

REPUBLIC OF KENYA
PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD
APPLICATION NO. 84/2021 OF 22ND JUNE 2021

BETWEEN

REVITAL HEALTH (EPZ) LTD.....APPLICANT

AND

THE ACCOUNTING OFFICER,

KENYA MEDICAL SUPPLIES AUTHORITY.....RESPONDENT

GEOKIM SUPPLIES CO. LTDINTERESTED PARTY

Review of the decision of the Accounting Officer, Kenya Medical Supplies Authority communicated in a letter dated 8th June 2021 in the matter of Tender Number IFT No.: GF ATM COVID-19 Response 20/21-OIT-003 for Supply of Laboratory Consumables I with specific regard to Item No. 3 Viral Transport Medium (VTM).

BOARD MEMBERS

- | | |
|-----------------------------|--------------|
| 1. Ms. Faith Waigwa | -Chairperson |
| 2. Ms. Isabella Juma, CPA | -Member |
| 3. Mr. Alfred Keriolale | -Member |
| 4. Ms. Phyllis Chepkemboi | -Member |
| 5. Arch. Stephen Oundo, OGW | -Member |

IN ATTENDANCE

1. Mr. Stanely Miheso

BACKGROUND TO THE DECISION

The Bidding Process

Kenya Medical Supplies Authority (KEMSA) (hereinafter referred to as "the Procuring Entity") advertised Tender Number Tender Number IFT No.: GF ATM COVID-19 Response 20/21-OIT-003 for Supply of Laboratory Consumables I using an Open International Tender method of procurement on 2nd February 2021. The Procuring Entity sought to procure 11 items in which Item No. 3 Viral Transport Medium VTM was part of. What is in issue in the subject review is Tender Number IFT No.: GF ATM COVID-19 Response 20/21-OIT-003 for Supply of Laboratory Consumables I with specific regard to Item No. 3 being Viral Transport Medium (hereinafter referred to as "Item No.3 VTM") (hereinafter referred to as the Subject Tender).

Tender submission deadline and opening of tenders

The Procuring Entity received Twenty-Four (24) tenders, by the tender submission deadline on 2nd March 2021 in which seventeen (17) tenders were with respect to Item No.3 VTM. The same were opened shortly thereafter by a Tender Opening Committee and recorded as follows: -

1. Benchtop Automation Ltd;
2. Intermed Africa Ltd;
3. F&S Scientific Ltd;
4. Biomedical & Engineering Solution;
5. Surgipath Services East Africa Ltd;

6. Caperina Enterprises Ltd;
7. Amiken Limited;
8. Kensel Ltd;
9. Sciencescope Limited;
10. Revital Healthcare (EPZ) Ltd;
11. Biodesk Africa Limited;
12. Medionics Healthcare Ltd;
13. Chemoquip Ltd;
14. Bell Industries Ltd;
15. Faram E.A Ltd;
16. Lycan Ventures Ltd;
17. Biozeq Kenya Ltd;
18. Steplabs Technical Services Ltd;
19. Ultralab E.A. Ltd;
20. Tashmi International Ltd;
21. Leventon Ltd;
22. Medix E.A Ltd;
23. Brain spine and Rehabilitation Hospital; and
24. Geokim Supplies Co. Ltd

Evaluation of Bids

The Ag. Chief Executive Officer having appointed the Tender Evaluation Committee, the Procuring Entity's Evaluation Committee (hereinafter referred to as the "Evaluation Committee"), evaluated tenders in the

following three stages and as captured in the Evaluation Report dated March 2021 (hereinafter referred to as the "Evaluation Report):

A- Preliminary Examination;

B- Technical Evaluation;

1. Documentary Examination;

2. Product Evaluation; and

C- Financial Evaluation.

Preliminary Examination

At this stage, the Evaluation Committee applied six (6) mandatory requirements set out in the criteria for evaluation A: Preliminary Evaluation of Section VIII: Evaluation Criteria at page 89 of the blank Tender Document (hereinafter referred to as the "Tender Document"). In addition, the Evaluation Committee applied the requirement of a duly filled and signed Supplier Data Record. At the end of this stage, three (3) tenders were found non-responsive whilst twenty one (21) tenders, among them the Applicant's tender, were found responsive and eligible to proceed to the Technical Evaluation Stage.

Technical Evaluation

At this stage, tenders were subjected to two stages of evaluation namely: Documentary Examination and Product Evaluation. The Evaluation Committee applied the criteria for evaluation in B: Technical Evaluation of Section VIII: Evaluation Criteria at page 89 and 90 of the Tender Document, where Item No. 3 VTM product evaluation required *inter alia* to be in line

with the parameters drawn from the technical specifications as spelt out in the Tender Document with one of them being the physical configuration and shape, and only bidders who were successful at this stage would proceed to financial evaluation.

The product specifications for Item No. 3- VTM set out in Section VI. Technical Specifications at page 63 of the Tender Document read together with Addendum 2 dated 17th February 2021 and applied by the Evaluation Committee were as follows: -

Product Specifications

- The tube must be made of plastic material that is shatter-proof and can withstand freezing;
- Tube should be made of material that allows easy observation into the volume of specimen;
- Molding cap must be tight on the tube to ensure that the sample does not leak;
- **The tube should be Skirted and should have internal conical shape, allowing the tube to stand upright on a rack or on the bench;**
- Tubes must have large marking area for labelling;
- The media must be RNase/DNase free;
- The media should have substances that reduce chances of bacterial and fungal contamination agents or any other approved growth

suppressants for VTMs such as gentamicin sulphate, amphotericin B and bovine albumin fraction V;

The VTMs supplied at the end of the requisition should have at least 75% of active shelf life to the date of expiry;

Provide product catalogues and samples;

A manufacture's catalogue showing the specifications and the following parameters: product mark of quality, name of manufacturer, country of origin. The catalogue must have manufacturer's detail;

Supply 10 tubes of VTM at room temperature in their original packaging for evaluation.

At the end of this stage, eleven (11) tenders out of seventeen (17) tenders with respect to Item No. 3 Viral Transport Medium (VTM) were found non-responsive whilst six (6) tenders were found responsive and eligible to proceed to the Financial Evaluation stage. Amongst the eleven (11) tenders that were non-responsive was the Applicant's tender which was found non-responsive for providing a sample that had a round bottom instead of skirted and with an internal conical shape for allowing the tube to stand upright on a bench and therefore did not proceed to the Financial Evaluation Stage.

Financial Evaluation

At this stage, the Evaluation Committee applied the criteria outlined in C: Financial Evaluation Stage of Section VIII: Evaluation Criteria at page 90 of the Tender Document. The Interested Party's tender was found responsive and its tender price recorded at a unit cost of USD 59.00 and a total cost of USD 247,800.00 being the lowest evaluated responsive tender.

Recommendation

The Evaluation Committee recommended award of the subject tender to the Interested Party at a unit cost of USD 59.00 and a total cost of USD 247,800.00 being the lowest evaluated responsive tenderer.

Post Qualification Parameters

The Evaluation Committee subjected the Interested Party to due diligence to confirm and verify the Interested Party's qualifications and found the Interested Party responsive at this stage. Thereafter, the Evaluation Committee upheld its recommendation on award of the subject tender to the Interested Party for having submitted the lowest evaluated responsive tender.

Professional Opinion

In a Professional Opinion dated 3rd June 2021 (hereinafter referred to as the "Professional Opinion"), the Procuring Entity's Acting Director of Procurement, reviewed the Evaluation Report and the Due Diligence Report and concurred with the Evaluation Committee's recommendation on the

award of the subject tender with respect to Item No. 3 VTM thus, advised the Respondent to award the subject tender to the Interested Party at a unit cost of USD 59.00 and a total cost of USD 247,800.00 being the lowest evaluated responsive tenderer. The said Professional Opinion was approved by the Respondent on 7th June 2021.

Notification to Bidders

Vide letters dated 8th June 2021, the Respondent notified the Applicant and all other tenderers whose tenders were found non-responsive of the outcome of their respective tenders.

THE REQUEST FOR REVIEW

The Applicant lodged a Request for Review together with a Statement in Support of the Request for Review signed by Roneek Rajesh Vora, the Applicant's Director on 21st June 2021 and a Further Statement dated 5th July 2021 and filed on 6th July 2021 praying for: -

- a. The Respondent's decision awarding the subject tender to the Interested Party be annulled and set aside;
- b. The Respondent's decision, communicated by the letter dated 8th June 2021 (hereinafter referred to as the "Applicant's letter of notification"), notifying the Applicant that it had not been successful in the subject tender be annulled and set aside;
- c. The Respondent be directed to carry out a product re-evaluation, of the Viral Transport Medium submitted by the Applicant at the technical evaluation stage, together with other bidders who proceeded to product

evaluation under the technical evaluation stage, noting to observe and apply the criteria in the Tender Document objectively as required by the Public Procurement and Asset Disposal Act, No. 33 of 2015 (hereinafter referred to as the "Act") at Section 80 (3) of the Act;

- d. The Respondent be compelled to pay to the Applicant the costs arising from/and incidental to this Application; and
- e. The Board to make such and further orders as it may deem fit and appropriate in ensuring that the ends of justice are fully met in the circumstances of this Request for Review (hereinafter referred to as the "subject review").

Vide a letter dated 22nd June 2021, the Acting Board Secretary notified the Respondent of the Request for Review filed by the Applicant and the suspension of procurement proceedings in accordance with Section 168 of the Act. In addition to this, the Acting Board Secretary directed the Respondent to file a response to the Request for Review and confidential documents relating to the subject tender within 5 days from the date of service of the subject review upon the Respondent. The Acting Board Secretary further attached Circular No. 2/2020 dated 24th March 2020 (hereinafter referred to as "the Board's Circular") detailing administrative and contingency plan to mitigate against the effects of Covid-19 pandemic.

Pursuant to the Board's Circular, the Board dispensed with physical hearings and directed all Request for Review applications be canvassed by way of written submissions. Further, clause 1 at page 2 of the Board's Circular

specified that pleadings and documents will be deemed as properly filed if they bear the official stamp of the Board.

Accordingly, the Applicant lodged Applicant's Written Submissions together with a list and bundle of authorities dated 5th July 2021 and filed on 6th July 2021. The Respondent swore a replying affidavit on 28th June 2021 and filed on 29th June 2021 together with Written Submissions dated 7th July 2021 and filed on 12th July 2021. The Interest Party filed a Replying Affidavit sworn by George Kimuri Theuri, the Interested Party's director on 12th July and filed it on even date.

BOARD'S DECISION

The Board has considered parties' respective pleadings and their attendant annexures, written submissions, list and bundle of authorities together with confidential documents submitted to the Board by the Respondent pursuant to Section 67 (3) (e) of the Act and finds the following issue crystalizes for determination: -

Whether the Evaluation Committee evaluated the Applicant's tender in accordance with section 80 (2) and (3) of the Act, the criteria set out in B: Technical Evaluation of Section VIII: Evaluation Criteria at page 89 and 90 of the Tender Document read together with the product specifications for Item No. 3- VTM set out in Section VI. Technical Specifications at page 63 of the Tender

Document as amended by Addendum 2 dated 17th February 2021 requiring the VTM tube to be skirted and to have internal conical shape, allowing the tube to stand upright on a rack or on the bench.

The Applicant at paragraph 2 of its Request for Review averred that the Procuring Entity breached Section 3 of the Act by failing to ensure bidders are treated fairly and failing to conduct the evaluation process in a manner that promotes objectivity and fairness of the evaluation procedures. At paragraph 3 of the Request for Review, the Applicant further averred that the Procuring Entity and the Respondent in evaluating the tender acted in breach of Section 3 and Section 80 (2) and (3) of the Act by: failing to treat the Applicant fairly as required by the Act; and failing to apply the criteria under the Tender Document in an objective manner that takes into consideration the equality of the product submitted as part of the Applicant's bid.

Further, at paragraph 4 of the Request for Review, the Applicant averred that the Evaluation Committee is in breach of Section 46 (4) (e) of the Act for failing to adopt a process that ensures the evaluation process utilized adheres to Article 227 (1) of the Constitution of Kenya, 2010. At paragraph 5 of the Request for Review, the Applicant averred that the Procuring Entity has acted in violation of Article 227 (1) of the Constitution by failing to apply the criteria set out in the Tender Document objectively with the sole purpose of discrediting the product submitted as part of the Applicant's tender

thereby diminishing fairness, equitability, competitiveness and cost-effectiveness in the subject tender much to the prejudice of the Applicant.

At paragraph 5 of the Statement in Support of the instant Request for Review the Applicant's Director, Roneek Rajesh Vora, averred that by a letter dated 8th June 2021, the Applicant was informed that the evaluation had been concluded and that its bid for supply of Item No. 3 Viral Transport Medium (VTM) was unsuccessful due to the reason that they provided a sample that had a round bottom instead of skirted and with an internal conical shape. At paragraph 13 of the of Statement in Support of the instant Request for Review, it was averred that had the Evaluation Committee applied the criteria under Addendum 2 and objectively taken into consideration the quality of the product offered by the Applicant, in line with Section 80 (2) and (3) of the Act, it would have concluded that the product offered by the Applicant would serve the purpose and meet the needs of the Procuring Entity.

At paragraph 5 of the Further Statement in Support of the instant Request for Review by Ronnek Rajesh Vora, he averred that if the shape of the VTM was mandatorily required to be skirted, the Procuring Entity, through Addendum 2 dated 17th February, would not have added the words "**stand upright on a rack**" to the specifications of the VTM, since a skirted VTM is self-standing and it does not need a rack to stand upright. At paragraph 7 of the Further Statement, he averred that if it was the Procuring Entity's intention to procure only skirted VTMs, it should not have inserted the words "stand upright on a rack," since it is a known fact that a skirted VTM is self-

standing, it does not need a separate rack to enable it to stand upright. At paragraph 11 of the Applicant's Further Statement, Ronnek Rajesh Vora averred that the Respondent and the Procuring Entity appear to be raising and relying on an unnecessary technicality as the reason the Applicant's sample was rejected at the Product Evaluation stage. The Applicant contends that the reason for rejection is unnecessary technicality because the shape of the VTM cannot affect the VTM's ability to collect and transport specimens. The Applicant averred that the deviation of the samples from the required 'skirted' samples does not affect the purpose of the VTM's. In that regard, the Applicant impugns the Respondent's interpretation of the specifications as being constricted and subjective rather than objective.

In reply, the Respondent at paragraph 7 of his Replying Affidavit deponed that through the statement of the Applicant's Director, Roneek Rajesh Vora, the Applicant raises two principal arguments in support of its Request for Review namely (a) the wording of the Addendum to the Tender Document dated 17th February 2021 specifically reading '***The tube shall be skirted and should have internal conical shape, allowing the tube to stand upright on a rack or on the bench***' had the effect of amending or imputing the mandatory nature of the VTM tender specifications outlined at page 63 of the Tender Document and which require that '***The tube should be skirted and should have internal conical shape, allowing the tube to stand upright on a bench***', (b) the addition of the words '***allowing the tube to stand upright on a rack***' imputed an alternative

for the Applicant to offer VTM sample other than skirted ones prescribed in a mandatory manner.

At paragraph 8 of his Replying Affidavit, the Respondent opposed the instant review on grounds *inter alia* that Addendum 2 dated 17th February 2021 provided additional information but did not in any way alter the mandatory shape of the tube as per the required specifications in the Tender Document and that the Applicant's non-compliance with any of the mandatory requirements of the tender specification laid down in the Tender Document constituted an automatic reason for disqualification of the Applicant's tender.

Having carefully studied all the parties' pleadings, written submissions, list and bundle of authorities and the confidential file submitted to it by the Procuring Entity which *inter alia* contains the VTM tube samples provided by tenderers in the subject tender, the Board observes that it is common ground that the Applicant provided VTM sample that has a round bottom and not skirted.

Article 227(1) that the Procuring Entity is alleged to have violated provides as follows:-

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.

On the other hand section 46(4)(e) and section 80(2) and (3) of the Act which the Procuring Entity is alleged to have breached provide as follows:-

Section 46(4)

An evaluation committee established under subsection (1), shall-

- (a)
- (b)
- (c)
- (d)
- (e) **Adopt a process that shall ensure the evaluation process utilized adheres to Articles 201(d) and 227(1) of the Constitution.**

Section 80. Evaluation of tenders

- (1)
- (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) **The following requirements shall apply with respect to the procedures and criteria referred to in subsection (2)—**

(a) the criteria shall, to the extent possible, be objective and quantifiable;

(b) each criterion shall be expressed so that it is applied, in accordance with the procedures, taking into consideration price, quality, time and service for the purpose of evaluation; and

(4)

(5)

(6)

(7)

The above provisions of law required the Evaluation Committee whilst evaluating the Applicant's tender to adopt a process that adheres to fairness, equitability, transparency, competitiveness, cost-effectiveness using the criteria set out in the Tender Document in an objective manner to the extent possible, *inter alia*.

At this juncture, it is incumbent on the Board to outline what the Tender Document provided with respect to evaluation of the product specification in issue for Item No.3 VTM set out in 1) Product Evaluation of B. Technical Evaluation of Section VIII at pages 89 and 90 of the Tender Document which provided as follows:-

1) Product Evaluation

The technical evaluation will involve the product evaluation, packaging evaluation and labeling evaluation. 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 and the packaging criteria will be based on securely wrapped, quality of packaging material, unit package, individual package, presence of peel off sign and peel ability (ease of opening the package), presence of tamper-proof seal , while the labeling criteria will be drawn from the technical specifications spelt out in 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.

From the above, the Evaluation Committee was required to evaluate the Applicant's VTM tube sample's physical configuration and shape based on the criteria drawn from the technical specifications spelt out in the Tender Document on a Yes/No basis to enable the Applicant's tender to proceed to the next stage of evaluation being the Financial Evaluation Stage. The Product Evaluation requirement were mandatory in nature because the Applicant's VTM sample's physical configuration needed to comply with the

technical specifications to score a Yes mark or a No mark if not in compliance with the technical specifications at this stage of Evaluation.

The technical specifications for Item No.3 VTM were set out in Section VI. Technical Specifications at page 63 of the Tender Document which provided as follows:-

the tube should be skirted and should have an internal conical shape, allowing the tube to stand upright on a bench.

However, the Procuring Entity issued Addendum 2 dated 17th February 2021 (hereinafter referred to as the "Addendum") requiring VTM to be as follows:-

the tube should be skirted and should have internal conical shape, allowing the tube to stand upright on a rack or on the bench.

From the foregoing provisions of the Tender Document, it is the Board's understanding that the Procuring Entity required VTM tubes supplied to them to be skirted and to have internal conical shape, allowing them to stand upright on a rack or on the bench. We say so because the use of the word 'and' between the words 'skirted' and 'should have internal conical shape' is conjunctive and not disjunctive. Conjunctive in the sense that the requirement was to have a tube that is both skirted on one hand and one that would have internal conical shape on the other hand to allow the tube to stand upright on a rack or on the bench. It is the Board's understanding

that the Evaluation Committee needed to first establish the VTM tube sample provided by the Applicant was skirted, secondly such a VTM tube sample had an internal conical shape and lastly that such a VTM tube sample could stand upright on a rack or on a bench.

The Board studied the VTM tube sample provided by tenderers in the subject tender and notes the Applicant provided a VTM tube sample that had a round bottom but not skirted. Further, the Applicant's VTM tube sample was standing upright on a rack that accompanied it which rack the Applicant had provided. The Board also notes that throughout the Applicant's pleadings and written submissions, the Applicant has not denied having provided a VTM tube sample that had a round bottom but not skirted.

On the other hand the Board notes the Interested Party provided a VTM tube sample that was skirted and had an internal conical shape. Further, the Interested Party's VTM tube sample was standing upright on a rack that accompanied it.

From the Evaluation Report, it is only the Applicant's VTM tube sample that had a round bottom but not skirted out of all the tenderers who were evaluated on the specific technical requirement in issue. This demonstrates that other tenderers understood that the Procuring Entity required VTM tubes that were both skirted and had internal conical shape allowing them to stand upright on a rack or on the bench. The Evaluation Committee found

the Applicant's tender non-responsive for having provided VTM tube sample that had a round bottom and not skirted with an internal conical shape.

The Board is not convinced by the Applicant's allegations that the Evaluation Committee did not apply the technical specification criteria in issue objectively when evaluating the Applicant's tender. We say so because, firstly, the Evaluation Committee in finding the Applicant's tender non-responsive for providing a VTM tube sample that had a round bottom strictly applied the technical specifications in accordance with the criteria set out in the tender document, secondly, the Interested Party and other tenderers in the subject tender provided VTM tubes that were both skirted and had internal conical shape allowing them to stand upright on racks accompanying the VTM tubes and thirdly, it makes logical sense and would be more advantageous for the Procuring Entity to procure VTM tubes that would on their own stand upright without a rack even though the Tender Document required the VTMs that would stand upright on a rack or on the bench.

The Board is cognizant that Section 75 (1) provides as follows:

75. (1) A procuring entity may amend the tender documents at any time before the deadline for submitting tenders by issuing an addendum without materially altering the substance of the original tender.

With respect to the issue at hand and in contextualizing the provisions of Section 75 (1) read together with Section 80 (2) and (3) in the instant review,

the Board observes the Procuring Entity issued the Addendum pursuant to Section 75 (1) of the Act, to give more clarity by way of an amendment to the Tender Document with respect to Item No.3 VTM that they wanted to procure.

The Board has already noted and found the criteria set out in B: Technical Evaluation of Section VIII: Evaluation Criteria at page 89 and 90 of the Tender Document read together with the product specifications for Item No.3 VTM set out in Section VI. Technical Specifications at page 63 of the Tender Document as amended by the Addendum requiring the VTM tubes to be skirted and to have internal conical shape, allowing it to stand upright on a rack or on the bench was a mandatory requirement at the Technical Evaluation stage.

Courts of higher jurisdiction have held that such mandatory requirements cannot be waived. The High Court in **Miscellaneous Civil Application No. 85 of 2018, Republic v Public Procurement Administrative Review Board Ex parte Meru University of Science and Technology; M/S AAKI Consultants Architects and Urban Designers (Interested Party) [2019] eKLR** held as follows at paragraph 81:

"A Procuring Entity is bound by its bid documents. Mandatory conditions cannot be waived."

From the foregoing, the Board finds the Evaluation Committee evaluated the Applicant's tender in accordance with Article 227(1), section 80 (2) and (3) of the Act, the criteria set out in B: Technical Evaluation of Section VIII: Evaluation Criteria at page 89 and 90 of the Tender Document read together with the product specifications for Item No.3 VTM set out in Section VI. Technical Specifications at page 63 of the Tender Document as amended by Addendum 2 dated 17th February 2021 requiring the VTM tube to be skirted and to have internal conical shape, allowing the tube to stand upright on a rack or on the bench.

Accordingly, the Board finds the Applicant's Request for Review lacks merit and proceeds to dismiss the same without costs.

FINAL ORDERS:

In exercise of the powers conferred upon it by section 173 of the Act, the Board issues the following order that:

- 1. The Request for Review dated 21st June 2021 and filed on 22nd June 2021 be and is hereby dismissed.**
- 2. Each party to bear its own costs.**

Dated at Nairobi this 13th day of July 2021.



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CHAIRPERSON

PPARB



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SECRETARY

PPARB