

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

REVIEW NO. 16/2012 OF 23<sup>RD</sup> APRIL, 2012

BETWEEN

LINDSCAN ADVANCED & TANK

SERVICES.....APPLICANT

AND

KENYA PIPELINE COMPANY

LIMITED.....PROCURING ENTITY

Review against the decision of the Tender Committee of the Kenya Pipeline Company Limited in the matter of Tender No. SU/QT/457N for Inline Inspection of Nairobi- Eldoret, Sinendet- Kisumu Multiproduct Pipeline.

**BOARD MEMBERS PRESENT**

Mr. P.M. Gachoka - Chairman

Mr. Sospeter Kioko - Member

Amb. Charles Amira - Member

Eng. Christine Ogut - Member

Ms. Loise Ruhiu - Member

## **IN ATTENDANCE**

Mr. C.R Amoth - Secretary  
Mrs. Maurine Kinyundo - Secretariat  
Mr. L. Otieno - Secretariat

## **PRESENT BY INVITATION**

### **Applicant, Lin Scan Advanced & Tank Services**

Mr. Muthomi Thiankolu - Advocate, Muthomi & Karanja Advocates  
Mr. Samuel Karanja - Advocate, Muthomi & Karanja Advocates  
Dr. Rahim Dokht - Representative, Lin Scan

### **Procuring Entity, Kenya Pipeline Company Limited**

Mr. Fidelis Muli - Chief Engineer,  
Mrs. Josephine Karambu - Procurement Officer  
Mrs. Gloria Khafafa - Senior Legal Officer  
Mr. M. Gitobu - Procurement Manager  
Mr. C. Kitui - GT

## **Interested Candidates**

Mrs. Elizabeth Rogo - Business Development Manager, Weatherford

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Mr. Sean Wilcock - Country Manager, Weatherford

Mr. George Nganga - Advocate, NDT Middle East

Mr. Martin Munyu - Advocate, Halliburton International

## **BACKGROUND OF AWARD.**

The Kenya Pipeline Company Limited invited tenders for the in-line inspection of Nairobi-Eldoret, Sinendet- Kisumu Multi-Product pipeline. The invitation was by way of an advert placed on the Daily Nation and The Star Newspapers of 10<sup>th</sup> October, 2011.

## **Closing/ Opening**

As at the time of tender opening on 10<sup>th</sup> November, 2011 seven firms had returned their bids for Tender No. SU/QT/457N/11-Tender for the In-line Inspection of the Nairobi-Eldoret, Sinendet- Kisumu Multi-Product Pipeline.

The seven firms that had returned their bids are as follows;

- a. Lin Scan Advanced Pipelines and Tanks Services
- b. NDT Middle East F.Z.E
- c. Halliburton International, Inc.

- d. Rosen Europe B.V Inspection Technologies
- e. Pipeline Performance Technologies
- f. Weatherford Pipeline & Specialty Services
- g. T.D Williamson (UK).

## **EVALUATION**

The tenders were evaluated into three stages using the criteria provided for in the tender documents. The three stages were;

- Preliminary evaluation where all bids were assessed against the mandatory requirements. Any firm that did not satisfy the mandatory requirement had their bid rejected;
- Technical evaluation where bidders were evaluated against the following criteria;
  - Past experience in similar works
  - Technical proposal
  - Program of work
  - Key personnel and their qualification
  - Financial capability

## **Preliminary Evaluation**

A preliminary evaluation was done to confirm that the bidders have met the mandatory requirements as stipulated in the advertisement and in the instructions to tenderers. The results of that evaluation are as shown in the table below;

## **Technical Evaluation**

Bidders who qualified at the preliminary stage of evaluation were further subjected to technical evaluation. Evaluation here was done based on the following criteria;

- Past experience in similar works
- Technical proposal
- Program of work
- Key personnel and their qualification
- Financial capability

The table below shows the results of the preliminary evaluation;

**TABLE A- Preliminary evaluation**

N O.	COMPANY	SEPARATE TECHNICAL & FINANCIAL BIDS	VALID KRA TAX COMPLIANCE	CERTIFICATE OF INCORPORATION	TENDER SECURITY  USD 12,500.00	COMMITTEE'S CONCLUSION
1	Lin Scan	YES	N/A	526457	YES	ACCEPTABLE
2	NDT Middle East FZE	YES	34415/77807	YES	YES	ACCEPTABLE
3	Rosen Europe B.V.	YES	N/A	YES	YES	ACCEPTABLE
4	Weatherford	YES	2521961	YES	YES	ACCEPTABLE
5	Halliburton	NO	N/A	YES	YES	DIQUALIFIED
6	T.D Williamson (UK) LTD	YES	N/A	NOT PROVIDED	YES	DIQUALIFIED
7	Pipeline Performance Technologies	YES	YES	YES	YES	DIQUALIFIED

**NOTES:**

1. Tax compliance for local bidders was considered mandatory.
2. Halliburton International Inc. did not provide separate technical and financial bids.

3. Performance Pipeline Technologies disclosed bid sums in the foreign currency form.

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4. T.D Williamson (UK) Ltd had the following omissions and commissions:
  - a. Disclosed bid sum in the form tender.
  - b. Their tender security expired on 30<sup>th</sup> November 2011.
  - c. Did not provide a copy of their Certificate of Incorporation.

Thus T.D Williamson (UK) Ltd, Halliburton International Inc. and Pipeline Performance Technologies bids were not considered further as per clause 17.2 in part 1 of the Tender document and in line with Regulation 47 of the Procurement and Disposal Act, 2005.

### **Technical Evaluation**

Bidders who qualified at the preliminary evaluation were further subjected to technical evaluation based on the criteria provided in the tender document. The table below shows a summary of the results of the Technical Evaluation.

**TABLE B-Technical Evaluation**

	<b>Evaluation criteria</b>	<b>Max Score</b>	<b>Rosen</b>	<b>Weatherford</b>	<b>NDT</b>	<b>Lin Scan</b>
<b>A</b>	Past experience in similar works	15	10.50	14.50	15.00	15.00
<b>B</b>	Technical proposal	40	28.75	31.00	39.00	31.88
<b>C</b>	Key personnel	35	14.375	6.625	32.50	16.00
<b>D</b>	Program of works	5	5.00	2.50	5.00	2.50
<b>e</b>	Financial capability	5	5.00	5.00	5.00	5.00
<b>Total</b>	<b>100</b>	<b>63.625</b>	<b>59.625</b>	<b>96.50</b>	<b>70.38</b>	

**Observations**

From the scores tallied in the summary table above,

- i. **NDT Middle East FZE and Lin Scan Advanced Pipeline & Tank Services** have attained a score **higher** than the minimum requirement of 70 points.
- ii. **Rosen Europe B.V.** stated that liability of re-run and standby costs shall apply. This contravenes a number of Clauses in the tender document; and in particular Clause 14, and 23 in Part 1 and therefore does not qualify besides attaining less than 70% score.



iii. **Weatherford Pipeline and Speciality Services** proposes KPC to launch and receive caliper tool; this contravenes a number of Clauses in the tender document; and in particular Clause 14, and 23 in Part 1 and therefore does not qualify besides attaining less than 70% score.

**Financial Evaluation**

Bidders who qualified at the technical evaluation stage were further subjected to the financial evaluation in accordance with the criteria provided in the tender document.

Each of the two financial bids was scrutinized and the findings are as detailed in the table below;

**TABLE C(i)-Financial Evaluation**

No.	Bidder	Key findings
1.	Lin Scan	<p>i. Submitted the Form of Tender;an abindance date error was noted</p> <p>ii. schedule 1 to conditions of contract not submitted</p> <p>iii.The schedule of prices submitted duly filled in Ink</p> <p>iv.Quoted for all items as listed in the tender documents, except for A5(any other preliminary item included in A1 to A4) and the optional item B4</p> <p>v.Quoted for all items as lump sum inclusive of all taxes, as stated in Bidder's Form of Tender</p>

		<p>vi. Price validity 120 days from date of closing date of the tender (in the forwarding letter)</p> <p>vii. Original Tender Security not included in the financial bid</p>
2.	<p>NDT Middle East</p>	<p>i. Submitted the Form of Tender</p> <p>ii. Schedule 1 to conditions of contract submitted</p> <p>iii. The schedule of prices submitted duly filled in Ink</p> <p>iv. Quoted for all items as listed in the tender documents, including A5 (any other preliminary item not included in A1 to A4) and the optional Item, B4</p> <p>v. Quoted for all items as lump sum, as stated in Bidder's Form of Tender</p> <p>vi. Price validity until 30<sup>th</sup> April, 2012</p> <p>vii. Original Tender Security included in the financial bid.</p>

## Arithmetic Errors

### a.) Lin Scan

No errors noted

**b.) NDT**

No errors noted

**Evaluated bid prices**

For comparison purposes, cost for preliminary works and measured works were added and the results are tabulated in Table C(2) below;

**TABLE C(2)-Financial Evaluation.**

	In USD, Unless stated	Lin Scan	NDT
Item	Item Description	Sub Total	Sub Total
G	Preliminary Items in A	114,970.00	240,000.00
M	Total for Item 'B1-B9	606,080.00	1,545,000
T	<i>Total for Item 'G + M'</i>	721,050.00	1,785,000.00
P	Allow for provisional sum of USD 200,000.00	200,000.00	200,000.00
	<b>Total for Item 'T+P'</b>	<b>921,050.00</b>	<b>1,985,000.00</b>

## Financial Scores

The financial scores were determined in accordance with Clause 34.2 of the Tender Document.

$$\text{Financial Scores} = \frac{\text{Lowest Financial Bid}}{\text{Financial Bid of Firm Under consideration}} \times 100$$

Financial Bid of Firm Under consideration

**Table C(3) -Financial Results**

NO	Name of Bidder	Bid Amount(USD)	Financial Score,%
1	Lin Scan	721,050.00	100.00
2	NDT Middle East	1,785,000.00	40.39

The amounts exclude the provisional sum as per **Part 1 Clause 26.2(b)**

**Table C(4) - Combined Evaluation Results**

		B	B	C=A+B
No	Name of Bidder	Weighted Technical score	Weighted Financial score	Combined score
1	Lin Scan	$70.38 \times 0.8 = 56.30$	$100.00 \times 0.2 = 20.00$	76.30
2	NDT Middle East	$96.50 \times 0.8 = 77.20$	$40.39 \times 0.2 = 8.08$	85.28

**Table C (5)- Ranking**

<b>No.</b>	<b>Name of Bidder</b>	<b>Combined Score</b>	<b>Ranking</b>
1	Lin Scan	76.30	2
2	NDT Middle East	85.28	1

**Conclusion**

**Lin Scan**

This bidder did **not conform** to all the terms, conditions and specifications of the tender document. Therefore Lin Scan's financial bid was considered **non-responsive**.

**NDT**

This bidder conformed to all the terms, conditions and specifications of the tender document without material deviation or reservation. Therefore NDT financial bid was considered responsive.

## **RECOMMENDATIONS**

The financial evaluation committee upon evaluation of the two bids recommended that M/s NDT Middle East be considered for award of the tender for Inline Inspection of Nairobi- Eldoret, Sinendet- Kisumu Multiproduct Pipeline at a total cost of USD. 1, 985, 000.00 inclusive of all applicable taxes with the provisional sum of USD 200,000.00 to be spent on approval of the Engineer for remedial measures to allow continued operation of the line at the original design pressure.

## **TENDER COMMITTEE DECISION**

The Tender Committee in its meeting No. TCM 18-2011/2012 held on 3<sup>rd</sup> April, 2012 adopted the recommendations of the Evaluation Committee and approved the award of Tender No. SU/QT/457N/11 for Inline Inspection of Nairobi- Eldoret, Sinendet- Kisumu Multiproduct Pipeline to M/s NDT Middle East at a total cost of USD. 1,985,000.00 inclusive of all applicable taxes with the provisional sum of USD 200,000.00 to be spent on approval of the Engineer for remedial measures.

## **THE REVIEW**

The Applicant Lin Scan Advanced Pipeline & Tank Services lodged this Request for Review on 23<sup>rd</sup> April, 2012 against the decision of the Tender Committee of Kenya Pipeline Company Limited in the matter of Tender No. SU/QT/457N for Inline Inspection of Nairobi-Eldoret, Sinendet-Kisumu Multiproduct Pipeline.

The Applicant requests the Board for the following orders;

- (a) the Decision of the Procuring Entity is hereby annulled;
- (b) the Procuring Entity is hereby directed to award the Tender to the Applicant;
- (c) alternatively, and without prejudice to prayers (a) and (b) above—
  - (ii) the Procuring Entity is hereby ordered to re-evaluate the tenders; or
  - (iii) the tender proceedings are hereby annulled in their entirety;
- (d) a declaration that the purported successful bidder was ineligible to participate in the Tender or to be awarded the contract;
- (e) the costs of and incidental to this Request for Review; and
- (f) such other, further or incidental orders and/or directions as the Honourable Board shall deem just and expedient.

The Board deals with the four grounds of review as follows:-

**GROUND 1,2AND 3- Breach of Sections 2, 31 and 66 of the Act and Article 227 of the Constitution of Kenya 2010.**

These grounds have been consolidated as they raise similar issues on the evaluation and qualification method used by the Procuring Entity in

awarding the subject tender.

The Applicant alleged that the Procuring Entity breached Sections 2 and 31 of the Public Procurement and Disposal Act (herein after referred to as the Act) and Article 227 of the constitution of Kenya 2010 by awarding the tender to a bidder which was a subsidiary of a company undergoing insolvency proceedings at the time of the tender award. In Support of the allegation, the Applicant presented to the Board a press release it had downloaded from the internet dated 27<sup>th</sup> December 2011 which read in part as follows;

*“it’s almost business as usual at NDT Systems Services ...even after the company had to file for the commencement of insolvency proceedings on December 23<sup>rd</sup> after talks with the financing banks fell through, we will now continue the company’s restructuring during the insolvency proceedings...The new headquarters in Stutensee houses approximately 210 employees. Another 290 people work in operating companies and offices in Argentina, Dubai, the UK, Canada, Mexico and the United States.”*

It alleged that the following matters are notable from the said press release, that;

- a. The purported successful bidder’s head office has filed for bankruptcy proceedings in Germany;
- b. financing banks have refused to come to the aid of the



purported successful bidder's head office; and

- c. the purported successful bidder's head office considers its subsidiaries as part of the same company and that it indeed refers to them as "operating companies."

The applicant relied on Section 65(5)(c) and 106 (b) of the evidence Act to support the admissibility of the information on insolvency as downloaded from the internet.

The Applicant submitted that, Section 31 (c) of the Act prohibits a Procuring Entity from awarding a tender to a bidder who is insolvent. Further, the Applicant submitted that Clauses 27.2 and 34.3 of the tender Documents were clear that the award of the tender was to be made to the tender who was substantially responsive and had offered the lowest tender price subject to possessing the *capacity* and *resources* to effectively carry out the contract works. It stated that, under Clause 34.3 of the tender documents, the Procuring Entity was under obligation to confirm if the tenderers were qualified to be awarded the contract and therefore argued that the Procuring Entity failed by not establishing that the alleged successful bidder could not qualify on account of the fact that it was facing insolvency proceedings as at the date of the purported award of the contract.

With regard to the breach of Section 66 of the Act, the Applicant submitted as follows:-

- a. The tender evaluation criteria forbid the awarding of a contract to a bidder who is undergoing bankruptcy or insolvency proceedings.
- b. the evaluation criteria only accorded 20% marks for the financial bid yet the Act requires the criteria to –
  - i. be objective and quantifiable; and
  - ii. Take sufficient account of price and technical parameters rather than being lopsided in favour of either.

It therefore submitted that the Criteria used could not meet the threshold of the requirements of the Act as set out under Section 66.

It stated that in view of the price difference between the two bids that went to financial evaluation, the purported successful bidder could not possibly have had the lowest evaluated price if the requirements set out in (b) above were truly adhered to.

The Applicant further stated that Section 66 of the Act regulates the evaluation and award of tenders and requires, among other things, that:-

- a.) The evaluation of tenders be done strictly in accordance with the criteria set out in the tender documents;

- b.) Tender evaluation criteria are objective and quantifiable;
- c.) Tender evaluation criteria should be expressed so as to take into consideration price, quality and service for the purpose of the evaluation ;and finally,
- d.)The award of a tender is made to the bidder with the lowest evaluated price.

The Applicant argued that the Procuring Entity, in carrying out the evaluation, acted in complete disregard of the above requirements and therefore breached the express provisions of Section 66 of the Act.

Finally, the Applicant argued that its bid, having passed the technical evaluation stage, and being lower than the successful bidder in price ought to have emerged the winner in the instant tender. It urged the Board to allow the Request for Review and grant it the prayers as sought.

In response, the Procuring Entity denied breaching Sections 31 and 66 of the Act and Article 227 of the constitution of Kenya 2010 as read together with Clauses 1.2, 1.4, and 27.2 and 34 of the tender document. It stated that-

- a. That Clause 34 (4) (e) of the Tender document called for the submission of audited accounts from each bidder which were used in the evaluation of the bids for determination of the bidders' financial position.
- b. That in addition to all the foregoing, the winning bidder provided an

acceptable and valid tender security as required by Clause 13 of the Tender Document, thus buttressing their assertion that they were financially capable of performing the service for which they had tendered; and

- c. That the conditions of contract required the winning tenderer to submit a performance Bank Guarantee from an acceptable institution. It submitted that there had been no breach of this condition that would raise the inference that the winning bidder was incapable of performing the contract as tendered for.

The Procuring Entity submitted that the allegation by the Applicant that the successful bidder was facing insolvency proceedings were baseless and unfounded as they were not backed by any cogent and/or substantial evidence. It took issue with the source and authenticity of the information, given that the same was downloaded from the internet which cannot be relied on. It nevertheless referred the Board to the same press release dated 27<sup>th</sup> December, 2011 which stated at page of 1 of 3 thereof that;

***"...the NDT companies in Argentina, Dubai, Canada, Mexico and the US are all legally independent and not part of the insolvency proceedings and will continue their normal operations."***

From the above extract, the Procuring Entity argued that although the source of the information could not legally hold, it was clear that, from the applicants own documents that the successful bidder, being NDT Middle

East FZE and based in Dubai was not affected by the purported insolvency proceedings.

With regard to the breach of Section 66 of the Act, the Procuring Entity averred that it was bound by law to evaluate and compare the tenders using the criteria as set out in the Tender Document. It submitted that the nature of the contract was that it was highly technical and that, for the same reasons, it had intentionally given more consideration in the weighting to the technical aspects as compared to the Financial. It submitted that the Applicant participated in the said tender with clear understanding of the weightings as provided for in the Tender Document and therefore cannot complain after being declared unsuccessful. Further, it submitted that the action by the Applicant on this matter was clearly an afterthought.

The Procuring Entity further submitted that the tender was designed to ensure maximum efficiency and economy by setting criteria that ensured that the successful bidder would possess the highest technical expertise for this particular service. It stated that indeed the results of the Evaluation Committee as captured in the Reports of the Preliminary, Technical and Financial evaluations clearly indicated that the evaluation criteria, as set out in the tender documents, was applied consistently and objectively to all the bidders.

In summary, the Procuring Entity submitted that the Request for Review as filed by the Applicant was in bad faith for the following reasons:

- a.) The Applicant bought the tender document on 12/10/2011 and submitted its bid on 24/11/2011 and therefore had the opportunity to examine the tender document and take special note of the formula and the weightings ascribed to each. The Applicant did not raise any issue at all with this formula until after it was declared unsuccessful.
- b.) In addition to the foregoing, Applicant, by its admission at paragraph 6 of the Abstract to the Request for Review, was informed of its successful attainment of the minimum qualifying mark of 70% in accordance with the Tender documents and did not question these findings or the criteria used to arrive at its score.
- c.) That any complaints by the Applicant on the criteria should have been made before the closing date for the tenders in accordance with Section 53 (2) of the Act. The Applicant still had an opportunity to question its technical scores within fourteen days of 8<sup>th</sup> February 2012 when it admitted receipt of the Procuring Entity's invitation to the Financial bid-opening. By operation of Regulation 73(2)(c) of the Public procurement and Disposal Regulations, 2006, Applicant's request is barred by statute and should therefore not be entertained by the Board.
- d.) That the Applicant's questioning of this criteria and the weighting ascribed to it only after notification that it was not the successful bidder is an afterthought and clearly shows bad faith and an

intention to unduly delay this procurement process.

The Procuring Entity also submitted that Section 66(4) of the Act enjoins it to award the tender to the bidder with the lowest evaluated price and that price alone is not the sole determinant in a tender process. It submitted that it duly complied with the evaluation criteria that had been provided in the Tender document pursuant to the requirements of Section 66(2) of the Act.

Finally, the Procuring Entity submitted that the complaint by the Applicant on the evaluation Criteria amounted to urging the Board to re-write the evaluation criteria and that the same was beyond the Board's jurisdiction.

It therefore urged the Board to find no merit in the Application and dismiss the Request for Review.

On its part, the successful bidder, M/s NDT Middle East FZE associated itself fully with the submissions of the Procuring Entity. It submitted that the documents presented by the Applicant to support the insolvency claim referred to two different entities, namely; NDT Systems and services and NDT Middle East FZE and therefore were two distinct entities in law. It stated that the Applicant had failed to demonstrate any evidence that the Procuring Entity, in evaluating the tender, breached any duty imposed on it by the Act or the Regulations as required under Section 93 of the Act.

Another interested candidate, M/s Halliburton stated it did not support the Request for Review and that it had no further submissions.

A third interested candidate, M/s Weatherford submitted that it had written to the Procuring Entity questioning the marks it was awarded at the technical evaluation and expressed its dissatisfaction that it had not received feedback to date.

The Board has carefully examined the documents presented before it and the parties' submissions.

The Issues for the Board to determine are:-

1. Whether or not, the Procuring Entity breached Sections 2 and 31 of the Act and Article 227 of the constitution of Kenya 2010 by awarding a tender to an entity that was allegedly facing bankruptcy/insolvency proceedings; and
2. Whether the evaluation criteria used by the Procuring Entity in evaluating this tender was objective and quantifiable so as to meet the threshold envisaged by Section 66 of the Act.

In addressing itself to the first issue on Section 31 of the Act on the purported Insolvency, The Board notes the provisions of Section 31 which states as below:-

***Section 31(1);***

- a.) The person has the necessary qualifications, capability, experience, resources, equipment and facilities to provide what are 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.) .....

e.) .....

It is clear from the above that if any company is facing any insolvency proceedings, it is not eligible for award of a tender. The question the Board has to consider is whether the Applicant has adequate evidence to enable it to determine whether the successful bidder is facing insolvency proceedings.

The Board notes the following:-

1. The Successful Bidder was NDT Middle East FZE whereas the company allegedly facing insolvency proceedings in Germany is NDT Systems & Services.

2. The Press release dated 27<sup>th</sup> December 2011 states in part as follows

*...the NDT companies in Argentina, Dubai, Canada, Mexico and the US are all legally independent and not part of the insolvency proceedings and will continue their normal operations."*

3. The Press release dated 30<sup>th</sup> March 2012 states in part as follows:-

*Thus Wessker has agreed not only to keep all roughly 210 jobs at the Stutensee headquarter as well as the additional 290 employees of the various international subsidiaries but has also approved an extensive guarantee of employment and existence for the Stutensee location.*

It is clear that the two press releases as placed to the Board by the Applicant contradict each other and therefore the Applicant has not established the nexus between the Germany Company and the successful bidder. Further, the Applicant has not established that the Successful Bidder is a subsidiary of the Germany company. These allegations were made by the Applicant and the burden to prove the allegations rested on it.

The second issue on the same point for the Board to address is on the source and authenticity of the information on the subject matter. With regard to the source of the information, it is undisputed fact that the Applicant, by his own admission, downloaded the information from the internet. The question is whether such information can be relied upon in a matter of the magnitude of this nature. Indeed upon perusing the press releases, the Board notes that there is contradiction in so far as one Section of the documents implies that the insolvency proceedings affected the global operations of the company i.e. the Germany Head office together with all its operating companies while page 1/3 of the same document clearly stipulate that *"...the NDT companies in Argentina, Dubai, Canada, Mexico and the US are all legally independent and not part of the*

*insolvency proceedings and will continue their normal operations."*

The Contradiction on this part alone puts a lot of doubt as to the reliability and integrity of the document. Further the Board also finds that the information regarding the Insolvency Proceedings as downloaded from the internet came from an entity known as NDT Systems and Services while the successful bidder in this tender was NDT Global ME FZE.

The Board further observes that the press release published January 5<sup>th</sup> 2012 have a disclaimer that states as follows:-

***Note: The information in this column, according to German Commercial institutions and Enterprises on the finished letter published unconfirmed for reference purposes only. This site does not assume any related responsibility for this, please companies interested in business dealings with honesty, comply with relevant laws and regulations and industry rules, while, to protect their legitimate interest and legitimate rights and interests.***

Therefore, it is clear that the allegations by the Applicant on the insolvency remains un substantiated and cannot form a basis for the Board to hold that the Successful bidder is insolvent.

The Board has also perused the tender documents and found that all bidders provided Audited Accounts as required by the tender documents. It is on the basis of the tender documents that the Procuring Entity was expected to determine the capacity and resources of the potential

successful bidder.

In view of the foregoing, the Board finds that this limb of the ground lacks merit and therefore fails.

Turning to the issue on whether the evaluation Criteria met the provisions of Section 66 of the Act, the Board notes the said provisions as hereunder:-

**Section 66;**

- 1.) .....
- 2.) *The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and no other criteria shall be used*
- 3.) *The following requirements shall apply with respect to the procedures and criteria referred to in subsection (2)-*
  - a.) *the criteria must, to the extent possible, be objective and quantifiable; and*
  - b.) *each criterion must be expressed so that it is applied, in accordance with the procedures, taking into consideration price, quality and service for the purpose of evaluation.*
- 4.) *The successful tender shall be the tender with the lowest evaluated price.*

In particular, the Board takes note of Section 66(2) of the Act which

provides as below;

*"The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and no other criteria shall be used."*

The Board also notes the provisions of the following relevant clauses in the tender document regarding the evaluation Criteria which state as follows:-

**Clause 26.1**

*The Employer will evaluate only tenders determined to be substantially responsive to the requirements of the tender documents in accordance with*

**Clause 26.2**

*In evaluating tenders, the Employer will determine for each tender the evaluated tender price by adjusting the tender price as follows:*

*a.) Making any correction for errors pursuant to clause 25.*

*b.) Excluding provisional sums and provision, if any, for contingencies in the Bills of Quantities, but including Day works where priced competitively.*

**Clause 34.2;**

*"Technical score shall constitute 0.8 weight of the overall evaluation whereas the financial score shall take the remaining 0.2 weight."*

*Lowest bid price, X, shall attract 100% score in Financial Evaluation*

*Any other bid price, Y shall attract a Financial score as below:-*

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

*Bidders final score shall be the summation of the technical and the financial marks subjected to the weights.*

*Clause 34.3;*

*The employer may, prior to the award of the tender, confirm the qualifications of the tenderer who submitted the lowest evaluated responsive tender in order to determine whether the tenderer is qualified to be awarded the contract.*

The Board, having perused the tender documents notes that the Procuring Entity applied the criteria in the manner set out in the tender documents. The Board also notes that the nature of the contract in question was highly technical and it is for that reason that the Procuring Entity gave more consideration in the weighting to the technical aspects as compared to the Financial. Indeed the Board observes that in projects that are highly technical, it is normal to give more weighting to the technical aspect. Therefore , the allegation by the Applicant that the formula used to combine the technical and financial scores at the ratio of 80/20 was not objective has no merit. Indeed the Board notes that the Standard tender document issued by PPOA pursuant to regulation 29 provide for this

formula. Accordingly, the Board finds that the evaluation criteria provided was objective and quantifiable in the circumstances.

The Board notes that the Procuring Entity applied the formula as set out in the tender document and the results were as follows:-

**Table 6- Combined Evaluation Results.**

		<b>B</b>	<b>B</b>	<b>C=A+B</b>
No	Name of Bidder	Weighted Technical score	Weighted Financial score	Combined score
1	Lin Scan	$70.38 \times 0.8 = 56.30$	$100.00 \times 0.2 = 20.00$	76.30
2	NDT Middle East	$96.50 \times 0.8 = 77.20$	$40.39 \times 0.2 = 8.08$	85.28

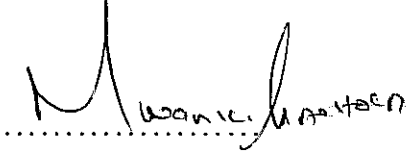
Therefore, the Successful bidder had the highest combined score and was rightly awarded the tender. Accordingly, this limb of the ground also fails.

**Ground 4: Loss**

The Board has held severally that tendering costs are commercial business risks borne by business people and therefore each party bears its cost.

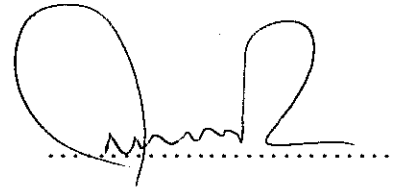
Taking all the above into consideration, the request for review fails and is hereby dismissed. The Board orders, pursuant to Section 98 of the Act that the procurement process may proceed. There are no orders as to costs.

Dated at Nairobi on this 11<sup>th</sup> Day of May, 2012.



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**CHAIRMAN**  
**PPARB**



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**SECRETARY**  
**PPARB**