

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**  
**APPLICATION NO. 138/2021 OF 16<sup>th</sup> NOVEMBER 2021**

**BETWEEN**

**JUBILEE MEDS LIMITED..... APPLICANT**

**AND**

**ACCOUNTING OFFICER,**

**KENYA MEDICAL SUPPLIES AUTHORITY ..... 1<sup>ST</sup> RESPONDENT**

**KENYA MEDICAL SUPPLIES AUTHORITY ..... 2<sup>ND</sup> RESPONDENT**

**CAPERINA ENTERPRISES LIMITED ..... 1<sup>ST</sup> INTERESTED PARTY**

**ALEXANDER HEALTHCARE LTD ..... 2<sup>ND</sup> INTERESTED PARTY**

Review against the decision of the Accounting Officer of Kenya Medical Supplies Authority in relation to Tender Number: KEMSA/ONT03/2021-2023 for Supply of Health Technologies (Surgical dressings, Resuscitaire, Catheters, Cord Clamp, Surgical Gloves, Cannulas, Administration sets & Syringes) reserved for Disadvantaged Groups with respect to Lot 10.

**BOARD MEMBERS**

- |                     |              |
|---------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Dr. Paul Jilani  | -Member      |

- |                        |         |
|------------------------|---------|
| 3. Dr. Joseph Gitari   | -Member |
| 4. Mrs. Irene Kashindi | -Member |
| 5. Eng. Mbiu Kimani    | -Member |

## **IN ATTENDANCE**

Mr. Philip Okumu - Acting Board Secretary

## **BACKGROUND TO THE DECISION**

### **The Tendering Process**

The 2<sup>nd</sup> Respondent, invited sealed tenders for Tender No. KEMSA/ONT03/2021-2023 for the Supply of Health Technologies (Surgical dressings, Resuscitaire, Catheters, Cord Clamp, Surgical Gloves, Cannulas, Administration sets & Syringes) containing eighteen (18) lots all reserved for Disadvantaged Groups (hereinafter referred to as the "subject tender") from qualified and eligible tenderers through an open national tender in MyGov newspaper, the Public Procurement Information Portal (PPIP) ([www.tenders.go.ke](http://www.tenders.go.ke)), the 2<sup>nd</sup> Respondent's website ([www.kemsa.co.ke](http://www.kemsa.co.ke)) and the IFMIS Supplier Portal ([www.supplier.treasury.go.ke](http://www.supplier.treasury.go.ke)) on 30<sup>th</sup> June 2021.

### **Clarifications**

Through Clarification 1 of 23<sup>rd</sup> July 2021, the 2<sup>nd</sup> Respondent made a clarification to all tenderers on a question posed by a prospective tenderer.

### **Tender Submission Deadline and Opening of Tenders**

The 2<sup>nd</sup> Respondent received a total of eighty-eight (88) tenders by the tender submission deadline of 29<sup>th</sup> July 2021 at 10:00 am. The subject tender having

required tenders to be submitted electronically through IFMIS, a list of tenders submitted online was printed and issued to eleven (11) tenderers' representatives present at the time of tender opening.

### **Evaluation of Tenders**

Going by an Evaluation Report dated 5<sup>th</sup> September 2021 (hereinafter referred to as the 'Evaluation Report'), the 2<sup>nd</sup> Respondent's Evaluation Committee (hereinafter referred to as the "Evaluation Committee") evaluated tenders with respect to Lot 10 of the subject tender in the following four (4) stages: -

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

### **Preliminary Examination**

At this stage, the Evaluation Committee applied the criteria outlined in Clause A) Preliminary Examination of Specific Evaluation Criteria of Section III - Evaluation and Qualification Criteria at page 37 of the Tender Document issued to tenderers by the 2<sup>nd</sup> Respondent (hereinafter referred to as the 'Tender Document'). At the end of this stage of evaluation, twenty-eight (28) tenders were found non-responsive while sixty (60) tenders including the Applicant's tender were found responsive, thus proceeded to the Technical Evaluation (Documents Examinations) stage of evaluation.

## **Technical Evaluation (Documents Examination and Product Evaluation)**

At this stage, the Evaluation Committee applied the criteria outlined in Clause B) Technical Evaluation and C) Product Evaluation of Specific Evaluation Criteria of Section III-Evaluation and Qualification Criteria at page 37 of the Tender Document for each of the eighteen (18) Lots of the subject tender that tenderers tendered for. The following nineteen (19) tenderers' tenders were evaluated at this stage of evaluation with respect to Lot 10 of the subject tender:

1. Angelica Medical Supplies Ltd
2. Alexander Healthcare Ltd
3. Caperina Enterprises Ltd
4. Fairtime Med Limited
5. Godsuns Limited
6. Impact Medical Supplies Ltd
7. Jeeps Solution Limited
8. Jomely Limited
9. Jubilee Meds Ltd
10. Kayness Company Limited
11. Kirata Africa Limited
12. Medix East Africa Limited
13. MKT Investments and Trading Ltd
14. Runipharm Limited
15. Shawalla Trading

16. Scarture Kenya Ltd
17. Sherrylite Company Limited
18. Sundales International Limited
19. Hillsher Company Limited

At this stage of evaluation, tenderers were assessed on a yes/no basis and with respect to Lot 10 of the subject tender, seventeen (17) tenders including the Applicant's tender were found non-responsive while the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties' tenders were found responsive thus, proceeded for Financial Evaluation.

### **Financial Evaluation**

At this stage of evaluation, the evaluation committee applied the criteria outlined in clause D) Financial Evaluation of Specific Evaluation Criteria of Section III-Evaluation and Qualification Criteria at page 38 of the Tender Document.

With respect to Lot 10 of the subject tender, the Evaluation Committee realised unit prices for the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties were above budget. The 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties were invited to revise their tenders by submitting their best and final offer in line with Section 131(c), 132(b)(3)(4)95) of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the 'Act') and Regulation 100(5) & (6) of the Public Procurement and Asset Disposal Regulations, 2020 (hereinafter referred to as the 'Regulations 2020').

The 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties revised their tenders and submitted their best and final offers as requested and the Evaluation Committee evaluated the same at this stage finding the 1<sup>st</sup> Interested Party's tender as the lowest evaluated responsive tender with respect to Lot 1(a) of the subject tender and the 2<sup>nd</sup> Interested Party's tender with respect to Lot 1(b) of the subject tender.

### **Recommendation**

The Evaluation Committee recommended the award of Lot 10 (a) of the subject tender to the 1<sup>st</sup> Interested Party at its unit price of USD1.44 approximately Kshs158.45 and at a total tender price of USD315,568.80 and Lot 10 (b) of the subject tender to the 2<sup>nd</sup> Interested Party at its unit price of Kshs.172.00 and a total tender price of Kshs.25,128,512.00.

### **Due diligence**

The Evaluation Committee conducted due diligence on the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties with respect to Lot 10 of the subject tender verifying their tax compliance certificates from the Kenya Revenue Authority website.

### **Professional Opinion**

In a Professional Opinion dated 28<sup>th</sup> October 2021, the 2<sup>nd</sup> Respondent's Acting Director Procurement, Mr. Edward Buluma, reviewed the manner the subject procurement process was undertaken including evaluation of tenders and concurred with the recommendations of the Evaluation Committee to

award Lot 10 (a) of the subject tender to the 1<sup>st</sup> Interested Party at its unit price of USD1.44 approximately Kshs.158.45 and at a total tender price of USD315,568.80 and Lot 10 (b) of the subject tender to the 2<sup>nd</sup> Interested Party at its unit price of Kshs.172.00 and at a total tender price of Kshs.25, 128,512.00.

### **Notification to Tenderers**

Vide letters dated 2<sup>nd</sup> November 2021, the 2<sup>nd</sup> Respondent notified all tenderers of the outcome of their respective tenders in the subject tender.

### **THE REQUEST FOR REVIEW**

Jubilee Meds Limited, the Applicant herein, filed a Request for Review dated 15<sup>th</sup> November 2021 with the Board on 16<sup>th</sup> November 2021 together with a Supporting Affidavit sworn by Shezan Kara, the Applicant's Director, on 15<sup>th</sup> November 2021 and an Applicant's Supplementary Affidavit sworn by Shezan Kara on 26<sup>th</sup> November 2021 and filed on 29<sup>th</sup> November 2021 through the firm of Sigano & Omollo LLP Advocates, seeking the following orders verbatim:

- a. The notification of award of the subject tender number KEMSA/ONT03/2021-2021 For the Supply of Health Technologies (Surgical dressings, Resuscitaire, Catheters, Cord Clamp, Surgical Gloves, Cannulas, Administration sets & Syringes (Item No.10 Infusion Giving Sets with Air Inlet)) to CAPERINA ENTERPRISES LIMITED and ALEXANDER HEALTHCARE LTD be and is hereby annulled and set aside.**

- b. The notification of unsuccessful bid dated 2<sup>nd</sup> November 2021 and addressed to the Applicant in the tender number KEMSA/ONT03/2021-2021 For the Supply of Health Technologies (Surgical dressings, Resuscitaire, Catheters, Cord Clamp, Surgical Gloves, Cannulas, Administration sets & Syringes (Item No.10 Infusion Giving Sets with Air Inlet)) be annulled and set aside.**
- c. The Accounting Officer of the procuring entity be and is hereby directed to re-admit the Applicant's bid in tender no. KEMSA/ONT03/2021-2021 For the Supply of Health Technologies (Surgical dressings, Resuscitaire, Catheters, Cord Clamp, Surgical Gloves, Cannulas, Administration sets & Syringes (Item No.10 Infusion Giving Sets with Air Inlet)) for financial evaluation and consideration for tender award.**
- d. The Accounting officer of the procuring entity be and is hereby directed to award the subject tender number KEMSA/ONT03/2021-2021 For the Supply of Health Technologies (Surgical dressings, Resuscitaire, Catheters, Cord Clamp, Surgical Gloves, Cannulas, Administration sets & Syringes (Item No.10 Infusion Giving Sets with Air Inlet)) in accordance with the award criteria in the tender document.**
- e. In the alternative, the honourable Review Board be pleased to order termination of the procurement proceedings in tender number KEMSA/ONT03/2021-2021 For the Supply of Health Technologies (Surgical dressings, Resuscitaire, Catheters,**

**Cord Clamp, Surgical Gloves, Cannulas, Administration sets & Syringes (Item No.10 Infusion Giving Sets with Air Inlet)) and further order the procuring entity to competitively re-tender the said tender item taking into account the findings of the Review Board herein.**

**f. Any other relief that the Board may deem fit and just to grant.**

**g. Costs of the Review.**

Vide letters dated 16<sup>th</sup> November 2021 the Acting Board Secretary notified the Respondents of the existence of the Request for Review.

In response, the Respondents filed a Notice of Appointment of Advocates, dated 19<sup>th</sup> November 2021, on even date and a 1<sup>st</sup> & 2<sup>nd</sup> Respondent's Memorandum of Response dated 23<sup>rd</sup> November 2021 and filed on even date through the firm of Warihui K'Owade & Ng'ang'a Advocates.

Vide letters dated 26<sup>th</sup> November 2021, the Acting Board Secretary notified all tenderers who tendered for Lot 10 of the subject tender of the existence of the Request for Review while inviting them to furnish the Board with any information and arguments touching on the subject tender.

Vide an email of 30<sup>th</sup> November 2021, Godsuns Limited attached a letter dated 30<sup>th</sup> November 2021 and a table with its response on the specific reasons its tender was found non-responsive.

The 1<sup>st</sup> Interested Party filed a 1<sup>st</sup> Interested Party's Memorandum of Response dated 1<sup>st</sup> December 2021 and filed on even date through the firm of Humphrey & Company LLP.

Further, the Acting Board Secretary furnished all tenderers with the Board's Circular No. 2/2020 dated 24<sup>th</sup> March 2020, detailing administrative and contingency measures to mitigate the spread of Covid-19. Pursuant to the Board's Circular No. 2/2020 dated 24<sup>th</sup> March 2020, the Board dispensed with physical hearings and directed all requests for review applications be canvassed by way of written submissions. Clause 1 at page 2 of the said Circular further specified that pleadings and documents would be deemed as properly filed if they bear the official stamp of the Board.

On 2<sup>nd</sup> December 2021, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed the 1<sup>st</sup> & 2<sup>nd</sup> Respondents' Written Submissions dated 2<sup>nd</sup> November 2021 and 1<sup>st</sup> & 2<sup>nd</sup> Respondents' List & Bundle of Authorities dated 2<sup>nd</sup> December 2021.

### **APPLICANT'S CASE**

The Applicant avers that it has a history of outstanding performance in delivery of 'Infusion Giving Sets with Air Inlet' equipment to the Respondents for the last two years and which equipment is one of the items the Applicant tendered for in the subject tender. Specifically, the Infusion Giving Sets with Air Inlet tendered for by the Applicant was provided for under Lot 10 of the subject tender. According to the Applicant, it offered a unit price of

Ksh.121.04 with respect to Lot 10 of the subject tender and which unit price was lower than that offered by the 1<sup>st</sup> Interested Party at Kshs.158.45 and the 2<sup>nd</sup> Interested Party at Kshs.172.00 calculated at an exchange rate of 1USD = KES110.0335. The Applicant believes having offered the lowest tender price, it qualified for award of Lot 10 of the subject tender under clause 39.1 of the Tender Document.

However, the Applicant avers that it received a regret letter dated 2<sup>nd</sup> November 2021 from the 2<sup>nd</sup> Respondent notifying the Applicant that it was unsuccessful with respect to Lot 10 (a & b) because the Applicant provided a sample that had secondary package that was not labelled. Upon enquiry by the Applicant vide a letter dated 3<sup>rd</sup> November 2021, the 2<sup>nd</sup> Respondent vide a letter dated 12<sup>th</sup> November 2021 explained to the Applicant that the required sample size for Lot 10 of the subject tender was the same as pack size in the price schedule (pack of 10) and it was a requirement for secondary pack to be labelled.

It is the Applicant's averment that the 2<sup>nd</sup> Respondent applied extraneous evaluation criteria, not provided in the Tender Document, while evaluating the Applicant's tender with respect to Lot 10 of the subject tender to disqualify the Applicant's tender contrary to Section 80(2) of the Act. To support this allegation, the Applicant first avers that the Tender Document required tenderers to submit a sample of 10 pieces for evaluation with respect to Lot 10 of the subject tender and which sample the Applicant

submitted and was issued with a sample receipt voucher which the Applicant has annexed as a copy marked SK-03 to the Supporting Affidavit of Shezan Kara. Secondly, the Applicant avers that the Tender Document did not stipulate the specific manner of packaging and labelling samples for Lot 10 of the subject tender.

The Applicant further avers that the award to the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties of Lot 10(a) and 10(b) of the subject tender respectively is in breach of Section 86(1) of the Act because the Applicant offered the lowest unit price for Lot 10 of the subject tender compared to the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties and that it has suffered or risks suffering loss of income that would have accrued if the Applicant was awarded Lot 10 of the subject tender.

### **RESPONDENTS' CASE**

On their part and in response to the Applicant's allegations, the Respondents contend that the Applicant failed to demonstrate by way of evidence or at all how the 2<sup>nd</sup> Respondent has breached Sections 80(2) and 86(1) of the Act as read together with clause 39.1 of the Tender Document.

The Respondents contend that the Applicant failed to comply with the mandatory requirements of the Tender Document as read together with the Act and Regulations 2020. It is the Respondents contention that product labelling criteria was provided for under clause C) Product Evaluation Criteria of Specific Evaluation Criteria of the Tender Document and only tenderers

who were successful at this stage would proceed to the next stage of evaluation. The Respondents further contend that the technical specifications for item 10 provided for the labelling of the primary, secondary and tertiary package with manufacturer's name, address, Country of origin, Batch No, Date of manufacture and Expiry at page 94 of the Tender Document and that a clause on Tender Sample at page 24 of the Tender Document provided for a properly labelled sample of each item quoted and which sample ought to be of the required pack size as indicated in the schedule of requirements.

The Respondents contend that the Applicant provided a sample for item 10 that had a secondary package that was not labelled in contravention of the mandatory requirements of the Tender Document and therefore materially deviated from the express requirements set out in the Tender Document. It is this failure, the Respondents contend, rendered the Applicant's tender non-responsive in accordance with Section 79 of the Act and the rejection of the Applicant's tender was in line with Regulation 75 of Regulation 2020.

The Respondents further contend that the Interested Parties complied with mandatory requirements and are the rightful successful tenderers of Lot 10 of the subject tender and that the Request for Review lacks merit, is ambiguous and amorphous and only intended to delay the procurement process and therefore the same should be dismissed with costs.

## **1<sup>st</sup> INTERESTED PARTY'S CASE**

The 1<sup>st</sup> Interested Party avers that it submitted a tender strictly complying with all the requirements of the tendering process as provided in the Tender Document and was informed that it was successful.

With respect to the allegations raised by the Applicant touching on evaluation of the Applicant's tender by the 2<sup>nd</sup> Respondent, the 1<sup>st</sup> Interested Party contends that it is not privy to or aware of the facts contained in the affidavit of Shezan Kara as it was only a tenderer and was not responsible for the tendering process.

#### **APPLICANT'S REJOINDER**

In a rejoinder to the Respondents' Memorandum of Response, the Applicant confirm that the Request for Review relates to only Lot 10 of the subject tender (Infusion Giving Sets with Air Inlet) only.

It is the Applicant's understanding that a primary package has the meaning of a package which is in direct contact with the product itself and with respect to Lot 10 being each piece of the Infusion Giving Sets with Air Inlet. Further, the Applicant avers that submission of samples for Lot 10 of the subject tender required tenderers to only submit a sample of 10 pieces for evaluation and that each piece would be packaged in a primary packaging and any tenderer who submitted ten pieces in primary packaging labelled with manufacturer's name, address, Country of origin, Batch No, Date of manufacture and Expiry, met the evaluation criteria of the subject tender.

According to the Applicant, the Tender Document did not contain any requirement for secondary packaging considering it merely required tenderers to submit a sample of ten pieces for evaluation and not a sample of one box or one pack of 10 pieces for evaluation where the primary packaging would be the one in contact with one piece of the sample and the secondary packaging would be the box containing the packaged ten pieces of the sample.

The Applicant further drew the attention of the Board to various provisions of the Tender Document on submission of samples for different items/lots which demonstrate the evaluation criteria which would be applied by the Respondents in the respective samples as follows:

<b>Item/Lot No.</b>	<b>Tender Document stipulation on Submission of Sample</b>	<b>Comment on packaging type stipulated for sample(s)</b>
4	Submit a sample of one (1) box of 6 pcs of each size for evaluation	Primary and secondary
5 and 6	Submit a sample of one (1) pack of 25 pieces of each size for evaluation	Primary and secondary
8	Submit a sample of box of 50 pieces of every size for evaluation	Primary and secondary
9	Submit a box of 20 pieces for evaluation	Primary and secondary
<b>10</b>	<b>Submit a sample of 10 pieces for evaluation</b>	<b>Primary only</b>
11	Submit a pack of Ten (10) pieces for evaluation	Primary and secondary
12	Submit a sample of one (1) box of 50 pairs of each for evaluation	Primary and secondary

The Applicant emphasizes that since the sample for Lot 10 of the subject tender was not required in a box or a pack, the only packaging for the same to be evaluated ought to have been the primary packaging and not the secondary packaging.

The Applicant reiterates the averments contained in its Request for Review and in the Supporting Affidavit of Shezan Kara and prays for the Request for Review to be allowed as prayed.

### **BOARD'S DECISION**

The Board has considered all the parties' pleadings and Written Submissions filed before it, including the confidential documents submitted to it by the Respondents pursuant to Section 67 (3) (e) of the Act") and finds that the following issue calls for determination: -

**Whether the Applicant's tender was evaluated in accordance with Clause 2 and 3) of C) Product Evaluation of Specific Evaluation Criteria of Section III - Evaluation and Qualification Criteria read with Section VII-Schedule of Requirements of the Tender Document and Section 80(2) of the Act.**

The Board would like to dispense with a preliminary issue based on Godsuns Limited's letter dated 30<sup>th</sup> November 2021. The Board notes that Godsuns Limited was one of the tenderers who tendered for Lot 10 of the subject tender. However, in response to the Request for Review herein, Godsuns Limited has made no comments with respect to Lot 10 of the subject tender but has instead given its response vide a letter dated 30<sup>th</sup> November 2021 to the reasons given to it as to why its tender was found non-responsive for Lot 2 (a & b), 4 (a & b), 14 (a & b) and 15 (a & b) of the subject tender. Further, Godsuns Limited has requested the Board to re-examine the sample it presented for Lot 2(a & b) of the subject tender.

We note no Request for Review has been filed by Godsuns Limited outlining any breach of duty imposed on the part of the Respondents by the Act or Regulations 2020 as required under Section 167(1) of the Act to invoke the jurisdiction of the Board to hear and determine Godsuns Limited's allegations with respect to Lot 2 (a & b), 4 (a & b), 14 (a & b) and 15 (a & b) of the subject tender. These allegations are brought before the Board through the back door and without paying the filing fees as required under Regulation 203(2) of Regulations 2020. In the circumstances, the Board refrains from addressing the allegations raised by Godsuns Limited with respect to Lot 2 (a & b), 4 (a & b), 14 (a & b) and 15 (a & b) of the subject tender.

On the issue framed for determination, the Board notes the subject tender contained eighteen (18) items that tenderers would tender for. However, the subject review is with respect to Item No. 10 (Infusion Giving Sets with Air Inlet) (hereinafter referred to as 'Lot 10') with respect to the subject tender. Accordingly, the Board will only address issues raised with respect to Lot 10 of the subject tender.

The Applicant tendered for Lot 10 of the subject tender but was notified that its tender was not successful vide a letter dated 2<sup>nd</sup> November 2021 because the sample it provided with respect to Lot 10 of the subject tender has a secondary package that was not labelled. Vide a letter dated 3<sup>rd</sup> November 2021, the Applicant sought for a review of the Respondents decision to disqualify it noting that there was no indication that the sample in Lot 10 of the subject tender was to be provided for in a secondary package like in a box of 10's as per unit of measure on the price. In response, vide a letter dated 12<sup>th</sup> November 2021 the 2<sup>nd</sup> Respondent clarified *inter alia* that '***for item no. 10 (Infusion Giving Sets with Air Inlet) the required sample size was the same as pack size in the price schedule (pack of 10) and it was a requirement for secondary pack to be labelled.***'

The Applicant now challenges this decision of the Respondents to disqualify it with respect to Lot 10 of the subject tender.

The Board is cognizant of Article 227 of the Constitution which provides for a system to be used in public procurement processes as it provides as follows:

**Article 227. Procurement of public goods and services**

- (1) When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost effective.**
- (2) An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for all or any of the following –**
  - (a) .....**
  - (b) .....**
  - (c) ..... and**
  - (d) .....**

The Act of Parliament envisaged in Article 227(2) of the Constitution is the Act. Section 80 of the Act speaks to how evaluation of tenders should be conducted and provides as follows:

**Section 80. Evaluation of tenders**

**(1) The evaluation committee appointed by the accounting officer pursuant to section 46 of the Act, shall evaluate and compare the responsive tenders other than tenders rejected .**

**(2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the provisions of this Act and statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered.**

**(3) .....**

**(4) .....**

**(5) .....**

**(6) .....**

**(7) .....**

The import of section 80 (2) of the Act read with Article 227 (1) of the Constitution enjoins an evaluation committee to evaluate tenders in a system that is fair and in accordance with the criteria and the procedure laid down in a tender document. A system that is fair is one that considers equal treatment of all tenders against a criteria of evaluation known by all tenderers as such criteria was provided for in a tender document issued to tenderers by a procuring entity.

The Board has perused the Tender Document and notes the criteria for evaluation of the subject tender was provided in Section III – Evaluation and Qualification Criteria running through pages 32 to 41 of the Tender Document. The criteria for evaluation of the product packaging and labelling was provided for in Clause 2 and 3 of C) Product Evaluation of Specific

Evaluation Criteria of Section III – Evaluation and Qualification Criteria at page 38 of the Tender Document read with Section VII – Schedule of Requirements running through pages 107 to 118 of the Tender Document.

The General Provision and Evaluation and contract award criteria under Section III – Evaluation and Qualification Criteria at page 32 of the Tender Document provides as follows:-

***1. General Provision***

***1.1 This section contains the criteria that the Procuring Entity shall use to evaluate tender and qualify tenderers.***

.....

***2. Evaluation and contract award Criteria***

***2.1 The Procuring Entity shall use the criteria and methodologies listed in this Section to evaluate tenders and arrive at the Lowest Evaluated Tender. The tender that (i) meets the qualification criteria, (ii) has been determined to be substantially responsive to the Tender Documents, and (iii) is determined to have the Lowest Evaluated Tender price shall be selected for award of contract.***

Clause 2 and 3 of C) Product Evaluation of Specific Evaluation Criteria of Section III – Evaluation and Qualification Criteria at page 38 of the Tender Document provide as follows:

**"C) PRODUCT EVALUATION**

**The product evaluation will be done on the sample submitted by the Bidders and will involve the following:**

***1) Evaluation of the Physical Properties and presentation of the products - The evaluation will be 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***

**2) Evaluation of the product packaging based on Good Manufacturing and pharmaceuticals practices of the dosage form and specifications under section VII of the Tender document.**

**3) Evaluation of the product labeling criteria based on technical specifications spelt out under section VII of the tender document.**

***The evaluation will be on a "Yes/No" basis;***

***NOTE: Only bidders who are successful at this stage will proceed to the next stage of evaluation."***

On product packaging and labeling, the Tender Document spells out the specific criteria in Section VII-Schedule of Requirements which provides a schedule of requirements, list of goods and delivery schedule, sample

technical specifications, Inspections and Tests. The notes for preparing the schedule of requirements at page 108 provides, *inter alia*, as follows;

.....

***The objective of the Schedule of Requirements is to provide sufficient information to enable Tenderers to prepare their Tenders efficiently and accurately, in particular, the Price Schedule, for which a form is provided in Section IV.....***

.....

Clause 1. Product and Package Specifications of Sample Technical Specifications Health Technologies of Section VII – Schedule of Requirements at page 112 of the Tender Document provides as follows:

***1. Product and Package Specifications***

***1.1.1 These specifications describe the basic requirements for the Health Technologies. Bidders are requested to submit with their offers the detailed specifications and Samples for the products they intend to supply. The sample requested is to be submitted as per technical specification offered by the Tenderer and shall represent exactly the pharmaceutical product that is intended to be supplied in case of contract award and must be submitted by the deadline for submission of tenders. The Bidders are requested to present information along with their offers indicating the shortest possible delivery period of each product.***

Clause 1.3 Packaging of Products of Clause 6.General of Sample Technical Specifications Health Technologies of Section VII – Schedule of Requirements at page 114 of the Tender Document provides as follows:

***Items should be packaged as follows:***

- (i) 100 ml bottles, not more than 100 per carton***
- (ii) 200 ml bottles, not more than 50 per carton***
- (iii) 500 ml bottles, not more than 24 per carton***
- (iv) 1.0 litre bottles, not more than 12 per carton***
- (v) 2.5 litre bottles, not more than 6 per carton***
- (vi) 5.0 litre bottles, not more than 4 per carton***
- (vii) For ear- and eye drops a maximum of 24 should be packed in each carton and the box must be partitioned if the contents are more than 6.***

***Specifications for plastic containers used shall be as follows:***

- Litre Jerry can- High Density***

- ***2 Litre Jerry can– High Density***
- ***1 Litre jerry can- High Density***

Clause 1.4 Tertiary Packing of Clause 6.General of Sample Technical Specifications Health Technologies of Section VII – Schedule of Requirements at page 114 and 115 of the Tender Document provides as follows:

***Tertiary Packing (Not applicable to tender sample but at pre-delivery and full consignment for the successful tenderer, however bidders are advised to verify the nature of packaging material before bidding.)***

- 1.5.1*** .....
- 1.5.2*** .....
- 1.5.3*** .....
- 1.5.4*** .....
- 1.5.5*** .....

Clause 2 Labeling Instructions of Clause 6.General of Sample Technical Specifications Health Technologies of Section VII – Schedule of Requirements at page 115 of the Tender Document provides as follows:

***2. Labeling Instructions***

***2.1 The label of the primary container for each Health Products shall meet the W210 GMP standard and include:***

***a) The international non proprietary name (INN) or generic name prominently displayed., where a brand name has been given it must be in addition to the INN.***

***b) The applicable pharmacopoeia standard;***

***c) the procuring entity unique marking (to be checked at predelivery);***

***d) Content per pack;***

***e) Instructions for use;***

***f) Storage requirements;***

***g) Batch/ lot number;***

***h) Date of manufacture and date of expiry (in clear English language, not code);***

***i) Name and address of manufacturer;***

***j) Any additional cautionary statement.***

***All labeling and packaging inserts shall be in English”***

***THE SAMPLE INCLUDING LITERATURE (INSERTS) SHOULD BE SUBMITTED.***

***All outer cartons should be labeled as follows:***

***KEMSA***

***TENDER NO. KEMSA/OIT03/2020-2023***

***KENYA MEDICAL SUPPLIES AUTHORITY***

**COMMERCIAL STREET**

**P. O. BOX 47715-00100, NAIROBI**

**2.2 The outer case or carton should also display the above information.**

**3. Cartons/ Case Identification**

**3.1 All cases/cartons should prominently indicate the following:**

- a) Procuring Entity's line and code numbers;**
- b) The generic name of the product;**
- c) Date of manufacture and expiry (in clear English language not code);**
- d) Batch number;**
- e) Quantity per case;**
- f) instructions for storage**
- g) Name and address of both the manufacturer and manufacturing site.**
- h) All labeling shall be original and imprinted (by use of indelible ink) on the product package**
- i) Any additional cautionary statements.**

**3.2 No case/carton should contain Health Products from more than one batch.**

**4. Unique Identifiers**

**4.1 The word "KEMSA" shall be extensively and conspicuously imprinted (by use of indelible ink) on the primary, secondary and**

**tertiary packaging of products to be supplied to the procuring entity. (Not applicable to tender sample but at pre-delivery and full consignment for the successful tenderer.)**

Clause 6 Tender Sample of Clause 6.General of Sample Technical Specifications Health Technologies of Section VII – Schedule of Requirements at page 117 of the Tender Document provides as follows:

**6.1 A properly labeled sample of each item quoted must be delivered to Kenya Medical Supplies Authority on or before closing of the tender at 10.00 a.m. on 22nd July ,2021. The sample must be of the required pack size as indicated in the schedule of requirements.**

***6.2 The sample including literature (inserts) should be submitted in their normal or usual commercial packing as registered by the Kenya Pharmacy and Poison’s Board, and should be labeled in English. The sample must be a true representative of the product tendered for and remaining shelf life of at least 120 days from date of submission.***

***6.3 Bidders should provide one sample to represent both lots per item. Bidders who submit two different samples for any given item will have their samples disqualified.***

On the delivery schedule specifications and description of products under Lot 10 of the subject tender, the Tender Document provides as follows at page 86 and 87;

<p><b>Item No.10</b> Infusion Giving Sets with Air Inlet</p>	<p><b>Sets, I.V. Fluid Infusion, with air inlet Product parameters</b></p> <ul style="list-style-type: none"> <li>• Material: Polyvinyl chloride (PVC) • Must be sterile (mode indicated) • For single use</li> <li>• The Luer lock fitting has a protecting cap which must be firmly fitting • The lock should not be screw type but the sliding type</li> <li>• Must not leak</li> <li>• Must have air inlet</li> <li>• Be of soft material</li> <li>• Sterilization method should be indicated</li> <li>• One (1) Infusion Giving Set packed in an individual sterilized pack with a tear off mark • The tip should penetrate the rubber cock without bending</li> <li>• Length is approximately 150cm (overall IV giving set length approximately 170cm).</li> <li>• Internal / external diameter is approximately 3mm/4mm. • Plastic Perforator: plastic (polyacetate).</li> <li>• Hollow device located at the proximal end • Composed of a tapering tube mounted on a base • Fitted with a protecting cap</li> <li>• Air inlet: plastic (ABS: acrylonitrile butadiene styrene) incorporated into the perforator</li> <li>• Fitted with an air filter (bacteriological filter)</li> <li>• Drop-counting chamber-located under the graduated chamber. Calibrated 20 drops/ml, and fitted with a 15µ polyamide filter • Dropper should be made of PVC material (Not pin)</li> <li>• Flow regulator: plastic (ABS: acrylonitrile butadiene styrene)</li> <li>• <b>The flow regulator should be well fitting and once locked/closed should not allow passage or leakage</b></li> <li>• Injection portal: plastic (ABS: acrylonitrile butadiene styrene) + synthetic rubber</li> <li>• Terminal connection (stopper): plastic (ABS: acrylonitrile butadiene styrene)</li> <li>• With Luer lock connector</li> </ul> <p><b><u>Packaging parameters</u></b></p> <ul style="list-style-type: none"> <li>• <u>Each set individually packed in a sterile easy peel pack</u></li> </ul> <p>• Standard weight of carton 15-20kg</p> <p><b><u>Labeling parameters</u></b></p>
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	<ul style="list-style-type: none"> <li>• Labeling should be in English</li> <li>• Legible and in indelible ink and not on a stick on</li> </ul> <ul style="list-style-type: none"> <li>• <u>The primary, secondary and tertiary package should be labeled with manufacturer's name, address, Country of origin, Batch No, Date of manufacture and Expiry</u></li> <li>• • The primary, secondary and tertiary package should be labeled KEMSA (not applicable to tender sample but to pre-delivery sample and full consignment for the successful Tenderer)</li> <li>• • Each carton to be clearly marked with the name and characteristics of the product and number of units per carton applicable to pre-delivery sample and full consignment for the successful Tenderer.</li> </ul> <p>Should conform to KEBS/ISO standard or equivalent (product should have mark of quality) • Manufacturer must be KEBS/ISO certified or equivalent</p> <p><b>Submission of sample</b></p> <ul style="list-style-type: none"> <li>• <u>Submit a sample of 10 pieces for evaluation</u></li> </ul>
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From a reading of the above provisions of the Tender Document, it is evident that tenderers were required to submit samples of 10 pieces for evaluation (and not a box of 10 pieces or a pack of 10 pieces) of the products they would supply for Lot 10 of the subject tender to the 2<sup>nd</sup> Respondent if found to have submitted the lowest most responsive tender with each set individually packed in a sterile easy to peel pack (and not packed in a box) and such sample product would be evaluated against the criteria for evaluation provided in Section III -Evaluation and Qualification Criteria at pages 32 to 41 of the Tender Document read with Section VII- Schedule of Requirements at pages 107 to 118 of the Tender Document.

We note that the provisions of Section III -Evaluation and Qualification Criteria at pages 32 to 41 read with Section VII - Schedule of Requirements at pages 107 to 118 of the Tender Document **do not** provide for labeling of

a secondary package with respect to the sample of 10 pieces required to be submitted by tenderers with respect to evaluation of Lot 10 of the subject tender. Infact, Clause 4.1 of Section VII – Schedule of Requirements at page 116 of the Tender Document indicate that a unique identifier, the word KEMSA, needs to be imprinted on the primary, secondary and tertiary packaging of products at pre-delivery and full consignment by the successful tenderer and such imprinting of the word KEMSA on primary, secondary and tertiary packaging is not applicable to tender sample.

We however note that it is only during delivery of the products by a successful tenderer of Lot 10 of the subject tender that the secondary and tertiary package of the products being delivered by a successful tenderer to the 2<sup>nd</sup> Respondent is required to be labeled with manufacturer's name, address, Country of origin, Batch No. Date of manufacture and Expiry as outlined in the Delivery Schedule specifications at page 87 of the Tender Document. This to our mind cannot form part of the criteria for evaluation for the following reason. First, delivery of products can only be done after a successful tenderer has been awarded and not during evaluation of tenders. Secondly, the Delivery Schedule specifications requiring labeling of secondary packaging does not form part of the criteria for evaluation stipulated under Section III -Evaluation and Qualification Criteria at pages 32 to 41 read with Section VII - Schedule of Requirements at pages 107 to 118 of the Tender Document.

Accordingly, there is no specific technical evaluation criteria that required tenderers to provide labelled secondary packaging with respect to Lot 10 of the subject tender, and no specifications are given as a criteria on how the secondary packaging would be labelled. If the Respondents intended for the sample of the secondary package to be labelled then nothing would have been easier than to indicate as much in the criteria for evaluation in the Tender Document under Section III -Evaluation and Qualification Criteria at pages 32 to 41 read with Section VII - Schedule of Requirements at pages 107 to 118 of the Tender Document.

Thus, the 2<sup>nd</sup> Respondent in finding the Applicant's tender non-responsive for failure to label a secondary package of the sample for Lot 10 of the subject tender used an an extraneous criterion not provided for in the criteria set out for evaluation under Section III -Evaluation and Qualification Criteria at pages 32 to 41 read with Section VII - Schedule of Requirements at pages 107 to 118 of the Tender Document. The Evaluation Committee should not have evaluated tenders based on a criterion not set out as a criteria for evaluation under Section III -Evaluation and Qualification Criteria at pages 32 to 41 read with Section VII - Schedule of Requirements at pages 107 to 118 of the Tender Document. Such an act goes against the principles of fairness, and transparency enshrined in Article 227(1) of the Constitution and is in breach of Section 80(2) of the Act.

The Courts have had occasion to address this issue in *Misc. Civil Application No. 60 of 2020, Republic V PPARB and Kenya Bureau of Standards Ex Parte Tuv Austria Turk* where it held;

**"It is important for bidders to compete on an equal footing. Moreover, they have a legitimate expectation that the procuring entity will comply with its own tender conditions. Requiring bidders to submit responsive, conforming or compliant tenders also promotes objectivity and encourages wide competition in that all bidders are required to tender on the same work and to the same terms and conditions."**

From the foregoing, an Evaluation Committee ought to comply with the conditions/ requirements for evaluation already set out as criteria for evaluation in the Tender Document without adding new requirements during evaluation that tenderers were not aware would form part of evaluation to comply beforehand.

Accordingly, **the Board finds the Applicant's tender was not evaluated in accordance with Clause 2 and 3) of C) Product Evaluation of Specific Evaluation Criteria of Section III - Evaluation and Qualification Criteria read with Section VII-Schedule of Requirements of the Tender Document and Section 80(2) of the Act.**

In the circumstances, the Applicant's tender having complied with all other requirements of the Technical Evaluation stage, as seen in the Evaluation Report, should be admitted for evaluation at the Financial Evaluation stage together with the Interested Parties tenders. For avoidance of doubt, the Interested Parties' tenders to be re-evaluated at the Financial Evaluation stage are the initial tenders submitted by the Interested Parties prior to being invited for competitive negotiations. Consequently, the competitive negotiations carried out with respect to Lot 10 of the subject tender involving the Interested Parties herein is hereby nullified and set aside to pave way for a re-evaluation of the Interested Parties tenders and that of the Applicant at the Financial Evaluation stage.

The upshot of our findings herein is that the Request for Review is allowed in the following specific orders.

### **FINAL ORDERS**

In exercise of the powers under section 173 of the Act, the Board makes the following orders with respect to the Request for Review:

- 1. The 2<sup>nd</sup> Respondent's Notification of Regret Letters addressed to all unsuccessful tenderers with respect to Lot 10 (Item No. 10-Infusion Giving Sets with Air-Inlet) dated 2<sup>nd</sup> November 2021 in Tender No. KEMSA/ONT03/2021-2023- for Supply of Health Technologies (Surgical dressings, Resuscitaire, Catheters, Cord Clamp, Surgical Gloves, Cannuls,**

**Administration sets & Syringes) reserved for Disadvantaged Groups be and are hereby cancelled and set aside.**

- 2. The 2<sup>nd</sup> Respondent's Letters of Notification of Award addressed to the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties with respect to Lot 10 (a) and Lot 10(b) respectively (Item no. 10-Infusion Giving Sets with Air-Inlet) in Tender No. KEMSA/ONT03/2021-2023- for Supply of Health Technologies (Surgical dressings, Resuscitaire, Catheters, Cord Clamp, Surgical Gloves, Cannuls, Administration sets & Syringes) reserved for Disadvantaged Groups be and are hereby cancelled and set aside.**
- 3. The 1<sup>st</sup> Respondent is hereby ordered to direct the Evaluation Committee to admit the Applicant's tender to the Financial Evaluation stage and conduct a re-evaluation of the 1<sup>st</sup> and 2<sup>nd</sup> Interested Party's tenders together with that of the Applicant's at the Financial Evaluation stage.**
- 4. Further to order No. 3 above, the 2<sup>nd</sup> Respondent is hereby directed to proceed with the procurement process to its logical conclusion within fourteen (14) days from the date of this decision, taking into consideration the Board's findings in this Request for Review.**

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

Dated at Nairobi this 7<sup>th</sup> Day of December 2021.



CHAIRPERSON  
PPARB



SECRETARY  
PPARB