

SCHEDULE 1

FORM 4

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 10/2008 OF 26 MARCH, 2008

BETWEEN

REVITAL HEALTHCARE (EPZ) LIMITED..... (APPLICANT)

AND

MINISTRY OF HEALTH..... (PROCURING ENTITY)

Appeal against the decision of the Tender Committee of Ministry of Health dated 19th February, 2008 in the matter of Tender No. MOH/10/2007 - 2008 for Supply of Immunization Items.

BOARD MEMBERS PRESENT

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|-------------------|---|----------|
| Mr. P. M. Gachoka | - | Chairman |
| Mr. J. W. Wambua | - | Member |
| Ms. Loise Ruhiu | - | Member |
| Eng. C. A. Ogut | - | Member |
| Mr. S. K. Munguti | - | Member |
| Ms. J. A. Guserwa | - | Member |
| Amb. C. M. Amira | - | Member |
| Ms. Natasha Mutai | - | Member |

IN ATTENDANCE

Mr. C. R. Amoth - Secretary
Ms. P. K. Ouma - Secretariat

PRESENT BY INVITATION

Applicant, Revital Healthcare (EPZ) Ltd

Mr. Michael Mubea - Advocate, Wetangula, Adan, Makokha &
Company Advocates
Mr. Michael Oduor - Clerk, Wetangula, Adan, Makokha &
Company Advocates
Ms. Diana Ogola - Wetangula, Adan, Makokha &
Company Advocates
Mr. Y. T. Abdulla - Chief Executive Officer
Mr. M.M. Essajee - Director

Procuring Entity, Ministry of Health

Mr. P. N. Momanyi - Senior Principle Procurement Officer
Mr. S. J. Mokuu - Chief Procurement Officer
Mr. Elias Dulo - Procurement Officer I
Mr. Charles Mokaya - Procurement Officer II

Interested Candidates

Mr. Migos Ogamba - Advocate, Angelica Medical Supplies Ltd
Mr. David Mutunga - Advocate, Angelica Medical Supplies Ltd

Ms. Mary Matu - Executive Director, Angelica Medical
Supplies Ltd
Mr. R. C. Shah - Director, Bakpharm Ltd

BOARD'S DECISION

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

BACKGROUND

The Ministry of Health advertised the tender for the Supply of Immunization items on 30th August, 2007. The closing/opening date was extended from Friday 28th September, 2007 to 9th October, 2007. Nine Bids were opened in the presence of the bidders' representatives.

EVALUATION

The Technical evaluation committee appointed by the Permanent Secretary carried the evaluation in three stages namely the Preliminary evaluation, Technical evaluation and the Financial evaluation.

At the Preliminary Evaluation, the Procuring Entity used the Evaluation Criteria contained in section VII of the Tender Documents. The bids were evaluated on whether or not they had met the following parameters:-

- a) The tender had been submitted in the required format
- b) The tender security submitted was in the required form, amount and validity period
- c) The tender form had been signed by the person lawfully authorized to do so.
- d) The required numbers of copies of the tender had been submitted
- e) The tender was valid for the period required
- f) All required documents and information had been submitted

g) Samples had been submitted accordingly

The Applicant was eliminated at the preliminary evaluation stage as it had not indicated, in the Form of Tender, its price validity period. Its bid was then termed as non-responsive and not evaluated further.

The tender was awarded on 19th February, 2008 to M/s Angelica Medical Supplies Ltd. The bidders were notified of the outcome of the tenders vide letters of notifications dated 6th March, 2008.

THE APPEAL

This Appeal was lodged on the 26th day of March, 2008 by Revital Healthcare (EPZ) Limited against the decision of the Tender Committee of Ministry of Health dated 19th February, 2008 in the matter of Tender No. MOH/10/2007 - 2008 for Supply of Immunization Items.

The Applicant was represented by Mr. Michael Mubea, Advocate, of Wetangula, Adan, Makokha & Company Advocates while the Procuring Entity was represented Mr. P. N. Momanyi, Senior Principle Procurement Officer. The interested candidates present Angelica Medical Supplies and Backpharm Ltd were represented by Mr. Migos Ogamba, Advocate and Mr. R. C. Shah respectively.

The Applicant in its Request for Review had raised five (5) grounds of appeal. The Board deals with them as follows:-

Ground 1 - Breach of Section 66 of the Public Procurement and Disposal Act 2005 (the Act)

The Applicant alleged that the Procuring Entity breached Section 66 of the Public Procurement and Disposal Act, 2005 in that it failed to consider that the Applicant complied with all the mandatory requirements making its tender responsive.

It further submitted that in the letter of notification by the Procuring Entity, it was informed that it was not successful on two grounds, namely that it did not indicate the validity period and did not fill in the form of tender as required. Further, it argued that Clause 2.10 of the tender had no provision for the tender period and in Clause 2.10.4, the validity period of the tender was to be 60 days from the date of opening. Counsel for the Applicant further stated that the tender documents was entailed to set out the tender validity period and there was no obligation for the tenderer to repeat the same information

In addition, it averred that the Procuring Entity failed to recognize that the Applicant was the only manufacturer of the products being procured in East and Central Africa; that the Applicant's letter dated 8th October, 2007 which formed part of the tender documents clearly stated that the prices were valid as per the terms of tender; and that the Applicant was the lowest bidder as provided for in Section 66(4) of The Act.

In its response, the Procuring Entity stated that the Applicant's Form of Tender was not complete as required by clauses 2.22.1 and 2.24.1 of Section II of the Instructions to Tenderers in the Tender Documents. In response to the

allegation that it failed to recognize that the Applicant was the only manufacturer, in the region, of the products being procured, the Procuring Entity averred that the tender was an open tender and that all eligible tenderers were free to participate as provided for in Sections 34, 51 (a) - (f) and 52 (1) and (3) of the Act and Clauses 2.1 and 2.1.1 of the Instructions to Tenderers in the Tender Documents.

On the matter of the Applicant's claim that its letter clarified the period of tender validity, the Procuring Entity responded that the letter did not clarify the validity period but only indicated that the Applicant's prices were valid as per the terms of the tender. It submitted that it required the tenderers to fill the price validity period in the Form of Tender. However, its Form of Tender was incomplete.

The Procuring Entity further responded that it carried out a preliminary evaluation of the tender as provided for in Regulation 47 (1) and (2) of the Public Procurement and Disposal Regulations 2006 (the Regulations). The Applicant's bid did not pass this stage and was therefore not evaluated on the technical or financial parameters as provided for by Regulations 49 and 50 of the Regulations. The Applicant's bid could therefore not be termed to be the lowest evaluated as it failed at the preliminary stage.

The Interested Candidate, Angelica Medical Supplies Limited, who was the successful tenderer, supported the Procuring Entity's submissions as to why the Applicant was neither responsive nor the lowest evaluated bidder. It stated that the mandatory requirements were not met by the Applicant. It further argued that Clauses 2.4.1, 2.22.1 and 2.24.1 mandated the Procuring Entity to examine the tender documents to confirm whether they were

complete. It stated that Section VII of the tender document clause 4, indicated that tenderers were to quote their prices in the original price schedule and not introduce new documents. Therefore the Applicant's letter of the 8th October, 2007 was contrary to the provisions of the tender document.

The Board has carefully considered the submission of the parties and examined the documents submitted before it. The Board has noted that the Applicant's Form of Tender at clause 4 was blank in regard to the period of tender validity. In addition, the Applicant's letter of 8th October, 2007 only stated that the price was valid as per the terms of the tender. The other bidders' Forms of Tender were completed and the price validity period stated was either 150 or 180 days.

In regard to references to the tender validity period as contained in the Tender Notice and tender document, the Board noted that the tender advertisement stated that the prices quoted should be valid for 150 days after the closing of the tender. Clause 2.10.4 of the Tender Document stated that the validity period shall be 60 days from the date of the tender opening while Clause 2.15.1 stated that the tender shall remain valid for 90 days or as specified in the Invitation to Tender. Clause 2.15.1 further stated that a tender valid for a shorter period would be rejected and be termed non-responsive.

The Board also noted that Clause 2.9.1, of the Tender Document, stated in mandatory terms that the tenderers should complete the Tender Form and the appropriate price schedules; and that in addition, the Special Conditions of Contract Clauses 7 and 8 stated that the Tender Form must be filled and

duly signed by an authorized person and that the bid validity period was 150 days. The Board finds that the Clause 4.1 of the Special Conditions of Contract states that whenever there was a conflict between the General Conditions of Contract (GCC) and the Special Conditions of Contract (SCC), the Provisions of the SCC shall prevail. The Board therefore holds that the bid validity period for this tender was 150 days. The Board finds that the incompleteness of the Form of Tender was a critical issue and would render a contract formation impracticable. The Form of Tender comprises the offer in a contract formation.

The Board has further noted that the tender was an open tender as stated in Clause 2 of the Instructions to Tenderers. The tender was open to all eligible tenderers, and as such did not require the Procuring Entity to recognize that the Applicant was the only manufacturer in East and Central Africa. In addition, whereas, the Applicant completed all other parts of its submitted Form of Tender, it left the tender validity period blank and thereby did not comply with Clause 2.9.1, of the Tender Document, requiring tenderers to complete the Tender Form and the appropriate price schedules; and the Special Conditions of Contract Clause 7 requiring the Tender Form to be filled and duly signed by an authorized person.

The Board holds that the Procuring Entity followed the evaluation procedure, in regard to Preliminary Evaluation, as stated in Clause 2.22 of the Tender Documents. Clause 2.22.1 stated that:

“The Procuring Entity would examine the tenders to determine whether they are complete, whether any computational errors have been made, whether required sureties have been furnished, whether the documents

have been properly signed, and whether the tenders are generally in order."

In addition, Clause 2.22.4 stated that the Procuring Entity would determine the substantial responsiveness of each tender to the tender documents, prior to the detailed evaluation. The Board holds that the Procuring Entity followed the criteria in the tender documents when it disqualified the Applicant at the Preliminary Stage.

From the foregoing, the Board further finds that the Applicant's allegation of being the lowest evaluated bidder does not arise as its tender was found to be non-responsive at the preliminary evaluation stage and was not evaluated technically or financially.

Accordingly, this ground of appeal fails.

Ground 2 - Breach of Section 62 (1) and Section 64 of the Public Procurement and Disposal Act 2005 (the Act)

The Applicant alleged that the Procuring Entity failed to seek clarification from it in regard to the missing information on the Tender Form contrary to Section 62 (1) of the Act. In addition, it claimed that the missing information was a minor omission or oversight that could have been corrected as provided for in Section 64 of the Act.

In its response, the Procuring Entity stated that there was no complexity in the Applicant's tender document that required clarification from the tenderer. It averred that the Applicant failed to follow the instructions to tenderers as

contained in Clause 2.4.2 of the tender document and Clause 7 of the Special Conditions of Contract. In addition, it stated that according to the evaluation criteria in Section VII of the Tender Document, the tender validity period was not a minor deviation.

The interested candidate, Angelica Medical supplies submitted that Clause 2.21.1 of the tender document on clarification of tender specified that the request for clarification was not to change the price or the substance of the tender. The Applicant's failure to indicate the validity period of the tender therefore affected its price.

The Board notes that Section 62(1) of the Act states that;

"The Procuring Entity may request a clarification of a tender to assist in the evaluation and comparison of tenders."

Section 64(1) of the Act states;

"A tender is responsive if it conforms to all mandatory requirements in the tender document."

Section 64(2) of the Act states that:-

"The following do not affect whether a tender is responsive-

- (a) Minor deviations that do not materially depart from the requirements set out in the tender documents; or*
- (b) Errors and oversights that can be corrected without affecting the substance of the tender"*

While Section 64(3) of the Act states:-

"A deviation described in subsection (2)(a) shall-

(a) Be quantified to the extent possible; and

(b) Be taken into account in the evaluation and comparison of tenders."

Finally, Clause 2.21.1 of the Tender Document stated that:-

"To assist in the examination, evaluation and comparison of tenders the Procuring Entity may, at its discretion, ask the tenderer for a clarification of its tender. The request for clarification and the response shall be in writing, and no change in the prices or substance of the tender shall be sought, offered, or permitted."

The Board has carefully examined the documents submitted before it and considered the parties' submissions and finds that clarification of tenders indicated in Section 62 (1) of the Act is not mandatory but is to be sought if the Procuring Entity deems it necessary. The Board further holds that the price validity period was to be stated in the submitted Tender Form as it forms the offer of the tenderer, and completing and signing of the Tender Form was a mandatory requirement of the Tender Document.

The preliminary evaluation as indicated in the evaluation criteria in the Tender Document was to find out if the bid conformed to the requirements of the tender document. In addition, the rectification of the omission of the filling in the tender validity period, which is a price related issue, on the submitted Form of Tender would have been contrary to Clause 2.21.1 which

stated that no changes in price or substance shall be sought, offered or permitted. Further, such a correction could not be done without affecting the substance of the tender as provided in Section 64(2)(b) of the Act.

Accordingly, this ground of appeal also fails.

Ground 3 - Breach of Section 67 of The Public Procurement and Disposal Act, 2005 (the Act)

In this ground the Applicant alleged that the Procuring Entity breached Section 67 of the Act, as it was not made aware of its bid being unsuccessful until 20th March, 2008 vide a letter dated 6th March, 2008. In addition, it also averred that it had not been formally notified who was the successful tenderer contrary to Section 67 (2) of the Act.

However, the Applicant withdrew this ground of appeal at the hearing.

Ground 4 - Uneconomical Award Contrary To Section 2(A) of the Act

The Applicant stated that the Procuring Entity's decision to award the tender to an entity other than the lowest bidder was uneconomical and was contrary to Section 2 (a) of the Public Procurement and Disposal Act 2005 whose objective is to ensure that Procuring Entities adopt procedures that aim at maximizing economic benefits and efficiency.

In its response, the Procuring Entity stated that it awarded the tender to the lowest evaluated bidder by following the laid down procedures fairly in order to promote integrity, transparency and accountability. It further stated that it adhered to Section 66 (2) of the Act in the evaluation and comparison of the bids using the criteria set out in the tender documents.

The Board has carefully examined the documents submitted before it and the parties' submissions and finds that as found under Grounds 1 and 2 of this Appeal, the Applicant's bid was determined to be non-responsive at the preliminary evaluation stage and was rejected. In addition, the Procuring Entity proceeded to evaluate the responsive bids and awarded the tender to the lowest evaluated bidder. The Board holds that the lowest priced bid at tender opening is not necessarily the lowest evaluated bid.

Accordingly, this ground of appeal also fails.

Ground 5 - Loss to the Applicant

The Applicant stated that it had suffered loss in the form of profits, opportunity of selling high quality goods to the Procuring Entity, business and legitimate expectations of profits. It requested the Board to annul the procurement proceedings, the award and order a re-tender, or that the tender be awarded to it. It further requested the costs of the review.

In its response, the Procuring Entity stated that the Applicant's failure to fully abide by the requirements of the tender attributed to its loss. It averred that it acted in a non-discriminatory manner.

The Board has carefully examined the documents submitted before it and considered the parties' submissions and finds that as found under Grounds 1 and 2 of this Appeal, the Applicant's bid was determined to be non-responsive at the preliminary evaluation stage and was rejected. The Procuring Entity proceeded to evaluate the responsive bids and awarded the tender to the lowest evaluated bidder. Costs incurred by tenderers at the

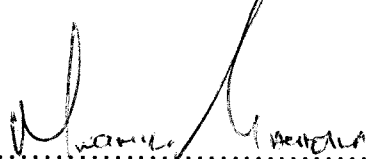
time of tendering are commercial risks borne by people in business, therefore, the Procuring Entity is not liable for such costs.

Accordingly, this ground of appeal also fails.

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

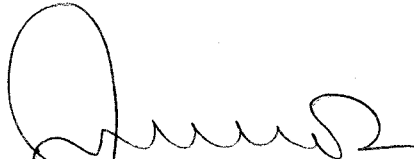
Accordingly, the procurement process may proceed.

Dated at Nairobi on this 23rd day of April, 2008



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**Signed Chairman,
PPARB**



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**Signed Secretary
PPARB**

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