

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 23 OF 11TH JUNE, 2014

BETWEEN

**CHINA PETROLEUM ENGINEERING
& CONSTRUCTION CORPORATION.....APPLICANT**

AND

**THE KENYA PIPELINE
COMPANY LIMITED PROCURING ENTITY**

AND

**ZAKHEM INTERNATIONAL
CONSTRUCTION LIMITED.....1ST INTERESTED PARTY**

**KALPATARU POWER
TRANSMISSION LIMITED2ND INTERESTED PARTY**

CHINA WU YI CO. LTD.....3RD INTERESTED PARTY

Review against the decision of Kenya Pipeline Co. Ltd in the Matter of
Contract No.: SU/QT/032N/13 for Construction, Testing and
Commissioning of Line 1 Pipeline Replacement Project.

BOARD MEMBERS PRESENT

- | | |
|-------------------------|------------|
| 1. Paul Gicheru | - Chairman |
| 2. Peter B. Ondieki | - Member |
| 3. Nelson Orgut | - Member |
| 4. Mrs. Rosemary Gituma | - Member |
| 5. Mrs. Gilda Odera | - Member |

IN ATTENDANCE

1. Philip Okumu - Holding brief for Secretary
2. Shelmith Miano - Secretariat

PRESENT BY INVITATION

PROCURING ENTITY - KENYA PIPELINE COMPANY

- | | |
|---------------------|------------------------|
| 1. Gloria Khafafa | - Senior Legal Officer |
| 2. Eng. Billy Aseka | - Chief Engineer |
| 3. Maureen Mwenje | - Procurement Officer |
| 4. Morris Nyaga | - Procurement Officer |

APPLICANT REVIEW NO 23/2014 - CHINA PETROLEUM ENGINEERING & CONSTRUCTION CORPORATION

1. Thomas K'Bahati - Advocate

INTERESTED PARTIES

- | | |
|--------------------|--|
| 1. Charles Kanjama | - Kalpataru Power Transmission Ltd, Advocate |
| 2. Gathoni Kimani | - Kalpataru Power Transmission Ltd, Advocate |
| 3. Philip Jalang'o | - Kalpataru Power Transmission Ltd, Engineer |
| 4. Stephen Owino | - Advocate |

5. Tom Makumu - Clerk
6. Peter Liu - Legal Officer,
7. Wang - Legal Officer,
8. Waweru Gatonye - Zhakhem Corp, Advocate
9. Brian Omugana - Zhakhem Corp, Advocate
10. Risper Oloo - Zhakhem Corp, Advocate
11. Lu Shipeng - Sinopec Service, Marketing Dept
12. Lu Siwei - Sinopec Service , Engineer
13. Zhao Chengshu - Sinopec Service, Engineer
14. Ol Gaoshun - Sinopec Service, Manager
15. Maurice Olunya - Amacec Kenya Ltd, Technical Advisor
16. Han Jile - Avic, Area Manager
17. Kiprop Kiprono - Quarsarq Group, Manager
18. Geoffrey Kirui - Quarsarq Group, Manager

THE BACKGROUND OF THE AWARD

The Kenya Pipeline Company is to construct a new white oils pipeline from Mombasa to Nairobi to replace the existing Line-1. The new pipeline shall be tied in to 4 new pumping stations and subsequently decommission the existing pipeline.

The scope of the project is to supply, deliver, construct and commission a 20" diameter pipeline including laying of FOC within the KPC's ROW from Mombasa to Nairobi, optimize the use of the existing stations including the associated works and augment the system to allow for new facilities in the existing stations, including four pump stations (PS1, PS3, PS5 and PS7), four terminals (PS9, PS10, PS12 and PS14), and four future pump stations (PS2, PS4, PS6 and PS8). In addition, the project includes the

upgrade of existing fire fighting systems in existing stations and design of new fire fighting systems for new stations.

The subject tender was first advertised as an Expression of Interest (EOI) for the Construction of the Proposed Mombasa-Nairobi Petroleum Products Pipeline Project, on Wednesday 16th January, 2013 in the local dailies and the same closed on 28th February, 2013. Forty (40) EOIs were submitted and underwent evaluation, after which thirteen (13) firms were shortlisted to proceed to the next stage of tendering i.e. Request for Proposal stage (RFP). The Procuring Entity's Tender Committee, at its sitting TCM No. 22-2012/2013 of 16th April, 2013, approved the thirteen (13) shortlisted firms to proceed to the RFP stage. Both the successful and unsuccessful firms were informed of the outcome vide letters dated 25th April, 2013.

Pre-Qualified Bidders

No.	Name of Bidder
1	Zakhem International Construction Ltd
2	China Petroleum Engineering & Construction Corporation
3	Punj Lloyd
4	Samsung & CT Corporation
5	Denys NV and IOT Infrastructure Energy System -JV
6	Daewoo E&C
7	Avic International Holding Corporation and ZTPE Consortium-JV
8	Sinopec International Petroleum Service

9	China Wu Yi Company Ltd and Xinjiang Petroleum Engineering Ltd-JV
10	Essars Projects Limited
11	Saipem Busines Unit
12	Kalpataru Power Transmission Ltd
13	Technofab- Gammon Consortium

The Request for Proposal (RFP) documents were issued to the 13 shortlisted firms on 5th March, 2014. Following inquiries and requests for clarification and extension by some bidders and subsequent issuance of addenda, the closing date of 17th April, 2013 was extended from 8th May, 2014, and subsequently to 15th May, 2014.

At the closing date of 15th May 2014, nine (9) firms out of the following thirteen (13) prequalified firms submitted their bids for the tender for Construction of the Proposed Mombasa-Nairobi Petroleum Products Pipeline Project.

No.	Name of Bidder
1	Zakhem International Construction Ltd
2	China Petroleum Engineering & Construction Corporation
3	Punj Lloyd
4	Denys NV/IOT Infrastructure Energy System
5	Avic International Holding Corporation/ZTPE Consortium
6	Sinopec International Petroleum Service
7	China Wu Yi Company Ltd/Xinjiang Petroleum Engineering

8	Saipem Busines Unit
9	Kalpataru Power Transmission Ltd

The Preliminary Evaluation commenced on 22nd May, 2014. M/s Kalpataru Power Transmission Ltd and M/s Avic International Holding Corporation/ZTPE consortium were the two bidders that failed to satisfy all the mandatory requirements and thus did not qualify to move to the Technical Evaluation stage. The Technical Evaluation Committee proceeded to evaluate the tenders based on the criteria set out in the tender document. The results of the preliminary and technical evaluation were presented to the Procuring Entity's Tender Committee, and thereafter communicated to all the bidders on 26th May 2014.

Preliminary Evaluation

a) Mandatory Requirements

The preliminary evaluation was performed to ensure that the bidders met the mandatory requirements listed in Section 1 of the invitation to tenderers item 5 and section 4.1.1(a) and (b) of the tender (RFP) document set out the mandatory requirements which were as follows:

- a) Certificate of Incorporation of the Company/Business Registration for both foreign and local partner*
- b) Tax Compliance Certificate from country of domicile for both local and foreign firms*
- c) Tender security of USD 500,000.00 issued by a reputable bank operating in Kenya*

d) Certificate of registration as a contractor in the country of operation for foreign firms and National Construction Authority Certificate (NCA 1) for local partners.

From the preliminary evaluation the Board wishes to make the following key observations on the responsiveness of the each of bidders of tenders:-

1. KALPATARU POWER TRANSMISSION LIMITED

- a. The company did not submit a Certificate of registration as a contractor in the country of operation as required in the mandatory requirements. This was also noted in the tender opening minutes.
- b. The tenderer provided a tender security of USD 500,000 provided from I& M Bank Ltd with an expiry date of 05/10/2014. This according to the Procuring Entity did not conform to the tender security period indicated in clauses 3.6.1 and 3.6.2 of the tender document which required the tenderers to provide a bid security which would be valid for a period of Thirty (30) days after the validity period of 150 days.

2. AVIC INTERNATIONAL HOLDING CORPORATION

The Procuring Entity found that it's tender security of USD 500,000 from KCB valid up to 08/10/2014. This did not conform to the tender security period indicated in clauses 3.6.1 and 3.6.2 of the tender document which requires the tender security to be valid for 150 days from the date of tender opening.

From the preliminary evaluation, two bidders out of the nine bidders failed on mandatory requirements and therefore did not proceed to detailed technical evaluation. The bidders are:-

a. Kalpataru Power Transmission Limited

b. AVIC International Holding Corporation/ZTPE consortium.

The following bidders were considered to be responsive and proceeded to the detailed technical evaluation:-

No.	Name of Bidder
1	Zakhem International Construction Ltd
2	China Petroleum Engineering & Construction Corporation
3	Punj Lloyd
4	Denys NV
5	Sinopec International Petroleum Service
6	China Wu Yi Company Ltd
7	Saipem Business Unit

Detailed Technical Evaluation

The detailed technical evaluation was carried out as per Clause 5.5 of the Tender Document, which states that all responsive bidders shall be evaluated and scored against the criteria provided for in the tender document.

In accordance with the requirement set out in the Technical Evaluation criteria, only tenderers who pass the 75 per cent overall mark and 50 per cent each of the five evaluation criteria on the technical evaluation shall qualify to have their financial submissions opened and evaluated.

Table: Summary of the Detailed Evaluation

No.	Criteria	Name of Bidder						
		Denys	Sinopec	Punj Lloyd	China Wu Yi	Zakhem	Saipem	CPECC
1	Relevant Experience in the oil and gas pipeline projects for the last (15) fifteen years (30 marks)	20	30	30	20	30	30	30
2	Key personnel and competency for the assignment (20 marks)	13	15.2	15.6	16.6	20	10.4	15.6
3	Key Plant and Equipment (20 marks)	16	14.5	20	20	20	16.75	16
4	Technical approach and methodology for the works (20 marks)	17	13	17	13.25	18	17	20
5	Financial capability for the last five years (10 marks)	10	8	8	6	8	6	8
	TOTAL (100 marks)	76.0	80.7	90.6	75.9	96.0	80.2	89.6

THE FINANCIAL OPENING

The financial bids were opened on 3rd June, 2014. The following seven (7) firms submitted bids as shown in table 1 below

Table: Bidder's prices as opened

No.	Company	Tender price USD	Remarks
1.	M/S China Wu Yi Company Limited	456,855,018.00	Inclusive of VAT
	M/S China Petroleum Engineering and Construction Corporation	518,959,520.52	Inclusive of VAT
2.			
3.	M/S Zakhem International Construction Limited	484,502,886.40	Inclusive of VAT
4.	M/S Punji Lloyd	670,165,882.00	Excludes VAT
5.	M/S Saipem Business Unit Engineering Construction	796,430,000.00	Inclusive of VAT
6.	M/S Denys NV	475,866,042.00	Inclusive of VAT
7.	M/S Sinopec International Petroleum Service	489,351,915.00	Inclusive of VAT

FINANCIAL EVALUATION

1.1 Arithmetic Errors

There were no arithmetic errors noted.

1.2 Financial Scores

As per the bid document:

1. The technical score was to constitute 0.7 weight of the overall evaluation whereas the financial score shall take the remaining 0.3 weight.
2. The lowest bid price, X, shall attract 100% score in Financial Evaluation. Any other bid price, Y shall attract a Financial Score as below:-

$$\text{Financial Score} = (\text{Lowest bid price, X} / \text{bid price, Y}) * 100\%$$

The Bidders final Score shall be the summation of the technical and the financial marks subjected to the weights.

M/s China Wu Yi Company Limited submitted a tender with a bid amount of USD 456,855,018.00 which being the lowest sum offered was used to determine the financial threshold for the purposes of giving the scores.

Table 4: Summary of Financial Scores

No.	Company	Financial Scores
1.	M/S China Wu Yi Company Limited	100
2.	M/S China Petroleum Engineering and Construction Corporation	88
3.	M/S Zakhem International Construction Limited	94.3
4.	M/S Punji Lloyd	58.8

5.	M/S Saipem Business Unit Engineering Construction	57.4
6.	M/S Denys NV	96
7.	M/S Sinopec International Petroleum Service	93.4

2.0 THE FINAL COMBINED TECHNICAL AND FINANCIAL SCORE

The scores attained by each bidder were finally aggregated as required by Section 82(5) of the Act and were as follows:-

No.	Company	Technical Scores	Weighted 70% Technical	Financial Score	Weighted 30% Financial	Combined Score	Rank
1.	M/S China Wu Yi Company Limited	75.9	53.13	100	30	83.1	4
2.	M/S China Petroleum Engineering and Construction Corporation	89.6	62.72	88	26.4	89.1	2
3.	M/S Zakhem International Construction Limited	96	67.2	94.3	28.29	95.5	1
4.	M/S Punji Lloyd	90.6	63.42	58.8	17.64	81.1	6
5.	M/S Saipem Business Unit Engineering Construction	80.2	56.14	57.4	17.22	73.4	7
6.	M/S Denys NV	76	53.2	96	28.8	82	5
7.	M/S Sinopec International Petroleum Service	80.7	56.49	93.4	28.02	84.5	3

CONCLUSION

From the scores tallied in the summary table above and pursuant to the Provisions of Section 82(5) of the Public Procurement and Disposal Act 2005. M/S Zakhem International Construction Limited scored the highest combined Technical and financial score of 95.5% and was thus ranked top.

RECOMMENDATION

The Tender Processing Committee recommended the award of the tender to M/S Zakhem International Construction Limited for the proposed Line 1 replacement project at their quoted price of USD Four hundred and eighty four million, five hundred and two thousand, eight hundred eighty six and forty cents only (484,502,886.40), inclusive of VAT

THE REQUEST FOR REVIEW

The Applicant was dissatisfied with the Procuring Entity's decision and lodged an application for review challenging the award of the subject tender to the successful bidder. The Request for Review was lodged with the Board on 10th June 2014. The Applicant's application for review was supported by the affidavit sworn by one Mr. FAN ALI on 10th June 2014 and to which he annexed several documents.

The Procuring Entity (the Respondent) filed a 24 paragraph Response in answer to the Applicant's Request for Review. The Response is dated 16th June, 2014. The Procuring Entity also filed two Replying Affidavits sworn by Nancy Rono and Nicolas Gitobu respectively in opposition to the Applicant's Request. The successful bidder which the Board shall herein after refer to as the 1st Interested Party filed a Memorandum of Response and

a Replying Affidavit sworn by one Adnan Annous. The two documents are dated and were filed with the Board on 20th June, 2014.

The 2nd Interested Party M/s Kalparatu power transmission Ltd filed grounds of opposition while the 3rd Interested Party did not file any Response, grounds and or a Replying Affidavit in support or in opposition to the Request for Review.

The Applicant and the 1st Interested Party framed issues for determination. The Board has looked at the Request for Review, the responses filed, the Supporting Affidavit and the Replying Affidavits and finds that the statement of issues dated 16th June, 2014 and which was filed by the Applicant on 20th June, 2014 aptly captures the issues raised for determination in this application.

The statement of issues filed by the Applicant set out the following as the issues that fell for determination in the Request for Review.

- (1) *Whether the Procuring Entity breached the provisions of Section 82 of the Act as read together with clauses 3.6.1 and 3.6.3 of the Tender Document when it accepted the tender security by Ecobank Nigeria Limited on behalf of the successful bidder.*
- (2) *Whether the Procuring Entity breached the Provisions of Section 82 of the Act as read together with clause 3.7 of the tender document by accepting the tender price of the successful bidder.*
- (3) *Whether the Procuring Entity breached the provisions of Section 82 of the Act as read together with the addendum No.5 dated 17th April 2014 in awarding the to tender the successful bidder which did not provide a sub-contract agreement with a local company.*

- (4) *Whether the Procuring Entity violated the Provisions of Article 227 of the Constitution.*
- (5) *Whether or not the Applicant's request for review was time barred.*
- (6) *Whether the Applicant has suffered loss and damage.*

During the hearing of the Request for Review, the Applicant was represented by Mr. K'Bahati Advocate while the Procuring Entity and the successful bidder were represented by M/s Gloria Khafafa and Mr. Waweru Gatonye respectively. Two other interested parties namely M/s Kalpataru Power Transmission Limited and M/s China Wu Yi were allowed to participate in the proceedings as Interested Parties pursuant to the Provisions of Section 96 of the Act. The two parties were represented by Mr. Charles Kanjama and Mr. Stephen Owino respectively.

The Board wishes to observe that though the Applicant framed Six (6) issues for determination, the Applicant confined his submissions to issues 1, 2, 3, 4 and 5 and abandoned issue no. 6. The Board further observes that although the Applicant raised the issue of the 1st Interested Party's lack of experience in ground 1.23 of its Request for Review, the Applicant did not frame any issue on the 1st Interested Party's lack of experience and did not address the Board on the issue of the 1st Interested Party's lack of experience.

All the advocates who appeared before the Board made their respective Submissions in support and or opposition to the Applicant's application for Review and the Board will now proceed and examine and render a determination on each of the issues framed for determination.

But before proceeding to deal with those issues, the Board has considered the issue raised by the Procuring Entity (Respondent) and the 1st Interested Party that certain grounds raised by the Applicant in this application were time barred. The Board has also read through the Request for Review, the affidavit in support thereof and the written responses and the Replying Affidavits filed in opposition to the Request for Review and has also considered the arguments on the issue of whether the Request for Review was filed out of time and finds that the issue cannot be determined independently without a consideration of the facts in support or in opposition of each respective ground of Review. The Board will therefore consider the issue of whether any of the grounds set out in the grounds of Review is time barred while addressing the particular ground and the determination on this issue will therefore be made in the Board's decision on each of the issues framed by the Applicant for determination.

As a starting point and before determining the issues before it, the Board finds it necessary to set out the relevant law on who bears the burden of proof in a Request for Review filed before the Board.

The Board held in the case of **Man Diesel S.E.V -vs- Kenya Electricity Generating Company Ltd (Application No. 45 of 2009)** that the burden of proof of any allegation of breach of any of the requirements of the Act or the Regulations lies with the Applicant and that it was not the function of the Board to carry out investigations on claims made by the parties to a Request for Review.

The Board will therefore proceed and determine the Request for Review before it bearing in mind that the burden of proving any allegation of the breach of any Provision of the Act and the Regulations lies with the Applicant.

ISSUE NO.1

Whether the Procuring Entity breached the provisions of Section 82 of the Act as read together with clauses 3.6.1 and 3.6.3 of the Tender Document when it accepted the tender security by Ecobank Nigeria Limited on behalf of the successful bidder.

On the issue of the tender security, counsel for the Applicant referred the Board to page 3 of the replying affidavit sworn by **Mr. Nicolas Gitobu** and particularly to annexure NGB and stated that it was clear from that document that the tender security given by the successful bidder in this matter was given by Ecobank Nigeria Limited. **Mr. K' Bahati** referred the Board to an email which was annexed to the affidavit of **FAN LI** in support of the argument that Ecobank Nigeria Limited was supervised and regulated by the Central Bank of Nigeria as well as the National Deposit Insurance Corporation of Nigeria. The annexure was however not marked and did not bear a commissioner of oath's stamp or any signature on it. He therefore argued on the basis of the email that Ecobank Nigeria Limited was a foreign bank regulated by a foreign institution yet the tender document required that such a bank ought to have been a local Bank regulated by the Central Bank of Kenya under the Provisions of the Central Bank Act and the Banking Act. The

Applicant stated that it did not know how reputable Ecobank Nigeria Ltd was because it was not a local bank.

Counsel for the Applicant therefore urged the Board to find that the Procuring Entity erred for not having disqualified the 1st Interested Party at the Preliminary evaluation stage for not meeting the mandatory requirement on tender security and proceeded to further submit that if the Procuring Entity had disqualified the Interested party at that stage the Applicant would have emerged as the lowest evaluated bidder.

Mr. K' Bahati urged the Board to therefore annul the award made in favour of the successful bidder and award the subject tender to the Applicant based on what he saw as a breach of the requirement on tender security among other grounds which the Board will consider in the other remaining issues framed for determination in this application for Review.

In answer to the issue of the tender security, counsel for the Procuring Entity started off her submissions by stating that the use of the words a local bank by counsel for the Applicant was not accurate and that the term "**a local Bank**" was a creation of the Applicant. The Procuring entity stated that there was no requirement in the tender document requiring that the bid security was to be provided by "**a local Bank**" and while relying on the requirement appearing at **page 7 of 85** of the tender document, the Procuring Entity stated that the requirement in the tender document was that the tenderer submits a tender security of USD 500, 000 issued by a reputable Bank operating in Kenya and that at no point did the Procuring Entity ever require that the tender security be provided by "**a local Bank**" as the Applicant and the 2nd Interested Party sought to urge.

Counsel for the Procuring Entity further argued that Section 57(2) of the Act gave the Procuring Entity the right to determine the form and the amount of the tender security subject to such requirements or limits as may be prescribed. Counsel referred the Board to the Provisions of Regulation 41 (4) of the Public Procurement and Disposal Regulations 2006 which provides that no tender Security shall be accepted under the Act unless such security is valid for a period of at least thirty (30) days after the expiry of the tender validity period and that this according to counsel for the Procuring Entity left the discretion of determining the form and the amount of the tender security on the Procuring Entity. Counsel for the Procuring Entity stated that in exercise of that discretion the Procuring Entity chose a form which required security to be provided by the Bidders from a reputable Bank operating in Kenya.

Counsel for the Procuring Entity argued that this requirement had been met by the 1st Interested Party since Ecobank Limited was a leading Pan African Bank with operations in 35 countries across the continent more than any other bank in the world and that it currently operates in several countries in West, Central, East and South Africa including Kenya and Nigeria.

Counsel for the Procuring Entity stated that the reason why the Procuring Entity required a bid bond from a reputable bank operating in Kenya was in order to be able to encash the bid security should any of the situations set out in the tender document arise and for that reason it wanted an assurance that should any of the condition set out in the tender document be reached then the bid security could be encashed in a bank operating in Kenya.

The Procuring Entity further submitted that it wrote letters to all the Banks that provided the bid securities for the firms which participated in the tender and that only two banks namely, I & M Bank and Ecobank Limited responded to the request.

Counsel for the Procuring Entity stated that Ecobank Kenya Limited confirmed the validity of the bid bond. The Procuring Entity then referred the Board to the Letter of confirmation dated 13th June 2014 issued by Ecobank Kenya Limited which was annexed to the affidavit of **Mr. Nicolas Gitobu** sworn on 19th June 2014 and which was produced as annexure NGC which not only confirmed that if the bid bond was presented to Ecobank Kenya Limited it would honour the guarantee. The letter also confirmed that both Ecobank Kenya Limited and the Ecobank Nigeria Limited were part of the Ecobank group with operations in 36 Countries.

Counsel for the Procuring Entity concluded her submissions by stating that the Procuring Entity was therefore right in the manner in which it established and found that the bid security provided by the successful bidder was actually a proper security for the purposes of this tender.

Mr. Waweru Gatonye on behalf of the successful bidder associated himself with the submissions by counsel for the Procuring Entity. Counsel for the successful bidder/the interested party stated that what the Procuring Entity was looking for was a tender security provided by a reputable bank that has operations in Kenya with the ultimate purpose that in the event that the need arose it would be able to encash the bid security without having to cross

borders to enforce it. The 1st Interested Party submitted that the bid bond provided by his client met the requirements more so because clarifications that were made after the Procuring Entity had carried out due diligence confirmed that the tender security was good enough since the results of the due diligence confirmed that the tender security could be encashed in Kenya. Counsel for the 1st Interested Party urged the Board not to encroach on a matter reserved to the Procuring Entity unless the Procuring Entity acted wrongly or had endangered the purpose of the bid security.

Mr. Kanjama who appeared on behalf of the 2nd Interested Party started off his submissions by stating that he supported part and was opposed to the other part of the Applicant's case. On the issue of the bid bond, **Mr. Kanjama** urged the Board to carefully look at the provisions of paragraph 3.6.1 of the tender document which according to him required a bidder to provide a tender security in the form of a Bank guarantee or a bid bond issued by a reputable bank operating in the Republic of Kenya.

Mr. Kanjama submitted that his interpretation of that provision was that such a bank could only mean a local bank that was registered under the Provisions of the Banking Act and which was regulated by the Central Bank of Kenya under the Provisions of the Central Bank of Kenya Act and the Banking Regulations issued by the Central Bank of Kenya. **Mr. Kanjama** stated that he had perused the documents that the Procuring Entity had referred to and which was annexed to the replying affidavit of Nicholas Gitobu and noted that the letter dated 13th June, 2014 emanated from Ecobank Nigeria Limited. (The letter was however not from Ecobank Nigeria Limited

but from Ecobank Kenya Limited). **Mr. Kanjama** submitted that the successful bidder therefore failed to comply with a mandatory requirement and should have been measured using the same yard stick which was applied against his client, Kalpataru Power Transmission Limited and ought to have been similarly disqualified.

Mr. Stephen Owino for the 3rd Interested Party associated himself with the position taken by the Applicant and the 2nd Interested Party. Mr. Stephen Owino submitted that the purpose of a bid bond was to enable the Procuring Entity encash it in the event that there was default on the part of the bidder. The 3rd Interested Party further submitted that the bid bond had to be issued by a **local bank** and wondered whether the Procuring Entity would have to go to Nigeria in order to encash the bid bond. He additionally stated that it would have been understandable if the letter of confirmation came from Ecobank Kenya Limited.

The Board has heard and considered the submissions made by all the parties regarding the issue of the bid bond and finds that under the Provisions of Section 57 of the Public Procurement and Disposal Act 2005 as read together with the Provisions of Regulation 41(4) of the Public Procurement and Disposal Regulations 2006, the Act and the Regulations permit the Procuring Entity to require that tender security be provided by tenderers.

Section 57 of the Act stipulates as follows:-

- (i) A Procuring Entity may require that the tender security be provided with the tenders.*

- (ii) *The Procuring Entity may determine the form and amount of the tender security subject to such requirements or limits as may be prescribed.*

Regulation 41(4) of the Public Procurement and Disposal Regulations 2006 on the other hand states as follows:-

"No tender security shall be accepted under the Act unless such security is valid for a period of at least 30 days after expiry of the tender validity period."

Section 66 of the Act which is also relevant to this application enjoins a Procuring Entity to prepare tender documents and set out the criteria on the basis of which such tenders shall be evaluated.

Pursuant to the powers conferred upon it by law, the Procuring Entity issued out Requests for Proposal to tenders and one of the requirements in the Request for Proposals which all bidders were required to comply with was to provide a tender security. This requirement is contained in clauses 3.6.1 to 3.6.3 which reads as follows:-

"3.6.1 The tenderer shall furnish as part of security as part of his tender, a tender security in the amount of USD 500, 000 in the form of a Bank Guarantee or Bid Bond issued by a reputable bank operating in the Republic of Kenya."

"3.6.2 The tender security shall be valid for at least thirty (30) days beyond the tender validity period."

3.6.2 Any tender not accompanied by an acceptable tender security will be rejected by KPC as non responsive."

None of the parties to this application took issue with the tender validity period or any other aspect of the tender security provided to the Procuring Entity by the successful bidder. The only contest was however on whether the successful bidder had submitted a tender security that complied with the requirements of clause 3.6.1 of the tender document, namely, a tender security issued by a reputable Bank operating in the Republic of Kenya.

It was not in dispute that the tender security submitted by the successful tenderer was issued by Ecobank Nigeria Limited. It was however the Applicant's view that the tender security did not meet the requirements of clause 3.6.1 of the tender document since Ecobank Nigeria Limited was not a local Bank registered in the Republic of Kenya and further that neither the successful bidder nor the Procuring Entity produced any evidence to show any connection between Ecobank Nigeria Ltd and Ecobank Kenya Limited.

The Procuring Entity which was supported by the 1st Interested Party countered this argument by stating that what the tender document required was a tender security from a reputable bank operating in Kenya and that from all the available evidence Ecobank Limited was a leading Pan-African Bank with operations in 35 countries across the continent and currently operated in West, Central, East and south Africa including Kenya and Nigeria.

The Board has considered the rival arguments made by the respective parties to this application for Review on this issue and finds on the basis of the documents placed before it and particularly on the basis of the document at the hand written page 7 of the Applicant's own request for review that Ecobank Limited currently operates in 35 Countries across the continent and in other Countries in the World including Kenya and Nigeria. This position is again captured in the Applicant's document at page 7 of its own Request for Review as follows:-

"The Group Today.

Today Ecobank is the leading Pan-African Bank with operations in 35 countries across the continent more than any other bank in the world it currently operates in countries in West, Central, East and Southern Africa namely Angola, Benin, Burkina Faso, Burundi, Cape Verde, Cameroon, Central African Republic, Chad, Congo, Brazzaville, Democratic Republic of Cogo, Cote d'Ivoire, Equatorial Guinea, Ethiopia, Gabon, Ghana, the Gambia, Guinea, Guinea Bissau, Kenya, Liberia, Malawi, Mali, Niger, Nigeria, Rwanda, Sao Tome & Principe, Senegal, Sierra Leone, South Africa, South Sudan, Tanzania, Togo, Uganda, Zambia and Zimbabwe. The Group also has a licenced operation in Paris and representative offices in Beijing, Dubai, Johannesburg, London and Luanda."

The Board has also examined the letter of guarantee/security provided by the successful bidder and which was produced by the Procuring Entity and was annexed to the supporting affidavit of Nicholas Gitobu as annexure NGB

and the letter of confirmation dated 13th June, 2014 issued by Ecobank Kenya Limited and has observed that both letters bear the letter head "Ecobank. The Pan African Bank."

The letter dated 13th June 2014 and which was signed by the Managing Director – Cluster Head East Africa and the Country Head Corporate Bank reads as follows:-

*The Managing Director,
Kenya Pipeline Company Limited,
P.O. Box 73442,
Nairobi.*

Dear Sir,

RE: GUARANTEE NO.ENG/G03339A FOR USD 500, 000 BY ORDER OF ZAKHEM CONSTRUCTION NIGERIA LIMITED ON BEHALF OF: ZAKHEM INTERNATIONAL CONSTRUCTION LIMITED

We refer to Guarantee no. ENG/G03339A for USD 500, 000 dated 2nd May 2014, by order of Zakhem Construction Nigeria Limited on behalf of Zakhem International Construction Limited.

We hereby add the confirmation of Undertaking of Ecobank Kenya Limited to honour any claim presented through Ecobank Kenya on the guarantee as per terms of issuance for the said guarantee.

Ecobank Kenya Limited is registered to do business in Kenya. Both Ecobank Kenya Limited and Ecobank Nigeria Limited are part of Ecobank group with operations in 36 countries in Africa including Kenya.

Yours sincerely
ECOBANK KENYA LIMITED

signed
Enouman Kassi

signed
Peter Makau

In the said letter the authors were not only confirming that Ecobank Kenya Limited would honour any claim presented to it on the guarantee but were also confirming that Ecobank Kenya Limited is registered to do business in Kenya and further that both Ecobank Kenya Limited and Ecobank Nigeria Limited are part of the Ecobank group with operations in Africa including Kenya.

The Board has also examined the minutes of the tender opening held on 3rd April, 2014 at the Procuring Entity's head office. The Board notes that all the tenderers were invited and were represented at the said tender opening meeting held on 3rd April, 2014. The records which were availed to the Board pursuant to the provisions of Section 44 of the Act show that the Applicant was represented by **Mr. Fan Li** who swore the Affidavit in Support of the application for Review before the Board and who identified himself as the managing director of the Applicant at paragraph 1 of the said affidavit which was sworn on 10th June, 2014.

The minutes of the tender opening meeting held on 3rd April, 2014, show that the tender opening committee inter-alia read out the contents of the tender securities provided by all the tenderers. The particulars of the 1st Interested Party which was listed as tenderer No. 7 were read out in that meeting in the presence of Mr. Fan Li.

Minute No. 5 of the tender opening meeting held on 3rd April, 2014 and which the Board finds relevant for the purposes of the determination of this issue read as follows:-

Minute 5 – Comments from floor

On the completion of the opening and confirmation that all the schedules had been checked and countersigned by the tenderers representatives the tenderers were released. There being no other business the meeting closed at 11.55 a.m.

Before arriving at its final decision on the first issue, Board further wishes to observe that the tender document set out the form and purpose of the tender security and the performance security at **pages 73 of 85 and 74 of 85** in the tender document.

The form of tender security clearly outlined the conditions and the purposes of the tender security under items 1, 2 and 3 of the said document namely; that the Procuring Entity would have recourse and enforce the tender security:-

1. If after tender opening the tenderer withdraws his tender during the period of Tender validity specified in the instructions to tenders or
2. If the tenderer does not accept the correction of his tender price pursuant to clause 5.7 of the Instruction to tenderers or
3. If the Tenderer having been notified of the acceptance of his tender by the Employer during the period of tender validity:-
 - (a) Fails or refuses to execute the form of agreement in accordance with the instructions to Tenderers if required; or
 - (b) Fails or refuses to furnish the performance security in accordance with the instructions to tenderers

The tender document then set out the form of the performance security that the successful bidder was required to execute if awarded the tender at **page 75 of 85** of the tender document.

The Board has considered all the arguments and the documents submitted by the parties alongside the documents submitted to it under the Provisions of 44 of the Act and finds that on the basis of the letter of confirmation dated 13th June, 2014 issued by Ecobank Kenya Limited and whose contents the Board has set out in this decision that both the Ecobank Nigeria Limited and the Ecobank Kenya Limited are part of the Ecobank group with operations in 36 African and other countries including Kenya.

Ecobank Kenya Limited the said letter dated 13th June, 2014 confirmed this position and further confirmed that it was ready to honour the bid security if it was presented to it in the event that the 1st Interested Party failed to observe any of the requirements set out in the form of tender security.

Based on that confirmation, the Procuring Entity could therefore enforce the tender security if any of the events set out at **page 73 of 85** on the tender security occurred. The Procuring Entity accepted this assurance as satisfactory. The Board finds no basis in the Applicant's complaint that the tender security was not satisfactory as the successful bidder did not owe the Applicant any obligation under the requirement under item 3.6.1. The security was to be issued in favour of and give an assurance to the Procuring Entity and not to the Applicant.

The Board further finds and holds that the Applicant had notice of the particulars of the successful bidder's bid security on 3rd April, 2014. Mr. Fan Li was present at the meeting held on that day when the tender committee

inter-alia opened and read out the particulars of the tender securities provided by each bidder. The Applicant through its Managing Director Mr. Fan Li therefore had notice of the particulars of the 1st Interested Party's bid security on that day and should have objected to the bid security on the floor or filed a Request for Review seeking to declare the 1st Interested Party's bid non-responsive within Seven (7) days from 3rd April, 2014 when he became aware of the particulars of the tender security provided by the successful bidder.

The Board has set out the purpose of the bid security bond and the performance bond. These two forms of securities are distinct and are for different purposes. A bid bond is meant to ensure that a tenderer meets its obligation upto the point of ensuring that the successful bidder executes the contract after which he must provide a performance security for the contract once it is signed. The bid bond therefore becomes obsolete and serves further no purpose once a contract is signed and a performance security provided.

Before concluding this issue, the Board has considered the 2nd Interested Party's Submission that the Procuring Entity ought to have used the same yardstick it used in disqualifying the 2nd Interested Party from the tender process. The Board however notes that the 2nd Interested Party was disqualified on the basis that its bid security was not valid for the entire tender validity period which is not the case here. The Board's decision on this is contained in application No. 19 of 2014.

The Board therefore finds that the Procuring Entity did not breach the Provisions of Section 82 of the Act as read together with the Provisions of

Clauses 3.6.1 of the tender document and the Applicant's first ground of Review as framed in issue No. 1 therefore fails and is dismissed.

ISSUE NO.2

Whether the Procuring Entity breached the Provisions of Section 82 of the Act as read together with clause 3.7 of the tender document by accepting the tender price of the successful bidder.

On the second issue framed by the Applicant for determination, Counsel for the Applicant submitted that whereas the successful bidder had quoted the sum of USD 520, 970, 845.60 as its initial offer but it subjected this figure to a discount thereby coming up with another price of USD 484, 502, 886.40. The Applicant therefore submitted that the 1st Interested Party had offered two alternative prices which was in breach of the Provisions of clause 3.7 of the tender document. Counsel for the Applicant argued that clause 3.7.2 of the tender document outlawed or prohibited the giving of alternative offers by tenderers and that the successful bidder ought to have been disqualified by the Procuring Entity for giving alternative offers under the Provisions of Clause 3.7.3 of the tender document.

Both the Procuring Entity and the successful bidder opposed the Applicants submissions on the second issue and stated that Clause 3.7.1 of the tender document only required tenderers to submit only one tender. The Procuring Entity argued that the successful bidder had submitted only one tender document pursuant to the said provisions and that the successful bidder fully complied with the Provisions of Clause 3.7.2 it had offered a tender price of USD 484, 502, 886.40 which it stated was its final offer. Counsel for the

Procuring Entity urged the Board to look at the tender document submitted by the successful bidder to confirm the actual factual position and additionally submitted that the tender price read out in the minutes of the financial opening showed that the 1st Interested Party offered its final tender sum as USD 484,502,886.40. Counsel for the 2nd Interested Party associated himself with the submissions of the Applicant on this issue while counsel for the 3rd Interested Party did not offer any submissions on the issue.

Mr. Gatonye on behalf of the successful bidder opposed the Applicant's submission on this issue and stated that his client had offered a final financial offer of USD 484, 502,886.40 and that the Applicant's contention that it had offered two bid prices was incorrect because the Applicant had only offered one final price. Counsel for the successful bidder while relying on the Provisions of Section 82(5) of the Public Procurement and Disposal Act 2005 urged the Board to find that the Procurement method adopted by the Procuring Entity in this Procurement was a Request for proposals which was governed by the Provisions of sections 76 to 87 of the Public Procurement and Disposal Act 2005 and that under the Provision of Section 82 (5) of the Act, the successful tenderer was the tenderer who had achieved the highest combined score on the technical and financial evaluation and that the Applicant not having attained the threshold provided by Section 82(5) of the Act could not ask the Board to substitute the Procuring Entity's decision with an order declaring it the successful bidder and therefore award it the subject tender.

The Board has heard the submissions made by the parties and has had the benefit of looking at the original tender documents and has established that the 1st Interested Party only gave one final price namely the sum of USD 484,

502, 886.40 as it's final financial offer which was read out to the parties during the financial opening meeting.

This position is reflected in the records of the minutes and the records of attendance at the financial opening for proposals held on 3rd June 2014 which were signed by the representatives of all the bidders including Mr. Fan Li on behalf of the Applicant. The record was also signed by members of the tender opening committee.

The record of 03/06/2014 shows that Mr. Fan Li was present and signed the attendance record on behalf of the Applicant while one Adnan Annous is recorded as having been present on behalf of the successful bidder. The successful bidders offer was the sum of USD 484, 502, 886.40 while the Applicant offered the sum of USD 518, 959, 520.52 both figures were inclusive of V.A.T. The Applicant's financial offer was therefore higher than the successful bidder's offer by the sum of USD 34,456,364 or thereabouts.

It cannot therefore be right for Mr. Fan Li who swore the affidavit in support of the application for review to state that the Applicant offered two alternative financial offers when all the documents indicate otherwise and when he himself was present during the opening of the financial proposals and in fact signed the list of those in attendance.

The summary of financial evaluation also shows that the successful bidder was evaluated and awarded the contract on the basis of the sum of USD 484, 502, 886.40 which was lower than the price of USD 518, 959, 520.52 offered by the Applicant.

Section 82(5) of the Public Procurement and Disposal Act 2005 requires that where the Procurement method used by the Procuring Entity is a Request for

Proposals as opposed to an open tender, the successful proposal shall be the proposal with the highest aggregate score determined by the Procuring Entity by combining the technical and financial scores.

The Board in the case **Landor Associated -vs- Kenya Power and Lighting Company Limited (Application no. 42 of 2009)** held that Section 66 of the Act was not applicable to Requests for Proposals and the procedure for evaluation and award in Requests for Proposals is governed by the Provisions of Sections of 76 to 87 of the Act.

The Board further held that under the Provisions of Section 82(5) of the Act, a tender ought to be awarded to the tenderer who has scored the highest combined technical and financial score.

The Applicant in this application was on the basis of the evidence placed before the Board not the bidder with the highest combined technical and financial score.

It's financial proposal was infact higher than the 1st Interested Party's financial proposal by the sum of USD 34,456,364 or thereabouts. The Board therefore finds that by awarding the subject tender to the 1st Interested Party the Kenyan tax payer was saved the sum of USD 34,456,364. On the second issue framed for determination, the Board therefore holds that the 1st Interested Party only gave one final financial offer of USD 484,502,886.40 and the Applicant's allegation that the 1st Interested Party gave two alternative financial proposals therefore fails.

ISSUE NO.3

Whether the Procuring Entity breached the provisions of Section 82 of the Act as read together with the addendum No.5 dated 17th April 2014 in awarding the tender the successful bidder which did not provide a sub-contract agreement with a local company.

While arguing the third issue framed for determination, the Applicant argued that Clause 4.1.1 of the tender document required International tenderers to submit duly signed subcontract agreements and that the successful bidder did not comply with the Provisions of this clause. The Applicant argued that the successful bidder was not a local company and therefore ought to have provided sub-contract agreements while submitting its proposal. The Applicant based its argument on this point on addendum number 5 which the Procuring Entity had allegedly issued out to bidders and that this addendum was couched in mandatory terms and was therefore binding on the tenderers under Clause 2.3 of the tender document.

Counsel for the Applicant in conclusion stated that once the Applicant had made this allegation it was then incumbent upon the Procuring Entity to prove otherwise.

On the issue of the alleged requirement for the Provision of subcontract agreements, the Procuring Entity submitted that this was not a mandatory requirement in this tender. The Procuring Entity argued that this tender was open to both International and local tenderers and that sub-contract agreements were only required where an international tenderer had indicated in the pre-qualification documents that it intended to use or sub-contract works to a local contractor or a local subcontractor.

The Procuring Entity further produced addendums No.4 and 5 which were annexed to the Affidavit of Nancy Rono. The two addenda were issued on 10th April 2014 and 17th April 2014 respectively. The Procuring Entity argued that the two addenda were issued in answer to specific questions raised by a local partner and stated that it clarified that the requirement for the provision of sub-contract agreements was only applicable to bidders who wished to engage local subcontractors.

The Procuring Entity therefore argued that the Applicant's interpretation of Clause 4.1.1 was not correct and that the Procuring Entity had not therefore breached the Provisions of the said requirement.

The Board has considered the arguments by of the parties on this issue and has also looked at the provisions of Clause 4.1 and 4.1.1 of the tender document appearing at page 17 of 85 of the tender document. These two clauses state as follows:-

4.1 sealing and marking of tenders.

4.1.1 The tenderer shall seal the mandatory documents, technical proposal, and the financial proposal of the tender in separate envelopes duly marked mandatory, technical proposal and financial proposal. The envelopes shall then be sealed in an outer envelop.

(a) mandatory documents shall constitute the following documents;

(b) (i).....

(ii).....

(iii).....

(iv).....

(v).....

(vi)Details of the sub-contractor complete with sub-contract agreement - schedule D

Schedule D referred to in Clause 4.1.1(vi) appears at Page 81 of 85 of the tender documents and provides as follows:-

4. Schedule D. Details of sub-contractors, if a tenderer wishes to sublet any portions of the works, he must give below details of the sub-contractors which he intends to employ for each portion.

Failure to comply with this requirement may invalidate the tender.

The Board holds the view that clause 4.1.1(vi) must be read together with schedule D appearing at page 81 of 85 of the tender document and that when this is done, it is plainly clear that the requirement to submit details of the sub-contractors as opposed to sub-contract agreements was not a mandatory requirement and was only applicable to bidders who intended to sub-contract works under the tender.

The Applicant's interpretation of this clause is therefore plainly wrong and the Applicant's reliance on Addendum number 5 dated 17th April 2014 is also wrong since this addendum was in answer to a specific inquiry to a specific local sub-contractor who sought to know whether as a local contractor it was bound by the provisions of Clause 4.1.1. That addendum clarified the position but did not affect the clear provisions set out in the tender document.

Section 34 of the Act enjoins the Procuring Entity to prepare specific requirements relating to any Procurement setting out the evaluation criteria to be used in evaluating the tenders. Section 59 (3) of the same Act states in mandatory terms that a Procuring Entity shall not attempt to have the substance of a tender changed.

Based on these Provisions of the Act and notwithstanding the Boards earlier finding on the requirement under clause 4.1.1(vi) the Board additionally finds that the Procuring Entity could not change the requirements of clause 4.1.1 (vi) by way of any written addendum.

On issue number 3 the Board therefore finds that the tender document only required a bidder to provide a sub-contract agreement with a local Company where the bidder intended to contract or sub-contract any part of the works to a sub-contractor. This ground of the Applicant's grounds of Review therefore fails and is also accordingly dismissed.

ISSUE NO.4

Whether the Procuring Entity violated the Provisions of Article 227 of the Constitution.

The Applicant finally argued that as a result of all the above alleged breaches of the Provisions of the Act, the Regulations and the criteria set out in the tender document the Procuring Entity had breached the Provisions of Article 227 of the Constitution which enjoins the Procuring Entity to act in a fair,

equitable and transparent manner and to ensure that the procurement process is competitive and cost effective.

Mr. Gatonye for the 1st Interested Party however countered this argument by stating that in order for a party to invoke the Provisions of Article 227 of the constitution, the party seeking to invoke that provision ought to give particulars and prove the specific breaches of Article 227 of the Constitution and that it was not sufficient to refer to and allege contravention of the Provisions of Article 227 of the Constitution without showing and proving the particulars of the breach of that Article.

The Board has already found in the preceding part of this decision that the Procuring Entity did not breach any of the Provisions of the Act or the Regulations made thereunder or the criteria set out in the tender documents.

It is not therefore open for the Applicant to allege that the Provisions of Article 227 of the Constitution had been breached.

The Board therefore agrees with the submissions by Counsel for the 1st Interested Party that there can't be a breach of the provisions of Article 227 of the Constitution in the absence of proof of any of the particulars of the alleged or a breach of the Provisions of the Act, the Regulations and or the criteria set out in the tender documents.

The Board can do no better than refer to the decision of the High Court of Kenya in the case of Rich Productions Limited =vs= Kenya Pipeline Company Limited [Nai High Court Constitutional Petition No.173 of 2014] which coincidentally relates to this self same procurement process.

In her judgment dated 19th June 2014 lady justice Mumbi Ngugi stated as follows in points Nos. 67, 68 and 69 of her judgment.

67. It is indeed true that the Constitution gives the High Court wide Jurisdiction to determine whether any acts said to be done under the authority of the Constitution have been done in violation of the Constitution. However, it is not enough for the Petitioner to allege violation of the constitution. It must go further and demonstrate in what respect there has been a violation of the Constitution.

68. I have not heard any demonstration of the unconstitutionality of the acts of the 1st Respondent (The Public Procurement Oversight Authority). It appears to have complied with the requirements of the public procurement and disposal act and to have answered satisfactorily the concerns of the institution charged with the mandate to oversee public procurement more importantly, it cannot be open to a party which fails to participate in a procurement process to then lodge a constitutional reference that in effect asks the court to enter into the mandate of the 2nd Respondent at the behest of a party that has not qualified under the Provisions of the relevant statute.

69. This would result in undermining institutions such as the 2nd Respondent which are established by law and it would be contrary to the express provisions of the Constitution at Article 159 which enjoins the court in the exercise of Judicial authority, to promote alternative forms of dispute resolution.

The Board fully adopts the court's reasoning and holds that the Applicant did not demonstrate any breach of the Provisions of Article 227 of the Constitution.

As the Board observed earlier, though the Applicant raised the issue of the 1st Interested Party's lack of experience in ground 1.23 of its Request for Review, the Applicant abandoned this ground and instead opted to argue issues No. 1, 2, 3, 4 and 5 above. The Board has however noted that both the Procuring Entity and the 1st Interested Party addressed this issue in their responses and the Replying Affidavits. The Board notes that the 1st Interested Party in the Replying Affidavit sworn by Mr. Adnan Annous on 20th June, 2014 produced several letters of award and completion certificates which were annexed to the said affidavit and marked as annexure "AA-3" inter-alia from the Nigerian National Petroleum Corporation, Sonatrach Pipeline Transportation Activity and Obajana Cement P2C among that the Board finds to be sufficient for the purposes of proving that the Interested Party had the necessary experience to carry out the works under this tender.

In the same affidavit the 1st Interested Party stated and this was not disputed that it is the Applicant which constructed the Mombasa - Nairobi Pipeline and which is the pipeline sought to be replaced between 1976 and 1977 and also the West Kenya Pipeline extension between the years 1991 - 1992. This was confirmed by the Procuring Entity which additionally stated that the Mombasa - Nairobi Pipeline constructed by the 1st Interested Party between 1976 -1977 was meant to last for 25 years but the Pipeline which the Procuring Entity was now seeking to replace had lasted for 10 more years above the initially expected period of Twenty Five (25) years.

This evidence was not disputed by the Applicant and the Board is not therefore surprised that the Applicant did not tender any submissions on this ground of Review.

The Board therefore finds and holds that the Applicant has the necessary experience to carry out the works.

FINAL ORDERS:

In view of all the foregoing determinations on the issues raised before the Board, and in exercise of the powers conferred upon it by the provisions of Section 98 of The Public Procurement and Disposal Act, 2005, the Board makes the following orders:-

- (a) That the request for review filed by the Applicant herein on 20th June 2014 be and is hereby dismissed.
- (b) That the stay order issued herein on 20th June 2014 is hereby discharged and the Procuring Entity is therefore at liberty to proceed with the procurement process.
- (c) Each party shall bear its own costs of this request for review.

Dated at Nairobi this 30th day of June, 2014.

.....
Chairman

PPRB

.....
Secretary

PPRB