

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**  
**APPLICATION NO. 132/2019 OF 7<sup>th</sup> NOVEMBER 2019**

**BETWEEN**

**MEDIONICS HEALTHCARE LIMITED.....APPLICANT**

**AND**

**THE PRINCIPAL SECRETARY,  
MINISTRY OF EDUCATION**

**STATE DEPARTMENT OF EARLY LEARNING AND**

**BASIC EDUCATION.....1<sup>ST</sup> RESPONDENT**

**AND**

**MINISTRY OF EDUCATION**

**STATE DEPARTMENT OF EARLY LEARNING AND**

**BASIC EDUCATION.....2<sup>ND</sup> RESPONDENT**

Review against the decision of the Ministry of Education, State Department of Early Learning and Basic Education with respect to Tender No. MOE/SDELBE/NCB/01/2019-2020 for the Supply and Delivery of the Sanitary Towels to Public Primary Schools from Local Manufacturers.

**BOARD MEMBERS**

- |                      |              |
|----------------------|--------------|
| 1. Ms. Faith Waigwa  | -Chairperson |
| 2. Dr. Joseph Gitari | -Member      |

- |                         |         |
|-------------------------|---------|
| 3. Mr. Alfred Keriolale | -Member |
| 4. Mr. Nicholas Mruttu  | -Member |

### **IN ATTENDANCE**

- |                         |                              |
|-------------------------|------------------------------|
| 1. Mr. Philemon Kiprop  | -Holding brief for Secretary |
| 2. Ms. Maryanne Karanja | -Secretariat                 |

### **PRESENT BY INVITATION**

#### **APPLICANT**

#### **-MEDIONICS LIMITED**

#### **HEALTHCARE**

- |                         |   |
|-------------------------|---|
| 1. Mr. Innocent Muganda | -Advocate, Caroline Oduor & Associates<br>Advocates |
| 2. Mr. Sagal Abdul      | -Lawyer, Caroline Oduor & Associates<br>Advocates   |
| 3. Ms. Lilian Kinoti    | -Director   |
| 4. Mr. Samuel Gachina   | -General Manager                                    |
| 5. Mr. Kevin Mburu      | -Business Development                               |

**PROCURING ENTITY****-MINISTRY OF EDUCATION STATE  
DEPARTMENT OF EARLY LEARNING  
AND BASIC EDUCATION**

- |                       |   |
|-----------------------|---|
| 1. Ms. Faith Chirchir | -Senior State Counsel                   |
| 2. Ms. Reginah Kanyi  | -Deputy Supply Chain Management Officer |
| 2. Mr. Jeremiah Mwayi | -                                       |

**INTERESTED PARTIES****A. AFRICAN COTTON INDUSTRIES LIMITED**

- |                        |           |
|------------------------|-----------|
| 1. Mr. Mureithi Regeru | -Director |
|------------------------|-----------|

**B. INTER CONSUMER PRODUCTS LIMITED**

- |                      |  |
|----------------------|--|
| 1. Mr. Paul Kinuthia |  |
|----------------------|--|

**BACKGROUND TO THE DECISION****The Bidding Process**

The mandate to procure and distribute sanitary towels was transferred to Ministry of Gender in the year 2016 from the Ministry of Education. However, the Ministry of Gender transferred the procurement of sanitary towels to the Ministry of Education State Department of Early learning and Basic Education (hereinafter referred to as "the Procuring Entity") vide their letter Ref no

MPSYG/SDGA/PROG/10/9/1E dated 7<sup>th</sup> August 2019 requesting the Ministry to start the process of procuring sanitary towels for deserving girls in primary schools. In addition, an Authority to Incur expenditure (A.I.E) was received which prompted the Procuring Entity to update its Procurement plan to accommodate the sanitary towels. The letter which had inter agency minutes on sanitary towels had directed that that we use restricted tender and procure the sanitary towels from the list of Local Manufacturers based on the due diligence done by the Inter-Agency. This was based and in line with the new Government policy of BUY KENYA BUILD KENYA and promote local industries. However, the department opted for an open tender so as not to lock any potential Manufacturer not captured in the Inter-Agency Minutes and also make the process more competitive based on the strict budget. Thus the Ministry advertised the tender for the Supply and distribution of sanitary towels from **Local Manufacturers**.

### **Tender Advertisement**

The Procuring Entity advertised Tender No. MOE/SDELBE/NCB/01/2019-2020 for the Supply and Delivery of the Sanitary Towels to Public Primary Schools from Local Manufacturers (hereinafter referred to as “the subject tender”) on 1<sup>st</sup> October 2019 in two local dailies according to procurement rules and procedures and the bidding document was uploaded in the Procuring Entity’s Website ([www.education.go.ke](http://www.education.go.ke)).

## **Bid Submission Deadline and Opening of bids**

Interested Firms submitted their bids within a period of seventeen (17) days where the closing date was 18<sup>th</sup> October 2019 at 10.00 am. as per the advertisement. The Procuring Entity opened the bids immediately thereafter at the 2<sup>nd</sup> floor of Jogoo House 'B' in the small boardroom and recorded as shown below:-

**Table 1: List of Responding Firms**

<b>Bid No.</b>	<b>Name of Bidder</b>
1.	Tropical Healthcare Limited
2.	Milka Trading Limited
3.	Jumbo Commodities Limited
4.	Reddy Pharm Ltd
5.	Rajo Group of Companies
6.	Interconsumer Products Limited
7.	African Cotton Industries Limited
8.	Lee Steward Communications
9.	Moca Venture Limited
10.	Eribet Supplies
11.	Dalab Investment Limited
12.	Medionics Healthcare Limited
13.	Whitelane Contractor Limited
14.	Vijana Trading Company Ltd
15.	Azad Agencies Limited
16.	Hanif Construction Company
17.	Dean Construction Company

## **Evaluation of Bids**

### **1. Preliminary Evaluation**

The bidders were evaluated on the mandatory requirements as stipulated in clause 29.1 of the Instructions to Tenderers of the Document for the Supply

and Delivery of the Sanitary Towels to Public Primary Schools from Local Manufacturers (hereinafter referred to as “the Tender Document”) These were:

- i. Valid Tax compliance certificate
- ii. Power of Attorney
- iii. Dully filled form of tender
- iv. Dully filled price schedule
- v. Dully filled Confidential Business Questionnaire
- vi. Bid Security (2% of the total amount)
- vii. Dully filled Integrity Declaration form
- viii. Dully filled Non-Debarment Statement form

## **Responsive Firms**

Nine (9) Firms were responsive at the end of preliminary stage and qualified for further evaluation.

## **2. Technical Evaluation**

This was done in accordance to the criteria stipulated in clause 29.1 of the Tender Document as follows:-

- i. Technical responsiveness to KEBS KS507:2005 and KS.59.080.30 specifications as under the schedule of requirements.
- ii. Kenya Bureau of Standards (KEBS) Certificate
- iii. Manufacturers brochures of the product being offered

## **Results for Detailed Technical Evaluation**

The nine (9) bids were evaluated and analyzed based on their responsiveness to the specifications of all the items under the technical requirement. Two Bidders were responsive at this stage and hence qualified for further evaluation.

The firms are:-

<b>Bid No</b>	<b>Bidder name</b>
6	Interconsumer Products Limited
7	African Cotton Industries Limited

## **3. Financial Evaluation**

The firms responsive at the Preliminary and Technical stage were further subjected to financial evaluation against the following requirements:-

- i. Three (3) year Audit Report
- ii. Average Annual Turnover of Kshs.100 Million
- iii. Financial resources (Demonstrate access to financial resources such as credit lines)
- iv. Past works for the last 3yrs (Contracts/Orders of Kshs. 20 Million each in the last 3yrs)
- v. Evidence of distribution capacity (Minimum of 5no. 10 tonne vehicles by having proof of ownership, leasing or hiring)

## **Post- Qualification/Due Diligence**

The two firms, M/s InterConsumer Products Limited and M/s African Cotton Industries Limited were subjected to post-qualification to ascertain their

capacity by physically checking their production capability at their respective factories. Their capacity was ascertained and being the most responsive bidders to the criteria were recommended for award.

### **Professional Opinion**

In a professional opinion dated 1<sup>st</sup> November 2019, the Head of Supply Chain Management Services issued a Professional Opinion to the Accounting Officer having reviewed the Evaluation Report and concurred with the recommendation made by the Evaluation Committee, advising the Accounting Officer to approve award of the subject tender to M/s InterConsumer Products Limited and M/s African Cotton Industries Limited.

### **Notification**

In letters dated 4<sup>th</sup> November 2019, all unsuccessful and successful bidders were notified of the outcome of their bids.

### **THE REQUEST FOR REVIEW**

M/s Medionics HealthCare Limited (hereinafter referred to as “the Applicant”) lodged this Request for Review seeking the following orders:-

- 1. An order setting aside the Respondents’ decision disqualifying the Applicant;***
- 2. An order declaring that the Applicant’s tender succeeded in the Technical Evaluation stage;***



- 3. An order directing the 2<sup>nd</sup> Respondent to conduct a Financial Evaluation of the Applicant's bid and proceed with the subject procurement process to its logical conclusion;***
- 4. An order declaring that any award of the tender herein is premature and be cancelled;***
- 5. An order directing the Respondents to pay the costs of the Review; and***
- 6. Such further orders as are necessary for the ends of justice.***

During the hearing, the Applicant was represented by Mr. Muganda on behalf of the firm of Caroline Oduor & Associates Advocates while the Procuring Entity was represented by its Senior State Counsel Ms. Chirchir. The successful bidders, that is M/s Africa Cotton Industries Ltd was represented by Mr. Regeru while M/s Inter Consumer Products Ltd was represented by Mr. Kinuthia.

## **PARTIES' SUBMISSIONS**

### **Applicant's Submissions**

In his submissions, Counsel for the Applicant, Mr. Muganda, fully relied on the Request for Review, the Applicant's Statement and documents attached thereto.

Mr. Muganda submitted that the Applicant was notified of the outcome of evaluation on its bid, which notification cited three reasons under which the Applicant's bid was found non-responsive.

Before delving into the reasons cited therein, Mr. Muganda submitted that the letter of notification failed to meet the threshold of section 87 (3) of the Act, in that the successful bidder was not disclosed by the Procuring Entity.

On the grounds cited for the Applicant's non-responsiveness, Mr. Muganda submitted that the Procuring Entity's Evaluation Committee went outside the Tender Document since not all bidders needed to be manufacturers of the product proposed by such bidder to be supplied in the subject tender. In his view, the subject tender was open to manufacturers and other persons who are not manufacturers but authorized by manufacturers to use the product proposed to be supplied.

He referred the Board to a copy of the Applicant's bid attached to the Request for Review wherein a manufacturer's authorization can be found issued by M/s Promed to the Applicant. Counsel further pointed out a KEBS certificate at page 148 of the Applicant's bid, KEBS sample laboratory reports at pages 150-153 of the aforementioned bid and manufacturer's brochure at page 155-157 which were all issued to M/s Promed and not the Applicant.

In his view, the failure by the Procuring Entity to consider these documents, the Applicant having received written authority to submit the same, was biased and against provisions of the Act, Article 10 and 227 of the Constitution. Mr. Muganda took the view that the Procuring Entity ought to have evaluated the documents in accordance with the Tender Documents requirements at pages 38 and 39, clause 30.1 thereof.

Mr. Muganda then referred the Board to section 10 of the Standards Act, Chapter 496, Laws of Kenya to support his submission that the Procuring Entity breached the said provision, which in his view applies only to manufacturers and not the Applicant.

In his conclusion, Mr. Muganda urged the Board to grant the prayers sought in the Request for Review.

### **Procuring Entity's Submissions**

In her submissions, Counsel for the Procuring Entity, Ms. Chirchir, fully relied on the Procuring Entity's Response and documents attached thereto.

Ms. Chirchir gave a background to the procurement process of the subject tender. She then proceeded to submit that the Applicant was disqualified because it was not a local manufacturer since the Applicant submitted documents of another company, i.e. M/s Promed. According to Ms. Chirchir,

the Applicant, having admitted not to be a manufacturer of the product proposed to be supplied, meant that the Applicant did not meet the requirements of the Tender Document.

In support of this submissions, Ms. Kanyi, the Procuring Entity's Head of Supply Chain Management Services reiterated that a lead bidder ought to have been a manufacturer, assuming one bided as a joint venture. She urged the Board to question whether a bidder who is not a manufacturer would attach documents belonging to a manufacturer's in that non-manufacturer's bid. She submitted that the tender advertisement guided all bidders that it was only local manufacturers whose bid would be considered for evaluation and subsequently award of the tender to the lowest evaluated bidder.

On the letter of notification, Ms. Kanyi admitted that the successful bidder was not disclosed therein, but that such omission was an oversight on the part of the Procuring Entity. Upon enquiry by the Board as to the importance of disclosing a successful bidder in a letter of notification, Ms. Kanyi submitted that this ensures transparency in the procurement process.

In her conclusion, Ms. Kanyi urged the Board to dismiss the Request for Review and allow the procurement process to proceed to its logical conclusion.

### **Interested Parties' Submissions**

Mr. Regeru for M/s Africa Cotton Industries Limited urged the Board to consider the interest of the girls who would be the beneficiaries of the subject procurement process in its decision. On his part, Mr. Kinuthia for M/s InterConsumer Products Limited, while concurring with submissions by Mr. Regeru urged the Board to consider the needs of girls in terms of the subject procurement process and the need to promote local manufacturers.

Upon enquiry by the Board, Mr. Regeru confirmed that the bid of M/s Africa Cotton Industries Limited's was successful in Lot 1 (half), 3, 4, 5 and 7 while Mr. Kinuthia submitted that M/s InterConsumer Products Limited's bid was successful in Lot 1 (half), 2 and 6.

### **Applicant's Rejoinder**

In a rejoinder, Mr. Muganda referred the Board to the Tender Name of the subject tender and submitted that the subject tender is for delivery of Sanitary Towels from Local Manufacturers, and not by Local Manufacturers. He then made reference to page 160 of the Applicant's bundle of documents wherein a Kenya Association of Manufacturer's Certificate issued to M/s Promed is attached.

Mr. Muganda submitted that an authorization is an official document giving official permission from one permission from one person to another.

Accordingly, he took the view that the Applicant got official permission from Promed to use the products of Promed.

He refuted submission by the Procuring Entity that a lead bidder needed to be a manufacturer and instead referred the Board to page 27 of the Tender Document on the requirements of eligible tenderers which includes non-manufacturers. He further made reference to the description given of eligible goods and related services at clause 4.6 on page 90 of the Tender Document, which according to Counsel, does not speak of joint ventures. To buttress this point, Mr. Muganda submitted that the Tender Document contained a Manufacturer's Authorization form which M/s Promed duly completed to demonstrate the authority given to the Applicant to use the former's products.

In conclusion, he urged the Board to find merit in the Request for Review and allow the same with costs to the Applicant.

### **BOARD'S DECISION**

The Board has considered each of the parties' cases, the documentation filed before it, including confidential documents submitted to it pursuant to section 67 (3) (e) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Act") and oral submissions of the parties.

The issues for determination are as follows:-

- I. Whether the letter of notification of unsuccessful bid dated 4<sup>th</sup> November 2019 issued to the Applicant meets the threshold of section 87 (3) of the Act;***
- II. Whether the Procuring Entity evaluated the Applicant's bid at the Technical Evaluation stage in accordance with the criteria set out in the Tender Document and the provisions of section 79 (1) and 80 (2) of the Act.***

The Board now proceeds to address the above issues as follows:-

On the first issue, the Board notes, the Applicant received a letter of notification of unsuccessful bid dated 4<sup>th</sup> November 2019 with the following details:-

***"Reference is made to the above tender you participated. The procurement process is now complete and you were not successful for the award due to the following reasons:-***

- You were successful in the preliminary evaluation along with other successful bidders. However, in the next stage of technical evaluation you were not shortlisted among the most responsive bidders for the supply of sanitary towels due to:***

- i. No KEBS certificate attached in the firm's name, the one attached was for PROMED INDUSTRIES LTD and not the bidder;***
- ii. No sample report from KEBS attached showing adherence to the specifications of the product being supplied as required as a manufacturer. The one attached was in the name of PROMED INDUSTRIES LTD who are not the bidders;***
- iii. No brochures attached for the firm, the one attached was for PROMED INDUSTRIES LTD who are not the bidders.***

***Thank you for showing interested in working with our organization and look forward to working with you in our forthcoming procurements"***

The Applicant challenged the said notification letter, alleging that it fails to meet the threshold of section 87 (3) of the Act since the successful tenderer was not disclosed.

Section 87 (3) of the Act which was referred to by the Applicant states as follows:-

***"(1) Before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity shall notify in writing the person***



***submitting the successful tender that his tender has been accepted***

***(2) .....;***

***(3) A person submitting the successful tender is notified under subsection (1), the accounting officer of the procuring entity shall also notify in writing all other persons submitting tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof***

A purposive interpretation of section 87 (3) of the Act is necessary to understand the reason why the legislature saw it fit to impose an obligation on the accounting officer of a procuring entity to disclose the successful tenderer. Firstly, the use of the word “appropriate” under the said section demonstrates that it is only after evaluation has been concluded and an award made, that the accounting officer of a procuring entity can disclose a successful tenderer when notifying unsuccessful tenderers of the outcome of their bids.

Secondly, the use of the word “appropriate” by the legislature under that section, shows that the legislature took section 167 (1) of the Act into consideration, which section provides two instances when an aggrieved candidate or tenderer may approach this Board. Section 167 (1) of the Act states as follows:-

***"Subject to the provisions of this Part, a candidate or tenderer, 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 within fourteen days from notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed"***

From the above provision, a candidate or tenderer may approach the Board within fourteen days from notification of award or within fourteen days from the date of occurrence of an alleged breach of duty by a procuring entity at any stage of the procurement process, or disposal process.

A candidate, as defined in section 2 of the Act means:-

***"a person who has obtained the tender documents from a public entity pursuant to an invitation notice by a procuring entity"***

On the other hand, a tenderer is defined in section 2 as:-

***"a person who submitted a tender pursuant to an invitation by a public entity"***

On one hand, a candidate remains as such if it only obtains the tender documents of a procuring entity. At the time a person or entity is deemed a candidate, no bid has been submitted to the procuring entity in response to an advertisement, therefore no evaluation process has begun, at that stage, to determine the successful tenderer.

On the other hand, since a tenderer can approach this Board at any stage of a procurement process or disposal process, it is possible that such tenderer may have been disqualified and notified of the outcome of its bid before a successful tenderer is determined. In that instance, the tenderer's letter of notification will not contain the identity of the successful bidder as none has been determined at that point.

Given that the Procuring Entity herein already concluded its evaluation process and subsequently awarded the tender as at 4<sup>th</sup> November 2019, successful tenderers for the respective lots were already determined. In that regard, it was appropriate in this instance for the Procuring Entity to disclose the successful tenderer or successful tenderers in the respective lots comprising of the subject tender. The subject tender had a total of 7 lots listed in clause 1 of Section I. Invitation to Tender of the Tender Document and the Applicant bid for all the 7 lots. This means, the Procuring Entity had the obligation to disclose the successful tenderers in each of the 7 lots that the Applicant bid for.

The reason why the legislature saw it fit to impose an obligation to a procuring entity to disclose the successful tenderer supports one of the national values and principles of governance expressed in Article 10 (2) (c) of the Constitution which states as follows:-

***"The national values and principles of governance include:-***

***(a) .....;***

***(b) .....;***

***(c) good governance, integrity, transparency and accountability***

***(d) ....."***

Notably, Article 227 (1) of the Constitution which specifically identifies public procurement principles, also identifies transparency as one of the principles that should guide State organs and public entities in their procurement processes. The said provisions states that:-

***"Whenever a State organ or public entity contracts for goods and services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective"***

Justice Nyamu in **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi**

**HCMA No. 1260 of 2007 [2008] KLR 728**, while considering the principles of procurement held as follows:-

***"Section 2 of the Public Procurement and Disposal Act, 2005 (which is similar to section 3 of the 2015 Act) is elaborate on the purpose of the Act and top on the list, is to maximize economy and efficiency as well as to increase public confidence in those procedures. The said Act also has other objectives namely to promote the integrity and fairness of the procurement procedures and to increase transparency and accountability. Fairness, transparency and accountability are core values of a modern society like Kenya. They are equally important and may not be sacrificed at the altar of finality."***

It is evident that courts have given the principles that guide procurement processes the value they deserve, noting that they are identified in the Constitution and the Act. It is therefore the Board's considered view that a procuring entity does not have the option to choose whether or not to disclose a successful tenderer, when such successful tenderer has already been determined.

It is not lost to the Board that the letter of notification of unsuccessful bid dated 4<sup>th</sup> November 2019 that was addressed to the Applicant disclosed the reasons why the Applicant's bid was disqualified. This enabled the Applicant to approach this Board within fourteen days from the date of the said

notification to exercise its right to administrative review under section 167 (1) of the Act, hence suffered no prejudice by the Procuring Entity's failure to disclose the successful tenderers in the respective lots the Applicant bidded for.

We however take cognizance of the emphasis placed by the Constitution and the Act on the need to adhere to the principle of transparency, being one of the principles that guide public procurement. Upon enquiry by the Board, the Procuring Entity's Head of Supply Chain Management, Ms. Regina Kanyi confirmed that disclosure of a successful tenderer helps adhere to the principle of transparency, but that the Procuring Entity's failure to disclose the successful tenderer was an oversight on the part of the Procuring Entity. Article 2 (1) of the Constitution describes the Constitution as:-

***"the supreme law of the Republic and binds all State organs at both levels of government"***

Even though the Applicant suffered no prejudice by the Procuring Entity's omission, the above provision supports the view that the Constitution is the supreme law in our country and no person or entity is above the law.

Accordingly, the Board finds that the letter of notification of unsuccessful bid dated 4<sup>th</sup> November 2019 addressed to the Applicant fails to meet the threshold of section 87 (3) of the Act.

On the second issue, the Board notes that the letter of notification of unsuccessful bid addressed to the Applicant cited three reasons why the Applicant's bid was disqualified. These include:-

- i.** No KEBS certificate attached in the firm's name, the one attached was for PROMED INDUSTRIES LTD;
- ii.** No sample report from KEBS attached showing the specifications of the product being supplied, the one attached was in the name of PROMED INDUSTRIES LTD;
- iii.** No brochures attached for the firm, the one attached was for PROMED INDUSTRIES LTD who are not the bidders.

From the aforesaid reasons, the Board notes, the Procuring Entity acknowledged that the Applicant attached a KEBS certificate, a sample report from KEBS and brochures, save that the aforementioned documents were for M/s PROMED INDUSTRIES LTD. The fact that the Applicant attached these documents in its original bid was not contested during the hearing.

The issue before the Board is whether the aforementioned documents belong to the Applicant or not. The Board studied the Applicant's original bid to establish to whom these documents belong to and notes the following:-

- At page 37, the Applicant attached a KEBS certificate issued on 31<sup>st</sup> July 2019 to M/s Promed Industries Ltd;
- At pages 38 to 41, KEBS Laboratory Test Reports dated 2<sup>nd</sup> August 2019 and 9<sup>th</sup> May 2018 for a product known as "Femistyle" submitted by M/s Promed Industries Ltd;
- At pages 43 to 45, a brochure for Femistyle, being the product submitted by M/s Promed Industries Ltd evidenced by the KEBS Laboratory Test Reports.

From the above list, it is worth noting that the aforementioned documents belong to M/s Promed Industries Ltd and not the Applicant. The question that the Board must now answer is what did the Tender Document require in respect of the aforementioned documents? The answer to this question will lead us to a further question, that is, what is the relationship between the Applicant and M/s Promed Industries Ltd and did the Applicant, by attaching documents belonging to M/s Promed Industries Ltd, meet the requirements of the Tender Document?

On the first question, the Board studied the provisions of the Tender Document and proceeds to make the following findings:-



The Procuring Entity advertised the subject tender on MyGov Publication website ([www.mygov.go.ke](http://www.mygov.go.ke)). The Board studied the said advertisement notice and notes that the Tender Name of the subject tender is *"Supply and Delivery of Sanitary Towels to Public Primary Schools from Local Manufacturers"*

The Board considered the use of the word "from" in the above captioned Tender Name and notes, according to Cambridge English Dictionary, 8<sup>th</sup> Edition, the word "from" has various uses in the English language. However, as it relates to the context of the above Tender Name, the word "from" is:-

***"used to show the source, or the point at which something originates"***

Applying the above definition to the Tender Name of the subject tender, the Board notes, the use of the word "from" therein means, the Procuring Entity seeks to procure Sanitary Towels that can be traced back to "Local Manufacturers" as the source of the said goods.

The Cambridge English Dictionary, 8<sup>th</sup> Edition, further defines "a manufacturer" as:-

***"a person or company that makes goods for sale."***

Hence, the Procuring Entity sought to procure Sanitary Towels for Public Primary Schools from a person or company that makes such goods for sale locally, at least from a reading of the Procuring Entity's advertisement of the subject tender.

Clause 4, bullet one of the said advert further states:-

***"The Sanitary Towels to be supplied must be Locally Manufactured"***

This is supported by the evidence that would be required to demonstrate that the Sanitary Towels are from local manufacturers, as expressed in Clause 4, bullet four of the said advert as follows:-

***"The Local Manufacturers must attach the Kenya Association of Manufacturers (KAM) Certificate"***

From the onset, the Procuring Entity specified that the Sanitary Towels being supplied to Public Primary Schools should originate from Local Manufacturers. Therefore, Sanitary Towels originating from foreign manufacturers would not be acceptable.

Having specified that the Sanitary Towels to be supplied to Public Primary Schools must originate from Local Manufacturers, the Board notes that the

Tender Document further made provision on eligible tenderers. Clause 3.1 of Section II. Instructions to Tenderers of the Tender Document provides as follows:-

***"A Tenderer may be a person, private entity, Government-owned entity, subject to ITT sub-Clause 3.4 or any combination of them with a formal intent to enter into an agreement or under an existing agreement in the form of a joint venture, consortium or association. In the case of a joint venture, consortium or association, unless otherwise specified in Clause 3 of the TDS, all parties shall be jointly and severally liable"***

Clause 3 of the TDS referenced above confirmed that a joint venture, consortium or an association would be eligible to submit a bid in this procurement process and that all parties to the joint venture, consortium or association would be jointly and severally liable. However, contrary to the submissions by the Procuring Entity, the Tender Document did not make reference to specific requirements of a lead bidder in the case of a joint venture, consortium or association.

Further, clause 4.6 on Eligible Goods and Related Services of Section II. Instructions to Tenderers of the Tender Document provided as follows:-

***"if so required in Clause 4 of the TDS, the Tenderer shall demonstrate that it has been duly authorized by the***

***manufacturer/patent holder of the goods to supply in Kenya, the goods indicated in its Tender in the format of the Manufacturer/Patent Holder's Authorization Form provided"***

Since the above clause is conditional on a provision in the Tender Data Sheet, the Board turned to the provisions of the Tender Data Sheet and notes that at clause 3 thereof (and not Clause 4 of the TDS as referenced above), the Tender Document confirms that "*Manufacturer's Authorization is Required*" for a tenderer to demonstrate that it has been duly authorized by the manufacturer/patent holder of the goods to supply in Kenya. Secondly, that the authorization shall be in the format of the Manufacturer/Patent Holder's Authorization Form provided.

In addition to this and in order to confirm that a "Manufacturer's Authorization ought to have been provided in order for a tenderer to demonstrate that it has been duly authorized by the manufacturer/patent holder of the goods to supply in Kenya, clause 14.3 (a) of Section II. ITT of the Tender Document stated thus:-

***"The documentary evidence of the tenderer's qualifications to perform the contract if its tender is accepted shall establish to the Procuring Entity's satisfaction:***

***(a) that, in the case of a tenderer offering to supply goods under the contract which the tenderer did not manufacture or otherwise produce, the tenderer has***

***been duly authorized by the goods' Manufacturer/Patent-holder to supply the goods in Kenya***

***...."***

The Procuring Entity went further to provide a standard Manufacturer's/Patent-Holder's Authorization Form in its Tender Document at page 73 thereof with the following details:-

***"To [name of Procuring Entity] .....***

***WHEREAS.....(name of the manufacturer) who are established and reputable manufacturers of.....(name and description of goods) having factories at.....(address of factory) do hereby authorize.....(name and address of Agent) to submit a tender, and subsequently negotiate and sign the Contract with you against Tender No.....(reference of the Tender) for the above goods manufactured by us.***

***We hereby extend our full guarantee and warranty as per the General Conditions of Contract for the goods offered for supply by the above firm against this Invitation for Tenders***

[signature for and on behalf of manufacturer]

On the foot of the above form, it is stated as follows:-

***"This letter should be on the letterhead of the Manufacturer and should be signed by a person competent and having the power of attorney to bind the manufacturer. It should be included by the Tenderer in its tender"***

The above Manufacturer's Authorization form demonstrates that it was likely that a tenderer would not be the manufacturer of the goods offered to be supplied in the subject tender. The provisions cited hereinabove further confirms the Board's finding that the Tender Document gave leeway for non-manufacturers bidding in the subject tender to submit an offer to supply the goods to the Procuring Entity, provided that a non-manufacturer has evidence of authorization from the Manufacturer/Patent holder to supply goods in Kenya and that evidence of such authorization has been provided to that effect.

Once the Procuring Entity made provision in its own Tender Document demonstrating there was leeway for non-manufacturers to submit an offer to supply goods from a Local Manufacturer, the Procuring Entity further informed tenderers of the evaluation and award criteria in the following terms:-

***"Clause 29.1 The evaluation and comparison of tenders shall be done using the procedures and criteria set out in the TDS and no other criteria shall be used***

The Tender Data Sheet identifies the evaluation criteria as Preliminary, Technical and Financial evaluation, including a Post-Qualification process before award of the tender. On Technical Evaluation, clause 18 of the Tender Data Sheet mentions the following will be considered during evaluation:-

***i. The Contractor/Supplier will be required to meet ALL the Technical specifications enlisted under the Schedule of requirements;***

***In addition, they must provide:-***

***ii. Kenya Bureau of Standard (KEBS) Certificate***

***iii. Manufacturers brochures of the product being offered.***

The Tender Data Sheet did not specify the KEBS Laboratory Test Reports considered during evaluation. Upon enquiry by the Board, the Procuring Entity submitted that the KEBS Laboratory Test Reports fall under item (i) above. Having studied the Evaluation Report signed on 31<sup>st</sup> October 2019, the Board notes that the following was the criteria used to evaluate bidders:-

- Technical responsiveness to KEBS KS507:2005 and KS 59.080.30 specifications under the schedule of requirements;

- Kenya Bureau of Standard (KEBS) Certificate; and
- Manufacturers brochures of the product being offered.

The Tender Document, at page 56 thereof stated that the specifications of the product to be supplied, "*must strictly follow KEBS KS507:2005 and KS 59.080.30 Sanitary Towels-Specifications from KEBS*". The existence of these specifications could only be confirmed by submission of Laboratory Test Reports, hence the reason why the KEBS Laboratory Test Reports submitted by tenderers was considered during evaluation.

On the award criterion, the Tender Document provided thus:-

***Clause 35.1      Subject to ITT Clause 30 to 34, the Procuring Entity will award the Contract to the tenderer whose tender has been determined to be substantially responsive to the tender documents and who has offered the lowest evaluated tender price, provided that such tenderer has been determined to be:-***

***(a)      Eligible in accordance with the provisions of ITT clause 3***

***(b)      .....;***

***(c)      .....;"***



Notably, ITT Clause 3, which is referenced by Clause 35.1 (a) above, deals with eligible tenderers and as already stated hereinbefore, includes non-manufacturers with evidence of authorization from the Manufacturer/Patent holder to supply goods in Kenya and that evidence in the form of authorization has been provided to that effect.

The Board has already established that the Tender Document provided that eligible tenderers include non-manufacturers with evidence of authorization from the Manufacturer/Patent holder to supply goods in Kenya and that evidence in the form of authorization has been provided to that effect. The second question before the Board is what is the relationship between the Applicant and M/s Promed Industries Ltd.

To demonstrate the existence of a relationship between it and M/s Promed Industries Ltd, the Applicant attached the following:-

- At page 47 of its original bid, a Manufacturer's/Patent-Holder's Authorization Form in the same format as the standard form at page 73 of the Tender Document, duly completed and issued on the letterhead of M/s Promed Industries Ltd, authorizing the Applicant to submit a tender, and subsequently negotiate and sign a contract with the Procuring Entity against the subject tender for the goods manufactured by M/s Promed Industries Ltd;

- At page 48 thereof, a Kenya Association of Manufacturers (KAMS) Certificate valid from 1<sup>st</sup> January 2019 to 31<sup>st</sup> December 2019, certifying that M/s Promed Industries Ltd is a member of Kenya Association of Manufacturers and subscribes to the values enshrined in the Association's Code of Ethics

From the above documents, the Board notes, M/s Promed Industries Ltd being a manufacturer duly registered as a member of the Kenya Association of Manufacturers, issued a Manufacturer's/Patent Holder Authorization to the Applicant to submit a tender, and subsequently negotiate and sign a contract with the Procuring Entity against the subject tender for the goods manufactured by M/s Promed Industries Ltd.

The Board would like to make an observation that the Applicant obtained a CR 12 extract from the Companies Registry as at 28<sup>th</sup> May 2019 for M/s Promed Industries Ltd and attached the same to the Request for Review but the same cannot be found in the Applicant's original bid. However, the said document provides evidence of the existence of a relationship between the Applicant and M/s Promed Industries Ltd, in the following terms:-

From the said CR 12 extract, M/s Medtronic Healthcare Limited is the sole shareholder of M/s Promed Industries Ltd with ordinary shares of 20,000.

Having studied the Applicant's bid, the Board notes that the Applicant, previously known as Medtronic Healthcare Limited changed its name to Medionics Healthcare Limited on 10<sup>th</sup> October 2016 evidenced by the Certificate of Change of Name at page 4 of the Applicant's original bid.

It is evident that the CR 12 extract of M/s Promed Industries Ltd still identifies M/s Medtronic Healthcare Limited as its shareholder as at 28<sup>th</sup> May 2019 even after the change of name to M/s Medionics Healthcare Limited took place on 10<sup>th</sup> October 2016. However, the Applicant provided sufficient evidence in its original bid to show it is the sole shareholder of M/s Promed Industries Limited, who in any case, duly authorized the Applicant to submit a tender, and subsequently negotiate and sign a contract with the Procuring Entity against the subject tender for the goods manufactured by M/s Promed Industries Ltd.

We therefore find that, by attaching the KEBS Certificate issued on 31<sup>st</sup> July 2019, the KEBS Laboratory Test Reports dated 2<sup>nd</sup> August 2019 and 9<sup>th</sup> May 2018 for a product known as "Femistyle" and Manufacturer's brochure of the aforementioned product, which documents belong to M/s Promed Industries Ltd, the Applicant satisfied the Technical Evaluation Criteria set out in Clause 18 of the Tender Data Sheet read together with page 56 of the Tender Document.

The Board makes an observation that reference was made to section 10 of the Standards Act, Chapter 496, Laws of Kenya which provides thus:-

***“Section 10. Standardization marks***

***(1) The Council shall, by notice in the Gazette, specify a separate mark, to be known as a standardization mark, for each of the following purposes—***

***(a) application to any commodity which is the subject of an order under [section 9\(2\)](#); and***

***(b) application to a commodity which is not the subject of an order under [section 9\(2\)](#) but concerning the manufacture or sale of which the Council has approved as specification.***

***(2) The standardization marks specified under subsection (1) shall not be identical with any trade mark registered under the Trade Marks Act ([Cap. 506](#)) or so nearly resemble it as to be likely to be mistaken for it, and no mark identical with those standardization marks or so nearly resembling them as to be likely to be mistaken for them shall be registered as a trade mark under the Trade Marks Act ([Cap. 506](#)).***

***(3) Where, after the publication of an order under [section 9\(2\)](#), any person intends to manufacture any commodity to which that order refers after the date specified therein he shall notify the Bureau in the prescribed form of his intention and the***

***Bureau, if it is satisfied that he is capable of manufacturing the commodity in accordance with the relevant Kenya Standard, shall issue him with a permit to use the standardization mark referred to in [paragraph \(a\)](#) of [subsection \(1\)](#).***

- (4) Where any person manufactures, or intends to manufacture, any commodity in respect of which a standardization mark has been specified under paragraph (b) of subsection (1) he may notify the Bureau of his intention to comply with the approved specification and his wish to apply the relevant standardization mark, and the Bureau, if it is satisfied that he is capable of manufacturing the commodity in accordance with the relevant specification, shall issue him with a permit to use that standardization mark.***
- (5) A permit issued under this section may be issued subject to conditions to be specified therein, which conditions may be varied from time to time, and any person to whom it is issued shall comply with those conditions.***
- (6) No person shall apply a standardization mark specified under subsection (1) to any commodity except under a permit issued by the Bureau or a person acting under its authority and unless that commodity complies with the relevant Kenya Standard or approved specification.***
- (7) Any person who—***

***(a) applies a standardization mark to any receptacle or covering of any commodity or to any label attached to any commodity or any receptacle or covering thereof; or***

***(b) places or encloses any commodity in a receptacle or covering to which a standardization mark has been applied, or in a receptacle or covering to which is attached a label to which any such mark has been applied,***

***shall, for the purposes of subsection (6), be deemed to have applied that standardization mark to that commodity.***

***(8) Any person who contravenes any of the provisions of subsection (3) or (6) or fails to comply with any condition in a permit, shall be guilty of an offence.***

***”***

Upon studying the above provision, the Board notes that they relate to manufacturers of products for which a standardization mark has been issued by the Kenya Bureau of Standards. Thus, the Applicant, having submitted a bid as a non-manufacturer authorized to supply goods of a manufacturer, the provisions of section 10 of the Standards Act do not apply to it.

The Board is cognizant of the provisions of sections 79 (1) and 80 (2) of the Act which state that:-

***"Section 79 (1) A tender is responsive if it conforms to all the eligibility and other mandatory requirements set out in the tender documents***

***Section 80 (2) The evaluation and comparison of tenders shall be carried out in accordance with the procedures set out in the tender documents..."***

In **Miscellaneous Civil Application No. 85 of 2018, Republic v Public Procurement Administrative Review Board Ex parte Meru University of Science & Technology; M/S Aaki Consultants Architects and Urban Designers (Interested Party) [2019] eKLR**, the court held as follows:-

***In my view, an "acceptable tender" is one that "in all respects complies with the specifications and conditions of the tender as set out in the tender document." The definition of 'acceptable tender' must be construed against the background of the system envisaged in Article 227 of the Constitution, namely one which is "fair, equitable, transparent, competitive and cost-effective." In other words, Whether "the tender in all respects complies with the specifications and conditions set out in the contract documents" must be judged against these values***

From the above decision, it is expected that a procuring entity will only accept a tender that conforms to the procedures and criteria set out in the Tender Document. This therefore creates an obligation to a procuring entity to stick to the procedures and criteria set out in its tender document when evaluating bids. The Procuring Entity in this case, had no choice but to apply the provisions in the Tender Document as a whole and not to the detriment of bidders who chose to comply with provisions that relate to non-manufacturers and the authorization they can obtain from local manufacturers to supply goods of the local manufacturer in the subject tender.

Having noted the Procuring Entity's own admission that the Applicant's bid contained a KEBS Certificate, KEBS Laboratory Test Reports and Brochures save that the aforesaid documents belong to M/s Promed Industries Limited and having noted that the Applicant met the eligibility criteria set out in the Tender Document, it is the Board's finding that, had the Procuring Entity adhered to the evaluation criteria in its Tender Document, the Applicant's bid would not have been disqualified at the end of Technical Evaluation.

In essence, the Procuring Entity demonstrated to the Board that the Applicant is eligible for Financial Evaluation, if the provisions on authorization given by a manufacturer to a non-manufacturer to submit a tender and subsequently negotiate and sign a contract with the Procuring Entity for the



goods manufactured by such manufacturer, had been given careful consideration and applied when evaluating the Applicant's bid.

Given that there is no contention as to the contents of the documents belonging to M/s Promed Industries Limited and submitted by the Applicant, and having established that the Applicant fully satisfied the eligibility criteria set out in the Tender Document, the Board finds that the Procuring Entity failed to evaluate the Applicant's bid at the Technical Evaluation stage in accordance with the criteria set out in the Tender Document and sections 79 (1) and 80 (2) of the Act.

In totality, the Board holds that the Request for Review succeeds in terms of the following specific orders:-

### **FINAL ORDERS**

In exercise of the powers conferred upon it by section 173 of the Public Procurement and Asset Disposal Act, 2015, the Board makes the following orders in the Request for Review:-

- 1. The Procuring Entity's Letter of Notification of Award dated 4<sup>th</sup> November 2019 addressed to M/s InterConsumer Products Ltd in respect of Tender No. MOE/SDELBE/NCB/01/2019-2020 for the Supply and Delivery of the Sanitary Towels to Public Primary Schools from Local Manufacturers, specifically**

**in relation to Lot 1 (half), 2, 3 (half) and 6, be and is hereby cancelled and set aside.**

- 2. The Procuring Entity's Letter of Notification of Award dated 4<sup>th</sup> November 2019 addressed to M/s African Cotton Industries Limited in respect of the subject tender, specifically in relation to Lot 1 (half), 3 (half), 4, 5 and 7, be and is hereby cancelled and set aside.**
- 3. The Procuring Entity's Letter of Notification of Unsuccessful bid dated 4<sup>th</sup> November 2019 addressed to the Applicant in respect of the subject tender, be and is hereby cancelled and set aside.**
- 4. The Procuring Entity is hereby directed to re-admit the Applicant's bid at the Financial Evaluation stage and re-evaluate the Applicant's bid at the Financial Evaluation stage, together with all other bidders who made it to the Financial Evaluation stage and conclude the procurement process to its logical conclusion, including the making of an award within fourteen (14) days from the date of this decision, taking into consideration the Board's findings in this case.**

**5. Given that the subject procurement process has not been concluded, each party shall bear its own costs in the Request for Review.**

**Dated at Nairobi, this 28<sup>th</sup> day of November 2019**

***Signed***

**CHAIRPERSON  
PPARB**

***Signed***

**SECRETARY  
PPARB**

**Delivered in the presence of:-**

- i. Mr. Muganda for the Applicant; and**
- ii. Ms. Kanyi for the Respondents.**