

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 24/2014 OF 11TH JUNE, 2014

BETWEEN

CHINA WUYI CO. LTD.....APPLICANT

AND

THE KENYA PIPELINE
COMPANY LIMITED PROCURING ENTITY

AND

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

KALPATARU POWER
TRANSMISSION LIMITED2ND INTERESTED PARTY

CHINA PETROLEUM ENGINEERING
& CONSTRUCTION CORPORATION.....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 |

- | | |
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| 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 24/2014 - CHINA WU YI CO. LTD

- | | |
|------------------|------------------|
| 1. Stephen Owino | - Advocate |
| 2. Tom Makumu | - Clerk |
| 3. Peter Liu | - Legal Officer, |
| 4. Wang | - Legal Officer, |

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. Thomas K'Bahati - China Petroleum, Advocate
5. Waweru Gatonye - Zhakhem Corp, Advocate
6. Brian Omugana - Zhakhem Corp, Advocate
7. Risper Oloo - Zhakhem Corp, Advocate

8. Lu Shipeng - Sinopec Service, Marketing Dept
9. Lu Siwei - Sinopec Service , Engineer
10. Zhao Chengshu - Sinopec Service, Engineer
11. Ol Gaoshun - Sinopec Service, Manager
12. Maurice Olunya - Amacec Kenya Ltd, Technical Advisor
13. Han Jile - Avic, Area Manager
14. Kiprop Kiprono - Quarsarq Group, Manager
15. 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 ^{the} 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 its 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	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
2	Key personnel and competency for the assignment (20 marks)	13	15.2	15.6	16.6	20	15.6
3	Key Plant and Equipment (20 marks)	16	14.5	20	20	20	16
4	Technical approach and methodology for the works (20 marks)	17	13	17	13.25	18	20
5	Financial capability for the last five years (10 marks)	10	8	8	6	8	8
	TOTAL (100 marks)	76.0	80.7	90.6	75.9	96.0	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
2.	M/S China Petroleum Engineering and Construction Corporation	518,959,520.52	Inclusive of VAT
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 **CHINA WU YI COMPANY LIMITED** was dissatisfied with the decision of the Procuring Entity awarding the subject tender to **Zakhem International Limited** and lodged a Request for Review on 11th June, 2014 challenging the Procuring Entity's decision to award the subject tender to the successful bidder. The Request for Review set out a total of twenty (20) grounds of Review.

The Request for Review was not however accompanied by any statement under the Provisions of Regulation 73(2) (b) which states that a Request for Review shall be accompanied by such statements as the Applicant considers necessary in support of its Request.

The Procuring Entity and the successful bidder filed their responses on 16th June, 2014 and 20th June 2014 respectively. The Procuring Entity's response was accompanied by a replying affidavit sworn by one **Nancy Rono** which is dated 16th June, 2014 while the Procuring Entity filed a Replying Affidavit sworn by one **Adnan Annous** on 20th June, 2014.

In addition to the above set of documents, both the Procuring Entity and the successful bidder (the 1st Interested Party) filed their respective submissions on 20th June, 2014 pursuant to the directions given by the Board on 16th June, 2014. The Applicant did not file any Submissions but instead filed a reply to the Respondent's Response dated 20th June, 2014 which was signed by its advocate. Several documents were then attached to the said reply.

When this Request for Review came up for hearing before the Board on 24th June, 2014, the Procuring Entity supported by the successful bidder (the 1st Interested Party) raised two objections relating to the competence of the Applicant's Request for Review. These two points of objection were principally that the Applicant's application for Review was incompetent since it was not supported by a statement or such statements as the applicant considers necessary in support of its Request for Review pursuant to the Provisions of Regulation 73(2) (b) of the Regulations and secondly that the documents annexed both to the Applicant's application for Review and to the Reply to the Respondent's Response were all improperly before the Board and ought to be struck out.

Upon a consideration of the nature of the two points of objection and in order to expeditiously determine the dispute before the Board caused by the requirement that the Board must consider and deliver a decision on any application for Review within 30 days of the Request being lodged with it, the Board allowed the Applicant to proceed and make its Submissions based on the Request for Review and the Reply to the Respondents response but subject to the following conditions:-

(i) That the Procuring Entity the (Respondent), the successful bidder (the 1st Interested Party) and any other party to the proceedings before the Board would have the right to address the Board on the issues of the competence and the propriety of the application for Review in view of the lack of a statement in support of the Request for Review under the Provisions of Regulation 73 (2) (b) of the Public Procurement and Disposal Regulations 2006.

(ii) The Applicant was allowed to rely upon the Reply to the Respondent's Response together with the documents attached to the said Response subject to the Procuring Entity (Respondent) the successful bidder and any other party's right to address the Board on the issue of the propriety of the response and the admissibility and the weight, if any, to be attached to the said Reply and any documents attached thereto.

(iii) That the Board would address the issues raised by the parties under items (i) and (ii) above in its final decision on the application for Review.

THE PARTIES' ARGUMENTS

The Applicant in this Request for Review was represented by Mr. Stephen Owino, Advocate while the Procuring Entity and the 1st Interested Party were represented by M/s Gloria Khafafa and Mr. Waweru Gatonye respectively. Two other interested parties, namely; Kalpataru Power Transmission Limited and China Petroleum Engineering and Construction Corporation also participated in the hearing of this application and were represented by Mr. Charles Kanjama and Mr. K' Bahati respectively.

During the hearing of the Application for Review Mr. Owino started off his Submissions by asserting that at the opening of the financial bid, it turned out that the applicant's proposed financial offer was the lowest price for the construction of the Pipeline that being USD 456,855,018.00 and that the Applicant was therefore surprised when the Procuring Entity informed the Applicant in a letter dated 3rd June, 2014 that its bid was not successful because it did not achieve the highest composite Technical and Financial score and that the Applicant's score was 83.1% and therefore below the successful bidder's score of 95.5%.

Counsel for the Applicant further submitted that the Procuring Entity did not evaluate the Applicant's technical proposal based on the criteria set out in clause 5.5 of the tender document and that the Procuring Entity suppressed the Applicant's scores in the said technical evaluation.

It was the Applicant's position based on its own evaluation that **on relevant experience in the oil and gas pipeline project for the last fifteen (15) years**, the Applicant ought to have demonstrated to have both completed or ongoing Pipeline projects in the oil and gas industry of at least 3 projects of over 100km Pipeline, each complete with more than three pumping or terminal stations.

It was the Applicant's position that it had provided evidence of three projects that met the above mentioned criteria. The Applicant stated that one of the projects was for a span of 522.7 kms with four stations, another one was for 802 kms with 15 stations and the third one for 526 kms with five stations and that it therefore ought to have been awarded the full 30 marks.

The Applicant's Counsel further submitted that if the Procuring entity had properly evaluated items 5.5 item No. 2 **on personnel and competency for the assignment**, the Applicant's total score under this item ought to have been 19.2 marks. To buttress this argument, the Applicant attached to its Request for Review a bundle of extracts from the Applicant's bid documents showing detailed Curriculum Vitae of the purportedly qualified personnel.

In respect of clause 5.5 under item 3 **plant and equipment**, the Applicant stated that it had the necessary equipment to warrant it to be assigned the full marks under this item. The Applicant attached to its Request for Review what it referred to as **annexture/exhibit "CWY 5"** these being copies of the extracts from the Applicant's bid documents which in its view showed proof of ownership/rental agreements. The Applicant therefore contended that it ought to have been awarded the full 20 marks by the evaluation committee.

In respect of item No. 4 namely, **the technical approach and methodology of the works**, the Applicant submitted from the bar that it provided the necessary information required which it attached to the Request of Review as **annexture/exhibit "CWY 6"**. The Applicant therefore stated that it ought to have been awarded the full 20 marks under this item.

In respect to the requirement under clause 5.5 item no. 5 - **Financial capability** for the last five years, the Applicant stated that it ought to have gotten a score of 6 marks under this item and attached to its proposal on uncertified audited accounts which the Applicant referred to as **annexture/exhibit "CWY 7"**.

Upon completing what the Applicant saw as the results of its own technical evaluation, the Applicant stated that the tender evaluation committee ought to have given it an aggregate technical score of 95.2 marks and further that the Applicant's financial proposal having been the lowest, the Applicant should have been awarded the full 100 marks by the Procuring Entity's tender evaluation committee.

The Applicant finally concluded its submissions on the issue of both the technical and financial evaluation by stating that using the formula provided for under clause 5.5.1 at page 24 of the tender document, the applicant's combined technical and financial score ought to have been 96.64 and that in its own words **"the applicant ought to have been ranked top"**.

The Applicant finally turned to ground 20 of its grounds for Review. The Board wishes to set out ground 20 of the grounds of Review for reasons which will become clearer in the later part of this decision.

Ground 20: of the grounds for Review put forward by the Applicant reads as follows:-

"20 The bidder who was declared to have been successful Zakhem International Construction Limited is not known to have had any projects in the Pipeline work anywhere in the last 5 years. This was a mandatory requirement and the bidder ought to have been found to be non-responsive and disqualified."

It is noteworthy that the Applicant did not attach any document to its Request for Review filed on 11/6/2014 other than the tender document in support of this ground of Review.

The Applicant instead filed what it termed as a "Reply to the Respondent's Response" which it filed on 20th June 2014 and in which it raised several other issues and attached further documents which ran into Thirty Six (36) odd pages.

The Applicant argued on the basis of the Reply to the Respondent's Response that the Procuring Entity had hurriedly constituted the evaluation committee on 21st May 2014 from its employees with a view of favouring the successful bidder despite of an agreement with Shengle Engineering & Consulting Company Limited and Kurrent Technologies Limited who allegedly carried out the design of the Pipeline to be the evaluators. The Applicant then attached copies of a fax Transmission in alleged support of the above proposition which it attached to the Request for Review and referred to it as annexure /exhibit "A".

The Applicant in response to the Procuring Entity's assertion that it did not provide certified copies of printed literature which was required to be furnished by the tenderers with the tender document and which were in another language other than English, the Applicant submitted that this requirement headed 3.1.1 "language of tender" had been amended subsequently and attached a document which it marked as exhibit "A1" which had allegedly amended the requirement in the original tender document. This document which bears the Procuring Entity's logo on the left hand corner and the reference page 12 of 83 of the tender at the bottom stated as follows under clause 3.

3.1.1 Language of tender

The tender and all correspondence and documents relating to the tender exchanged between the tenderer and KPC shall be written in the English

language. Supporting documents which are printed literature furnished by the tenderer with the tender may be in another language provided they are accompanied by an appropriate translation of pertinent passages in the above stated language. For the purpose of interpretation of the tender, the English language shall prevail.

The Applicant therefore claimed that on the basis of the document marked "A1" the Procuring Entity had removed the requirement for certification and instead required a document in a foreign language to be accompanied by a translation in the English language but not a certified copy of the translation in the English language.

The Applicant in addition to attaching the above document also attached three other documents to its Request for Review which it referred to as annextures/exhibits "B" and "C" which contained a list of projects which it alleged the 1st Interested Party had completed or were ongoing and a copy of the Procuring Entity's summary of detailed evaluation report complete with the names and the signatures of the members of the Procuring Entity's tender processing committee which it referred to as annexture/exhibit "D". This document runs into five (5) pages and is attached to the "Reply to the Respondent's Response" filed on 20th June, 2014.

For good measure, the Applicant in its concluding remarks labelled several allegations of corruption collusion and alleged ongoing investigations against the 1st Interested Party over allegations of corruption and collusion in Nigeria.

The Applicant in seeking to support these allegations attached an email extract of a document which contained these allegations but which was not

apparently referred to either in the Response or the Reply to the Respondent's Response to the Request for Review in support of the criminal allegations of corruption and collusion. The email extract was not attached to any affidavit.

The Procuring Entity as earlier averted to filed a written Response and swore a Replying Affidavit in answer to the Applicant's application. The Procuring Entity also filed written submissions which it highlighted at the hearing of this Request for Review.

The Procuring Entity in its response stated that the results of the Preliminary and Technical Evaluation were communicated to the Applicant and all the other participating bidders on 26th May 2014. The Applicant was thereafter invited for the financial bid-opening held on 3rd June 2014, at which its representatives Messrs Zu and Tom were present.

The Procuring Entity therefore stated that the Applicant had Ten (10) days from the 26th May 2014 to file a Request for Review on the Preliminary and Technical Evaluation and that by operation of the Provisions of Regulation 73(2) (b) of the Public Procurement and Disposal Regulations, 2006, the Applicant's Request for Review on preliminary and technical evaluation was barred by statute and should therefore not be entertained by the Board.

On the substantive grounds for review, Counsel for the Procuring Entity argued that during evaluation and comparison of Tenders, the Procuring Entity's evaluating team was mindful of the provisions of Clause 3.1.1 of the Tender Document which the Applicant attached to its Request for Review at page 13 of 85 of the tender document which stated as follows:-

"3.1 Language of tender

3.1.1 The tender and all correspondence and documents relating to the tender exchanged between the tenderer and KPC shall be written in the English language. Supporting documents which are in printed literature furnished by the tenderer with the tender may be in another language provided they are accompanied by an appropriate certified translation of pertinent passages in the above stated language. For the purpose of interpretation of the tender, the English language shall prevail. Any document which is not accompanied by an appropriate translation to the English language shall be disregarded. "

Counsel for Procuring Entity stated that it was for this reason that the Applicant did not, and could not have scored full marks under Clause 5.5, Item No. 1 and further that the Procuring Entity noted that none of the projects done by the Applicant were in the oil and gas industry, except for only two projects listed as having been carried out by the Applicant's joint venture partner which met the threshold. The Applicant's so called partner in the joint venture consortium was not a party to the proceedings before the Board.

Under Clause 5.5, Item No. 2 of the tender document the Procuring Entity stated that during evaluation, it was noted that the Applicant in some instances presented personnel who were not registered with the relevant body, did not comply with the Engineers Board of Kenya Rules and Regulations, the Curriculum Vitae attached to the tender document were not signed, and certificates/documents in a foreign language were not

accompanied by a certified English translation and thus could not be evaluated. By reason of all the foregoing, the Procuring Entity therefore submitted that the Applicant did not, and could not have scored the full marks in this category.

In response to the allegations under Clause 5.5, Item No. 4 - *Technical Approach and Methodology of Works*, the Procuring Entity stated that it noted that:

- i) *"CWY's (The Applicant) organisation and staffing for the tasks (as shown at page 362 of the Request for Review) was not adequate as it did not provide for all the key personnel, and some tasks were not assigned and further noted that it did not relate to the stated tasks and the client.*
- ii) *The work plan (programme of works) (as shown at page 363 of the Request for Review) was not complete as there was no chart outlining the critical path and the milestones.*
- iii) *The Bidder did not supply completed data sheets, or any data sheets at all for the equipment which they were to install for KPC. Instead, they provided a list which did not contain the required data as required in the tender document and as more particularly shown at page 364 of the Request for Review.*

The Procuring Entity therefore conclude that the Applicant did not, and could not have scored full marks in the category of *Technical Approach and Methodology of Works*.

On financial evaluation, the Procuring Entity argued that the Applicant could not possibly have provided the best bid as it was based on incomplete /defective documents and information and therefore it was

not reflective of the needs of the Procuring Entity since the Form of Tender signed by the Applicant stated that its bid price was based on "*the conditions of contract, contractor general obligations, scope of works, bill of quantities, construction specifications, equipment specifications and data sheets, and drawings.*"

The Procuring Entity denied the contents of paragraph 20 of the Request for Review and stated that the Successful Bidder provided sufficient proof of relevant experience in the oil and gas pipeline projects, both on-going and completed, for the last 15 years by submitting proof in the form of letters of award and completion certificates from their various clients indicating that they had done over 4 projects of over 100km with more than three pumping stations and terminal stations.

On the issue of the competence of the Request for Review, the Procuring Entity submitted that under the Provisions of Regulation 73(2) (b) of the Public Procurement and Disposal Regulations, the Applicant was required to file a statement or such statements as would support the facts the Applicant wished to rely upon and that it was not open to the Applicant to file a Request for Review sign it and then attach numerous documents to it without any statement of fact to support the grounds of Review. The Procuring Entity therefore urged the Board to find that the Request for Review before it was incompetent on this ground alone and that the Board should dismiss it with costs.

The Procuring Entity took great exception to the applicants "**Reply to the Respondent's Response**" filed on 20th June, 2014 which was signed by counsel for the Applicant together with all the documents which were

attached to the said Reply on the grounds that all the said documents were inadmissible in law for the following reasons:-

- (i) That the attached documents had not been formally produced by way of an affidavit sworn by the applicant or any other person for that matter.
- (ii) That the Applicant was not the author of all the documents marked as exhibits "A" and "D" which were in any event confidential documents which the Applicant was not entitled to under the provisions of Section 45 of the Act since the Applicant had not requested for any of the said documents from the Procuring Entity as required by the law.

Counsel for the Procuring Entity therefore wondered how the Applicant came to be in possession of the Procuring Entity's own documents without having made a request for them. What Counsel referred to as confidential documents were copies of the fax transmission between Sheng Li Engineering and Constructing Company Ltd (SLECC) and the Procuring Entity's Engineer Elias Karumi and a copy of a page of the contract document between SLECC and KPC.

On document marked "A1" and which was attached to the Reply to the Respondent's Response, the Procuring Entity submitted that the document was a forgery and that the document did not originate from it. The Procuring Entity invited the Board to peruse page 13 of 85 of the Applicant's tender document which contained the same document together with the original tender document and upon such examination it would become obvious that the document marked as annexure "A1" was a forgery.

The Procuring Entity submitted that at no point did it remove the requirement on the **certification of documents** which were not written in the English language from the tender document and argued that such certification was the only mark that could give credence to such a document particularly in an International tender since members of an evaluation committee would not be reasonably expected to read and interpret and understand the contents of all the documents written in foreign languages and that certification was the only means that the Applicant should verify ownership and the veracity of a document authored in foreign languages. The Procuring Entity argued that all the other bidders except the Applicant had complied with the requirement on certification.

On the documents purportedly printed from the email, Counsel for the Procuring Entity submitted that the said documents were not signed and or certified and that one could not therefore establish the sources of the documents. She therefore urged the Board to disregard them.

Mr. Waweru Gatonye who appeared in this Application on behalf of the 1st Interested Party opposed the Application and associated himself with the arguments made by Counsel for the Procuring Entity. Mr. Gatonye started off his address by submitting that the Applicant's application was incurably defective for failing to comply with the mandatory Provisions of Regulation 73(2) (b) of the Public Procurement and Disposal Regulations 2006 in that the Request for Review which was largely based on facts was not accompanied by any statement of facts or an affidavit to support the facts the Applicant sought to rely upon.

Counsel for the 1st Interested party stated that the requirement of Regulation 73(2) (b) of the Regulations were couched in mandatory terms and that failure to comply with the said Regulation rendered the Applicant's application incurably defective and urged the Board to strike out the Applicant's Request for Review for being incompetent.

On the issues raised in grounds 1 to 19 of the Request for Review Counsel for the 1st Interested Party argued that what the Applicant was seeking to do was to engage in the process of self evaluation. He however submitted that evaluation of tenders was the preserve of the tender evaluation committee. Counsel for the 1st Interested Party therefore submitted that if the Board entertained and granted any of the grounds or the reliefs sought by the Applicant, such an action would erode public confidence in the Public Procurement process as it would send the message that the decisions of the Procuring Entity are susceptible to external influence from competitors in total disregard of the contents of the tender documents.

Counsel for the 1st Interested Party further submitted that the subject matter of this application was one of immense National and Regional interest being a vision 2030 flagship project which was expected to be completed in December 2014 and that an online inspection of the current Nairobi-Mombasa Pipeline revealed that it is in a very poor state and should be replaced by 2016 and that any further delays to this project would jeopardise the supply of fuel in Kenya and the greater East African Region and also endanger public safety.

Counsel for the 1st Interested Party associated himself with the Procuring Entity's submissions on the issue of confidential documents and urged the Board to treat the issue of disclosure of confidential documents with the seriousness it deserves since the issue if proved would give rise to criminal conduct that the Board should not countenance.

Counsel for the 1st Interested Party concluded his submissions by stating that his client's experience and ability had been established beyond any doubt and restated the contents of the Procuring Entity's response that it had constructed the Pipeline sought to be replaced and that the pipeline which was initially meant to have lasted for twenty five (25) years but had lasted for 10 more years than the expected period.

Counsel for the 1st Interested Party therefore urged the Board to strike out or dismiss the Applicant's application for Review with costs.

On the propriety of the Applicants **"Reply to the Respondents Response"** and the admissibility of the documents attached to the said reply Mr. Gatonye fully associated himself with the Procuring Entity's Submissions and added that the Applicant had alleged corruption and collusion both of which amounted to criminal conduct against his client, the 1st Interested Party and that such an allegation required to be proved. Counsel for the 1st Interested Party urged the Board to note that the Applicant had not placed any record of a criminal conviction or at the very least a report from any commission of inquiry to prove that the successful bidder had been convicted or had been recommended for prosecution by any commission of inquiry for any offence involving corruption or conspiracy. Mr. Gatonye submitted that the document that the Applicant was relying upon in making the assertions of corruption and conspiracy against his client

was neither signed nor was it attached to any affidavit and was therefore valueless.

Mr. Kanjama for the 2nd Interested Party Kalpataru Power Transmission Limited quite surprisingly opposed the Applicants application on the ground that the Applicant in this Request for Review had effectively abrogated to itself the duties of the Procuring Entity's tender evaluation committee. He stated that what the applicant was seeking to achieve by this application was to re-evaluate its own tender. He argued that it was improper for the Applicant to ask the Board to re-evaluate and award it the tender since such a Request would amount into turning the Board into an evaluation committee. Counsel for the 2nd Interested Party stated that the process of evaluation was a complex one that required special expertise and that the Board was not suited to perform such a function and could not usurp the role of the Procuring Entity's tender evaluation Committee. The 2nd Interested Party however supported the Applicant's prayer number 3 which sought the 1st Interested Party to be disqualified from the tender process.

On the issue of Regulation 73 (2) (b) of the Regulations Mr. Kanjama's position was that Regulation 73(2) (b) indeed required that an Applicant files a statement but qualified this by stating that the Regulation did not state what form that statement should take.

Mr. K'Bahati for the 3rd Interested Party also opposed the Applicant's Application for Review and asserted that he supported the Procuring

Entity's decision as regards the Applicant in this application so long as the Procuring Entity carried out the evaluation in accordance with the law and the tender document.

THE ISSUES FOR DETERMINATION

Though the Board directed the parties to this application to file agreed or separate issues in its order of directions given on 16th June, 2014, the Board notes that it is only Counsel for the 1st Interested Party who framed issues in his submissions filed on 20th June, 2014. The Board has looked at the Applicants Request for Review, the responses thereto and the Replying Affidavits and the oral and written submissions made by the parties and has framed the following issues for determination:-

- a) Whether or not the Applicant's Request for Review is competent in view of the Provisions of Regulation 73(2) (b) of the Public Procurement and Disposal Regulations 2014.
- b) Whether or not the Reply to the Respondent's Response dated 20th June, 2014 and filed on 20th June, 2014 together with all the documents attached thereto are properly before the Board and what weight if any should be attached to the said response.
- c) Whether or not the Procuring Entity acted in breach of the Provisions of Regulation 82 (2) of the Public Procurement Act and the Regulations made thereunder.
- d) Whether the successful bidder did not prove to have performed similar project in the Pipeline works anywhere in the last 5 years.
- e) Whether or not the Applicants allegations of corruption and collusion and any other like practices was a matter properly before the Board and if so whether the said allegations were proved.

f) Who should bear the costs of the Request for Review?

THE BOARD'S DETERMINATION ON THE ISSUES FRAMED.

The Board has considered the Request for Review, the Responses thereto, the Replying Affidavits filed in opposition thereto, the written and the oral Submissions made by the advocates for all the parties who appeared before it and finds as follows in respect of each of the issues framed for determination.

ISSUE NO. 1

Whether or not the Applicant's Request for Review is competent in view of the Provisions of Regulation 73(2) (b) of the Public Procurement and Disposal Regulations 2014.

While addressing this ground of Review, the Applicant admitted that it had only filed a Request for Review without a statement to which it attached several documents and that the Request for Review was not accompanied by any statement or such other statements by an officer of the Applicant or by any other person for that matter stating the facts supporting the grounds that the Applicant sought to rely upon. The Request for Review was also not supported by any Affidavit in support of any of the grounds set out in the Request for Review.

The Applicant's short reply to this objection was that the Provisions of Regulation 73(2) (b) were not mandatory since that Provision of the Regulations did not require a Request for Review to be accompanied by any statement or affidavit. The Applicant additionally submitted that

under the Provisions of Regulation 86 of the Public Procurement and Disposal Regulations 2006 the Review Board was not bound to observe the rules of evidence while hearing a Request for Review under the Regulations.

Counsel for the Procuring Entity and the 1st Interested Party however disagreed with the Applicant's position and argued that the Applicant's position was incorrect and insisted that in order for a Request for Review to be properly before Board the Request for Review had to be accompanied by a statement or such statements as the Applicant considered necessary in supporting the Request for Review and it was not therefore proper for the applicant in this case to literally draw a Request for Review, attach documents to it and then file it with the Board.

Counsel for the 1st Interested Party further submitted that the Applicant had misunderstood and misinterpreted the Provisions of Regulation 86 of the Public Procurement and Disposal Regulations and submitted that Regulation 86 of the Regulations did not take away the Applicant's duty to prove its case. Counsel for the 1st Interested Party urged the Board to give a purposive interpretation to the Provisions of Regulation 86 of the Regulations and relied on the decision of the Board in the case of **Voith Hydro Gmbh and Company -vs- Kenya Electricity Generating Company Limited (Application No. 55 of 2009)** where the Board held that the Provisions of Regulation 73 of the Regulations were mandatory and that as such they had to be complied with strictly.

Both Counsels for the 2nd and the 3rd Interested Parties admitted that Regulation 73(2) (b) of the Regulations required an Applicant in an application for Review to file a statement or such other statements as the

applicant considers necessary in support of its Request for Review but qualified that submission by stating that the Regulations did not provide the form that such a statement or statements should take.

The Board has considered the rival submissions tendered by the parties on this issue. Regulation 73 of the Public Procurement and Disposal Regulations states as follows:-

73 (1) A Request for Review under the Act shall be made in for the RB1 set out in the Fourth Schedule to these Regulations.

(2) The Request referred to in paragraph (1) shall

(a) state the reasons for the complaint including any alleged breach of the Act or these Regulations.

(b) be accompanied by such statements as the applicant considers necessary in support of its Request.

The Board finds and holds that the Provisions of Regulation 73(2) (b) of the Regulations are plain and are worded in mandatory terms. A Request for Review must by didn't of the Provisions of Regulation 73 (2) (b) be accompanied by such statements as the Applicant considers necessary to support its case particularly where the Request for Review is based on disputed facts which need to be proved. Such a statement must be signed by the Applicant himself/herself or by an officer of the Applicant, if it is a Company or a Corporation.

~~The Board in addition to the case of Voith Hydro GMBH & Company vs-~~
Kenya Limited Generating Company Limited (Application No. 55 of 2009) has held that the requirement for any Request for Review to be accompanied by a statement is mandatory in the recent case of PPRB

Review No. 33 f 2013 delivered on 12th September, 2013 between Kocks Krannes G. M. B. H (Germany) -vs- Kenya AirPorts Authority where the Board held as follows:-

"The Procuring Entity submitted that under the Provisions of Regulation 73(2) (b) of The Public Procurement and Disposal Regulations any Request for review must be accompanied by such statement in support of its Request. It was the Procuring Entity's further submission that the Provision was couched in mandatory terms as evidenced by the use of the word "SHALL" in Regulation 73(2) (b). It was the Procuring Entity's further submission, supported by the Interested Party that the Statement envisaged by Regulation 73(2)(b) is evidential in nature and that since the statement accompanying the Request for Review was not signed by the Applicant, then the statement was incomplete and that consequently the Request for Review lodged by the Applicant was also incomplete and should fail". The Board then proceeded to uphold this finding and struck out the Applicant's Request for Review.

This is therefore an issue which the Board has considered and determined in the past.

It is true as submitted by the applicant and the 2nd and the 3rd Interested Parties that Regulation 73 (2) (b) of the Regulations does not state the form which such a statement should take. This argument of itself does not however take away the burden of proof placed upon an Applicant in a Request for Review to prove his/her/or its case. Such burden can only be discharged through the establishment of the facts in support of the grounds relied upon by way of a statement, an affidavit or any other acceptable means of ascertaining the facts relied upon.

Where the grounds for the Complaint are factual, it is incumbent upon an applicant to prove those facts and an applicant cannot hide behind the provisions of Regulation 86 of the Regulations to escape from this requirement since that Regulation does not take away the Applicant's burden of proof in relation to proving the allegations made by him/her or it in an application filed before the Board, it was held in the case of **Man Diesel SE -vs- Kenya Electricity Generating Company Limited (Application No. 45 of 2009)** that the burden of proving any complaint or ground for Review lies with the Applicant who must offer sufficient facts in support of the Applicant's case and that it was not the duty of the Board to carry out an investigation on claims made by parties to a Request for Review.

The Board has perused the Request for Review and the Reply to the Respondent's Response and notes that they were both signed by the Advocate acting for the Applicant. The Board notes that other than the Request for Review and the Reply to the Respondent's Response, none of the Applicant's Officers signed any affidavit or other document in support of the Applicant's Request for Review as evidence of ownership of the Request for Review.

It is trite law that an advocate cannot depone to or purport to support or give evidence in support or opposition to contested issues. An advocate cannot in the same breath descend into the arena of a dispute as an advocate merely represents and presents his client's case and cannot take over the case.

The Board therefore finds and holds on the basis of all the matters out under this ground that the Applicant's Request for Review was filed in breach of the Provisions of Regulation 73(2) (b) of the Public Procurement and Disposal Regulations and is therefore incompetent and is accordingly struck out.

Though the Board's finding on the above issue is enough to dispose off this Application for Review, this application raised a number of other fundamental and serious issues which the Board will now proceed and consider under the following issues:-

ISSUE NO. 2

Whether or not the Reply to the Respondent's Response dated 20th June, 2014 and filed on 20th June, 2014 together with all the documents attached thereto are properly before the Board and what weight, if any should the Board attach to the documents attached to the said Response.

Both Counsel for the Procuring Entity and the 1st Interested Party objected to the propriety of the Reply to the Respondent's Response dated 20th June, 2014 and filed with the Board on 20th June, 2014 together with all the documents attached thereto. The Procuring Entity and the first Interested Party argued that the said response and the documents attached thereto were improperly before the Board and that the documents attached to the response were inadmissible and ought to be struck out for the reasons which the Board has already set out in the arguments by the parties appearing in this decision and in issue number 1 which the Board has already pronounced itself upon.

The Applicant submitted that the reply and the documents attached to the response were properly before the Board and reminded the Board that unlike in the normal court's the Board had much more powers and was entitled to look at the reply and to investigate and seek the services of an expert in order to verify the veracity of any allegation brought before it.

The Board has carefully considered the arguments put forward for and against the issue of the propriety of the Reply and the admissibility and the weight to be placed on the **"Reply to the Respondent's Response"** and the documents attached thereto.

The Board finds that the said reply was signed not by any of the Applicant's officer but by the advocate for the Applicant who introduced several new complaints including allegations of corruption and collusion against the Interested Party and the allegation that the Procuring Entity had hurriedly constituted an evaluation committee on 21st May 2014 from amongst its employees with a view of favouring the successful bidder.

The Board reiterates that an advocate acts for his client and cannot enter into the arena of litigation or a dispute on contested issues. Both the Request for Review and the **Reply to the Respondents Response** were signed by Counsel for the Applicant. All the documents attached to both the two documents were not attached to a statement or an affidavit signed or sworn by any of the officers of the Applicant Company.

The Board therefore finds and holds that Counsel for the Applicant descended into the arena of this dispute and ought to have confined his role to the Limited extent of signing the Request for Review and no more. It was not therefore open for Counsel to annex documents to the Request for Review, or prepare and sign the Reply and annex documents to it

without a statement or an affidavit by the Applicant either confirming the facts or verifying the veracity of the documents annexed to the Request or the Response.

On the issue of the documents annexed to the Applicant's response the Board has carefully read the said documents and notes that the document marked as annexure "A" is a copy of a fax transmission between the Procuring Entity's consultants M/s (SLECC) and KPC's Engineer while the document marked Exhibit "D" is a summary of the technical evaluation by the Procuring Entity's tender processing committee. The exhibit contains information on the scores and evaluation results of all the other bidders. When challenged to declare how the Applicant came to be in possession of the said document's Counsel for the Applicant merely asserted that the Applicant was entitled to these documents under the provisions of section 45 of the Act.

Section 44 of the Act requires a Procuring Entity or an employee of the Procuring Entity not to disclose any confidential information save for the specific items of disclosure set out in Section 44(2) while Section 45 of the same Act requires a Procuring Entity to keep records for each Procurement for at least six (6) years after the resulting contract was entered into, or if no contract resulted after the Procurement proceedings were terminated.

Section 45 (2) of the Act then sets out the records to be maintained and this include :-

45(e) a summary of the evaluation and comparison of the tenders, proposals or quotations, including the evaluation criteria.

Section 45(3) of the act states as follows:-

After a contract has been awarded or the procurement proceedings have been terminated, the Procuring entity shall, on request make the records for procurement available to a person who submitted a tender proposal or a quotation or if direct procurement was used to a person with whom the Procuring entity was negotiating.

Section 44(4) of the Act makes it an offence to disclose confidential information and any person who contravenes the provisions of the said Act may face criminal sanctions.

The Board has also carefully looked at the document marked as Exhibit 'A1' which was attached to the Applicants Reply to the Respondent's Response and has compared it with the document in the original tender document.

Annexure 'A1' is indicated as being page 12 of 83 of the tender document.

The tender document which the original tender document which the Board has had occasion to peruse however runs into 85 and not 83 pages as suggested by Annexure "A1". Counsel for the Procuring Entity argued that the document marked as annexure A1 was a forgery and that it did not emanate from it.

The Procuring Entity also stated that at no point did it receive any Request from the Applicant under the Provisions of Sections 44 or 45 of the Act.

The Board has anxiously considered this issue and finds that the documents attached to the Applicant's Reply to the Respondent's Response prima facie confidential documents which the Procuring Entity and its employees are prohibited from disclosing more so when there is no Request made by a bidder under the provisions of Section 45 (3) of the Act.

The Board further finds that the document marked as annexure "A1" did not form part of the 85 page tender document which was produced and placed before the Board by the Applicant and whose original the Board has had the occasion to verify. The Board cannot therefore avoid coming to the conclusion that the said document is a forgery or was leaked out to the Procuring Entity during the process of preparation of the tender documents. The original tender document contains the requirement that all documents written in a language other than the English language shall be accompanied by an appropriate certified translation.

The Board has perused the tender document submitted to it by the Procuring Entity and has noted that the Procuring Entity presented Curriculum Vitae of several persons of Chinese origin and which were attached to the tender document whom it had claimed had experiences of 10 to 15 years experience in the oil and gas industry. The applicant however admitted at the hearing of this Request for Review that the Applicant as opposed to its partner in the consortium had ~~has~~ never performed a single contract in the oil and gas industry. The Applicant or any of its employees did not therefore have any experience in that field and the Curriculum Vitae produced did not therefore have any basis.

Section 31(5) of the Public Procurement and Disposal Act 2005 criminalises the production of false, inaccurate and or misleading information about qualification with the intention of influencing the outcome of Procurement.

In view of all the foregoing matters, the Board finds holds and or directs as follows on the second issue framed for determination.

- a) The Reply to the Respondent's Response dated and filed on 20th June, 2014 together with all the documents attached to the said Response were improperly before the Board and are hereby struck out.
- b) The documents attached to the said response as attachments "A" and "D" are confidential documents which ought not to have been disclosed to the Applicant particularly in the absence of a Request for the document by the Applicant pursuant to the Provisions of Section 45(3) of the Act. The disclosure of the said documents therefore prima -facie contravened the Provisions of Sections 44 and 45 of the Act.
- c) The document attached to the **Reply to the Respondent's Response** and which was marked as exhibit 'A1' was not part of the tender document and is either a forgery or was a document intended to be used in the final version of the tender document but which was not used but nonetheless ended up in the hands of the Applicant.
- d) In view of the Board's findings under item (b) and (c) above and in order to regain Public confidence in the Procurement process in this Country, the Managing Director of the Procuring Entity who is also it's accounting Officer/Chief accounting Officer is directed to immediately take steps to establish the circumstances under which what are prima-facie confidential/apparently forged or leaked documents came into the possession of the Applicant and file a report with the Public Procurement Oversight Authority within Twenty One (21) days from the date of this decision. This direction is however given without prejudice to any other remedy that the Procuring Entity may have in law including commencing debarment proceedings or engaging any relevant Government agency to assist it to investigate this matter.

ISSUES NO. 3 AND 4

Whether or not the Procuring Entity acted in breach of the Provisions of Regulation 82 (2) of the Public Procurement Act and the Regulations made thereunder.

Whether the successful bidder did not prove to have performed similar project in the Pipeline works anywhere in the last 5 years.

All the advocates who appeared before the Board were unanimous that what the Applicant had sought to do was to carry out a self evaluation which was the sole preserve of the Procuring Entity's tender evaluation committee. The Board has already held that the Applicant's Request for Review and the Reply to the Respondent's Response together with all the documents attached thereto were improperly before the Board and has already struck them out.

In view of the above finding, the Board finds that the Applicant did not prove any infringement of the Provisions of Regulation 82(2) of the Public Procurement and Disposal Act and further that the Applicant did not prove the allegation that the successful bidder did not have the necessary experience to perform a similar project.

ISSUE NO. 5

Whether or not the Applicants allegations of corruption and collusion and any other like practices was a matter properly before the Board and if so whether the said allegations were proved.

The Board has already stated in the preceding part of this decision that the allegations of corruption and collusion and any other like practices was not pleaded and was not part of the grounds for Review set out by the Applicant. The Board has also found that the email communication that the Applicant sought to rely upon and which was attached to the Applicant's **Reply to the Respondent's Response** was not mentioned anywhere in the response and was not formally produced before the Board by way of any statement or an affidavit.

The entire Request for Review and the reply to the Respondent's Response together with all the documents attached thereto having been struck out the Applicant could not and cannot prove the allegations of corruption, conclusion and or the commission of any other like practices against the Applicant.

This Board has and will only act on the materials placed before it and the grounds set out in the Request for Review and which must be proved. The Board will not rely on bare allegations or rumours.

The Board in any event agrees with Mr. Gatonye's submissions that an allegation of a criminal nature can only be proved through the production of a judgment issued by a court of competent jurisdiction or any other record of conviction and that such an allegation should not be taken lightly.

The Board therefore finds and hold that the Applicant did not plead nor place any evidence of corruption, collusion and or any like practice before the Board and further that this allegation was unsupported and lacks basis and is accordingly dismissed.

ISSUE NO. 6

Who should bear the costs of the Request for Review?

This was clearly a case of sour grapes. The Applicant's case was entirely unsupported by evidence. The Applicant also relied on documents which prima facie appear to be in contravention of sections 44, 45, and 31 of the Act. The Applicant also imputed criminal conduct on the part of the 1st interested party without any evidence to support such allegations and as costs follow the event this is therefore an appropriate case where the Applicant must be condemned to pay costs.

THE BOARD'S OBSERVATIONS

Having heard the representations by all the parties and perused all the documents and the grounds for Review, the Board has observed that some of the Requests for Review filed by tenderers and particularly the unsuccessful tenderers are based on very flimsy allegations which are without any proper basis and are filed for the sole purposes of slowing down the Procurement processes in this Country. The Board appreciates that any candidate to a tender has the right to file a Request for Review before the Board but reminds parties that such a Request must be based on valid and justifiable grounds.

The Board warns candidates that it will not be the dumping ground or be used for the proposes of slowing tender processes and will not hesitate to employ the wide powers that the Act has conferred on it just as it has done in the case of the Applicant in this Request for Review.

FINAL ORDERS

Accordingly and for all the reasons set out above and in exercise of the powers conferred upon the Board by the Provisions of Section 98 of the Act, the Board makes the following orders:-

- a) That the Request for review filed by the Applicant herein with the Board on 11th June, 2014 be and is hereby dismissed.
- b) That the order of stay issued by this Board on 11th June, 2014 is discharged and the Procuring Entity is therefore at liberty to proceed with the procurement which was the subject matter of this Review.
- c) The Applicant shall pay the costs of this application to the Procuring Entity and all the Interested Parties. The said costs shall be agreed upon and failing such agreement any of the parties to this Request shall be at liberty to move the Board to have the said costs taxed.

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


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Chairman


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Secretary

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