

**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 AUTHORITY.....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/OIT7/2013-2015 for the Supply of Non Pharmaceuticals (Surgical Tubes, Blades, and Cannulaes & Safety Boxes).

**THE BOARD'S DECISION AND ORDERS ON ALL THE  
INTERLOCUTORY APPLICATIONS.**

**Date: 28<sup>th</sup> April, 2014**

Mr. Albert Khaminwa Advocate for Revital Pharma Limited (Though has not filed a notice of appointment of advocates).

Mr. Chairman: I wish to apply for an adjournment. My client was served with the notice to appear before the Board on 25<sup>th</sup> April 2014 and my client therefore needs time to put in a Replying Affidavit setting out certain grievances which were not addressed by the Procuring Entity.

Mr. Chairman: Did your client file it's own independent Request for Review.

Mr. Khaminwa: No Mr. Chairman my client did not file it's own Request for Review but it has grievances which it insists must be brought to the attention of the Board.

Chairman: Does any Advocate or any of the Interested Parties wish to comment on any of the matters that Mr. Khaminwa has raised. I see no indication that any of you wants to make a comment.

Mr. Mwaniki Gachuba Advocate for the Applicant

Mr. Chairman I also have an application to make. I have reduced my submissions into writing complete with authorities but I have not filed and served them. My clerk presented them to the Board today at midday but he was unable to file them. I therefore seek the Board's indulgence. I am

praying that the Board allows me to file, serve and rely on the written submissions.

Chairman: Does any of the parties have any objection to Mr. Gachuba's application.

Mr. Julius Ogamba - Advocate for the Procuring Entity.

I have a strong objection to that application. I have not seen the submissions. How can I be expected to read them and argue the Request for Review? Counsel for the Applicant is ambushing me. He can still make his submissions orally and touch on any matter that is in his written submissions subject to the caveat that if he has any authorities he wishes to rely upon, I have no objection to him relying on them subject to my being accorded an opportunity to comment on them.

Mr. Khaminwa: I have also seen the submissions. I stick by my earlier submissions on the issue of the adjournment.

Chairman: Any other comments from any of the Interested Parties? I see none.

**DECISION AND THE ORDER OF THE BOARD ON THE APPLICATION FOR ADJOURNMENT AND LEAVE TO FILE, SERVE AND RELY ON WRITTEN SUBMISSIONS.**

The Board has considered the application for adjournment by Mr. Khaminwa and the application by Mr. Gachuba seeking to be allowed to file, serve and rely on his written submissions. The Board has also considered the submissions by Mr. Ogamba and Mr. Khaminwa in answer to Mr. Gachuba's application. On the application for adjournment, the Board declines the prayer for adjournment for the following reasons:-

- a) The Board has perused all the documents before it and has noted that Mr. Khaminwa has not filed a notice of appointment of advocates on behalf of Revital Pharma Ltd.
- b) When Revital Pharma Ltd was served with a notice by the secretary to the Board, it wrote to the Board and intimated that it would file a notice of Preliminary Objection with the Board before the hearing of this matter today but none has been filed todate.
- c) The Interested Party Revital Pharma Ltd has intimated that it requires time to file a Replying Affidavit setting out it's grievances. The Board finds that this can be done in a separate Request for Review if at all it has it's own independent grievances but it cannot raise those grievances in a Request for Review filed by another bidder since the Board would not even have jurisdiction to address or grant any orders to it without any prayer or prayers arising from any of it's independent grievances.

- d) The Interested Party will not be prejudiced since all the documents relating to this tender are already before the Board and the Applicant can refer to and comment on any of the documents on any issue that may be raised touching on it. The Board notes that all the other Interested Parties present have not filed any Replying Affidavits but the Board shall hear any of them on any issue touching on them and that includes the interested Party who has applied for adjournment.
- e) The Board also declines Mr. Gachuba's application for leave to be allowed to file, serve and rely on it's written submissions because this Request for Review was filed by him on behalf of his client on 11<sup>th</sup> April, 2014 and he has therefore had all the time to file and serve his written skeleton submissions. The Board agrees with the submissions in opposition to the application and finds that the other parties having not been served with the written submissions at all, they will suffer prejudice.

Mr. Gachuba can in any event make oral submissions on any of the issues in his written submissions and can rely on any authority subject to any objection by any of the parties.

**Julius Ogamba - Advocate for the Procuring Entity**

**Mr. Chairman:** I have an application to make in respect of the items No's. 1, 2, 3, 4, and 5 as advertised in the Daily Nation Newspaper of 18<sup>th</sup>

December 2013. Those tenders are not the subject matter of the Application before the Board but when this application for Review was filed, the Board through its secretary issued a blanket order of stay in respect of the above items. The order of stay was issued on 11<sup>th</sup> April 2014 and the Procuring Entity cannot therefore proceed any further with the process of procurement in respect of tenders No. 1, 2, 3, 4 and 5 in spite of the fact that they were not part of the contested items in the Request for Review before the Board.

**Chairman:** Mr. Gachuba do you have any objection to the Application made by Mr. Ogamba.

**Mr. Mwaniki Gachuba Advocate for the Applicant.**

I have no objection to the application. I confirm that items No. 1, 2, 3, 4 and 5 are not the subject matter of the Request for Review that my client filed and the order of stay given on 11<sup>th</sup> April 2014 as respects those items was therefore issued in error.


**THE BOARD'S DECISION AND ORDER ON THE STAY ISSUED IN RESPECT OF ITEMS 1, 2, 3, 4 AND 5**

Both Counsel for the Procuring Entity and the Applicant concede that items No's. 1, 2, 3, 4 and 5 as advertised in the Daily Nation Newspaper of 18<sup>th</sup> December, 2013 were not the subject matter of the Application for Review before the Board and that the stay order as respects those items

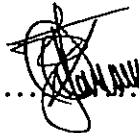
was issued in error. Accordingly, the order of stay issued on 11<sup>th</sup> April 2014 as respects items 1, 2, 3, 4 and 5 as advertised in the Daily Nation Newspaper of 18<sup>th</sup> December 2013 be and is hereby vacated and the Procuring Entity is at liberty to proceed with the Procurement process in respect of the said items.

Dated at Nairobi this 28<sup>th</sup> day of April, 2014.

Chairman

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Secretary

for:  \_\_\_\_\_

