

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO.2 /2010 OF 12<sup>TH</sup> JANUARY, 2010

BETWEEN

ZHONGMAN PETROLEUM &

NATURAL GAS GROUP .....APPLICANT

AND

KENYA ELECTRICITY GENERATING CO. LTD..... PROCURING ENTITY

Reviews against the decision of the Tender Committee of Kenya Electricity Generating Co. Ltd dated the 10<sup>th</sup> December, 2010 in the matter of Tender No.OLK-150 for Supply of Two New 1500HP DC Electric Land Rigs and Associated Equipment

**BOARD MEMBERS PRESENT**

Mr. P. M. Gachoka	-	Chairman
Ms. Judith Guserwa	-	Member
Amb. Charles Amira	-	Member
Mr. Joshua Wambua	-	Member
Ms. Natasha Mutai	-	Member

**IN ATTENDANCE**

Mr. P. M. Wangai	-	Holding Brief for Secretary
Ms. Kerina A. Rota	-	Secretariat

**PRESENT BY INVITATION FOR APPLICATION NO.7/2010**

**Applicant, Zhongman Petroleum & Natural Gas Group Co. Ltd**

- |                       |   |                                   |
|-----------------------|---|-----------------------------------|
| Ms. Kethi. O. Kilonzo | - | Advocate, Kilonzo & Co. Advocates |
| Ms. Wambui Chege      | - | Lawyer, Kilonzo & Co. Advocates   |
| Dr. S. Patel          | - | Local Representative              |
| Mrs. S. Patel         | - | Consultant                        |
| Mr. N. Ogutu          | - | Local Administrative Manager      |

**Procuring Entity, Kenya Power & Lighting Co. Ltd**

- |                      |   |   |
|----------------------|---|---|
| Mr. Kiragu Kimani    | - | Advocate, Hamilton Harrison & Mathews Advocates |
| Mr. Michi Kirimi     | - | Advocate, Hamilton Harrison & Mathews Advocates |
| Mr. Amol Hanningtone | - | Lawyer, Hamilton Harrison & Mathews Advocates   |
| Mr. Dennis Onwonga   | - | Legal Manager                                   |
| Ms. Eunice Kirimi    | - | Lawyer  |

**Interested Candidate, Shengli Oil Highland Petroleum Equipment Ltd**

- |                     |   |          |
|---------------------|---|----------|
| Mr. Kingori Kariuki | - | Advocate |
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## **BOARD'S RULING**

This Request for Review was listed for hearing today, 4<sup>th</sup> May, 2010 pursuant to the High Court order given on 18<sup>th</sup> March 2010 in **High Court Misc Application No. 53 of 2009 Republic -vs- The Public Procurement Administration Review Board & others Ex-parte Zhongman Petroleum & Natural Gas Group Company Limited.**

At the commencement of the hearing, Mr. Kimani for the Procuring Entity applied for an adjournment on the ground that there is a pending application **No. 63 of 2010** (UR 43/2010) in the Court of Appeal arising from the decision of the High Court aforementioned. He stated that the said application as been certified urgent and is fixed for hearing on 27<sup>th</sup> May, 2010.

Mr. Kimani urged the Board to adjourn the hearing of this Request for Review to a date after the 27<sup>th</sup> of May, 2010. He stated that if the Request For Review was argued and determined before the application in the Court of Appeal is heard and determined, it will render the hearing of that Application a mere academic exercise. He pointed out that the Applicant will not suffer any prejudice as the implementation of the project had been stopped as ordered by the High Court.

Finally, Mr. Kimani stated that the Board should mention the matter soon after 27<sup>th</sup> of May, 2010 so that the parties can update the Board on the outcome of the Application in the Court of Appeal.

Mr. Kingori for Successful Candidate supported the submissions of the Procuring Entity. He urged the Board to adjourn the hearing of the Request for Review as the pending Application in the Court of Appeal raises serious issues of law.

Ms. Kethi Kilonzo for the Applicant opposed the application for adjournment on the following grounds:-

- (i) There is no order for stay stopping the Board from hearing the Request for Review. On the contrary, the order of the High Court is clear that the Board should hear the Request for Review on merit.
- (ii) If the Board adjourned the hearing it would be in contempt as it will be acting against the directions of the High Court.
- (iii) Section 97 (1) of the Public Procurement and Disposal Act, 2005 requires the Board to complete the hearing within thirty days after receiving the Request for Review. She stated that the Board ought to hear and determine the Request for Review within thirty days from 6<sup>th</sup> April 2010 when the High Court order was served on the Board.

- (iv) Section 97(11) of the Act states that no review under the Act shall stay or delay the procurement process beyond the time stipulated in the Act or the Regulations.

In conclusion Ms. Kilonzo urged the Board to reject the application for adjournment and hear the Request for Review on merit.

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

The Board notes that this Request for Review was fixed for hearing on 4<sup>th</sup> February, 2010. At the commencement of the hearing, the Procuring Entity raised a preliminary objection that the Request for Review was filed out of time. The Board upheld the preliminary objection and dismissed the Request for Review. Being dissatisfied with the decision of the Board, the Applicant filed **High Court Misc 53 of 2010**. The High Court quashed the Board's decision by its Judgment dated 18<sup>th</sup> March 2010 and ordered the Board to hear the Request for Review on merit.

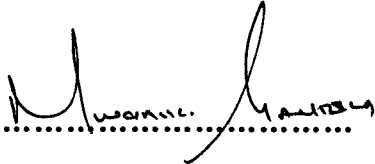
The Order of the High Court was served on the Board by the Applicant's advocate vide their letter dated 6<sup>th</sup> April 2010. The Board then fixed the Request for Review for hearing on 4<sup>th</sup> May, 2010.

Upon careful consideration of the parties' submissions the Board agrees with Ms. Kilonzo for the Applicant that there is no order for stay of the hearing of this Request for Review. However, the Board's attention has been drawn to the pending Application in the Court of Appeal. The Board notes that the Application relates to the tender which is the subject for this Request for Review. The Board further notes that if it proceeds with the hearing and determination of the Request for Review before 27<sup>th</sup> May, 2010 it shall render that Application in the Court of Appeal an academic exercise as the Board may annul or uphold the tender in question. There is also a possibility of two conflicting decisions on the same tender. Bearing this in mind, and in the interest of justice, the Board holds that this Request for Review should be adjourned to a date after the 27<sup>th</sup> of May, 2010.

The Board observes, that if the Procuring Entity is not successful in the Court of Appeal the parties will proceed with the hearing of this Request for Review on merits. The Board notes that no party will suffer Prejudice by this adjournment as the implementation of the tender has been put on hold pending the determination of this Request for Review. The Board further observes that Section 97 of the Act is now not applicable as the thirty days contemplated by that section has since expired.

In view of the foregoing, the Board orders that this Request for Review be adjourned to 31<sup>st</sup> May, 2010 at 2.30 p.m. for further directions. The Procuring Entity shall pay the adjournment fee for Kshs. 5,000 within seven days from the date hereof.

**Dated at Nairobi on this 4<sup>th</sup> day of May, 2010**



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**CHAIRMAN, PPARB**



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**SECRETARY, PPARB**

