

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 24/2009 OF 9TH JULY, 2009

BETWEEN

HETERO DRUGS LIMITED.....APPLICANT

AND

**PROCUREMENT & SUPPLY CHAIN MANAGEMENT
CONSORTIUM/MINISTRY OF PUBLIC HEALTH
AND SANITAION..... PROCURING ENTITY**

Review against the decision of the Tender Committee of the Ministry of Public Health and Sanitation, the Procuring Entity dated 25th June, 2009 in matter of tender No. IFT No.GF ATM Rd 7 Ph1-08/09-OIT-001 for Supply and Delivery of HIV Drugs (VII).

BOARD MEMBERS PRESENT

Mr. P. M. Gachoka	-	Chairman
Amb. Charles Amira	-	Member
Mr. Joshua W. Wambua	-	Member
Eng. C. A. Ogut	-	Member
Ms. Judith Guserwa	-	Member

IN ATTENDANCE

- Mr. C. R. Amoth - Board Secretary
Mr. P. M. Wangai - Secretariat
Ms. Kerina Rota - Secretariat

PRESENT BY INVITATION

Applicant, Hetero Drugs Limited

- Mr. John Njenga - Advocate, Muma & Kanjama Advocates
Mr. Andrew Muma - Advocate, Muma & Kanjama Advocates
Mr. Wilfred Chege - Intern, Muma & Kanjama Advocates
Mr. Bavesh Shar - Vice-President/Head of Operations, Africa
Dr. William Gitau - Sales Manager

**Procuring Entity, Procurement & Supply Chain Management Consortium
(PSCMC)/ Ministry of Public Health & Sanitation**

- Ms. Nazima Malik - Kaplan & Stratton Advocates
Mr. S. Makanda - Legal Assistant, Kaplan & Stratton
Advocates
Mr. David Muttu - Procurement Manager, KEMSA
Mr. Nyamweya - Procurement Expert, PSCMC
Mr. Alesandro Angionas - Procurement Expert, GTZ
Dr. Patrick Wambua - NASCOP

Interested Candidates

- Mr. Collins Masibo - Sales/Marketing Co-ordinator
Mr. Gauresh S. Rama - Country Manager, Emcure
Pharmaceuticals Ltd

- Mr. Gregory Musembi - Aurobindo Pharmaceuticals Ltd
 Mr. Kalyan Kumar - Manager, Matrix Laboratories Ltd
 Mr. Mutuku Mutava - Agent, Ranbaxy Ltd
 Ms. Batul Ebrahinja - Representative, Lords Healthcare Ltd

BOARD'S DECISION

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

BACKGROUND

The tender was advertised by the Procuring Entity on the 6th March, 2009. The tender No. IFT No.GF ATM Rd 7 ph 1-08/09-OIT-OO1 was for Supply and Delivery of ARV Drugs (VII). The tenders were closed/opened on the 8th April, 2009 in the presence of bidders.

The following bidders submitted their bids:

No.	Bidder's Name	Bid Bond (USD)	Tender Price (USD)
1.	Emcure Pharmaceuticals Ltd	70, 000.00	3,042,440.00
2.	Cosmos Ltd	290, 000.00	13,818,175.00
3.	Ranbaxy Laboratories Ltd	340, 000.00	14,348,626.00
4.	Matrix Laboratories Ltd	165, 806.00	12,780,337.00
5.	Aurobindo Pharmaceuticals Ltd	314, 177.00	14,651,872.00
6.	Lords Healthcare Ltd	295, 000.00	14,739,055.00
7.	Macleods Pharmaceuticals Ltd	200, 00.00	9,904,798.76
8.	Strides Arcolab	250, 000.00	11,088,731.00

9.	Hetero Drugs Ltd	290, 000.00	12,502,894.00
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EVALUATION

This was conducted in three stages namely preliminary, technical and financial evaluation stages in that order:

PRELIMINARY EVALUATION

This was conducted to determine the responsiveness of the tenders to the mandatory requirements of the tender. The results were as follows:-

No	Bidder's Name	Bid Form & Price Schedule	Bid Bond	Bank Bid Security Validity	Remarks
1.	Emcure Pharmaceuticals Ltd	Y	Y	Y	Y
2.	Cosmos Ltd	Y	Y	Y	Y
3.	Ranbaxy Laboratories Ltd	Y	Y	Y	Y
4.	Matric Laboratories Ltd	Y	Y	Y	Y
5.	Aurobindo Pharmaceutical Ltd	Y	Y	Y	Y
6.	Lords Healthcare Ltd	Y	Y	Y	Y
7.	Macleods Pharmaceuticals Ltd	Y	Y	Y	Y
8.	Strides Arcolab	Y	Y	Y	Y
9.	Hetero Drugs Ltd	N	Y	Y	N

KEY: Y: Responsive N: None-Responsive

Arising from the above information, Hetero Drug Ltd, the Applicant, was found non-responsive for submitting a scanned copy of its Price Schedule contrary to Clause 21.1 of the Instructions to Tenderers. Its tender was therefore disqualified at the preliminary evaluation stage and was not considered further.

After the technical and financial evaluation, the tender awards were affected by the tender committee on 25th June, 2009 to M/S Lords HealthCare Ltd, Ranbaxy Laboratories Ltd and Emcure Pharmaceuticals Ltd with respect to the items they were found lowest evaluated.

Letters of notification of award to the successful and unsuccessful tenderers are dated 25th June, 2009.

THE REVIEW

This Request for Review was lodged by Hetero Drugs Limited on 9th July, 2009 against the decision of the Procuring Entity dated 25th June, 2009 in the matter of tender No. IFT No.GF ATM Rd 7 Ph1-08/09-OIT-001 for Supply and Delivery of HIV Drugs (VII).The Applicant was represented by Mr. Andrew Muma and Mr. John Njenga, both Advocates while the Procuring Entity was represented by Ms. Nazima Malik also an Advocate.

The Applicant's Request for Review revolved around the decision by the Procuring Entity to disqualify it on account that it submitted a scanned copy of its Price Schedule instead of the Original One.

At the hearing, the Applicant submitted that the price schedule that it submitted complied with all the requirements that were envisaged in the

tender documents and the Public Procurement and Disposal Act, 2005('the Act'). It argued that the requirements for the price schedule were that it ought to have been typed and written or printed in indelible ink. It pointed out that the price schedule was to be signed by an authorized person who had a power of Attorney. It further argued that the price schedule was to be in the right format and was to be submitted with the original tender documents and the required number of copies. It contended that the Applicant had complied with all the foregoing requirements.

The Applicant submitted that the Procuring Entity had only contested the method by which the price schedule was prepared and not the responsiveness. It argued that the scanned document could not be erased and hence it conformed with the requirements of the Instruction to Tenderers (ITT). It also argued that it submitted together with the tender form, the price schedule and the later was actually an annexure and the bid price was set out in the form of tender. In that regard, it referred the Board to the provisions of Section 64(1) of the Act read together with Regulation 47(b) of the Public Procurement and Disposal Regulations, 2006 (herein referred to as "the Regulations") which provided for the submission of a tender in the required format and duly signed by the authorized person as envisaged by Regulation 47(c).

The Applicant submitted that the emphasis should be on the authority of the signatory and the form and not on the need to exclude electronically submitted documents or printouts. It stated that the principles and rules of Interpretation of statutes were clear and provide for the application of the literal rule that **"An Act must be construed as a whole"** and that words are reasonably capable of only one meaning whatever the result. The Applicant stated that if

the Act had intended to preclude electronically transmitted documents then the intention would have been clearly set out.

The Applicant made reference to Section 83G of the Kenya Communications Act No. 2 which provides for Electronic transmission of Electronic documents submitted via e-mail. It submitted that it had complied with clause 21 of the Instructions to Tenderers which provided for the submission of the original and copies duly labelled as such. The applicant maintained that it had complied with the requirement of supplying all copies and the original duly typed Tender Form or written in indelible ink and therefore its bid could not be declared non-responsive.

The Applicant also made reference to the requirement of the documents set at Clause 14.1 of the ITT which comprised (a) the duly filed in Tender Form and Price Schedule in accordance with the forms indicated (b) Original Form of Tender Security amongst others and stated that neither the Section nor the Act excluded computer generated originals whatsoever.

With regard to the use of indelible ink the Applicant argued that the ink used in completing its price schedule was not capable of being erased and therefore qualified as indelible ink.

Finally, the Applicant stated that Section 83G of the Kenya Communications Act provided for admission of electronic documents or information notwithstanding the provisions of any other law excluding such admission. The Applicant argued that the meaning of the term **"original document"**

should be understood in a wider context as set out at Section 65 of the Evidence Act which recognizes electronic agreement as admissible documents.

It made reference to Section 64 of the Act on the issue of responsiveness of the tender as being one that conforms to all mandatory requirements in the tender document notwithstanding minor deviation that do not materially depart from the requirements set out in the tender documents. To this end, the Applicant argued that the acceptance of its tender was not going to affect the other tenderers in any way.

Finally, the Applicant urged the Board to direct the Procuring Entity to award it the tender, being the lowest bidder as it would lead to the country saving Kshs. 40,000,000/=. It also urged the Board to consider its alternative prayers 2, 3 and 4 in the request for review as available options.

In response, the Procuring Entity submitted that Section 64(1) of the Act clearly provided that for a tender to be responsive, it must conform to all the mandatory requirements in the Tender Documents. Therefore, the Applicant's tender was not responsive in that it did not comply with Clause 21.1 of the ITT which provided for the submission of the original Tender and a copy thereof. It further made reference to Regulation 47(1) which provided for the preliminary evaluation of the tenders to determine their responsiveness.

The Procuring Entity further argued that the required format for the tender was to supply the original together with the copies as set out at Clause 14.1 of the I.TT. It submitted that the original tender would be submitted to a third party namely a bank and hence the need to emphasize the need for the original. It further argued that Clause 14.1 of the ITT made specific requirements for the original tender form and Price Schedule together with the

security in accordance with the Provisions Clause 19 of the ITT. The Procuring Entity therefore submitted that this requirement was mandatory and it envisaged an original Tender Form and original price schedule.

The Procuring Entity also submitted that if copies of the Tender Form and Price Schedule were to be accepted under Clause 14.1 of the ITT, then it would completely defeat the mandatory requirements of Clause 21.1 which required the tenderers to supply original documents

It further stated that although the original form of tender was submitted, the price schedule that was submitted was a scanned copy of the original bearing a copy of the stamp. It argued that the applicant did not give any explanation as to why it submitted an original form of tender with a scanned copy of the price schedule. The Procuring Entity quarried the decision of the applicant to submit an original form of Tender and a scanned copy of the price schedule if it considered the same to be as good as an original.

The Procuring Entity referred the Board to the definition of the word original as set out in the Concise Oxford Dictionary which referred to something that existed from the beginning, and in this respect argued that the scanned copy of the price schedule did not exist from the beginning and therefore could not qualify to be an original. It also submitted that the Form of Tender and price schedule ought to have been typed or written in indelible ink. It argued that the scanned price schedule was not typed, handwritten, stamped in indelible ink nor signed with a pen and hence the applicant's failure to conform to the mandatory requirements of the tender as set out in the ITT. The Procuring Entity drew the attention of the Board to an extract from the World Bank specifications in its Procurement Manual which provided that attention

should be directed towards deficiencies that if accepted would provide unfair advantages to the bidder amongst other requirements.

The Procuring Entity argued that the validity of the bid itself for example its signatures should not be in question. It stressed the need to have the original Tender Document kept in a safe place for comparison and verification purposes with the copies.

The Procuring Entity further argued that it was not in a position to verify the signature on the scanned price schedule. It also urged that the Applicant had not given the definition of the electronically generated original in order to buttress its argument on the admissibility of the scanned price schedule. It added that Section 83G of the Kenya Communication Act applied to electronic messages like the email and not a signature, unless the same qualified as an electronic signature as envisaged by subsection 3 of Section 83 of the aforementioned Act. The Procuring Entity pointed out that the subject tender was not an e-Procurement tender.

Finally, the Procuring Entity argued that the Evidence Act did not apply to proceedings before the Board. It submitted that the Applicant's Request for Review was frivolous. It urged the Board to dismiss the Review and allow the procurement process to proceed arguing that the current stock of the drug will get depleted within the next two months.

On the part of the interested candidate, Ranbaxy Laboratories Ltd submitted that there was no justification for the Applicant to supply a scanned document when all the bidders were asked to supply originals.

In reply, the Applicant argued that the objectives of the Act as demonstrated from the preamble was to establish procedures for efficient public procurement which would be achieved if the Procuring Entity embraced the advances in technology and the benefits of globalization by allowing electronic communication to be effected as envisaged by Section 83G of the Kenya Communication Act. It made reference to the provisions of Section 83J of the aforesaid Act which deals with the formation and validity of contracts. It maintained that the scanned price schedule had a bigger sense of permanence than anything else written by hand. It urged the Board to disregard the Procuring Entity's reference to the World Bank documents as they were not part of the I.T.T. of the subject tender. It urged the board to allow the request for review.

The Board has carefully considered the submissions of the parties and examined all the documents that were submitted. The Board has noted from the I.T.T. that the requirements of the tender as set out at Clause 21.1 were as follows:-

"The tenderer shall prepare an original and the number of copies/sets of the tender indicated in the TDS, clearly marking each one as "ORIGINAL TENDER and COPY OF TENDER", as appropriate. In the event of any discrepancy between them, the original shall prevail"

Pursuant to the foregoing requirement, the Board notes that all the bidders were to comply with the set requirements. It is not disputed that the Applicant supplied an original Form of Tender and a **scanned price schedule**. The issue that arises in this regard is for the Board to determine whether the scanned price schedule that was submitted by the Applicant qualifies as an original

document and whether it was acceptable in line with aforesaid requirements of the tender document.

The next issue for the Board to determine is whether the Applicant should have been disqualified from the tender process by the Procuring Entity at the preliminary stage.

The Board has examined the Applicant's bid documents that were submitted to the Procuring Entity. The Board notes that the Applicant submitted an Original **Form of Tender** and a scanned Price Schedule. The Board further notes that the Applicant's Form of Tender was duly signed and contained the bid price of USD 12, 502, 894.60 in the following terms:

"...Having examined the Tender Documents, the receipt of which is hereby acknowledged, we, the undersigned, offer to supply and deliver the goods under the above-named contract in full conformity with the said Tender Documents for the sum of:

USD : 12, 502, 894.60

In Words: USD TWELVE MILLION FIVE HUNDRED TWO THOUSANDS EIGHT HUNDRED NINETY FOUR AND CENTS SIXTY ONLY (herein after called "the Total Tender Price") or such other sums as may be determined in accordance with the terms and conditions of the Contract. The above amounts are in accordance with the Price Schedules attached herewith and made part of this Tender.

We undertake, if our tender is accepted, to deliver the goods in accordance with the delivery schedule specified in the Schedule of Requirements.

If our tender is accepted, we undertake to provide an advance payment security and a performance security in the form, in the amounts, and within the times specified in the tender documents..."

The Form of Tender is the primary document that is the basis of the formation of contract between a Procuring Entity and a tenderer. By signing the Form of Tender, a tenderer binds itself to the price the details of which will be included in the contract to be signed. As the Board has already noted, the Applicant submitted the Form of Tender as required in the right format in that it reflected the price, tender validity period and signature of the authorized person. The Board further notes that attached to the Form of Tender was a scanned copy of the Price Schedule.

The issue that the Board is to determine is whether this scanned price schedule was admissible taking into consideration the ITT requirements and the provisions of the Kenya Communications Act. The Board notes that Section 83G of this Act provides as follows:

"Where any law provides that information or other matter shall be in writing then, notwithstanding anything contained in such law, such requirement shall be deemed to have been satisfied if such information or matter is:-

- (a) Rendered or made available in an electronic form; and***
- (b) Accessible so as to be useable for subsequent reference.***

The Board finds that the scanned Price Schedule was within the provision of Section 83G and that the Procuring Entity should not have disqualified the Applicant's bid on that basis.

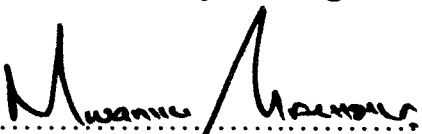
Further the Board finds and holds that no prejudice would have been suffered by the Respondent and the other bidders by admitting the scanned price schedule in the Tender process for evaluation. The Board has also noted that the Procuring Entity's submission that it has stocks of the vital drugs to last for two months and hence the need to re-evaluate the tenders within the shortest time possible.

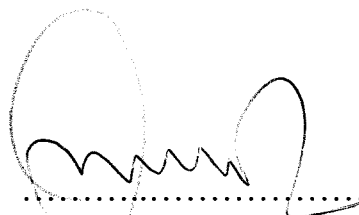
Taking all the above matters into consideration this ground of the Review succeeds.

Pursuant to Section 98 of the Act the Board orders as follows:-

- 1) The award of the five items in respect of which the Applicant had placed its bid is nullified;
- 2) The Procuring Entity is to admit the Applicant's bid documents and carry out re-evaluation of all the bid documents afresh.

DATED this 7th day of August, 2009


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Chairman, PPARB


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Secretary, PPARB

