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ELEVENTH PARLIAMENT- THIRD SESSION

THE PUBLIC INVESTMENTS COMMITTEE

SPECIAL REPORT ON THE PROCUREMENT PROCESS OF
THE KENYA PIPELINE COMPANY LTD LINE 1 CAPACITY
ENHANCEMENT PROJECT (MOMBASA - NAIROBI PIPELINE)

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FEBRUARY 2015

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ABBREVIATIONS

Cap	-	Chapter
EOI	-	Expression of Interest
FOC	-	Fibre Optic Cable
KPC	-	Kenya Pipeline Company Limited
PPDA	-	Public Procurement and Disposal Act
PPOA	-	Public Procurement Oversight Authority
PPARB	-	Public Procurement Administrative Review Board
RFP	-	Request for Proposal
WKPE	-	Western Kenya Pipeline Extension
PS	-	Pump Station
ROW	-	Right of Way
VAT	-	Value Added Tax

1.0 PREFACE

Mr. Speaker Sir,

The Public Investments Committee is a Select Committee established under Standing Order No. 206 and is responsible for the examination of the working of public investments.

1.1 Mandate of the Committee

The Committee is mandated to:-

- (a) Examine the reports and accounts of the public investments;
- (b) Examine the reports, if any, of the Auditor-General on the public investment;
- (c) Examine, in the context of the autonomy and efficiency of the public investments, whether the affairs of the public investments, are being managed in accordance with sound financial or business principles and prudent commercial practices.

The Committee shall however not examine:-

- (a) Matters of major government policy as distinct from business or commercial functions of the public investments;
- (b) Matters of day-to-day administration; and,
- (c) Matters for the consideration of which machinery is established by any special statute under which a particular public investment is established.

The procedure of a Select Committee and other related matters thereto is covered under Standing Order No. 173–203. The Committee has power, under Article 125 of the Constitution, National Assembly (Powers and Privileges) Act (Cap. 6), the State Corporations Act (Cap. 446) and the Public Audit Act, 2003, to summon witnesses, examine them on oath and receive evidence.

1.2 Committee Membership

The Committee comprises of the following Members:-

- | | | | |
|------|---|---|-------------------------|
| (1) | Hon. Adan W. Keynan, CBS. MP | - | Chairperson |
| (2) | Hon. Kimani Ichung'wah, MP | - | Vice Chairperson |
| (3) | Hon. Francis Mwanzia Nyenze, EGH. MP | | |
| (4) | Hon. (Dr.)Oburu Oginga, MP | | |
| (5) | Hon. (C.P.A.) Thomas Ludindi Mwadeghu, MP | | |
| (6) | Hon. Adan M. Nooru, MP | | |
| (7) | Hon. Mithika Linturi, MP | | |
| (8) | Hon. Wafula Wamunyinyi, MP | | |
| (9) | Hon. Elias Bare Shill, MP | | |
| (10) | Hon. Sammy Mwaita, MP | | |
| (11) | Hon. (Dr.) Paul Otuoma Nyongesa, EGH. MP | | |
| (12) | Hon. John Olago Aluoch, MP | | |
| (13) | Hon. (Eng.) John Kiragu, MP | | |
| (14) | Hon. (Major) (Rtd) John Waluke Koyi, MP | | |
| (15) | Hon. Abdullswamad Sheriff Nassir, MP | | |
| (16) | Hon. Beatrice Nkatha Nyaga, HSC.MP | | |
| (17) | Hon. Bernard Munywoki Kitungi, MP | | |
| (18) | Hon. Chrisanthus Wamalwa Wakhungu, MP | | |
| (19) | Hon. Cornelly Serem, MP | | |
| (20) | Hon. Ejidius Njogu Barua, MP | | |
| (21) | Hon. Irungu Kang'ata, MP | | |
| (22) | Hon. Johana Ngeno, MP | | |
| (23) | Hon. John Muchiri Nyaga, MP | | |
| (24) | Hon. John Ogutu Omondi, MP | | |
| (25) | Hon. Korei Ole Lemein, MP | | |

- (26) Hon. Mary Sally Keraa, MP
- (27) Hon. Onesmus Muthomi Njuki, MP

1.3 Committee Proceedings

The Committee held eight Sittings in which it closely examined and heard evidence from witnesses. The minutes of the Committee are hereto annexed and copies of the Hansard report may be obtained at the National Assembly Library.

In its inquiry into whether or not the procurement of KPC Line I Capacity Enhancement Project (Mombasa to Nairobi Pipeline) by KPC was managed in accordance with sound business principles, prudent commercial practices, public procurement laws, the Committee heard and received both oral and written evidence from the Management of Kenya Pipeline Company; M/s Kalpataru Power Transmission; M/s China Wu Yi Company Limited and the Public Procurement Oversight Authority.

The Committee had also invited the management of M/s China Petroleum Engineering Construction Company and M/s Zakhem International Construction Limited but they failed to appear before it.

The records of evidence adduced, documents and notes received by the Committee form the basis of the Committee's observations and recommendations as outlined in the report and can be obtained in the Hansard reports of the Committee available in Parliament's Library.

These observations and recommendations, if taken into account and implemented, will enhance accountability, effectiveness, transparency, efficiency, prudent investment and

financial management in state corporations and the public investments sector as a whole and guide in future procurements.

1.4 Committee's General Observations

The section below provides a summary of the Committee's observations on the Procurement of KPC Line 1 Capacity Enhancement Project (Mombasa - Nairobi Pipeline) under Tender No. SU/QT/032N13: -

1.4.1 The Kenya pipeline company (KPC) Line 1 Capacity Enhancement Project (Mombasa - Nairobi Pipeline) is strategic not only for the long-term financial stability of the company but also for ensuring reliable and adequate supply of petroleum products to the country (Kenya) and the land-locked countries of Uganda, Rwanda, Burundi and parts of the Democratic Republic of Congo.

1.4.2 The replacement of the pipeline, once implemented according to specifications, will ensure: -

- (i) The projected demand of petroleum products in Kenya and in the Eastern Africa region up to year 2044 is met.
- (ii) Sustained, reliable, efficient supply and distribution of refined petroleum products in line with region's growing demand up to the year 2044.
- (iii) Reduced shortages of fuel for the domestic and export market occasioned by leakages and pipe bursts of the old pipeline.
- (iv) Reduced road damage and environmental pollution caused by road tankers.

1.4.3 M/s Zakhem International Construction Ltd, the company that was awarded the tender, had met the competence required in terms of technical capability, experience and resources (financial and human resource) to undertake the project, in addition to having the advantage of having constructed the same pipeline in 1972. The pipeline has lasted for 36 years from the initial plan of 25 years.

- 1.4.4** M/s Rich Productions Limited filed a judicial review of the Expression of Interest (EOI). The case was dismissed because of material non-disclosure by the petitioner and the Court's view was that the company lacked the requisite experience and financial capacity to tender for the construction of the pipeline.
- 1.4.5** There were two administrative reviews by the Public Procurement Administrative Review Board (PPARB) by M/s Kalpataru Power Transmission Limited and M/s China Petroleum Engineering & Construction Company challenging the award of the tender to the successful bidder, but both cases were dismissed for lack of proof of breach of any of the provisions of the Public Procurement and Disposal Act, 2005 or the Public Procurement and Disposal Regulations, 2006 and Article 227 of the Constitution.
- 1.4.6** After the PPARB reviews and the High Court's judgment, no party has since raised any further queries in relation to the tender. The PPARB and the High court rulings are attached as *Annex 1 and 2* respectively.

1.5. Committee's Recommendations

From the evidence adduced (oral and written) and the observations, the Committee recommends that:-

- 1.5.1.** Kenya Pipeline Company (KPC) should implement the Project and expedite the capacity enhancement and extension of the petroleum products pipeline to other deserving areas not covered by the current Pipeline.
- 1.5.2.** KPC should ensure that the pipeline capacity enhancement is constructed according to the required engineering standards, design specifications and bid price of USD 484,502,886.40 and further ensure that the project meets the projected capacity and desired needs.

- 1.5.3.** KPC should increase the storage capacity for petroleum products at various pump stations so as to reduce transport of petroleum products by road in order to reduce damage to the roads and environmental pollution caused by road tankers.
- 1.5.4.** M/s Zakhem International Construction Company Ltd carries out its obligation of constructing the pipeline with due diligence, cost effectiveness with no variations to the bid price of USD 484,502,886.40 and in a timely manner.
- 1.5.5.** The procuring entities should consult widely and especially with the Office of the Attorney General during the procurement process and in particular to seek advice before contracts are signed.

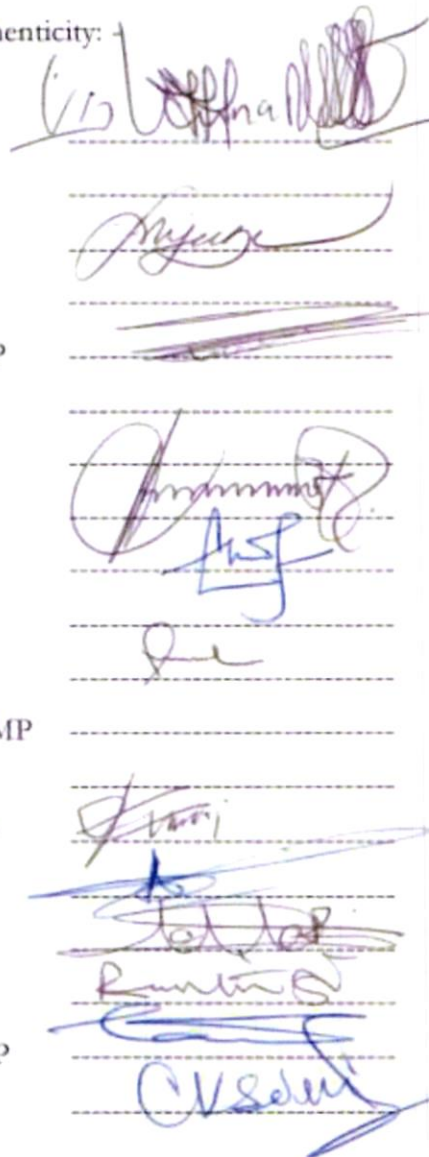
1.6. Acknowledgement

The Committee wishes to record its appreciation to the Office of the Speaker and the Clerk of the National Assembly for facilitating the work of the committee in fulfillment of its mandate. The Committee is also grateful to all the witnesses who appeared and adduced evidence before it. Further, the Committee is grateful to the staff of the National Assembly, Kenya National Audit Office, the Inspectorate of State Corporations and the National Treasury for the services they rendered to the Committee. It is their commitment and dedication to duty that made the work of the Committee and production of this Report possible.

ADOPTION OF THE SPECIAL REPORT OF THE PUBLIC INVESTMENTS COMMITTEE ON THE PROCUREMENT PROCESS OF KENYA PIPELINE COMPANY LTD. LINE 1 CAPACITY ENHANCEMENT PROJECT (MOMBASA - NAIROBI PIPELINE)

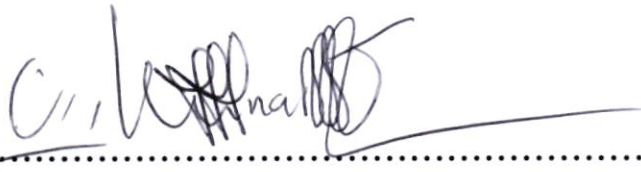
We the Members of the Public Investments Committee have, pursuant to Standing Order 199, adopted this Report and hereby affix our signatures to affirm our approval and confirm its accuracy, validity and authenticity:

- (1) Hon. Adan Wehliye Keynan, CBS, MP
- (2) Hon. Anthony Kimani Ichung'wah, MP
- (3) Hon. Francis Mwanzia Nyenze, E.G.H, MP
- (4) Hon. (Dr.) Oburu Oginga, MP
- (5) Hon. (C.P.A.) Thomas Ludindi Mwadeghu, MP
- (6) Hon. Adan Mohammed Nooru, MP
- (7) Hon. Franklin Mithika Linturi, MP
- (8) Hon. Athanas Wafula Wamunyinyi, MP
- (9) Hon. Elias Bare Shill, MP
- (10) Hon. Sammy Silas Komen Mwaita, MP
- (11) Hon. John Olago Aluoch, MP
- (12) Hon. (Dr.) Paul Otuoma Nyongesa, EGH MP
- (13) Hon. (Eng.) John Kiragu, M.P
- (14) Hon. (Major) (Rtd.) John Waluke Koyi, MP
- (15) Hon. Abdullswamad Sheriff Nassir, MP
- (16) Hon. Beatrice Nkatha Nyaga, HSC, MP
- (17) Hon. Bernard Munywoki Kitungi, MP
- (18) Hon. Chrisanthus Wamalwa Wakhungu, MP
- (19) Hon. Cornelly Serem, MP



Mr. Speaker,

On behalf of the Members of the Public Investments Committee, I beg to table the Special Report of the Committee on the Procurement of KPC line 1 capacity enhancement project (Mombasa-Nairobi pipeline) pursuant to Standing Order 199.

Sign: 

HON. ADAN. W. KEYNAN, CBS, MP
CHAIRPERSON, PUBLIC INVESTMENTS COMMITTEE

Date:

- (20) Hon. Ejidius Njogu Barua, MP
- (21) Hon. Irungu Kang'ata, MP
- (22) Hon. Johana Kipyegon Ng'eno, MP
- (23) Hon. John Muchiri Nyaga, MP
- (24) Hon. John Ogutu Omondi, MP
- (25) Hon. Korei Ole Lemein, MP
- (26) Hon. Mary Sally Keraa, MP
- (27) Hon. Onesmus Muthomi Njuki, MP



Handwritten signatures in blue and black ink on a lined background. The signatures are arranged vertically, corresponding to the list of names on the left. The top signature is in blue ink and appears to be 'Barua'. Below it are several signatures in black ink, including one that looks like 'Kang'ata', 'Ng'eno', 'Nyaga', 'Omondi', 'Lemein', 'Keraa', and 'Njuki'. There are also some illegible scribbles and marks in blue and black ink.

2.0 BACKGROUND

- 2.1** The Kenya Pipeline Company (KPC) Limited is a State Corporation established on 6th September, 1973 under the Companies Act (Cap 486) of the Laws of Kenya. The company's operations are also governed by relevant legislations and regulations such as the Public Procurement and Disposal Regulations, 2006.
- 2.2** The main objective of setting up the company was to provide efficient, reliable, safe and cost effective means of transporting petroleum products from Mombasa to the hinterland. In pursuit of this objective, the company constructed pipeline network, storage and loading facilities for transportation, storage and distribution of petroleum products.
- 2.3** The company's other mandate includes:
- a) To build a pipeline for the conveyance of petroleum or petroleum products from Mombasa to Nairobi.
 - b) To own, manage or operate such pipelines and any other pipelines and associated ancillary facilities.
 - c) To market, process, treat, deal in petroleum products and other products and goods and provide transport and other distributive facilities, outlets and services in connection therewith.
- 2.4** KPC started its operations in 1978 after installing a 14-inch diameter underground pipeline from Mombasa to Nairobi. The pipeline is about 450 km long.
- 2.5** The purpose of the pipeline is to transport refined petroleum products from Mombasa to the hinterlands for local use and further transfer to neighboring countries of Uganda, Democratic Republic of Congo, Rwanda, Burundi, Northern Tanzania and Southern Sudan by road.
- 2.6** The pipeline operates with eight pump stations located along the pipeline and each pump station has two pumps rated at 440m³/h. It is operated by running either one or two pump sets per station, depending on the demand for the product.

- 2.7** The Mombasa to Nairobi Pipeline was designed with a flow rate of 880m³/h, which had been projected to meet the product demand up to 2018 and beyond.
- 2.8** Between the year 1990 and 1993, KPC embarked on a new project to extend the pipeline to the Western Kenya Towns of Nakuru, Kisumu and Eldoret. The 14-inch Mombasa to Nairobi Pipeline is referred to as Line I, Nairobi to Eldoret pipeline is commonly referred to as Line II, while Sinendet (50 km after Nakuru) to Kisumu Line is referred to as Line III. The purpose of construction of the petroleum pipelines was to ease stress on the national road network by road tankers, to transport the products faster, economically and safely taking special care of the environment.
- 2.9** The Western Kenya Pipeline Extension (WKPE) was designed for a flow rate of 220m³/h but the initial installed capacity was 160m³/h with 3 pump stations at Nairobi-PS21, Ngema-PS22 and Nakuru-PS24. During the first nine years of its operation, demand increased significantly and the pipeline reached its threshold leading to the installation of the Morendat Pump Station -PS23 in 2003 in order to achieve the designed operating flow rate of 220m³/h.
- 2.10** While the WKPE had reached its ultimate capacity, the demand continued to increase especially for export products. The export trucks were allowed to transport product from Nairobi thus exposing the road network to the very risk and damage that the initial intention of installation of the petroleum pipeline network was meant to address.
- 2.11** Between 2005 and early 2009 Line 1 capacity was enhanced by building four new stations between Mombasa and Nairobi in order to improve on the initial installed capacity of 440 m³/h to the ultimate capacity of 880 m³/h. Four stations of PS2-Taru, PS4-Manyani, PS6-Makindu and PS8-Konza were commissioned on 26th November, 2008 to meet the demand that is projected by 2030.
- 2.12** Kenya and the region at large has been experiencing a sustained economic growth and as a result demand for petroleum products for the last three decades increased

necessitating improvement of the initial capacities provided by the first pipeline networks.

- 2.13** In October 2011, KPC announced a call for tenders for a consultant to carry out detailed engineering design, prepare tender documents, and supervise implementation of the pipeline replacement project from Mombasa to Nairobi.
- 2.14** The consultant designed a replacement pipeline optimizing the use of the existing pipeline facilities to meet the growing demand. The consultant also carried out a technical and financial evaluation to determine the optimal pipe size considering the demand for petroleum products in the region. The pipeline shall be tied into four new pumping stations and subsequently decommission the existing pipeline.
- 2.15** KPC is to construct a new pipeline from Mombasa to Nairobi to replace the existing Line-1. The project is strategic not only for the long-term financial stability of the company but also for ensuring reliable and adequate supply of petroleum products to western Kenya and the land-locked countries including Rwanda, Burundi and Democratic Republic of Congo among others.
- 2.16** The replacement of the Pipeline is intended to:-
- (a) Help meet the projected demand of petroleum products in Kenya and in the Eastern Africa Region up to the year 2044.
 - (b) Ensure sustained, reliable, efficient supply and distribution of refined petroleum products in line with the region's growing demand up to the year 2044.
 - (c) Reduce shortages of fuel for the domestic and export market occasioned by leakages and pipe bursts of the old pipeline.
 - (d) Reduce the number of tankers on the roads thereby reducing road damage and environmental pollution.
- 2.17** The scope of the project is to supply, deliver, construct and commission a suited pipeline size 20" diameter pipeline including laying of Fibre Optic Cable (FOC) within the KPC's ROW (Right of Way) from Mombasa to Nairobi, optimize the

use of 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, PS7), four terminals (PS9, PS10, PS12 and PS14, and four future pump stations (PS2, PS4, PS6, PS8). In addition, the project includes the upgrade of existing firefighting systems in existing stations and design of new firefighting systems for new stations. The multiproduct pipeline is to be laid alongside the existing 450km line from Mombasa to Nairobi.

3.0. EVIDENCE BY WITNESSES

3.1 EVIDENCE BY THE KENYA PIPELINE COMPANY LIMITED

Mr. Charles Tanui, Managing Director, KPC appeared before the Committee on 8th July, 2014 to adduce evidence on the procurements process of the Mombasa - Nairobi pipeline replacement project. The submission by KPC is attached as **Annex 3**. The Managing Director informed the Committee that:-

3.1.1 The tender was first advertised in the local dailies on Wednesday 16th January, 2013 for the construction of the proposed Mombasa – Nairobi Petroleum Products Pipeline Project, and was closed on 28th February, 2013. Forty (40) Expression Of Interest (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).

3.1.2 The Procuring Entity's tender Committee at its Sitting of 16th April, 2013 approved 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.

3.1.3 The following thirteen (13) firms were prequalified:-

- (i) Zakhem International Construction Ltd;
- (ii) China Petroleum and Engineering & Construction Company;
- (iii) Punj Lloyd;
- (iv) Samsung & CT Company;
- (v) Denys NV Infrastructure Energy –JV;
- (vi) Daewoo E&C;
- (vii) Avic International Holding Company and ZTPE Consortium –JV;
- (viii) Sinopec International Petroleum Service;
- (ix) China Wu Yi and Xinjiang Petroleum Engineering Ltd –JV
- (x) Essars Project Ltd;

- (xi) Saipem Business Unit;
- (xii) Kalpataru Power Transmission Ltd; and
- (xiii) Technofab-Gammon Consortium.

3.1.4 The RFP documents were issued to each of 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, 2014 was extended to 8th May, 2014 and subsequently to 15th May, 2014.

3.1.5 At the closing date of 15th May, 2014, only nine (9) firms out of the thirteen (13) prequalified firms submitted their bids for the tender for construction of the proposed Mombasa – Nairobi Petroleum Products Pipeline project, namely:-

- (i) Zakhem International Construction Ltd;
- (ii) China Petroleum and Engineering & Construction Company;
- (iii) Punj Lloyd;
- (iv) Denys NV Infrastructure Energy –JV;
- (v) Avic International Holding Company and ZTPE Consortium
- (vi) Sinopec International Petroleum Service;
- (vii) China Wu Yi and Xinjiang Petroleum Engineering Ltd –JV;
- (viii) Saipem Business Unit;
- (ix) Kalpataru Power Transmission Ltd;

3.1.6 The preliminary evaluation commenced on 5th March, 2014. The mandatory requirements as set out in the RFP document were as follows:-

- (i) Certificate of Incorporation of the Company Registration for both local and foreign partner;
- (ii) Tax Compliance Certificate from country of domicile for both local and foreign firms

- (iii) Tender Security of US\$ 500,000 issued by a reputable bank operating in Kenya; an
- (iv) Certificate of Registration as a contractor in the country of operation for foreign firms and National Construction Authority Certificate for local partners.

3.1.7 M/s Kalpataru Power Transmission Ltd and M/s Avic International Holding Company and ZTPE Consortium –JV consortium failed to satisfy all the mandatory requirements and thus did not qualify to move to technical evaluation stage.

3.1.8 The Board made the following observations on the responsiveness of each of the two tenders of the bidders:-

(a) M/s Kalpataru Power Transmission Limited

- (i) The company did not submit a Certificate of Registration as a contractor in the country of operation.
- (ii) The company provided a tender security of US\$500,000 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 the tender document which required the tenderer to provide a bid security which would be valid for a period of Thirty (30) days after the validity period of 150 days.

(b)M/s Avic International Holding Company and ZTPE Consortium –JV

The company provided a tender security of US\$ 500,000 from Kenya Commercial Bank with an expiry date of 08/10/2014. This according to the procuring entity did not conform to the tender security period indicated in the tender document, which requires the tender security to be valid for 150 days from the date of tender opening.

3.1.9 The financial bids were opened on 3rd June, 2014. The seven bidders that passed the Technical Evaluation stage submitted the financial bids as shown below:-

No.	Company	Tender Price (US Dollars)	Remarks
1.	China Wu Yi and Ltd	456,855,018.00	Inclusive of VAT
2.	China Petroleum and Engineering & Construction Company	518,959,520.52	Inclusive of VAT
3.	Zakhem International Construction Limited	484,502,886.40	Inclusive of VAT
4.	Punj Lloyd	670,165,882.00	Inclusive of VAT
5.	Saipem Business Unit	796,430,000.00	Inclusive of VAT
6.	Denys NV	475,866,042.00	Inclusive of VAT
7.	Sinopec International Petroleum Service	489,351,915.00	Inclusive of VAT

3.1.10 The Mombasa – Nairobi Pipeline (Line 1) replacement project tender was estimated to cost Kshs. 53 billion and was awarded to M/s Zakhem International Construction Limited. M/s Zakhem International Construction Limited’s bid of Kshs. 43 billion was lower than the engineer’s estimate of Kshs. 53 billion and in

addition the company also had the necessary capability, experience and resources to undertake the project.

3.1.11 Thirteen companies were shortlisted out of the 40 that went through the pre-qualification process and were notified to submit RFP. Nine (9) bidders submitted their bid documents by the RFP closing date of 15th May 2014. Two firms namely Kalpataru Power Transmission Ltd and AVIC International Holding Company later failed to meet the mandatory requirements at the technical evaluation stage and thus could not proceed to financial evaluation.

3.1.12 Seven listed companies met the minimum score of 50 per cent in each qualifying criteria under technical evaluation and attained a minimum total score of 75 per cent and thus proceeded to Financial Evaluation. The financial bid accounted for 30 per cent of the marks while the technical aspects accounted for 70 per cent.

3.1.13 After technical and financial evaluation, M/s Zakhem International Construction Ltd received a combined score of 95.5 per cent followed by M/s China Petroleum Engineering Construction with 89.1 per cent, M/s Sinopec International Petroleum Service with 84.5 per cent. M/s China Wu Yi Company with 83.1 per cent, M/s Denny NS with 82 per cent, M/s Punj Lloyd with 81.1 per cent and M/s Saipem Business Unit Engineering Construction with 73.4 per cent.

3.1.14 M/s China Wu Yi was the lowest evaluated in the financial aspect, but the firm lacked technical capacity after it jointly bid with another Chinese firm, Xiang Jing.

3.1.15 M/s Zakhem International Construction Ltd had met the competence required, with an advantage of having constructed the same pipeline in 1972; which has lasted for 36 years from the initial plan of 25 years.

Committee Observations

The Committee observed that:-

- 3.1.16** KPC accepted a bid bond by M/s Zakhem International Construction Ltd issued by Ecobank Nigeria, in spite of their requirement of a bond from a bank operating in the country.
- 3.1.17** M/s Zakhem International Construction Ltd's bid of Kshs. 43 billion was lower than the engineer's estimate of Kshs. 53 billion and in addition the company also had the necessary capability, experience and resources to undertake the project. M/s Zakhem International Construction Ltd's quotation of Kshs. 10 billion less than the engineer's estimates is likely to provide an avenue for variation of the actual cost and may likely lead to an abuse.
- 3.1.18** M/s Zakhem International Construction Ltd had met the competence required, with an advantage of having constructed the same pipeline in 1972; which has lasted for 36 years from the initial plan of 25 years

Committee Recommendation

- 3.1.19** The Committee recommends that the procuring entity should be clear and unambiguous in its future advertisement for EOI and in particular clearly define what "a bank operating in the country" actually means in relation to bid bonds and whether it applies to local banks only or foreign-owned banks operating in Kenya.

3.2 EVIDENCE BY M/S KALPATARU POWER TRANSMISSION LIMITED

Mr. Kishore Komanduri, the Managing Director, M/s Kalpataru Power Transmission Ltd, appeared before the Committee on 20th August, 2014 to adduce evidence on the procurement process of the Mombasa – Nairobi pipeline (Line 1) replacement project. The submission of the company is attached as **Annex 4** and highlights are as follows:-

- 3.2.1** M/s Kalpataru power Transmission Limited has its registered office at 101, Part III, GIDC Estate Sector -128, Gandhinagar -38202, Gujarat, India;
- 3.2.2** Kenya pipeline Company in January 2013 invited expression of interest for the proposed Mombasa – Nairobi Petroleum Products Pipeline Project under Tender No. SU/QT/032N13;
- 3.2.3** M/s Kalpataru affirms that its submission on the prequalification by the procuring entity was responsive to the set criteria and subsequently by a letter dated 25th April, 2013, the procuring entity notified the applicant that it had been shortlisted for the request of proposal for the construction of Mombasa –Nairobi Petroleum Products Pipeline;
- 3.2.4** Kenya Pipeline Company Limited (procuring entity) breached sections 31 and 39 of the Public Procurement and Disposal Act, 2005 (providing for qualification for persons to be awarded contract and protection from discrimination in the procurement process respectively) and the Public Procurement and Disposal Regulations, 2006;
- 3.2.5** By a letter dated 26th May 2014, Kenya Pipeline Company informed the applicant that its bid was not responsive on account of:-
- (a) The applicant's failure to submit registration as a contractor in his country of origin.
 - (b) The invalidity of Tender security (Bid Bond) for the required period as it expired on 12th October, 2014, which was less than 150 days as required in the invitation to submit request for quotation.
- 3.2.6** The procuring entity failed to promote the integrity and fairness of procedure in evaluation criteria;
- 3.2.7** The Indian law permits the applicant as a registered company to perform contracting work in terms of its Articles 48 to 51 of the Memorandum of Association;

- 3.2.8** The Procuring Entity provided unusual requirements to the procurement process one of which was that the applicant were required to produce “*Certificate of Registration as a contractor in the Country of operation for Foreign firms*”;
- 3.2.9** The procuring entity irregularly varied the date of submission contrary to section 53 of the Public Procurement and Disposal Act, 2005;
- 3.2.10** The purported extension of the deadline by the Procuring Entity dealt great harm as the applicant had already taken the necessary steps to ensure that it had procured and secured the Tender Security Bid Bond for USD 500,0000 from I&M, a reputable Bank operating in Kenya, in which the Bid Bond was valid for 150 days from the date of Tender opening which had been set as 8th May, 2014. This was a back to back arrangement with applicant bankers in India with the bank in Kenya;
- 3.2.11** The procuring entity’s action to extend the deadline by a letter on 7th May, 2014 , twenty (20) hours before the set deadline, was in breach of Section 55(3) of the Public Procurement and Disposal Act, 2005;
- 3.2.12** The Public Procurement and Disposal Act, 2005 is perfectly clear at Section 31 (6) in stating that the only pre- condition to be followed during the procurement process are those set out in the Act;
- 3.2.13** The procedure adopted by the Procuring Entity in changing the submission date and preliminary evaluation was not transparent and was contrary to the object and spirit of Public Procurement as set out in Article 227 of the Constitution as read together with section 2 of the Public Procurement and Disposal Act, 2005;
- 3.2.14** The applicant submits that the basis of rejection of its bid is contrary to the Constitution of the Republic of Kenya, the Public Procurement and Disposal Act, 2005 and the Public Procurement and Disposal Regulations, 2006 and as a consequence the applicant has suffered loss and damage by virtue of being disqualified based on a criteria not recognized by law.

3.2.15 The applicant was denied its right to fair opportunity to compete with other bidders on a level playing field, which has resulted in financial loss on the applicant.

3.2.16 M/s Kalpataru Power Transmission had requested the Public Procurement Administrative Review Board to review the decision of KPC dated 26th May 2014 in the Tender for the Procurement Construction, Testing and Commissioning of Line I Pipeline Replacement Project, Contract No. SU/QT/032N/13.

Committee Observation

The Committee observed that:-

3.2.17 The procuring entity duly informed the bidders of the intended variation in the date of submission and extension of the submission deadline pursuant to the provisions of Section 55(3) of the Public Procurement and Disposal Act, 2005

Committee Recommendations:

The Committee recommends that:-

3.2.18 Kenya Pipeline Company (KPC) Ltd. should enhance its internal staff capacity in order to ensure that estimates given for particular projects do not vary considerably from the bidders' tender price.

3.2.19 The procuring entity should attach more value on the necessary capability, experience and resources required to undertake the project in their Expression Of Interest (EOI) and in evaluation of the tenders.

3.2.20 The procuring entity ensures adherence to the Public Procurement and Disposal Act, 2005 and its Regulations.

3.2.21 The unsuccessful bidders, after exhaustion of review at the PPARB or a case at the High Court, should allow projects to be carried out by successful bidders.

3.3 EVIDENCE BY M/S CHINA WU YI COMPANY LIMITED

3.3.1 The Managing Director, China Wu Yi, Mrs. Lily Liu, appeared before the Committee on Wednesday 22nd October, 2014 to adduce evidence on the Procurement of KPC Line 1 Capacity Enhancement project. She informed the Committee that the company had no further interest in the procurement of KPC Line Capacity Enhancement Project and is satisfied with the ruling by the Court.

Committee Observation

The Committee observed that:-

3.3.2 M/s China Wu Yi Company Limited had no further interest in the procurement of the matter of KPC Line 1 Capacity.

3.3.3 M/s China Wu Yi Company Ltd. is a leading Chinese based company with strong presence in Kenya and has undertaken complex and important national projects.

Committee Recommendation

3.3.4 The Committee recommends that unsuccessful bidders, after exhaustion of review at the PPARB or a case at the High Court, should allow projects to be carried out by successful bidders.

3.4 EVIDENCE BY PUBLIC PROCUREMENT OVERSIGHT AUTHORITY

Mr. Maurice Juma, the Director-General, Public Procurement Oversight Authority (PPOA) appeared before the Committee on 26th August, 2014 to adduce evidence on the procurement process of the Mombasa – Nairobi Pipeline (Line 1) replacement project. The submission by PPOA is attached as **Annex 5**. He informed the Committee that:-

- 3.4.1** The PPOA acting under its mandate under Section 49 and 101 of the Public Procurement and Disposal Act, 2005 requested a response from Kenya Pipeline Company on issues raised by the complainant (M/s Rich Productions Limited) and documentary evidence of various documents related to the Expression Of Interest (EOI).
- 3.4.2** The Authority on two occasions requested KPC to respond to the issues raised including a demonstration on the actions KPC would undertake to address the anomalies cited and ensure that the subject EOI is processed in accordance with the conditions prescribed in the EOI document and within the confines of the Public Procurement and Disposal Act, 2005 (PPDA, 2005).
- 3.4.3** KPC confirmed to PPOA that they had complied with all the requirements of PPDA, 2005 and the project consultant was finalizing on the tender documents (RFP) to be issued to the prequalified firm. The replacing of line I was because the current line had exceeded its lifespan (25 years), the maintenance costs were extremely high and was posing a health hazard because of the numerous pipe bursts.
- 3.4.4** KPC's quarterly report on the subject tender as per PPOA circular No. 4/2009 on procurement planning and reporting requirements is expected on 14th October, 2014.
- 3.4.5** M/s Rich Productions Limited filed a judicial review of the EOI. The case was dismissed because of material non-disclosure by the petitioner and the Court's view that it was a briefcase company with neither the requisite experience nor financial capacity to tender for the construction of the pipeline.
- 3.4.6** There were two administrative reviews at the PPARB by M/s Kalpataru Power Transmission Limited and M/s China Petroleum Engineering & Construction Company challenging the award of the tender to the successful bidder, but both cases were dismissed for absence of proof of breach of any of the provisions of the Public Procurement and Disposal Act, 2005 or the Public

Procurement and Disposal Regulations, 2006 and Article 227 of the Constitution.

3.4.7 Taking into account the Public Procurement Administrative Review Board's (PPARB's) reviews and the High Court's judgment, no party has raised any further queries in relation to the tender and therefore PPOA cannot investigate once a case is concluded by PPARB and the High Court.

Committee Observations

The Committee observed that:-

3.4.8 A judicial review case by M/s Rich Productions Limited at the High Court was dismissed because of material non-disclosure by the petitioner and the court's view that it was a briefcase company with neither the requisite experience nor financial capacity to tender for the construction of the pipeline.

3.4.9 M/s Kalpataru Power Transmission Limited and M/s China Petroleum Engineering & Construction Company filed two separate administrative reviews at PPARB challenging the award of the tender to the successful bidder, but both cases were dismissed for lack of proof of breach of any of the provisions of the Public Procurement and Disposal Act, 2005 or the Public Procurement and Disposal Regulations, 2006 and Article 227 of the Constitution.

3.4.10 The High Court and the PPARB handled the cases brought before them expeditiously.

Committee Recommendation

The Committee recommends that:-

3.4.11 The prequalification of bidders should be done with due diligence so as to exclude briefcase companies from tendering and going through the evaluation process.

3.5 EVIDENCE BY THE SOLICITOR-GENERAL

The Solicitor General, Mr. Njee Muturi accompanied by Senior Deputy Chief State Counsel, Ms. Roselyn Amadi appeared before the Committee on 23rd October, 2014 to give evidence on the procurement of Line 1 Capacity Enhancement Project by Kenya Pipeline Company. The submission is hereby attached as **Annex 6**. The Solicitor General informed the Committee that:-

3.5.1 M/s Zakhem International Construction Ltd was awarded the tender for Procurement of Line 1 Capacity Enhancement Project by KPC on 3rd July, 2014 after technical and financial evaluation.

3.5.2 The Office of the Attorney General was not consulted nor requested to advise the contract between Kenya Pipeline Company and M/s Zakhem International Construction Ltd signed on 3rd July, 2014 on the procurement of Line 1 Capacity Enhancement Project by Kenya Pipeline Company.

3.5.3 The High Court dismissed a petition brought before it seeking a declaration that the tender for procurement of Line 1 Capacity Enhancement Project by Kenya Pipeline Company was unconstitutional, illegal and irregular.

Committee Observation

3.5.4 The Office of the Attorney General was not consulted nor requested to advise on the contract between KPC and M/s Zakhem International Construction Ltd signed on 3rd July, 2014 on the procurement of Line 1 Capacity Enhancement Project by KPC.

Committee Recommendation

3.5.5 The Committee recommends that procuring entities should consult widely and especially with the Office of the Attorney General during the procurement process and in particular to seek advice before contracts are signed.

4.0 COMMITTEE'S GENERAL OBSERVATIONS

From the evidence adduced, both orally and in writing, the Committee observed that:-

- 4.1** The KPC Line 1 Capacity Enhancement Project (Mombasa - Nairobi Pipeline project is strategic not only for the long-term financial stability of the company but also for ensuring reliable and adequate supply of petroleum products to western Kenya and the land-locked countries of Uganda, Rwanda, Burundi and parts of the Democratic Republic of Congo.
- 4.2** The replacement of the pipeline, once implemented according to specifications, will ensure :-
- (i) The projected demand of petroleum products in Kenya and in the Eastern Africa Region up to the year 2044 is met.
 - (ii) Sustained, reliable, efficient supply and distribution of refined petroleum products in line with region's growing demand up to the year 2044.
 - (iii) Reduced shortages of fuel for the domestic and export market occasioned by leakages and pipe bursts of the old pipeline.
 - (iv) Reduced road damage and environmental pollution caused by tankers.
- 4.3** M/s Zakhem International Construction Ltd the company that was awarded the tender had met the competence required in terms of technical capability, experience and resources (financial and human resource) to undertake the project, in addition to having the advantage of having constructed the same pipeline in 1972. The pipeline has lasted for 36 years from the initial plan of 25 years.
- 4.4** M/s Rich Productions Limited filed a judicial review of the EOI. The case was dismissed because of material non-disclosure by the petitioner and the court's view was that the company lacked the requisite experience and financial capacity to tender for the construction of the pipeline.
- 4.5** There were two administrative reviews at the PPARB by M/s Kalpataru Power Transmission Limited and M/s China Petroleum Engineering & Construction

CompanyLtd. challenging the award of the tender to the successful bidder, but both cases were dismissed for lack of proof of breach of any of the provisions of the Public Procurement and Disposal Act, 2005 or the Public Procurement and Disposal Regulations, 2006 and Article 227 of the Constitution.

4.6 After the PPARB's decision and the High Court's judgment, no party has since raised any further queries in relation to the tender.

5.0 COMMITTEE'S RECOMMENDATIONS

From the evidence adduced (oral and written) and the observations, the Committee recommends that:-

- 5.1 Kenya Pipeline Company (KPC) should implement the Project and expedite the capacity enhancement and extension of the petroleum products pipeline to other deserving areas not covered by the current Pipeline.
- 5.2 KPC should ensure that the pipeline capacity enhancement is constructed according to the required engineering standards, design specifications and bid price of USD 484,502,886.40 and further ensure that the project meets the projected capacity and desired needs.
- 5.3 KPC should increase the storage capacity for petroleum products at various pump stations so as to reduce transport of petroleum products by road in order to reduce damage to the roads and environmental pollution caused by road tankers.
- 5.4 M/s Zakhem International Construction Company Ltd carries out its obligation of constructing the pipeline with due diligence, cost effectiveness with no variations to the bid price of USD 484,502,886.40 and in a timely manner.
- 5.5 The procuring entities should consult widely and especially with the Office of the Attorney General during the procurement process and in particular to seek advice before contracts are signed.



**MINUTES OF THE 5TH SITTING OF THE PUBLIC INVESTMENTS
COMMITTEE HELD ON WEDNESDAY, 4TH FEBRUARY, 2015, IN FAHARI
CONFERENCE ROOM, WHITESANDS RESORT, MOMBASA AT 9.30 A.M.**

PRESENT

1. **The Hon. Adan Wehliye Keynan, CBS, MP (Chairperson)**
2. The Hon. Francis Mwanzia Nyenze, EGH, MP
3. The Hon. (CPA) Thomas Ludindi Mwadeghu, CBS, MP
4. The Hon. (Dr.) Paul Nyongesa Otuoma, EGH, MP
5. The Hon. Elias Bare Shill, MP
6. The Hon. Athanas Wafula Wamunyinyi, MP
7. The Hon. John Olago Aluoch, MP
8. The Hon. (Maj.) (Rtd.) John Waluke Koyi, MP
9. The Hon. Abdullswamad Sheriff Nassir, MP
10. The Hon. Beatrice Nkatha Nyaga, HSC, MP
11. The Hon. Bernard Munywoki Kitungi, MP
12. The Hon. Chrisanthus Wamalwa Wakhungu, CBS, MP
13. The Hon. Cornelly Serem, MP
14. The Hon. Ejidius Njogu Barua, MP
15. The Hon. Irungu Kang'ata, MP
16. The Hon. Johana Kipyegon Ng'eno, MP
17. The Hon. John Muchiri Nyaga, MP
18. The Hon. John Ogutu Omondi, MP
19. The Hon. Korei Ole Lemein, MP
20. The Hon. Mary Sally Keraa, MP
21. The Hon. Onesmus Muthomi Njuki, MP

ABSENT WITH APOLOGY

22. **The Hon. Anthony Kimani Ichung'wah, MP (Vice Chairperson)**
23. The Hon. (Dr.) Oburu Oginga, MGH, MP
24. The Hon. Adan Mohammed Nooru, MP
25. The Hon. Franklin Linturi Mithika, MP
26. The Hon. Sammy Silas Komen Mwaita, MP
27. The Hon. (Eng.) John Kiragu, MP

IN ATTENDANCE

NATIONAL ASSEMBLY

1. Mr. Nicholas Emejen - Principal Clerk Assistant I
2. Ms. Susan Maritim - Clerk Assistant I
3. Ms. Rose Wanjohi - Clerk Assistant II
4. Mr. Philip Lekarkar - Clerk Assistant III
5. Mr. Salem Lorot - Legal Counsel II

6. Mr. Joash Kosiba - Fiscal Analyst I
7. Mr. Erick Ososi - Research Officer III

KENYA NATIONAL AUDIT OFFICE

1. Mr. Obed Chweya - Senior Manager, Audit
2. Mr. Boniface Muli - Senior Manager, Audit

NATIONAL TREASURY

Mr. John Munge - Accountant 1

MINUTE NO. 049/2015 PRELIMINARIES

The Chairman called the meeting to order at thirty minutes past nine o'clock. Hon. Elias Bare Shill, MP, said the Prayer.

MINUTE NO. 050/2015 ADOPTION OF THE SPECIAL REPORT ON THE PROCUREMENT PROCESS OF THE KENYA PIPELINE COMPANY LINE 1 ENHANCEMENT PROJECT

The Committee considered the revised draft of the Special Report on the Procurement Process of the Kenya Pipeline Company Line 1 Enhancement Report.

The Members present then unanimously adopted the Special Report on Procurement Process of the Kenya Pipeline Company Line 1 Enhancement Report having been Proposed by Hon. Ejidius Njogu Barua, MP and Seconded by Hon. Beatrice Nkatha Nyaga, HSC, MP.

MINUTE NO. 051/2015 ANY OTHER BUSINESS

No other business arose.

MINUTE NO. 052/2015 ADJOURNMENT

There being no other business, the Chairperson adjourned the meeting at thirty minutes past eleven o'clock.

Signed.....


(Chairperson)

Date: 10/2/2015

**MINUTES OF THE 4TH SITTING OF THE PUBLIC INVESTMENTS
COMMITTEE HELD ON TUESDAY, 3RD FEBRUARY, 2015, IN FAHARI
CONFERENCE ROOM, WHITESANDS RESORT, MOMBASA AT 2.30 P.M.**

PRESENT

1. The Hon. Adan Wehliye Keynan, CBS, MP (Chairperson)
2. The Hon. Francis Mwanzia Nyenze, EGH, MP
3. The Hon. (CPA) Thomas Ludindi Mwadeghu, CBS, MP
4. The Hon. (Dr.) Paul Nyongesa Otuoma, EGH, MP
5. The Hon. Elias Bare Shill, MP
6. The Hon. Athanas Wafula Wamunyinyi, MP
7. The Hon. John Olago Aluoch, MP
8. The Hon. (Maj.) (Rtd.) John Waluke Koyi, MP
9. The Hon. Abdullswamad Sheriff Nassir, MP
10. The Hon. Beatrice Nkatha Nyaga, HSC, MP
11. The Hon. Bernard Munywoki Kitungi, MP
12. The Hon. Chrisanthus Wamalwa Wakhungu, CBS, MP
13. The Hon. Cornelly Serem, MP
14. The Hon. Ejidius Njogu Barua, MP
15. The Hon. Irungu Kang'ata, MP
16. The Hon. Johana Kipyegon Ng'eno, MP
17. The Hon. John Muchiri Nyaga, MP
18. The Hon. John Ogutu Omondi, MP
19. The Hon. Korei Ole Lemein, MP
20. The Hon. Mary Sally Keraa, MP
21. The Hon. Onesmus Muthomi Njuki, MP

ABSENT WITH APOLOGY

22. The Hon. Anthony Kimani Ichung'wah, MP (Vice Chairperson)
23. The Hon. (Dr.) Oburu Oginga, MGH, MP
24. The Hon. Adan Mohammed Nooru, MP
25. The Hon. Franklin Linturi Mithika, MP
26. The Hon. Sammy Silas Komen Mwaita, MP
27. The Hon. (Eng.) John Kiragu, MP

IN ATTENDANCE

NATIONAL ASSEMBLY

- | | | |
|------------------------|---|---------------------|
| 1. Ms. Susan Maritim | - | Clerk Assistant I |
| 2. Ms. Rose Wanjohi | - | Clerk Assistant II |
| 3. Mr. Philip Lekarkar | - | Clerk Assistant III |
| 4. Mr. Salem Lorot | - | Legal Counsel II |
| 5. Mr. Joash Kosiba | - | Fiscal Analyst I |

6. Mr. Erick Ososi - Research Officer III

KENYA NATIONAL AUDIT OFFICE

1. Mr. Obed Chweya - Senior Manager, Audit
2. Mr. Boniface Muli - Senior Manager, Audit

NATIONAL TREASURY

Mr. John Munge - Accountant 1

MINUTE NO. 049/2015 PRELIMINARIES

The Chairman called the meeting to order at thirty minutes past two o'clock. Hon. Mary Sally Keraa, MP, said the Prayer.

MINUTE NO. 050/2015 BRIEF BY THE CHAIRPERSON OF THE SUB-COMMITTEE

The Chairperson of the Sub-Committee Hon. Francis Mwanzia Nyenze, E.G.H, MP briefed the Committee as follows:

- i. On the matter of the **Special Report on the Procurement of the Independent Supervision Consultants for the Standard Gauge Railway**, the Chairperson requested for more time (one more day) to conclude and table the findings of the Sub-Committee on the matter.
- ii. On the matter of the **Statement referred to the Committee regarding the procurement and disposal of scrap metal, scrap cast iron and scrap locomotive materials under stores and inventories of the Kenya Railways Corporation between the financial years 2008/2009 to 2012/2013**, the Chairperson requested for an additional two weeks to consider and report its findings to the Committee;
- iii. On the matter of the **Procurement Process of the Kenya Pipeline Company Line 1 Enhancement Project**, the Committee reported that it had concluded its report and is before the Committee for consideration and adoption.

MINUTE NO. 051/2015 CONSIDERATION OF THE SPECIAL REPORT ON THE PROCUREMENT PROCESS OF THE KENYA PIPELINE COMPANY LINE 1 ENHANCEMENT PROJECT

The Committee considered the Special Report on Procurement Process of the Kenya Pipeline Company Line 1 Enhancement Report and made the following amendments;

- i. All abbreviations in the draft report ought to be captured on the Abbreviations page and arranged in alphabetical order;
- ii. The full meaning of KPC is Kenya Pipeline Company and not Kenya Pipeline Corporation;
- iii. The word 'leaks' on Page 3 of the Report be replaced with 'leakages'.
- iv. The statement 'absence of proof' on page 8 be changed to be lack of proof.
- v. The word 'timely manner' on page 8 to be deleted.
- vi. The full names of 'M/s Zakhem' is 'M/s Zakhem International Construction Limited.'
- vii. 'Gujrat' on page 21 to be corrected to read 'Gujarat'.
- viii. The name 'Richmonds Productions' on page 29 ought to be corrected to read 'Rich Productions'.
- ix. On page 28, the Attorney General's role is to 'advise' as opposed to 'approve' projects.

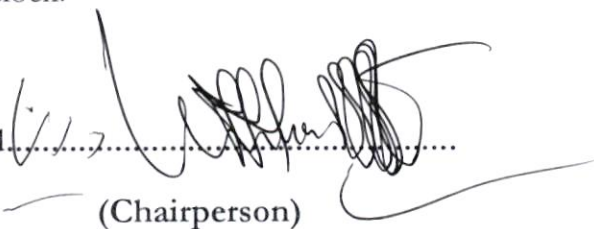
The Committee further recommended that there should be consistency in numbering and in the legal provisions contained in the draft Report.

MINUTE NO. 052/2015 ANY OTHER BUSINESS

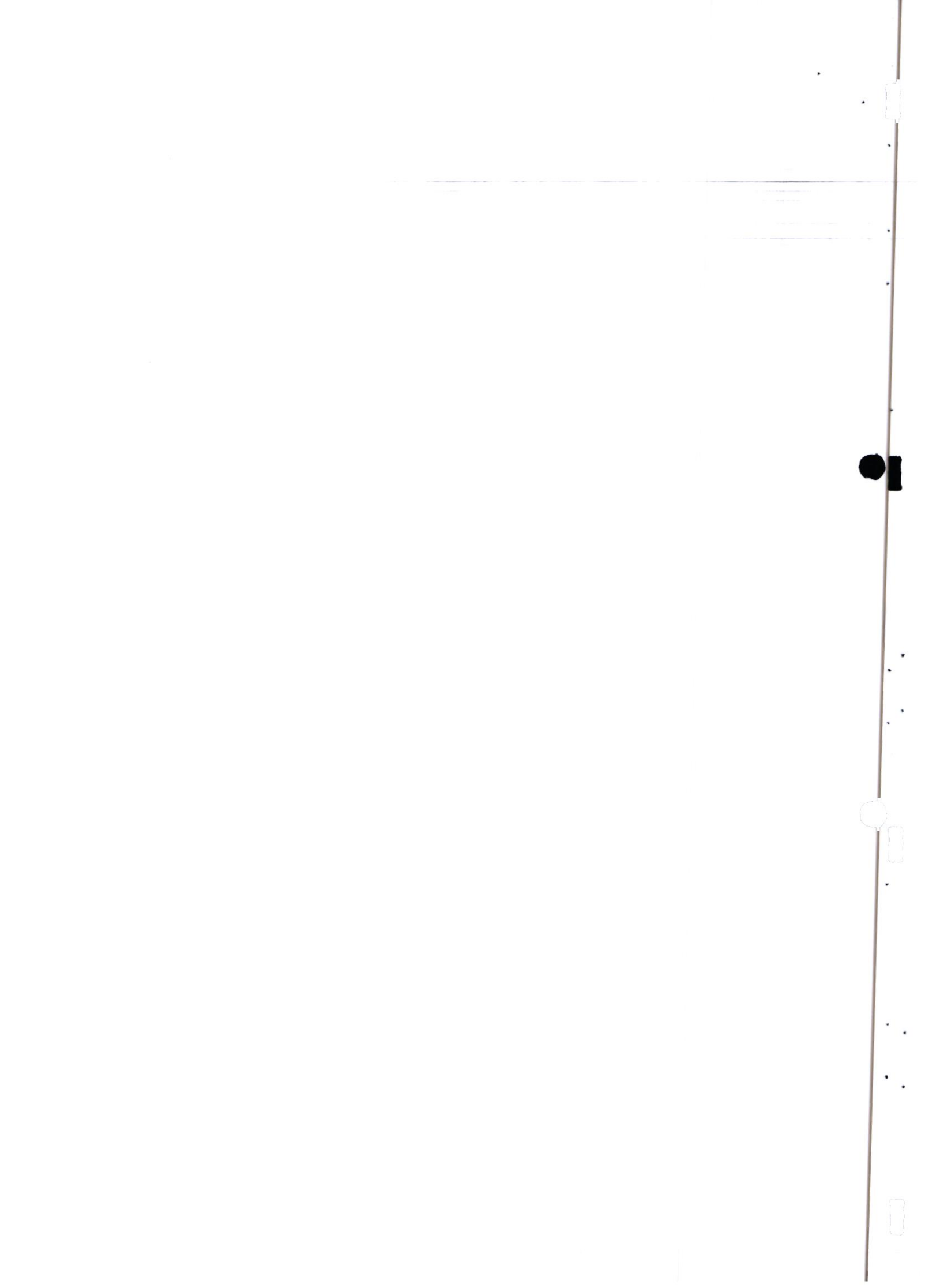
No other business arose.

MINUTE NO. 053/2015 ADJOURNMENT

There being no other business, the Chairperson adjourned the meeting at thirty minutes past five o'clock.

Signed.....

(Chairperson)

Date: 10/2/2015



**MINUTES OF THE 156TH SITTING OF THE PUBLIC INVESTMENTS COMMITTEE
HELD ON THURSDAY 23RD OCTOBER, 2014 IN COMMITTEE ROOM 7, MAIN
PARLIAMENT BUILDINGS AT 11.45 AM.**

PRESENT

1. Hon. Adan Keynan, CBS, MP - Chairperson
2. Hon. Ichung'wah, Antony Kimani, MP - Vice Chairperson
3. Hon. Sammy Mwaita, MP
4. Hon. Serem Cornelly, MP
5. Hon. Ole Lemein, Korei, MP
6. Hon. Linturi, Franklin Mithika, MP
7. Hon. Nyaga, Beatrice Nkatha, MP
8. Hon. Kipyegon, Johana Ngeno, MP
9. Hon. Eng. John Kiragu, MP
10. Hon. Nyongesa, Otuoma Paul, MP
11. Hon. Nyenze, Francis Mwanzia, MP
12. Hon. Dr. Oburu Oginga, MP
13. Hon. Koyi, John Waluke, MP
14. Hon. Kitungi, Benard Munyoki, MP

ABSENT WITH APOLOGY

1. Hon. Shill, Elias Bare, MP
2. Hon. Noor, Adan Mohammed, MP
3. Hon. Nyaga, John Muchiri, MP
4. Hon. Kang'ata, Irungu, MP
5. Hon. Njuki, Onesmus Muthomi, MP
6. Hon. Barua, Ejidius Njogu, MP
7. Hon. Nassir, Abdullswamad Sheriff, MP
8. Hon. Omondi John Ogutu, MP
9. Hon. Aluoch, John Olago, MP
10. Hon. Mwadeghu, Thomas Ludindi, MP
11. Hon. Keraa, Mary Sally, MP
12. Hon. Wafula Wamunyinyi, MP
13. Hon. Wakhungu Chrisantus Wamalwa, MP

IN-ATTENDANCE

NATIONAL ASSEMBLY

1. Mr. Aden Abdullahi - Clerk Assistant I

- | | | |
|------------------------|---|----------------------|
| 2. Mr. Philip Lekarkar | - | Clerk Assistant III |
| 3. Mr. Eric Ososi | - | Research Officer III |
| 4. Mr. Salem Lorot | - | Legal Counsel |

KENYA NATIONAL AUDIT OFFICE

Mr. Obed K. Chweya - Senior Manager, Audit

INSPECTORATE OF STATE CORPORATIONS

Ms. Joyce Wesonga - Assistant Inspector General

MINUTE NO. 716/2014: PRELIMINARIES

The Chair called the meeting to order at Fifty Three Minutes past Eleven O'clock. A word of prayer was said by Hon. Kipyegon, Johana Ngeno, M.P.

MINUTE NO. 717/2014: CONFIRMATION OF MINUTES

Confirmation of Minutes of the previous meeting was deferred to the next meeting.

MINUTE NO. 718/2014: EVIDENCE BY THE SOLICITOR GENERAL

The Solicitor General, Mr. Njee Muturi accompanied by Senior Deputy Chief State Counsel Roselyn Amadi appeared before the Committee on 23rd October, 2014 to give evidence on the procurement of the Independent Supervision Consultants for the Standard Gauge Railway from Mombasa to Nairobi by Kenya Railways Corporation and the Procurement of Line 1 Capacity Enhancement Project by Kenya Pipeline Corporation.

MINUTE NO. 719/2014: CRITERIA OF AWARD OF THE TWO PROCUREMENTS

The Solicitor General informed the Committee that:-

- i). In accordance with the Public Procurement and Disposal Act, an entity is qualified to be awarded a contract for procurement of goods or services only if the entity has the necessary qualifications, capability, experience, resources, equipment and facilities to provide what is being procured among other criteria. These criteria are normally contained in an Expression of Interest (EOI) request or Request for Proposals (RFP) document.
- ii). The Tenders by both Kenya Railways Corporation and Kenya Pipeline Company were open international tenders which had evaluations at the technical and financial stages and it appears that the due legal process was followed by the two procuring entities.

- iii). TSDI/APEC/EDON Consortium who scored the highest at the technical evaluation and lowest at the financial bid was awarded the tender at their bid price of USD 41,184,638 VAT included. A contract was signed with the Consortium on 3rd June, 2014.
- iv). The Public Procurement Administrative Review Board and the High Court both later upheld the decision of the Procuring Entity of awarding the contract to TSDI/APEC/EDON Consortium.
- v). In the case of procurement of Line 1 Capacity Enhancement Project by Kenya Pipeline Corporation, the tender was awarded to Zakhem International Construction Corporation on 3rd July, 2014 after technical and financial evaluation.
- vi). The High Court also dismissed a petition brought before it seeking a declaration that the tender for procurement of Line 1 Capacity Enhancement Project by Kenya Pipeline Corporation was unconstitutional, illegal and irregular.

The Committee observed that:-

- i). Kenya Railways Corporation awarded TSDI/APEC/EDON Consortium the tender for Independent Supervision Consultants for the Standard Gauge Railway based on a distorted financial bid it submitted.
- ii). TSDI/APEC/EDON Consortium may have quoted too low for consultancy and supervision contract knowing that a sum of Kshs. 9,382,963,974.65 meant for the Consultancy Services was hidden in the main contract between KRC and CRBC.
- iii). The actual cost of the Consultancy Services is Kshs. 13,007,212,118.65 TSDI/APEC/EDON's bid of Kshs. 3,624,248,144 (USD 41,184,638) plus the amount in the main contract of Kshs. 9,382,963,974.65 which is the amount that had been set aside in the main contract between KRC and CRBC for the purposes of supervision of the construction of the SGR.
- iv). TSDI/APEC/EDON Consortium lacks adequate and necessary qualifications, capability, experience, resources, equipment and facilities to provide what is being procured, APEC being an engineering company while EDON is an architectural company.

In the KPC Line 1 contract, the Committee observed that:-

- i). The Procuring Entity accepted a bid bond from the winner of the contract Zakhem International Construction Limited from a foreign bank, Eco Bank Nigeria, while

regulations required that bidders provide bank guarantees issued by banks based in Kenya.

- ii). Due diligence was not followed by KPC before awarding the tender and that financial evaluation and signing of the contract was done in a hurry and that it was not possible for bids worth such a large sum of money to be evaluated in less than 10 hours.

MINUTE NO. 720/2014: VALUE FOR MONEY

The Solicitor General informed the Committee that:-

- i). Value for money is a term used to assess whether or not an organisation has obtained maximum benefit from goods and services it both acquires and provides, within the resources available to it. It involves economy, efficiency and effectiveness.
- ii). The Public Procurement and Disposal Act is designed to ensure that there is value for money.
- iii). It is not the Solicitor General's mandate or professional knowledge to determine whether there is value for money in the two contracts.

The Committee observed that due to the apparent conflict of interest in the construction, consultancy and supervision of SGR between the contractor and the consultant, the Government of Kenya will not be guaranteed of quality and value for money.

MINUTE NO. 721/2014: CONFLICT OF INTEREST BETWEEN TSDI AND CRBC IN THE DESIGN REVIEW AND CONSTRUCTION SUPERVISION FOR THE STANDARD GAUGE RAILWAY.

The Solicitor General informed the Committee that TSDI is an enterprise legally established in China in accordance with the laws and regulations of the Peoples' Republic of China. The Corporation is a commercial entity wholly owned by the Government and has no shareholders. CRBC is also a state owned company.

The Committee observed that:-

- i). Both TSDI and CRBC are owned by the Chinese government and are both supervised by State Owned Assets Supervision and Administrative Commission of the State Council (SASAC) despite the fact that one of them is the main contractor and the other is the supervisor.
- ii). The project for the construction of the SGR may suffer from lack of independent supervision in terms of cost-effectiveness, adherence to international standard specifications, quality guarantee and value for taxpayers' money due to conflict of interest between the contractor and the consultant/supervisor.

- iii). It is unlikely that TSDI will safeguard against huge cost overruns, costly delays, quality of rolling stock & locomotives and ensure that Kenyans get value for money for the investment.
- iv). Similar railway construction projects constructed/supervised by Chinese companies in Tanzania/Zambia and Namibia totally failed due to sub-standard Chinese technology.

**MINUTE NO. 722/2014: ADVICE AND APPROVAL OF THE ATTORNEY GENERAL
IN THE PROCUREMENT OF THE TWO CONTRACTS.**

The Solicitor General informed the Committee that:-

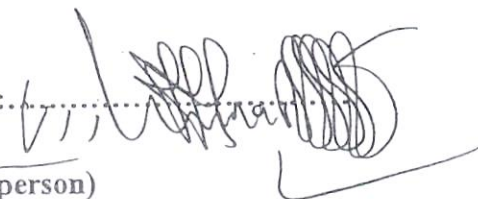
- i). The procurement of goods and services is the responsibility of the Procuring Entity and the Accounting Officer therein is wholly responsible and accountable for a fair and transparent process as laid out in the Public Procurement and Disposal Act, 2005.
- ii). The Attorney General is not in a position to establish whether due diligence was followed by the procuring entities, KRC and KPC.

The Committee observed that the Office of the Attorney General was not consulted nor requested to approve:-

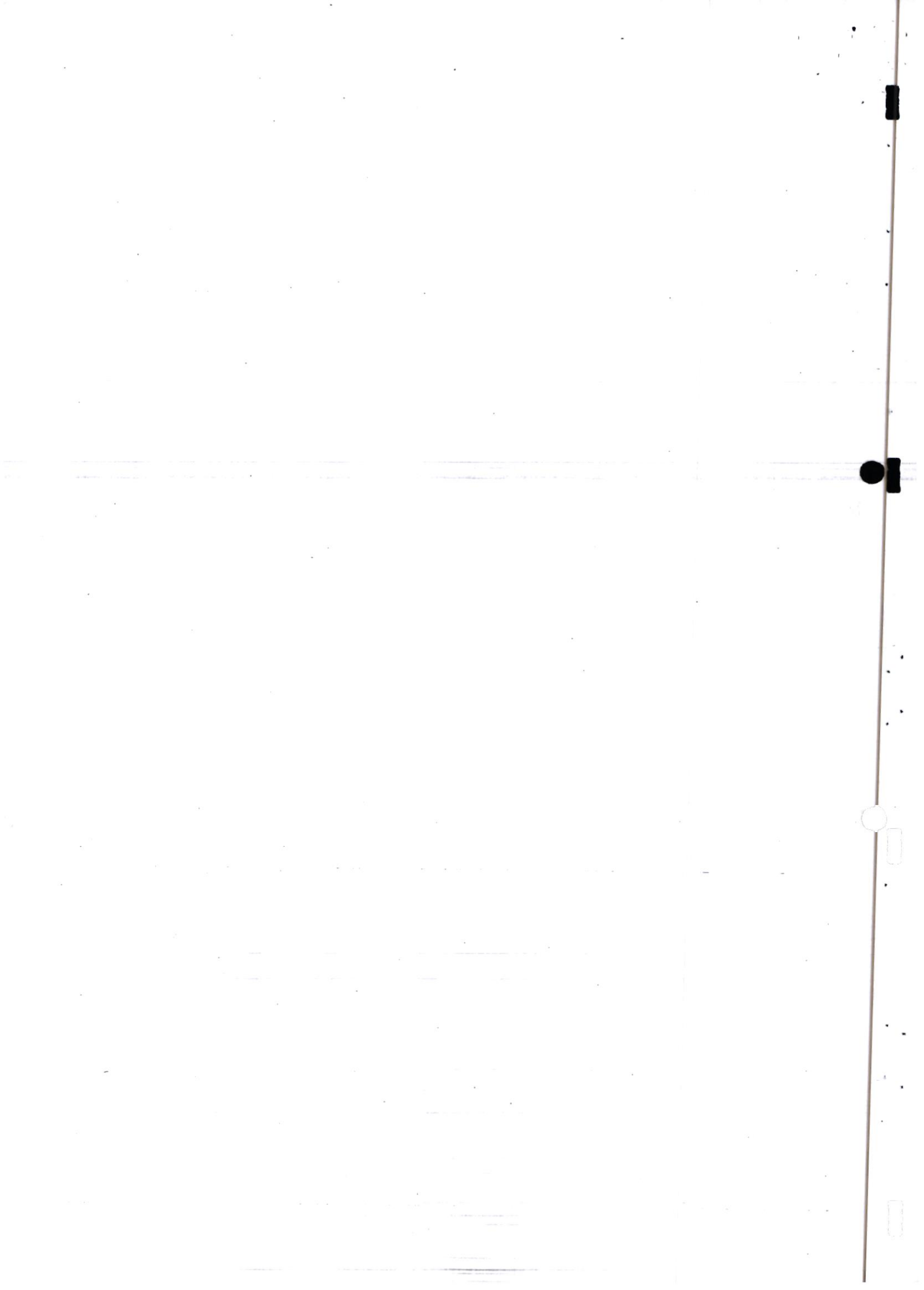
- (i) The contract Between KRC and TSDI/APEC/EDON signed on 3rd June, 2014 for the provision of consultancy services for the Design Review and Construction Supervision for the construction of the Standard Gauge Railway from Mombasa to Nairobi.
- (ii) The contract Between KPC and Zakhem International signed on 3rd July, 2014 on the procurement of Line 1 Capacity Enhancement Project by Kenya Pipeline Corporation.

MINUTE NO. 723/2014: ADJOURNMENT

The Chair adjourned the Meeting at Six Minute past One O'clock.

Signed: 
(Chairperson)

Date: 27/11/2014



**MINUTES OF THE 155TH SITTING OF THE PUBLIC INVESTMENTS COMMITTEE
HELD ON THURSDAY 23RD OCTOBER 2014, IN COMMITTEE ROOM, 7 MAIN
PARLIAMENT BUILDINGS AT 9.30 AM**

PRESENT:

1. Hon. Adan Keynan, CBS M.P. – **Chairperson**
2. Hon. Korei Ole Lemein, M.P.
3. Hon. Sammy Mwaita, M.P.
4. Hon. Bare Shill, M.P
5. Hon. John Aluoch Olago, M.P.
6. Hon. Bernard Munyoki Kitungi, M.P.
7. Hon. Cornelly Serem, M.P
8. Hon. John M. Nyaga, M.P
9. Hon. Njogu Barua, M.P.
10. Hon. Beatrice Nyaga, M.P.
11. Hon. Mary Keraa Sally, M.P.
12. Hon. Francis Nyenze Mwanzia, M.P.
13. Hon. Chrisanthus Wamalwa, M.P
14. Hon. Mwadeghu Thomas, M.P.
15. Hon. Eng. John Kiragu, M.P.
16. Hon. Johana Ngeno, M.P.
17. Hon. Mithika Linturi, M.P
18. Hon. Dr. Oburu Oginga, M.P
19. Hon. Major (Rtd) John Waluke, M.P.
20. Hon. Ogutu John Omondi, M.P.

ABSENT WITH APOLOGY

1. Hon. Kimani Ichung'wah, M.P. – **Vice Chairperson**
2. Hon. Irungu Kang'ata, M.P
3. Hon. Dr. Paul Otuoma, EGH, M.P.
4. Hon. Abdullswamad Sheriff, M.P.
5. Hon. Onesmus Njuki, M.P.
6. Hon. Adan M. Nooru, MBS, M.P.
7. Hon. Wafula Wamunyinyi, M.P.

IN – ATTENDANCE

NATIONAL ASSEMBLY

- | | | |
|------------------------|---|------------------------|
| 1. Mr. Abdullahi Aden | - | First Clerk Assistant |
| 2. Ms. Rose Wanjohi | - | Second Clerk Assistant |
| 3. Mr. Philip Lekarkar | - | Third Clerk Assistant |
| 4. Mr. Salem Lorot | - | Legal Counsel |
| 5. Mr. Eric Ososi | - | Research Officer |

KENYA NATIONAL AUDIT OFFICE

- | | | |
|------------------------|---|----------------|
| 1. Mr. Charles Nanyuki | - | Ag. Director |
| 2. Mr. Obed K. Chweya | - | Senior Manager |
| 3. Mr. Romanus Ochieng | - | Manager |

MINUTE NO 712 /2014: EVIDENCE BY KENYA PIPELINE COMPANY

The Managing Director Kenya Pipeline Company Mr. Charles Tanui accompanied by the Company Secretary Mrs. Flora Okoth; Legal Officer Mrs. Gloria Khafafa; Finance Manager Mr. Samuel Odoyo; Eng. Elias Karumi and Mr. Philip Kimelu appeared before the Committee to adduce evidence on the Procurement of KPC Line 1 Capacity Enhancement project.

MINUTE NO. 713 /2014: EVIDENCE BY THE KENYA PIPELINE COMPANY

The Committee heard that

- (i) In line with the provisions of Section 78 and 79 of the Public Procurement and Disposal Act 2005, the notice inviting expression of interest was advertised in Daily Nation and the Standard Newspaper of 16th January 2013. 45 firms collected the Tender Document. By the closing date of 28th February 2013 40 firms had submitted their bids for evaluation;
- (ii) Bids were evaluated and out of the 40 evaluated bids 16 were found to be non-responsive during preliminary evaluation and the said firms disqualified in accordance with the provision of regulation 47 of the Public Procurement and Disposal Act, 2005;

- (iii) 24 firms went under detailed technical evaluation and 13 firms met all the minimum qualification criteria;
- (iv) The winning bidder Zakhem International was invited for negotiations in accordance with section 84 of the Public Procurement and Disposal Act 2005; and
- (v) After negotiations the contract between Zakhem International Construction Limited and KPC Limited was signed on 1st July 2014 in accordance with section 85 of the Public Procurement and Disposal Act 2005.


MINUTE NO. 714/2014: COMMITTEE OBSERVATIONS

The Committee observed that:-

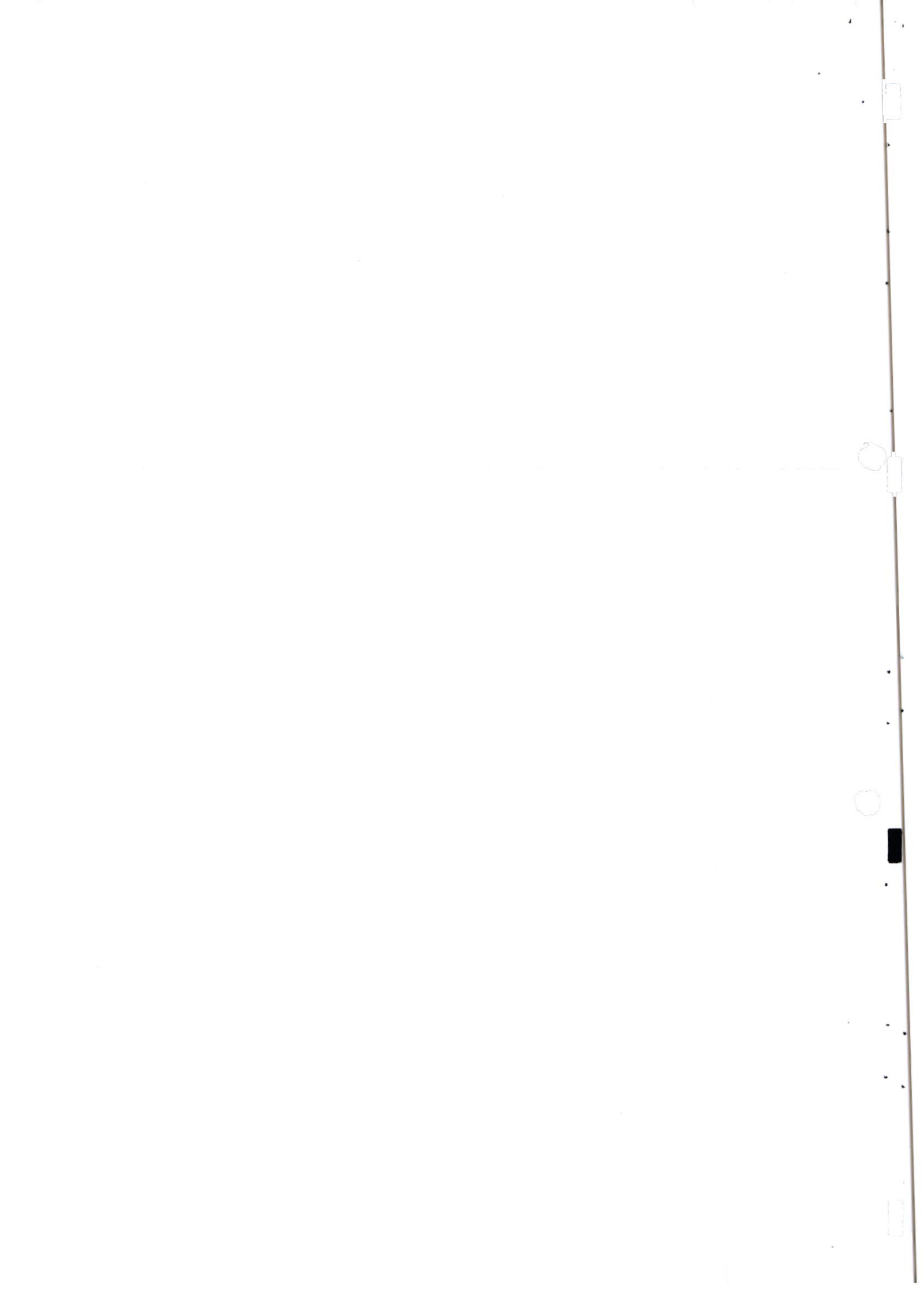
- (i) It had invited Zakhem International on several occasions but the company could not honor the invitation of the Committee.
- (ii) The Committee advised the Kenya Pipeline Company that it was Zakhem International's interest to appear before the Committee because it was the mandate of the Committee to examine all matters regarding investment in the country.

MINUTE NO. 715/2014: ADJOURNMENT

There being no other business, the Chairperson adjourned the meeting at Fifteen Minutes past ten O'clock

Signed:  Date: 3/02/2015

(Chairperson)



**MINUTES OF THE 153RD SITTING OF THE PUBLIC INVESTMENTS COMMITTEE
HELD ON WEDNESDAY 22ND OCTOBER 2014, IN COMMITTEE ROOM 7, 1ST
FLOOR, MAIN PARLIAMENT BUILDINGS AT 3.30 PM**

PRESENT

1. Hon. Adan Keynan, CBS M.P. – **Chairperson**
2. Hon. Kimani Ichung'wah, M.P. – **Vice Chairperson**
3. Hon. Korei Ole Lemein, M.P.
4. Hon. Bare Shill, M.P.
5. Hon. John Aluoch Olago, M.P.
6. Hon. Bernard Munyoki Kitungi, M.P.
7. Hon. Cornelly Serem, M.P.
8. Hon. John M. Nyaga, M.P.
9. Hon. Njogu Barua, M.P.
10. Hon. Wafula Wamunyinyi, M.P.
11. Hon. Beatrice Nyaga, M.P.
12. Hon. Mary Keraa Sally, M.P.
13. Hon. Irungu Kang'ata, M.P.
14. Hon. Dr. Paul Otuoma, EGH, M.P.
15. Hon. Francis Nyenze Mwanzia, M.P.
16. Hon. Chrisanthus Wamalwa, M.P.

ABSENT WITH APOLOGY

1. Hon. Ogutu John Omondi, M.P.
2. Hon. Sammy Mwaita, M.P.
3. Hon. Abdullswamad Sheriff, M.P.
4. Hon. Onesmus Njuki, M.P.
5. Hon. Eng. John Kiragu, M.P.
6. Hon. Johana Ngeno, M.P.
7. Hon. Mithika Linturi, M.P.
8. Hon. Adan M. Nooru, MBS, M.P.
9. Hon. Mwadeghu Thomas, M.P.
10. Hon. Dr. Oburu Oginga, M.P.
11. Hon. Major (Rtd) John Waluke, M.P.

IN – ATTENDANCE

NATIONAL ASSEMBLY

- | | | |
|------------------------|---|------------------------|
| 1. Mr. Abdullahi Aden | - | First Clerk Assistant |
| 2. Ms. Rose Wanjohi | - | Second Clerk Assistant |
| 3. Mr. Philip Lekarkar | - | Third Clerk Assistant |
| 4. Mr. Salem Lorot | - | Legal Counsel |
| 5. Mr. Eric Osoi | - | Research Officer |

KENYA NATIONAL AUDIT OFFICE

- | | | |
|-----------------------|---|----------------|
| 1. Mr. Obed K. Chweya | - | Senior Manager |
| 2. Mr. Romanus Odina | - | Manager |

MINUTE NO 701 /2014: EVIDENCE BY CHINA WU YI

The Managing Director of China Wu Yi, Mrs. Lily Liu accompanied by the Legal Officer Mr. Josphat Onsongo appeared before the Committee to adduce evidence on the Procurement of KPC Line 1 Capacity Enhancement project.

MINUTE NO 702 /2014: EVIDENCE

The Managing Director, China Wu Yi, informed the Committee that it has no further interest on the matter regarding the procurement of KPC Line Capacity Enhancement Project and is satisfied with the ruling by the Court.

MINUTE NO 703/ 2014: COMMITTEE RESOLUTIONS

The Committee resolved that China Wu Yi submits the following information:-

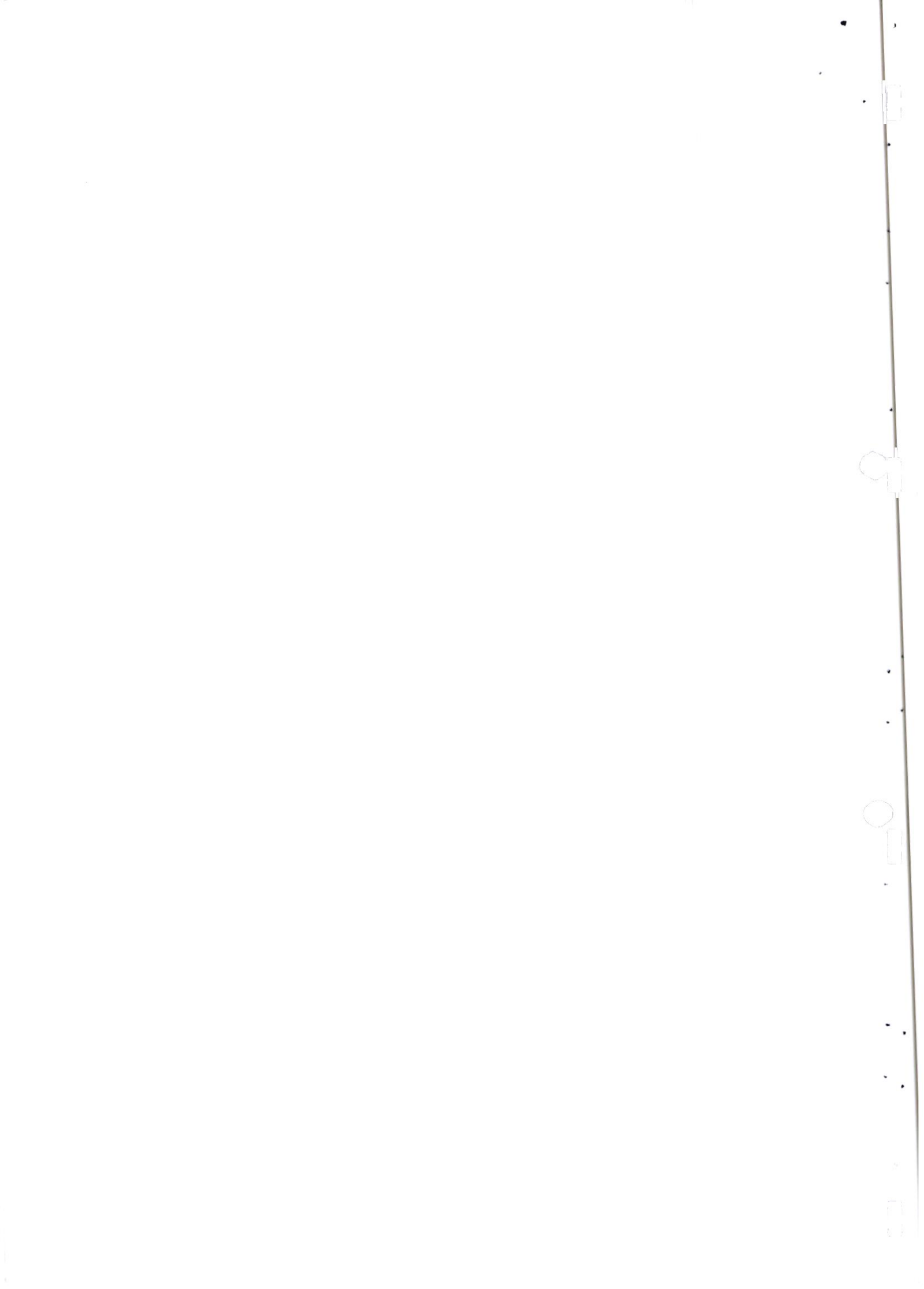
- (i) Copies of the Complaints to the Public Procurement Oversight Authority;
- (ii) Ruling of the Court on the procurement of KPC Line Capacity Enhancement Project;
- (iii) All the correspondences made to the Kenya Pipeline Company, Public Procurement Oversight Authority and the Public Procurement Administrative Review Board.

MINUTE NO 704/2014 - ADJOURNMENT

There being no other business, the Chairperson adjourned the meeting at Fifteen Minutes past four O'clock

Signed:  Date: 3rd February 2015

(Chairperson)



MINUTES OF THE 151ST SITTING OF THE PUBLIC INVESTMENTS COMMITTEE HELD ON WEDNESDAY 1ST OCTOBER 2014 IN COMMITTEE ROOM 7, MAIN PARLIAMENT BUILDING AT 2:30 P.M.

PRESENT:

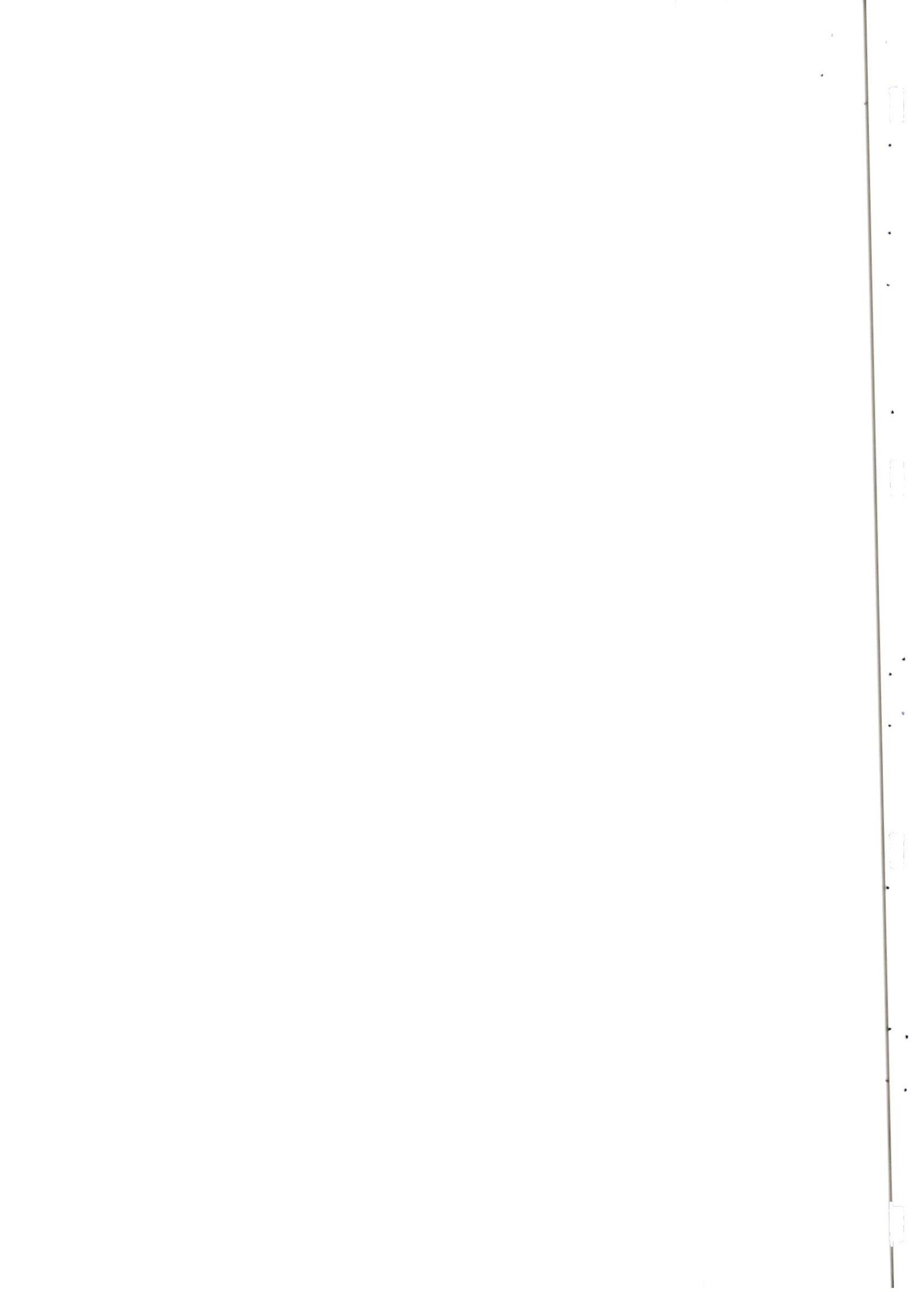
1. Hon. Adan Keynan, CBS, M.P. – **Chairperson**
2. Hon. Kimani Ichung'wah, M.P. – **Vice Chairperson**
3. Hon. Sammy Mwaita, M.P.
4. Hon. Cornelly Serem, M.P.
5. Hon. Bare Shill, M.P.
6. Hon. Korei Ole Lemein, M.P.
7. Hon. Bernard Munyoki Kitungi, M.P.
8. Hon. Francis Nyenze Mwanzia, M.P.
9. Hon. John Aluoch Olago, M.P.
10. Hon. Major (Rtd) John Waluke, M.P.
11. Hon. John M. Nyaga, M.P.
12. Hon. Paul Otuoma, M.P.
13. Hon. Wafula Wamunyinyi, M.P.
14. Hon. Mary Keraa Sally, M.P.
15. Hon. Beatrice Nyaga, M.P.
16. Hon. Chrisanthus Wamalwa, M.P.

ABSENT WITH APOLOGY

1. Hon. Ogutu John Omondi, M.P.
2. Hon. Dr. Oburu Oginga, M.P.
3. Hon. Njogu Barua, M.P.
4. Hon. Adan M. Noor, M.P.
5. Hon. Irungu Kang'ata, M.P.
6. Hon. Johana Ngeno, M.P.
7. Hon. Eng. John Kiragu, M.P.
8. Hon. Mithika Linturi, M.P.
9. Hon. Onesmus Njuki, M.P.
10. Hon. Abdullswamad Sheriff, M.P.
11. Hon. Mwadeghu Thomas, M.P.

IN – ATTENDANCE:
NATIONAL ASSEMBLY

- | | | |
|-------------------------|---|----------------------|
| 1. Mr. Abdullahi Aden | - | Clerk Assistant I |
| 2. Ms. Rose Wanjohi | - | Clerk Assistant II |
| 3. Mr. Phillip Lekarkar | - | Clerk Assistant III |
| 4. Mr. Eric Ososi | - | Research Officer III |



KENYA NATIONAL AUDIT OFFICE

1. Mr. David M Njoka - Director of Audit
2. Mr. Obed K. Chweya - Senior Manager
3. Mr. Josiah M. Ogutu - Assistant Manager

INSPECTORATE OF STATE CORPORATIONS

Mr. David Gichuhi - Senior Assistant Inspector General

TREASURY

Mr. John Munge - Accountant 1

MINUTE NO. 654 /2014: PRELIMINARIES:

The meeting was called to order at 3:00 p.m. by the Chairperson followed by a word of prayer by Hon. Paul Otuoma M.P.

MINUTE NO. 655/2014: EVIDENCE BY ZAKHEM INERNATIONAL CONSTRUCTION LTD:

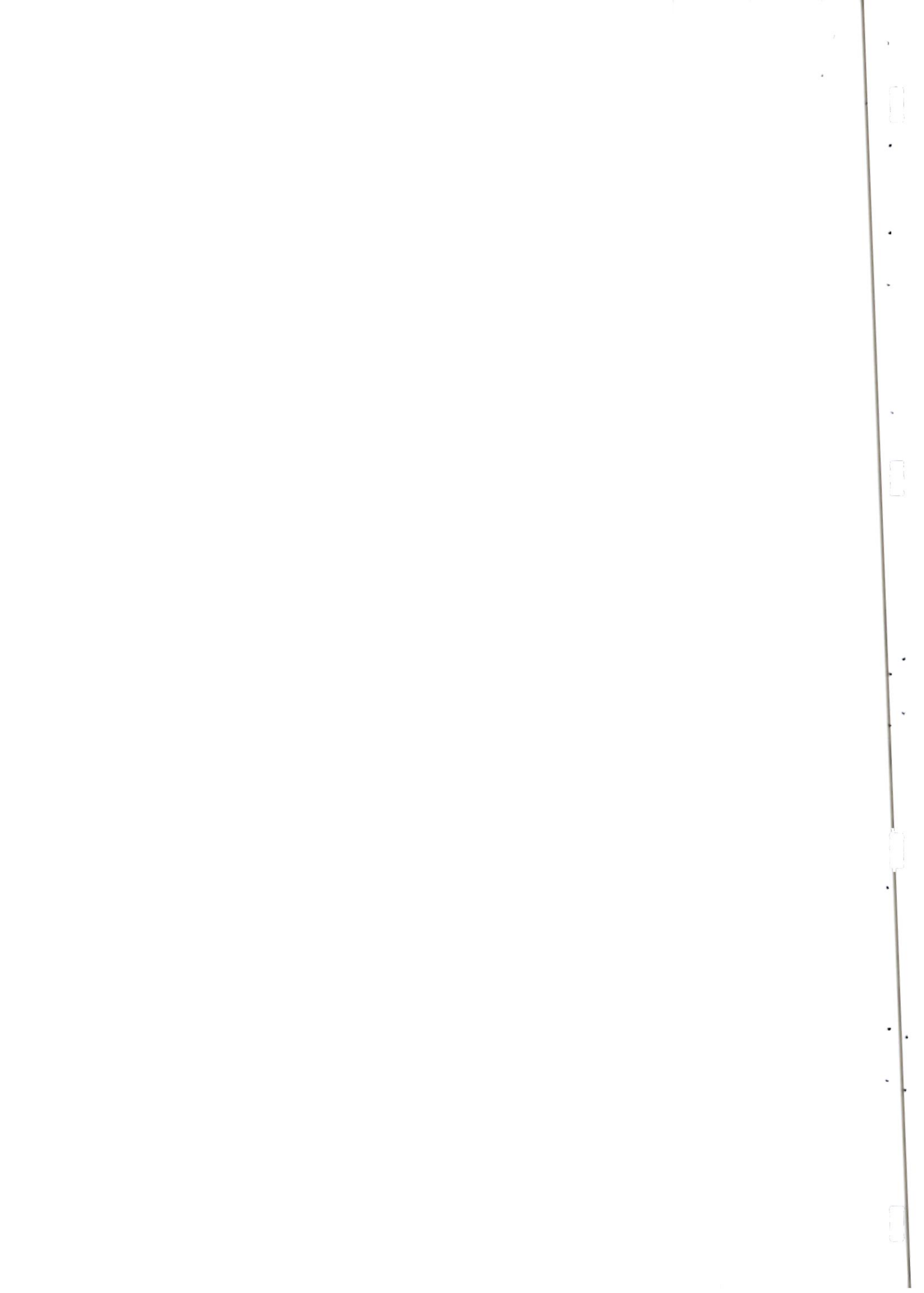
Evidence by Zakhem International Construction Ltd on the Procurement process of the Kenya Pipeline Line 1 Capacity Enhancement project (Mombasa-Nairobi Petroleum pipeline)

The Managing Partner, Waweru Gatonye & Co. Advocate, Waweru Gatonye appearing by authority of the M.D Zakhem International Mr. Ibrahim Zakhem both as Attorney and Principal on behalf of the M.D and Zakhem International Construction Ltd accompanied by Mr. Paul Wanga, Advocate Waweru Gitonye & Co and Mr. Brian Omaganda Advocate Waweru Gatonye & Co appeared before the Committee to give evidence

MINUTE NO.656/2014: EVIDENCE

The Committee observed that

- (i) Although Mr. Waweru Gatonye was appearing on behalf of the M.D Mr. Ibrahim both as an Attorney and Principal, the summons clearly stipulated that the Managing Director appears before the Committee in person.
- (ii) That Mr. Waweru Gatonye though had informed the Committee that Mr. Ibrahim Zakhem was out of the country on medical grounds, he was non-committal on when Mr. Zakhem would be available.



The Committee resolved that

- (i) To defer the presentation of the evidence from Zakhem International Construction until Mr. Ibrahim is able to appear the Committee.
- (ii) Mr. Waweru Gatonye to advise the Committee in writing when Mr. Ibrahim Zakhem will be available to appear before the Committee in person.
- (iii) Mr. Waweru Gatonye to provide the Committee with documentary evidence that his client Mr. Ibrahim Zakhem was indeed sick.

MINUTE NO. 657/2014: ADJOURNMENT

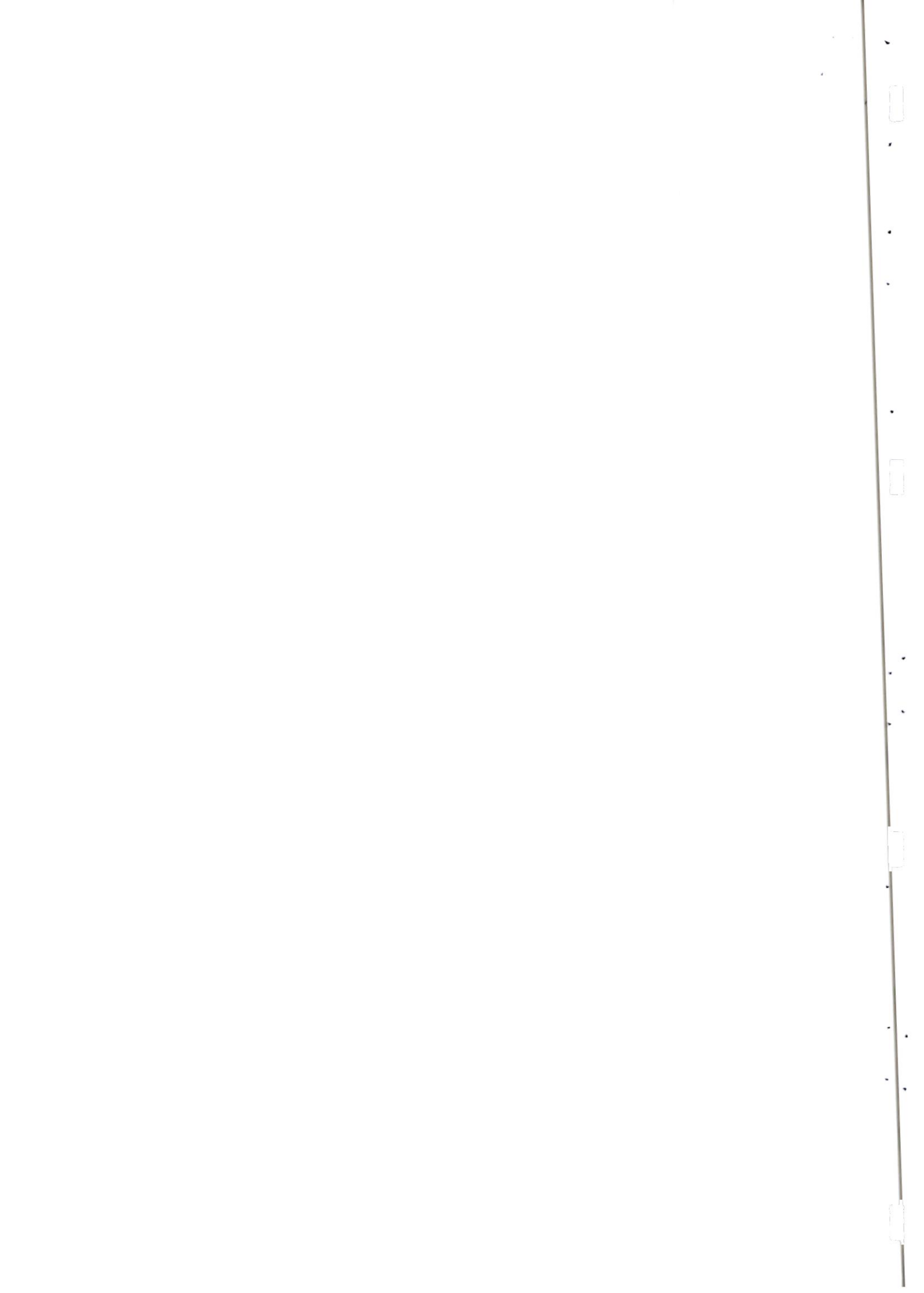
There being no other business the meeting was adjourned at Half past Three O'clock.

Signed: _____

(Chairperson)

Date: _____

3rd February 2015



**MINUTES OF THE 142ND SITTING OF THE PUBLIC INVESTMENTS COMMITTEE
HELD ON TUESDAY 23RD SEPTEMBER, 2014 IN COMMITTEE ROOM 7, MAIN
PARLIAMENT BUILDINGS AT 11:30 AM.**

PRESENT

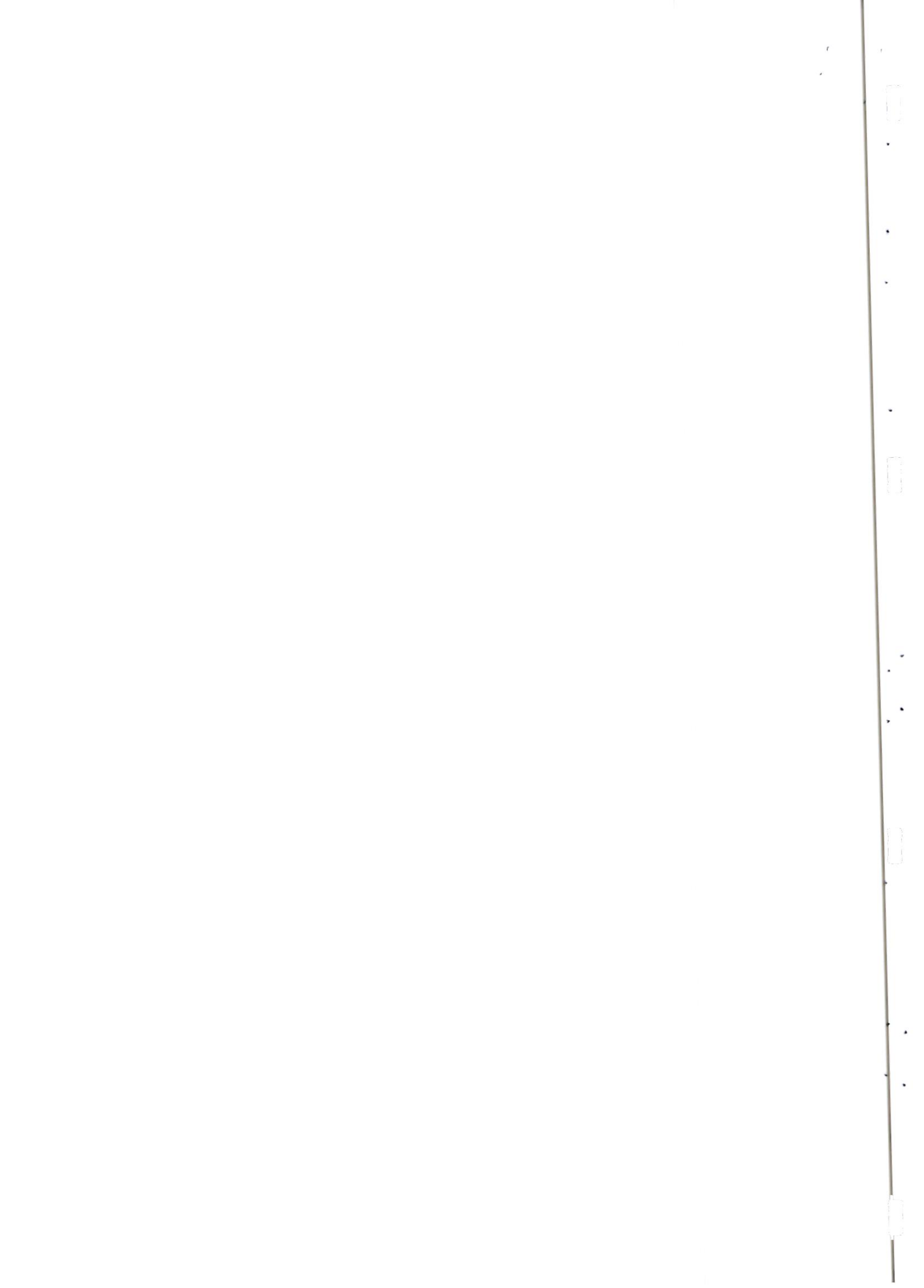
1. Hon. Adan Keynan, CBS, MP - Chairperson
2. Hon. Ichung'wah, Antony Kimani, MP - Vice Chairperson
3. Hon. Shill, Elias Bare, MP
4. Hon. Linturi, Franklin Mithika, MP
5. Hon. Eng. John Kiragu, MP
6. Hon. Nassir, Abdullswamad Sheriff, MP
7. Hon. Omondi John Ogutu, MP
8. Hon. Kitungi, Benard Munyoki, MP
9. Hon. Wakhungu Chrisantus Wamalwa, MP

ABSENT WITH APOLOGY

1. Hon. Sammy Mwaita, MP
2. Hon. Serem Cornelly, MP
3. Hon. Ole Lemein, Korei, MP
4. Hon. Noor, Adan Mohammed, MP
5. Hon. Nyaga, Beatrice Nkatha, MP
6. Hon. Nyaga, John Muchiri, MP
7. Hon. Njuki, Onesmus Muthomi, MP
8. Hon. Kipyegon, Johana Ngeno, MP
9. Hon. Barua, Ejidius Njogu, MP
10. Hon. Kang'ata, Irungu, MP
11. Hon. Nyongesa, Otuoma Paul, MP
12. Hon. Aluoch, John Olago, MP
13. Hon. Dr. Oburu Oginga, MP
14. Hon. Koyi, John Waluke, MP
15. Hon. Nyenze, Francis Mwanzia, MP
16. Hon. Mwadeghu, Thomas Ludindi, MP
17. Hon. Keraa, Mary Sally, MP
18. Hon. Wafula Wamunyinyi, MP

IN-ATTENDANCE
NATIONAL ASSEMBLY

1. Mr. Aden Abdullahi - Clerk Assistant I



- | | | |
|------------------------|---|----------------------|
| 2. Ms. Rose Wanjohi | - | Clerk Assistant II |
| 3. Mr. Philip Lekarkar | - | Clerk Assistant III |
| 4. Mr. Eric Ososi | - | Research Officer III |

KENYA NATIONAL AUDIT OFFICE

- | | | |
|-----------------------|---|-----------------------|
| 1. Mr. Obed K. Chweya | - | Senior Manager, Audit |
| 2. Mr. Boniface Muli | - | Manager, Audit |

INSPECTORATE OF STATE CORPORATIONS

- | | | |
|------------------------|---|-----------------------------|
| 1. Mrs. Margret Ratemo | - | Assistant Inspector General |
|------------------------|---|-----------------------------|

TREASURY

- | | | |
|---------------|---|--------------|
| 1. John Munge | - | Accountant I |
|---------------|---|--------------|

MINUTE NO. 606 /2014: PRELIMINARIES

The Chair called the meeting to order at Forty Minutes past Eleven O'clock followed by a word of prayer.

MINUTE NO. 607 /2014: CONFIRMATION OF MINUTES.

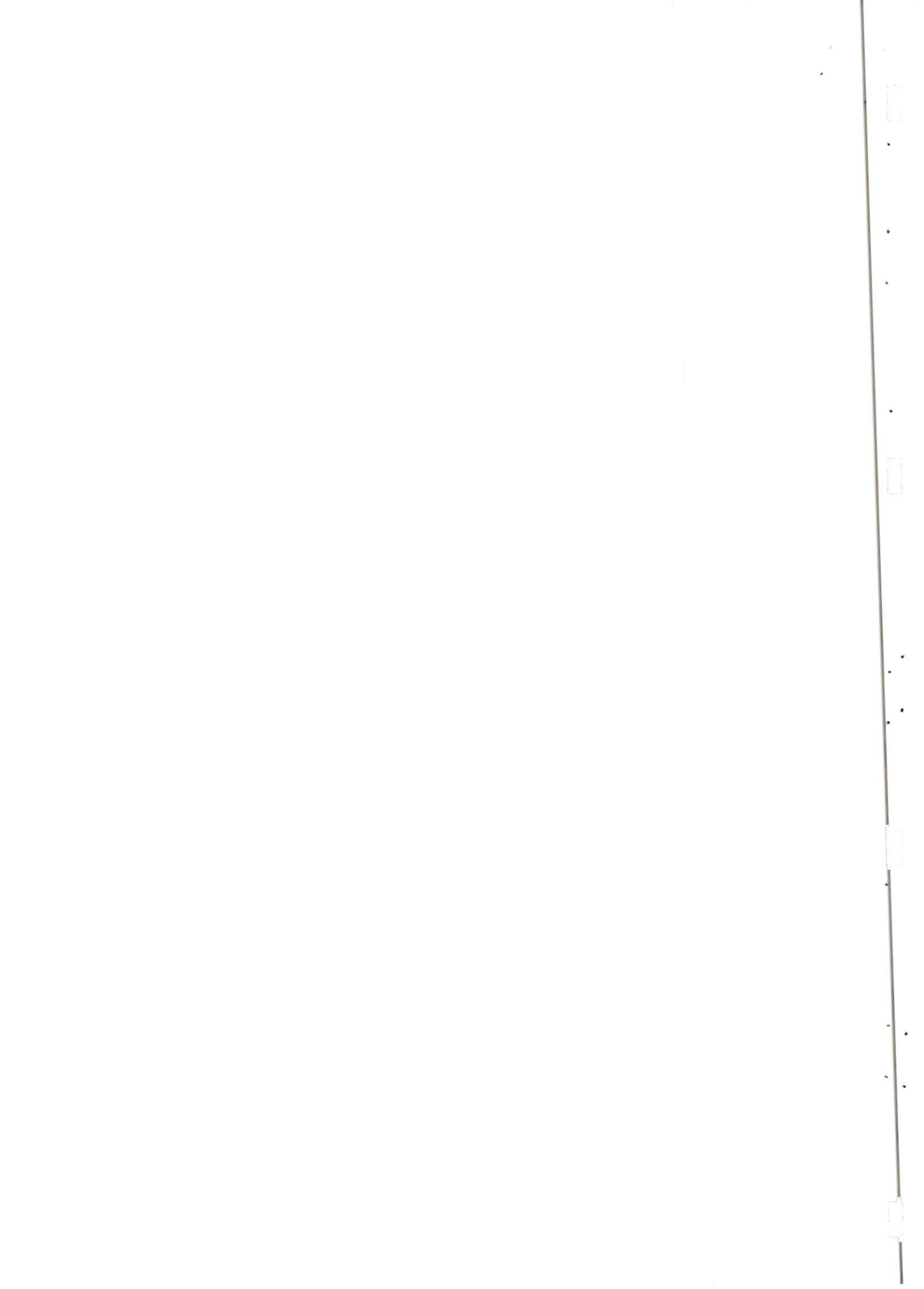
Confirmation of the minutes of the previous meeting was deferred to the next meeting.

**MINUTE NO.608/2014: EVIDENCE ZAKHEM INTERNATIONAL LTD ON THE
PROCUREMENT FOR THE INDEPENDENT SUPERVISION
CONSULTANTS FOR THE STANDARD GAUGE RAILWAY
FROM MOMBASA TO NAIROBI BY KENYA RAILWAYS.**

Advocate Waweru Gatonye accompanied by advocate Paul Wanga acting as the advocates for Zakhem International Construction Limited appeared before the Committee to give evidence on the procurement of Kenya Pipeline Corporation Line 1 Capacity Enhancement Project (Mombasa – Nairobi Petroleum Pipeline).

MINUTE NO. 609/2014: COMMITTEE OBSERVATIONS

The Committee observed that:-



The Managing Director of Zakhem International Construction Limited neither appeared in person before the Committee nor sent an apology instead he sent an advocate Mr. Waweru Gatonye to represent the Company.

- i. Mr. Waweru Gatonye had no introductory letter from the Company.
- ii. The matter before the Committee was not judicial process and therefore the Managing Director is obligated to appear in person before the Committee or together with his representative to give evidence.

MINUTE NO. 610/2014: COMMITTEE RESOLUTIONS

The Committee resolved:-

- i. That in the absence of an introductory letter from the Managing Director Mr. Ibrahim Zakhem, Mr. Waweru Gatonye is a stranger before the Committee and the Committee was constrained to receive any evidence from him.
- ii. To invoke Article 125 (1) of the Constitution and summon the Managing Director, Zakhem International Construction Limited Mr. Ibrahim Zakhem to appear before the Committee **on 2nd October, 2014 at 2.30pm** to give evidence on the procurement of Kenya Pipeline Corporation Line 1 Capacity Enhancement Project.

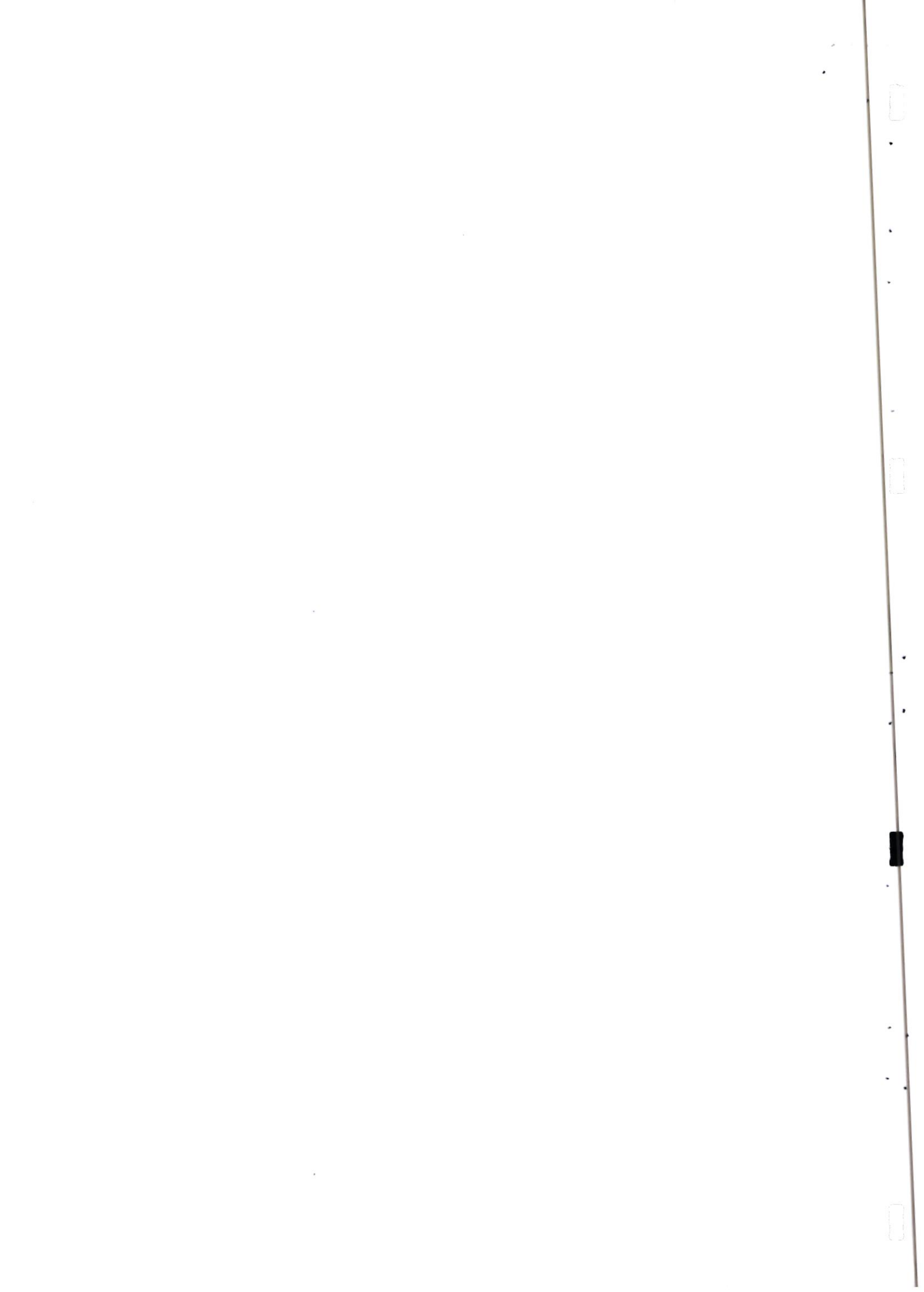
MINUTE NO. 611 /2014: ADJOURNMENT.

The Chairperson adjourned the Meeting at Ten Minutes past Twelve O'clock

Signed.....

(Chairperson)

Date.....*3rd February 2015*



MINUTES OF THE 135TH SITTING OF THE PUBLIC INVESTMENTS COMMITTEE HELD ON TUESDAY 26TH AUGUST 2014 IN COMMITTEE ROOM 7, MAIN PARLIAMENT BUILDINGS AT 3:00 P.M.

PRESENT:

1. Hon. Adan Keynan, CBS, M.P. – **Chairperson**
2. Hon. Kimani Ichung'wah, M.P. – **Vice Chairperson**
3. Hon. Paul Otuoma, M.P.- **Ag Chairperson**
4. Hon. Sammy Mwaita, M.P.
5. Hon. Korei Ole Lemein, M.P.
6. Hon. John M. Nyaga, M.P.
7. Hon. Onesmus Njuki, M.P.
8. Hon. Eng. John Kiragu, M.P.
9. Hon. Cornelly Serem, M.P.
10. Hon. Johana Ngeno, M.P.
11. Hon. Beatrice Nyaga, M.P.
12. Hon. Bare Shill, M.P
13. Hon. Dr. Oburu Oginga, M.P.
14. Hon. Irungu Kang'ata, M.P.
15. Hon. Mary Keraa Sally, M.P.
16. Hon. John Aluoch Olago, M.P.
17. Hon. Njogu Barua, M.P.
18. Hon. Wafula Wamunyinyi, M.P.
19. Hon. Francis Nyenze Mwanzia, M.P.
20. Hon. Chrisanthus Wamalwa, M.P.

ABSENT WITH APOLOGY

1. Hon. Adan M. Noor, M.P.
2. Hon. Mithika Linturi, M.P.
3. Hon. Bernard Munyoki Kitungi, M.P.
4. Hon. Major (Rtd) John Waluke, M.P.
5. Hon. Ogutu John Omondi, M.P.
6. Hon. Abdullswamad Sheriff, M.P.
7. Hon. Mwadeghu Thomas, M.P.

IN – ATTENDANCE:

NATIONAL ASSEMBLY

- | | | |
|-------------------------|---|-----------------------------|
| 1. Mr. Nicholas Emejen | - | Principal Clerk Assistant I |
| 2. Mr. Abdullahi Aden | - | Clerk Assistant I |
| 3. Ms Rose Wanjohi | - | Clerk Assistant II |
| 4. Mr. Phillip Lekarkar | - | Clerk Assistant III |
| 5. Mr. Salem Lorot | - | Legal Counsel |
| 6. Mr. Eric Osoi | - | Research Officer III |

KENYA NATIONAL AUDIT OFFICE:

1. Mr. Obed K. Chweya - Senior Manager
2. Mr. Charles N.Nyanyuki - Ag. Director

INSPECTORATE OF STATE CORPORATIONS

Mr. Davidson D.W Sifuma - Assistant Inspector General

MINUTE NO 559 /2014: PRELIMINARIES:

The meeting was called to order at 3:28 p.m. by the Ag Chairperson Hon Paul Otuoma and followed by a word of prayer by Hon. Wafula Wamunyinyi, M.P.

MINUTE NO.560/2014: EVIDENCE BY PUBLIC PROCUREMENT OVERSIGHT AUTHORITY:

The Director General, Public Procurement Oversight Authority Mr. M. Juma accompanied by Mr. Romanus Ochieng Manager audit, Mr. Peter K. Ndungu Manager Compliance and Mr. H.O Moti, Senior Compliance Officer appeared before the Committee to respond to the procurement processes of provision of consultancy services for design, review and construction supervision of S.G.R and of Kenya Pipeline Corporation Line 1 capacity enhancement project.

MINUTE NO 561/2014: EVIDENCE FOR CONSULTANCY SERVICES FOR SGR

The Director General Public Procurement Oversight Authority (P.P.O.A) informed the Committee that

- (i) Kenya Railways Corporation adhering to P.P.O.A circular no 4/2009 submitted its report on procurement of provision of consultancy services for design, review and construction supervision for the construction of SGR from Mombasa to Nairobi funded by the Government of Kenya on July 9th 2014.
- (ii) On the question of whether the procurement was done in accordance with the procurement law, the Director General informed the Committee that as per their quarterly report, Kenya Railways Corporation used open tender method to advertise for Request for Proposal for consultancy in the dailies as prescribed in the Public Procurement and Disposal Act (P.P.D.A) 2005. P.P.O.A also conduct procurement assessments during site visits and confirm that certain mandatory requirements which organizations need to follow are done.

Nine candidates participated and three were responsive to the conditions of the tender after preliminary, technical and financial evaluation processes and they were TSDI/APEC/EDON consortium (USD 41,184,638); Team Engineering (USD

73,922,750) and Korea Railway Network (USD 82,277,096). TSDI/APEC/EDON consortium were awarded the tender at the total cost of USD 41,184,638 as the bidder with the highest combined scores in both technical and financial evaluation, in line with Section 82(5) of the P.P.D.A.

The law forbids P.P.O.A to do the adverts for the tender and also to sit in the panel to monitor the valuation of the bids. To enhance transparency, contracts of excess of 50 million require independent consultants to review them. The Institution of Engineers of Kenya who were appointed as observers as per regulation 12(8) PPDA (2006) and regulations 4 of P.P.D.A (2013) reported to P.P.O.A that they were satisfied with the way the Technical and Financial proposals were evaluated and that they supported the decision to award the tender to the lowest evaluated bidder.

P.P.O.A opines that the conduct of the subject procurement satisfied the thresholds prescribed in the various procurement legislations

- (iii) On the question of whether there was value for money in the procurement, the Director General informed the Committee that the use of both technical and financial specifications in tender documents is intended to arrive at a value for money result. The specifications are then subjected to a wide market to allow for sufficient competition amongst potential bidders which increases chances of getting market prices.

K.R.C awarded TSDI/APEC/EDON consortium the tender as they had the highest combined score after considering both the technical (guaranteeing quality) and financial (guaranteeing an economical price). TSDI/APEC/EDON Consortium had the highest technical score (62.02%) and the lowest financial value (USD 41,184,638) of the three responsive bidders. The second bid's financial quote was USD 46,092,458 or 3,541,878,868 (in Kenya shillings) higher than the financial quote of the winning bid.

- (iv) On the question of whether there was a conflict of interest, the Director General informed the Committee that Section 43 of the P.P.D.A sets out instances when conflict of interest may arise in a procurement process. The Authority is aware that SASAC (a Chinese government entity) supervises both TSDI (part of the consultancy team) and C.R.B.C (the contractor) of S.G.R.

The P.P.O.A has not received complaints regarding any form of conflict of interest which may taint the procurement process and should the Authority receive such a report, it would investigate according to its mandate.

The Committee made the following observations

- (i) That P.P.O.A did not have the budgetary provisions from Kenya Railway for the S.G.R project and wondered how they were able to review how the winning bid represented value for money.
- (ii) That it appeared as if the Authority only reviewed the procurement processes of the organizations which fall under their preview, when concerns were raised.
- (iii) Although the authority was aware that SASAC supervises both TSDI and CRBC, they did not deem this to be a conflict of interest.

The Committee after deliberations resolved that P.P.O.A gives them by Thursday 4th September 2014, the following reports

- (i) The relationship between SASAC and TSDI
- (ii) The budgetary provisions for the S.G.R project by Kenya Railway Corporation.

MINUTE NO 562/2014: EVIDENCE FOR KENYA PIPELINE CORPORATION LINE 1 CAPACITY ENHANCEMENT PROJECT:

The Director General Public Procurement Oversight Authority (P.P.O.A) informed the Committee that

- (i) P.P.O.A acting under its mandate under Section 49 and 101 of the Public Procurement and Disposal Act (P.P.D.A)2005 requested a response from Kenya Pipeline Corporation on issues raised by the complainant(M/s Rich Productions Limited) and documentary evidence of various documents related to the Expression of Interest (EOI)
- (ii) The Authority requested KPC twice to respond to the issues raised including a demonstration on the actions KPC would undertake to address the anomalies cited and ensure that the subject EOI is processed in accordance with the conditions prescribed in the EOI document and within the confines of the P.P.D.A (2006)
- (iii) KPC confirmed that they had so far complied with all the requirements of P.P.D.A (2005) and the project consultant was finalizing on the tender documents (RFP) to be issued to the prequalified firm. The replacing of the Line 1 was because the current line had exceeded its lifespan (25 yrs), the maintenance costs were extremely high and was posing a health hazard because of the numerous pipe bursts.
- (iv) KPC's Quarterly report on the subject tender as per P.P.O.A circular No. 4/2009 on Procurement Planning and Reporting requirements is expected on 14th October 2014.

- (v) M/s Rich Productions Limited filed a judicial review of the EOI. The case was dismissed because of material non-disclosure by the petitioner and the court's view that it was a brief case company with neither the requisite experience nor financial capacity to tender for the construction of the pipeline.
- (vi) There were two administrative reviews by the Administrative Review Board (A.R.B) by M/s Kalpataru Power Transmission Limited and M/s China Petroleum Engineering & Construction Corporation challenging the award of the tender to the successful bidder, but both cases were dismissed for absence of proof of neither breach of any of the provisions of the Act or the Regulations nor of the article 227 of the Constitution.
- (vii) Taking into account the A.R.B's decision and the High Court's judgment, no party has raised any further queries in relation to the tender. P.P.O.A cannot investigate once a case is concluded by A.R.B

The Committee made the following observation


- (i) Although P.P.O.A cited section 114(1) part 7 of the P.P.D.A as preventing them investigating a matter which has appeared and been concluded before the A.R.B, the section does not bar them from taking the matter to court for review. The section is also quiet on whether P.P.O.A can investigate a matter that has not been canvassed or tackled in the A.R.B.

The Committee deliberated and resolved that P.P.O.A will provide them by Thursday 4th September 2014 with the following

- (i) A report on the section in P.P.D.A used by P.P.O.A not to investigate or prosecute the matter further once it's appeared before A.R.B.
- (ii) A report on the issues that P.P.O.A raised via correspondence with KPC on two occasions 14th June 2013 and 23rd August 2013.

MINUTE NO 563/2014 ADJOURNMENT:

There being no other business the meeting was adjourned at Six O'clock.

SIGNED  DATE 5/11/2014
(Chairperson)



**MINUTES OF THE 131ST SITTING OF THE PUBLIC INVESTMENTS COMMITTEE
HELD ON WEDNESDAY 20TH AUGUST 2014, IN COMMITTEE ROOM, 7, MAIN
PARLIAMENT BUILDINGS AT 3.00 PM**

PRESENT:

1. Hon. Adan Keynan, CBS M.P. – **Chairperson**
2. Hon. Francis Nyenze Mwanzia, M.P.
3. Hon. Korei Ole Lemein, M.P.
4. Hon. John Aluoch Olago, M.P.
5. Hon. Bernard Munyoki Kitungi, M.P.
6. Hon. Cornelly Serem, M.P.
7. Hon. Mary Keraa Sally, M.P.
8. Hon. John M. Nyaga, M.P.
9. Hon. Beatrice Nyaga, M.P.
10. Hon. Onesmus Njuki, M.P.
11. Hon. Major (Rtd) John Waluke, M.P.
12. Hon. Dr. Oburu Oginga, M.P.
13. Hon. Johana Ngeno, M.P.
14. Hon. Njogu Barua, M.P.
15. Hon. Eng. John Kiragu, M.P.
16. Hon. Ogutu John Omondi, M.P.
17. Hon. Wafula Wamunyinyi, M.P.
18. Hon. Abdullswamad Sheriff, M.P.
19. Hon. Dr. Paul Otuoma, EGH, M.P.
20. Hon. Bare Shill, M.P.
21. Hon. Sammy Mwaita, M.P.

ABSENT WITH APOLOGY

1. Hon. Kimani Ichung'wah, M.P. – **Vice Chairperson**
2. Hon. Mithika Linturi, M.P.
3. Hon. Adan M. Nooru, MBS, M.P.
4. Hon. Mwadeghu Thomas, M.P.
5. Hon. Chrisanthus Wamalwa, M.P.
6. Hon. Irungu Kang'ata, M.P.

IN – ATTENDANCE

NATIONAL ASSEMBLY

- | | | |
|-------------------------|---|-----------------------|
| 1. Mr. Abdullahi Aden | - | First Clerk Assistant |
| 2. Ms. Rose Wanjohi | - | Clerk Assistant II |
| 3. Mr. Phillip Lekarkar | - | Clerk Assistant III |
| 4. Mr. Eric Ososi | - | Research Officer II |

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OFFICE OF THE AUDITOR GENERAL

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|-----------------------|---|----------------|
| 1. Mr. Obed K. Chweya | - | Senior Manager |
| 2. Mr. Boniface Muli | - | Manager |

TREASURY

- | | | |
|----------------|---|--------------|
| Mr. John Munge | - | Accountant I |
|----------------|---|--------------|

INSPECTORATE OF STATE CORPORATIONS

- | | | |
|-------------------|---|-------------------------|
| Ms. Joyce Wesonga | - | Asst. Inspector General |
|-------------------|---|-------------------------|

MINUTE NO.544/2014 EVIDENCE BY M/S KALPATARU POWER TRANSMISSION LIMITED

Mr. Kishore Komanduri, the Managing Director, M/s Kalpataru Power Transmission Ltd, appeared before the Committee to adduce evidence on the procurement process of the Mombasa – Nairobi pipeline (Line 1) replacement project.

Mr. Kishore Komanduri, Managing Director, M/s Kalpataru Power Transmission informed the Committee that;

- (i) Kalpataru power Transmission Limited has its registered office at 101, Part III, GIDC Estate Sector -128, Gandhinagar -38202, Gujrat, India;
- (ii) Kenya pipeline Company in January 2013 invited expression of interest for the proposed Mombasa – Nairobi Petroleum Products Pipeline Project under Tender No. SU/QT/032N13;
- (iii) Kalpataru avers that its submission on the prequalification by the procuring entity was responsive to the set criteria and subsequently by a letter dated 25th April, 2013 the procuring entity notified the applicant that it had been shortlisted for the request of proposal for the construction of Mombasa –Nairobi Petroleum Products Pipeline;
- (iv) Kenya Pipeline Company Limited (procuring entity) breached section 31 and 39 of the Public Procurement and Disposal Act, 2005 and the Public Procurement and Disposal Regulations;



- (v) By a letter dated 26th May 2014, Kenya Pipeline Company informed the applicant that its bid was not responsive on account of;
- The applicant did not submit registration as a contractor in his country of origin,
 - The Tender security (Bid Bond) was not valid for the required period as it expires on 12th October, 2014, which is less than 150 days as required in the invitation to submit on Request for quotation,
- (vi) The procuring entity failed to promote the integrity and fairness of procedure in evaluation criteria;
- (vii) The Indian law permits the applicant as registered company to perform contracting work in terms of its Articles 48 to 51 of the Memorandum of Association;
- (viii) The Procuring Entity provided unusual requirement to the procurement process for example the applicant were required to produce "*Certificate of Registration as a contractor in the Country of operation for Foreign firms*";
- (ix) Irregular variation of the date of submission contrary to section 53 of the Public Procurement and Disposal Act, 2005;
- (x) The purported extension of the deadline by the Procuring Entity dealt great harm as the applicant had already taken the necessary steps to ensure that it had procured and secured the Tender Security Bid Bond for USD 500,0000 from I&M a reputable Bank operating in Kenya in which the Bid Bond was valid for 150 days from the date of Tender opening which had been set as 8th May, 2014. This was a back to back arrangement with applicant bankers in India with the bank in Kenya;
- (xi) The Procuring entity's action to extend the deadline by a letter on the 7th May, 2014, Twenty (20) Hours before the set deadline, was in breach of Section 55(3) of the Public Procurement and Disposal Act, 2005;
- (xii) The Public Procurement and Disposal Act, 2005 is perfectly clear at Section 31 (6) in stating that the only pre- condition to be followed during the procurement process are those set out in the Act;
- (xiii) The procedure adopted by the Procuring Entity in changing the submission date and preliminary evaluation was not transparent and contrary to the object and spirit of the Public Procurement as set out in Article 227 of the Constitution as read together with section 2 of the Public Procurement and Disposal Act;



- (xiv) The applicant submits that the basis of rejection of its bid is contrary to the Constitution of the Republic of Kenya, the Public Procurement and Disposal Act, 2005 and the Public Procurement and Disposal Regulations as a consequence the applicant has suffered loss and damage by virtue of being disqualified based on a criteria not recognized by law.
- (xv) The applicant was denied its right to fair opportunity to compete with other bidders on a level playing field, which has resulted in financial loss on the applicant.
- (xvi) Kalpataru power Transmission had requested the Public Procurement Administrative Review Board to review the decision of the Kenya Pipeline Company limited dated 26th May 2014 in the Tender for the Procurement Construction, Testing and Commissioning of Line Pipeline Replacement Project, Contract No. SU/QT/032N/13.

MINUTE. NO.545/ 2014 COMMITTEE RESOLUTIONS

The Committee resolved to internalize and conceptualize the documents submitted by Kalpataru Power Transmission Limited for review of the decision of the Kenya Pipeline Company Limited in the Tender for the Procurement Construction, Testing and Commissioning of Line Pipeline Replacement Project, Contract No. SU/QT/032N/13.

MINUTE NO. /2014 - ADJOURNMENT

There being no other business, the Chairperson adjourned the meeting at Fifteen Minutes past Six O'clock.

Signed: .....
(Chairperson)

Date: 4th September, 2014.....



**MINUTES OF THE 127TH SITTING OF THE PUBLIC INVESTMENTS COMMITTEE
HELD ON THURSDAY 14TH AUGUST, 2014 IN THE COMMITTEE ROOM 7, MAIN
PARLIAMENT BUILDINGS AT 10:00 AM.**

PRESENT

1. Hon. Adan Keynan, CBS, MP - Chairperson
2. Hon. Ichung'wah, Antony Kimani, MP - Vice Chairperson
3. Hon. Sammy Mwaita, MP
4. Hon. Serem, Cornelly, MP
5. Hon. Shill, Elias Bare, MP
6. Hon. Nyaga, John Muchiri, MP
7. Hon. Barua, Ejidius Njogu, MP
8. Hon. Nyaga , Beatrice Nkatha, MP
9. Hon. Njuki, Onesmus Muthomi, MP
10. Hon. Eng. John Kiragu, MP
11. Hon. Kipyegon, Johana Ngeno, MP
12. Hon. Aluoch, John Olago, MP
13. Hon. Dr. Oburu Oginga, MP
14. Hon. Koyi, John Waluke, MP
15. Hon. Hon. Keraa, Mary Sally, MP
16. Hon. Wafula Wamunyinyi, MP
17. Hon. Kitungi, Benard Munyoki, MP
18. Hon. Chrisantus Wamalwa, MP

ABSENT WITH APOLOGY

1. Hon. Noor, Adan Mohammed, MP
2. Hon. Ole Lemein, Korei, MP
3. Hon. Linturi, Franklin Mithika, MP
4. Hon. Kang'ata, Irungu, MP .
5. Hon. Mwadeghu, Thomas Ludindi, MP
6. Hon. Nyongesa, Otuoma Paul, MP
7. Hon. Omondi John Ogutu
8. Hon. Nyenze Francis Mwanzia, MP
9. Hon. Nassir, Abdullswamad Sheriff, MP

IN-ATTENDANCE

NATIONAL ASSEMBLY

1. Mr. Nicholas Emejen - Principal Clerk Assistant I
2. Mr. Abdullahi Aden - Clerk Assistant I
3. Ms. Rose Wanjohi - Clerk Assistant II

4. Mr. Philip Lekarkar - Clerk Assistant III
6. Mr. Eric Ososi - Researcher Officer III

KENYA NATIONAL AUDIT OFFICE

1. Charles Nyanyuki - Ag. Director, Audit
2. Mr. Obed K. Chweya - Senior Manager, Audit
3. Mr. Romanas Ochieng - Manager, Audit

NATIONAL TREASURY

1. Mr. John Munge - Accountant I

MINUTE NO. 531/2014: PRELIMINARIES

The Chairperson called the meeting to order at Twenty Minutes past Ten O'clock and a word of prayer was said by Hon. Bare Shill, MP.

MINUTE NO. 532/2014: EVIDENCE: M/s CHINA WU YI COMPANY LIMITED.

The Engineer of Contracts, Mr. Huang Si Lin; Administration Officer, Mr. Peter Liu; Legal Officer, Mr. Josphat Onsongo and Assistant to the Managing Director, Mr. Zhang Jze appeared before the Committee to adduce evidence on the procurement of Kenya Pipeline Corporation Line 1 Capacity Enhancement Project(Nairobi – Mombasa Pipeline).

MINUTE NO. 533/2014: COMMITTEE OBSERVATIONS

The Committee heard that the Company received the invitation letter late and could not therefore prepare adequately for submission of the evidence. The Committee further heard that the Managing Director is on leave outside the country and could not attend the meeting.

The Committee observed that M/s China Wu Yi Company is a major and reputable construction company in the country and the officers before the Committee may not competently represent the Company. The Committee deliberated on the matter and resolved to reschedule the meeting Tuesday, 26th August 2014. The Committee directed that the Managing Director should attend the meeting in person.

MINUTE NO. 534/2014: ADJOURNMENT.

There being no other business the Chairperson adjourned the meeting at Ten Minutes past Eleven O'clock.

Signed



(Chairperson)

Date

4th September 2014



4. Mr. Philip Lekarkar - Clerk Assistant III
6. Mr. Eric Osoi - Researcher Officer III

KENYA NATIONAL AUDIT OFFICE

1. Charles Nyanyuki - Ag. Director, Audit
2. Mr. Obed K. Chweya - Senior Manager, Audit
3. Mr. Romanas Ochieng - Manager, Audit

NATIONAL TREASURY

1. Mr. John Munge - Accountant I

MINUTE NO. 520 /2014: PRELIMINARIES

The Chairperson called the Meeting to order at Twenty Minutes past Ten O'clock and a word of prayer was said by Hon. Bare Shill, MP.

MINUTE NO. 521/2014: EVIDENCE: M/s CHINA WU YI COMPANY LIMITED.

The Engineer of Contracts, Mr. Huang Si Lin; Administration Officer, Mr. Peter Liu; Legal Officer, Mr. Josphat Onsongo and Assistant to the Managing Director, Mr. Zhang Jze appeared before the Committee to adduce evidence on the procurement of Kenya Pipeline Corporation Line 1 Capacity Enhancement Project(Nairobi – Mombasa Pipeline).

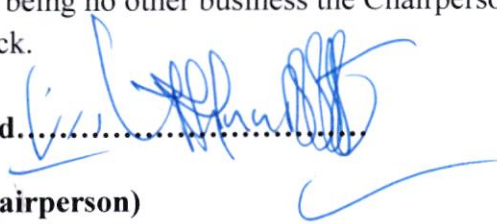
MINUTE NO.1491 /2014: COMMITTEE OBSERVATIONS

The Committee heard that the Company received the invitation letter late and could not therefore prepare adequately for submission of the evidence. The Committee further heard that the Managing Director is on leave outside the country and could not attend the meeting.

The Committee observed that M/s China Wu Yi Company is a major and reputable construction company in the Country and the officers before the Committee may not competently represent the Company. The Committee deliberated on the matter and resolved to reschedule the meeting to Tuesday, 26th August, 2014. The committee directed that the Managing Director should attend the meeting in person.

MINUTE NO. 522/2014: ADJOURNMENT.

There being no other business the Chairperson adjourned the meeting at Ten Minutes past Eleven O'clock.

Signed.....

(Chairperson)

Date.....*4th September, 2014*

**MINUTES OF THE 125TH SITTING OF THE PUBLIC INVESTMENTS COMMITTEE
HELD ON TUESDAY 13TH AUGUST, 2014 IN THE COMMITTEE ROOM 7, MAIN
PARLIAMENT BUILDINGS AT 10:00 AM.**

PRESENT

1. Hon. Adan Keynan, CBS, MP - Chairperson
2. Hon. Ichung'wah, Antony Kimani, MP - Vice Chairperson
3. Hon. Sammy Mwaita, MP
4. Hon. Serem, Cornelly, MP
5. Hon. Shill, Elias Bare, MP
6. Hon. Nyaga, John Muchiri, MP
7. Hon. Barua, Ejidius Njogu, MP
8. Hon. Nyaga, Beatrice Nkatha, MP
9. Hon. Njuki, Onesmus Muthomi, MP
10. Hon. Eng. John Kiragu, MP
11. Hon. Kipyegon, Johana Ngeno, MP
12. Hon. Aluoch, John Olago, MP
13. Hon. Dr. Oburu Oginga, MP
14. Hon. Koyi, John Waluke, MP
15. Hon. Hon. Keraa, Mary Sally, MP
16. Hon. Wafula Wamunyinyi, MP
17. Hon. Kitungi, Benard Munyoki, MP
18. Hon. Chrisantus Wamalwa, MP

ABSENT WITH APOLOGY

1. Hon. Noor, Adan Mohammed, MP
2. Hon. Ole Lemein, Korei, MP
3. Hon. Linturi, Franklin Mithika, MP
4. Hon. Kang'ata, Irungu, MP .
5. Hon. Mwadeghu, Thomas Ludindi, MP
6. Hon. Nyongesa, Otuoma Paul, MP
7. Hon. Omondi John Ogutu
8. Hon. Nyenze Francis Mwanzia, MP
9. Hon. Nassir, Abdullswamad Sheriff, MP

IN-ATTENDANCE

NATIONAL ASSEMBLY

1. Mr. Nicholas Emejien - Principal Clerk Assistant I
2. Mr. Abdullahi Aden - Clerk Assistant I
3. Ms. Rose Wanjohi - Clerk Assistant II

**MINUTES OF THE 104TH SITTING OF THE PUBLIC INVESTMENTS COMMITTEE
HELD ON TUESDAY 8TH JULY, 2014 IN THE COMMITTEE ROOM 7, MAIN
PARLIAMENT BUILDINGS AT 10:00 PM.**

PRESENT

1. Hon. Adan Keynan, CBS, MP -Chairperson
2. Hon. Ichung'wah, Antony Kimani MP -Vice Chairperson
3. Hon. Mwaita, Sammy Silas Komen, MP
4. Hon. Noor, Adan Mohammed, MP
5. Hon. Shill, Elias Bare, MP
6. Hon. Nyaga, John Muchiri, MP
7. Hon. Nyaga, Beatrice Nkatha, MP
8. Hon. Barua, Ejidius Njogu, MP
9. Hon. Eng. John Kiragu, MP
10. Hon. Kipyegon, Johana Ngeno, MP
11. Hon. Aluoch, John Olago, MP
12. Hon.(Maj(Rtd)Koyi, John Waluke, MP
13. Hon. Dr. Oburu Oginga, MP
14. Hon. Omondi John Ogutu, MP
14. Hon. Nyenze Francis Mwanzia, MP
16. Hon. Wafula Wamunyinyi, MP.
17. Hon. Wakhungu Chrisantus Wamalwa, MP

ABSENT WITH APOLOGY

1. Hon. Serem, Cornelly, MP
2. Hon. Ole Lemein, Korei, MP
3. Hon. Linturi, Franklin Mithika, MP
4. Hon. Kang'ata, Irungu, MP
5. Hon. Mwadeghu, Thomas Ludindi, MP
6. Hon. Nassir, Abdullswamad Sheriff, MP
7. Hon. Njuki, Onesmus Muthomi, MP
8. Hon. Keraa, Mary Sally, MP
9. Hon. Nyongesa, Otuoma Paul, MP.
10. Hon. Kitungi, Benard Munyoki, MP

IN-ATTENDANCE

NATIONAL ASSEMBLY

1. Mr. Nicholas Emejen -Principal Clerk Assistant I
2. Ms. Rose Wanjohi -Clerk Assistant II



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3. Mr. Philip Lekarkar

-Clerk Assistant III

4. Mr. Salem Lorot

-Legal Counsel

KENYA NATIONAL AUDIT OFFICE

1. Mr. Obed K. Chweya

-Senor Manager, Audit

2. Charles Nyanyuki

-Ag. Director, Audit

NATIONAL TREASURY

1. Mr. John Munge

-Accountant I

MINUTE NO.333 /2014: PRELIMINARIES.

The meeting started at Twenty Minutes past Ten O'clock after a word of prayer by Hon. Beatrice Nkatha MP

MINUTE NUMBER 334 /2014: EVIDENCE ON PROCUREMENT OF THE MOMBASA -NAIROBI PIPELINE (LINE 1) REPLACEMENT PROJECT

The Managing Director Kenya Pipeline Corporation Mr. Charles Tanui accompanied by Chief Manager Technical Mr. Elias Karumi, Finance Manager, Mr. Samuel Odoyo, Company Secretary, Ms. Fiona Okoth, Legal Officer, Ms Gloria Khafafa, Procurement Manager, Mr. Nicholas Gitobu, Operations Manager, Mr. Philip Kimelu, ICT Manager, Mr. Francis Muraya, Mr. Billy Aseka, Mr. Bramwell Wanyalikhha and Ms Jacintah Sekoh appeared before the Committee to give evidence on the procurement of Mombasa –Nairobi Pipeline (Line 1) Replacement Project. The officers were put under oath before giving evidence.

The Committee heard that:-

The Mombasa – Nairobi pipeline (Line 1) replacement project tender that had been estimated to cost Sh53 billion has been awarded to Zakhem International Construction Limited. Zakhem's bid of Kshs. 43 billion was lower than the engineer's estimate of Kshs. 53 billion and that the company also had the necessary capability, experience and resources to undertake the project.

Thirteen companies were shortlisted out of the 40 that went through the pre-qualification process. Out of those only nine responded and two namely Kalpataru Power Transmission Ltd and AVIC International Holding Corporation later failed to meet the mandatory requirements.

Seven listed companies met the minimum score of 50 per cent in each qualifying criteria and attained a minimum total score of 75 per cent and thus proceeded to Financial Evaluation.



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The financial bid accounted for 30 per cent of the marks while the technical aspects accounted for 70 per cent.

After technical and financial evaluation Zakhem received a combined score of 95.5 per cent followed by China Petroleum Engineering Construction with 89.1 per cent, Sinopec International Petroleum Service with 84.5 per cent. China Wu Yi Company with 83.1 per cent, Denny NS 82 per cent, Punj Lloyd 81.1 per cent and Saipem Business unit Engineering Construction 73.4 per cent.

China Wu Yi was the lowest evaluated in the financial aspect, but the firm lacked technical capacity after it jointly bid with another Chinese firm, Xiang Jing.

Zakhem International had met the competence required, with an advantage of having constructed the same pipeline in 1972; which has now lasted for 36 years from the initial plan of 25 years.

MINUTE NO. 335 /2014: COMMITTEE OBSERVATIONS

The Committee was concerned that:-

The 14 day statutory stay was not followed during the awarding of the Contract pursuant to the provisions of the Public Procurement and Disposal Act. The process of Financial Evaluation had been done in a hurry and finalised in less than 12 hours before the tender was awarded.

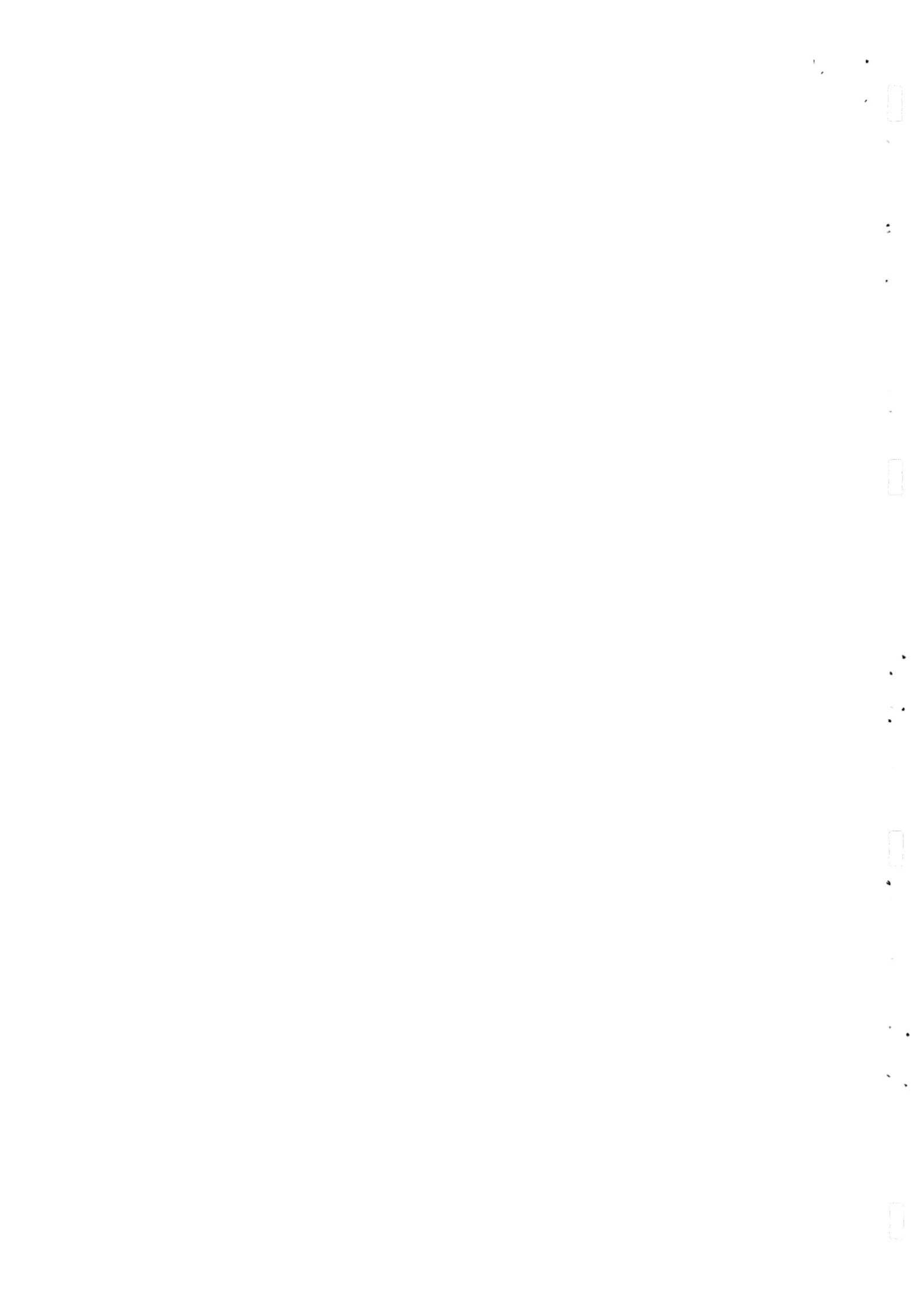
Two firms China Wu-Yi and Xiang Jing that bid jointly were not treated as one entity as allowable in law, and whether KPC had deliberately failed to evaluate the two companies to pave way for Zakhem International.

KPC accepted a bid bond by Zakhem International issued by Eco-bank Nigeria, in spite of their requirement of a bond from a bank operating in the country.

That Zakhem International had been blacklisted in some African countries.

The Committee directed the Managing Director to furnish the Committee with:-

- a). Chronology of the entire Procurement Process;
- b). Feasibility study report;
- c). Documentary evidence for the award of the Contract including the criteria for Technical and Financial Evaluation;
- d). The Tender documents and bid bonds;
- e). The technical capacity which includes the Curriculum Vitae of the personnel of the bidding firms; and
- f). Evidence for the provision of the 40% local content as required by the law.



MINUTE NO. 336/2014: ADJOURNMENT.

There being no other business the Chairperson adjourned the meeting at Twelve Minutes past Twelve O'clock.

Signed.....

Date..... 5th August 2014

(Chairperson.



REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 19/2014 OF 30TH MAY 2014

Annex
1

BETWEEN

KALPATARU POWER
TRANSMISSION LIMITEDAPPLICANT

AND

THE KENYA PIPELINE
COMPANY LIMITEDPROCURING ENTITY

AND

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

CHINA PETROLEUM ENGINEERING
& CONSTRUCTION CORPORATION2ND 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.

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BOARD MEMBERS PRESENT

We further agree that no change or addition to or other modification of the terms of the Contract or of the Works to be performed thereunder or of any of the contract documents which may be made between you and the Contractor shall in any way release us from any liability under this Guarantee, and we hereby waive notice of any such change, addition, or modification.

This Performance Guarantee shall be valid until issuance of the Defect Liability Certificate and shall be governed by the laws of Kenya.

IN WITNESS whereof the Guarantor has caused its Common Seal to be hereunto affixed in Lagos Nigeria on one original copy only on this 10th day of June 2014 in the presence of:

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.

PERFORMANCE GUARANTEE

TO: 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 meeting on 20th 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.

AND WHEREAS: it has been stipulated by you in the said Contract that the Contractor shall furnish you with a Bank Guarantee by a recognised bank for the sum specified therein as security for compliance with its obligations in accordance with the Contract;

AND WHEREAS: We, ECOBANK NIGERIA LIMITED with registered office at Plot 21, Ahmadu Bello Way, Victoria Island, Lagos, Nigeria (hereinafter called "the Guarantor") have agreed to give the Contractor such a Bank Guarantee.

No.	Name of Bidder
1	ZAKHEM INTERNATIONAL CONSTRUCTION LIMITED
2	China Wu Yi Company Ltd and Xinjiang Petroleum Engineering
3	Avic International Holding Corporation and ZTPE Consortium
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
8	Sinopec International Petroleum Service
9	China Wu Yi Company Ltd and Xinjiang Petroleum Engineering

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www.ecobank.com

Board of Directors: Mr. S. F. Kuku, CFR (Chairman); Jibril Aku (Managing Director); Anthony Okpanachi (Deputy Managing Director); Alhaji Moazu Anache, Mr. Olukeniyeni (Independent); Prof. Wilfred Belonwu; Mr. Edouard Dossou-Yovo (Beninese-Independent); Mr. Orikolade Karim, Mrs. Funmi Oyetunji; Eveline Tall (Senegalese);
Executives: Foluke Aboderin; Dele Alabi; Kingsley Aigbokhaevbo; Shehu Jafiya; Kingsley Umadia

	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 consorfium were the two bidders that failed to satisfy



ZAKHEM

ZAKHEM INTERNATIONAL CONSTRUCTION LTD.
Civil and Mechanical Engineers & Contractors

all the mandatory requirements and thus did not qualify to move to the

Technical Evaluation stage. The Technical

Reply to: Zakhem Construction (Kenya) Ltd.
Dudung Road Opp. G.S.O Headquarters
P.O. Box 41196 - 00100 NAIROBI - KENYA
Tel: 254 57 2512128/9, +254 20 8562113
E-mail: zakhem@africaonline.co.ke

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.

The Chief Manager Technical

Kenya Pipeline Company Limited

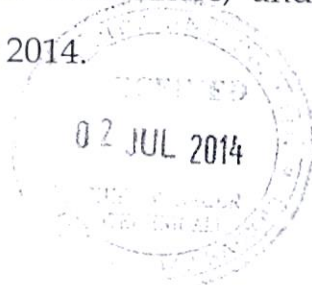
Nairobi Terminal

Off Nanyuki road

Industrial Area

P.O. Box 73442-00200

NAIROBI



1st July, 2014

Preliminary Evaluation

Our Ref: ZIC-AD/0082/14/LR/AA

a) Mandatory Requirements

Dear Sir,

The preliminary evaluation was performed to ensure that the bidders

RE: **LINE 1 – REPLACEMENT PROJECT**
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)

Pursuant to clause 10.1 of the Conditions of Contract Part II Conditions of Particular Application, please find enclosed herewith the Performance Guarantee in the sum of US\$ 48,450,288.64 issued by Ecobank as the guarantor.

a) Certificate of Incorporation of the Company/Business

Yours faithfully,

For: **ZAKHEM INTERNATIONAL CONSTRUCTION LTD** Partner
Registered by the Registrar of Companies

b) Tax Compliance Certificate from country of domicile for both

ADNAN ANNOUS and foreign firms

Encl. **c) Tender security of USD 500,000.00 issued by a reputable bank**

cc: **operating in Kenya**
The Managing Director
Kenya Pipeline Company Limited
Nairobi Terminal of registration as a contractor in the country of
Off Nanyuki road
Industrial Area for foreign firms and National Construction Authority
P.O. Box 73442-00200
NAIROBI 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 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	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:-

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

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 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 its 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 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 countries 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

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

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,*

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 firms 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 in view 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.

.....

Chairman

PPRB

.....

Secretary

PPRB

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 23 OF 11TH JUNE, 2014

\ BETWEEN

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

AND

THE KENYA PIPELINE COMPANY LIMITED PROCURING ENTITY

AND

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

KALPATARU POWER TRANSMISSION LIMITED2ND INTERESTED PARTY

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

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

BOARD MEMBERS PRESENT

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

IN ATTENDANCE

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

PRESENT BY INVITATION

PROCURING ENTITY - KENYA PIPELINE COMPANY

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

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

1. Thomas K'Bahati - Advocate

INTERESTED PARTIES

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

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

THE BACKGROUND OF THE AWARD

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

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

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

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

Pre-Qualified Bidders

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

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

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

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

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

8	Saipem Busines Unit
9	Kalpataru Power Transmission Ltd

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

Preliminary Evaluation

a) Mandatory Requirements

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

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

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

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

1. KALPATARU POWER TRANSMISSION LIMITED

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

2. AVIC INTERNATIONAL HOLDING CORPORATION

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

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

- a. Kalpataru Power Transmission Limited
- b. AVIC International Holding Corporation/ZTPE consortium.

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

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

Detailed Technical Evaluation

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

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

Table: Summary of the Detailed Evaluation

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

THE FINANCIAL OPENING

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

Table: Bidder's prices as opened

No.	Company	Tender price USD	Remarks
1.	M/S China Wu Yi Company Limited	456,855,018.00	Inclusive of VAT
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 was dissatisfied with the Procuring Entity's decision and lodged an application for review challenging the award of the subject tender to the successful bidder. The Request for Review was lodged with the Board on 10th June 2014. The Applicant's application for review was supported by the affidavit sworn by one Mr. FAN ALI on 10th June 2014 and to which he annexed several documents.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ISSUE NO.1

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Section 57 of the Act stipulates as follows:-

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

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

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

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

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

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

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

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

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

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

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

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

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

"The Group Today.

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

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

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

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

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

Dear Sir,

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

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

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

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

Yours sincerely
ECOBANK KENYA LIMITED

signed
Enouman Kassi

signed
Peter Makau

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

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

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

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

Minute 5 - Comments from floor

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ISSUE NO.2

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ISSUE NO.3

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

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

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

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

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

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

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

4.1 sealing and marking of tenders.

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

(a) mandatory documents shall constitute the following documents;

(b) (i).....

(ii).....

(iii).....

(iv).....

(v).....

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

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

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

Failure to comply with this requirement may invalidate the tender.

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

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

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

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

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

ISSUE NO.4

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

FINAL ORDERS:

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

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

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

.....
.....

Chairman

PPRB

.....
.....

Secretary

PPRB

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

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

BETWEEN

CHINA WU YI CO. LTDAPPLICANT

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

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 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:-

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

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 annexures/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 annexure/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 or it's 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 its 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

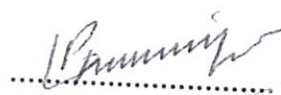
Accordingly and for all the reasons set out above and in exercise of the powers conferred upon the Board by the Provisions of Section 98 of the Act, the Board makes the following orders:-

- 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.

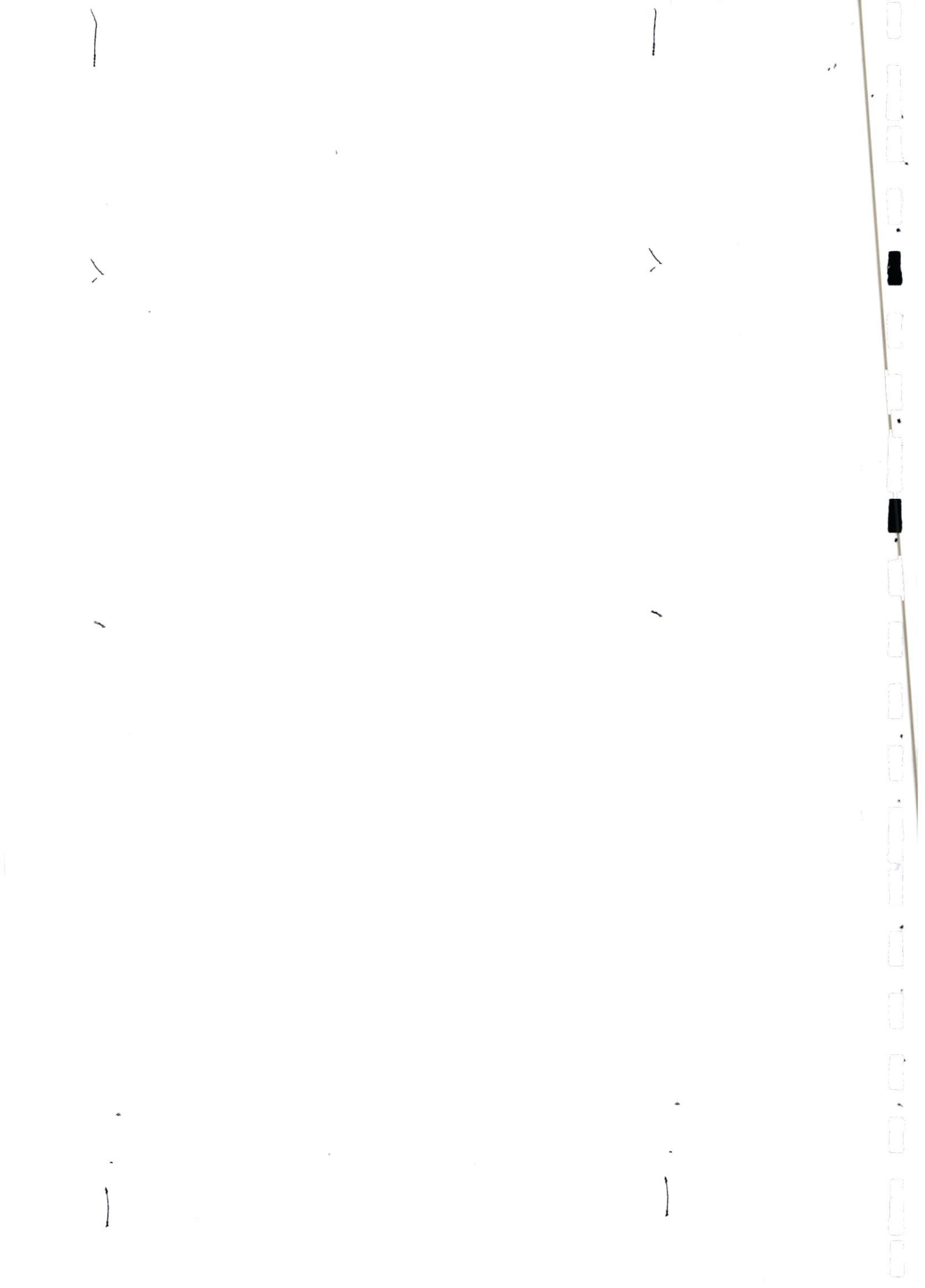
Dated at Nairobi this 30th day of June, 2014.


.....

Chairman


.....

Secretary





Annex
2

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
PETITION NO 173 OF 2014

RICH PRODUCTIONS LIMITEDPETITIONER

VERSUS

KENYA PIPELINE COMPANY1ST RESPONDENT

PUBLIC PROCUREMENT OVERSIGHT AUTHORITY (PPOA)2ND RESPONDENT

JUDGMENT

Introduction

1. The petitioner, a limited liability company incorporated in Kenya under the provisions of the Companies Act Cap 486, has filed this petition seeking orders to stop the 1st respondent from proceeding with the tendering process for the construction of a pipeline from Mombasa to Nairobi on the basis that the process has been carried out in violation of the Constitution and the law governing the public procurement process. In the affidavit sworn in support of the petition, the petitioner describes its core business as trading and sourcing for international partners, primarily in the energy sectors.
2. In the petition dated 12th April 2014, the petitioner seeks the following orders:
 - i. ***A declaration that the Procurement Proceedings undertaken by the 1st Respondent's in relation to the proposed construction of Mombasa Nairobi Petroleum Products Pipeline including but not limited to invitation and expression of interest, evaluation and outcome of the said expression of interest, subsequent requests for proposal/tender for technical and financial bids for the proposed construction of Mombasa Nairobi Petroleum Products Pipeline are unconstitutional, illegal and irregular.***
 - ii. ***An order of certiorari do issue to bring to this Honourable Court for the purposes of being quashed the procurement proceedings undertaken by the 1st respondent in relation to the proposed construction of Mombasa Nairobi Petroleum Products Pipeline including but not***

~~limited to invitation and expression of interest, evaluation and outcome of the said expression of interest subsequent requests for proposals/tender for technical and financial bids for the proposed construction of Mombasa Nairobi Petroleum Products Pipeline.~~

iii. ~~An order that fresh procurement proceedings in relation to the proposed construction of Mombasa Nairobi Petroleum Products Pipeline be commenced afresh.~~

iv. *Such other orders as this honourable court shall deem just and fit to grant.*

v. *Costs of this suit.*

3. The petition is opposed by both the 1st and 2nd respondents. The 1st respondent is a state corporation established under the Companies Act. Its main objective is described in its pleadings as being to provide efficient, reliable, safe and cost effective means of transporting petroleum products from Mombasa to the hinterland. It has to this end constructed a pipeline network, storage and loading facilities for transportation and distribution of petroleum products. It intends to construct a new pipeline from Mombasa to Nairobi as the lifespan of the existing pipeline, which was constructed and commissioned in 1978, ended in 2003. It is to this end that the 1st respondent invited expressions of interest and proposals for construction of a new pipeline.

4. The 2nd respondent is a statutory oversight body established under the provisions of the Public Procurement and Disposal Act, 2005. It has the statutory mandate to, among other things, ensure that procurement procedures under the Act are complied with.

The Petitioner's Case

5. The petitioner is aggrieved that the 1st respondent has invited separate financial and technical bids for the pipeline project. It contends that inviting such bids separately fundamentally deviates from the Expression of Interest (EOI) documents it had initially issued and is unlawful as it contravenes section 64 of the Act. It contends that the approach is unfair and discriminates against bidders or contractors who were either unsuccessful in the EO1 stage or were hindered from applying due to the onerous financial requirements.

6. It accuses the 1st respondent of discriminatory application of procurement procedures in a manner deliberately intended to exclude the petitioner and otherwise qualified contractors from participating in the tender, thus violating the provisions of Article 10, 27 and 227 of the Constitution which require entities, in contracting for goods and services, to ensure that they do so in a manner that is fair, equitable, transparent, competitive and cost-effective.

7. Learned Counsel, Mr. Sagana, presented the petitioner's case. He relied on the affidavit sworn in support of the petition by Ms. **Catherine N. Macharia** a Director of the petitioner, on 14th April 2014 and submissions dated 28th April 2014.

8. In the said affidavit, Ms. Macharia makes various depositions with regard to the factual situation leading to the present petition. She states that on or about 16th January 2013, the 1st respondent advertised for expression of interest (EO1) for prequalification of contractors for the proposed Mombasa – Nairobi Petroleum Products Pipeline Tender No SU/QT/032N/13; that desirous of participating in the EO1, the petitioner entered into a consortium with a company known as Stallion Gulf Limited.

9. According to the petitioner, the consortium was, however, unable to tender due to the onerous financial requirements imposed by the 1st respondent. Ms. Macharia deposes that among the mandatory requirements in the EO1 were, under clause 1.2 (b)(ii) on financial capability, a requirement for an undertaking to arrange for credible loan facility from reputable financial institution upto a maximum of 70% of the project cost without anticipating a sovereign guarantee. This financial capability requirement was assigned a score of 25% out of a minimum score of 70% in the evaluation criteria contained in the EO1 documents. The petitioner was therefore prohibited from submitting its bid as only prequalified contractors were invited to submit bids for construction of the project.
10. The petitioner avers that it recently established that the outcome of the EO1 was the subject of various complaints to the 2nd respondent on the fairness and integrity of the procurement process applied by the 1st respondent; that the 1st respondent specifically conducted the tender to ensure specific candidates did not qualify for short listing, which resulted in the lodging of complaints with the 2nd respondent.
11. The petitioner relied in this regard on a letter dated 14th June 2013 in which the Director General of the 2nd respondent indicates that in his opinion, the procurement was not evaluated in strict adherence to the requirements set out in the bid document and procurement law and directed that the procurement be undertaken in accordance with the Public Procurement and Disposal Act and the Regulations made thereunder.
12. Ms. Macharia avers that it was anticipated that due to the concerns raised by the 2nd respondent, the 1st respondent would restart the process so that all bidders are treated equally and fairly in accordance with the Constitution and the said Act; that instead of addressing the 2nd respondent's concerns, and in a complete departure from the requirements of the EO1 documents, the 1st respondent invited Tenders for Financing of Line One (Mombasa – Nairobi) replacement project – SU/QT/132N/14 which were to be submitted on or before 11th March 2014; and that it also separately requested for Technical and Financial Proposals for the Construction of Mombasa – Nairobi Petroleum Pipeline to prequalified bidders only, due for submission by 17th April 2014.
13. The petitioner contends that it will suffer serious prejudice if the orders sought in this petition are not granted as it will be excluded from participating in the procurement process.
14. In his submissions on behalf of the petitioner, Mr Sagana reiterated the above averments. He pointed out that parties interested in the project had to submit audited accounts for the previous five years with a financial capability of not less than US\$500m and give an undertaking from a reputable financial company of not less than 70% of the cost and a tax compliance certificate.; that while only 13 companies were prequalified, the 1st respondent changed the requirements after pre-qualification.
15. Mr. Sagana submitted that the petitioner was happy with the requirements of the EO1 but is unhappy that they were changed after locking out the petitioner and others. He cited as evidence of the change two letters from the 2nd respondent dated 14th June and 23rd August 2013; a letter from the 1st respondent dated 30th August 2013; as well as the invitation to tender for the financing of the project by the 1st respondent. It was his submission that the fresh bid will give undue advantage to the 13 prequalified companies to the disadvantage of the petitioner; that the petitioner would have put in its bid if the financial qualifications were not so onerous; that it had the technical but not the financial capacity and should not have been excluded through the

onerous requirements; and that the 1st respondent was obliged by Article 227 to stick to what it had initially tendered for.

16. To the respondent's contention that the petitioner is a briefcase company, it was the petitioner's submission that the Court was not required to determine whether the petitioner could have qualified or not, but whether there was material deviation to the exclusion of the petitioner and others.
17. With regard to jurisdiction, the petitioner submitted that it could not have made its claim before the 2nd respondent as it was not a candidate for pre-qualification since it did not tender due to the high financial requirements; and that it could only approach the Court by way of petition. This was in accordance with section 93 of the Act which deals with the jurisdiction of the Public Procurement and Disposal Oversight Authority (PPOA) by providing that a candidate can go before the Authority and defines a candidate as one who submitted a bid. The petitioner therefore asked the Court to grant the orders sought in the petition so that the procurement process for the pipeline project could start afresh and be conducted in accordance with the procurement law and the Constitution.

The 1st Respondent's Case

18. The 1st respondent made four main arguments against the petition. The first was that the petitioner had not exhibited a resolution authorising the filing of the suit, and the petition was therefore incompetent. Counsel relied on the decision of the Court in **East African Portland Cement –vs- Capital Market Authority & 4 Others[2014]eKLR** for the proposition that a suit by a company must have the authority of the Board of directors and a resolution to that effect.
19. Secondly, it was the 1st respondent's case that the petitioner was guilty of material non-disclosure; that the petitioner had only presented such material before the Court as suited its purposes while withholding material information from the Court; that the 2nd respondent had been receiving anonymous complaints with regard to the tender leading to the exchange of correspondence between the respondents on the alleged irregularities in the process, none of which concerned the petitioner; that all the concerns of the 2nd respondent were addressed; and the 2nd respondent gave the green light for the 1st respondent to proceed with the project by its letter dated 7th October 2013, but that the petitioner had only presented to the Court such letters as showed the complaints with regard to the process but not the ones showing that the issues had been addressed and resolved.
20. It contended therefore that the petition, which oscillates between an action by a citizen seeking to safeguard the public interest and a bidder with a financial interest, was couched in a manner intended to deceive the Court into thinking that the 1st respondent had violated the Constitution and the law.
21. Thirdly, it was the 1st respondent's case that it had complied with both the Constitution and the law on public procurement and been allowed to proceed with the tender process by the 2nd respondent.
22. The fourth limb of the 1st respondent's case is that the petitioner which the 1st respondent refers to as a briefcase company, has no capacity to tender for the project and could not qualify even were the tender process to be stopped. Counsel contended that it was a company that specializes in film production; that it was incorporated in 1998 and has filed no returns since its incorporation; and has a share capital of Kshs 100,000 while the project is worth between

Kshs50-60billion.

23. Further, that even had it entered into a consortium, as alleged, with a company known as Stallion Guilt Limited, the information available from Stallion Guilt Limited's website indicated that it belongs to a Winnie Mugweru and Martin Mugweru, and there was no indication that it ever constructed a pipeline. It was the 1st respondent's further contention that no consortium agreement had been produced in evidence.
24. The 1st respondent contended further that there was no evidence that the petitioner ever obtained the tender documents; that the intention behind the EOI was to weed out serious tenderers from those without the capacity to perform; and that the petitioner and its alleged partner could not have met the qualifications as they had never constructed a pipeline.
25. The 1st respondent submitted that the end of life of the current pipeline from Mombasa to Nairobi is mid-2014; that the petitioner had had time since 16th January 2013, when it was allegedly excluded from participation in the EOI due to the onerous conditions, yet it was approaching the Court over one and a half years later. It was the 1st respondent's contention that the petitioner could not in any event have qualified for the contract when compared against the massive experience of the 13 pre-qualified companies.
26. Mr. Murgor submitted that Article 227 of the Constitution and the Public Procurement and Disposal Act provide a comprehensive procedure for challenging procurements by public entities; that the Public Procurement Oversight Authority has the jurisdiction to terminate a procedure; and there was time before the signing of the contract for the petitioner to challenge the process before the appropriate forum.
27. The respondent took the position that this matter was therefore improperly before the Court; that the petitioner had conceded that as it had not tendered, it had no right to file a matter before the PPOA; that filing this petition before this Court was an abuse of process and the petition should be dismissed.

The 2nd Respondent's Case

28. Like the 1st respondent, the 2nd respondent opposed the petition, observing that no orders were sought against it, and prayed that the petition be dismissed with costs.
29. In the affidavit sworn by Mr. Maurice Juma, the Director General of the 2nd respondent, it states that it is an oversight authority established under the Public Procurement and Disposal Act, 2005 with the mandate to, among other things, ensure that procurement procedures established under the Act are complied with; and that it has the power, through the office of the Director General, to call for and inspect the records or accounts of any procuring entity in order to ensure compliance with the provisions of the Act.
30. According to the 2nd respondent, it received an anonymous complaint regarding the procurement the subject of this petition; that it commenced an assessment of the procurement process and raised with the 1st respondent several queries which the 1st respondent responded to; and that it advised the 1st respondent to ensure compliance. Consequently, there are no pending queries between the respondents over the procurement.
31. Counsel for the 2nd respondent, Mr. Moimbo, submitted that all the queries raised over the

subject of this petition were satisfactorily answered by the 1st respondent, culminating in a consensus that the tendering should proceed; that the allegation that the 2nd respondent had not sanctioned the tendering process was not true, and the petition should not have been filed at all and ought to be dismissed. He submitted further that even if the tendering process was to restart, the petitioner would not meet the financial requirements.

Issues for Determination

32. The petitioner complains about various aspects of the tendering process for the Mombasa-Nairobi pipeline by the 1st respondent. It acknowledges that it did not submit an expression of interest and therefore did not tender for the construction of the pipeline as it did not meet the financial requirements of the tender.
33. The core of its claim, as I understand it, is that because the 1st respondent has, subsequent to the EO1, invited separate financial and technical bids for the pipeline, it has deviated from the EO1 documents. It is the petitioner's contention that because of this deviation, the actions of the 1st respondent are unlawful as they contravene section 64 of the Public Procurement and Disposal Act; are unfair and discriminatory and in violation of Article 27 of the Constitution, as well as Articles 10 and 227. This is because bidders or contractors who were unsuccessful at the EO1 stage or did not apply due to the onerous financial requirements cannot now participate in the separate technical and financial bids; and that therefore the acts of the 1st respondent favour the 13 pre-qualified bidders.
34. The response from the 1st and 2nd respondent is that the petition is incompetent for having been filed without authority; that there was material non-disclosure by the petitioner; that there was no violation of the right to non-discrimination as alleged; and that the procurement process was in accordance with the requirements of the Public Procurement and Disposal Act.
35. In considering the petitioner's claims in this matter, I shall do so by evaluating the material presented before me against the above provisions of law in order to respond to following two main issues:
 - i. ***Whether a violation of the provisions of Articles 10, 27 and 227 of the Constitution has been disclosed.***
 - ii. ***Whether this Court has the jurisdiction to deal with the issues raised in the present petition;***

Undisputed Facts

36. Before addressing my mind to the above issues, I believe it is necessary to set out what is common ground between the parties in view of the undisputed facts in the pleadings before me. These undisputed facts emerge from the averments of the parties, particularly the affidavit of **Gloria Robai Khalifa** sworn on 19th April 2014. The contents of Ms. Khalifa's affidavit were not controverted by the petitioner. Indeed, during the hearing of this matter, Counsel for the petitioner relied substantially on the 1st respondent's documentation contained in the said affidavit in presenting the petitioner's case.
37. First, it is undisputed that the 1st respondent advertised the tender as an expression of interest (EOI) for construction of the proposed Mombasa-Nairobi Petroleum Products Pipeline project in local dailies on Wednesday, 16th January 2013. The EOI closed on 28th February 2013. Forty

EOI were received and evaluated, and thirteen firms were shortlisted to proceed to the next stage.

38. However, on 25th April 2013, the 1st respondent received a letter dated 24th April 2013 from the 2nd respondent regarding allegations of irregularities in the processing of the tender. The 2nd respondent sought a detailed account and documents relating to the procurement process.
39. From the documents annexed to the 1st respondent's affidavit, it appears that the 1st respondent stopped the procurement process to enable the 2nd respondent carry out its review; that it received a letter from the 2nd respondent dated 14th June 2013 and 23rd August 2013, highlighting the areas that required clarification; that it responded by letters dated 24th June and 30th August 2013 on the issues raised by the 2nd respondent; that it further wrote to the 2nd respondent on 3rd October 2013 requesting for authority to proceed with the tender process; and that the 2nd respondent, in its letter dated 9th October 2013, raised no further queries with regard to the tender process but gave the 1st respondent the go ahead to proceed.
40. The 1st respondent has also set out in some detail the history behind the present dispute and the necessity for a tender for the construction of the pipeline. According to Ms. Khalifa, the existing Nairobi Mombasa pipeline was constructed and commissioned in 1978, with a design lifespan of 25 years, which ended in 2003. As a result, the cost of maintaining the pipeline has become extremely high; and there have been numerous pipe bursts with the latest reported on Wednesday, 10th July 2013. The 1st respondent therefore intends to construct and commission a new multi-product pipeline alongside the existing pipeline from Mombasa to Nairobi, to cover a distance of 450 kilometres.
41. The 1st respondent also sets out in the said affidavit the tasks which the successful contractor is expected to undertake with regard to the construction of the new pipeline. It has also elaborated what it required from those submitting their EOI. The requirements included proof of relevant experience in similar assignments in the last ten years; audited accounts for the last five years to demonstrate financial capability for undertaking such projects; demonstration of necessary qualifications, capability, experience, resources, equipment and facilities necessary to render the services; as well as the legal capacity to enter into a contract for the provision of the services.
42. In addition, they were required to provide proof that they had relevant experience in the construction of petroleum products cross country pipelines, pump stations, and related ancillary works in the last ten years; and had satisfactorily constructed and commissioned at least two petroleum products cross country pipelines and related engineering works. The purpose of the EOI was to weed out what the 1st respondent refers to as briefcase contractors and middlemen who did not have the capacity to carry out the works required but whose participation in the process was likely to lead to wastage of public resources.
43. The petitioner has not disputed that it did not have the requisite experience or financial capability to tender for construction of the pipeline. Indeed, it has not disputed the contentions by the 1st respondent that it is guilty of non-disclosure of material facts in its pleadings.
44. Among the matters that it is accused of failing to disclose are that it is a dormant or briefcase company which has never filed annual returns from the date of its incorporation, and was thus in violation of the provisions of the Companies Act; that it was therefore incapable of meeting basic requirements under the EO1; that it is not a construction contractor nor is it specialised in building cross country petroleum products pipelines, its core business being, inter alia, according to its memorandum of association, to carry on the business of production of television and radio

programmes, educating and entertaining the public through television programmes, photography, motion picture renters and activities related to the film industry.

45. Further, it did not disclose that Stallion Gulf Limited, the company which the petitioner alleges it had entered into a consortium with for the purpose of tendering for the construction of the pipeline, is a local company initially registered as a partnership on 3rd June 2008 and incorporated in January 2010. It did not, also, disclose that the core business of Stallion Gulf Limited, according to information on its website, is “**distribution of petroleum products within the markets...**” Consequently, the 1st respondent’s contention that the petitioner and its alleged partner in the consortium are completely incapable of fulfilling the requirements under the EO1 with regard to relevant experience, financial capability availability of resources and legal requirements has not been challenged.
46. It is also undisputed that the petitioner did not raise any issue after the evaluation of the EOI and notification of the prequalified parties by the 1st respondent. It appears, however, to have subsequently obtained access to correspondence between the respondents- according to the 1st respondent, through some unlawful means-relating to allegations made against the tender process. It is these documents which form the basis of the petitioner’s claim.
47. According to the 1st respondent, the petitioner “plucked out selective correspondence” to create the false impression that the 1st respondent was acting contrary to the Constitution and the Public Procurement and Disposal Act; and that it has deliberately withheld the correspondence that proves that the concerns of the 2nd respondent were addressed after which it cleared the 1st respondent to proceed with the procurement process. The 1st respondent denies contravention of section 64 of the Public Procurement and Disposals Act.

Analysis and Determination

48. While conceding that it had not submitted an EOI, and that it is not dissatisfied with the conditions imposed in the EOI, the petitioner now complains that the process followed by the 1st respondent is discriminatory and a violation of Articles 10, 27 and 227 of the Constitution.
49. Article 10 contains the national values and principles of governance. It states as follows:

“(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—

- (a) applies or interprets this Constitution;**
- (b) enacts, applies or interprets any law; or**
- (c) makes or implements public policy decisions.**

(2) The national values and principles of governance include—

- a. patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;**
- b. human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;**

c. good governance, integrity, transparency and accountability; and

(d) sustainable development.”

50. Article 27 contains the non-discrimination provisions of the Bill of Rights. Sub-article 1, 2, and 4, which I believe are relevant to the present proceedings, are in the following terms:

“(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

(3)....

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.”

51. The question is whether the facts before the Court as set out above demonstrate violation of either Article 10 or 27. It is not disputed that the petitioner could not meet the requirements of the EOI. Consequently, it did not submit an EOI for consideration. It claims that it could have qualified if the 1st respondent had issued separate financial and technical bids as it has now done, as the petitioner could have tendered with Stallion Gulf Limited with which it had entered into a consortium.

52. I must remind myself at this stage that it is not the mandate of this Court to delve into an inquiry into whether or not any of the parties who submitted their EOI to the 1st respondent had the requisite technical or financial capacity to do so. That, as I will demonstrate later in this judgment, falls within the mandate of the 1st respondent in evaluating the tender; and of the 2nd respondent in the event that a tenderer is dissatisfied with the outcome of the process. I must, however, in determining whether there was a violation of the rights of the petitioner, or of the Constitution and the law as alleged, address my mind to the facts placed before me.

53. From the evidence, it is apparent that it would not have been possible, either for the petitioner alone or with its consortium partner, to qualify even had the separate financial and technical requirements been included in the EOI. That neither the petitioner nor Stallion Gulf Limited had any experience in construction of pipelines was not disputed, nor is it disputed that their core business did not include construction of pipelines.

54. Indeed, the petitioner tacitly acknowledged this. In his submissions before the Court, Counsel for the petitioner took the view that what the Court should consider is not whether the petitioner had qualified or not; rather, the Court should consider whether the 1st respondent, by requesting for separate financial and technical bids, was being unfair to other tenderers and giving an advantage to the thirteen pre-qualified tenderers.

55. This is a submission that I must respectfully dismiss. As this is a constitutional petition, the petitioner has an obligation, as is now well established, to show what provisions of the Constitution have been violated, and how these provisions have been violated, with regard to it. See **Anarita Karimi Njeru (1976-80) 1 KLR 1272 and Trusted Society of Human Rights Alliance-v- Attorney General & Others High Court Petition No. 229 of 2012.**

56. The petitioner did not submit an EOI. It is not a company that would have qualified under the EOI, nor could it have done so, from the evidence, even had it been able to show that it had entered into a consortium with the said Stallion Gulf Limited. Like the petitioner, this company, incorporated in 2010, did not have the requisite experience or financial capability to undertake the task at hand. Thus, as earlier stated, the invitation for separate financial and technical bids could not have made any difference to the petitioner. I can therefore find no violation of Articles 10 and 27 with respect to the petitioner.

57. The petitioner has argued that it has the locus to bring this petition, and that the Court has jurisdiction to entertain it, on the basis of Articles 23, 258 and 259 of the Constitution as read with Article 165 of the Constitution. It may indeed be argued that the petitioner was entitled to bring this petition under Article 22 on behalf of others who may well have qualified for the tender. However, Article 22 (2) provides that

“In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—

a. a person acting on behalf of another person who cannot act in their own name; (Emphasis added)

58. Assuming that there were tenderers or companies which had submitted expressions of interest, who were disqualified at that stage, and who may be aggrieved by the subsequent call for separate financial and technical tenders, it has not been shown why they have not lodged a claim against the 1st respondent in their own name, or applied to be enjoined in these proceedings as interested parties.

Jurisdiction

59. The answer to that, perhaps, goes to the question of the Court's jurisdiction to entertain the present petition. The petitioner has alleged violation of the provisions of Article 227, the relevant provisions of which state that:

“(1) When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.

(2) An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for all or any of the following—

(a) categories of preference in the allocation of contracts;

(b) the protection or advancement of persons, categories of persons or groups previously disadvantaged by unfair competition or discrimination;

(c) sanctions against contractors that have not performed according to professionally regulated procedures, contractual agreements or legislation; ...”

60. It is, I believe, common ground that the legislation that meets the requirements of this constitutional provision is the Public Procurement and Disposal Act, 2005. It is also common ground that the 2nd respondent has the mandate, under the Act, to adjudicate over disputes

pertaining to procurement by public entities. The question is whether a party, who has not participated in the tendering process and is therefore disqualified from lodging a claim under the Act, can bypass the provisions of the Act with regard to disputes and approach this Court by way of a constitutional petition such as is presently before me.

61. It is now well settled that where the Constitution or an Act of Parliament establishes a mechanism for resolution of disputes, that mechanism ought to be strictly followed, a principle that has been re-emphasised in a long line of cases including, to name but a few, **The Speaker of The National Assembly -vs- The Hon James Njenga Karume, Civil Application No 92 of 1992 (Unreported), Kipkalya Kiprono Kones -vs- Republic & Another ex-parte Kimani Wanyoike & 4 Others, (2008) 3 KLR (EP) 291, -vs- Electoral Commission of Kenya (No. 2) (2008) 2 KLR (EP) 43, Francis Gitau Parsimei -vs- National Alliance Party and Another Nairobi Petition No. 356 of 2012 [2012]eKLR.**

62. With regard to the dispute now before me, the Public Procurement and Disposal Act has set out the process for resolution of disputes arising out of public procurement processes. Section 93 thereof provides that:

***“Subject to the provisions of this Part, any candidate who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the regulations, may seek administrative review in such manner as may be prescribed.*”**

63. The term “***candidate***” is defined in the definitions section contained in section 3 of the Act to mean “***a person who has submitted a tender to a procuring entity***”.

64. The petitioner concedes that it did not submit an EOI as it did not qualify. It was not, therefore, a “***candidate***” which could lodge a complaint with the 2nd respondent; and it is for this reason that it has lodged the present constitutional petition. The question is whether a party which has not participated in a procurement process should be permitted to then come to Court alleging anomalies in a procurement process which the Public Procurement Oversight Authority, the body in which the law has vested jurisdiction in such matters, has given a clean bill of health. In my view, the answer must be in the negative.

65. The reason why the Constitution and the law establish different institutions and mechanism for dispute resolution in different sectors is to ensure that such disputes as may arise are resolved by those with the technical competence and the jurisdiction to deal with them. While the Court retains the inherent and wide jurisdiction under Article 165 to supervise bodies such as the 2nd respondent, such supervision is limited in various respects which I need not go into here. Suffice to say that it cannot exercise such jurisdiction in circumstances where the parties before it seek to avoid the mechanisms and processes provided by law, and convert the issue in dispute into a constitutional issue when it is not.

66. The petitioner has also premised its case on the jurisdiction of the Court under Articles 165(3)(d)(ii) and 258 of the Constitution, arguing that the Court has jurisdiction to determine “***the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution.***”

67. It is indeed true that the Constitution gives the High Court wide jurisdiction to determine whether any acts said to be done under the authority of the Constitution have been done in violation of the Constitution. However, it is not enough for the petitioner to allege violation of the Constitution. It

must go further and demonstrate in what respect there has been a violation of the Constitution.

68. I have not heard any demonstration of the unconstitutionality of the acts of the 1st respondent. It appears to have complied with the requirements of the Public Procurement and Disposal Act, and to have answered satisfactorily the concerns of the institution charged with the mandate to oversee public procurement. More importantly, it cannot be open to a party which has not participated in a procurement process to then lodge a constitutional reference that in effect asks the Court to enter into the mandate of the 2nd respondent at the behest of a party that has not qualified under the provisions of the relevant statute.
69. This would result in undermining institutions such as the 2nd respondent which are established by law, and it would be contrary to the express provisions of the Constitution at Article 159 which enjoin the Court, in the exercise of judicial authority, to promote alternative forms of dispute resolution.
70. For the above reasons, I am unable to find any merit in the present petition. It is therefore dismissed with costs to the respondents.

Dated, Signed and Delivered at Nairobi this 19th day of June 2014

MUMBI NGUGI

JUDGE

Mr. Sagana instructed by the firm of Sagana, Biriq & Co. Advocates for the Petitioner

Mr. Murgor instructed by the firm of Murgor & Murgor & C. Advocates for the 1st Respondent

Mr. Moimbo instructed by the State Law Office for the 2nd Respondent



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Annex
3

CONFIDENTIAL

KENYA PIPELINE COMPANY LIMITED

REPORT ON THE PROCESS OF THE TENDER FOR THE CONSTRUCTION OF THE
NAIROBI -MOMBASA PETROLEUM PIPELINE (REPLACEMENT OF LINE 1)

PART A: EXPRESSION OF INTEREST

**(Pursuant to Section 77-80 of the Public Procurement and Disposal
Act, 2005)**

1. In line with the Provisions of Section 78 and 79 of the Public Procurement and Disposal Act 2005, the Notice inviting expressions of interest was advertised in the Daily Nation and the Standard newspapers of 16th January 2013. 45 firms collected the Tender Document. By the closing date of 28th February 2013, 40 firms had submitted their bids for evaluation. (**Adverts for EOI :Tag 2**)
2. The bids were evaluated between 1st March 2013 and 28th March 2013. A report on the outcome of the evaluation report was prepared in accordance with the provisions of Section 80 of the Public Procurement and Disposal Act, 2005. Of the 40 evaluated bids, 16 were found to be non-responsive during Preliminary Evaluation. The said firms were thus disqualified in accordance with the provisions of Regulation 47 of the Public Procurement and Disposal Regulations, 2006. (**Technical Evaluation Report for EOI: Tag 6**)
3. 24 firms underwent detailed technical evaluation. Of these firms, 11 did not meet the minimum qualifying criteria and were thus disqualified from the tender in

Annex
3

accordance with the provisions of Regulation 49 of the Public Procurement and Disposal Regulations, 2006. (**Technical Evaluation Report for EOI: Tag 6**)

4. The 13 firms that met all the minimum qualification criteria were recommended for progression to the Request For Proposal (RFP) stage in accordance with Regulation 51 (2) of the Public Procurement and Disposal Regulations, 2006. The letters of notification were sent to all the bidders on 25th April 2013. (**Letters of Notification: Tag 8**)

Part A₁: INQUIRY BY THE PUBLIC PROCUREMENT OVERSIGHT AUTHORITY

(26th April 2013 - 7th October 2013)

5. By a letter dated 24th April 2013 which was received on 25th April 2013, the Public Procurement Oversight Authority wrote to KPC to inform it that a complaint had been lodged with the Authority on the manner in which the tender evaluation was carried out. No details of the alleged infringement(s) or the aggrieved parties were given. The Authority nonetheless halted the tender process pending the conclusion of its investigations into the matter. (**Letter from PPOA: Tag 9**)
6. Several correspondences were exchanged between KPC and the Authority. KPC satisfactorily answered all the queries raised by the Authority. Between 30th August 2013 (when the last correspondence by KPC to the Authority was sent) and 3rd October 2013, there was no further communication to KPC from the Authority. (**Letters between PPOA and KPC : Tag 10-13. Detailed responses from KPC TO PPOA: Tag 14 &16.)**

In its letter of 3rd October 2013, KPC requested for permission to proceed with the project. The Authority responded on 7th October 2013, and gave KPC the go-ahead to continue with the process. (**Tags 17 &18**)



PART B: REQUEST FOR PROPOSAL

(Pursuant to Section 81-83 of the Public Procurement and Disposal Act, 2005)

7. Pursuant to Section 81 of the Public Procurement and Disposal Act, 2005, on 5th March 2014, KPC issued the 13 prequalified bidders with an invitation to submit their Proposals for the construction of the Mombasa-Nairobi Petroleum products pipeline. **(Letters of Invitation at Tag 19)** The tender closing date was 17th April 2014. However, at the request of several bidders who sought more time to compile their documents, this date was extended twice; first to 8th May 2014, and finally to 15th May 2014. **(Letters at Tag 21 & 33)** The extensions are allowed under Section 55 of the Public Procurement and Disposal Act, 2005 as read together with Clause 2.3.3 of the Tender Document, which provided that :

“In order to allow prospective tenderers reasonable time in which to take the Addendum into account in preparing their tenders, the employer may, at its discretion, extend the deadline for the submission of tenders.”

8. By a Petition dated 12th April 2014, a company known as Rich Productions Ltd (which **did not** participate in the tender process at all) sued KPC seeking a declaration that the tender for construction of Mombasa-Nairobi Petroleum Products Pipeline was unconstitutional and irregular. The Petitioner's attempts to stop the tender process by an application for conservatory orders pending hearing and determination of the petition were denied. KPC was allowed to continue with the tender process pending the hearing and determination of the Petition.



9. The ruling on the Petition was delivered on 19th June 2014. The High Court of Kenya dismissed the petition with costs and held that KPC had not infringed any law, and indeed had been cleared by the institution charged with the mandate to oversee public procurement. **(High Court Judgment at Tag 28 b)**
10. Nine (9) bidders submitted their bid documents by the RFP closing date of 15th May 2014. Pursuant to Section 82 (1) & (2) of the Public Procurement and Disposal Act, 2005, and Regulations 47 and 57 of the Public Procurement and Disposal Regulations, 2006), the Technical evaluation was carried out between 16th May 2014 and 26th May 2014. **(Preliminary and Technical Evaluation Report: Tag 23)**
11. Seven firms met the minimum qualifying mark of 75% overall and were thus progressed to the financial bid-opening stage. The financial bids were opened and evaluated, and the award to Zakhem International Construction Corporation was made on 3rd June 2014. Zakhem was the bidder that obtained the highest composite score and was thus awarded the Tender in accordance with Section 82(5) of the Public Procurement and Disposal Act, 2005, which states that

“The successful proposal shall be the responsive proposal with the highest score determined by the Procuring Entity by combining, for each proposal, in accordance with the procedures and criteria set out in the Request for Proposals, the scores assigned to the technical and financial proposals under subsections (2) and (3) and the results of any additional methods of evaluation under subsection (4).”

(Financial Evaluation report, Tag 26)



**PART C: REPORT ON CASES INVOLVING THE TENDER FOR THE
CONSTRUCTION OF THE NAIROBI MOMBASA PETROLEUM PIPELINE**

**Case no. (i) : High Court Petition Number 173 of 2014; Rich
Productions Ltd -Vs- Kenya Pipeline Co. Ltd & Public
Procurement Oversight Authority**

This matter was heard on 24th April 2014 and the ruling delivered on 19th June 2014 dismissed the case against KPC. The Court held that it could not interfere with the tender process since KPC had not breached any constitutional provisions, and had indeed complied with the Public Procurement and Disposal Act, 2005. **(Tag 28(b))**

Case no. (ii): Public Procurement Administrative Review Board

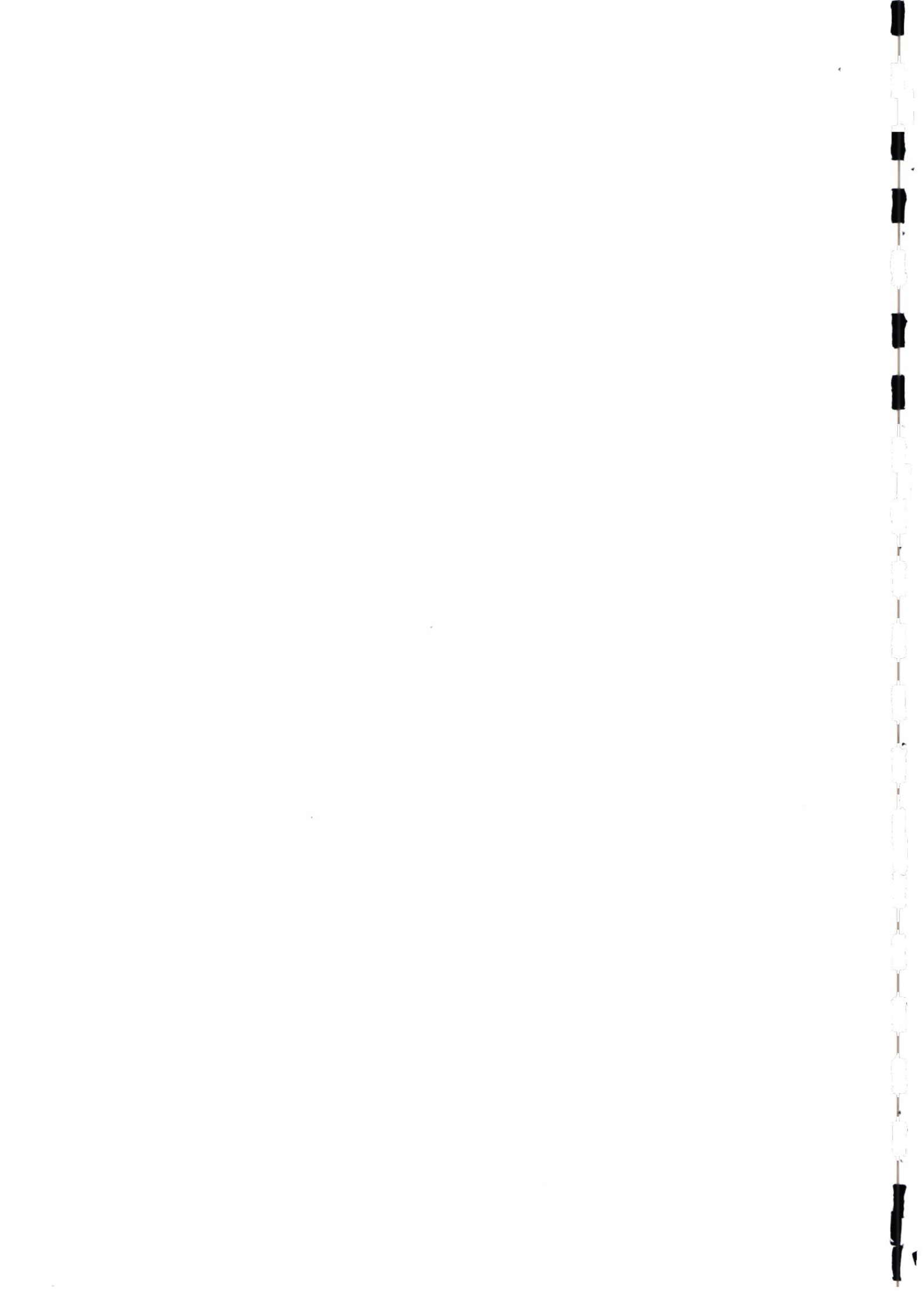
Application No. 19 of 30th May 2014:

Kalpataru Power Transmission Ltd -Vs- KPC

Kalpataru Power Transmission Company Limited filed this case after it was disqualified at preliminary stage of evaluation for failing to provide mandatory requirements . The Board dismissed its case on 27th June 2014 and held that KPC was right to disqualify Kalpataru as it failed to fulfil mandatory conditions in the tender document by failing to provide:

- a) A valid bid bond
- b) Certificate of registration as a contractor in its country of origin
- c) Tax clearance certificate from its country of origin.

(Tag 29)



**Case no. (iii): Public Procurement Administrative Review Board
Application No. 23 of 2014 ; China Petroleum Engineering &
Construction Corp. (CPECC) –Vs- KPC**

China Petroleum Engineering Construction Corporation filed a case against KPC alleging that the winning bidder Zakhem Construction Corporation was not qualified to perform the contract. The Board dismissed its case and held that KPC had properly evaluated all the bids and awarded the tender to the winning bidder.

CPECC had alleged that :

- 1) Zakhem's bid bond was not valid
- 2) Zakhem did not have the necessary qualifications and experience to perform the contract **(Tag 30)**

**Case no. (iv): Public Procurement Administrative Review Board
Application No. 24 of 2014 ; China Wu Yi Co Ltd –Vs- KPC**

China Wu Yi Company Ltd filed a case against KPC alleging that the winning bidder Zakhem Construction Corporation was not qualified to perform the contract and further, that China Wu Yi was improperly evaluated and thus should be awarded the contract.

The Board dismissed its case and held that KPC had properly evaluated and awarded the tender to the winning bidder. The Board further ordered investigations and possible action against this bidder for engaging in malpractices contrary to section 31(5) of the Public Procurement and Disposal Act, 2005, while competing for this tender.

China Wu Yi was ordered to pay to KPC the costs of the case. **(Tag 31)**



Part D: CURRENT STATUS OF THE TENDER FOR THE CONSTRUCTION OF
THE NAIROBI MOMBASA PETROLEUM PIPELINE

1. On 30th June 2014, the Public Procurement Administrative Review Board in its ruling in Application No. 24 of 11th June 2014 ; China Wu Yi Ltd –vs- Kenya Pipeline Co Ltd ordered that :

'The order of Stay issued by the Board on 11th June 2014 is hereby discharged and the Procuring Entity is at liberty to proceed with the procurement which was the subject matter of the Review.'

This order was replicated in Application Number 19 of 30th May 2014; Kalpataru Power Transmission Ltd –vs- KPC Ltd, and also in Application Number 23 of 10th June 2014; China Petroleum Engineering and Construction Co. Ltd –vs- KPC Ltd.

2. The winning bidder, Zakhem International Construction Ltd was invited for negotiations in accordance with Section 84 of the Public Procurement and Disposal Act, 2005. The Project Consultants, M/s Shengli Consultants, were present at the meeting.
3. After negotiations, the contract between Zakhem International Construction Ltd and KPC Ltd was signed on 1st July 2014 in accordance with Section 85 of the Public Procurement and Disposal Act, 2005.
4. On 2nd July 2014, Zakhem International Construction Ltd furnished KPC with its performance bond for the sum of Kshs USD 48,450,288.64 being 10 % of the contact price. **(Tag 32)**

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5. KPC followed the process laid down in Section 77-85 of the Public Procurement and Disposal Act, 2005 in awarding the tender for Construction of Line I replacement Pipeline to Zakhem International Construction Company.





REPORT ON THE PROCESS OF THE TENDER FOR THE CONSTRUCTION OF THE NAIROBI -MOMBASA PETROLEUM PIPELINE (REPLACEMENT OF LINE 1)

PART A: EXPRESSION OF INTEREST

(Pursuant to Section 77-80 of the Public Procurement and Disposal Act, 2005)

			1
1	Advertisement <i>(Section 78-79 of the PP&D Act, 2005)</i>	16th January 2013 <i>(Advert carried in the Nation and Standard Newspapers of 16th January 2013)</i>	2
2	No. of firms that purchased the tender documents	45 <i>(Tender collection register attached)</i>	3
3	Date of tender opening	28th February 2013	
4	No. of bids opened	40 <i>(Tender opening minutes of 28th February 2013 attached)</i>	4
5	Firms that submitted bids	<ol style="list-style-type: none"> 1. Dodsai Engineering and Construction Pte. Ltd 2. Al Iraq Al MOA SER 3. Essar Projects Ltd 4. SICIM World-wide EPC Solutions for Oil & Gas 5. Consolidated Contractors Group (CCC)- JV with EIFFAGE TP 6. China Wu Yi/ Xinjiang Petroleum Engineering. 7. Atlas International Engineering Co. Ltd 8. China Petroleum Engineering Co, CPC 9. Techno FAB Gammon Consortium 10. Shanghai Zhenhua Heavy Industry 11. EN Petrol Energy Contracting & Trade Co. 12. China National Chemical Engineering No.7 Construction Co. 13. Kalpataru Power Transmission Ltd. 14. Fernas Nurol- JV 15. Sew Infrastructure-Sicilsaldo Sopetra Consortium 16. China Petroleum Pipeline Bureau, CPP 	5.





		<p>17. Zakhem International Construction Co. Ltd. 18. Avic International Bidding & ZTPE Consortium 19. Sinohydro Corp Ltd & Huayu –JV 20. Aveng Group 21. Elecnor 22. Procomon & Associates Gulf LC 23. China Perfect Machinery Industry Corp Ltd. 24. Ahak International BV –Consortium 25. Panyuchu Kong Steel Pipe Co. Ltd. 26. Samsung CMT Corp & Deahan Oil Pipeline Corp. 27. Punj Lloyd 28. China State Construction Engineering Corp.(K) Ltd 29. Spiecapag 30. Construcao Queiroz Galvao 31. China Petroleum Engineering & Construction Corp. 32. Farasat & Johan Pars Consortium 33. Sinopec International Petroleum Services Co. 34. Tehran Janoob Technical & Construction 35. Daewoo E&C 36. Larsen & Toubro Ltd. Hydrocarbon 37. Daewoo International 38. Tata Projects Ltd. 39. Saipem Business Unit Engineering & Construction 40. Denys/IOT infrastructure Energy System</p>	
6	Tender Evaluation (Section 80 of the PP&D Act, 2005)	<p>Tender evaluated between 1st March -28th March 2013</p> <p>(Tender Evaluation Report dated 28th March 2013 attached)</p>	6
6	Firms found non-responsive at preliminary evaluation (16 firms)	<p>1. Al Iraq Al MOA SER 2. Dodsal Engineering and Construction Pte. Ltd 3. SICIM World-wide EPC Solutions for Oil & Gas</p>	





	<p><i>(Regulation 47 of the Public Procurement and Disposal Regulations, 2006</i></p>	<ol style="list-style-type: none"> 4. Consolidated Contractors Group (CCC)- JV with EIFFAGE TP 5. Atlas International Engineering Co. Ltd 6. Shanghai Zhenhua Heavy Industry 7. EN Petrol Energy Contracting & Trade Co. 8. China National Chemical Engineering No.7 Construction Co. 9. Sew Infrastructure-Sicilsaldo Sopetra Consortium 10. Elecnor 11. Procomon & Associates Gulf LC 12. China Perfect Machinery Industry Corp Ltd. 13. Ahak International BV –Consortium 14. Farasat & Johan Pars Consortium 15. Tehran Janoob Technical & Construction 16. Larsen & Toubro Ltd. Hydrocarbon 	
7	<p>Firms that did not meet detailed technical evaluation criteria (11 firms) <i>(Regulation 49 of the Public Procurement and Disposal Regulations, 2006)</i></p>	<ol style="list-style-type: none"> 1. China Petroleum Engineering Co, CPE 2. Fernas Nurol- JV 3. China Petroleum Pipeline Bureau, CPP 4. Sinohydro Corp Ltd & Huayu –JV 5. Aveng Group 6. Panyuchu Kong Steel Pipe Co. Ltd. 7. China State Construction Engineering Corp.(K) Ltd 8. Spiecapag 9. Construcao Queiroz Galvao 10. Daewoo International 11. Tata Projects Ltd. 	
8	<p>Firms that met all technical criteria and progressed to the RFP stage (13 firms)</p>	<ol style="list-style-type: none"> 1. Zakhem International Construction Co. Ltd. 2. Avic International Bidding & ZTPE Consortium 3. Essar 4. Denys/IOT Infrastructure Energy Services JV 5. Saipem Business Unit Engineering & Construction 6. Daewoo E&C 7. Sinopec International Petroleum Services Co. 8. Punj Lloyd 9. Samsung CMT Corp & Deahan Oil Pipeline Corp. 10. Kalpataru Power Transmission Ltd. 11. China Wu-Yi /Xinjiang Petroleum Engineering JV. 12. Techno FAB Gammon Consortium 	





		13. China Petroleum Engineering & Construction Corp.(CPECC)	
9	Pre-qualification of bidders approved by Tender Committee (Regulation 51 (2) of the Public Procurement and Disposal Regulations, 2006)	TCM- 22-2012/2013 held on 16th April 2013 (Tender Committee Minutes and regulations attached)	7
10	Notification letters sent to bidders (Section 66 of the Public Procurement and Disposal Act, 2005)	25th April 2013 (Letters to bidders attached)	8
11	Date of PPOA letter halting the procurement process	Letter dated 24 th April 2013 received on 25th April 2013 after letter to bidders had been dispatched)	9
12	Response from MD to PPOA	Letter dated 29th April 2013 requesting time to compile documents	10
13	Documents Submitted to PPOA	27th May 2013	11
14	PPOA preliminary response on its findings received	14⁰⁰th June 2013	12
15	KPC response on issues raised sent:	24th June 2013 and 23rd July 2014	13 14
16	Letter from PPOA with further queries	23rd August 2013	15
17	Letter from KPC to PPOA with further responses	30th August 2014	16
18	No further formal communication from PPOA on the subject tender	30th August -3rd October 2013	
16	Letter from KPC requesting permission from PPOA to progress the procurement process	3rd October 2013	17
17	Response from PPOA acknowledging KPC's response and	7th October 2013	18





commitment to abide by the law and giving go-ahead for the process to continue		
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PART B: REQUEST FOR PROPOSAL

(Pursuant to Section 81-83 of the Public Procurement and Disposal Act, 2005

1.	No. of bidders shortlisted	13	
2.	Bidders shortlisted	<ol style="list-style-type: none"> 1. Zakhem International Construction Co. Ltd. 2. Avic International Bidding & ZTPE Consortium 3. Essar 4. Denys/IOT Infrastructure Energy Services JV 5. Saipem Business Unit Engineering & Construction 6. Daewoo E&C 7. Sinopec International Petroleum Services Co. 8. Punj Lloyd 9. Samsung CMT Corp & Deahan Oil Pipeline Corp. 10. Kalpataru Power Transmission Ltd. 11. China Wu-Yi /Xinjiang Petroleum Engineering JV. 12. Techno FAB Gammon Consortium 13. China Petroleum Engineering & Construction Corp.(CPECC) 	
3.	Date RFP were sent out to bidders	5th March 2014	19
4.	Date of site visit	1st - 4th April 2014	20
5.	<p>High Court Constitutional and Human Rights Division Petition No. 173 of 2014; Rich Productions Ltd – vs- Kenya Pipeline Company Limited</p>	<p>The Petitioner sued KPC seeking a declaration that the tender for construction of Mombasa-Nairobi Petroleum Products Pipeline was unconstitutional and irregular. The Petitioner's attempts to stop the tender process by an application for conservatory orders pending hearing and determination of the petition were denied. KPC was allowed to continue with the tender process pending the hearing and determination of the Petition. The ruling on the Petition was delivered on 19th June 2014. The High Court of Kenya dismissed the petition with costs and held that KPC had not infringed any law, and indeed had been cleared by the institution charged with the mandate to oversee public procurement.</p>	

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6.	Tender Opening date (Extended upon requests from several bidders)	<ul style="list-style-type: none"> Scheduled for 8th May 2014 extended to 15th May 2014 	21
7.	No. of bidders who responded : 9 .	<ol style="list-style-type: none"> Zakhem International Construction Ltd China Petroleum Engineering & Construction Corporation Punj Lloyd Denys NV/IOT Infrastructure Energy System Avic International Holding Corporation/ZTPE Consortium Sinopec International Petroleum Service China Wu Yi Company Ltd/Xinjiang Petroleum Engineering Saipem Busines Unit Kalpataru Power Transmission Ltd 	22
8.	Preliminary and technical Evaluation (Pursuant to Section 82 (1) & (2) of the Public Procurement and Disposal Act, 2005, and Regulations 47 and 57 of the Public Procurement and Disposal Regulations, 2006)	Technical evaluation carried out between 16th May 2014-26th May 2014	23
9.	Approved to proceed to financial evaluation by Tender Committee (Regulation 51 (2) of the Public Procurement and Disposal Regulations, 2006)	TCM- 37-2013/2014 held on 26th May 2014	24
10.	Firms progressed to financial opening (7 No. firms)	<ol style="list-style-type: none"> Zakhem International Construction Co. Ltd. China Petroleum Engineering & Construction Corp.(CPECC) Punj Lloyd Denys/IOT Infrastructure Energy Services JV Sinopec International Petroleum Services Co 	25



		6. China Wu-Yi /Xinjiang Petroleum Engineering JV 7. Saipem Business Unit Engineering & Construction	
11.	Financial bids opened	3 rd June 2014	26
12.	Financial Evaluation <i>(Pursuant to Section 82 (3), (4) & (5) of the Public Procurement and Disposal Act, 2005)</i>		
13.	Tender committee awarded <i>(Pursuant to Regulation 14 of the Public Procurement and Disposal Regulations, 2006)</i>	TCM 39-2013/2014 held 3 rd June 2014	27
14.	Tender Committee awarded	Zakhem International	
15.	Notification to bidders sent <i>(Pursuant to Section 83 of the Public Procurement and Disposal Act, 2005)</i>	3 rd June 2014	28





**PART C: REPORT ON STATUS OF CASES INVOLVING THE TENDER FOR THE
CONSTRUCTION OF THE NAIROBI MOMBASA PETROLEUM PIPELINE**

CLAIM	STATUS
Query from PPOA Allegations of irregularities in the processing of the tender by an unspecified bidder.	Vide letter dated 7 th October 2013, PPOA granted KPC permission to proceed with the procurement process. Matter concluded
Request For Review Application No. 24 of 11 th June 2014 Public Procurement Review Board China Wu Yi –VS- KPC	Matter concluded . Case against KPC dismissed with costs on 30th June 2014 (Ruling attached)
Request for review Application No. 23 of 2014 Public Procurement Review Board China Petroleum Engineering & Construction Corp.(CPECC) –Vs- KPC	Matter concluded Case against KPC dismissed on 30th June 2014. . (Ruling attached)
Request for review Public Procurement Review Board Application No. 19 of 30 th May 2014 Kalpataru Power Transmission Ltd –Vs- KPC	Matter concluded Case against KPC dismissed on 27th June 2014 (Ruling attached)
High Court Petition Number 173 Of 2014; Rich Productions Ltd – Vs- Kenya Pipeline Co. Ltd & Public Procurement Oversight Authority Heard by: Lady Justice Mumbi Ngugi	Matter heard on 24th April 2014. Ruling delivered on 19th June 2014 dismissing the case against KPC. Court held that it could not interfere with the tender process since KPC had not breached any constitutional provisions, and had complied with the Public Procurement and Disposal Act, 2005. (Ruling attached)





PART D : CONTRACT NEGOTIATION AND SIGNING

(Pursuant to Section 84-85 of the Public Procurement and Disposal Act, 2005)

16.	Lifting of stay of Procurement process	Court rulings delivered on 27 th June 2014 and 30 th June 2014.	29-31
17.	Contract Negotiations	Negotiations held on 1 st July 2014 Between KPC Ltd, Zakhem International Construction Ltd and SLECC. (Project Consultants)	
18.	Contract Signing	1st July 2014	
19.	Performance Bond	2nd July 2014	32



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REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. OF 2014

BETWEEN

KALPATARU POWER TRANSMISSION LIMITEDAPPLICANT

AND

THE KENYA PIPELINE COMPANY LIMITEDRESPONDENT

REQUEST FOR REVIEW OF THE DECISION OF THE KENYA PIPELINE COMPANY LIMITED DATED 26TH OF 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.

REQUEST FOR REVIEW

We, **Kalpataru Power Transmission Limited**, a public company with limited liability, having its registered office at 101, Part III, GIDC Estate, Sector – 128, Gandhinagar – 382028, Gujrat, India, and who have appointed the firm of **MUMA & KANJAMA ADVOCATES, MAENDELEO HOUSE, 3RD FLOOR, MONROVIA STREET, P.O. BOX 528-00100 NAIROBI** to represent it in these proceedings **HEREBY REQUEST** the Public Procurement Administrative Review Board to review the whole of the decision of The Kenya Pipeline Company Limited dated 26th of 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** in relation to the Applicant on the following ground, namely:-

1. BREACH OF SECTIONS 31 AND 39 OF THE PUBLIC PROCUREMENT AND DISPOSAL ACT, 2005 (“the Act”) AND THE PUBLIC PROCUREMENT AND DISPOSAL REGULATIONS 2006 (“the Regulations”) BY THE KENYA PIPELINE COMPANY(THE PROCURING ENTITY).

- 1.1 The Kenya Pipeline Company in January 2013 invited expression of interest for the proposed Mombasa-Nairobi Petroleum Products Pipeline Project under Tender No. **SU/QT/032N/13**.
- 1.2 The Applicant, a private company with limited liability, under the laws of India and having its registered office at 101, Part III, GIDC Estate, Sector – 128, Gandhinagar – 382028, Gujrat, India, responded to the invitation, applied and submitted the pre-qualification questionnaire for contractors.
- 1.3 The said pre-qualification questionnaire stated at paragraph 3 of the questionnaire that the objective of the pre-qualification was “*to shortlist applicants who have the requisite technical and financial capabilities to bid for the proposed works*”.

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- 1.4 The Kenya Pipeline Company questionnaire required submission, *inter alia*, various documents which the Applicant duly submitted in response to the pre-qualification parameters.
- 1.5 The said pre-qualification submission was evaluated based on the technical capability, financial capability, key personnel, and plant and equipment. Hence the purpose of the pre-qualification questionnaire was to ensure that all bidders who qualified past this stage were suitable as contractors.
- 1.6 The Applicant avers that its submission on the pre-qualification by the Procuring Entity was responsive to the set criteria and subsequently by a letter dated 25th April, 2013, the Procuring Entity notified the Applicant that it had been shortlisted for the request of proposal for the construction of the Mombasa-Nairobi Petroleum Products Pipeline.
- 1.7 By a letter dated the 5th of March 2014, The Kenya Pipeline Company Limited invited proposals from the Applicant amongst other pre-qualified applicants for the Procurement, Construction, Testing and Commissioning of Line 1 Pipeline Replacement Project, Contract No.: **SU/QT/032N/13**.
- 1.8 The above request required the Applicant to submit documents as part of the pre-qualification process.
 - (i) *Submit separate technical and financial bids.*
 - (ii) *Submit a valid KRA Tax Compliance Certificate (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.*
- 1.9 The Applicant in satisfaction of the requirements submitted the following documents:
 - (vi) Separate technical and financial bids.
 - (vii) Tax Compliance Certificates.
 - (viii) Certificate of Incorporation of the company/ Business Registration.
 - (ix) Original tender security for USD 500,000, issued from a reputable Bank operating in Kenya. Valid for 150 days from date of tender opening.

- (x) 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
- 1.10 By a letter dated 26th May, 2014, the Kenya Pipeline Company informed the Applicant that its bid was not responsive on account of two reasons:
- “We regret to inform you that your bid was not responsive because you did not:*
- (a) Submit registration as a contractor in your country of origin.*
- (b) Tender security was not valid for the required period as it expires on 12th October, 2014, which is less than 150 days as required in the invitation to submit an RFQ.”*
- 1.11 The Applicant contends and submits that the above decision was erroneous in fact and in law and ought to be set aside
- 1.12 The Applicant contends and submits that the Public Procurement and Disposal Act, 2005 under Section 31 provides for the statutory criteria for qualification of persons to participate and to be awarded contracts for procurement.
- 1.13 Section 31 of The Public Procurement and Disposal Act, 2005, provides as follows;
- 31 (1) A person is qualified to be awarded a contract for a 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

- 1.14 Section 31(6) requires that the provisions of Section 39 of the Act also be adhered to during the procurement process.

Section 39(1) provides 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.

- 1.15 The Applicant submits that the Act is perfectly clear at section 31(6) in stating that the only pre-conditions to be followed during the procurement process are those set out in the Act itself, specifically in Sections 31 and 39.

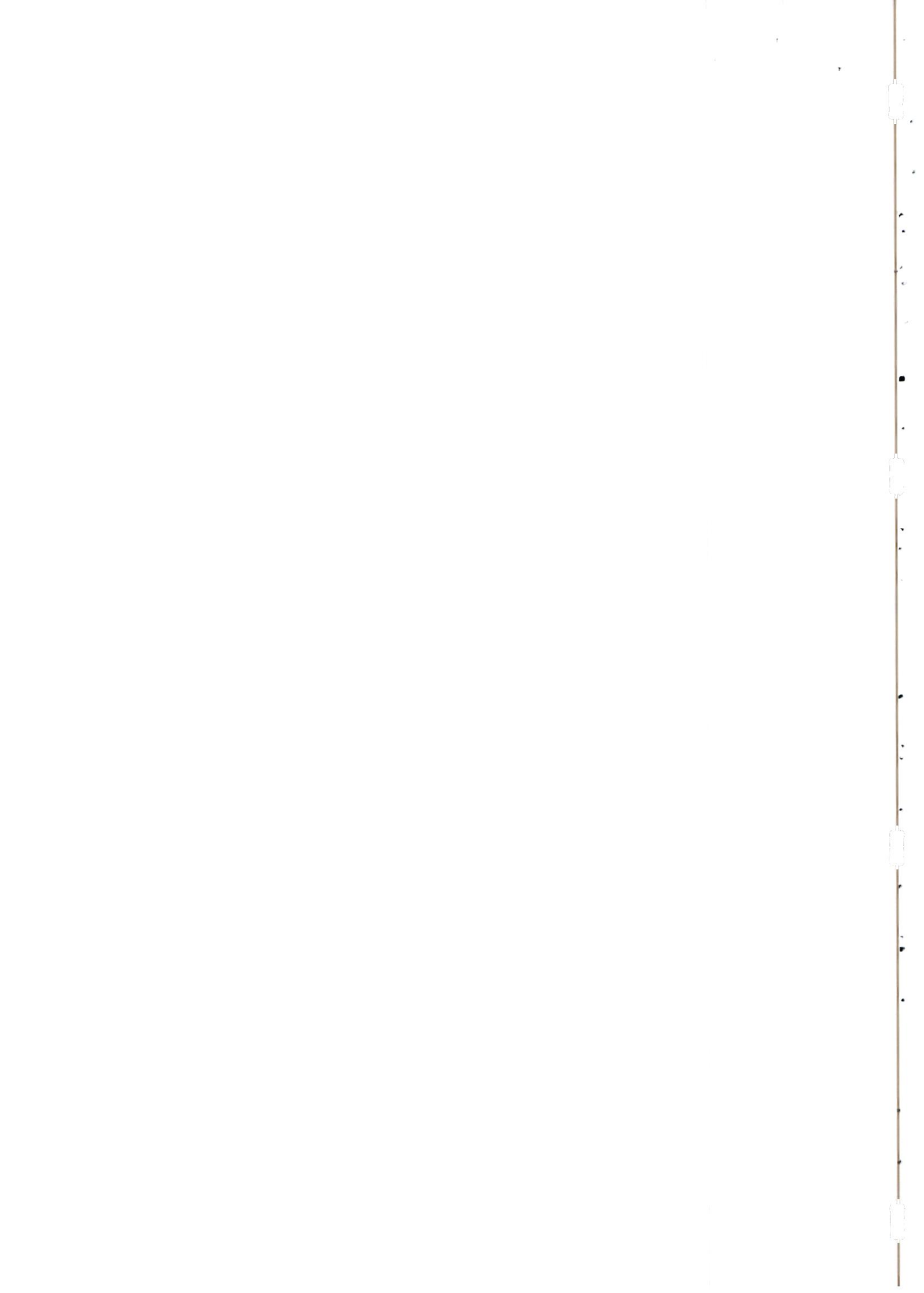
- 1.16 The Applicant submits that the wording and object of Section 31 are clear and are underpinned in the pre-qualification questionnaire which all interested bidders were required to fill.

- 1.17 The Applicant is alive to the fact that Section 39(2) also provides an avenue for the Minister to prescribe preferences or reservations that would disqualify a bidder. The section states as follows:

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.

- 1.18 The Applicant submits that no preference was prescribed or reservations prescribed by the Minister in respect of this particular contract.

- 1.19 The Applicant submits that the only valid and legal criteria for eligibility is the criteria set out in Section 31 of the Act, and the mandatory requirements set out in the letter of 5th March, 2014 were not in consonance with the



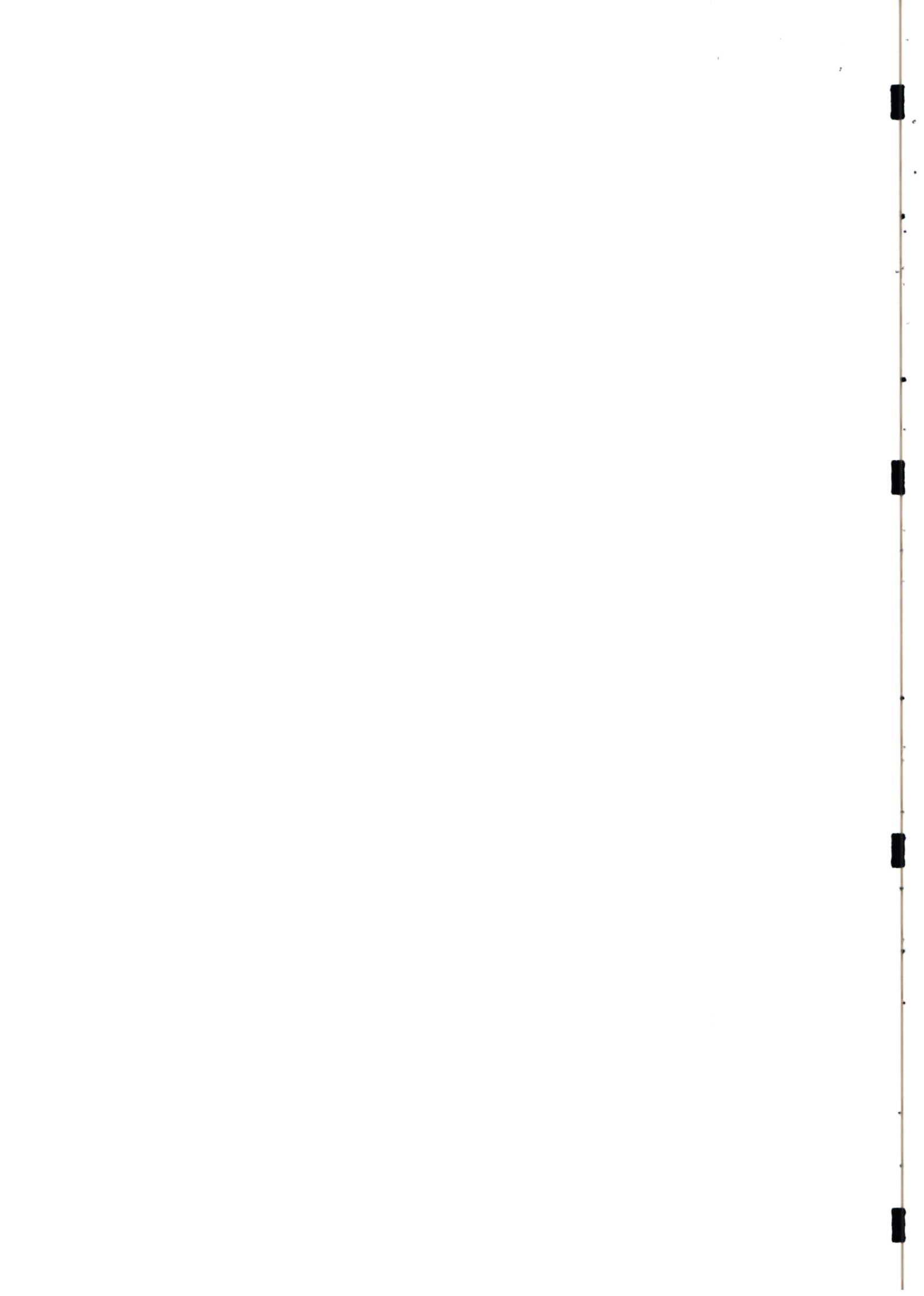
provisions of the Act and as a consequence and of necessity must give way to the mandatory statutory requirements.

- 1.20 The Applicant submits that the basis of rejection of its bid is contrary to the Constitution of the Republic of Kenya, the Public Procurement and Disposal Act, 2005, and the Public Procurement and Disposal Regulations, as a consequence of which the Applicant has suffered loss and damage by virtue of being disqualified based on criteria not recognised by law.
- 1.21 The Applicant was denied its right to a fair opportunity to compete with the other bidders on a level playing field, which has resulted in financial loss on the part of the Applicant.

2 BREACH OF ARTICLE 227 OF THE CONSTITUTION OF KENYA 2010 ("the Constitution").

- 2.1 The Applicant submits that there was lack of transparency and accountability.
- 2.2 The Applicant submits that the basis of rejection of its bid is based on breach of duties imposed by the Constitution, the Public Procurement and Disposal Act, 2005, and the Public Procurement and Disposal Regulations on the Kenya Pipeline Company Limited.
- 2.3 The Procuring Entity by dint of Article 2 (1) of the Constitution is bound to uphold the Constitution and by Article 227 abide by the Public Procurement and Disposal Act, 2005, and the Public Procurement and Disposal Regulations.
- 2.4 The Procuring Entity is bound by the Constitution, the Public Procurement and Disposal Act, 2005, and the Public Procurement and Disposal Regulations uphold the rules of fairness and transparency throughout the procurement process.
- 2.5 The procedure adopted by the Procuring Entity in changing the submission date and preliminary evaluation was not transparent and was contrary to the object and spirit of public procurement as set out in Article 227 of the Constitution as read together with Section 2 of the Act.
- 2.6 Article 227 of the Constitution sets out the following requirements:

Article 227(1) When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.
- 2.7 Section 2 of the Act in addition states as follows:



2. *The purpose of this Act is to establish procedures for procurement and the disposal of unserviceable, obsolete or surplus stores and equipment by public entities to achieve the following objectives:*

(a) to maximise economy and efficiency;

(b) to promote competition and ensure that competitors are treated fairly;

(c) to promote the integrity and fairness of those procedures;

*(d) to increase transparency and accountability in those procedures;
and*

(e) to increase public confidence in those procedures.

2.8 The Applicant submits that in coming up with the procedure and criteria for evaluation of tenders in this procurement, the Procuring Entity was under a constitutional and statutory obligation to ensure that the procedure and criteria adopted was in conformity with the objects of the Constitution and statute.

2.9 In this case, the Procuring Entity failed to inspire public confidence by disqualifying the Applicant due to

(a) a perceived failure to meet the requirements of the tender process,

(b) the Applicant had successfully passed the pre-qualification stage.

(c) The reasons set out by the Procuring Entity for this disqualification defeats the very objects of the Constitution and statute.

(d) The reasons set out by the Procuring Entity for this disqualification shows a lack of transparency and accountability in the procurement process.

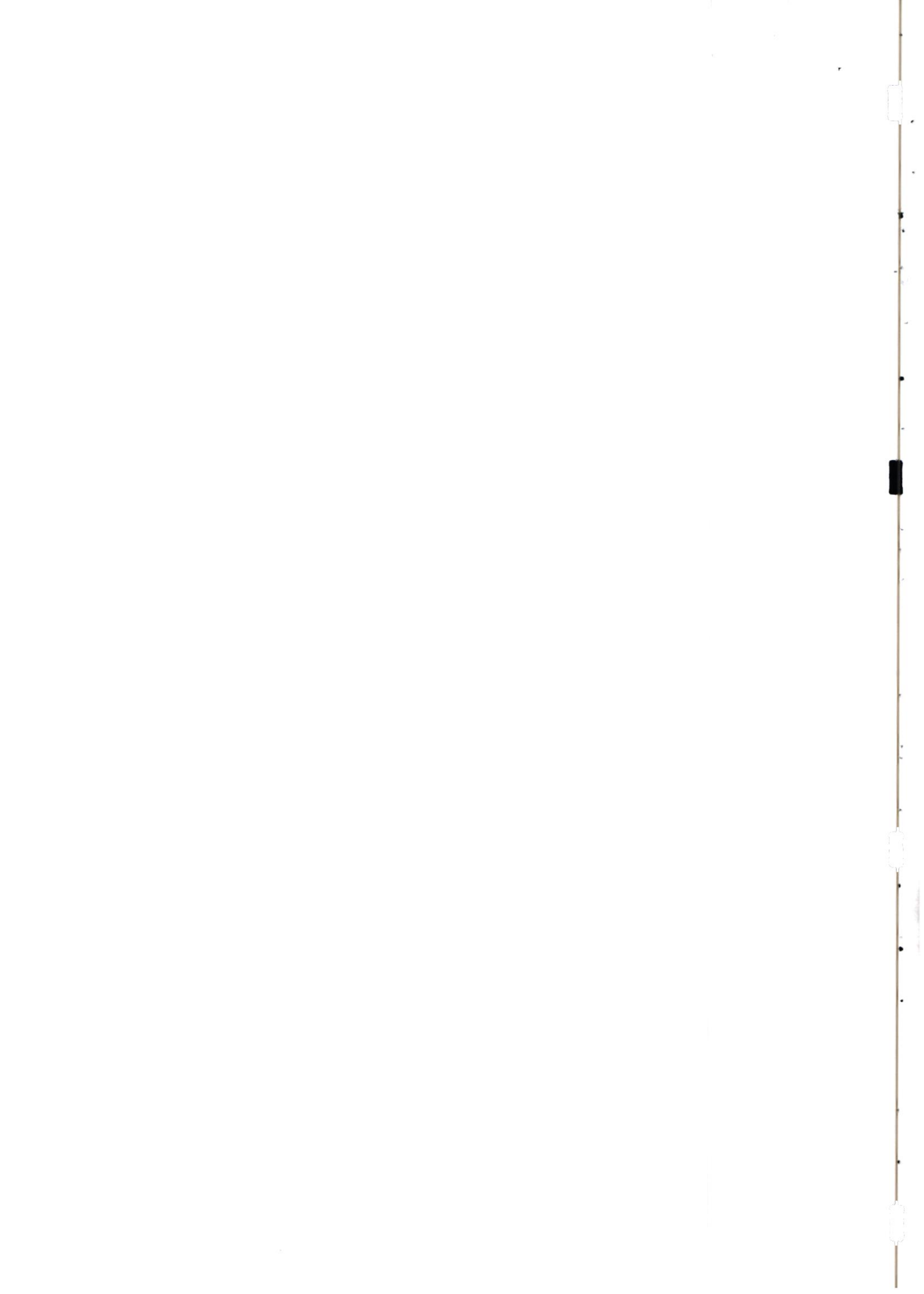
2.10 The Applicant submits that the basis of rejection of its bid is contrary to the Constitution of the Republic of Kenya, the Public Procurement and Disposal Act, 2005, and the Public Procurement and Disposal Regulations, as a consequence of which the Applicant has suffered loss and damage by virtue of being disqualified based on criteria not recognised by law.

2.11 The Applicant was denied its right to a fair opportunity to compete with the other bidders on a level playing field, which has resulted in financial loss on the part of the Applicant.



3 Failure to promote the integrity and fairness of procedures in evaluation criteria

- 3.1 In keeping with the provisions of Article 227 of the Constitution as well as Sections 31 and 39 of the Act, the requirements that a Procuring Entity can give are only those as set out Section 31 and 39 of the Act.
- 3.2 The Procuring Entity provided unusual requirements to the procurement process, one of which was that Applicants were required to produce "Certificate of Registration as a contractor in the country of operation for foreign firms".
- 3.3 As a Company registered in India, the Applicant was subject to a different set of standards as would be required for a local firm.
- 3.4 Indian law permits the Applicant as registered company to perform contracting work in terms of its Articles 48 to 51 of the Memorandum of Association.
- 3.5 Articles 48 to 51 of the Memorandum of Association of the company clearly set out that the Applicant could legally conduct contracting work as "*Structural Engineers, Civil Engineers, Hydraulic Engineers, Marine Engineers, Chemical Engineers, Aeronautical Engineers, Textile Engineers, Automotive Engineer and all and every work connected with the same*".
- 3.6 The Procuring Entity, however, did not accept the Articles and Memorandum of Association of the Applicant as proof of that fact and to this end disqualified the Applicant on the basis that it did not provide a separate Certificate of Registration as a contractor.
- 3.7 The Indian legal regime did not provide the applicant for provide a "separate Certificate of Registration as a contractor" and the only legal proof of this fact was the Articles and Memorandum of Association of the Applicant.
- 3.8 The Applicant submits that the procurement procedures, when inviting expressions of interest from local as well as international bidders, must respect and acknowledge the various laws provided in different countries so as to ensure that the procuring process is one that is both fair and integrity-based.
- 3.9 By not taking into consideration the company law regime and requirements that the Applicant's own country imposed on it, the Procuring Entity failed to provide a fair procuring environment.



4. IRREGULAR VARIATION OF THE DATE OF SUBMISSION CONTRARY TO SECTION 53 OF THE ACT.

4.1 Section 53 of the Act outlines the circumstances under which alterations may be made, as well as the exact manner in which this procedure should be undertaken. The section states as follows:

(1) A procuring entity may amend the tender documents any time before the deadline for submitting tenders by issuing an addendum.

(2) An amendment may be made on the procuring entity's own initiative or in response to an inquiry.

(3) The procuring entity shall promptly provide a copy of the addendum to each person to whom the procuring entity provided copies of the tender documents.

(4) The addendum shall be deemed to be part of the tender documents.

4.2 Section 53 of the Act clearly sets out that any amendments made either at the request of a bidder or on the Entity's own volition, must be in the form of an addendum.

4.3 The Act leaves no room for other forms of amendments to be added to the tender documents.

4.4 The Procurement Entity through its Request for Proposal to the Applicant dated 5th March, 2014 set the deadline for submission of proposals as 17th April, 2014, whereupon the tenders would be opened "*immediately thereafter in the presence of tenderers or their representatives*" who wished to attend.

4.5 Indeed, the Procuring entity in the course of amending and clarifying various issues all along Complied with the law to the letter, sending an Addendum to the Applicant when an alteration was made as to the date of submission in Addendum Number 4 dated 10th April, 2014. Under item number 42 that **"The tender submission date has been extended by 3 weeks from 17th April 2014 to 8th May 2014 at the same place and time"**.

4.6 Thereafter, some bidders continued to ask for an extension of time, but the Procuring Entity declined any further extension to the tender submission date.

(i) In Addendum number 5 dated 17th April, 2014, items number 72 and 76 reiterated that Addendum 4 No. 42 still stood.

(ii) In Addendum number 6 dated 30th April, 2014, the Procuring Entity reiterated that the deadline would remain 8th May, 2014.

(iii) Lastly, the Procuring Entity released to the bidders a letter dated 15th May, 2014, attached to which was a document titled Addendum 8. Item Number 28 of Addendum 8 stated with regard to the extension of the deadline that "*Refer addendum No. 4 and no further extension will*



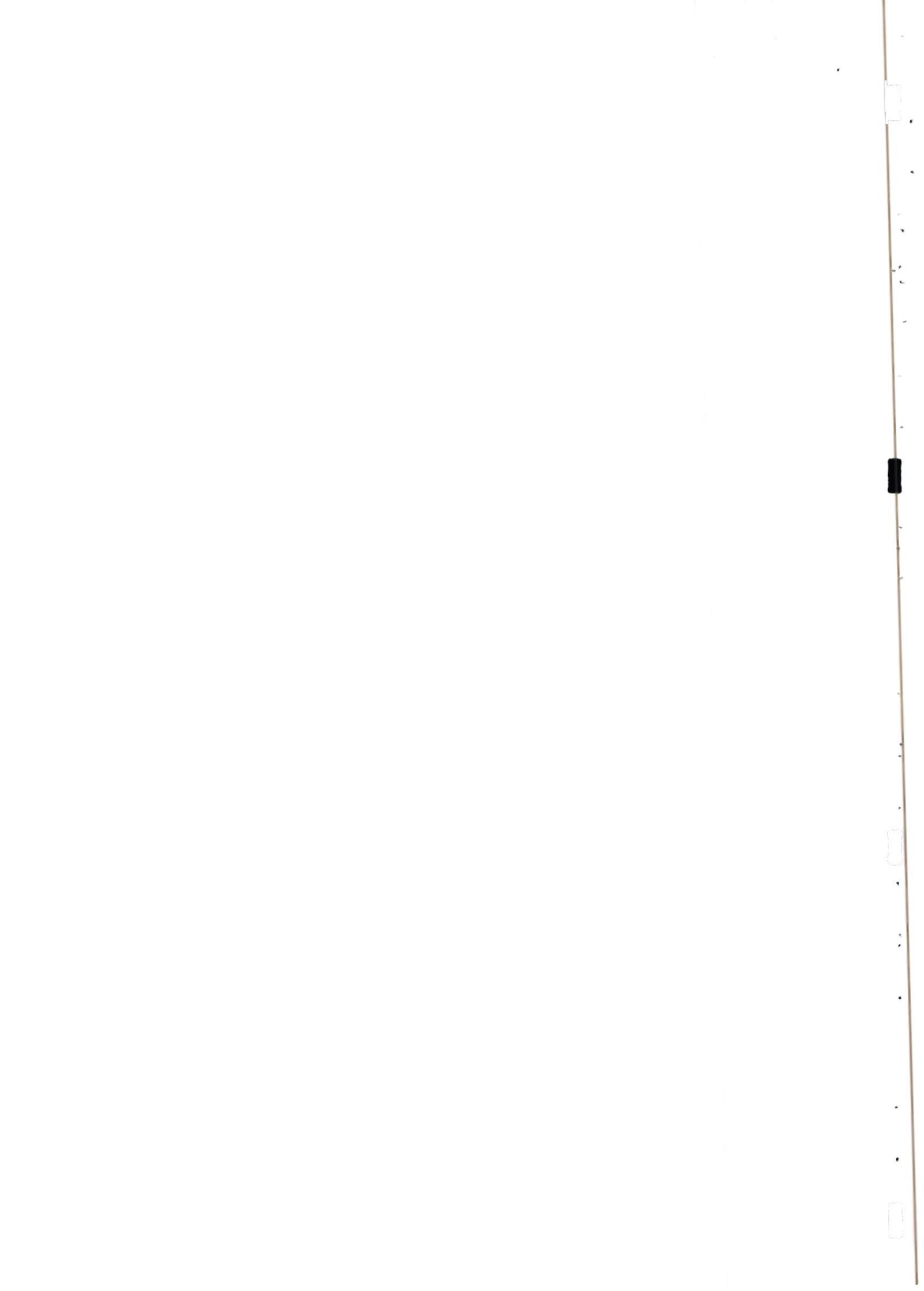
be granted". The Procuring Entity remained consistent in its issuing of Addenda until this date.

- 4.7 However, in breach of the Request for Proposal terms, the Procuring Entity, twenty (20) hours to the set submission date of 8th May, 2014 issued a letter dated 7th May, 2014 informing all bidders that the tender submission date had been extended from 8th May, 2014 to 15th May, 2014.
- 4.8 The change of the set submission date did not take the form of an Addendum.
- 4.9 The Applicants submits that owing to the fact that an amendment was issued in the form of a letter rather than an Addendum, the same cannot be said to be valid per section 53 of the Act.
- 4.10 By the letter dated 7th May, 2014 the Procuring Entity deliberately failed to adhere to its own Request for Proposal terms.
- 4.11 In consequence, public confidence in the whole procurement process was seriously eroded contrary to Article 227 of the Constitution as read together with Section 2 of the Act and in the circumstances, the rejection of the Applicant's bid ought to be set aside/nullified.
- 4.12 The Applicant submits that the purported extension of the deadline by the Procuring Entity dealt great harm to the Applicant as it had already taken the necessary steps to ensure that it had procured and secured the tender security for USD 500,000, from a reputable Bank operating in Kenya which tender security was valid for 150 days from the date of tender opening which had been set as 8th May, 2014. This was a back to back arrangement with Applicants bankers in India with the reputable Bank operating in Kenya.
- 4.13 The Procuring Entity's action to extend the deadline by letter on the 7th of May, 2014, twenty (20) hours before the set deadline, was in breach of Section 55(3) of the Act.

Section 55 (3) of the act provides as follows;

If the tender documents are amended under section 53 when the time remaining before the deadline for submitting tenders is less than one third of the time allowed for the preparation of tenders, the procuring entity shall extend the deadline as necessary to allow the amendment of the tender documents to be taken into account in the preparation or amendment of tenders.

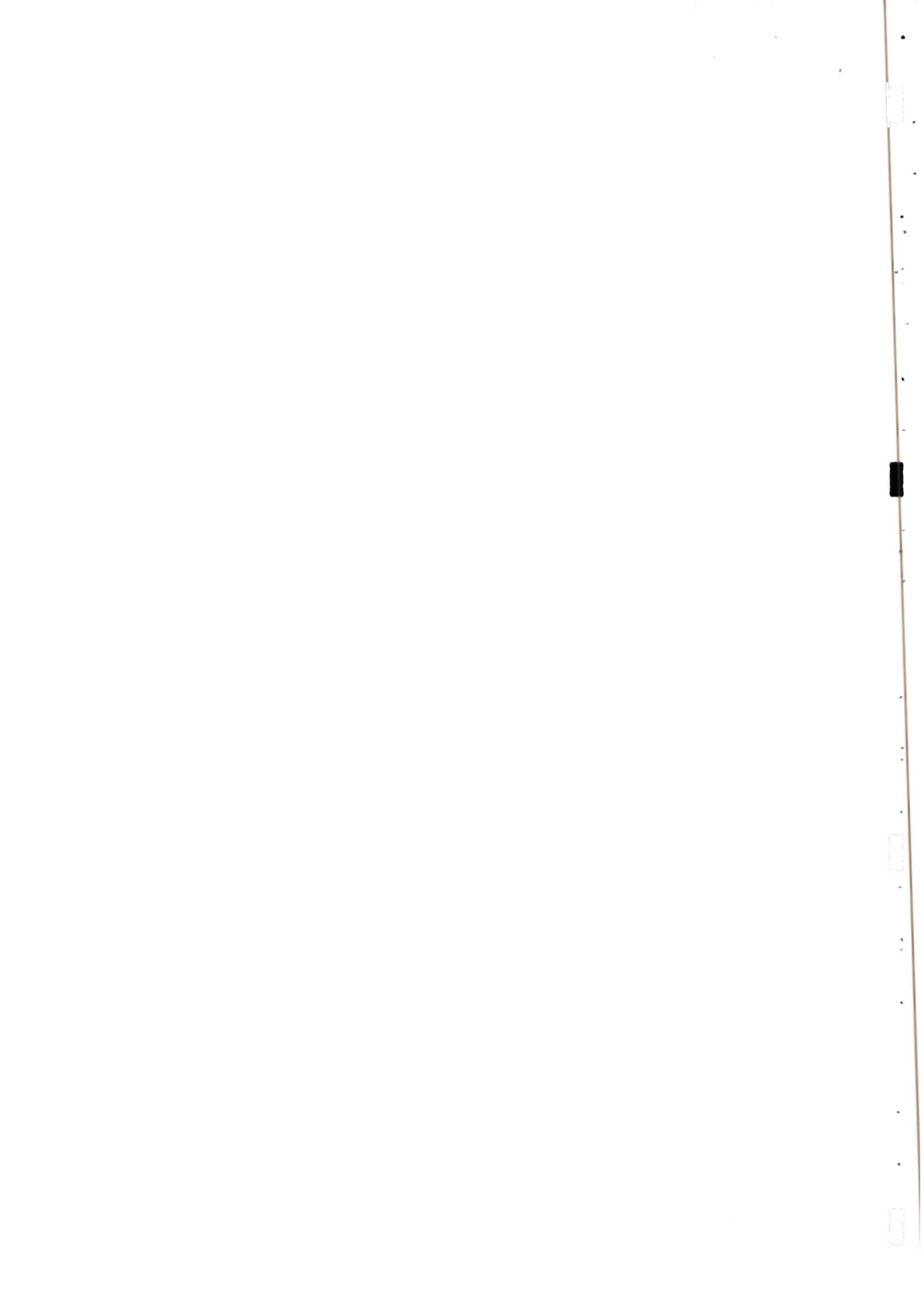
- 4.14 The Procuring Entity failed to extend the submission *deadline as necessary to allow the amendment of the tender documents to be taken into account in the preparation or amendment of tenders.*



- 4.15 The Applicant's representative had already travelled to Nairobi with the sealed documents and did not have time to extend its tender security so as to comply with the new deadline set by the Procuring Entity.
- 4.16 This action has occasioned a situation of lack of fairness on the part of the Applicant by the Procuring Entity.
- 4.17 By the Procuring Entity changing the tender opening date through non-transparent means, the Applicant was unable to rectify its tender security. The Procuring Entity's non-transparent means of extending the tendering period was then used as grounds for the disqualification of the Applicant's tender as the Applicant's security fell short of 150 days due to the new date of submission. Had the Procuring Entity changed the date in accordance with section 53, the Applicant would have had an opportunity to amend its tender security document.
- 4.18 By its said conduct, the Procuring Entity deliberately misled the Applicant and then failed to properly evaluate its tender. The said conduct by the Procuring Entity was improper, unreasonable and illegal.
- 4.19 By its conduct aforesaid, the Procuring Entity again failed to ensure that it applied the principles of fairness, transparency and accountability in the preliminary evaluation.
- 4.20 As a result the Procuring Entity's conduct complained above, the Applicant has suffered loss and damage as follows;
- (a) Financial loss in expenses;
 - (b) Loss of reputation;
 - (c) Loss of opportunity to participate in the biggest undertaking in Kenya Vision 2030 Development.

BY THIS MEMORANDUM, the Applicant requests that this Honourable Board be pleased to order:-

- a. A fair administrative action by the Board in this matter in terms of Article 47 of the Constitution of the Republic of Kenya.
- b. 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 nullified.
- c. 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 Enforcement Act.





**KENYA PIPELINE COMPANY LIMITED
PIPELINE PLAZA
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REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. OF 2014

BETWEEN

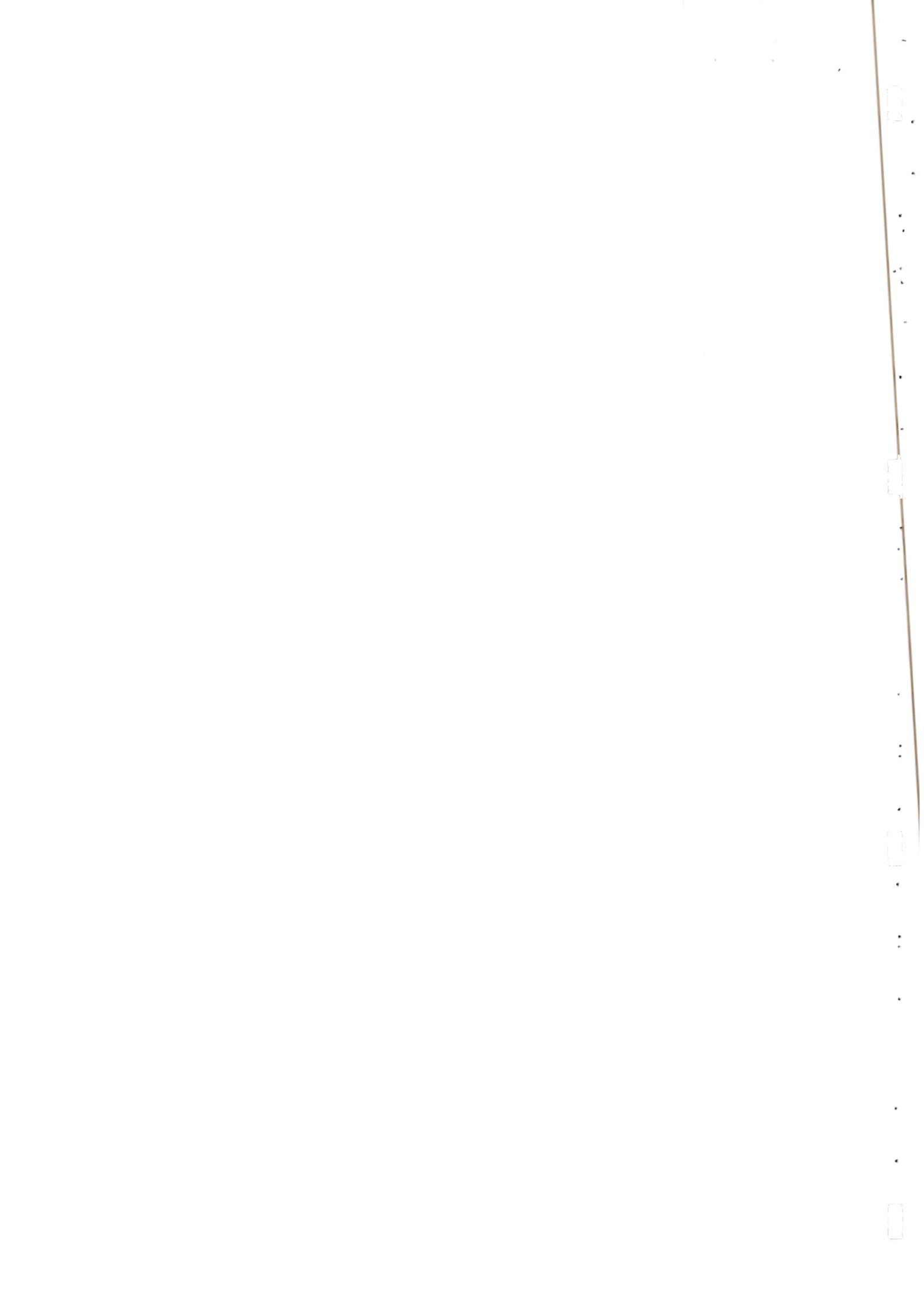
KALPATARU POWER TRANSMISSION LIMITEDAPPLICANT

AND

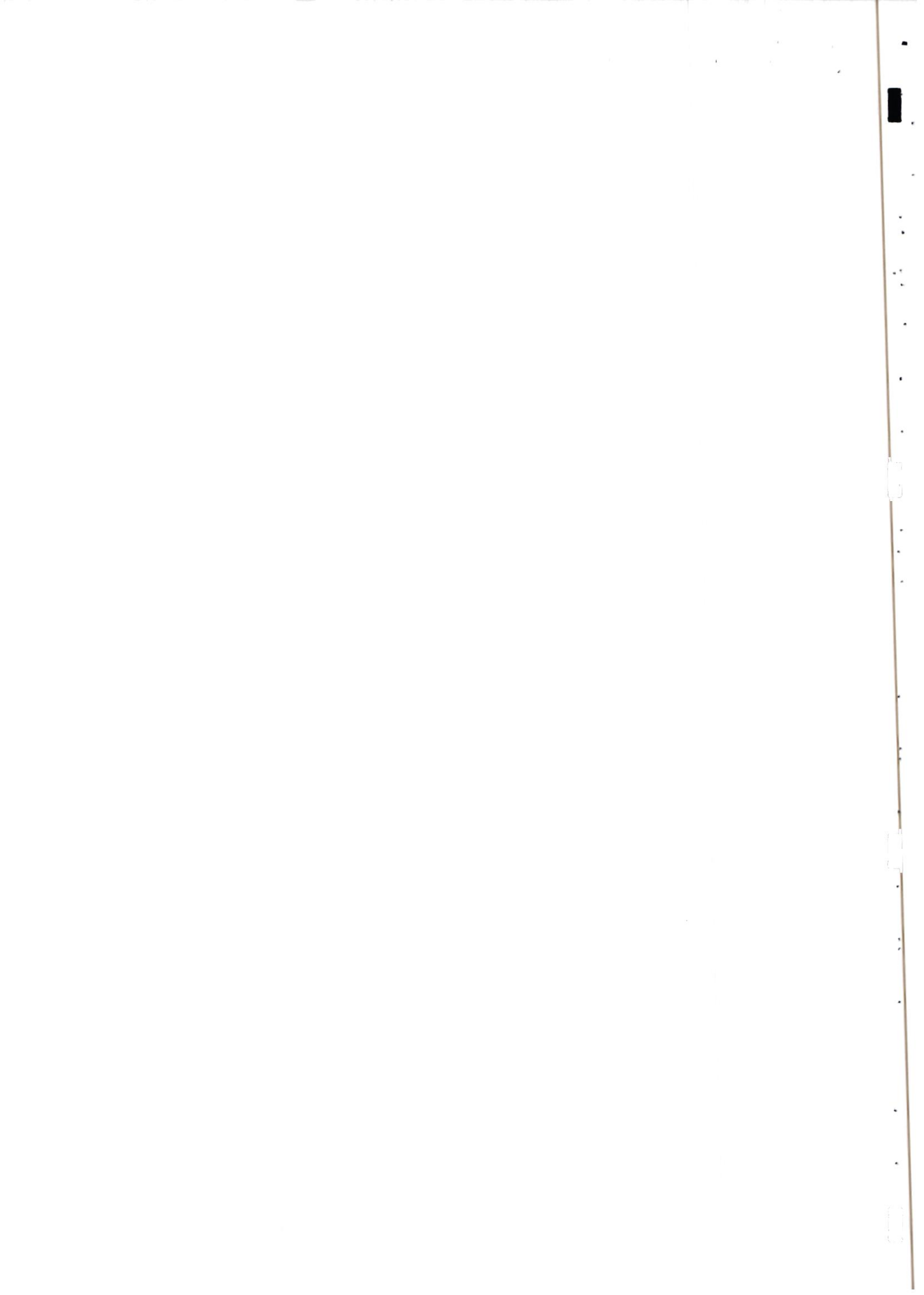
THE KENYA PIPELINE COMPANY LIMITEDRESPONDENT

REQUEST FOR REVIEW OF THE DECISION OF THE KENYA PIPELINE COMPANY LIMITED DATED 26TH OF 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

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REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. OF 2014

BETWEEN
KALPATARU POWER TRANSMISSION LIMITEDAPPLICANT

AND
THE KENYA PIPELINE COMPANY LIMITEDRESPONDENT

REQUEST FOR REVIEW OF THE DECISION OF THE KENYA PIPELINE COMPANY LIMITED DATED 26TH OF 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

APPLICANT'S AFFIDAVIT IN SUPPORT OF THE REQUEST FOR REVIEW

Rule 73(2) (b) of the Public Procurement and Disposal Regulations 2006)

I **KISHORE KOMANDURI** of Post Office Box Number 71, Kalpataru Synergy, Opp Grand Hyatt Hotel, Vakola, Santa Cruz East, Mumbai 400 055 Maharashtra, in the Republic of India solemnly make oath and state as follows:

- 1) **THAT** I am the head of Commercial undertakings of the Applicant. I have been duly authorized by Board of directors of the Applicant in this matter I annex hereto a copy of the letter of authorization in a bundle of documents and marked "**KK-1**". (See page 1 of Annextures)
- 2) **THAT** the Applicant is an experienced and reputed company based in India and engaged in various cross-country Power Transmission and Pipeline projects in India and abroad.
- 3) **THAT** the application herein seeks the Public Procurement Administrative Review Board to review the whole of the decision of The Kenya Pipeline Company Limited dated 26th of 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** in relation to the Applicant. A copy of the dated 26th of May 2014 is annexed hereto in a bundle and marked "**KK-2**". (See page 2 of Annextures).
- 4) **THAT** the Kenya Pipeline Company Limited in January 2013 issued an invited expression of interest - in the form of a pre-qualification document for contractors - for the proposed Mombasa-Nairobi petroleum products pipeline project under Tender No. **SU/QT/032N/13**. The pre-qualification document outlined that the tender was for the supply, delivery and installation of 450 km cross-country petroleum products pipeline (from Mombasa to nairobi) including all associated works namely: Civil, Mechanical, Electrical, Telecommunications, Corrosion control, Communication, Instrumentation and Controls. A copy of the expression of interest is annexed hereto in bundle and marked "**KK-3**". (See page 3-26 of Annextures).
- 5) **THAT** I am aware that the said pre-qualification questionnaire stated at



paragraph 3 of the questionnaire that the objective of the pre-qualification was "to shortlist applicants who have the requisite technical and financial capabilities to bid for the proposed works".

- 6) **THAT** I am aware that The Kenya Pipeline Company questionnaire required submission, *inter alia*, various documents which the Applicant duly submitted in response to the pre-qualification parameters.
- 7) **THAT** I am aware that the said pre-qualification submission was evaluated based on the technical capability, financial capability, key personnel, and plant and equipment. Hence the purpose of the pre-qualification questionnaire was to ensure that all bidders who qualified past this stage were suitable as contractors.
- 8) **THAT** I am aware that the Applicants submission on the pre-qualification by the Procuring Entity was responsive to the set criteria and subsequently by a letter dated 25th April, 2013, the Procuring Entity notified the Applicant that it had been shortlisted for the request of proposal for the construction of the Mombasa-Nairobi Petroleum Products Pipeline. A copy of the dated 25th April 2013 is annexed hereto in a bundle and marked "KK-4". (See page 27 of Annexures).
- 9) **THAT** I am aware that by a letter dated the 5th of March 2014, The Kenya Pipeline Company Limited invited proposals from the Applicant amongst other pre-qualified applicants for the Procurement, Construction, Testing and Commissioning of Line 1 Pipeline Replacement Project, Contract No.: **SU/QT/032N/13**. A copy of the dated 5th of March 2014 is annexed hereto in a bundle and marked "KK-5". (See page 28-29 of Annexures) and the Tender Document and marked "KK-6". (See page 33-114 of Annexures).
- 10) **THAT** I am aware that the above request required the Applicant to submit documents as part of the pre-qualification process.
 - (i) *Submit separate technical and financial bids.*
 - (ii) *Submit a valid KRA Tax Compliance Certificate (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.*
- 11) **THAT** I am aware that the Applicant in satisfaction of the requirements submitted the following documents:
 - a) *Separate technical and financial bids. (See page 119-121 of Annexures).*
 - b) *Tax Compliance Certificates. (See page 122-127 of Annexures).*
 - c) *Certificate of Incorporation of the company/ Business Registration. (See page 128-132 of Annexures).*



- d) *Original tender security for USD 500,000, issued from a reputable Bank operating in Kenya. Valid for 150 days from date of tender opening. (See page 133-220 of Annextures). 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. I annex hereto a copy of the a letter of submission and the relevant documents in a bundle and marked “KK-7”, “KK-8”.*
- e) **“KK-9 ,“KK-10”., “KK-11, “KK12” and “KK-13”.**

- 12) **THAT** I am aware that by a letter dated 26th May, 2014, (**Annex “KK2”**) the Kenya Pipeline Company informed the Applicant that its bid was not responsive on account of two reasons:

“We regret to inform you that your bid was not responsive because you did not:

- (a) Submit registration as a contractor in your country of origin.*
(b) Tender security was not valid for the required period as it expires on 12th October, 2014, which is less than 150 days as required in the invitation to submit an RFQ.”

- 13) **THAT** I have read the application for Review by the Applicant I wish to adopt the grounds set therein in this affidavit and state that the decision of the procuring entity contained in the letter dated 26th May, 2014, (**Annexure “KK2”**) was erroneous in fact and in law and pray that the same be set aside .
- 14) **THAT** I a advised by the Advocates on record for the for the Applicant and I verily believe the said advise to be sound that the Procuring Entity breached Sections 31 and 39 of The Public Procurement And Disposal Act, 2005 (“The Act”) and The Public Procurement And Disposal Regulations 2006 (“The Regulations”) as follows;

- a) The Applicant responded to the invitation, applied and submitted the pre-qualification questionnaire for contractors.
- b) The Public Procurement and Disposal Act, 2005 under Section 31 provides for the statutory criteria for qualification of persons to participate and to be awarded contracts for procurement.
- c) Section 31(6) requires that the provisions of Section 39 of the Act also be adhered to during the tendering process.
- d) The Act is perfectly clear at section 31(6) that the only pre-conditions to be followed during the tendering process are those set out in the Act itself, specifically in Sections 31 and 39.
- e) The wording and object of Section 31 are clear and are underpinned in the pre-qualification questionnaire which all interested bidders were required to fill.
- f) That Section 39(2) also provides an avenue for the Minister to prescribe preferences or reservations that would disqualify a bidder.
- g) That no preference was prescribed or reservations prescribed by the Minister



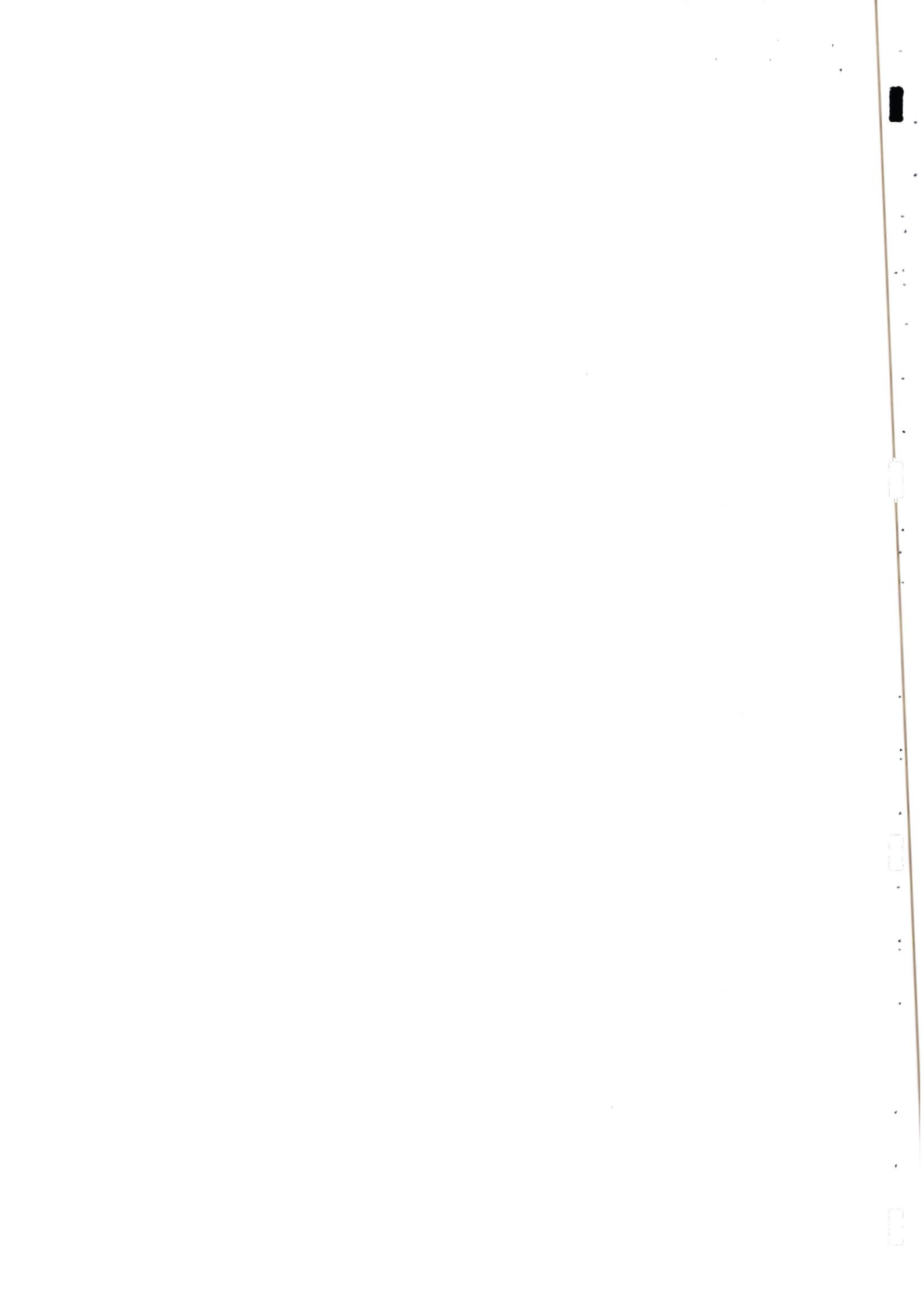
in respect of this particular contract.

- h) The only valid and legal criteria for eligibility is the criteria set out in Section 31 of the Act, and the mandatory requirements set out in the letter of 5th March, 2014 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.
- 15) **THAT** I verily believe that the basis of rejection of its bid is contrary to the Constitution of the Republic of Kenya, the Public Procurement and Disposal Act, 2005, and the Public Procurement and Disposal Regulations, as a consequence of which the Applicant has suffered loss and damage by virtue of being disqualified based on criteria not recognised by law.
- 16) **THAT** I verily believe that the Applicant was denied its right to a fair opportunity to compete with the other bidders on a level playing field, which has resulted in financial loss on the part of the Applicant.
- 17) **THAT** I am advised by the Advocates on record for the for the Applicant and I verily believe the said advise to be sound that the Procuring Entity breached Article 227 of the Constitution of Kenya 2010 ("The Constitution") as there was lack of transparency and accountability.
- 18) **THAT** I am advised by the Advocates on record for the for the Applicant and I verily believe the said advise to be sound that the basis of rejection of its bid is based on breach of duties imposed by the Constitution, the. Public Procurement and Disposal Act, 2005, and the Public Procurement and Disposal Regulations on the Kenya Pipeline Company Limited.
- 19) **THAT** I am advised by the Advocates on record for the for the Applicant and I verily believe the said advise to be sound that the Procuring Entity by dint of Article 2 (1) of the Constitution is bound to uphold the Constitution and by Article 227 abide by the Public Procurement and Disposal Act, 2005, and the Public Procurement and Disposal Regulations.
- 20) **THAT** I am advised by the Advocates on record for the for the Applicant and I verily believe the said advise to be sound that the Procuring Entity is bound by the Constitution, the Public Procurement and Disposal Act, 2005, and the Public Procurement and Disposal Regulations uphold the rules of fairness and transparency throughout the procurement process.
- 21) **THAT** I am advised by the Advocates on record for the for the Applicant and I verily believe the said advise to be sound that the procedure adopted by the Procuring Entity in changing the submission date and preliminary evaluation was not transparent and was contrary to the object and spirit of public procurement as set out in Article 227 of the Constitution as read together with Section 2 of the Act.
- 22) **THAT** I am advised by the Advocates on record for the for the Applicant and I verily believe the said advise to be sound that Article 227 of the Constitution is mandatory and requires that sets out the following requirement every *State organ or any other public entity to contract for goods or services, in accordance with a system that is fair, equitable, transparent,*



competitive and cost-effective.

- 23) **THAT** I am advised by the Advocates on record for the for the Applicant and I verily believe the said advise to be sound that Section 2 of the Act requires the Procuring entity to attain the objectives ;
- (a) economy and efficiency;
 - (b) promote competition and ensure that competitors are treated fairly;
 - (c) to promote the integrity and fairness of those procedures;
 - (d) to increase transparency and accountability in those procedures; and
 - (e) to increase public confidence in those procedures.
- 24) **THAT** I am advised by the Advocates on record for the for the Applicant and I verily believe the said advise to be sound that in coming up with the procedure and criteria for evaluation of tenders in this procurement, the Procuring Entity was under a Constitutional and Statutory obligation to ensure that the procedure and criteria adopted was in conformity with the objects of the Constitution and statute.
- 25) **THAT** I verily believe that in this case, the Procuring Entity failed to inspire public confidence by disqualifying the Applicant due to
- (a) a perceived failure to meet the requirements of the tender process,
 - (b) the Applicant had successfully passed the pre-qualification stage.
 - (c) The reasons set out by the Procuring Entity for this disqualification defeats the very objects of the Constitution and statute.
 - (d) The reasons set out by the Procuring Entity for this disqualification shows a lack of transparency and accountability in the procurement process.
- 26) **THAT** I verily believe that in this case that basis of rejection of its bid is contrary to the Constitution of the Republic of Kenya, the Public Procurement and Disposal Act, 2005, and the Public Procurement and Disposal Regulations, as a consequence of which the Applicant has suffered loss and damage by virtue of being disqualified based on criteria not recognised by law.
- 27) **THAT** I verily believe that in this case that the Applicant was denied its right to a fair opportunity to compete with the other bidders on a level playing field, which has resulted in financial loss on the part of the Applicant.
- 28) **THAT** I verily believe that in this case that there was failure to promote the integrity and fairness of procedures in evaluation criteria
- 29) **THAT** I am advised by the Advocates on record for the for the Applicant and I verily believe the said advise to be sound that in keeping with the provisions of Article 227 of the Constitution as well as Sections 31 and 39 of the Act, the requirements that a Procuring Entity can give are only those as



set out Section 31 and 39 of the Act.

- 30) **THAT** I am advised by the Advocates on record for the for the Applicant and I verily believe the said advise to be sound that the Procuring Entity provided unusual requirements to the tendering process, one of which was that Applicants were required to produce "**Certificate of Registration as a contractor in the country of operation for foreign firms**".
- 31) **THAT** I am aware and state that the Applicant as a Company registered in India, is permitted by law with to perform contracting work in terms of its Articles 48 to 51 of the Memorandum of Association and that there is other registration as a contractor.
- 32) **THAT** I am aware and state that Articles 48 to 51 of the Memorandum of Association of the company clearly set out that the Applicant could legally conduct contracting work as "*Structural Engineers, Civil Engineers, Hydraulic Engineers, Marine Engineers, Chemical Engineers, Aeronautical Engineers, Textile Engineers, Automotive Engineer and all and every work connected with the same*".
- 33) **THAT** the Procuring Entity, however, did not accept the Articles and Memorandum of Association of the Applicant as proof of that fact and to this end disqualified the Applicant on the basis that it did not provide a separate Certificate of Registration as a contractor.
- 34) **THAT** I am aware and state that the Indian legal regime did not provide the applicant for provide a "separate Certificate of Registration as a contractor" and the only legal proof of this fact was the Articles and Memorandum of Association of the Applicant.
- 35) **THAT** I verily believe that the procurement procedures, when inviting expressions of interest from local as well as international bidders, must respect and acknowledge the various laws provided in different countries so as to ensure that the procuring process is one that is both fair and integrity-based.
- 36) **THAT** I verily believe that by not taking into consideration the company law regime and requirements that the Applicant's own country imposed on it, the Procuring Entity failed to provide a fair procuring environment.
- 37) **THAT** I am advised by the Advocates on record for the for the Applicant and I verily believe the said advise to be sound that there was irregular variation of the date of submission contrary to section 53 of the Act.
- 38) **THAT** I am advised by the Advocates on record for the for the Applicant and I verily believe the said advise to be sound that Section 53 of the Act outlines the circumstances under which alterations may be made, as well as the exact manner in which this procedure should be undertaken.
- 39) **THAT** I am advised by the Advocates on record for the for the Applicant and I verily believe the said advise to be sound that Section 53 of the Act clearly



sets out that any amendments made either at the request of a bidder or on the Entity's own volition, must be in the form of an addendum.

- 40) **THAT** I am advised by the Advocates on record for the for the Applicant and I verily believe the said advise to be sound that the Act leaves no room for other forms of amendments to be added to the tender documents.
- 41) **THAT** I am aware that the Procurement Entity through its Request for Proposal to the Applicant dated 5th March, 2014 set the deadline for submission of proposals as 17th April, 2014, whereupon the tenders would be opened "*immediately thereafter in the presence of tenderers or their representatives*" who wished to attend.
- 42) **THAT** I am aware that the Procuring entity in the course amendment and clarifying various issues all along Complied with the law to the letter, sending an Addendum to the Applicant when an alteration was made as to the date of submission in Addendum Number 4 dated 10th April, 2014. Under item number 42 that "***The tender submission date has been extended by 3 weeks from 17th April 2014 to 8th May 2014 at the same place and time***". (See page 233-258 of Annextures).
- 43) **THAT** I am aware that some bidders continued to ask for an extension of time, but the Procuring Entity declined any further extension to the tender submission date.
- (i) In Addendum number 5 dated 17th April, 2014, items number 72 and 76 reiterated that Addendum 4 No. 42 still stood. (See page 259-295 of Annextures).
- (ii) In Addendum number 6 dated 30th April, 2014, the Procuring Entity reiterated that the deadline would remain 8th May, 2014. (See page 296-308 of Annextures).
- (iii) Lastly, the Procuring Entity released to the bidders a letter dated 15th May, 2014, attached to which was a document titled Addendum 8. Item Number 28 of Addendum 8 stated with regard to the extension of the deadline that "*Refer addendum No. 4 and no further extension will be granted*". The Procuring Entity remained consistent in its issuing of Addenda until this date. (See page 318-328 of Annextures).

I annex hereto copies of the above documents in a bundle and marked "**KK-14-KK 20**".

- 44) **THAT** in breach of the Request for Proposal terms, the Procuring Entity, Sixteen Hours (16) hours to the set submission date of 8th May, 2014 issued a letter dated 7th May, 2014 informing all bidders that the tender submission date had been extended from 8th May, 2014 to 15th May, 2014. I annex hereto a copy of an E-mail received in a bundle and marked "**KK-21**". (See page 329 of Annextures).
- 45) **THATI** state that the change of the set submission date did not take the form of an Addendum.
- 46) **THAT** I am advised by the Advocates on record for the for the Applicant and I verily believe the said advise to be sound that an amendment was irregular



as it was issued in the form of a letter rather than an Addendum, the same cannot be said to be valid per section 53 of the Act.

- 47) **THAT** I am advised by the Advocates on record for the for the Applicant and I verily believe the said advise to be sound that by the letter dated 7th May, 2014 the Procuring Entity deliberately failed to adhere to its own Request for Proposal terms.
- 48) **THAT** I am advised by the Advocates on record for the for the Applicant and I verily believe the said advise to be sound that in consequence, public confidence in the whole procurement process was seriously eroded contrary to Article 227 of the Constitution as read together with Section 2 of the Act and in the circumstances, the rejection of the Applicant's bid ought to be set aside/nullified.
- 49) **THAT** I state that the purported extension of the deadline by the Procuring Entity dealt great harm to the Applicant as it had already taken the necessary steps to ensure that it had procured and secured the tender security for USD 500,000, from a reputable Bank operating in Kenya which tender security was valid for 150 days from the date of tender opening which had been set as 8th May, 2014. This was a back to back arrangement with Applicants bankers in India with the reputable Bank operating in Kenya.
- 50) **THAT** I am advised by the Advocates on record for the Applicant and I verily believe the said advise to be sound that the Procuring Entity's action to extend the deadline by letter on the 7th of May, 2014, Sixteen Hours (16) hours before the set deadline, was in breach of Section 55(3) of the Act.
- 51) **THAT** I am advised by the Advocates on record for the Applicant and I verily believe the said advise to be sound that the Procuring Entity's failed to extend the submission *deadline as necessary to allow the amendment of the tender documents to be taken into account in the preparation or amendment of tenders.*
- 52) **THAT** I am aware that the Applicant's representative had already travelled to Nairobi with the sealed documents and did not have time to extend its Tender security so as to comply with the new deadline set by the Procuring Entity. This was a back to back arrangement with Applicants bankers in India with the reputable Bank operating in Kenya. I annex hereto a copy of the Applicants representatives passport in a bundle and marked "**KK-22**". **(See page 330 of Annextures).**
- 53) **THAT** I verily believe that this action was occasioned a situation of lack of fairness on the part of the Applicant by the Procuring Entity.
- 54) **THAT** I wish to state that the Procuring Entity in changing the tender opening date through non-transparent means, the Applicant was unable to rectify its tender security. The Procuring Entity's non-transparent means of



extending the tendering period was then used as grounds for the disqualification of the Applicant's tender as the Applicant's security fell short of 150 days due to the new date of submission.

- 55) **THAT** by its said conduct, the Procuring Entity deliberately misled the Applicant and then failed to properly evaluate its tender. The said conduct by the Procuring Entity was improper, unreasonable and illegal.
- 56) **THAT** by its conduct aforesaid, Procuring Entity again failed to ensure that it applied the principles of fairness, transparency and accountability in the preliminary evaluation.
- 57) **THAT** it is clear from the foregoing that the manner in which the Procuring Entity conducted itself was contrary to the national values and principles set out in Article 10 of the Constitution.
- 58) **THAT** by as a result the Procuring Entity's conduct complained above, the Applicant has suffered loss and damage as follows;
- (i) Financial loss in expenses;
 - (j) Loss of reputation;
 - (k) Loss of opportunity to participate in the biggest undertaking in Kenya Vision 2030 Development.
- 59) **THAT** I am advised by the Advocates on record for the Applicant and I verily believe the said advise to be sound that the said conduct further contravened the Applicant's right to administrative action that is reasonable and procedurally fair contrary to the provisions of Article 47 of the Constitution.
- 60) **THAT** the Applicant requests that this Honourable Board be pleased to order a fair administrative action by the Board in this matter in terms of Article 47 of the Constitution of the Republic of Kenya.
- 61) **THAT** the facts deposed to herein are true to the best of my knowledge, save for facts deposed to on information and belief the sources whereof and grounds have been disclosed respectively.

SWORN at **NAIROBI** by the said
KISHORE KOMANDURI
This .day of 2014

BEFORE ME

COMMISSIONER FOR OATHS

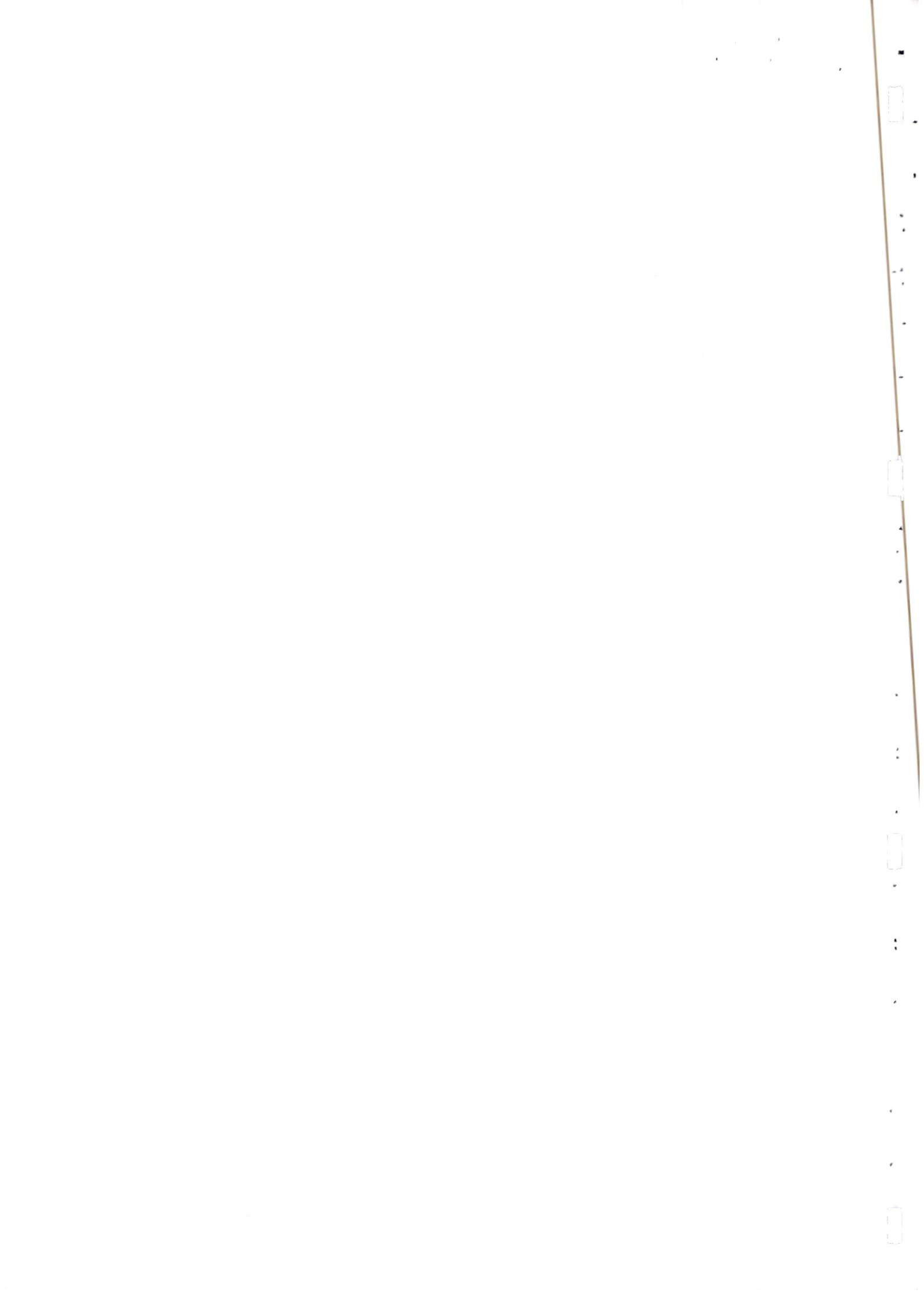


DRAWN & FILED BY:-

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P.O. BOX 528-00100
NAIROBI.
*E mail: Info@mumakanjama.com***

TO BE SERVED UPON:-

**KENYA PIPELINE COMPANY LIMITED
PIPELINE PLAZA
SEKONDI ROAD
OFF NANYUKI ROAD,
INDUSTRIAL AREA
P.O. BOX 73442-00200
NAIROBI.
*E MAIL: info@kptc.com***

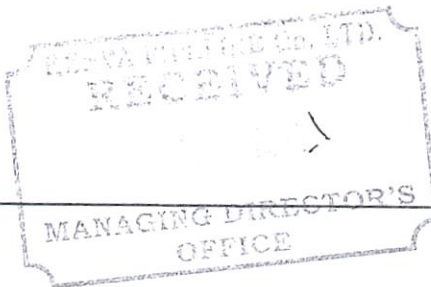


Pm 33

KALPATARU

POWER TRANSMISSION LIMITED

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Tel: +254 20 3740351/3740376
E-Mail: kptl-kenya@africaonline.co.ke
Website: www.kalpatarupower.com

Ref :-KPTL/PL/BDD/01/14

Date: 20.03.2014

The Managing Director,
Kenya Pipeline Company Ltd,
Sekondi Rd, off Nanyuki Rd, Industrial Area
P. O. Box 73442-00200,
Nairobi, Kenya.
Tel: +254-20-6532244
Fax: +254-20-650438
E-mail: pm@kpc.co.ke

Sub: Tender Document No.: SU/QT/032N/13 for "Proposed Line-1 Replacement Project of The Kenya Pipeline Company Limited"

Dear Sir,

This has reference to the abovewherein due date for submission of tender is on **17.04.2014**.

We would like to submit that we are seriously interested to prepare a comprehensive and competitive bid against the subject tender, as such it requires proper understanding with respect to various implications on design, engineering, execution methodology, spread requirements and commercial aspects. Also, we are in process of gathering various technical and commercial inputs from our International/National subcontractors/vendors, which may take at least another Ten(10) weeks to prepare a competitive bid.


In view of above, we request you to kindly extend the due date of submission of bid till **26.06.2014**.

We assure you our best services at all time.

Thanking You,

Your's Truly,

For **Kalpataru Power Transmission Ltd.**


Sarotra SK
(Assistant Vice President)



11/11/14

KPTL/PL/BDD/156/14

Date: April 21st, 2014

The Managing Director
Kenya Pipeline Company Ltd.
Kenpipe Plaza, Sekondi Rd,
Off Nanyuki Rd, Industrial Area
P.O Box 73442-00200
Nairobi, Kenya



Sub : **PROPOSED LINE1 REPLACEMENT PROJECT (TENDER NO. SU/QT/032N/13)**
REQUEST FOR EXTENSION OF BID SUBMISSION DATE

Dear Sir,

We refer to your addendum No.4 & 5 dated April 10 and 17th, 2014 concerning the above project.

We are currently working towards submitting a competitive bid, and would like to seek your kind understanding for you to grant us a further 3 weeks, from your current extension date of 8th of May 2014.

- We require additional time to fully absorb and adjust the clarifications of addendum 4 & 5 into our bid documents and also give the vendors & subcontractors time to adjust to your clarifications.
- Our Vendors and subcontractors have requested us for more time to enable them accurately submit to us accurate and competitive pricing. This will be greatly beneficial to KPC.

We are looking forward to partnering with KPC on this project, and in the spirit of partnership we seek your understanding in granting us an additional three (3) weeks, from May 8 to May 29th, 2014. The extension will enable us submit a good technical and financial proposal for the benefit of KPC.

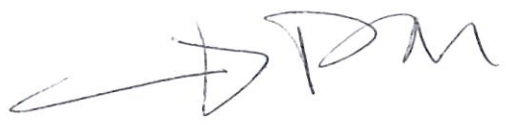
Looking forward to your positive response,

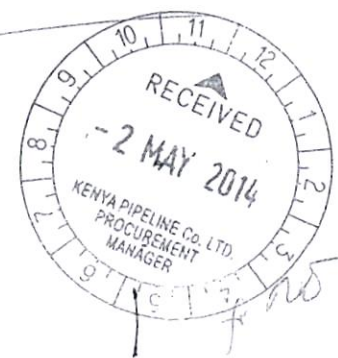
Yours Faithfully,

For Kalpataru Power Transmission Limited

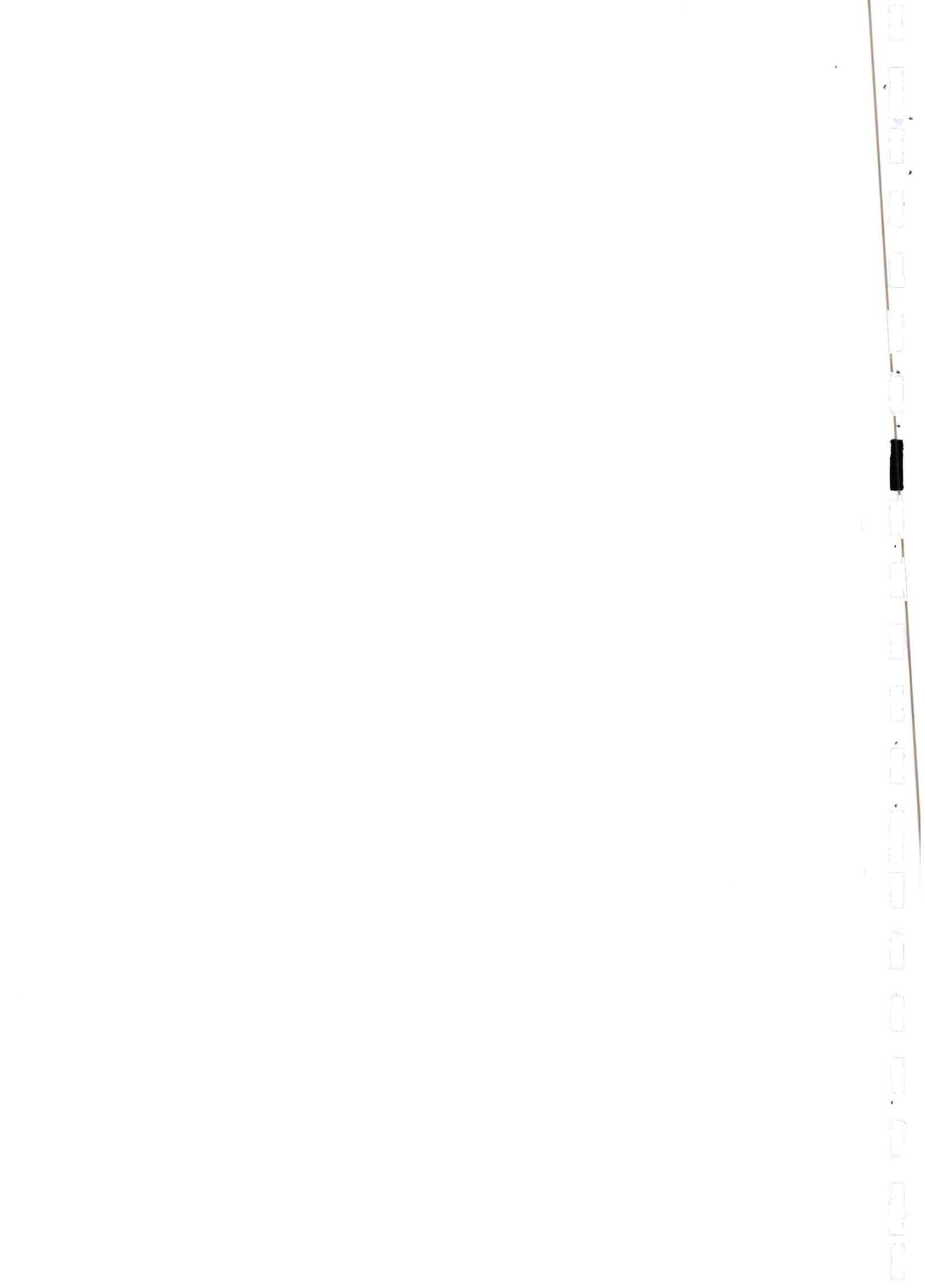


Sanjay Gupta
General Manager





C.C. Procurement Manager
Chief Manager Technical





PUBLIC PROCUREMENT OVERSIGHT AUTHORITY
Transforming Procurement

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Harambee Avenue
P.O. Box 58535-00200
NAIROBI
KENYA

Ref. PPOA/1/02/37(5)

Amex
5

22nd August, 2014

Justin Bundi, CBS
Clerk of the National Assembly
Clerk's Chambers
National Assembly
Parliament Buildings
NAIROBI

Dear *Mr. Bundi,*

A BRIEF ON PROCUREMENT PROCESS OF KENYA PIPELINE CORPORATION LINE 1 CAPACITY ENHANCEMENT PROJECT (MOMBASA - NAIROBI PETROLEUM PIPELINE)

Reference is made to your letter Ref: KNA/PIC/CORP/2014/ (115) dated 4th August, 2014 on the above subject and wish to inform you as follows:

1. PPOA received a letter on 24th April, 2013 requesting the Authority to investigate the process as a matter of urgency to ensure that the procurement law is upheld.
2. The Authority, acting within its mandate pursuant to Section 49 and 101 of the Public Procurement and Disposal Act, 2005 (the Act) PPOA vide letter Ref. No. PPOA/COMP/30/15 VOL. III T/Y (2) dated 29th April, 2013 requested for response from Kenya Pipeline Corporation (KPC) on the issues raised by the complainant accompanied by documentary evidence of various documents related to the Expression of Interest (EOI).

3. KPC submitted its response and the documents vide letter Ref. No. PR/CO/15 dated 24th May, 2013. Upon analysis of the same PPOA raised various issues regarding the processing of the EOI vide letter Ref. No. PPOA/COMP/30/09 Vol. IV (12) dated 14th June, 2013 and requested for response on the issues including demonstrations of actions KPC would undertake to address the anomalies cited in the letter.
4. KPC responded to the issues raised in a letter dated PR/CO/15 dated 23rd July, 2013.
5. PPOA had further queries with the KPC response and vide letter Ref. No. PPOA. 4/30/15 Vol. III (24) dated 23rd August, 2013 advised and reiterated that KPC address the outstanding issues raised in PPOA letter of 14th June, 2013. KPC was further advised to take such steps to ensure that the subject EOI is processed in accordance with the conditions prescribed in the EOI document and within the confines of the procurement Act the Public Procurement and Disposal Regulations, 2006 (the Regulations).
6. In their letter Ref. No. PR/CO/15 dated 3rd October, 2013, KPC confirmed that they had so far complied with all the requirements of the Public Procurement and Disposal Act, 2005 together with the Regulations made there under and the project consultant was finalizing on the tender documents (RFP) to be issued to the prequalified firms. Further to their response, KPC pointed out that this is a very important project not only for KPC but for the country at large. The Mombasa- Nairobi pipeline (Line 1) which KPC intends to replace was constructed and commissioned in 1978 with a design lifespan of 25 years, which ended in 2003. The Line has been in use for 34 years, and according to an in-line inspection survey done in 2010, the line is substantially corroded in most sections of the pipeline and urgently requires replacement. Consequently the cost of maintaining the pipeline has become extremely high. Furthermore it has become a health hazard with numerous pipe bursts with the latest reported in July 2013.

7. Pursuant to PPOA Circular No. 4/2009 of 24th June, 2009 on Procurement Planning and Reporting Requirements, KPC is expected to submit to the Authority its Quarterly Report on the subject tender in the 14th of October, 2014.
8. M/s Rich Productions Limited (the Petitioner) filed a judicial review of the EOI under Petition No. 173 of 2014 at the High Court of Kenya, Nairobi on 12th April, 2014 seeking for a declaration that the procurement proceedings in relation to the proposed construction of Mombasa Nairobi Petroleum Products Pipeline including but not limited to invitation and expression of interest, subsequent requests for proposal /tender for technical and financial bids for the proposed construction of Mombasa Nairobi petroleum products Pipeline were unconstitutional, illegal and irregular
9. The petition was subsequently dismissed after it emerged that the petitioner was guilty of material non-disclosure by presenting one sided evidence couched to deceiving the court. It was held that the petitioner was a brief case company which admitted that it did not have the requisite experience or financial capability to tender for construction of the pipeline. The purpose of the EOI was to weed out briefcase contractors and middlemen who did not have the capacity to carry out the works required but whose participation in the process was likely to lead to wastage of public resources.
10. There were two administrative reviews filed at the Administrative Review Board (ARB). Review Applications No. 19/2014 of 30th May 2014 lodged by M/s Kalpataru Power Transmission Limited and Application No. 23/2014 of 11th June 2014 lodged by M/s China Petroleum Engineering & Construction Corporation challenging the award of the tender to the successful bidder by KPC. The Review Board dismissed both applications as it observed that **there was absence of proof of neither breach of any of the provisions of the Act or the Regulations nor of Article 227 of the Constitution**. Copies of the ARB decisions are hereby submitted for ease of reference.

11. Taking into account the ARB's decision and the High Court's judgment, no party has raised any further queries in relation to the Mombasa-Nairobi Pipeline.

Yours *Sincerely,*

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M. J. O. Juma, MBS
DIRECTOR GENERAL
(Encls)

① D/Comm Fees



ZAKHEM INTERNATIONAL CONSTRUCTION LTD.
Civil and Mechanical Engineers & Contractors

Clerk of the National Assembly
Clerk's Chambers
National Assembly
Parliament Buildings
P.O. Box 41842-00100
NAIROBI

Outering Road, Opp. G.S.U. Headquarters
P.O. Box 41 196 - 00100 NAIROBI - KENYA
Tel: +254 57 2513128/9, +254 20 8562113
E-mail: zakhem@africaonline.co.ke

② EMEJEN
pls desep
FA
30/9



27th September, 2014

Our Ref: ZIC-AD/0074/14/LR/AA

Dear Sir,

**SUB: APPOINTMENT OF MR. WAWERU GATONYE TO APPEARANCE
BEFORE THE PUBLIC INVESTMENT COMMITTEE ON BEHALF OF
MR. IBRAHIM ZAKHEM OF ZAKHEM INTERNATIONAL
CONSTRUCTION LIMITED**

Your letter of invitation dated 10th September, 2014 and the summons dated 24th September, 2014 refer.

We have noted from your letter and summons that you require the attendance of the Managing Director to adduce evidence on the procurement process of Kenya Pipeline Company Line 1 capacity Enhancement Project (Mombasa-Nairobi Petroleum Pipeline).

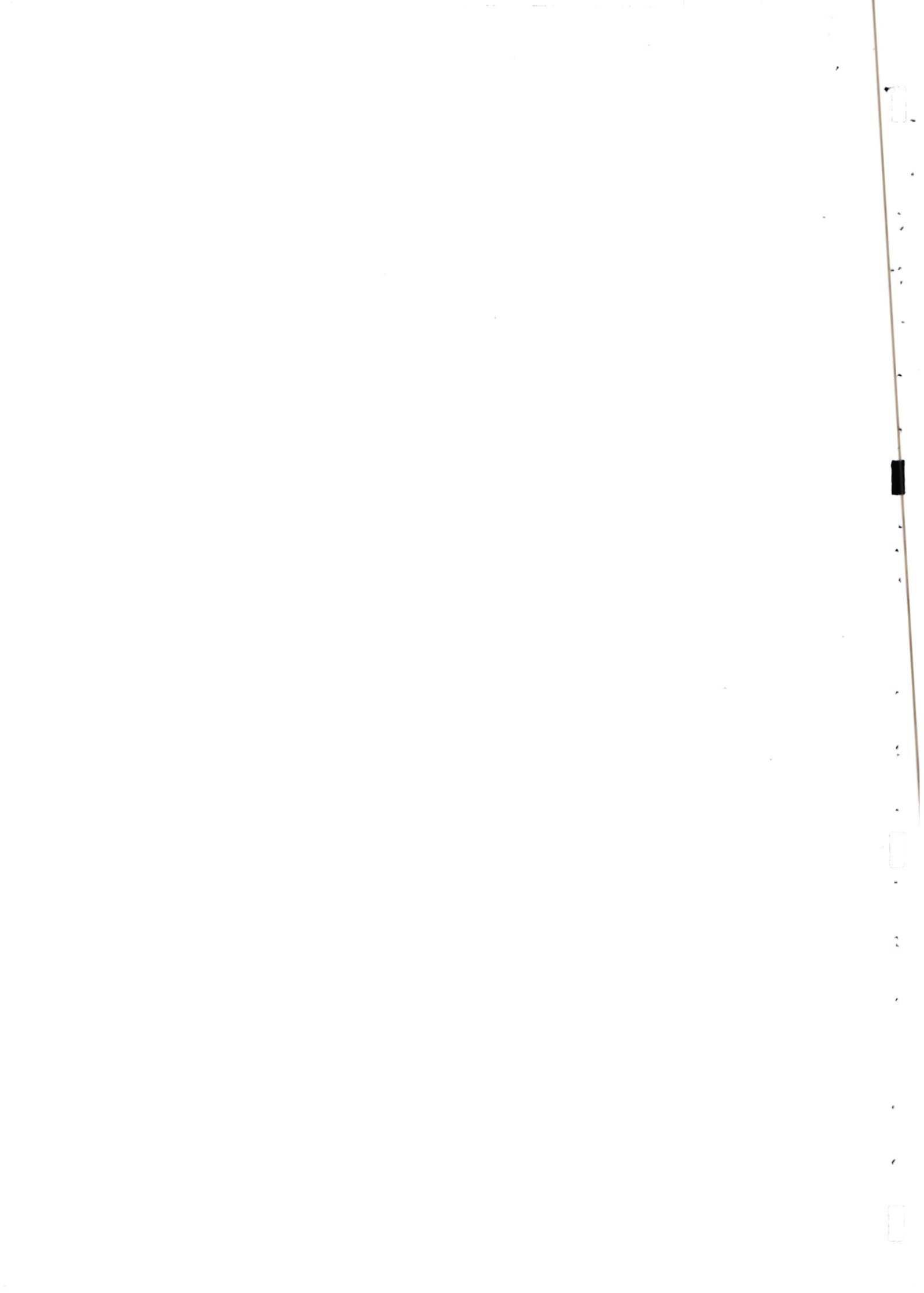
As earlier communicated to you the Managing Director is currently out of the country and shall not be available on 1st October.

However, Mr. Waweru Gatonye, advocate is authorized by the MD to appear before the committee both as attorney and principal on behalf of the Managing Director and Zakhem International Construction Limited. The advocate as you are aware is fully conversant with the said procumbent process in so far as it relates to the company. Previously he represented the company before the Public Procurement Review Board when the tender was challenged by other unsuccessful bidders.

In case you require any further clarification, please do not hesitate to contact us.

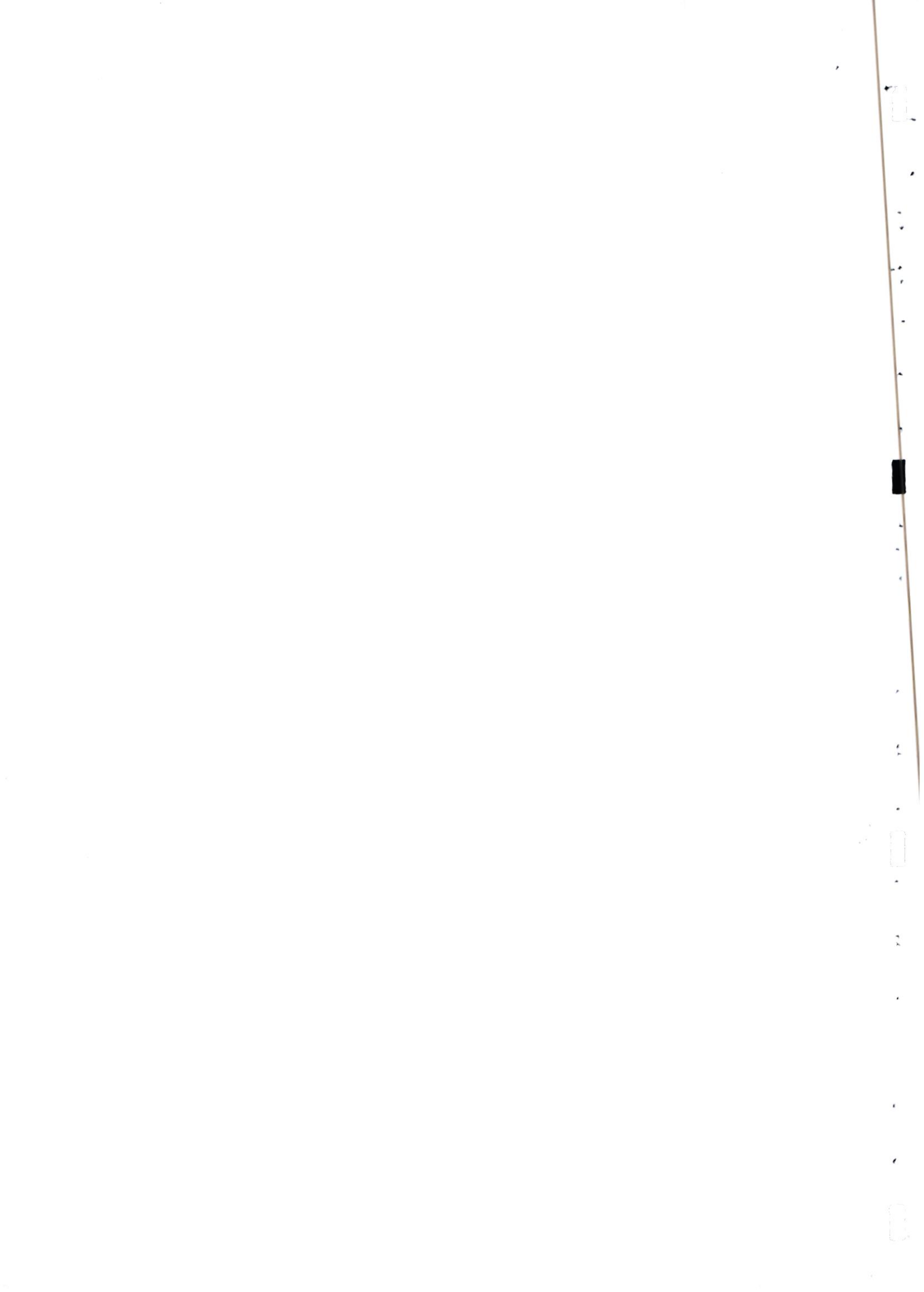
Yours faithfully,
For: ZAKHEM INTERNATIONAL CONSTRUCTION LTD.





cc:

1. Mr. Edward Ouko
Auditor General
Kenya National Audit Office
Anniversary Office
NAIROBI
2. Mrs. Esther Koimett
Investment Secretary
The National Treasury
NAIROBI
3. Mr. Edward Ngigi
Ag. Inspector General
Inspectorate of State Corporations
Office of the Deputy President
NAIROBI
4. Waweru Gatonye & Co. Advocates
Timau Plaza, 4th Floor
Argwings Kodhek / Timau Road Junction
P.O. box 55207-00200
NAIROBI





中国武夷实业股份有限公司 CHINA WU YI CO., LTD.

Top 225 International Contractor (ENR)

Kenya Branch Office Address: China Wu Yi, Nyangumi Road, Kilimani, Nairobi P.O. Box: 49282-00100, GPO
Tel.: +254-20-2653333 Fax: +254-20-2653333 E-mail: chinawuyikenya2013@gmail.com

September 16, 2014

**Clerk of the National Assembly
Clerk's Chambers, National Assembly
Parliament Buildings
P.O. Box41842 – 00100
NAIROBI**



Dear Sir,

RE: INVITATION TO APPEAR BEFORE THE PUBLIC INVESTMENTS COMMITTEE

We refer to the captioned and to previous pertinent correspondences particularly your letter to us REF: NA/PIC/CORR/2014/ (135) DATED 8th September, 2014 which we have received and whose contents we have noted.

We have previously been invited to appear before the Honorable Public Investment Committee and by our letter to you dated August 22nd 2014, we gave our position in this matter, a position we would like to retaliate in this letter.

The Kenya Pipeline Corporation's Proposed Line 1 Replacement Pipeline Tender No. SU/QT/032N/13 was advertised and we participated. After all the tendering processes, we were informed that unfortunately we were not successful. We have no objection to what has been decided by the Kenya Pipeline Corporation and we do not intend to pursue or participate in this project or any matters related to it. We however think it is a good project for the country and hope it will be executed as planned so that it can benefit the country and more particularly the energy sector. We look forward to enhanced cooperation with the energy sector of Kenya in the future and hope to contribute to its growth.

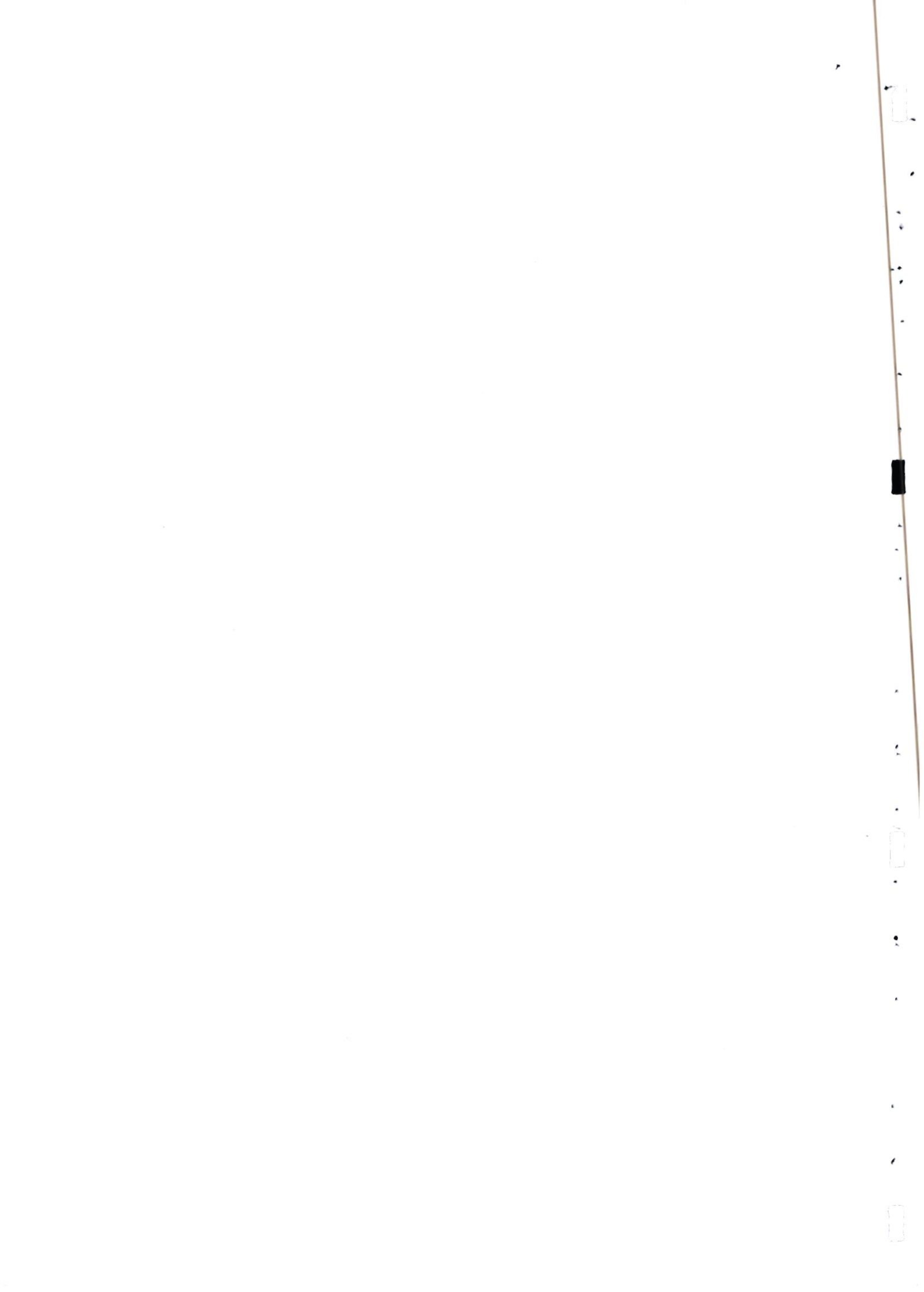
We also stated in our previous letter and wish to retaliate here, that since we do not have any further submissions to give apart from what has been stated in this letter and since we do not wish to take precious time of the Honorable Public Investment Committee, We are requesting that you to excuse us from the meeting scheduled to be held on the 24th Sept. 2014 by the committee.

Your kind consideration will be highly appreciated.

Yours faithfully,

Liu Hui
**Managing Director
China Wu Yi Co. Ltd**

Mr. Engen
Post
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中国武夷实业股份有限公司 CHINA WU YI CO., LTD.

Top 225 International Contractor (ENR)

Kenya Branch Office Address: China Wu Yi, Nyangumi Road, Kilimani, Nairobi P.O. Box: 49282-00100, GPO
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August 22, 2014

YOUR REF: NAI/PIC/CORR/2014/(113)

Clerk of the National Assembly
Clerk's Chambers
National Assembly
Parliament Buildings
P.O. Box 41842 - 00100
NAIROBI

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pse use the CRA refs to
25/8/14

I have advised one of appear.

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25/8

Dear Sir,

RE: INVITATION TO APPEAR BEFORE THE PUBLIC INVESTMENTS COMMITTEE

We refer to the captioned and to your letter of invitation dated 14th of August 2014 which we received on the 21st of August, 2014.

It is noted that your invitation relates to the Procurement of Kenya Pipeline Corporation Line 1 Capacity Enhancement Project (Mombasa-Nairobi Petroleum Pipeline) which the Parliamentary Investment Committee is investigating.

The subject tender was first advertised as an expression of interest (EOI) for the construction of the Proposed Mombasa-Nairobi Petroleum Project, on Wednesday 16th January, 2013 in the local newspapers and the same closed on the 28th February, 2013. We submitted our application for pre-qualification and by a letter dated 25th April, 2013 the procuring entity (Kenya Pipeline Corporation Limited) notified us we were successful and therefore pre-qualified to tender.

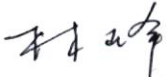
Request for proposals documents were issued to us on the 5th May, 2014 and we submitted our bid. We subsequently received notification from Kenya Pipeline Corporation on the 26th May, 2014 informing us that we were not successful in the tender.

We have no objection to what has been decided by the Kenya Pipeline Corporation and we do not intend to pursue this project anymore. We believe that the tender is a good project for the country and hope it will be executed as planned for the large public good and particularly the energy sector. We look forward to enhanced cooperation with the energy sector of Kenya in the future and hope to contribute to its growth.

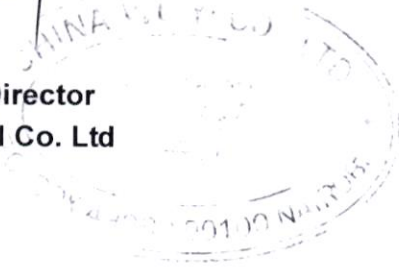
Since we do not have any further submissions to give apart from what has been stated in this letter and since we do not wish to take precious time of the Honorable Public Investment Committee, we therefore sincerely request you to excuse us from attending the meeting scheduled to be held on the 26th Aug. 2014 by the committee.

Kindly consider our request.

Yours faithfully,



Liu Hui
Managing Director
China Wu Yi Co. Ltd



Cc.

1. **Mr. Edward Ouko**
Auditor General
Kenya National Audit Office
Anniversary Office
NAIROBI.

2. **Mrs. Esther Koimett**
Investment Secretary
The National Treasury
NAIROBI.

3. **Mr. Edward Ngigi**
Ag. Inspector General
Inspectorate of State Corporations
Office of the Deputy President
NAIROBI

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REPUBLIC OF KENYA

**OFFICE OF THE ATTORNEY-GENERAL
&
DEPARTMENT OF JUSTICE**

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AG/CONF/14/153/3 VOL.II

22nd October 2014

Mr. Justin Bundi, CBS
Clerk of the National Assembly
National Assembly
Parliament Buildings
P.O. Box 41842 - 00100
NAIROBI

Dear

Justin Bundi,

RE: APPEARANCE BEFORE THE PUBLIC INVESTMENT COMMITTEE.

Reference is hereby made to your letter NO. KNA/PIC/CORR/2014/ (154) dated 10th October 2014 in which you requested for a briefing on a number of issues.

The Office of the Attorney General draws its mandate from Article 156 of the Constitution of Kenya, 2010, which vests on the Attorney General the responsibility of being the Principal Legal Adviser to the Government, to ensure that the rule of law is promoted, protected and upheld and defend the public interest.

Further the Office of the Attorney General Act No. 49 of 2012 clearly spells out the functions of the office that include:

- Advising Government Ministries, Departments, Constitutional Commissions and State Corporations on legislative and other legal matters including:
- Negotiating, drafting, vettings and interpreting local and international documents, agreements and treaties for and on behalf of the Government and its agencies; and
- Performing any function as may be necessary for the effective discharge of the duties and the exercise of the powers of the Attorney-General.

It is in that respect that we believe our oversight role has been called upon to provide some insight on the tender process herein mentioned. We therefore address the four questions raised as follows.

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DEPARTMENT OF JUSTICE
CO-OPERATIVE BANK HOUSE, HAILESELASSIE AVENUE
P.O. Box 56057-00200, Nairobi- Kenya TEL: Nairobi 2224029 / 2240337
E-MAIL: legal@justice.go.ke WEBSITE: www.justice.go.ke



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1. **Whether the two procurements were done in accordance with the provision of the Public Procurement and Disposal Act 2005 and Procurement Regulations.**

In accordance with the Public Procurement and Disposal Act, a person is qualified to be awarded a contract for procurement only if the person has the necessary qualifications, capability, experience, resources, equipment and facilities to provide what is being procured among other criteria.

These criteria are normally provided for in an Expression of Interest request or in a document titled Request for Proposals (RFP) by the procuring entity. According to our research, the Kenya Railways document was available to all bidders through an advert on 24th July 2013.

We have also established that the Kenya Pipeline Company Limited Tender for the Construction of the Nairobi-Mombasa Petroleum Pipeline (Replacement of Line 1) commenced with an expression of interest whereby 24 firms underwent detailed technical evaluations.

The documents provided by the Procuring Entity show that there was an open international tender process which included evaluations at the technical and financial levels separately for the Kenya Railways Tender and it appears that the due legal process was also followed by the Kenya Pipeline Company.

M/S TSDI/APEC/EDON who scored the highest at the technical evaluation stage and also the lowest in the financial bid was awarded the tender at their bid price of US\$41,184,638 VAT inclusive. Notification to all bidders was done on 19th May, 2014.

After negotiations were held with the winning bidder, a contract was signed on the 3rd June, 2014.

It should be noted that in the High Court Application No.267 of 2014 they upheld the decision of the Public Procurement Administration Review Board of 6th June, 2014 whereby they held inter alia that the contract dated 3rd June, 2014 was signed in accordance with the Provisions of Section 68(2) of the Act as read together with the Provisions of section 67(1) of the Act.

In the case of the Pipeline project the documents provided indicate and it appears that after proper due legal process the tender was awarded to Zakheim International Construction Corporation on 3rd June 2014.

In this instance also the High Court in Petition No. 173 of 2014 dismissed a petition brought before it on the basis that the process had been carried out in violation of the constitution and the law governing the public procurement process They were seeking for a declaration that the tender was unconstitutional illegal and irregular but it was held that KPC had not infringed any law, and indeed they had been cleared by the Procurement Oversight authority.

It was further held that Public Procurement and Disposal Act has set out the process for resolution of disputes arising out of Public Procurement Process.

In accordance with the process for procurement under the Public Procurement and disposal Act, 2005 and Procurement Regulations, and the ruling of the High Court, we are duly persuaded that the procurement procedures were followed.

2. Whether there was value for money

Value for money is a term used to assess whether or not an organization has obtained maximum benefit from the goods and services it both acquires and provides, within the resources available to it. It is often described in terms of the three Es of economy, efficiency and effectiveness.

In addition, the PP & D Act is designed to ensure that there is transparency in the whole process as well as value for money. This therefore requires compliance with all the law and necessary provisions of the applicable law and regulations. As far as whether the contractual price is value for money, it is not within our mandate or professional knowledge to comment on that.

3. Whether there was conflict of interest in the procurement of TSDI as an Independent Consultant for design review and construction supervision of the Standard gauge Railway by the Kenya Railway Corporation, and

We understand that the Third Railway Survey and Design Institute Group Corporation (TSDI) is an enterprise legally established in China in accordance with the laws and regulations of the People's Republic of China. The Corporation is a commercial entity wholly owned by the Government and has no shareholders and if that is correct then there is no relationship in the manner of control or joint control between TSDI and CRBC.

In this regard we do not foresee any conflict in their operations as per their respective contracts.

4. Whether due diligence was followed by the procuring entity including seeking advice and approval of the Office of the Attorney General in the Contract for the Independent Consultancy.

We wish to reiterate that procurement of goods and services is the responsibility of the Procuring Entity and the Accounting Officer therein is wholly accountable for a fair, transparent and inclusive process provided by the PP & D Act.

The High Court also resolved that the reason why the Constitution and the law establish different institutions and mechanisms for dispute resolution in different sectors is to ensure that such dispute as may arise are resolved by those with the technical competence and the jurisdiction to deal with them.

We are not in a position to establish whether a due diligence was followed by the procuring entities. We however state that the office of the Attorney General was not requested to approve the contract signed on 3rd June 2014, for the provision of consultancy services for design Review and Construction supervision for the construction of a Standard Gauge Railway from Mombasa to Nairobi Key and procurement installation of facilities, Locomotives and Rolling Stock.

We were also not requested to approve the Contract signed on 3rd July between Zakheim International and KPC.

Yours *Sincerely*


NJEE MUTURI
SOLICITOR-GENERAL