

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 149/2021 OF 15TH DECEMBER 2021

BETWEEN

CHEMOQUIP LIMITED _____ APPLICANT

VERSUS

THE ACCOUNTING OFFICER

KENYA MEDICAL SUPPLIES AUTHORITY _____ RESPONDENT

AND

ULTRA LAB E.A LIMITED _____ INTERESTED PARTY

Review against the decision of the Accounting Officer, Kenya Medical Supplies Authority in relation to tender number GF ATM MAL NFM-2021/2022-OIT-02 for Supply of Rapid Diagnostic Tests (RDT's)

BOARD MEMBERS

1. Ms. Faith Waigwa -Chairperson
2. Mrs. Njeri Onyango -Vice Chairperson
3. Mr. Alfred Kerioale - Member
4. Mr. Ambrose Ogeto – Member
5. Ms. Rahab Chacha – Member

IN ATTENDANCE

Mr. Stanley Miheso – Holding brief for the Acting Board Secretary

BACKGROUND TO THE DECISION

The Tendering Process

The Respondent, invited sealed tenders for Tender Number GF ATM MAL NFM-2021/2022-OIT-02- for Supply of Rapid Diagnostic Tests to Kenya Medical Supplies Authority (hereinafter referred to as the “subject tender”) from qualified and eligible tenderers through an open international tender advertised in the Daily Nation, the Respondent’s website (www.kemsa.co.ke) and the Public Procurement Information Portal (www.tenders.go.ke).

Addenda

Through Addendum No.1 dated 16th September, 2021, the Respondent issued clarifications on questions asked by prospective tenderers seeking clarification on who the Ministry of Health regulators are.

Pre-tender Conference

A pre-tender conference was held on the 6th September, 2021 at the College of Insurance, South C, Nairobi. The subject tender, was one of the tenders discussed at that meeting. At that meeting, clarifications were issued to bidders in respect of the subject tender, on the format of tender submission, tender evaluation, and the requirements on the mandatory

documents. Further, a clarification was also given in respect of the subject tender that the following documents were mandatory;

- 1) Manufacturer's authorization.
- 2) Product and manufacturing site must be WHO prequalified .
- 3) Provide valid registration certificate by Ministry of Health authorized regulator.
- 4) Must appear in Pharmacy and Poisons Board (PPB) list of invitro diagnostics. Provide current valid product listing with QR codes from PPB.
- 5) Current valid manufacturing certificate of Quality issued by an independent recognized body to the manufacturer of the product. The certificate must be item specific.

It was clarified that failure to comply with those mandatory requirements would lead to disqualification.

Tender Submission Deadline and Opening of Tenders

Vide an online tender portal; the Respondent received a total of (3) tenders by the tender submission deadline of 21st September, 2021 at 10.00am. The tenders were opened shortly thereafter in the presence of tenderers representatives and the following tenderers were recorded as having submitted their tenders;

1. Ultra Lab East Africa limited
2. Chemoquip Limited
3. Medivision Equipment Limited

The public tender opening was carried out at the Tender Opening Hall.

Evaluation of Tenders

A Tender Evaluation Committee composed of officials from the Ministry of Health and the Respondent was constituted and appointed by the Procuring Entity as required. Going by the Evaluation Report duly prepared and executed by the Respondent's Evaluation Committee members on 15th October, 2021 (hereinafter referred to as the ('Evaluation Report'), the Respondent's Evaluation Committee (hereinafter referred to as the "Evaluation Committee") evaluated tenders with respect to the subject tender in the following four (4) stages:-

1. Preliminary Examination
2. Technical Evaluation
3. Financial Evaluation
4. Post qualification

Preliminary Examination/Mandatory

At this stage, the Evaluation Committee applied the criteria outlined in Preliminary Evaluation under Specific Evaluation Criteria on page 41 of the Tender Document for the Supply of Health Products (hereinafter referred to as the ('Tender Document')). According to the evaluation report, at the end of this stage of evaluation, all three (3) tenders including the Applicant's and the Interested Party's Tender were found responsive thus proceeded to the Technical Evaluation Stage.

Technical Evaluation

At this stage, the Evaluation Committee applied the criteria outlined in Technical Evaluation on page 41 of the Tender Document. At the end of this stage of evaluation two (2) tenders were found non responsive while one tender which is the Interested Party's tender was found to be responsive thus proceeded for financial evaluation.

Financial Evaluation

The Evaluation Committee applied the criteria outlined in Financial Evaluation in page 43 of the Tender Document. At this stage the Interested Party's tender was the only one and was found to be the lowest tenderer at a unit price of USD 10.24 and a total cost of USD 1,105,920.

Recommendation

The Evaluation Committee recommended the award of the subject tender to the Interested Party at a unit price of USD 10.24 and a total cost of USD 1,105,920.

Professional Opinion

In a Professional Opinion dated 22nd November 2021, the Respondent's Director of Procurement, Mr. Edward Buluma, reviewed the tender procurement process in the subject tender, including the evaluation of tenders and was of the opinion that the Evaluation Committee was properly constituted and that the Evaluation Committee carried out due diligence on the lowest evaluated tenderer in line with section 83 (1) of the Public Procurement and Asset Disposal Act 2015 (hereinafter referred

to as the "Act"). He concurred with the Evaluation Committee's recommendation of award to the Interested Party at a unit price of USD 10.24 and a total cost of USD 1,105,920.

Notification of Tenders

Vide an email and letter dated 24th November 2021 the Applicant together with other tenderers, were notified of the outcome of the tender process.

THE REQUEST FOR REVIEW

Chemoquip Limited, the Applicant herein, lodged a Request for Review dated 8th December, 2021 on 15th December, 2021 together with a Statement in Support of Request for Review sworn on 10th December, 2021 by Feroz Nawab the director of the Applicant through the firm of Naikuni Ngaah & Miencha Co. Advocates, seeking the following orders:-

- 1. An order annulling the award of the tender to Ultralab E.A Limited.***
- 2. An order declaring that the Applicant be deemed to have been successful and the Respondent be directed to award the tender to the Applicant.***
- 3. In the alternative and without prejudice to the foregoing, an order directing the respondent to initiate a new procurement process for the subject goods.***

4. An order awarding costs of this Request for Review to the Applicant which was necessitated by the incompetence of the Respondent.

The Respondent through their Advocate on record Waruhiu K`Owade & Nganga filed a Notice of Preliminary Objection dated 22nd December, 2021 against the Applicant's Review Application which was dated 8th November, 2021. The Respondent also filed a Memorandum of Response dated 22nd December, 2021.

The Interested Party did not file a response with the Board and neither did any other tenderer.

Pursuant to the Board's Circular No. 2/2020 dated 24th March 2020 detailing the Board's administrative and contingency management plan to mitigate the effects of Covid-19 pandemic, the Board dispensed with physical hearings and directed that all request for review applications would be canvassed by way of written submissions. Clause 1 at page 2 of the said Circular further specifies that pleadings and documents would be deemed as properly filed if they bear the official stamp of the Board.

The Respondent filed written submissions which were filed with the Board on 3rd January, 2021. The gist of the said submissions is to support the position taken by the Respondent as above. The Respondent also refers

to various decisions in Review applications, in regard to the filing of applications as prescribed in section 167 of the Act

APPLICANT'S CASE

The Applicant contends that they provided a valid registration certificate by the Ministry of Health regulator which was issued to them by the Pharmacy and Poisons Board. The certificate was valid until 31st December, 2021. The Respondent therefore erred in its evaluation of the Applicant's tender in regard to the reasons for disqualification set out in the letter of Notification dated 24th November, 2021 alleging that the Applicant had failed to provide a valid registration certificate.

The Applicant avers that the Respondent erred in holding that the Applicant failed to provide a copy of the valid validation certificate as the Respondent was aware that the mandate of Kenya Medical Laboratory Technicians and Technologists Board (KMLTTB) to carry out validation on kits/reagents used in medical laboratories has been the subject of controversy with Pharmacy and Poisons Board since 2015 hence the need for amendment which was introduced in the Tender Documents vide Addendum No 1 and in the pre tender meeting on 6th September, 2021.

The Applicant avers that the Respondent erred in stating through its letter of 24th November, 2021 that the Applicant failed to provide a copy of valid validation certificate as the Cabinet Secretary had directed the Kenya

Medical Laboratories Technicians and technologists Board (KMLTTB) to stop evaluation/validation of kits/reagents used in medical laboratories.

According to the Applicant the Respondent erred in its letter of 24th November, 2021 by holding that the Applicant failed to provide a valid validation certificate as PPB issues Retention Certificate after carrying out evaluation and validation based on the documentation provided by the Applicant.

According to the Applicant, the Respondent erred in holding that validation is to be provided by either PPB or KMLTB as KMLTB has been banned from carrying out validation and PPB issues retention certificate after carrying out evaluation and validation of the testing kit.

The Applicant further avers that the Respondent ignored its own tender rules despite having clarified via Addendum No 1 dated 16th September, 2021 that validation can either be by KMLTTB or PPB.

According to the Applicant the Respondent ignored the tender from the Applicant at unit price of USD 7.23 which was the lowest despite providing all the relevant documentation that was legally possible to be provided and Ultralab EA Limited the Interested Party, which was awarded the tender, was the highest in terms of price.

RESPONDENT'S RESPONSE

The Respondent through its Accounting officer contends that the Applicant has failed to sufficiently demonstrate that the Procuring Entity acted in breach of Sections 80 (2) and 86 (1) of the Act as read together with SECTION I Clause 16.2 16.4 17.7, 29 & SECTION III of the tender documents as alleged.

The Respondent avers that the valid registration certificates by Ministry of Health authorized regulator and a valid copy of validation certificate by Ministry of Health Authorized regulator were listed in the minutes of the pre-tender conference held on 6th September, 2021 as mandatory and failure to provide these requirements would lead to disqualification. The Applicant's tender fell short of these Mandatory requirements as they failed to provide a valid registration certificate by the Ministry of Health authorized regulator and they also failed to provide a valid copy of validation certificate by Ministry of Health authorized regulator.

The Respondent contends that the above position was communicated to the Applicant and through the letter of Notification dated 24th November, 2021 and an explanation for the same given through a letter dated 30th November, 2021. The Respondent avers that the Applicant's failure to comply with mandatory requirements rendered its tender non responsive. The Respondent further avers that failure by the Applicant to comply with a mandatory requirement cannot amount to a minor deviation as contemplated in Section 79 (2) as this constituted a substantive material

deviation from the express and mandatory requirements in the tender documents as read together with the Act and regulations.

Finally, the Respondent contends that the Interested party was the rightful successful tenderer as they had complied with the mandatory requirements in the tender documents as read together with the Act and provisions of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as Regulations 2020) and the Applicant has not tendered any credible evidence to the contrary. It is the Respondent's prayer that the Applicant's Request for Review be dismissed with costs to allow the procurement process to be completed.

BOARD'S DECISION

The Board has considered each party's case, the pleadings and written submissions filed before it, including the confidential documents submitted by the procuring entity pursuant to section 67 (3) (e) of the Act and finds the following to be the issues for determination:

- i) Whether the Board has jurisdiction to entertain the request for review;**

Depending on the outcome of the first issue;

- ii) Whether the procuring entity's evaluation committee evaluated the applicant's tender in accordance with the provisions of section 80(2) of the Act with respect to mandatory evaluation criteria set out in the Tender document;**

- iii) What are the appropriate orders to grant in the circumstances?

Whether the Board has Jurisdiction to entertain the request review

The Respondent has raised a preliminary objection on the ground that the Request for Review was filed out of the fourteen days statutory timelines, thus time barred and consequently, this Board has no jurisdiction to entertain it.

The Respondent in its Notice of Preliminary Objection filed with the Board on 22/12/2021 states as follows:

“NOTICE IS HEREBY GIVEN of the objection showing that the orders sought herein the Review Application dated 8th December 2021, does not lie in law and the said objection be determined Preliminary to and in advance of any determination of this matter and that hearing be limited in the first instance to the determination of such preliminary objection namely;

- 1. THAT the present Application as taken out, drawn and filed is incompetent, fatally defective and unsustainable in law or at all.***
- 2. THAT the Application for Review has been filed out of time, offending the provisions of section 167 of the Public Procurement and Asset Disposal Act No. 33 of 2015.***

3. THAT in the above premises this Application should be struck out in its entirety".

The Respondent also filed a Memorandum of Response on the same date. Paragraph 7 therefore states as follows

"7 The above position was communicated to the Applicant by the Procuring Entity vide its letter dated 24th November, 2021 and an explanation for the same was given vide a letter dated 30th November, 2021".

It is trite law that courts and decision-making bodies such as the Board can only act in cases where they have jurisdiction. Nyaragi, JA stated as follows in the *locus classicus* case of ***The Owners of Motor Vessel "Lillian S" vs. Caltex Oil Kenya Limited (1989) eKLR:***

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction." [Emphasis is

ours]

Similarly, in the case of ***Kakuta Maimai Hamisi vs. Peris Pesi Tobiko & 2 Others [2013] ekLR*** the Court of Appeal emphasized the importance of the issue of jurisdiction and stated that:

"So central and determinative is the issue of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings is concerned. It is a threshold question and best taken at inception."

The Board derives its jurisdiction from Section 167 provides as follows;

"167. Request for a review

(1) Subject to the provisions of this Part, a candidate or a 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 of 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."

(2)

(3)

(4)

The Respondent raises an objection on the ground that the Request for Review ought to have been filed within 14 days from the date of Notification (24th November 2021) and therefore, the filing of the present Application on the 15th of December, 2021 is way out of time, and in contravention of the strict requirements of section 167 of the Act.

Regulation 203(2)(c) provides as follows:-

"203. Request for a review.

(1) -----.

(2) The request referred to in paragraph (1) shall—

(a) -----;

(b) -----;

(c) be made within fourteen days of—

(i) the occurrence of the breach complained of, where the request is made before the making of an award;

(ii) the notification under section 87 of the Act; or

(iii) the occurrence of the breach complained of, where the request is made after making of an award to the successful bidder."

It therefore follows that the Board would not have the requisite jurisdiction to entertain the Request for Review if it finds the same was filed outside the prescribed 14 days. The board will now determine if the Request for Review was filed within time.

The Board has seen the letter of Notification issued by the Respondent to the Applicant. The said letter is dated 24th November 2021. The same reads as follows;

"GF ATM MAL NFM-21/22-OIT-002 Date: 24TH November,2021

Chemoquip Limited

P.O Box 3356-00600

Nairobi, Kenya.

Email: sales@chemoquip.com

Dear Sir/Madam,

RE: NOTIFICATION FOR TENDER NO. GF ATM MAL NFM-2021/2022-OIT-002 FOR SUPPLY OF RAPID DIAGNOSTIC TESTS (RDT's)

Reference is made to the above tender and advise that your bid was unsuccessful due to the following reason(s);

<i>#</i>	<i>Item Description</i>	<i>Reasons for non-responsiveness</i>
<i>1</i>	<i>Malaria Rapid Diagnostic Tests (RDT's)</i>	<i>➤ Valid registration certificate by Ministry of Health authorized</i>

		<p>regulator (KMLTTB or PP) with KMLTTB OR PPB not provided.</p> <p>➤ Valid copy of validation certificate by Ministry of Health regulator (KMLTTB OR PPB) not provided</p>
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Further, be advised that the above tender was awarded as per attached schedule.

Kindly arrange to collect your bid security after 14 days from the date of this letter. Thank you for the interest and participation in the tender.

Yours faithfully,

FOR: Ag. CHIEF EXECUTIVE OFFICER"

From the confidential documents supplied by the Respondent as provided for under section 67 (3) (e) of the Act, the Board takes note of the e-mail remittance message generated on 24th November 2021. The extract shows that on Wednesday 24th November, 2021 at 17:08 hours, a letter of Notification for tender **No. GF ATM MAL NFM-2021/2022-OIT-002 FOR SUPPLY OF RAPID DIAGNOSTIC TESTS (RDTs)** was sent to the Applicant vide the following e-mail addresses; (cql@chemoquip.com; quotations@chemoquip.com and feroz@chemoquip.com)

The Board notes that the letter of Notification of the outcome of the Tender Evaluation was dated 24th November, 2021 and was remitted to the known contacts of the Applicant on the same day via e-mail. This fact has not been contested. Indeed, receipt of the said letter is admitted. It is therefore safe for the Board to conclude that the Notification was received on the same day.

The Applicant in response to the Preliminary Objection filed a "Further Replying Affidavit" (sic) sworn by Mr. Feroz Nawab; Mr. Nawab describes himself as a Director of the Applicant duly authorized and having authority to swear the Affidavit.

In his Affidavit which is specifically directed at the Preliminary Objection by the Respondent, at paragraph 7, he depones as follows.

"THAT" on the issue that the application herein has been filed out of time, I am advised by our advocates on record which advise I verily believe to be true that the same has been filed within the time line contemplated under section 167 of the Public Procurements and Assets Disposal Act No. 3 of 2015

The Applicant further filed its written submissions on 29th December, 2021. In the said submissions, one of the issues framed as arising for determination is "whether the Application for review has been filed out of time".

At paragraph 4 of the submissions, the Applicant submits as follows;

"4. The prescribed timeline for the filing review runs from either Notification of the award or date of occurrence in the alleged breach. In the instant case, the Applicant engaged the Respondent to point out that it had provided the relevant documentation. The Respondent in its last letter of 30th November, 2021 reiterated its position that the Applicant had failed to provide the mandatory documents. The 14 days therefore runs from the said date of 30th November, 2021 which qualifies as the "date of alleged breach".

The Board understands the Applicant's submissions and Replying Affidavit to mean that it concedes section 167 calls for filing of a Review Application within 14 days of notification or occurrence of alleged breach. According to the Applicant, occurrence of breach manifested itself on 30th November 2021 when the Respondent issued a letter reiterating the contents of the notification letter of 24th November 2021.

The Board notes that the Applicant concedes that it received the Letter of Notification of 24th November, 2021 which the Board finds was issued and remitted to the Applicant on the same day. The Respondent on its part states that the time started running immediately thus 14 days should have been from 25th November to 8th December, 2021.

The Board has reviewed the Tender Document submitted with the Respondent's confidential documents.

The Board has also perused the contents of the Letter of Notification of the 24th November, 2021. It is the Board's view that the said letter complies with the requirements of section 87(3) of the Act as read together with Regulation 82 of The Public Procurement and Asset Disposal Regulations, 2020 (The Regulations)

The letter of notification of 24th November, 2021 clearly;

- a) Referred to the tender in issue.
- b) Notified the Applicant of the reasons of the disqualification of its Tender in clear terms.
- c) Notified the Applicant of who was the successful tenderer and the tender price.

It is the Board's view therefore that the breach complained of is contained in the Letter of Notification of 24th November, 2021 which was remitted and received by the Applicant on the same day. The Board therefore finds and holds that time for filing the Application for Review started running from the 25th of November, 2021 in terms of Section 167 (1) of the Act and 14 days therefore would lapse on 8th December, 2021.

The Applicant as per paragraph 4 of the submissions filed, which is cited above, does concede that the time limit is 14 days of the occurrence of the breach. The Applicant then submits that the date of the breach or

from which time should be reckoned is 30th November, 2021. The Board has considered this proposition as well. From the confidential documents obtained from the Respondent, the Board has taken note that the Respondent's letter of 30th November 2021, was remitted to the Applicant via the known e-mail addresses as already set out above on the same day. The e-mail message as per the extract is shown to have been remitted by a member of the Respondent's staff on Tuesday, 30th November 2021 at 15:55 hours. Going by the Applicant's submissions, the 14 days should therefore be reckoned from the 1st of December, 2021 and the Board notes the same would lapse on 14th of December, 2021.

The Request for Review was filed on the 15th of December, 2021. Accordingly, whether the date of 24th November 2021 or 30th November 2021 is considered for purposes of counting the 14 days from date of notification or from occurrence of breach, in both instances the Request for Review was filed outside the time prescribed under Section 167 (1) of the Act.

Given the foregoing, the Board finds and holds that the Request for Review filed on the 15th of December, 2021 was filed out of the period set out in Section 167 (1) of the Act. Accordingly, the same is time barred and the Board has no jurisdiction to hear and determine the Request for Review.

The upshot of our finding is that the Board will now down its tools and shall not proceed to make a determination on the other issues framed for determination.

FINAL ORDERS

In exercise of the powers conferred upon it under Section 173 of the Act, the Board makes the following orders with respect to the Request for Review dated 8th December, 2021:

- 1. The Request for Review dated 8th December, 2021 and filed on 15th December, 2021 be and is hereby struck out for want of jurisdiction.**

- 2. In view of the findings in this matter, each party shall bear its own costs of this Request for Review.**

Dated at Nairobi this 5th day of January, 2022

CHAIRPERSON

SECRETARY

PPARB

PPARB