

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 60/2010 OF 4TH NOVEMBER, 2010

BETWEEN

HYOSUNG EBARA COMPANY LTD.....Applicant

AND

KENYA PIPELINE COMPANY LTDProcuring Entity

Review against the decision of the Tender Committee of Kenya Pipeline Company Ltd of 4th November, 2010 in the matter of tender for Supply Installation and Commissioning of Mainline Pump sets Line 1 Third Pump.

BOARD MEMBERS PRESENT:

Mr. P. M. Gachoka	-	Chairman
Mr. J. W. Wambua	-	Member
Ms J. A. Guserwa	-	Member
Amb. C. Amira	-	Member
Mr. S. K. Munguti	-	Member
Ms. N. Mutai	-	Member

IN ATTENDANCE

Mr. C. R. Amoth	-	Secretary
Mr. M. A. Obuya	-	Secretariat
Ms. K. A. Rota	-	Secretariat

PRESENT BY INVITATION:

Procuring Entity, The Kenya Pipeline Company Limited

- Ms Gloria Khafafa - Senior Legal Officer
- Mr. Nicholas Gitobu - Procurement Manager
- Mr. H. K. Wambua - Chief Engineering (Mechanical) Officer

Applicant, Hyosung Ebara Company Limited

- Prof. Albert Mumma - Advocate
- Mr. Charles Agwara - Advocate
- Ms Bennadette Musyoki - Representative
- Mr. S. Pandya - Representative

Interested Candidates

- Mr. Ligunya Stephen - Advocate, Ebara Corporation
- Mr. George Opiyo - Sales Manager, Flowserve

BOARD'S DECISION

Upon hearing the representations of the parties and Interested Candidates herein and upon considering the information in all the documents before it, the Board decides as follows: -

BACKGROUND

This was an open tender advertised in the local dailies on the 20th & 21st of July, 2010 for the Supply, Installation and Commissioning of Mainline Pumpsets line 1Third Pump.

Closing/Opening:

The bids closed/opened on 23rd September, 2010. The bidders who submitted bids as at opening were as follows:-

1. Lechi mechanical
2. Bytewise Ltd
3. Uni supply
4. Hyosung Ebara
5. Encom Ltd
6. Kobe Kikai
7. Shabi Boeki
8. Nihon Kogyo
9. Flowserve

EVALUATION

Tender evaluation was carried out in three stages namely Preliminary, Technical and Financial.

Preliminary Evaluation:

The bids were evaluated for responsiveness on the following parameters:

- i) Separate Technical and Financial Bid;
- ii) Certificate of Incorporation/Registration;
- iii) Copy of a valid KRA tax compliance certificate;
- iv) Tender security;
- v) Required number of tender copies submitted;
- vi) Pre-tender site visit certificate;

vii) Manufacturers Authorization Form duly filled;

Pursuant to the foregoing requirements, the bidders were evaluated and scored as hereunder:

The Mandatory Requirements Score Sheet

	MANDATORY REQUIREMENTS	BIDDERS								
		Lechi mechanical	Bytewise Ltd	Uni supply	Hyosung Ebara	Encom Ltd	Kobe Kikai	Shabi Boeki	Nihon Kogyo	Flowserve
1	Separate Technical and Financial Bid	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
2	Certificate of Incorporation/Registration	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
3	Copy of a valid KRA tax compliance certificate	Yes	Yes	Yes	Yes	Yes	N/A	N/A	N/A	N/A
4	Tender security	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
5	Required number of tender copies submitted	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
6	Pre-tender site visit certificate	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
7	Manufacturers Authorization Form duly filled	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	N/A

Technical Evaluation

Nine bidders qualified for the detailed Technical Evaluation.

Technical Evaluation Criteria

No.	DESCRIPTION OF CRITERIA	POINTS
1	Provision of Data Sheets, Drawings and Performance data	50
2	Programme of Supply	10
3	Qualifications of Key Personnel for Commissioning of Mainline Pumpsets	15
4	Warranty and After Sales Service	15
5	Training	10
	Total	100

SUMMARY OF TECHNICAL EVALUATION SCORES

No	Description of Criteria	Points		Lechi mechanical	Bytewise Ltd	Uni supply	Hyosung Ebara	Encom Ltd	Kobe Kikai	Shabi Boeki	Nihon Kogyo	Flowserve
1	Provision of Data Sheets, Drawings and Performance data	50		20	5	0	45	38	38	38	38	46
			%	40	10	0	90	66	90	90	90	82
2	Programme of Supply	10		0	0	0	10	7	7	7	7	7
			%	0	0	0	100	70	70	70	70	70
3	Qualifications of Key Personnel for Commissioning of Mainline Pumpsets	15		0	0	0	10	0	15	15	15	15
			%	0	0	0	100	0	100	100	100	66.6
4	Warranty and After Sales Service	15		0	0	0	15	15	15	15	15	15
			%	0	0	0	100	100	100	100	100	100
5	Training	10		0	0	0	10	7	10	10	10	10
			%	0	0	0	100	100	100	100	100	100
Total		100		20	5	0	90	67	85	85	85	93

For abider to qualify, it was required to attain a score of at least 60% in each of the five individual categories, and 70% overall to be eligible for consideration in the financial evaluation.

TECHNICAL EVALUATION REMARKS

The Evaluation Committee made the following remarks in their report:

- 1) "M/s Lechi Mechanical, M/s Bytewise, M/s Uni-supply & M/s Encom have scored less than 60% in more than one of the five categories. They therefore do not qualify for further evaluation.

- 2) **M/s Hyosung Ebara, M/s Kobe Kikai, M/s Shabi Boeki, M/s Nihon Kogyo & M/s Flowserve** have attained marks above the pass mark of 70% and are therefore technically competent to be evaluated further.
- 3) The Tender Committee is invited to note that **Ebara Corporation** has written a letter to KPC supposedly terminating their Joint Venture with **M/s. Hyosung Ebara** of Korea for supply of the mainline model SPD VIIM as per the attached letter dated 24th September, 2010 and received on 8th October, 2010.

The Tender Committee was invited to note that **M/s. Kobe, M/s Shabi Boeki** and **M/s Nihon Kogyo Co.** had submitted similar documents for this tender.

- 4) "The Tender Committee is invited to note the contents of this evaluation and consider the items listed in Items 3 & 4 above. It is recommended that **M/s. Hyosung Ebara, M/s Kobe Kikai, M/s Shabi Boeki, M/s Nihon Kogyo** and **M/s. Flowserve** proceed to the financial bid"

FINANCIAL EVALUATION AND AWARD OF TENDER

This Request for Review was filed before the award of the tender and therefore this information remains confidential.

THE REVIEW

The Request for Review was lodged by M/s Hyosung Ebara Co. Ltd on 4th November, 2010 in the matter of Tender No: SU/QT/349N/10 for the Supply, Installation and Commissioning of Mainline Pumpsets Line 1 Third Pump. The Applicant was represented by Professor Albert Mumma and Mr. Charles Agwara both Advocates while the Procuring Entity was represented by Ms. Gloria Khafafa, Advocate.

The Applicant raised 21 grounds and sought for the following orders:

- a) *"The decision to award the Tender for the Supply Installation and Commissioning of Mainline Pump sets Line 1 Third Pump. Project No. SU/QT/349N/10 be annulled.*
- b) *The Applicant be awarded the Tender for the Supply Installation and Commissioning of Mainline Pumpsets Line 1 Third Pump. Project No. SU/QT/349N/10.*
- c) *In the alternative and without prejudice to the above the Procuring Entity be ordered to tender afresh and process the tenders in a fair and transparent manner;*
- d) *The Procuring Entity pays all the costs incurred by the Applicant in preparing the Tender together with the costs of this review."*

Preliminary Issue

At the commencement of the hearing, Ebara Co. Ltd an intended interested party through Mr. Likunya Stephen, Advocate sought leave of the Board to be enjoined to the proceedings which application was supported by the Procuring Entity. The Applicant opposed this application and the Board after due consideration of the application declined to grant the leave sought. This was grounded on the fact that the Applicant did not qualify to be a party to the proceedings under the provisions of Sections 3, 93 and 96 of the Public Procurement and Disposal Act herein after referred to as the Act.

Merits of the Case

The parties then proceeded to argue the Request for Review application on merit and in this regard they made the following submissions:

Grounds 1 – 21 Breach of Sections 2 and 66 of the Act

These grounds have been consolidated as they raise similar issues.

The Applicant argued that, the Procuring Entity had essentially unlawfully disqualified it in that it had given irregular reasons for its disqualification. It referred the Board to the letter of 26th October, 2010 in which the Procuring Entity had informed the Applicant of its disqualification on the grounds that it did not attain the minimum qualifying mark and would therefore not proceed to the Financial Evaluation stage.

The Applicant alleged that the Procuring Entity breached the statutory duties imposed on it under the Act when it based its decision on criteria other than the ones set out in the tender document contrary to Section 66 of the Act. It alleged that the tender evaluation and the award process were carried out in contravention of the provisions of the Act and were therefore wrong and/or unlawful. The Applicant further submitted that on 26th October, 2010, the Procuring Entity wrote to it informing it that it had evaluated its tender but that the same did not attain the minimum qualifying mark; therefore its bid was not capable of proceeding for financial evaluation.

The Applicant submitted that it sought clarification on the contents of the said letter but in its response dated 27th October, 2010 the Procuring Entity changed the story by claiming that the Applicant's tender had been disqualified because of the failure to comply with a mandatory requirement for a Manufacturer's Authorization letter. It argued that the Procuring Entity claimed that it had allegedly on the 24th September, 2010 received a letter from one Ebara Corporation,(a third party) who claimed that the joint venture between it and the Applicant herein had been terminated, which letter the Procuring Entity claimed it took as implying a withdrawal of the Manufacturer's Authorization to the Applicant's bid. The Applicant added that this contention by the Procuring Entity was untrue, dishonest and designed to mislead as the Applicant's Manufacturer's Authorization to the bid was in place, valid and had not been withdrawn to date. It further submitted that the Procuring Entity acted unfairly and fraudulently by shifting goal posts and alleging that the

Applicant's bid purportedly failed on account of failure to meet a mandatory requirement. It further stated that, according to the same Procuring Entity, the bid was evaluated as responsive and proceeded to the technical evaluation stage and allegedly failed because it did not obtain the minimum score requirement to proceed to the financial evaluation.

The Applicant further submitted that in terms of Section 2 of the Act, the Procuring Entity had a primary duty to treat it fairly in the tender award process and to ensure transparency and accountability in its procedures. It added that the Procuring Entity treated it unfairly in the tender evaluation process and thereby breached and/or defeated the primary objective or purpose of the Act. It emphasized that the Procuring Entity, by giving two separate and contradictory reasons/explanations for its disqualification of the Applicant's tender to proceed to financial evaluation, confirmed that the tender evaluation process lacked integrity, transparency and accountability as required by the Act. The Applicant also submitted that the Procuring Entity relied on information from a third party as the basis for disqualifying its bid. It further submitted that the Procuring Entity did not verify the authenticity nor sought any clarification from the Applicant and therefore employed different evaluation criteria other than the ones set out in the tender document. It concluded that the whole tender process was fraudulent as the Procuring Entity was from the onset bent towards ensuring that the successful bidder won the tender even though their bid was less competitive.

In response, the Procuring Entity stated that it adopted and fully relied on its filed response to the Request for Review together with the Affidavit of one Nicholas Gitobu-the Procurement Manager at Kenya Pipeline Company.

The Procuring Entity stated that its decision was correct and lawful and further that no award had been made yet, hence there was no award process that could be faulted by the Board. The Procuring Entity submitted that all the tenderers were subjected to the same evaluation criteria which were clearly spelt out in the Tender document. It added that the criteria were consistently, fairly and objectively applied to all bidders as clearly evidenced in both the Technical and financial evaluation summaries. The Procuring Entity cited Clause 1.3 of Addendum No.4 to the Tender Document, as well as Clauses 24.3 and 27.1 of the tender document which reads as follows;

Clause 1.3

"... ..The technical submissions for each bidder who has met all the mandatory requirements shall be evaluated as follows... .."

Clause 24.3

"Subject to item 11,24 and 29, KPC will award the contract to the successful tenderer whose tender has been determined to be substantially responsive and has been determined to be the lowest evaluated tender, provided further that the tenderer is determined to be qualified to supply the equipment satisfactorily."

Based on the above, the Procuring Entity stated that the Applicant failed to fulfil one of the mandatory requirements as set out in the tender documents and it is for this reason that its bid could not proceed to the Financial Evaluation stage. The Procuring Entity emphasized that it acted lawfully, correctly and fairly in disqualifying the Applicant's bid the moment it came to its attention that the Applicant had not fulfilled a **mandatory** requirement of providing the Manufacturer's Authorisation Letter.

The Procuring Entity gave a chronology of events that led to its decision as follows:

1. *“On 8th October, it received a letter dated 24th September, 2010 from Ebara Corporation, Japan, notifying KPC of the termination of the Joint Venture Agreement and termination of the technical license agreement between Ebara Corporation and Hyosung Ebara Co. Ltd.*
2. *The contents of the said letter were duly noted by the Technical Evaluation Committee, but they did not make a decision at that point since their mandate was to evaluate the tenderers bids in accordance with the given criteria on technical evaluation, and this letter had been received after the preliminary evaluation had been carried out.*

3. *When the Tender Committee sat to ratify the minutes of the evaluation committee, they noted that the letter from Ebara Corporation had in effect withdrawn the Manufacturer's Authorization previously submitted by the Applicant herein (see page 28-33 of part 1 of the Applicant's technical tender).*
4. *It also became apparent to the Tender Committee that the Applicant no longer had the requisite legal capacity to enter into the contract as required by Section 3(1) (b) of the Public Procurement and disposal Act, 2005.*
5. *The tender committee then decided to disqualify the Applicant's bid after satisfying itself and confirming that indeed the letter was genuine and emanated from Ebara Corporation in Japan.*
6. *The tender committee had no alternative but to treat the Applicant's Tender as non-responsive in terms of Section 61(1) of the Public Procurement and Disposal Act, 2005 as read together with Regulation 48 of the Public Procurement and Disposal Regulations, 2006".*

The Procuring Entity submitted that any withdrawal, cancellation, or termination, whether express or implied, of any of the conditions set out in the letter of Authorization by the manufacturer was indeed a withdrawal of the letter of authorization and the Procuring Entity was bound to treat it as such.

The Procuring Entity further submitted that on 1st November, 2010, the Applicant, through its lawyers M/s Mbaluka & Company Advocates, wrote to it and attached a copy of a mutual termination agreement between the Applicant and Ebara Corporation Japan. The said mutual termination agreement was entered into by the parties on 30th July, 2010 and the effective date for termination was on 31/08/2010. It added that the said agreement did not form part of the Applicant's tender documents and so it did not and could not take it into account during the preliminary evaluation of 23rd September 2010. It argued that the Applicant, when initially informed of the letter of 26th September, 2010 by Ebara, did not deny the authenticity of the letter or its contents, but instead sent to it a copy of the mutual termination agreement thereby confirming the contents of the said letter and hence the Applicant is estopped from questioning the authenticity of a letter whose contents it has already confirmed through another document.

The Procuring Entity reiterated that the grace period of four months stated in the said Mutual Termination Agreement only related to royalties and other payments between Ebara Corporation and the Applicant herein; and therefore it did not change the substance of the termination. It stated that in the tender documents, it is clear that the project for which the tender was advertised was intended to be commenced and completed within a period of 12-18 months from commencement. It further argued that the alleged grace period that the Applicant was relying on would expire on 31st December, 2010 around the time the contract was expected to commence,

therefore raising serious doubts about the Applicant's ability to perform the contract as contemplated. The Procuring Entity stated that it relied on Section 31 of the Act in disqualifying the Applicant's bid.

The Procuring Entity reiterated that at the time the Applicant submitted its bid on 23rd September, 2010, it was aware that it had already signed a mutual agreement on termination of the Joint Venture Agreement and termination of the Technical License Agreement between Ebara Corporation and Hyosung Ebara Co. Ltd, which agreement took effect on 31st August, 2010. It added that as at September 2010, the Applicant would no longer be entitled to use the name 'Ebara' in its operations, yet it has continued to do so. It reiterated that the Applicant at the time of bidding did not inform it of the existence of the Termination Agreement. It added that the Applicant did not submit a Manufacturer's Authorization letter yet it was well aware that the Joint Venture Agreement would stand terminated as at 31st August, 2010, even before the tenders were opened. It added that the Applicant knew that the tender validity period was 120 days, and therefore there was a possibility that the grace period set out in the termination agreement would indeed expire even before the contract was signed, thus leaving the Procuring Entity exposed.

The Procuring Entity further submitted that from the foregoing, it had reasons to believe that the Applicant intended to mislead it into believing that it had a valid Manufacturer's Authorization letter and was therefore competent to bid for the tender. The Procuring Entity concluded that it

was therefore entitled to disqualify the Applicant not only for failure to satisfy a mandatory requirement, but also for attempting to conceal its qualifications.

The Board has carefully considered the submissions of the parties and the documents that were presented before it.

All the grounds raised herein relate to the manner in which the evaluation process was carried out and whether the subsequent disqualification of the Applicant's bid was done fairly and in accordance with the criteria set out in the tender documents.

The Board notes that the evaluation process was to be done in three stages namely preliminary, technical and financial.

The Board further notes that this tender closed/opened on 23rd September 2010. Upon opening of the tender, nine Bidders had submitted their bids. The Bidders were subjected to preliminary evaluation and all the bidders proceeded to technical evaluation stage.

Upon technical evaluation the technical evaluation committee made the following observations.

"The tender Committee is invited to note that Ebara Corporation has written a letter to KPC supposedly terminating their joint venture with Ms Hyosung Ebara Company Limited of Korea for supply of the

Mainline Model SPD VIIM as per the attached dated 24th September 2010 and received on 8th October 2010.”

It is common ground that the main dispute in this tender was triggered by the letter dated 24th September 2010 which was sent to the Procuring Entity after the opening of the tender. That letter stated as follows”

“DOC No. 183-R1009011

September 24, 2010 Tokyo Japan

To: M/s Kenya Pipeline Company Limited

Kenpipe Plaza, Sekondi Road Off Nanyuki Road

Industrial Area

P.O. Box 73442-00200 Nairobi, Kenya

Att. Mr. Selest N. Kilinga, Managing Director

Subject. Termination of Korean Joint venture Hyosung- Ebara Co. Ltd (HECO)

We are writing to inform you the termination of the captioned Joint Venture Agreement and the termination of technical License Agreement with Hyosung-Ebara C. ltd.

Joint Venture Termination

1. *The HECO share owned by EBARA Corporation has been totally sold to Hyosung Corporation on August 31, 2010. EBARA Corporation is no longer party of Korean Joint Venture Hyosung- Ebara Co., Ltd.*
2. *After the withdrawal of EBARA Corporation from the Joint Venture, former HECO will have a new trade name in which the word "EBARA" will be no longer part thereof. The new trade name of HECO shall be determined and officially announced before end September, 2010.*

Technical License Termination

3. *All the Technical License Agreements regarding custom pumps signed between EBARA Corporation and HECO have been simultaneously terminated on August 31, 2010.*
4. *All responsibilities of products offered, manufactured, sold and warranties made by HECO or former HECO will be fully taken by the former HECO. Support from EBARA will not be available.*
5. *The spot license of 250X200SPD7M was not given to HECO. Therefore, there is not any interchangeability of parts with existing EBARA pumps in M/s KPC.*

We apologize in advance for any inconvenience that this termination of joint venture and technical License may cause to you.

EBARA Corporation will maintain its best performance to maximally satisfy all customers, users and business partner. We look forward to always best serving you.

Yours truly

Hidenon Iwanaga

*General Manager
Customer Service International Department
EBARA CORPORATION."*

Upon receipt of the said letter the Procuring Entity wrote to the Applicant on 27th October in the following terms;

"SU/QT/349N/10

27TH October 2010

*Hyosung Ebara Co. Ltd
450, Gongduk-Dong
Mapo-Seoul 121-010
KOREA*

TEL: + 82 2-32798254

Attention: Graham Shaw

Dear Sir,

*RE: TENDER FOR SUPPLY INSTALLATION AND COMMISSIONING
OF MAILINE PUMPSETS LINE 1 THIRD PUMP*

*We refer to the above tender and to your letter dated 26th October 2010.
Please note that one of the mandatory requirements in the tender was a
manufacturer's authorization letter.*

On 24th September 2010, we received a letter from Ebara Corporation advising KPC of termination of the Joint venture with Hyosung Ebara Co. Ltd for the supply of mainline pump model SPD VIM, (See attached). Under the circumstances, this implies withdrawal of Manufacture's authorisation to the bid.

Please be advised accordingly

Yours faithfully

SELEST N. KILINDA
MANAGING DIRECTOR
Attachment

Copy to Mr. J.O. Juma
Ag. Interim Director General
Public Procurement Oversight Authority
NAIROBI"

The Applicant replied to the letter on 1st November 2010 through its Advocates, Mbaluka & Company Advocates. Its letters states as follows;

"YOUR REF: T.B.A
November, 2010

OUR REF: SU/QT/349/10

DATED: 1st

*The Managing Director
Kenya Pipeline Company Limited
Ken Pipe Plaza
Sekondi Road
Off Nanyuki Road
Industrial Area
NAIROBI*

Dear Sir,

**RE: TENDER FRO SUPPLY INSTALLATION AND COMMISIONING
MAILINE PUMPSETS LINE 1 THIRD PUMP**

We act for HYOSUNG Ebara Company Limited who have placed your letter of 27th October, 2010 in our hands with instructions to address you as hereunder.

We advise that the purported explanation that our Client did not comply with the mandatory requirements of a Manufacturer's authorization letter is not tenable, acceptable or genuine for there is a mutual termination agreement between our client and Ebara Corporation dated 30th July, 2010 which agreement clearly stipulates that the agreement has a grace period of 4 months after which the agreement will become effective. This is at 30th December, 2010 and therefore cannot be cited as an excuse or impediment to a tender award or positive evaluation or consideration. A copy of the agreement is attached for your records.

We further put you on notice that you attempt to disqualify or block our client in this line is unlawful, unsubstantiated and unsustainable in law

and unless you stop the tender award process or re-advertise afresh then we shall proceed to institute the appropriate legal action to vindicate, protect and assert our Clients lawful rights you will note that your initial letter on 26th October, 2010 did not mention any letter from Ebara Japan it only stated that our Client's Technical Mark was not sufficient.

PLEASE NOTE that our client is perfectly entitled to having the final Technical mark report of evaluation and the financial bid opened. We trust that you shall reconsider your position immediately to avoid unnecessary litigation for vindicating and protecting our Client's interests.

Yours faithfully,

MBALUK & CO. ADVOCATES

Joel Mbaluk

ADVOCATE

Encl

CC The Director General

Public Procurement oversight Authority

NAIROBI

The Board notes at this juncture that the termination agreement was forwarded to the Procuring Entity by the Applicant through its Advocates letter dated 1st November 2010. The other relevant fact on the issues is contained at Page 26 of the Applicant's tender documents. The Applicant stated as follows:

***"TENDER FOR THE SUPPLY AND COMMISSIONING OF MAINLINE
PUMPSETS***

SU/QT/349N/10

HYOSUNG AGREEMENT WITH EBARA JAPAN

- ***JOINT VENTURE AGREEMENT BETWEEN HYOSUNG -EBARA & EBARA CORPORATION JAPAN - 8TH NOVEMBER 1994***
- ***LISCENCE AGREEMENT BETWEEN EBARA CORPORATION JAPAN & HYOSUNG - EBARA CORPORATION LTD - 29TH SEPTEMBER 2001"***

Finally, on the issue of the relevant facts, the Board notes that upon receipt of the letter dated 24th September, 2010, the Procuring Entity Tender Committee disqualified the Applicants bid and its financial proposal was returned. It is therefore clear that the Applicant's disqualification in this tender was on the basis of the termination of the joint venture agreement between it and Ebara Corporation. The other issue that arises from the termination is whether the Applicant had provided the Manufacturer's Authorization Form duly filled as required. Before dealing with these issues, the Board highlights the following facts;

- i) This tender closed/opened on 23rd September 2010.
- ii) The tender validity period was 120 days and this means the award of the tender had to be done on or before 22nd January 2011.
- iii) The mutual termination agreement between the Applicant and Ebara Corporation was signed on 30th July 2010. Article 1 at paragraph 2 thereof provided for a grace period of four (4)

months with effect from 1st August 2010, therefore, the grace period was to expire on 1st December 2010.

It is therefore not in dispute that when the Applicant submitted its bid whose closing/opening date was 23rd September 2010, it was already aware that it had entered into a mutual termination agreement with Ebara Corporation. The Board notes that at page 28 of the Applicant's Technical Bid it included a part of the Joint Venture Agreement dated 8th November, 1994 and an addendum dated 29th September, 2002 and the license issued pursuant to that agreement. It is noteworthy that the Applicant did not include the mutual termination agreement in its bid document. Clearly, this was meant to mislead the Procuring Entity. This is contrary to the provisions of Section 31 (5) which provides as follows;

"The Procuring Entity may disqualify a person for submitting false inaccurate or incomplete information about his qualification"

At the hearing, the Applicant submitted that the venture agreement was not relevant as it was not quoting for a pump issued by Ebara Corporation. That argument is clearly an afterthought on three grounds as follows;

- i) The Board notes that the Joint Venture Agreement and the license that was issued pursuant to the joint venture was included as part of the Applicant's Technical Proposal. This was to be used during the evaluation process. The Applicant deliberately failed to disclose that

the joint venture had been mutually terminated and that the grace period was expiring on 1st December 2010.

ii) The letter by Mbaluka & Company Advocates dated 1st November 2010 to the Procuring Entity stated at paragraph 2 as follows;

"We further put you on notice that you attempt to disqualify or block our client in this line is unlawful, unsubstantiated and unsustainable in law and unless you stop the tender award process or re-advertise afresh then we shall proceed to institute the appropriate legal action to vindicate, protect and assert our Clients lawful rights you will note that your initial letter on 26th October, 2010 did not mention any letter from Ebara Japan it only stated that our Client's Technical Mark was not sufficient."

It is clear from the content of the said letter that the joint venture had been given as part of the technical proposal and was to be used in the evaluation. If the joint venture was not relevant the said letter would have stated so.

iii) The grace period provided in the Joint Venture Agreement was to expire on 1st December 2010 whereas the tender validity period is to expire on 22nd January 2011. Therefore, even if the Procuring Entity was to consider the grace period, this could not assist the Applicant as it was expiring before the tender validity period.

In view of the foregoing facts, the Board finds that the Applicant concealed material fact and/or provided inaccurate or incomplete information about its qualifications. The Applicant therefore ought to have been disqualified at the preliminary evaluation stage. The Board further notes that the Technical Evaluation Committee referred this issue to the Tender Committee. Although it ought to have dealt with the issue, the Board finds that the fact that the Technical Evaluation Committee allowed the Applicant to proceed to the technical evaluation stage cannot invalidate this serious anomaly on its bid. Further the fact that the Procuring Entity relied on the letter dated 24th September 2010 does not mean that the tender process was flawed. The Applicant was notified about the letter dated 24th September 2010 and it confirmed that indeed that was the true position through its Advocate's letter dated 21st November 2010.

The next issue that arises for determination is whether the Applicant complied with clause 4 Section A of the tender documents which provided as follows;

“Mandatory requirements are as shown below (These must be placed in a separate envelope marked “Mandatory Requirements”)

- ***Certificate of Incorporation of the company***
- ***Manufacturer's Authorization Form duly filled***
- ***Tender security of Kshs. 300,000.00 or equivalent in foreign currency***
- ***Valid KRA tax compliance certificate***
- ***Certificate of Tenderers Site Visit”***

The Board notes that one of the mandatory requirements was that the bidder had to provide the Manufacturer's Authorization letter in the format given in form SJ in Section J which provided as follows;

"SECTION J: Manufacturer's Authorization For

To *Kenya Pipeline Company Limited*

Ken Pipe Plaza

Sekondi Road, Off Nanyuki Road

Industrial Area

P.O. Box 73442-00200

NAIROBI

WHEREAS... ..[*name of the manufacturer*]
who are established and reputable manufacturers
of... ..[*name and/or description of the goods*] *having*
factories at... ..[*address of the factory*] *do hereby*
authorize... ..[*name and address of Agent*] *to submit a*
tender, and subsequently negotiate and sign the Contract with you
against tender No... ..[*reference of the Tender*] *for*
the above goods manufactured by us.

We hereby extend our full guarantee and warranty as per the General
Conditions of Contract for the goods offered for supply by the above
firm against this Invitation for the Tenderers.

[Signature for and on behalf of manufacturer]

Note: this letter of authority should be on the letterhead of the Manufacturer and should be signed by a person competent"

The Board notes that the Applicant provided an Authorization Letter dated 24th August, 2010 in the following format;

HYOSUNG EBARA CO., LTD

Aug. 24, 2010

To: KENYA PIPELINE COMPANY

Subject: Supply and Commission Mainline Pumpsets

Authorization Letter

We, Hyosung Ebara Co., Ltd are pleased to announce with immediate effect the appointment of the below mentioned company with details as follows:

Unitech Industrial Agencies Ltd.

Ramco Court B. 13 Mombasa Road,

Nairobi - 00507, Kenya

Tel: +254 (20) 604846/7 Fax: + 254 (20) 606331

Email: sunil V. Pandya, Director - Mobile: + 254 720430680

as our exclusive representative for supplying the related Hyosung Ebara's Centrifugal Pumps to the captioned job.

With this letter, Unitech Industrial Agencies Ltd, has the rights to act on our behalf to promote our products, respond to inquiries, provide technical support, execute sales, negotiate and sign contracts for this job.

Yours faithfully,

Sincerely

*Byung - ki, Lee/ Deputy General Manager
Global Business Team III"*

It is clear from the said documents that;

- i) The Applicant did not supply the required Manufacturer's Authorization letter as stipulated in the Tender Documents. Therefore, the Applicant's bid should have been disqualified at the Preliminary Evaluation Stage.
- ii) The purported letter of authorization is issued to M/s Unitech Industrial Agencies Ltd as a duly appointed agent.
- iii) At the hearing, the Applicant stated that it was not providing a pump under the Ebara Corporation license but its own pump and it did give the

model of the pump that it intended to supply. It therefore argued that it was not necessary for it to provide a Manufacturer's Authorization Form. This argument is not supported by the Applicant's tender documents. If the Applicant was a manufacturer it would have included all the relevant supporting documents in the tender. Such documents would have been considered in the Preliminary and technical evaluation. As the Board has already noted, the Applicant, included a Joint Venture Agreement with Ebara Corporation which had been terminated by mutual consent by an agreement dated 30th July 2010 but failed to include the termination agreement in its bid.

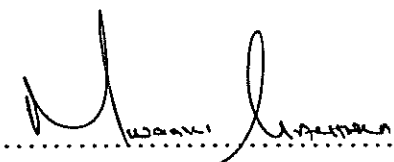
Taking all the above facts into consideration, the Board finds that all the Bidders were subjected to the same evaluation process based on criteria that were set out in the Tender Documents. Therefore, the argument by the Applicant that it was treated unfairly and unprocedurally on criteria that was not in the Tender Documents has no merit. The Applicant has no one to blame but itself for including incomplete and inaccurate information in the tender, and it cannot complain due to the fact that the information was brought to the attention of the Procuring Entity. The Board notes that this is a tender for supply, installation and commissioning of mainline pump and the technical competence of the bidders was paramount.

Taking into account all the above, all the grounds fail and the Request for Review is hereby dismissed.

As for the costs, the Board holds that each party bears its own cost.

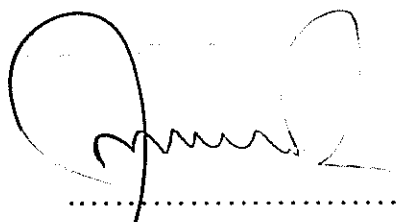
Pursuant to Section 98 of the Act, the Board directs that the Procuring process may proceed.

Delivered on this 29th day of November, 2010



A handwritten signature in black ink, appearing to be 'M. L. ...', written over a horizontal dotted line.

Chairman, PPARB



A handwritten signature in black ink, appearing to be 'J. ...', written over a horizontal dotted line.

Secretary, PPARB

