

**REPUBLIC OF KENYA**

**THE PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW  
BOARD**

**APPLICATION NO. 17/2007 OF 12<sup>TH</sup> MARCH, 2007**

**BETWEEN**

**MACNAUGHTON LIMITED, APPLICANT**

**AND**

**KENYA PORTS AUTHORITY, PROCURING ENTITY**

Appeal against the decision of the Tender Committee of Kenya Ports Authority dated 14<sup>th</sup> February, 2007 in the matter of Tender No. KPA/075/2006/PM for the Supply of Drugs.

**BOARD MEMBERS PRESENT**

|                       |   |          |
|-----------------------|---|----------|
| Mr. Richard Mwongo    | - | Chairman |
| Mr. Adam S. Marjan    | - | Member   |
| Mr. P. M. Gachoka     | - | Member   |
| Eng. D.W. Njora       | - | Member   |
| Mr. John W. Wamaguru  | - | Member   |
| Ms. Phyllis N. Nganga | - | Member   |
| Mr. J. W. Wambua      | - | Member   |

**IN ATTENDANCE**

|                  |   |                             |
|------------------|---|-----------------------------|
| Mr. C. R. Amoth  | - | Holding Brief for Secretary |
| Mr. P. M. Wangai | - | Secretariat                 |
| Mr. I. K. Kigen  | - | Secretariat                 |

## **PRESENT BY INVITATION FOR APPLICATION NO. 17/2007**

### **Applicant, Macnaughton Limited**

- Dr. Paul K. Mbugua - Director, Sales and Marketing.
- Dr. Jambo Haro - Medical Representative
- Mr. James Gathiru - Customer Care

### **Procuring Entity, Kenya Ports Authority**

- Mr. Yobesh Oyaro - Procurement Manager
- Mr. Raha Jilo - Assistant Corporation Secretary
- Mr. Geoffrey K. Kavate - Procurement Officer
- Dr. John Jao - Pharmacist

### **Interested Candidates**

- Mr. Mayur Patel - Managing Director, Wessex Pharmaceuticals
- Mr. Oliver Almeida - Country Manager, Wessex Pharmaceuticals
- Mr. M. Khan - General Manager, Europa Healthcare Limited
- Mr. Ranjiv Sharawa - Country Manager, Europa Healthcare Limited
- Mr. Ken Ogollah - Country Manager, Europa Health Care Limited
- Mr. Badi Maulidi - Branch Unit Head, HighChem Pharmaceuticals
- Mr. Richard Makokha - Sales and Marketing Manager, Bayer East Africa Limited
- Mr. C. K. Shah - Pharmacist, Statim Pharmaceuticals Limited
- Mr. M. K. Shah - Pharmacist, Nairobi Pharmaceuticals
- Mr. Mital Shah - General Manager, Administration, Bio deal Laboratories Limited
- Mr. P. R. Chandarawa - Director, Pharma Specialities Limited
- Dr. J. W. Kamama - Manager, Kulal International Limited
- Mr. R. N. Siddigi - Head of Operation, Cadilla Pharmaceuticals Limited

|                    |   |   |
|--------------------|---|---|
| Mr. M. Okume       | - | Medical Representative, Assia Pharmaceuticals |
| Dr. Osendo         | - | Company Pharmacist, Assia Pharmaceutical      |
| Mr. Collins Masibo | - | Marketing Coordinator, Cosmos Limited         |
| Mr. Rabim Kamai    |   | Marketing manager, Medisel (K) Limited        |

## **BOARD'S DECISION**

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

## **BACKGROUND**

The tender was advertised in the local dailies on 6<sup>th</sup> October, 2006 for the Supply of Drugs.

The tender opening /closing date was 7<sup>th</sup> November, 2006. Thirty seven (37) firms bought the tender documents and duly returned their completed bids. The tender was opened on the due date and attracted the following bidders: -

1. Cosmos Limited;
2. Biodeal Laboratory Limited;
3. Surgilinks Limited;
4. Assia Pharmaceuticals Limited;
5. Cadilla Pharmaceuticals (EA) Limited;
6. Bayer EA Limited;
7. Madawa`Pharmaceuticals;
8. Goodman Agencies;
9. Pharma Specialties Limited;
10. Europa Healthcare Limited;
11. C. Mehta & Company Limited;
12. Howse Mc George Laborex Limited;
13. Armicon Pharmaceuticals Limited;
14. Sai Pharmaceuticals Limited;
15. Omaera Pharmaceuticals Limited;
16. Ocean view Pharmaceuticals Limited;
17. Synermed Pharmaceuticals Limited;

18. Medisel (K) Limited;
19. Dawa Pharmaceuticals Limited;
20. Lords Healthcare Limited;
21. Jos Hansen & Soehne (EA) Limited;
22. Universal Corporation Limited;
23. Harleys Limited;
24. Regal Pharmaceuticals Limited;
25. Macnaughton Limited;
26. Highchem Pharmaceuticals Limited;
27. Philips Pharmaceuticals Limited;
28. Wessex pharmaceuticals Limited;
29. Surgipharm Limited;
30. Zadchem Pharmaceuticals Limited;
31. Uni Supplies and Marketing (K) Limited;
32. Nairobi Pharmaceuticals Limited;
33. Statim Pharmaceuticals Limited;
34. Sunpar Pharmaceuticals Limited;
35. Galaxy Pharmaceuticals Limited;
36. Njimia Pharmaceuticals Limited; and
37. Kulal International Limited.

## **THE EVALUATION OF TENDER**

The above bidders were examined based on the following mandatory requirements: -

1. Tender security;
2. Original manufacturer's authorization form;
3. Proof of registration of quoted products by Pharmacy and Poisons Board (PPB);
4. Questionnaire form; and
5. Declaration form duly signed.

Three (3) bidders namely, Madawa Pharmaceuticals, Galaxy Pharmaceuticals Limited and Uni Supplies and Marketing (K) Limited failed to comply with the above parameter and were disqualified.

The other thirty four (34) firms qualified for further evaluation.

In the technical evaluation, the following firms were disqualified for submitting financial information contrary to Paragraph 2.17.2 of the tender document. These were: -

1. Biodeal Laboratory Limited;
2. Assia Pharmaceuticals Limited;
3. Kulal International Limited.
4. Jos Hansen & Soehne (EA) Limited;
5. Macnaughton Limited; and
6. Galaxy Pharmaceuticals Limited.

The remaining twenty nine (29) firms were subjected to detailed technical evaluation based on the following parameters: -

1. Particulars of tendering company;
2. A complete set of audited accounts for financial years ending 2003, 2004 and 2005;
3. Company profile, organizational structure and CVs of technical staff (pharmacists);
4. Evidence of supply contracts with at least three (3) corporate clients for goods of similar nature in any of the past two years, 2004 and 2005;
5. Detailed description of the organization's distribution network; and
6. Detailed description of organization's customer care.

NB. Tenderers must score at least 70 marks out of 100 marks in the technical evaluation to qualify for further evaluation i.e. financial bid (pricing).

Based on the evaluation methodology above, the firms scored as follows: -

| NO. | FIRM                            | SCORE | PASS/FAIL (P & F) |
|-----|---------------------------------|-------|-------------------|
| 1.  | Cosmos Limited                  | 98    | P                 |
| 2.  | Surgilinks Limited              | 81    | P                 |
| 3.  | Cadilla Pharmaceuticals Limited | 83    | P                 |
| 4.  | Bayer Healthcare E.A Limited    | 80    | P                 |
| 5.  | Goodman Agencies Limited        | 88    | P                 |
| 6.  | Pharma Specialties              | 83    | P                 |
| 7.  | Europa Health care              | 75    | P                 |
| 8.  | C. Meththa & Company Limited    | 90    | P                 |

|     |                                 |    |   |
|-----|---------------------------------|----|---|
| 9.  | Howse Mc George Laborex         | 95 | P |
| 10. | Armicon Pharmaceuticals Limited | 73 | P |
| 11. | Sai Pharmaceuticals Limited     | 90 | P |
| 12. | Omaera Pharmaceuticals Limited  | 78 | P |
| 13. | Ocean view Pharmaceuticals Ltd  | 93 | P |
| 14. | Synermed Pharmaceuticals Ltd    | 78 | P |
| 15. | Medisel (K) Limited             | 83 | P |
| 16. | Dawa Limited                    | 65 | F |
| 17. | Lords Healthcare                | 94 | P |
| 18. | Universal Corporation           | 66 | F |
| 19. | Harley's Limited                | 90 | P |
| 20. | Regal pharmaceuticals Limited   | 88 | P |
| 21. | Highchem Pharmaceuticals Ltd    | 91 | P |
| 22. | Surgipharm Limited              | 98 | P |
| 23. | Philips pharmaceuticals         | 96 | P |
| 24. | Wessex Pharmaceuticals Limited  | 89 | P |
| 25. | Zadchem Pharmaceuticals Ltd     | 76 | P |
| 26. | Nairobi Pharmaceuticals Limited | 90 | P |
| 27. | Statim Limited                  | 78 | P |
| 28. | Sunpar Pharmaceuticals Limited  | 76 | P |
| 29. | Njimia Pharmaceuticals Limited  | 88 | P |

Dawa Limited and Universal Corporation scored 65 and 66 marks respectively and were therefore disqualified for failing to attain the pass mark of 70.

The other twenty seven (27) firms attained the required pass mark and therefore qualified for financial evaluation.

The evaluation committee recommended award of the theatre equipments and surgical items to various firms based on the user's previous experience. The firms are Howse Mc George Laborex Limited, Pharma Specialities Limited, Europa Healthcare Limited, Sai Pharmaceuticals Limited, Omaera Pharmaceuticals Limited, Ocean View Pharmaceuticals Limited, Synermed pharmaceuticals Limited and Medisel (K) Limited.

In its meeting held on 14<sup>th</sup> February, 2007, the Tender Committee concurred with the evaluation committee and awarded the tender to various firms based on the items.

## **THE APPEAL**

This appeal was lodged on 12<sup>th</sup> March, 2007 by Macnaughton Limited against the decision of the Tender Committee of Kenya Ports Authority in the matter of Tender for Supply of Drugs.

The Applicant, in its Memorandum of Appeal, raised one (1) ground of appeal based on Breach of Regulation 30 (5). It requested the Board for an order that the tender process be stopped, pending review of their case.

Dr. Paul K. Mbugua and Mr. James Gathiru represented the Applicant and Mr. Yobesh Oyaro and Mr. Raha Jilo represented the Procuring Entity.

The Board hereby deals with the ground of appeal and the Preliminary Objection by the Procuring Entity as follows:

### **PRELIMINARY OBJECTION**

At the hearing, the Procuring Entity raised a Preliminary Objection, arguing that the appeal by the Applicant should not be entertained by the Board as it was filed outside the appeal window period. It was argued that the appeal was filed on 12<sup>th</sup> March, 2007 yet the notification of non-success dated 16<sup>th</sup> February, 2007 was dispatched on 19<sup>th</sup> February, 2007. The appeal should therefore have been filed before 12<sup>th</sup> March, 2007.

In reply, the Applicant denied that its appeal was filed outside the appeal window. It submitted that it received the notification on 23<sup>rd</sup> February, 2007. Taking into account a 21-day appeals window, its appeal on 12<sup>th</sup> March, 2007 was well within the appeal window.

On careful consideration of the parties' submissions on the Preliminary Objection, the Board held that the appeal filed on 12<sup>th</sup> March, 2007 was within the appeal window. The Procuring Entity's Objection was therefore dismissed and the appeal was allowed to proceed on its merits.

### **Breach of Regulation 30 (5)**

At the hearing, the Applicant submitted that they complied with clause 2.17.2 of the tender document with regard to the two envelope system, sealing, marking of tenders and that all the required documents were

submitted. In addition, they argued that they enclosed a blank copy of the tender document for reference purposes but did not indicate prices on the price schedule as alleged by the Procuring Entity. The above Regulation stated that a tender would be considered responsive if the “errors or oversights” in it were capable of being corrected without touching on the substance of the tender and any such deviations. The Applicant also demonstrated to the Board the manner in which it submitted its bid. It argued that the original technical bid, the financial bid and an erroneous blank copy of tender document were submitted as “ORIGINAL” in one envelope marked ‘Technical submission’. The Applicant pleaded that the inclusion of the blank copy of the tender document was an oversight that the Procuring Entity could consider a minor deviation and not disqualify the Applicant.

In response, the Procuring Entity stated that the Applicant was among six (6) firms dropped for failing to comply with Clause 2.17.2 of the tender document, which prohibited bidders from disclosing their financial information in technical bids. The Procuring Entity stated that the Applicant submitted, in one envelope marked ‘Technical Submission’ three (3) documents. Two (2) were marked as “copies” and the third one had attachments without following tender instructions as contained in Clause 2.17.2.3 of the tender document. As the Applicant did not comply with the tender instructions, it was not responsive pursuant to Clause 2.22. 5 of the tender document.

The Board has carefully considered the party’s arguments and examined the documents and the alleged breach of the Regulation and noted that Regulation 30 (5) provides as follows: -

*“The Procuring Entity may regard a tender as responsive even if it contains minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set forth in tender documents or if it contains errors or oversights that are capable of being corrected without touching on the substance of the tender and any such deviations shall be quantified, to the extent possible, and approximately taken account of in the evaluation and comparison of tenders.”*

In order to address the issue of responsiveness and the subsequent disqualification of the Applicant, it is important to note that the Procuring Entity carried out its tender process as follows: -



The tender was advertised in the local dailies on 6<sup>th</sup> October, 2006 for the Supply of Drugs.

The tender opening /closing date was 7<sup>th</sup> November, 2006. Thirty seven (37) firms bought the tender documents and duly returned their completed bids. The tender was opened on the due date.

#### Preliminary Examination

The thirty seven bidders were examined based on the following mandatory requirements: -

1. Tender security;
2. Original manufacturer's authorization form;
3. Proof of registration of quoted products by Pharmacy and Poisons Board (PPB);
4. Questionnaire form; and
5. Declaration form duly signed.

Based on these parameters, three (3) bidders failed to comply and were disqualified. These were: -

1. Madawa Pharmaceuticals;
2. Galaxy Pharmaceuticals Limited; and
3. Uni Supplies and Marketing (K) Limited.

The other thirty four (34) firms qualified for further evaluation.

#### Technical Evaluation

In the technical evaluation, the following firms were disqualified for submitting financial information contrary to Paragraph 2.17.2 of the tender document. These were: -

1. Biodeal Laboratory Limited;
2. Assia Pharmaceuticals Limited;
3. Kulal International Limited.
4. Jos Hansen & Soehne (EA) Limited;
5. **Macnaughton Limited; and**

6. Galaxy Pharmaceuticals Limited.

The Board noted that Clause 2.16.1 provides as follows:

*“The tenderer shall prepare two copies of the tender, clearly marking each “ORIGINAL TENDER” and “COPY OF TENDER” as appropriate. In the event of any discrepancy between the them, the original shall govern.”*

The Board also observed that Clause 2.17.2 of the tender document provided as follows: -

*“Envelope A shall contain the technical submission and shall be clearly marked “Envelope A – Technical Submission.” Envelope A shall contain NO indication of the tender price or other financial information of the bid and.....”*

The Board further noted that Clause 2.17.3 of the tender document provided as follows: -

*“Envelope B shall contain the financial submission and shall be marked clearly “Envelope B – Financial Submission”. Envelope B shall contain the documents listed below: -*

- *Schedule of prices (in the format provided herein).”*

Having examined the three documents of the Applicant, there were no markings indicating the “ORIGINAL TENDER” as required under Clause 2.16.1 of the tender document. The document marked 16 A contains various attachments, while the documents marked 16 B and 16 C are marked “COPY” and contain the priced Schedule of Requirements. At the hearing the Board noted from the diagrammatic demonstration of the Applicant’s bid submission that it enclosed both the ‘Technical bid’ and Financial bid’ in one envelope marked ‘Technical Submission’. The Applicant did not therefore follow the tender conditions stipulated under Clauses 2.16.1 and 2.17.2 of the tender document.

The Board further noted that the Applicant’s documents marked 16 B and 16 C, Section VI – Schedule of Requirements contain its unit prices, indicated under Item No. 103 in document 16 B and Item Nos. 5, 7, 9, 10, 102, 103, 107, 137, 138, 140, 147, 148, 149, 151, 152, 233, 279, 286, 289, 290, 291,

294, 324, 325, 328, 333 and 335 in document 16 C. The Board found that the pricing should only have been contained in the financial bid which ought to have been in envelope B, and not to be opened until after technical evaluation. These were mandatory requirements that the Applicant should have complied with as they touched on the substance of the tender, and could not be treated as minor deviations.

From the foregoing, the Applicant contravened Regulation 30 (5) and Clauses 2.16.1 and 2.17.2 of the tender document, which prohibited bidders from indicating their tender prices or other financial information on their technical submissions. The Procuring Entity was therefore right in declaring that the Applicant's bid was substantially non-responsive. Regulation 30 (5) was not breached by the Procuring Entity.

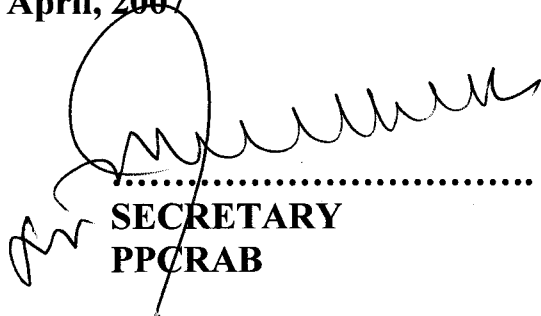
Accordingly, this ground fails for lack of merit.

Taking into account all the foregoing matters, the appeal fails and is hereby dismissed.

Accordingly, the procurement process may proceed.

**Dated at Nairobi on this 12<sup>th</sup> day of April, 2007**

  
.....  
**CHAIRMAN**  
**PPCRAB**

  
.....  
**SECRETARY**  
**PPCRAB**

