

**REPUBLIC OF KENYA**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**REVIEW NO. 11/2014 OF 11TH APRIL, 2014**

**BETWEEN**

**LEADSTAR COMPANY LIMITED .....APPLICANT**

**AND**

**KENYA MEDICAL SUPPLIES AGENCY .....PROCURING ENTITY**

Review against the decision of the Tender Committee of Kenya Medical Supplies Authority (KEMSA) dated 2<sup>nd</sup> April, 2014 as communicated in the letter dated 4<sup>th</sup> April, 2014 in the matter of Tender No. KEMSA/OTT7/2013-2015 for the Supply of Non Pharmaceuticals (Surgical Tubes, Blades, and Cannulaes & Safety Boxes).

**BOARD MEMBERS PRESENT**

Mr. Paul Gicheru	- Chairman
Eng. Weche Okubo	- Member
Mr. Nelson Orgut	- Member
Mr. Hussein Were	- Member

**IN ATTENDANCE**

Ms. Pauline Opiyo	- Board Secretary
Mr. Philemon Kiprop	- Secretariat

## **PRESENT BY INVITATION**

### **Applicant – Leadster Company Limited**

1. Mwaniki Gachuba            Advocates, Onyoni Opini Advocates
2. Peter Olendi                 Advocates, Onyoni Opini Advocates

### **Procuring Entity – Kenya Medical Supplies Agency**

1. Julius Ogamba               Advocate
2. Edward Buluma             Director Procurement
3. Fredrick Wanyonyi         DLS/Cs
4. Nandili Mary                DCNO
5. Daisy Ronno                 Pupil, Migos Ogamba Advocates

### **Interested Parties**

1. Albert Khamininwa         Advocate, Revital Pharma
2. M M Essajee                 Director ,Revital
3. Elijah Oluoch               Sales Manager, Revital
4. Andrew Oluoch             Anocma Enterprises
5. R.C Shah                     Director, Bakpham Ltd
6. Dr Raju Vaghella           Director ,Rup Pharm Ltd
7. Marrion Wanjiku           Director, Access Alliance
8. Shruti Nasrani              Director, Alpha Medical
9. Pritpal Singh Bharja       CSN Manager
10. James Kinyua              Director, Admark
11. O Phaudy                   Operation Director, Nairobi Enterprises
12. Paul Siocha                 Operation ,Swissgarde Ltd
13. Judy C. koech              Legal Swissgarde Ltd
14. Brendah Kagwima         Sales Manager, Medisystem

- |                    |                          |
|--------------------|--------------------------|
| 15. Lucy Mutema    | Managing Director Petrel |
| 16. James Mutema   | Director Petrel          |
| 17. Joseph Nderitu | Sales, Buss GKS.         |
| 18. Naweed Khan    | Manager, Winston Int.Ltd |

### **BOARD'S DECISION**

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

### **THE BACKGROUND**

The Procuring Entity, the Kenya Medical supplies Authority advertised open International tenders in the four Daily Newspapers namely; the Daily Nation and the Star on 18<sup>th</sup> December, 2013 and the Standard and People Daily on 23<sup>rd</sup> December 2014. Tenders were closed/opened on 6<sup>th</sup> February 2014. The tender advertisements/consisted of 10 different tenders including one which is the subject matter of this Request for Review namely Tender No. 7 KEMSA/OIT7/2013-2015 for supply of the non Pharmaceuticals (surgical tubes Blades, Cannulaes and safety boxes.

According to the documents placed before the Board this tender attracted 129 firms who bought the tender documents but only 70 firms of the 129 of them submitted their bids.

One of the 70 firms which submitted their bids was Leadstar Company Limited which is the Applicant herein.

## **THE EVALUATION**

The tenders were opened and were subjected to the following three stages of evaluation.

1. Preliminary Examination
2. Technical Evaluation - Documents
3. Technical Evaluation - Product
4. Financial Evaluation.

Preliminary Evaluation was based on the following mandatory requirements:

- Tender form was to be duly completed and signed.
- Bid Bond was to be in original.
- The value of bid bond was to be 2% of the bid amount
- The Bid Bond was to be valid for a period of 30 days beyond tender validity
- A Declaration of Undertaking duly signed (Anti-corruption declaration dully signed).
- The business questionnaire was duly completed and signed.
- The bidder had to supply a copy of Certificate of Incorporation.
- The bidder had to supply a copy of the current Tax Compliance Certificate.

The outcome of the preliminary evaluation was as follows

### **Observation on bidders**

Bidder No 56 (KAM Pharmacy (Wholesale) Ltd) provided an expired tax compliance certificate (Expired 12th November 2012) but they attached evidence of application of a new tax compliance certificate.

### **Recommendations**

- a) Bidders No. 1, 2, 3, 4, 6, 7, 8, 9, 12, 13, 14, 15, 16, 17, 18, 19, 21, 22, 23, 24, 26, 27, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 66, 67, 69 and 70 passed preliminary examination and qualified for technical evaluation of documents.
- b) Bidder No. 5 (Pema Scientific Ltd) - The Tax compliance certificate provided (KRA 18/041709/2013) was invalid.
- c) Bidder No. 10 (Stivek Agoma EA Ltd)- The Tax compliance certificate provided (KRA 18/196107/2013) was invalid.
- d) Bidder No. 11 (Kenlink Global Ltd) - The Tax compliance certificate provided (KRA 17/001182/2014) was invalid.
- e) Bidder No. 20 (Apple Pharmaceuticals Ltd) - Did not provide Anti-corruption Policy.
- f) Bidder No. 25 (Runyaj International Ltd) - Provided bid security valued at Kshs 1,000,000.00 which was less than 2% of the total bid amount (Total bid amount was KES 64,396,760.000 and therefore 2% was KES.1, 287,935.20).
- g) Bidder No. 28 (Medisysem Supplies and Services Ltd) - The Tender form was not provided.
- h) Bidder No. 44 (Focusnet Connections Ltd) - The Tax compliance certificate provided (KRA 18/022794/2013) was invalid.
- i) Bidder No. 45 (Culture Star Enterprises Ltd).

- Provided tax compliance certificate No. KRA 16/018414/2013 which expired on 3rd November 2013.
  - Anti -corruption Policy was not provided.
- j) Bidder No. 65 (Rup Pharma Ltd) - Anti -corruption Policy was neither filled nor signed.
- k) Bidder No. 68 (Cathmos Enterprises Ltd) - Provided a bid security issued to crane hardware instead of Cathmos Enterprises Ltd).

### **1. TECHNICAL EVALUATION - DOCUMENTS**

Documents submitted by the bidders were subjected to a product by product examination to confirm the following:-

- Whether the Manufacturer's Authorization had been given.
- Whether the bidder had provided a Certificate of Quality.

Bidders who failed to meet any of the above criteria were declared non-responsive and disqualified from further evaluation; the Applicant passed this stage of evaluation.

### **3. TECHNICAL EVALUATION - PRODUCT**

The technical evaluation involved the product evaluation, packaging evaluation and labeling evaluation, using a checklist that had been developed and agreed upon prior to the evaluation exercise. The evaluation was based on product type, product form i.e. the physical configuration and shape, product ingredients i.e. content, components

and composition, measurements i.e. dimension and weight, elasticity where applicable, absorbency where applicable, texture where applicable and the packaging criteria was based on securely wrapped, quality of packaging material, unit package, individual package, presence of peel off sign and peel ability (ease of opening the package), presence of tamper-proof seal, while the labeling criteria was drawn from the technical specifications spelt out in the tender document.

The evaluation was on a "Yes/No" basis; with a "Yes" score earning one point and a "No" score earning no point (0). The scores for each item bid were represented as a % of the maximum possible score for that item on a weighted score as follows:

- Product Evaluation - 80% (i.e. 100% was weighted to 80%)
- Labeling and Packaging Evaluation - 20% (i.e. 100% was weighted to 20%).

Products that did not meet the set 100% (weighted to 80%) of the set evaluation criteria were disqualified. However products were required to meet at least 75% (weighted to 15%) of the labeling and packaging requirements, giving a minimum total weighted score of 95%.

Suppliers who were successful at the examination of the technical documents evaluation stage and had products that had a minimum weighted technical score of 95% were recommended for financial evaluation.

The outcome of this stage of evaluation for the bidders who reached that stage in the items which they had tendered for were as follows:-

Bidders No. 21(Lifecare Medics Ltd), 46 (Harley's Ltd), 66(Gomfa Enterprises Ltd) and 69 (Pharmaken Ltd) did not provide samples for evaluation and were therefore disqualified from further evaluation.

Bidders No. 15(Highridge Pharmaceuticals Ltd), 22(Leadstar Company Ltd), 48(Veteran Pharmaceuticals Ltd) 51 (Debra Ltd) and 61 (Requip Company Ltd) samples had the manufacturer's details affixed with a sticker and were therefore disqualified from further evaluation.

Bidder No. 30 (Admark Holdings Ltd) sample had the details of the manufacturer rubber stamped and was therefore disqualified from further evaluation.

Bidder 31 (Access Alliance Ltd) sample had no manufacturer's details and was therefore disqualified from further evaluation.

#### **4. FINANCIAL EVALUATION AND AWARD**

Financial evaluation was carried out in respect of all the bidders who were declared technically responsive and the bidders with the lowest evaluated responsive bids were recommended for the award of the respective tenders by the tender evaluation committee after a consideration of the margin of preference and after taking into account all the other relevant considerations.

The tender committee considered the recommendations of the tender evaluation committee and concurred with them and consequently awarded the following bidders the tenders in respect of the items that they had tendered for;-

##### **Item No. 6: Feeding Tubes - Size 12 Fg**

To Bidder No. 3, Revital Healthcare (Epz) Ltd at a unit price of USD 0.100 and at a total cost of USD 6,891.800



**Item No. 7: Feeding Tubes - Size 4 Fg**

To Bidder No. 62, Colour International Ltd at a unit price of USD 0.088 and a total cost of USD 10,526.912.

**Item No. 8: Feeding Tubes - Size 10 Fg**

To Bidder No. 18, Suken International Limited at a unit price of USD 0.250 and at a total cost of USD 17,073.750.

**Item No. 9: Feeding Tubes - Size 20 Fg**

To Bidder No. 18, Suken International Limited at a unit price of USD 0.250 and at a total cost of USD 416.750.

**Item No. 10: Feeding Tubes - Size 22 Fg**

To Bidder No. 18, Suken International Limited at a unit price of USD 0.250 and at a total cost of USD 416.750.

**Item No. 11: S.Blades -23 S.S/C.S. Sterile On Disp Bp - Handle**

To Bidder No. 17, Winston International Ltd at a unit price of USD 1.730 and at a total cost of USD 168,036.630.

**Item No. 12: S.Blades -15 S.S/C.S on Disp Bp - Handle Size 6**

To Bidder No. 17, Winston International Ltd at a unit price of USD 1.690 and at a total cost of USD 72,925.190.

**Item No. 13: I.V. Cannulaes - 18g**

To Bidder No. 46, Harley's Ltd at a unit price of USD 0.112 and at total cost of USD 77,716.352.

**Item No. 14: I.V. Cannulaes - 22g**

To Bidder No. 46, Harley's Ltd at a unit price of USD 0.112 and at a total cost of USD 103,556.656.

**Item No. 15: I.V. Cannulaes - 20g**

To award the tender as follows as there was a tie on prices;

- Bidder No. 1 (Anocma Enterprises) to supply 462,307 pieces at a unit price of KES 12.000 and at a total cost of KES 5,547,684.00
- Bidder No. 52 (Jafcom Holdings Ltd) to supply 462,307 pieces at a unit price of KES 12.000 and at a total cost of KES 5,547,684.00

**Item No. 16: I.V. Cannulaes - 24g**

To Bidder No. 1 (Anocma Enterprises) at a unit price of KES 13.500 and at a total cost of KES 10,837,071.00.

## REVIEW

This Request for Review was lodged by Leadstar Company Limited on 11<sup>th</sup> April, 2014 against the decision of the Tender Committee of the Kenya Medical Supply Agency as notified in the letter dated 4<sup>th</sup> April, 2014 in matter of tender No. KEMSA/OIT7/2013-2015.

The Applicant was represented by Mr. Mwaniki Gachuba Advocate from the firm of M/s Onyoni Opini and Gachuba Advocates while the Procuring Entity was represented by Mr. Julius Ogamba Advocate from the firm of M/s Ogamba & Company Advocates.

Various Interested Parties appeared before the Board of the hearing of the Request for Review but only the following introduced themselves when the Board requested the parties to do so; Revital Pharma Limited represented by Mr. Albert Khaminwa advocate Rup Pharm Limited, Alpha Medical Manufactures Limited, Bakpham Limited and Petrel Agencies all of who appeared through their respective officers.

Other than the application for adjournment made by Mr. Khaminwa learned Counsel for the Revital Pharma Limited but which the Board declined to grant for the reasons given in it's decision delivered on 28<sup>th</sup> April, 2014, all the Interested Parties except Alpha Medical Manufacturers Limited did not support or oppose the submissions made by the Applicant or the Procuring Entity. Alpha Medical Manufacturers Limited however supported the Applicant's submissions and differed with the Procuring Entity's position though it had not filed an independent Request for Review.

The Board wishes to note at the outset that it has looked at all the documents filed before it and was unable to locate any notice of appointment of advocates by Counsel for Revital Pharma Limited.

The Applicant in this Request for Review based his request on four grounds of Review, namely;

1. **THAT** the Procuring Entity violated section 2(b),(c),(d)&(e) and 66(2) of the Public Procurement and Disposal Act, 2005 and Regulation 16(5)(a) of the Public Procurement and Disposal Regulations, 2006 read with Article 227(1) of the Constitution of Kenya, 2010 by evaluating the Applicant's tender document contrary to the Instructions to Tenderers (ITT) Clause 5, 29.2 and 29.3; Technical Data Sheet (TDS) Clause 6.3; General Technical Specifications of Non-Pharmaceuticals Clause 8.1(g) and 12 and the Schedule of Requirements of the Tender Document.
  
2. **THAT** the Procuring Entity violated the provisions of section 2(a) of the Public Procurement and Disposal Act, 2005 and Regulation 16(5)(b) of the Public Procurement and Disposal Regulations, 2006 as amended by Regulation 5(4)(b) and 14(b) of the Public Procurement and Disposal (Amendment) Regulations, 2013 by failing to evaluate and award the tender within 30 days of the opening date.
  
3. **THAT** the Procuring Entity's decision was unlawful as it violated the provisions of section 17(2)(a) of the Sale of Goods Act, cap 31.

4. **THAT** the Procuring Entity's decision was unconstitutional as it contravened the provisions of Article 27(1), 46(1)(c), 47(1) and 227(1) of the Constitution of Kenya, 2010 and the same is therefore null and void and of no legal effect.

The Applicant consequently sought for the following reliefs:-

- a) *That the decision of the Procuring Entity to disqualify the Applicant's tender be annulled.*
- b) *That the Procuring Entity do substitute the award of the tender and award the same to the Applicant having submitted the lowest evaluated bid or in the alternative, the Procuring Entity do re-evaluate the Applicant's tender in accordance with section 66(2) of the Public Procurement and Disposal Act, 2005 and the tender document.*
- c) *That costs plus interest of the Application be borne by the Procuring Entity.*

When the Request for Review came up for hearing, the Procuring Entity indicated that it did not wish to pursue the preliminary objection set out in paragraph 2 of its Replying Affidavit sworn on 17<sup>th</sup> April, 2014 which was to the effect that the Request for Review before the Board had been filed out of time. This therefore paved the way for the hearing of the Applicant's Request for Review on the merits.

Counsel for the Applicant abandoned ground 3 of the Request for Review and argued the remaining three grounds. The Board shall therefore now proceed and consider the parties arguments and render a decision on each of the three grounds for Review. The Board in doing so

has taken into account the positions taken by each Interested Party as already indicated at pages 9 and 10 of this decision.

### **Ground 1**

**Whether or not the Procuring Entity violated the provisions of Sections 2(b), (c), (d) and (e) and 66.2 of the Public Procurement and Disposal Act, Regulation 16 (5) (a) of the Public Procurement and Disposal Regulations 2006 read with Article 227 (i) of the Constitution of Kenya by evaluating the Applicants tender document contrary to the instructions to tenderers (ITT) clause 5, 29.2, the Technical Data Sheet clause 6.3, General Technical specifications of non Pharma Ceutical clause 8.1 (g) and 12 and the schedule of the tender document.**

As relates to this ground of Review, the Applicant alleged that the Procuring Entity violated the provisions of sections 2(b), (c), (d) & (e) and 66(2) of the Act, and Regulation 16(5)(a) as read together with Article 227(1) of the Constitution of Kenya, 2010 by evaluating the Applicant's tender document contrary to the requirements of the said Documents.

The Applicant's main argument was that the Procuring Entity had not specified in the tender document how samples were to be labelled and that the tender document did not also explain how the manufacturers details were to be affixed.

Counsel for the Applicant referred the Board to the printed page 80 of the tender document which appears at the hand written page 90 of the Applicant's Request for Review headed "labelling parameters" and

stated that all that was required from the bidders was that the sample supplied by the bidder was to be labelled in English and that the Procuring Entity had therefore erred in disqualifying the Applicant based on a criteria that was not set out in the tender document.

The Applicant therefore submitted that the Procuring Entity had breached the provisions of Section 66(2) of the Act which stipulates that the evaluation and comparison of tenders shall be done using the procedures and the criteria set out in the tender documents and no other criteria shall be used.

The Applicant referred the Board to the decision in the case of the **Republic =vs= The Public Procurement Administrative Review Board and 2 others ex-parte Hyosung Ebara Company Limited (2011) eKLR** where the High Court held that where a Procuring Entity had provided an evaluation criteria in its tender documents, the Procuring Entity must strictly adhere to that criteria in the tendering process and that if it acted outside that criteria it would be acting contrary to the provisions of Section 66(2) of the Act.

The Applicant also referred the Board to the decision in the case of the **Republic =vs= Public Procurement Administrative Review Board & Another ex-parte Selex Sistemi Intergrate (2008) eKLR** in support of the proposition that by purporting to carry out an evaluation using a criteria other than that provided for in the tender document, the Procuring Entity had failed to comply with clear statutory and mandatory provisions of the law, namely, Section 66(2) of the Public

Procurement and Disposal Act 2005 and the objectives set out under Section 2 of the said Act and its decision was therefore ultra-vires, null and void.

The Applicant finally submitted that even if the labelling using a removable sticker was of such importance to the Procuring Entity, the Board Should treat it as a minor informality and irregularity which could be resolved during contract negotiation and to find that it was therefore harsh and unreasonable for the Procuring Entity to have rejected the Applicant's tender on such a flimsy ground. The Applicant did not dispute that it did not submit samples for items 8 and 10 in its submissions in support of the Application or in its response to the Procuring Entity's submissions.

In response to this ground of review, the Procuring Entity denied that the Applicant's tender was the most economically responsive tender. It stated that the Applicant's tender was disqualified at the technical evaluation-product evaluation stage since the evaluation committee discovered that the samples submitted by the Applicant under items No. 6,7,9,11,12,13,14,15 and 16 had the manufacturers details affixed with a removable sticker contrary to the instructions in the tender document and further submitted that the applicant did not submit samples for items No. 8 and 10 contrary to the instructions in the tender document.

The Procuring Entity disagreed with the Applicant's assertion that the requirement on how samples were to be labeled was an extraneous criteria not contained in the tender document and referred the Board to



Clause 12.2 appearing at page 85 of the Applicant's own Request for Review which stipulated how samples should be labeled.

The Procuring Entity consequently argued that by failing to comply with the criteria set out in clause 12.2 of the tender document the Applicant had failed to observe clear requirements which were contained in the tender document and was seeking preferential treatment since all the other bidders had been evaluated based on the same criteria.

Counsel for the Procuring Entity additionally submitted that clause 12.2 simply required the manufacturer's details to be submitted in the normal commercial nature and that the labeling envisaged by clause 12.2 was not that of simply typing and sticking the manufacturers particulars on the samples and further indicated that the Procuring Entity required the supply of a considerable number of packages for each item tendered for and that some extend to several thousands and wondered how practical the method of labeling that involved typing and sticking samples using removable stickers would have worked and that if allowed such interpretation of clause 12.2 it would open a floodgate for counter feight goods since any bidder would be at liberty to pick a product from anywhere and then proceed to produce a computer print out giving typed details of the manufacturer and then stick it on the product.

Counsel for the Procuring Entity also submitted that the Procuring Entity was under a constitutional duty/obligation to protect consumer rights under the provisions of Article 46 of the Constitution of Kenya 2010 and that under clause 29.2 of the Tender Document, labeling of

products was a fundamental aspect of the tender and not a minor deviation or formality that could be cured through negotiations since it would take away all the rights conferred on consumers by the provisions of the said Article 46 of the Constitution.

The Procuring Entity in conclusion submitted that contrary to the allegations made by the Applicant in the instant application that the Procuring Entity had violated any of the provisions of the Constitution, the Act the Regulations and the tender document on the evaluation criteria, the Procuring Entity submitted that no such breach had been demonstrated by the Applicant. The Procuring Entity therefore urged the Board to dismiss the Request for Review in it's entirety since it was an abuse of due process and had been filed with the sole object of delaying the Procurement process.

The Board has perused a copy of the tender document issued to the bidders and the evaluation report submitted to it by the Procuring Entity. The Board notes that the bid document had an elaborate evaluation criteria which included the criteria on the evaluation of the products.

Clause (b) 6.3(b) provides as follows:-

*(b) 6.3(b) The Tenderer is requested to provide, in support of their technical offer, a sample for tests for each of the items offered under separate cover at or before the tender closing date and time. The sample is to be clearly labeled with the tenderer's name, tender reference and identification of the product. The*

*sample requested is to be submitted as per technical specification offered by the Tenderer and shall represent exactly the product that is intended to be supplied in case of contract award.*

*(c) If, for reasons other than the tender specific labeling requirements, the sample is not consistent with the required technical specifications then the offer for the particular item shall be rejected.*

On the issue of labeling under clause 8 headed **Labeling Instructions**, the tender document provides as follows:-

**8.1 The Label for each Non pharmaceutical products shall include:**

- a) Date of manufacture and date of expiry (in clear language, not code)*
- g) Name and address of manufacturer*
- h) .....*

While clause 12.2 headed "samples" provides as follows:-

*12.2 The sample including literature should be submitted in their normal or usual commercial packing and should be labeled in English. The sample must be a true representative of the product tendered for.*

It is clear from all the above clauses in the tender document that the manner in which samples were to be labeled was part of the criteria provided for in the tender document. Clause 12.2 which the Board has referred to above states without any ambiguity that the sample

including the literature should be submitted in their normal or usual commercial packaging and should be labeled in English. The sample must be a true representative of the product tendered for.

The Board further finds that the Applicant was bound to observe this criteria which was applied to all the other tenderers and notes that quite a number of them were disqualified based on this requirement as already stated in the background to this decision. This being an evaluation criteria specifically set out in the document and which was applied to all tenderers across the board the criteria cannot therefore be termed a minor informality or irregularity.

The requirement on the proper labeling of products is meant to protect consumer rights as respects their origin, quality in order to enable the consumers gain the full benefit from the goods and services with the ultimate aim of protecting their health, safety and economic interests as required by Article 46 of the Constitution of Kenya 2014.

The Procuring Entity therefore acted within the provisions of the law and more particularly Section 66(2) of the Act by applying an evaluation criteria which was expressly set out in the tender documents.

The Board is further fortified in its finding on the above issue by the provisions of Sections 27(1) and 64(1) of the Act and Regulations 47 and 48 which provide as follows:-

Section 27(1):-

*"A Public Entity shall ensure that this Act, the Regulations and any directions of the Authority are complied with respect to each of its procurements".*

Section 64(1)

*"A tender is responsive if it confirms to all the mandatory requirements in the tender documents".*

Regulations 47 and 48 (1)

*47(1) "Upon opening of the tenders under section 60 of the Act, the evaluation committee shall first conduct a preliminary evaluation to determine whether:-*

- a) The tender has been submitted in the required format.*
- b) .....*
- c) all required documents and information have been submitted;*  
*and*
- d) any required samples have been submitted.*

*(2) the evaluation committee shall reject all tenders, which do not satisfy the requirement set out in paragraph (1)".*

*48(1) A Procuring Entity shall reject all tenders, which are responsive in accordance with Section 64 of the Act".*

According to the evaluation report placed before the Board, the Applicant's tender was rejected because the Applicant's samples had the

manufacturer's details affixed with a sticker and were therefore disqualified from further evaluation. This was attributed to the fact that it submitted samples that had some literature imprinted on the package while details of the manufacturer were affixed using computer generated print outs typed on a paper and were then affixed on the samples using a removable sticker, while the packaging was in plastic/polythene. The Board has inspected the samples in contention and has verified that the above indeed was the position. As for items No. 8 and 10 the Board has examined all the samples supplied by the Procuring Entity and did not find any evidence to show that they were provided either to the Procuring Entity or to the Board by the Applicant.

The Applicant did not at any rate deny that it did not supply samples for items 8 and 10 and therefore finds and holds that the Applicant also failed to comply with the mandatory requirements in the tender documents as regards items 8 and 10.

The Board agrees with and is bound by the High Court decisions in the cases of the **Republic =vs= the Public Procurement Administrative Review Board and 2 others Exparte Hyound Ebara Company Limited (2011) eKLR** and the decision in the case of the **Republic =vs= the Public Procurement Administrative Review Board and Another Exparte Selex Sistemi Intergrate (2008) eKLR** which the Board was referred to by Mr. Gachuba learned Counsel for the Applicant. The two decisions however support the Procuring Entity's position since the Board has already found that the requirements on samples and the

labeling parameters were part of the evaluation criteria. A finding to the contrary would therefore go against these two High Court decisions.

In view of what the Board has stated above, it is the Applicant and not the Procuring Entity which failed to comply with the mandatory tender requirements and ground 1 of the Applicant's Request for Review therefore fails.

## GROUND 2

Whether the Procuring Entity violated the provisions of Section 2(a) of the Public Procurement and Disposal Act 2005 and Regulations 16 (5) (b) of the Public Procurement and Disposal Regulations 2006 as amended by Regulation 5(4) (b) and 14(b) of the Public Procurement and Disposal (Amendment) Regulations 2013 by failing to evaluate the tender within Fifteen (15) days of opening date.

On this ground of Review, the Applicant argued that the Procuring Entity violated the provisions of section 2 (a) of the Public Procurement and Disposal Act 2005 and Regulation 16(5) (b) of the Public Procurement and Disposal Regulations 2006 as amended by Regulation 5(4) (b) and 14(b) of the Public Procurement and Disposal (amendment Regulations) 2013 by failing to evaluate and award the tender within Fifteen (15) days of the opening date though ground 2 on the typed Request for Review reads Thirty (30) days.

The Procuring entity in its Replying Affidavit sworn on 17<sup>th</sup> April 2014 by Dr. John M. Munyu MBS gave an explanation of the reasons why

the evaluation and the award were not made within the stipulated period and these are contained at paragraphs 7, 12, and 13 of the said Replying affidavit. They were basically that this tender attracted 129 firms who bought the tender documents and out of which 70 firms submitted their bids. He further stated that he appointed a tender evaluation committee for the tender but owing to the sheer number of the firms to be evaluated, the process could not be completed within 15 days and that he was requested to extend the period of evaluation pursuant to the provisions of clause 14(2) of Legal Notice 106 of 18<sup>th</sup> June 2013 (The Public Procurement and Disposal Amendment Regulations 2013) a request which he acceded to in his letter dated 20<sup>th</sup> February 2014 which he produced as annexure "JMM 6".

The Board has considered the submissions made by both parties together with the provisions of Section 66 (6) of the Act, Regulation 16(5) (5) of the Public Procurement and Disposal Regulations 2006 and the provisions of the amended Regulation 5 (4) (b) and Regulation 14 (2) of the Public Procurement and Disposal (amendment) Regulations 2013 and finds that though Regulation 5(4) (b) of amended Regulations provides that tenders shall be evaluated within a period of Fifteen (15) days, Regulation 14 (2) of the Regulations allows the accounting officer or the head of the Procuring Entity to extend that period by a further period of time not exceeding Thirty (30) days from the date of expiry of the initial period where the tender is complex or has attracted a high number of tenderers but so long as the extension is made within the tender validity period.



The Board has taken into account the sheer number of bidders numbering 70 in total and the volume of documents placed before it in this application and finds that the reasons given by the procuring entity cannot be faulted. The process of evaluation is one that requires considerable care in carrying out and the evaluation of 70 bids to confirm compliance with the preliminary mandatory requirements, followed by technical and financial evaluations is by no means an engaging one. The Board also notes that each item on the tender form required an evaluation of several products some extending to several hundred's in number.

Going back to annexure "JMM 6", the letter by Dr. Munyu shows that the evaluation of the tender commenced on 20<sup>th</sup> February, 2014 and the period of 15 days from 6<sup>th</sup> February, 2014 therefore lapsed on 21<sup>st</sup> February, 2014 or thereabouts while the extension was granted on 20<sup>th</sup> February 2014 and was therefore within the period of 15 days required for evaluation when the decision to extend the period was made. The Board has also established as a fact that the validity period for this tender was 120 days from 6<sup>th</sup> February, 2014 and that the tender is therefore alive up to 5<sup>th</sup> of June, 2014 or thereabouts.

The Board has already stated that this tender attracted a high number of tenderers and that the Board has examined the entire evaluation report and all the documents and the samples placed before it and in addition to the finding on the high number of tenderers the Board also finds that the tender in issue was a complex one and that though any of the two thresholds, namely, either complexity or the number of the tenderers is

enough for the purposes of extension, this tender met both these two thresholds.

The Procuring Entity's accounting officer was therefore right in his decision to extend the period for tender evaluation.

In the case of **Hatari Security Guards Limited =vs= Kenya College of Communications Technology (PPRB) Application No. 30 of 2008** The Applicant applied for Review inter-alia on the grounds that the Procuring Entity had evaluated the tenders outside the then required evaluation period of Thirty (30) days but the Board held at holding No. 4 of it's decision that even though the Procuring Entity breached the provisions of Regulation 46 on the period of evaluation, the award was made within the tender validity period and the Applicant did not suffer any prejudice.

The Applicant did not demonstrate what prejudice it suffered and cannot seek to be treated on the basis of a different yardstick from that applied to all the other tenderers.

Consequently the Board finds and holds that ground 2 of the Applicant's Request for Review also fails.

**GROUND 3:**

Whether or not the Procuring Entity's decision was unconstitutional for contravening the provisions of Article 27 (1) 46 (i) (C), 47(i) and 227 (1) of the Constitution of Kenya 2010 and whether the same is therefore null and void and of no legal effect.

This ground was argued by the Applicant on the basis that the Procuring Entity had breached the provisions of the Act and the Regulations as particularized in grounds 1 and 2 above. The Board has examined both grounds and has found that both grounds have failed.

The Board therefore holds that the Applicant having not demonstrated any breach of the Act, the Regulations or the evaluation criteria in the Tender Documents by the Procurement entity, the Applicant cannot claim that any of its constitutional rights were breached.

This ground of Review must therefore also fail and the Board holds so.

Finally the Board notes that this tender involves the issue of supply of non Pharmaceutical Surgical tubes, blades and cannulaes and safety Boxes which are to be used in Public hospitals for the treatment of patients and notwithstanding the fact that the Board has already found that all the grounds for Review set up by the Applicant lack merit, it would be in the Public interest if patients can access the equipments the subject matter of this Review without any further undue delay.

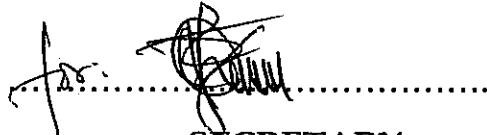
In view of all the above findings and in exercise of the powers conferred upon this Board by the Provisions of Section 98 of the Act, the Board therefore makes the following orders:-

- a) The Request for Review dated 11<sup>th</sup> April 2014 and filed by the Applicant on the same day be and is hereby dismissed.
- b) The order of stay issued by this Board on 11<sup>th</sup> April 2014 pursuant to the said Request for Review is hereby discharged and the Procuring Entity is therefore at liberty to proceed with the Procurement/Procurements which were the subject matter of this Request for Review.
- c) Each party shall bear it's own costs of this Request for Review.

Dated at Nairobi on this 29<sup>th</sup> day of April, 2014

  
.....

**CHAIRMAN**  
**PPARB**

  
.....

**SECRETARY**  
**PPARB**