REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 19/2014 OF 30TH MAY 2014

BETWEEN

KALPATARU POWER
TRANSMISSION LIMITED .....APPLICANT

AND

THE KENYA PIPELINE
COMPANY LIMITED .....PROCURING ENTITY

AND

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

CHINA PETROLEUM ENGINEERING
& CONSTRUCTIONCORPORATION .....2ND INTERESTED PARTY

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

Review against the decision of the Kenya Pipeline Company Limited made on 26th May, 2014 in the matter of Tender No. SU/QT/032N/13 for the Procurement, Construction, Testing and Commissioning of Line1 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 19/2014- KALPATARU POWER TRANSMISSION LTD

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

INTERESTED PARTIES

1. Stephen Owino - Advocate, China Wu Yi Co.
2. Tom Makumu - Clerk, China Wu Yi Co

3. Peter Liu - Legal Officer, China Wu Yi Co
4. Wang - Legal Officer, China Wu Yi Co
5. Thomas K'Bahati - China Petroleum, Advocate
6. Waweru Gatonye - Zhakhem Corp, Advocate
7. Risper Oloo - Zhakhem Corp, Advocate
8. Brian Omuganda - Zhakhem Corp, Advocate
9. Lu Shipeng - Sinopec Service, Marketing Dept
10. Lu Siwei - Sinopec Service , Engineer
11. Zhao Chengshu - Sinopec Service, Engineer
12. Ol Gaoshun - Sinopec Service, Manager
13. Maurice Olunya – Amacec Kenya Ltd, Technical Advisor
14. Han Jile - Avic, Area Manager
15. Kiprop Kiprono – Quarsarq Group, Manager
16. 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
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:-

Financial Score = (Lowest bid price, X/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 DISPUTE

This Request for Review was lodged by Kalpataru Power Transmission Limited, which was represented by the firm of Muma & Kanjama Advocates of P.O. Box 528-00100, Nairobi, against the decision of the Kenya Pipeline Company Limited of 26th May, 2014, in the matter of Tender for Procurement, Construction, Testing and Commissioning of Line 1 Pipeline Replacement Project - Contract No. SU/QT/032N/13.

The Applicant requested the Board for the following orders: -

a. **THAT a fair administrative action be taken by the Board in this matter in terms of Article 47 of the Constitution of the Republic of Kenya;**
b. **THAT the Procuring Entity's decision dated the 26th of May, 2014 rejecting the Applicant's bid for the Procurement, Construction, Testing and Commissioning of Line 1 Pipeline Replacement Project, Contract No. SU/QT/032N/13 be set aside and/or be nullified;**
c. **THAT the Procuring Entity's decision contained in the letter of 7th May, 2014 extending the submission date from 8th May, 2014 to 15th May, 2014 be declared to be null and void and in**

contravention of Section 53 of the Public Procurement and Disposal Act, 2005;

d. **THAT the Procuring Entity be directed to comply with Section 53 of the Public Procurement & Disposal Act and issue an extension by way of an addendum and the extension be at least twenty (20) days being one third of the original time required for preparation of the tender documents;**

e. **THAT the Procuring Entity be directed to admit the Applicant's bid for the Procurement, Construction, Testing and Commissioning of Line 1 Pipeline Replacement Project, Contract No. SU/QT/032N/13 in compliance with the provisions of the Constitution of Kenya, the Public Procurement and Disposal Act 2005, the Public Procurement and Disposal Regulations, 2006 and in conformity with the Technical and Financial evaluation criteria set out in the tender documents;**

f. **THAT the costs of and incidental to these proceedings be in the cause;**

g. **THAT this Honourable Board be pleased to issue such further or other orders as it may deem just.**

The Applicant alleges that by a letter dated 5th March 2014, the Procuring Entity (the Kenya Pipeline Company Limited) invited proposals from the Applicant, amongst other pre-qualified bidders, for the Procurement, Construction, Testing and Commissioning of Line 1 Pipeline Replacement Project, Contract No.: **SU/QT/032N/13.**

The Applicant stated that the above request required the Applicant to submit the following documents as part of the pre-qualification process:

(i) *Separate technical and financial bids.*

(ii) *A valid KRA Tax Compliance Certificate (for Local Companies).*

(iii) *Certificate of Incorporation of the company/Business Registration.*

(iv) *Original tender security for USD 500,000, issued from a reputable Bank operating in Kenya. Must be valid for 150 days from date of tender opening.*

(v) *Certificate of Registration as a contractor in the country of operation for foreign firms and National Construction Authority Certificate NCA1 for local partners.*

The Applicant further stated that, in satisfaction of the requirements, it submitted the following documents:

a) Separate technical and financial bids.
b) Tax Compliance Certificates.
c) Certificate of Incorporation of the company/ Business Registration.
d) Original tender security for USD 500,000, issued from a reputable Bank operating in Kenya, valid for 150 days from the date of tender opening.
e) Certificate of Incorporation of the company as a company and its Memorandum of Association in proof of its Registration as a contractor in the country of operation.

The Applicant stated that it was however surprised when it received a letter dated 26th May, 2014 from the Procuring Entity informing the Applicant that its bid was not responsive on account of two reasons namely:-

(a) That they did not submit proof of registration as a contractor in their country of operation, and

(b) That their tender security was not valid for the required period as it expired on 5th October, 2014, which was less than 150 days as required in the Request for Proposal/the tender documents.

The Applicant faulted the said decision which it stated was erroneous in fact and in law and ought to be set aside since it was contrary to the Provisions of Section 31 of The Public Procurement & Disposal Act, 2005 which provides for the statutory criteria for qualification of persons to participate and to be awarded contracts for procurement. The Applicant submitted that no preference or reservations were prescribed by the Minister in respect of this particular contract and that the only valid and legal criteria for eligibility that ought to have been applied was the criteria set out in Sections 31 and 39 of the Act. The Applicant further stated that the mandatory requirements set out in the letter of 5th March, 2014 issued by the Procuring Entity were not in consonance with the provisions of the Act and as a consequence and of necessity must give way to the mandatory statutory requirements. The Applicant stated that the Procuring Entity introduced unusual requirements into the procurement process, one of which was that bidders were required to produce "a *Certificate of Registration as a contractor in the country of operation for foreign firms*", and that as a company registered in India, the Applicant was subject to a different set of standards as would be required for a local firm.

The issues for determination

The Board has looked at the issues framed by the parties and considers the following issues falling for determination in this application.

1. **Whether the Applicant provided a valid bid bond for the purposes of this Procurement.**
2. **Whether the Respondent erred in declaring the Applicant non-responsive on account of it's failure to provide a Certificate of registration as contractor in India and a tax Compliance Certificate.**

THE PARTIES' ARGUMENTS

Mr. Kanjama stated that under the Provisions of Article 227 of the Constitution the Board was bound to interpret any legislation, including the Public Procurement and Disposal Act in light of this Article of the Constitution in assessing whether a procurement process was fair, equitable, transparent, competitive and cost effective. He quoted the Provisions of Sections 31 and 39 which state that procurement must be done without discrimination unless participation in the Procurement process is limited by the Act. He argued that the Applicant, having been prequalified it meant that it was competent and qualified to perform the contract but had been unfairly excluded from taking further part in the process and therefore the question that arose was whether that exclusion was in accordance with the provisions of the Constitution, the Act and the Regulations. He singled out the Procuring Entity's letter of 7th May 2014 extending the submission date from 8th May, 2014 to 15th May 2014 as being an unreasonable extension that prejudiced the Applicant as it went against the Provisions of Section 55(3) of the Act and did not allow the Applicant sufficient time to extend its bid bond which ended up being rendered non compliant because the Applicant could not extend the bid bond validity period. He contended that the resulting lack of compliance therefore arose because of the extension and the Board should consider the fact that the bid bond was for a period less than that provided for and that

it was therefore a minor deviation in accordance with the Provisions of Section 64(2) which should not be used to disqualify the Applicant.

In reply Counsel for the Procuring Entity sought to clarify that the pre-qualification process done under the Expression of Interest (EOI) must not to be confused with the process of evaluation of the Request for Proposal (RFP) as the former was completed and concluded in April 2013. She opposed the suggestion by the applicant which seemed to imply that, since the applicant had been prequalified at the initial expression of interest stage, then the Procuring Entity should not have keenly scrutinized the tender document submitted by it. She referred the Board to the Provisions of Section 81 of the Act which states that the Procuring Entity should give each person prequalified a request for proposal with a copy of terms of reference containing instructions for preparation and submission of proposals. The Request for proposals/ the tender document required that bidders should have proposals which would include a technical and financial proposal with the procedures and criteria to be used to evaluate and determine whether the proposal was responsive. The Procuring Entity argued that the Applicant was disqualified upon the examination of the mandatory requirements.

As regards the issue of extension of time for the tender submission from 8th May to 15th May 2014, Counsel for the Procuring Entity argued that Section 53 of the Act does not give a minimum period within which an extension should be granted and that this extension was done in response to Requests by several bidders who requested for more time and was not a unilateral decision of the Procuring Entity. She added that there was no other condition that the bidders were called upon to fulfil and since the Applicant's Bid Bond was issued by I&M Bank in Kenya this extension

could not have prejudiced the Applicant in any way. Furthermore she observed that all the other 8 bidders complied and extended their bid bonds accordingly. She further argued that this was yet another illustration of a case where the Applicant should have taken up the issue on receipt of the letter and complained if indeed it thought it would not be able to comply instead of waiting until after the period provided for had lapsed.

Mr. Gatonye associated himself with the Procuring Entity's submissions and stated that since the Applicant did not invoke the jurisdiction of the Board within the time prescribed by law, the application was incompetent. He stated that the requirement on the period of the validity of a tender bid bond was a mandatory requirement and not a minor deviation and that the Procuring Entity had no discretion in the matter if the bid bond did not cover the bid bond validity period. Regarding the claim that Procuring the Entity had violated Article 227 of the Constitution, Mr Gatonye stated that the Applicant had failed to demonstrate how the Procuring Entity did not comply with Articles 227 by giving particulars of the breaches of the Constitution that had been violated.

The Board has considered the rival submissions on the issue of the Bid Bond. The bid bond submitted by the Applicant appears at pages 129 to 130 of the tender document. The second last paragraph of the Bid Bond which was issued by the I & M Bank Limited Kenyatta Avenue in Kenya expressly states that the guarantee would remain in force upto and including Thirty (30) days after the period of tender validity i.e. 5th October 2014 and that any demand in respect thereof should reach the Bank not later than the said date.

It is therefore plain from a reading of the bid bond itself that it was valid upto 5th October 2014 and this is borne out by the fact that the Bank itself stated that the Bank would not honour any demand received after the said date.

The Bank additionally directed the Applicant to return the bid bond for cancellation with a rider that the Bid Bond shall stand cancelled whether returned to the Bank or not.

The Procuring Entity would not therefore have a bid bond to hold onto after 5th October 2014. This was however a mandatory requirement under this contract but not a minor deviation as the Applicant sought to argue.

Regulation 57 of the Public Procurement and Disposal Regulations 2006 provides that the procedure for Preliminary evaluation of open tenders set out in Regulation 47 shall apply to evaluation of Request for Proposals under Section 82 of the Act.

Regulation 47 (1) stipulates that upon opening tenders under Section 60 of the Act, the evaluation committee shall first conduct a preliminary evaluation to determine whether:-

"(1) (b) any tender security submitted is in the required form, amount and validity period."

It was held in the case of **Mwangemi General Contractors -vs - Mokowe Secondary (PRB Application No. 28 of 2010)** that the provision of a Bid Bond is a mandatory requirement and that any such Bid Bond must be in the form, amount and within the tender validity period.

The Board held similarly in the case of **Avery (East Africa) Ltd -vs- Kenya Power and Lighting Company Ltd (PRB Application No. 14 of 2008)** and

proceeded to disqualify the candidate who had not complied with the requirement.

As rightly submitted by Counsel for the Procuring Entity and the successful bidder, the purpose of a Bid Bond is to ensure that a tenderer complies with its obligations from the date the tender is opened for evaluation to the date when a contract is entered into.

In view of the clear and unambiguous requirement of Regulations 57 and 41 of the Regulations and Sections 53 and 60 of the Act, where any period provided for in a tender is extended the bid bond must be similarly extended.

Where the validity period for the Bid Bond lapses the tender dies once the validity period lapses and no award can flow from a "dead" tender. **(See the case of Arpland Architects -vs- Ministry of Housing (PRB Review No. 4 of 2010).**

The Applicant's expressed difficulty in having its tender validity period extended cannot also be a valid ground since all the other remaining eight bidders extended their bid bonds accordingly upon the expiry of the specified period and there is absolutely no reason why the applicant whose Bank is located in Nairobi had to travel back to India to have its bid bond extended. Furthermore the Applicant must have been aware that its bid bond was non compliant when it handed it in on 15th May, 2014, knowing very well that the tender submission date had been moved from 8th May, 2014 to 15th May, 2014. With this knowledge the Applicant ought to have taken steps to extend the bid bond like the other bidders did but not to merely submitted a tender whose bid bond had expired at the time it was submitting it.

The Board has perused the tender documents placed before it and has established that the other bidders who participated in this tender came from other counties which are far and wide such as China, Italy, Lebanon, India and Belgium among others.

The Board therefore finds and holds that the Applicant's Bid Bond was valid only upto 5th October 2014 and that the Procuring Entity rightly disqualified the Applicant at the preliminary evaluation stage pursuant to the provisions of Regulation 47 (1) and Section 60 of the Act.

The second ground of the Application revolved around the requirement that the Applicant did not provide a ***"certificate of registration as a contractor in the country of operation"*** and that the requirement for a Tax Compliance Certificate. Mr. Kanjama stated that there was no requirement for the registration of contractors or a Tax Compliance Certificate in India and therefore faulted the Procuring Entity for disqualifying the Applicant on the basis of these two requirements. According to him, the key word used is **"registration"** and that the Certificate of Incorporation and the Memorandum and Articles of association of the Company were sufficient for that purpose. Without citing any proof of the existence of such a practice in India, Mr. Kanjama submitted that it was not a legal requirement for contractors in india to be registered or to be issued with a tax compliance Certificate. He further stated that, because the Procuring Entity was inviting bids from all over the world, it should have reasonably expected that this proof would take various forms depending on the regulations of the various countries. In this case he stated that Articles 48 and 49 of the Memorandum of Association of the Applicant stated that the Applicant was capable of performing the tender for the construction of a Pipeline if the tender was awarded to it. Referring to documents that had

been submitted by one of the bidding companies namely Punj Lloyd Limited from India which was a certificate of registration issued by the Construction Federation of India (CFI), he stated that this was not a statutory body but a business association and was not therefore expected to issue *"a certificate of registration as a contractor in the country of operation for foreign firms"*. He went on to argue that in the event that the Procuring Entity puts a condition that is not consistent in different jurisdictions, for the purposes of fairness, it should accept the best proof of that registration. In the case of the Applicant it stated that this best proof were Articles and Memorandum of Association documents for Applicant which demonstrated that it could legally conduct contracting work as *"Structural Engineers, Civil Engineers, Hydraulic Engineers, Marine Engineers, Chemical Engineers, Aeronautical Engineers, Textile Engineers, Automotive Engineers and all every work connected with the same"* .

Articles 48 and 49 of the Applicant's Memorandum of Association state as follows:

"Other Objects:

48. To carry on the business of carriers of passengers and goods, manufacturers of, and dealers in railway, tramway, electric, magnetic, galvanic, and other apparatus, suppliers of light, heat, sound and power, and to acquire any invention and construct railway and tramways and work the same by steam, gas, oil, electricity or other power.

49. To carry on the business of Structural Engineers, Civil Engineers, Hydraulic Engineers, Marine Engineers, Chemical Engineers, Aeronautical Engineers, Textile Engineers, Automotive Engineers and all and every work connected with the same and to carry on the business of electricians,

electrical, mechanical and consulting engineers, suppliers of electricity for the purpose of light, heat, motive power or otherwise, manufacturers of and dealers in machinery, apparatus, instruments and things required for or capable of being used in connection with generation, distribution, supply and accumulation, employment and use of electricity, galvanism, magnetism or otherwise.

In response, Counsel for the Procuring Entity, argued that, apart from the Applicant failing to submit a certificate, it also failed to confirm that the company actually carries out the activities it is mandated to carry out. She went on to state that the Procuring Entity recognized that the bidders would be international firms and that it was necessary for it to take into account the different jurisdictions between the local and foreign. Foreign firms were required to submit a certificate of registration as a contractor in the country of operation as proof that they were indeed engaged in activities relevant to the tender. She further argued that if it was intended to consider just the certificate of incorporation as certificate of registration as a contractor then the two mandatory requirements would not have been set out separately. She stated that what had been demonstrated by the Applicant was merely evidence of incorporation, which was evidence of the actual formation of the company and had nothing to do with the activities of the company. She went further to state that the requirement was not for a certificate of registration as a contractor by the Government of India but rather for a **"certificate of registration as a contractor in the country of operation"**. Punj Lloyd, also from India, fulfilled the requirement and there was no reason why the Applicant could not.

Mr. Gatonye supported the arguments by Counsel for the Procuring entity and wondered whether it was true that in India there is no registration of

contractors by a statutory body and if so then the Applicant should have done what the other Indian contractor did namely provide a Certificate of registration with CFI. At least that would have shown some evidence that this is a company involved in construction. Counsel stated that the Procuring Entity was looking for a serious contractor with experience to do a major contract and the act of showing documents of incorporation without proof of experience in carrying out construction work was not enough. Counsel further submitted that this particular requirement was aimed at excluding what in Kenya have come to be known as ***"Cowboy"*** contractors and was meant to weed out tenderers who had no proof of experience in carrying out projects of this magnitude.

The Board has read the tender documents and has noted that the Procuring Entity required all bidders to provide the following documents which were indicated as being part of the mandatory requirements.

a) A certificate of Incorporation of the Company/Business Registration for both Foreign and local partner.
b) A tax Compliance Certificate from the County of domicile for both local and foreign firms.
c) .....
d) A Certificate of Registration as a Contractor in the County of operation for foreign terms and National Construction Authority Certificate NCA 1 for local partners.

The requirement for the Certificate of Incorporation and the certificate of Registration as a contractor in the County of operation for foreign firms were two distinct requirements under the mandatory requirements. The best that the Applicant should have therefore done in the circumstances and in the event that it had proved that a Certificate of registration as a contractor in India was not a mandatory requirement in India, it should have produced the next best proof as was shown in the case of Punj Lloyd

which was to provide proof that indeed it is involved in construction. Whether this came from CFI or the Government of India or indeed any other appropriate Institution was essential for compliance.

The requirement that the bidders provide a tax Compliance certificate was also a mandatory requirement in the tender document. The Applicant did not provide evidence to show that this was not a requirement in India. The allegation was an allegation of fact which the Board cannot take judicial notice of and ought to have been established. The Applicant instead produced uncertified accounts for the years 2012-2013.

Section 31 of the Act provides as follows:_

> *"31 (1) A person is qualified to be awarded a contract for procurement only if the person satisfies the following criteria:*
>
> *(a) the person has the necessary qualifications, capability, experience, resources, equipment and facilities to provide what is being procured;*
> *(b) the person has the legal capacity to enter into a contract for the procurement;*
> *(c) the person is not insolvent, in receivership, bankrupt or in the process of being wound up and is not the subject of legal proceedings relating to the foregoing;*
> *(d) the procuring entity is not precluded from entering into the contract with the person under section 33;*
> *(e) the person is not debarred from participating in procurement proceedings under Part IX.*

(2) The procuring entity may require a person to provide evidence or information to establish that the criteria under subsection (1) are satisfied.

(3) The criteria under subsection (1) and any requirements under subsection (2) shall be set out in the tender documents or the request for proposals or quotations or, if a procedure is used to pre-qualify persons, in the documents used in that procedure.

(4) The procuring entity shall determine whether a person is qualified and that determination shall be done using the criteria and requirements set out in the documents or requests described in subsection (3).

(5) The procuring entity may disqualify a person for submitting false, inaccurate or incomplete information about his qualifications.

(6) No person shall be excluded from submitting a tender, proposal or quotation in procurement proceedings except under this section and under section 39.

(7) Procuring entities shall use creative approaches, such as design and build in order to enhance efficiency of the procurement process and project implementation"

While Section 39 of the same Act states as follows:-

"39(1) Candidates shall participate in procurement proceedings without discrimination, except where participation is limited in accordance with this Act and the Regulations.

39(2) Subject to subsection (8), the Minister shall, in consideration of economic and social development factors, prescribe

preferences and or reservations in public procurement and disposal."

As the Board has already observed in its determination on the issue of the bid bond, a mandatory requirement contained in a tender document cannot be waived and the Board therefore finds and holds that the Applicant was properly disqualified at the Preliminary evaluation stage for not complying with the mandatory requirements set out in the tender document.

The Board finally observes that in the absence of any proof of breach of any of the Provisions of the Act or the Regulations, the Applicant's contention that the Procuring Entity breached the Provisions of Article 227 of the Constitution cannot stand and is therefore also disallowed.

In conclusion therefore and inview of all the foregoing matters and in exercise of the powers conferred upon it by the Provisions of Section 98 of the Act, the Board makes the following orders:-

a) The Request for review filed by the Applicant herein on 30th May, 2014 be and is hereby dismissed but with no order as to costs.
b) The order of stay issued herein on 30th May, 2014 be and is hereby discharged and the Procuring Entity is at Liberty to proceed with the Procurement process.

Dated at Nairobi this 27th day June 2014.

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Chairman

PPRB

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Secretary

PPRB