12<sup>th</sup> September 2011.



## THE REVIEW

The Applicant, M/s Erick Otieno Nyambetha lodged this Request for Review on 29<sup>th</sup> November, 2011 against the decision of the Ministry of Gender, Children and Social Development Tender Committee dated 12<sup>th</sup> September, 2011 in the matter of Tender **No.** P111545 – Expressions of Interest for Consultancy Services for a Social Protection Advisor. The Applicant was represented by Mr. Namada Simoni, Advocate while the Procuring Entity was represented by Ms. Winnie F. Mwasiaji, Assistant Director. The interested party present was Ms. Nancy Nelima Nafula of KIPPRA.

The Applicant requested the Board for the following orders:-

- (i) A review of the award of the contract for consultancy services for a Social Protection Advisor by the Ministry of Gender Children & Social Development and the cancellation of the award of the said contract to any other party.*
- (ii) That he be granted the contract having completed the process as the best ranked bidder and having gone through negotiations.*
- (iii) In the alternative that he be compensated in damages for the unlawful failure on the part of the ministry to award him the contract.*
- (iv) That he be paid the costs of bringing these proceedings.*

The Applicant raised thirteen grounds of appeal which the Board deals with as follows:-

### **Grounds 1, 2 and 6**

At the very outset the Applicant indicated that he would consolidate the above grounds and argue them together. The Applicant stated that he submitted a tender in response to an advertisement in the Daily Nation

Newspaper placed by the Procuring Entity by which services of an individual consultant were invited to support the Ministry in delivering its mandate on social protection by complimenting the efforts of its existing staff. He further stated that, following evaluation by the Procuring Entity of the bid submitted by himself and those of other bidders, his bid was ranked the best. In support of this statement, he pointed to paragraph 4 of the response by the Procuring Entity in which the Procuring Entity states that the Applicant scored 90% marks, which was the highest among the bidders.

The Applicant further stated that following the evaluation, he was invited by the Procuring Entity for negotiation on 3<sup>rd</sup> August 2011 at which four representatives of the Procuring Entity, among them, Winnie Mwasiaji and Lydia Ciira, were present. He submitted that at the negotiations, the issue of his availability to carry out the assignment was discussed, and he indicated to the representatives of the Procuring Entity that he would be available to undertake the consultancy within a period of two weeks from the time of receipt of the letter confirming the award. He stated that at the end of the negotiation, he left with the impression that he would receive a letter from the Procuring Entity confirming his engagement to carry out the services.

The Applicant further submitted that following the negotiations, he never received any further communication on the matter until he wrote a letter dated 2<sup>nd</sup> November 2011 to the Procuring Entity by which he inquired about the fate of his tender, whereupon the Procuring Entity informed him vide a letter dated 16<sup>th</sup> November 2011 that:

***"the contract for the above consultancy was concluded and all participants were informed accordingly of the outcome.***

***As for your case, the notification of award was sent via e-mail as per the attached copy on 13<sup>th</sup> October 2011 for your information."***

The Applicant argued that the above-cited letter of notification sent to him by the Procuring Entity did not constitute a valid notification for the reason that the e-mail address used by the Procuring Entity, which was **nyambedha@gmail.com**, was not the one he had given in his tender documents, which were **Erick.nyambetha@gmail.com** or **nyambetha@maseno.ac.ke**. The Applicant averred that the correct e-mail addresses had always been used in previous correspondence between the parties.

In response, the Procuring Entity stated that the procurement in question was advertised on 12<sup>th</sup> November, 2010. It further stated that following receipt of Expression of Interest from a number of bidders, it carried out evaluation of the bids in which the Applicant emerged the winner after scoring 90%. The Procuring Entity further stated that on 3<sup>rd</sup> August 2011, the Applicant was invited for negotiation in order to ascertain, among other things, the Applicant's availability to carry out the consultancy on a full time basis. It averred that during the negotiation, upon being asked to confirm his availability to work at the offices of the Procuring Entity in Nairobi as required, the Applicant informed the Procuring Entity that he would not be available on a full time basis in light of his commitment as lecturer at the Maseno University. The Procuring Entity further averred that the Applicant stated that he could carry out the assignment using such devices as teleconferencing, Skype, e-mail and other related forums, which in any event, are technologies which the Procuring Entity did not have.

The Procuring Entity submitted that upon realizing that the Applicant could not carry out the assignment on a full time basis, it contacted the second ranked bidder, Dr. Paschal Kizito Achatch Wambiya, and entered into negotiation with him on 25<sup>th</sup> August 2011. It stated that after the negotiations were completed with Dr. Wambiya, it notified all the bidders

of the outcome of the process by a letter dated 12<sup>th</sup> September 2011, which was transmitted by e-mail to each bidder. It further stated that following this notification, it signed a contract with Dr. Wambiya on 28<sup>th</sup> October 2011, and the consultant commenced working on 1<sup>st</sup> November, 2011.

As to the address used to communicate to Applicant, the Procuring Entity stated that the e-mail address used to send the notification letter to the Applicant, i.e. nyambedha@gmail.com, was extracted from the address listing by the Technical Evaluation Committee.

### **Grounds 3, 4, 5 and 11.**

The Applicant stated that the tender in question was governed by the World Bank Guidelines. In particular, he pointed to **Clause 2.30** of the Guidelines which states that:

*"If the negotiations with the highest ranked consultant fail, the Borrower shall inform the concerned consultant in writing of all pending issues and disagreements, and provide them a final opportunity to respond in writing ..... If there is still disagreement, the Borrower shall inform the consultant in writing of its intention to terminate negotiations. Negotiations may them be terminated after obtaining the Bank's no objection, and the next ranked consultant invited for negotiations. The Borrower shall furnish to the Bank for review the minutes of negotiations and all relevant communications, as well as the reasons for such termination.....After negotiations are successfully completed and the Bank has issued its no objection to the initialed negotiated contract, the Borrower shall promptly notify other firms on the short list that they were unsuccessful."*

The Applicant submitted that the Procuring Entity failed to comply with these guidelines as it did not:

- 1) notify the Applicant in writing that negotiations had failed;

- 2) notify the Applicant of any pending issues;
  - 3) notify the Applicant of the Procuring Entity's intention to terminate the negotiations.
  - 4) notify the World Bank that negotiations had failed.
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He argued that the Procuring Entity did not only flout the World Bank Guidelines but was also committed a flagrant breach of the Public Procurement and Disposal Act, (hereinafter referred to as the Act), and the Public Procurement and Disposal Regulations(hereinafter referred to as the Regulations).

While admitting that the procurement is subject to the World Bank Guidelines, the Applicant nevertheless submitted that the Act and the Regulations apply, and thus the Board has jurisdiction to adjudicate on the procurement pursuant to **Section 93(1)** of the Act, on the premise that:

- 1) Kenya resources are also being used in the procurement;
- 2) the object of the procurement is meant for the good of the public; and
- 3) the Board has oversight role and thus had a duty to ensure that the law was complied with.

Finally, the Applicant averred that as a result of these acts by the Procuring Entity, he had suffered personally as he had psychologically prepared himself to undertake the consultancy, and further that he had incurred financial loses.

Based on these grounds, he urged the Board to nullify the decision of the Procuring Entity to award the tender and the resultant contract to the Successful Bidder, and instead award the contract, as well as damages, to the Applicant.

In response the Procuring Entity denied having breached the World Bank Guidelines, and the Act and the Regulations. It stated that throughout the process it acted in good faith and without any ill-will towards the Applicant. In support of this contention, it pointed out that it evaluated the Applicant's Expression of Interest as the highest, and thereafter proceeded to invite him for negotiations. It stated that the only reason it did not enter into a contract with the Applicant was due to failure by the Applicant to commit himself to carrying out the assignment on a full time basis, and in a hands-on manner, as required by the Procuring Entity.

After hearing the submissions by the parties in all the grounds cited above, the Board is of the view that the whole case turns on the question as to whether it has jurisdiction to entertain this Application, taking into account the provisions of **Section 7(1)** of the Act, and the provisions of the tender document.

**Section 7(1)** of the Act states that:-

*"If there is a conflict between this Act, the regulations or any directions of the Authority and a condition imposed by the donor of funds, the condition shall prevail with respect to a procurement that uses those funds and no others."*

It is clear from this section that where there are conditions imposed by the donor of funds in respect to a procurement undertaken in Kenya using the donated funds, the conditions so imposed take precedence over the national law. As stated hereinbefore, the call for Expression of Interest for the consultancy was advertised in the Daily Nation Newspaper. Paragraph one of the notice states in part that "The Ministry of Gender, Children and Social Development (which is the Procuring Entity), has received *financing* from the Bank toward the cost of the National Protection Programme.....",

implying that the funds for the implementation of the consultancy are donated funds. Among other things, the said advertisement, at its paragraph three, states that "*A consultant will be selected in accordance with the procedures set out in the World Bank's Guidelines: Selection and Employment of Consultants by the World Bank: current edition.*"

True to this statement, bidders who responded to the notice were provided with a tender document entitled "Guidelines Selection and Employment of Consultants Under IBRD Loans and IDA Credits & Grants by World Bank Borrowers", thereby leaving them in no doubt as to which regulations would govern the tender in question. The introduction to the Guidelines sets out the purpose of the guidelines to be "*.....to define the Bank's policies for selecting, contracting, and monitoring consultants required for projects financed in whole or in part by a loan from the International Bank for Reconstruction and Development (IBRD).....*", thereby making it clear that a project, such as the one under consideration, insofar as it is financed by a loan provided by the World Bank, is subject to the Guidelines. That the project is financed by the World Bank is not in doubt as indicated by the advertisement for Expression of Interest referred to above and the tender document.

Notwithstanding the provision of **Section 7(1)** of the Act cited above; the clear statement in the advertisement of the Expression of Interest; provisions of the Guidelines; and indeed his own admission that the procurement is subject to the World Bank Guidelines; the Applicant has urged the Board to find that the Board has jurisdiction to entertain the Application. His arguments for this proposition are that: the procurement cannot be accomplished without deployment of some Kenyan resources; the process is meant for the good of the Kenyan public, which the Board has a

duty to protect; and that the Board has an oversight role, and thus a duty, to ensure that the law is complied with.

While the Board is sympathetic to the plight of the Applicant for the reasons stated in the observations which it makes hereinafter on the manner in which this matter has been handled by both the Procuring Entity and the World Bank, the Board finds its hands tied by the provision of **Section 7(1)** of the Act. In the view of the Board, this section resolves the conflict of law in favour of a donor of funds where its regulations are in conflict with the Act. Accordingly, the Board finds that insofar as the procurement is subject to the World Bank Guidelines, it lacks jurisdiction to deal with the matter.

The Board further notes that at the time the Application was filed, the Procuring Entity had already entered into negotiations with the second ranked consultant and signed a contract with him in accordance with the World Bank Guidelines. The Board further notes that the said contract is already being implemented as of 1<sup>st</sup> November 2011. In view of this finding the Board cannot deal with the merits of the Application. In the circumstance the Application fails.

The above findings notwithstanding, the Board is constrained to make the following observations.

The Board notes that the procedures for negotiations with the highest ranked consultant are clearly set out in **Clause 2.30** of the Guidelines. Briefly they are as follows:

1. If negotiations with the highest ranked consultant fails, the Borrower (Procuring Entity) shall inform the consultant in writing of all pending issues, and provide them a final opportunity to respond in writing;
2. If there is still disagreement, the Borrower shall inform the consultant in writing of its intention to terminate the negotiations.



3. Negotiations may then be terminated after obtaining the Bank's no objection, and the next ranked consultant invited for negotiations;
4. The Borrower shall furnish the Bank with the minutes of the negotiations and all relevant communications, as well as the reasons for such termination, for review;
5. Once negotiations have commenced with the next ranked consultant, the Borrower shall not reopen the earlier negotiations;
6. After negotiations are successfully completed and the Bank has issued its no objection to the initialed negotiated contract, the Borrower shall notify other consultants on the short list that they were unsuccessful.

There is no evidence that the first requirement set out above was ever complied with. According to the minutes of the negotiations which took place on 3<sup>rd</sup> August, 2011, it is recorded under the item "Availability" that *"The candidate could not confirm availability requirements of the Ministry. Currently he is serving as a lecturer at Maseno University and he would wish to continue with the lecture's job. The committee was of the view that the candidate could not carry out the two functions effectively and efficiently as per the demands of the assignment."*

There was no evidence tendered before the Board to show that the Procuring Entity ever wrote to the Applicant after the said negotiations to inform him of any pending issues, (in this case presumably his non-availability), thereby denying the Applicant an opportunity to either change his mind about his alleged non-availability, or confirm it. This is clearly a breach of the procedural requirement set out in **Clause 2.30**.

As regards the requirement set out under item 1 above, the issue of continuing disagreement, there was no evidence put before the Board to the effect that there were disagreements notified to the Applicant by the Procuring Entity in writing, of its intention to terminate the negotiations as

required by the Clause. What is clear is that following the negotiations on 3<sup>rd</sup> August 2011 cited above, the Procuring Entity proceeded to terminate the negotiations unilaterally, and in complete disregard of this procedural requirement.

Furthermore, before taking this unilateral decision, it was required that the Bank's no objection must be obtained. There was no evidence that this no objection was ever obtained. During the hearing the Procuring Entity informed the Board that a letter of 'no objection' had been obtained from the Bank at the beginning of the process. That letter was not produced before the Board for examination so as to enable the Board to establish its tenor. Be that as it may, that letter could certainly not deal with events taking place after its issue, because if that were to be the case, then there would be no need for the requirement that the Bank's no objection must be obtained before termination of negotiations. This action by the Procuring Entity, seemingly with the acquiescence of the Bank, was a breach of the guidelines.

According to the clause under consideration, it was clear that following procedural termination of negotiations, with the sanction of the Bank, the Procuring Entity could then invite the second ranked consultant for negotiations. The second ranked consultant was indeed invited for negotiations, which subsequently led to a contract being signed with him. However, all of this was done without following the procedures set out in the guidelines.

According to **Clause 2.30**, the Procuring Entity was required to furnish to the Bank for review the minutes of the negotiations and all relevant communications and reasons for termination. There was no evidence tendered before the Board to show that the minutes of the negotiations of

3<sup>rd</sup> August, 2011, were ever given to the Bank, nor was there any evidence provided to the Board to show that all relevant communications pertaining to the negotiations were furnished to the Bank. Furthermore, there was no evidence provided to the Board to show that the reasons for termination of the negotiations were ever provided to the Bank, for its review, as required under the clause in question.

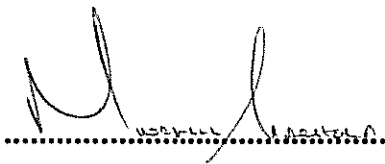
All these glaring gaps in the procurement process under dispute raises the question: what was the reasons for these elaborate procedures if they could be ignored with impunity, as indeed was the case in this matter? As we understand it the rationale for all the procedural safeguards in public procurement administration is to ensure that there is transparency, accountability, fairness to bidders, realization of value for money, and public confidence in the procurement function. This particular procurement, undertaken using the World Bank guidelines, undermine these values, especially in view of the fact that the Bank failed to ensure that the very rules which it prescribed for the procurement were violated with impunity by the Procuring Entity with its acquiescence.

This situation is aggravated by the fact that under the World Bank Guidelines there are no procedures for entertaining grievances by a dissatisfied bidder. The procedures under the Guidelines provide that after the Bank has issued its no objection to the initialed negotiated contract, the Borrower shall promptly notify other consultants on the short list that they were unsuccessful. Thereafter any aggrieved bidder is left to merely rue his misfortune. This explains the reason why in the instant case the Applicant has brought this matter before the Board, although the procurement is governed by the World Bank Guidelines. This lacuna in the World Bank Guidelines needs to be addressed urgently, for a procurement system without a bidder protest mechanism is likely to encourage the kind of

practice which is manifest in this procurement. One way to address the lacuna is for the Bank to consider using country systems.

Notwithstanding these procedural lapses, as already noted above, the contract has already been signed in accordance with the World Bank Guidelines, and is already being implemented. Accordingly, the Board has no power to annul the contract in accordance with **Section 93** of the Act.

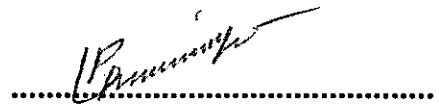
**Dated at Nairobi on this 22<sup>nd</sup> day of December, 2011.**



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**CHAIRMAN**

**PPARB**



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**SECRETARY**

**PPARB**