

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 17/2013 OF 3RD MAY, 2013

BETWEEN

RUP PHARM LIMITEDAPPLICANT

AND

**NATIONAL COUNCIL FOR PERSONS WITH
DISABILITIES..... PROCURING ENTITY**

Review against the decision of the Tender Committee of National Council for Persons with Disabilities . in the matter of Tender No: NCPWD/01/2013-13 for Supply and delivery of sunscreen lotions with Sunscreen Protection Factor (SPF) 30+and SPF 50+.

BOARD MEMBERS PRESENT

Mr. P. M. Gachoka	- Chairman
Eng Christine Ogut	- Member
Ms. Judith Guserwa	- Member
Mr. Akich Okola	- Member

IN ATTENDANCE

Mr. Philemon Chemoiywo - Holding Brief for the Secretary

Ms Shelmith Miano - Secretariat

PRESENT BY INVITATION

Applicant - RUP PHARM LIMITED

Mr. P.S.Kisaka - Advocate

Dr.Raj Vaghella -Advocate

Mr.James Masika -Court Clerk

Procuring Entity - NATIONAL COUNCIL FOR PERSONS WITH DISABILITIES

Mr. Fredrick C.Omondi -Advocate

Mr. John Lektari - Senior Supply Chain Officer

Dr.Edwin Burugu -ACC Pharmacist

Interested Parties

Mr. Andrew Kilonzo -Procurement Officer,Matex Hospital Supplies

Mr. Maria Mbeneka - Advocate, Sunken International

Mr. LizBeth Mwende - Student

BOARD'S DECISION

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

BACKGROUND OF AWARDS

The National Council for Persons with Disabilities (NCPWD) received funds from the government for the Persons with Albinism (PWAs) programme. Consequently, the council in liaison with the ministry of medical services and the ministry of Gender Children & Social Development formed a technical working group to identify the requirements for the programme.

Advertisement

Advertisement of tender for the procurement of sunscreen lotions as referenced the tender NO. NCPWD/01/2012-13 for the procurement of sunscreen lotions was advertised on 18th February 2013 in the Daily Nation News paper and in the Standard Newspaper on 19th February 2013.

Closing/Opening:

The tenders were Closed/Open on 14th March 2013 at 11.00 am.

Four tenderers listed below responded

1. Matex hospital ltd
2. Ruppharm ltd
3. Dol international ltd
4. Suken International

EVALUATION

Members appointed Mr. Peter Musakhi and Dr. Paulyne Wairimu as the Chairperson and Secretary respectively among other seven members of evaluation Committee.

The Evaluation process included members of other ministries and organizations. The received tenders were subjected to two stages of evaluation namely; Technical and Financial evaluations.

Members from the Pharmacy and Poisons Board shared with the members evaluation criteria which also included marks that would assist during the technical evaluation of the tenders. The criterion was basically what was in the Tender Document, hence the expert explained on what each committee member was the requirement to look out for in each of the 17 criteria items.

The Committee discussed and agreed with the Evaluation Criteria provided by the Pharmacy and Poisons Board; and the criterion was adopted and used as working document.

The following considerations were made to be included in the Evaluation Criteria by the Committee:

- **Criteria 10:** The Active Pharmaceutical ingredients or equivalent should also include, Oxybenzone, Zinc Oxide Not More than 5% and Titanium Dioxide. **N/B-** For one to get the full marks allocated, they should have at least three ingredients mentioned above.
- **Criteria 10,11,12,15 and 16** are the major criteria to look out for, and therefore, each bidder (tender) must have at least 50% on the above mentioned items of the criterion.
- **Criteria 10.** The Active Pharmaceutical ingredients or equivalent are

1. Oxybenzone,
 2. Avobenzene Not More Than 5%
 3. Homosalate Not More Than 5%
 4. Octyl Methoxycinnamate Not More Than 5%
 5. Zinc Oxide Not More than 5%
 6. Titanium Dioxide.
- **Criteria 6:** Documentary Evidence of conformity of the goods; One should lookout for
 1. Certificate of Analysis
 2. Good manufacturing practice

N/B- A tender should declare whether they have Parabens because it causes an allergic effect.
 - **Criteria 7:** Water Resistance of the product;
Very water resistant- Should last 80 minutes after leaving water.
Water resistant- Should last 40 minutes after leaving water.
 - **Criteria 15:** Directions for use of product, should indicate
 - Apply generous amounts
 - Apply 20 minutes before sun exposure
 - To be reapplied every two hours or more
 - **Criteria 16:** Required warning statements- Not to be used on damaged or broken skin

Check out for UVA and UVB (protection against both UVA and UVB radiation from the sun)

The pass mark for the technical proposal is 40 marks (50%) for a tenderer to move to the next stage.

Evaluation of Tenders

The committee evaluated four tenders which were the only bids received and opened during tender opening meeting .Each was accompanied by samples of sunscreen lotions. The following are the results of the evaluation:

	RUP PHAM LTD	DOL INTERNATIONAL LTD	SUNKEN INTERNATIONAL LTD	MATEX HOSPITAL SUPPLIES LTD
Criteria No	Product 1-Sunchek & Truderma	Product 2-Solset	Product 3-Gallius Sun	Product4-Ave'ne
1	2	2	2	0
2	0	0	0	0
3	0	3	3	3
4	5	5	5	5
5	2	2	2	0
6	3	3	0	0
7	1	2	2	0
8	8	8	8	8
9	0	2	2	0
10	8	6	8	0
11	0	8	8	0
12	0	0	8	0
13	0	0	5	0
14	0	0	5	0
15	2	6	6	2

16	0	8	8	0
17	2	2	2	0
TOTALS	33	57	74	18

Findings

Following the earlier set pass mark of 50%, only two tenders passed the mark on the technical evaluation that is product 2 and product 3 with 57 and 74 marks respectively and therefore recommended to second level of evaluation

The following are the financial proposals from the two products that, is 2 and 3;

- **Product 2- 100ml**

Unit cost

SPF30- KShs 600.00

SPF50- Kshs 720.00

- **Product 3- 200ml**

Unit cost

SPF30- KShs 2,321.50

SPF50- Kshs 2,806.15

Product 2 which was 100 ml packs size was equated by Evaluation Committee to product 3 which is 200ml pack size hence the unit cost was adjusted as below;

- **Product 2- 100ml 200ml**

Unit cost

SPF30-	KShs 600.00	1,200Ksh
SPF50-	Kshs 720.00	1,440kshs

Note: The quantity of the sunscreen lotions to be procured is at 15,000 bottles. The committee therefore looked at the total amount the Council would incur when purchasing either type of the sunscreen lotions and it is as follows;

- **Product 2- 100ml 200ml (Equiv) Quantity Total**

Unit cost

SPF30-	KShs 600.00	1,200Ksh	15,000	18,000,000/=
SPF50-	Kshs 720.00	1,440kshs	15,000	21,600,000/=

- **Product 3- 200ml Quantity Total Unit cost**

SPF30-	KShs 2,321.50	15,000	34,822,500/=
SPF50-	Kshs 2,806.15	15,000	42,092,250/=

Recommendations

After the evaluation, the committee further looked into the financial proposals and various aspects in terms of quantity, other relevant efficacies and prices. The committee's recommendation of the product is based on the following factors:

FINDINGS	PRODUCT	PRODUCT 3 (GALLIUS)
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		2(SOLSET)	SUN)
1	The combination of Avobenzone + Titanium dioxide	Present It makes the product weak (as one inactivates the other) and thus the need to be used more frequently	Absent
2	Parabens (PABA)	Not declared	Absent Safer (no allergies). Parabens can cause allergic reaction to hypopigmentation individuals that is Persons with Albinism.
3	Dates of expiry and manufacture.	No specific dates of expiry and manufacturing. These were provided in handwritten on bottle/ container.	It is clearly labeled with the expiry and manufacturing dates.
4	Duration of use	The product is designed for normal day use and needs one to reapply often with exposure to the sun.	The product is designed for sportsmen thus use for persons exposed in the sun more, this is very relevant for Persons with Albinism and one may take more hours before reapplying.

In view of the above, Product 3 was recommended because;

There was lack of Parabens, lack of combination of finding No. 1, proper labeling of manufacturing and expiry dates and the frequency of use for product 3.

THE TENDER COMMITTEE DECISION

The Tender Committee at its meeting held on 15th April, 2013 approved award of the tender for Supply and delivery of Sunscreen Lotions with Sunscreen Protection Factor (SPF)30+ and SPF 50+ to SUNKEN INTERNATIONAL LTD at Ksh.49,994,587.50 (VAT inclusive) for 9750 bottles.

THE REVIEW

The Request for Review was lodged on 3rd May, 2013 against the decision of the Tender Committee of **NATIONAL COUNCIL FOR PERSONS WITH DISABILITIES** in the matter of Tender No: NCPWD/01/2013-13 for Supply and delivery of sunscreen lotions with Sunscreen Protection Factor (SPF) 30+and SPF 50+.

The Applicant was represented by Mr. P.S.Kisaka , Advocate while the Procuring Entity was represented by Mr. Fredrick C.Omondi , Advocate. The Interested Candidates M/s Matex Hospital Supplies Limited was represented by Mr. Andrew Kilonzo, Procurement Officer, while M/s Sunken International Limited was represented by Ms Maria Mbeneka, Advocate.

The Applicant has raised two grounds of Appeal and urged the Board to make the following orders:-

1. *Nullify the award of the tender*
2. *The Applicant be declared & awarded the tender with full costs of this application.*

The Applicant raises two grounds of review which the Board deals with as follows:

Ground 1and 2

The two grounds were consolidated as they raise similar issues on evaluation and subsequent notification.

The Applicant submitted that the Procuring Entity failed to award the tender to the Applicant who had submitted the lowest bid price at the opening of the tender. It alleged that its tender at Kshs.19, 796,746.50 complied with the evaluation criteria (technical) specified in the Tender Document. It stated that when the Procuring Entity made the award, it failed to consider that its tender being the lowest priced was the most qualified. It further stated that the award to M/s Sunken International Limited herein after referred to as the Successful Bidder was made on a basis of a skewed evaluation. It submitted that the evaluation criteria were provided on pages 34, 35, 37 and 38 of the tender document.

The Applicant submitted that the Procuring Entity had not awarded it any scores during the evaluation of criteria numbers 2, 3, 9, 11, 12, 13, 14 and 16 as per the Procuring Entity's response to the Request for Review as filed. It stated that with regard to evaluation criteria no.2 on the "status of approval in the country of origin (where applicable)", it had provided literature that contained the product specifications and the country of origin. It further stated that it had submitted a certificate of manufacture as evidenced on page 11 of its bundle and the documents on the country of origin were to be found on page 16.

With regard to criteria No.3, it urged the Board to examine the counter receipt voucher which clearly showed that it had provided 100ml samples of SPF 30+, SPF 50+, SPF 26+ and 60ml SPF 50+ as examples of the presentation of the packaging and quality by Aurochem Laboratories. It

stated that despite availing to the Procuring Entity the required samples, it was not awarded full scores for this criterion. It further submitted that 200ml sample provided by the Successful bidder did not conform to the required 100ml packaging as specified in the Tender Document.

The Applicant submitted that with regard to criteria no.9 on "the net quantity of the product (by volume in milliliter or weight in grams)" whereas the Procuring Entity scored it zero, it should have sought clarification on why the quantity was hand written. It further submitted that the Procuring Entity was obliged by the Act to treat all bidders equally. It queried why the Procuring Entity only sought clarification on the 200ml sample provided by the Successful bidder, as evidenced in the letter on page 85 dated 11th April, 2013 of the Procuring Entity's response. It argued that likewise, the Procuring Entity should have sought clarification on the samples it had provided.

With regard to criteria no.11 on "The proportions ofmg/ml", it submitted that the literature it provided had supplied all the required information. It argued that depending on the country of origin, the products could be marketed in terms of milliliters or milligrams. It further submitted that lotion could be measured in terms of weight or volume. It stated that it had written the quantity by hand to meet the requirement of the Tender Document. It further stated that in a letter dated 12th March,2013, the manufacturer of the sample M/s Aurochem Laboratories (India) Pvt. Ltd had written to the Procuring Entity stating that if awarded

the contract, as a manufacturer it would supply 100ml in Volume, of SPF30+ and SPF 50+ accordingly labeled specifically manufactured for the Procuring Entity's organization.

The Applicant submitted that with regard to criteria no.12, its sample met recommended storage condition of below 25°C which was below the required storage condition of below 30°C; hence it should have been scored fully. It further submitted that with regard to criteria No.13 & 14 on "Batch or Lot number of the product" and "Expiry date of the Product (should be at least 2/3 of the inferred shelf life", the Procuring Entity should have sought clarification in a similar manner as that of the successful bidder. In addition, it stated that with regard to criteria 16, that its samples had the required warning statements and should have been evaluated fairly.

The Applicant stated that whereas the Successful bidder had tendered at Kshs. 76 million, the award at Kshs. 49 million denied the Procuring Entity a competitive offer of Kshs. 19 million. In conclusion, it urged the Board to set aside the award of the tender to the Successful Bidder, M/s Sunken International Limited as the entire evaluation process disadvantaged the Applicant.

With regard to notification, the Applicant in its written submissions alleged that it had not received the letter of **Notification** of award dated 17th April, 2013 which was posted. It stated that the Procuring Entity only provided it with a copy of the notification letter when it visited its offices on 2nd May, 2013.

In conclusion it urged the Board to nullify the award of the tender to the successful bidder and award it costs.

In response the Procuring Entity stated that the Notification of award/regret letters were sent out to the tenderers without delay including the Applicant herein through their postal address as provided in the tender document.

The Procuring Entity submitted that the claim by the Applicant that it was the lowest evaluated bidder was not true as the technical evaluation report indicated that the Applicant managed to score 33 marks out of 80 which was below the 50% (40 marks) pass mark. It further submitted that the Evaluation Committee set a pass mark of 40 before proceeding to the financial evaluation. It argued that the Applicant was not qualified to proceed to the next stage of evaluation since it did not meet required pass mark. It further argued that the allegation that the Successful bidder was favoured was not true. It stated that contrary to the Applicants submissions that the evaluation process was skewed, all bidders were evaluated fairly as per the criteria set in the bid document. It submitted that the following were the reasons why it did not score the Applicant on various criteria.

1. With regard to evaluation criteria no.2 on the "status of approval in the country of origin (where applicable)", the evaluation committee was looking for proof that the product was registered in the country of origin to enable it assess the stated side effects during use of

product. It stated that the Applicant had not provided proof of approval by country of origin.

2. With regard to evaluation criteria no.3, the Applicant was scored zero because the evaluation committee did not know what sample the Applicant would provide if successful.
3. With regard to evaluation criteria no.9, for the samples provided by the Applicant, the total quantity was hand written and thus unacceptable.
4. With regard to evaluation criteria no.11, for the samples provided by the Applicant, the stated w/w was not representative of the total volume as the final volume was indicated by hand written.
5. With regard to evaluation criteria no.12, the Procuring Entity stated that whereas the bid document required bidders to provide "stability **date** to support the stated storage conditions should be provided" it evaluated bidders on the requirement on "stability **data** to support said storage conditions should be provided". It did not score the Applicant as it had not provided any data to prove stability conditions were provided.
6. With regard to evaluation criteria no.13 & 14, the Applicants samples were not scored as it had provided samples with stick on/ peel off batch numbers/ expiry and manufacturing dates which was unacceptable.
7. With regard to criteria no.16, whereas the Applicants sample contained warning statement, No warning on the "Do not Use on Broken skin" was provided.

The Procuring Entity stated that the clarification it sought from the Successful bidder did not change the substance of the tender. It urged the Board to strike out the Request for Review as filed, dismiss it with costs and confirm the award of the tender to the Successful Bidder.

In conclusion the Procuring Entity stated that the delay in signing of the tender contract heavily prejudices persons with Albinism, as the sunscreen lotions was meant to cushion persons with Albinism from sunshine while the Applicant herein was only interested in delaying the signing of the contract based on financial gains at the expense of the rights of Persons with Albinism as provided for under the Persons With Disabilities Act No. 14 of 2003.

The Successful bidder submitted that section 93 of Act allowed bidders to file a Request for Review and that both it and the Applicant were rightfully before the Board since they had both been posted the letter of notification as submitted by the Procuring Entity. It referred the Board to section 93 (b) which refers to the matters that are not subject to review are matters which appear to be frivolous. As the Applicant failed to demonstrate how the Successful bidder prejudice them, by failure to receive/get the letters of notification from the Procuring Entity.

The Successful bidder submitted that section 93 of Act allowed bidders to file a Request for Review and that both it and the Applicant were rightfully before the Board since they had both been posted the letter of notification as submitted by the Procuring Entity. It referred the Board to

section 93 (b) which refers to the matters that are not subject to review are matters which appear to be frivolous. As the Applicant failed to demonstrate how the Successful bidder prejudice them, by failure to receive/get the letters of notification from the Procuring Entity.

On its part, the Successful Bidder stated that it was notified of the Request for Review on 16th May, 2013. It submitted that Section 93 of Act allowed bidders who claimed to have suffered or risk suffering loss or damage due to breach of duty by the Procuring Entity to file a Request for Review. It referred the Board to section 93 (b) which refers to the matters that appear to be frivolous. It argued that the Applicant by submitting that it did not receive the letter of notification had not demonstrated how it risked incurring any losses or damage. It stated that it was awarded the Tender for the Supply and delivery of sunscreen lotions with Sunscreen Protection Factor (SPF) 30+and SPF 50+ on 17th April, 2013 and went on to accept the offer on 25th April, 2013. It submitted that the Request for Review as filed was frivolous as the Applicant had not demonstrated that its product was technically superior to that provided by the Successful bidder. It argued that it had won the tender having passed the technical evaluation stage. It urged the Board to dismiss the Request for Review and award it costs. It further requested the Board to allow it to complete the execution of the contract with the Procuring Entity and award it costs.

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

After hearing the submissions by parties, the Board is of the view that the whole case turns on the issue as to whether it has jurisdiction to entertain this application taking into account the provisions of Regulation 73 of the Public Procurement and Disposal Regulations (2006).

The jurisdiction of the Board is provided by Section 93 of the Public Procurement and Disposal Act, 2005. The said section provides as follows;

Section 93 (1): *“Subject to the provisions of this Part, any candidate who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the regulations, may seek administrative review as in such manner as may be prescribed.”*

Further the procedure for approaching it as set out in Regulation 73 which provides as follows;

73 (1) *“A request for review under the Act shall be made in Form RB 1 set out in the Fourth Schedule to these regulations.*

73(2) *The request referred to in paragraph (1) shall –*

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- *Be made within fourteen days of –*

- *the occurrence of the breach complained of where the request is made before the making of an award; or*
- *the notification under sections 67 or 83 of the Act;”*

The issue to be determined by the Board is whether this Request for Review was filed on time?

To answer the above question it is necessary to set out the background to this Request for Review which is as follows:

1. On 3rd May, 2013 the Applicant filed a Request for Review challenging the award of the No: NCPWD/01/2013-13 for Supply and delivery of sunscreen lotions with Sunscreen Protection Factor (SPF) 30+ and SPF 50+ to another bidder.
2. The Orders sought in the Request for Review were as follows;
 - a. *Nullify the award of the tender*
 - b. *The Applicant be declared & awarded the tender with full costs of this application.*
3. The Procuring Entity filed its Response on 13th May 2013 and by a letter ref. NCPWD/GF/7Vol.1 (183) dated 8th May, 2013.
4. That the Applicant was notified of the award of the tender vide a letter dated 17th April, 2013 from a copy of EMS delivery bill and certificate of postage issued on 17th April, 2013.
5. That the Notification letter to the Applicant had the address P.O Box 79677-00200 Nairobi which is the correct address.
6. The Applicant and filed this Request for Review on 3rd May, 2013.

From the foregoing, the Board finds that the Applicant was notified by registered mail on 17th April, 2013 and therefore the allegation that it was notified on 2nd May, 2013 is not sustainable. The Board further notes that time for the purposes of the appeal window started running on 18th April, 2013 and closed on 1st May, 2013. However, 1st May, 2013 was a public holiday and hence the last day was 2nd May, 2013. The Board notes that the Appeal was filed on 3rd May, 2013 which was one day after the Appeal window had closed

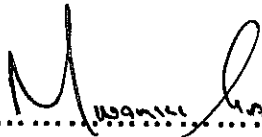
In view of the foregoing, the Board finds that the Application having been filed after the lapse of the Appeal window it has no jurisdiction.

The High Court has ruled before that , the first thing that a court or a quasi judicial body must determine before hearing an Application is whether it has jurisdiction to hear a matter brought before it. In the case of **D. Chandulal K. Vora Company Ltd v. Public Procurement Administrative Review Board (MISC. APP. No. 1160 of 2004**, the Learned Judge quoted Justice Nyarangi in the case of **Owners of the Motor Vessel "Lillians" v. Caltex Oil (K) Ltd C.A No.50 of 1989** as follows:

“Jurisdiction is everything and without it the court has no juris power to make one more step. Where a court has no jurisdiction there would be no basis for continuation of proceedings pending other evidence A court of law downs its tools in respect to the matter before it the moment it holds the opinion that it is without jurisdiction”.

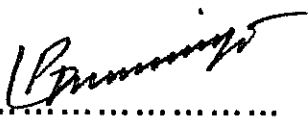
Taking all the above matters into account, this Request for Review fails and is hereby dismissed, with no orders to costs.

Dated at Nairobi on this 27th day of May, 2013.



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CHAIRMAN
PPARB



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SECRETARY
PPARB