SCHEDULE 1

FORM 4

REPUBLIC OF KENYA

PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND APPEALS BOARD

APPLICATION NO 16/2005 OF 21ST APRIL, 2005

BETWEEN

ORGENICS LIMITED..... APPLICANT

AND

THE PROCUREMENT AND SUPPLY CHAIN MANAGEMENT CONSORTIUM, PROCURING AGENT FOR MINISTRY OF HEALTH .....PROCURING ENTITY

Appeal against the Award of the Tender Committee of the Ministry of Health and Procurement and Supply Chain Management Consortium dated 4th April, 2005 in the matter of Tender No. GE ATM – 04/05 – 01T-003–Ministry of Health

BOARD MEMBERS PRESENT

1. Mr. Richard Mwongo - Chairman
2. Mr. Adam S. Marjan
3. Mr. Paul M. Gachoka
4. Prof. N. D. Nzomo
5. Mr. John Wamaguru
6. Mr. Kenneth Mwangi - Secretary

BOARD'S DECISION

Upon hearing the submissions of the parties and the interested candidates, and upon considering the information contained in all the documents before it, the Board hereby makes its decision as follows:-

BACKGROUND

The Government of Kenya received certain grants from the Global Fund to aid the fight against AIDS, Tuberculosis and Malaria. Part of the proceeds were to be applied to fund payments under contracts for the supply and delivery of test kits for HIV/AIDS, Hepatitis and Syphilis through the Ministry of Health. To conduct the procurement, the Ministry appointed a procuring agency, the Procurement and Supply Chain Management Consortium, comprising of Kenya Medical Supplies Agency (KEMSA), Crown Agents, GTZ GmbH (the German Technical Aid Organization), and a corporation known as John Snow, Inc. This Consortium and the Ministry of Health are jointly named as the Procuring Entity in the appeal herein.

The tender for the supply of Test Kits was advertised as an international tender on 13th September, 2004 in the press. The tender opening was carried out on 26th October, 2004, and some 12 tenderers duly submitted their tenders at or before the closing date as follows:-

1. High Chem East African Ltd,
2. Orgenics Ltd,

3. Faram Agencies Ltd,
4. Intercross Agencies Ltd,
5. Farmco International,
6. Macmed Healthcare Kenya Ltd,
7. Unisel Pharma (K) Ltd,
8. Plasmatec Laboratory Products Ltd,
9. Geest Overseas Limited,
10. Chemoquip Limited,
11. Chem – Labs Services Ltd, and
12. Biotec Laboratories UK Ltd.

The tender invited bids for the supply and delivery of Test Kits as follows:-

Lot 1 -	5,000 Kits (20,500 UPS)	Simple Rapid HIV ½ Test Kits
Lot 2 -	800 Kits (5200 UPS)	Eliza HIV ½ Test Kits
Lot 3 -	3,600 UPS	Hepatitis B Eliza Detection Kits
Lot 4 -	1,800 UPS	Hepatitis C Eliza Detection Kits
Lot 5 -	21,000 UPS	PRP Simple Rapid Test Kits

At the tender opening the read out prices of tenderers were as follows:-

	Name	Lot 1	Lot 2	Lot 3	Lot 4	Lot 5
1.	High Chem	-	$632,488.00	-	$500,625.00	$472,500.00
2.	Orgenics	$4,455,000.00	$437,400.00	$290,304.00	$153,792.00	
3.	Faram E.A. ltd	-	Euro289,272.00	Euro172,758.00	-	-
4.	Intercros Agencies			$207,360.00	$119,232.00	$136,500.00

5.	Farmco International	$3,180,000.00	-	-	-	-
6.	Macmed Healthcare	$4,100,000.00	-	-	-	-
7.	Unisel Pharma (K) Ltd	$5,551,400.00	$99,414.00	$62,496.00	$57,852.00	$59,640.00
8.	Plasmatec Laboratory	-	-	-	-	£59,850.00
9.	Geest Overseas Ltd	-	£291,546.00	£131,220.00	£97,614.00	£190,680.00
10.	Chemoquip Ltd	$2,000,000.00	-	-	-	$63,000.00
11.	Chem Labs	-	-	-	-	Euro 273,000.00
12.	Biotech Laboratories	£162,000.00	£72,000.00	£54,000.00	£54,000.00	£105,000.00

The tender document had been professionally prepared by the Consortium, as seasoned and experienced procuring agents, and it expressly provided for the Exchequer and Audit (Public Procurement) Regulations, 2001 as amended, to be applicable to the tender process.

The tender evaluation process established under the tender documents was well-detailed, and precisely drafted. It was divided into the following stages:

1. Stage 1 - Preliminary Tender Evaluation (General and Commercial) under Instructions To Tenderers (ITT) Clause 29. At this stage, tenders were to be examined for completeness, computational errors, provision of sureties, tender validity, signing of documents, and generally, whether the tenders were complete and in order. During this stage of evaluation, three tenderers were found to be non-responsive. These were Geest Overseas Ltd and Chemoquip Ltd, who did not submit a power of attorney for bid signatory, and Biotec Laboratories Ltd, which did not sign its standard tender form. Nine (9) bidders were responsive and proceeded to the next stage.

2. Stage 2 of evaluation consisted of Preliminary Bid Examination (Technical) pursuant to ITT Clause 6. Here, the generally responsive tenders were examined for documentary evidence on conformity and eligibility of the goods to the tender documents. Each lot was examined by a team of evaluators designated by the Ministry and the Consortium. At this stage clarifications were sought from the tenderers in support of their respective tenders.

The outcome of the evaluation at this stage was as follows:

Lot 1 Responsive tenderers were found to be:-

(a) Orgenics Ltd
(b) Farmco International
(c) Macmed Healthcare Kenya Ltd
(d) Unisel Pharma (K) Ltd

Lot 2 Responsive tenderers were found to be

(a) High Chem East Africa Ltd
(b) Orgenics Ltd
(c) Faram East Africa Ltd
(d) Unisel Pharma (K) Ltd

Lot 3 Responsive tenderers were found to be:-

(a) Orgenics Ltd
(b) Faram East Africa Ltd
(c) Intercross Agencies Ltd
(d) Unisel Pharma Ltd

Lot 4 Responsive tenderers were found to be:-

(a) Intercross Agencies

(b) Unisel Pharma E.A. Ltd

Lot 5 Responsive tenderers were found to be:-

(a) High Chem E.A. Ltd

(b) Chem-Labs Services Ltd

The responsive tenderers proceeded to the third stage of evaluation.

3. Stage 3 – was the Detailed Examination stage. It involved examination of tenders for correction of errors under ITT Clause 30, and conversion of tenders to single currency under ITT Clause 31. This was to be based on the exchange rates published by the Central Bank four days before the tender submission date. Evaluation and comparison of tenders under ITT Clause 32 was also carried out.

4. Stage 4 - Post Qualification stage. This stage involved determining whether the tenderer selected as having the lowest evaluated and responsive tender was qualified to perform the contract satisfactorily pursuant to the criteria listed in ITT Clause 7.1 and the criteria listed in the Tender Data Sheet (TDS) relevant to that clause. These criteria included: previous performance, bidders average annual turnover, minimum annual production capacity, registration and licensing status.

After completion of the four stages of evaluation, the Technical Evaluation Team made recommendations for award based on the post-qualification (P/Q) outcome which was as follows:-

Lot	Lowest Evaluated	Price	Recommended on Post Qualification	Price
1	Farmco International	US$3,180,000.00	Macmed	US$ 4,100,000.00
2	Faram E.A. Ltd	Euro 289,272.00	Faram	Euro 289,272.00
3	Unisel Pharma	US$ 62,496.00	Faram	Euro 172,758.00
4	Unisel Pharma	US$ 57,582.00	Intercross Agency	US$ 119,232.00
5	Chem-Labs	Euro 273,000.00	Chem-Labs	Euro 273,000.00

The Ministerial Tender Committee met on 10th March, 2005, and awarded the tenders for each lot in line with the Technical Evaluation Team's said recommendations.

THE APPEAL

The Applicant filed an appeal against the award of the tenders on 21st April, 2005. The appeal consisted of six grounds each of which the Procuring Entity responded to in detail. At the hearing, the Applicant was represented by Hon. J. Sunkuli, Advocate, and the Procuring Entity was represented principally by Mr. Alan Pringle of Crown Agents and Mr. Franz Frederichs of GTZ assisted by various members of the Consortium and Dr. Nyamongo of the Ministry of Health.

The Applicant's grounds of appeal were scanty and invoked an impression of lack of specificity in respect of the alleged breaches, although particular Regulations alleged to be breached were cited. At the hearing, however, the Applicant provided substantial meat to eke the

skeletal appeal, the upshot of which revolved around a complaint that the whole tender evaluation process was improperly done.

We now deal with each ground of appeal hereunder. For ease, we have combined similar grounds.

GROUNDS 1 AND 3

In these grounds, the Applicant complained that the tender in respect of Lots 1, 3 and 4 were awarded to companies whose products failed to meet the technical specifications and should have been disqualified pursuant to Regulation 13(5) for submission of false information. The Applicant also complained, in general, that the evaluation that was carried out, was unfair.

In these grounds the Counsel for the Applicant argued at length that the successful tenderer's products offered in Lots 1 and 2 manufactured by Abbott Laboratories were of inferior quality to its own products. The successful products in these categories were Determine, Unigold and Bioline, whilst those supplied by the Applicant were Doublecheck, Dynamed and Immunocomb. The Applicant submitted that the inferiority of the accepted products would result in a tedious manner and process of testing, lengthening the time of testing or making it necessary for patients to take additional tests. It attempted to show that its own products were superior and could identify and differentiate between the different strains of HIV 1, 2 and sub-type 'O', and that they were more sensitive, conclusive and also safe for use in blood banking.

On its part, the Procuring Entity reiterated that the products accepted all met the technical specifications as set out in the tender, and were listed in the WHO Bulk Procurement Scheme and National Guidelines for Voluntary Counselling and Testing. Further, that all products were registered with the National Aids Control Programme. In addition, the Procuring Entity confirmed that the successful tenderer did not, so far as they were aware, submit false information. Instead, the Procuring Entity averred that it was the Applicant who submitted false information regarding the refrigeration of the Lot 1 products, ability to test blood and qualification under the WHO Procurement Scheme. As such, it was the Applicant that should have been disqualified under Reg. 13(5).

We have considered the submissions of the parties on these grounds. We consider that the Applicant's arguments focused more on promoting the merits of its products, rather than on the merits and demerits of the process and methods used by the Procuring Entity to arrive at its adjudication. We do not think it is the Board's role to test the quality of the products in question as we are not a standards or research body so facilitated. In any event, no expert evidence was given on the quality of the products in question. We are therefore, unable to make a finding from the evidence that Reg. 13(5) was breached or that the products accepted by the Procuring Entity were of such inferior quality as not to meet the technical specifications set out in the tender document.

Accordingly, these two grounds of appeal fail.

GROUNDS 2 AND 4

These were complaints that the tender was conducted in a manner incompatible with principles of fair and open competition, contrary to Regulation 4, and that the technical specifications for the items comprising Lot 1 were rigged or manipulated in favour of Macmed Health Care (K) Limited, the successful tenderer, contrary to Regulation 14.

Regulation 4 is a general provision that highlights the purpose of the Regulations as a whole. That purpose is indicated as the promotion of economy and efficiency in public procurement and ensuring that public procurement procedures are conducted in a fair, transparent and non-discriminatory manner. The evidence adduced by the Applicant did not specifically reveal the absence of competition and fairness, other than that the tender process throughout reflected a thread that generally evinced unfairness and irregularity. We shall, however, revert to this issue in dealing with grounds 5 and 6 of the appeal.

With regard to the limb in ground 2, alleging rigging of the tender specifications, counsel for the Applicant submitted that the successful bidder had been awarded the tender for these particular items in Lot 1, since inception of the Global Fund. Further, that the previous tenders for the items in Lot 1 required a kit that would test and detect HIV 1, 2 and sub-type 'O', and that this requirement was removed from the current tender.

On its part, the Procuring Entity argued that in Kenya the HIV/Aids programme is designed in such a way that items in Lot 1 were intended merely to enable personnel testing patients to identify whether or not the

patient was positive, and that sub-type 'O', being so rare in Kenya and worldwide, was not intended to be identified using the Simple Rapid Test under Lot 1. Further, the Procuring Entity argued that Lot 1 was for use in instant tests carried out in Voluntary Counseling and Testing Centres throughout the country, manned by personnel who are not highly qualified. The test was merely intended to answer the inquirer with a 'yes' or 'no' result, and not to identify other strains.

The Procuring Entity also pointed out that the successful tenderer was not a manufacturer, but a dealer in test kits and had to source products from manufacturers. Accordingly, it did not have specifications of its own which could give rise to rigging. The Procuring Entity went into detail in showing that each of sub-regulations 1, 2 and 3 of Regulation 14 were met.

For example, Regulation 14(1) required the tender document to contain a complete description of the items for the purpose of creating open competition; Regulation 14(2) required the technical specifications to clearly describe the items with respect to quality, performance, packaging etc.; and Reg. 14(3) required the specifications to be in terms of performance and be based on international standards or recognized local standards. In all these respects, the Procuring Entity was able to show conclusively that the technical specifications they designated met the requirements of the said Regulations.

We have carefully considered all the arguments put to us on this issue. We are not satisfied that the Applicant was able to discharge the burden of showing clearly, through evidence, that the technical specifications for Lot 1 were rigged in favour of the successful or, indeed, any other

tenderer. Any allegation of rigging is a serious allegation and would require strict proof to discharge the burden, which the Applicant failed to discharge in this case.

Accordingly, this limb of ground 2 fails.

GROUNDS 5 AND 6

These grounds were complaints that the procurement process used did not promote economy and efficiency, and fair and open competition on an equitable basis or provide best value for money, and that the test kits accepted would translate into extra costs. These aspects of the appeal dovetail with the complaint, earlier raised and indicated in grounds 2 and 4, concerning the breach of Regulation 4.

This regulation is frequently cited as encompassing a complaint of irregular evaluation of tenders. That complaint dovetails with the complaints of the interested candidate, Farmco International that essentially accused the Procuring Entity of granting undue advantage to the successful bidder. The complaint by Farmco was that it had bid using the 2003 WHO Bulk Procurement Scheme, but was locked out despite the tender being silent as to the scheme year. Further, that the successful bidder tendered as a joint venture despite the tender being silent on joint ventures, which aspect augmented Macmed's annual turnover, and on which the interested candidate was disqualified.

These grounds beg questions on propriety and integrity of the evaluations carried out on the tenders. The issue of tender evaluation was not dwelt with at length during the hearing itself. This, however, was no handicap

since the Board had in its possession all tender documents relevant to the tender process. The role of the Board is not to be merely a passive recipient of arguments made and information highlighted by the parties. Upon an appeal being filed, the Board, using its standard procedural forms and documents, ordinarily requires a Procuring Entity to submit to the Board all documents used in the tender process. The Board exercises this discretion in its capacity as an administrative review tribunal whose purpose under Part VIII of the Regulations is to evaluate and fairly adjudicate upon complaints regarding the tender process leading up to the tender stage complained of. It is therefore entitled, in carrying out its functions, to refer to all documents forwarded to it and to arrive at a conclusion on the complaints lodged. Bodies such as the Board, not being purely judicial in character are expected to exercise their functions with greater flexibility, speed and informality than are, for example, the courts. This explains the wide-ranging composition of Boards with a multi-profession membership.

Accordingly, and in order to answer the questions begged in respect of ground 5 and 6, the Board perused the Technical Evaluation Report, and the results which the Procuring Entity arrived at in awarding this tender.

The Board observed that the Technical Evaluation Report prepared by the Consortium, provided information which revealed detailed evaluation of bidders from the specifications in the tender documents, but only general compliance thereon. The Technical Evaluation Report did not indicate the success level of each tenderer's offer to specific parameters that were analyzed and evaluated to determine a bidder as complaint to the specifications. In other words, the Report, read by a person who had not been involved in the evaluation, appeared to be a scoresheet of areas of

non-compliance, rather than indicating or rating each tenderer on the basis of its level of compliance, with respect to each criteria specified in the tender document. Accordingly, it was impossible for the Board to determine from the Report the level of compliance of each tenderer's bid to each specification in the tender document. The Board did also perused some handwritten highlights of the Technical Evaluation Committee's evaluation notes, which the Board observed were scanty and did not comprise a rating of each bid against the specifications in the tender document.

The Board noted that the tender documents were structured on the basis of the World Bank's bid documents. However, the invitation to tender in the press and advertisement clearly stated that the procedures applicable to the tender were:

> "Open International Tender (OIT) procedures specified in the Government of Kenya (GOK) Public Procurement Regulations 2001, amended in 2002, and the Global Fund's Guidelines on Procurement and Supply Management, April, 2004."

We have perused the Global Fund's Guidelines and found them to contain general principles and policy on procurement, but no specific guidance on the detailed nature and process of evaluation. On the other hand, the Public Procurement Users Guide, 1st Edition 2002, made by the Public Procurement Directorate pursuant to Reg. 7, contains direct guidance on how evaluations should be conducted under the Regulations. We cite the relevant provisions of the User's Guide hereunder:

"2.21 Examination and Evaluation of Tenders

2.21.4 Technical evaluation should be done by a technical committee appointed for that purpose. The committee should be professionally qualified to **rate all the tender offers** in relation to quality and performance.

2.21.5 ..... The Committee should be requested to carry out the appropriate technical or professional evaluation/analysis and to advise on the **rating of the offers in relation to the given specifications.**

2.22.1 Every request to a tender committee to adjudicate on a tender should indicate the procuring entity's preference giving reasons for the choice. The recommendations should take into account **the professional or technical rating of the offers**, where applicable, as well as all other procurement factors..." (emphasis added).

The thing that stands out from these requirements is that the technical evaluation committee must rate all tender offers in relation to the given specifications. To "rate" a thing is defined as follows:-

"to consider a quantity or amount in relation to, or measured against another quantity or amount, or to assign or receive a position on a scale of relative values, or to "rank", and 'Rating' refers to classification according to order or grade or ranking"

Collins Thesaurus gives other definitions of the word "rate" as follows:

"evaluate, consider, rank, reckon, class, value, measure, regard estimate, count, grade, assess, weigh, esteem, classify appraise, adjudge".

In our view, the Technical Evaluation Report did not provide to the Ministerial Tender Committee a rating of the offers in relation to the specifications set out in the tender documents. The Report details the deviation, but does not record the areas of compliance. Therefore, it is surprising that when the Ministerial Tender Committee received the Evaluation Report without a rating of each tenderer in relation to the evaluated criteria, the Tender Committee did not object or raise any concern, as none is recorded in its minutes of 10th March, 2005. All that the Ministerial Tender Committee did was to endorse the evaluation report wholesale. In our view, this was irregular since all that the Tender Committee relied on in its adjudication was a scoresheet detailing non-compliance and, conversely, generalizing compliance. The rationale for detailing an evaluation committee's rating of each offer against the tender specifications is that it enables easy cross-checking of errors and omissions by the technical evaluation committee. This will be evident in our detailed analysis of the post-qualification evaluation hereafter.

The Board's detailed perusal of the Technical Evaluation Report and the original tender documents of bidders, revealed the following further anomalies, particularly on the Post-Qualification evaluation:

Post Qualification Evaluation

1. Farmco the lowest responsive bidder in Lot 1, was disqualified on two grounds:-

- Failure of its item B in Lot 1 to be included in the WHO Bulk Procurement Scheme 2004, and

- That its minimum average turnover was US $3.2 million based on the accounts it submitted.

The first observation on this, is that the tender document was not specific that the WHO Bulk Procurement Scheme to be used would be that for year 2004. During the hearing the Procuring Entity argued that it was obvious that anyone tendering in year 2004 would use the 2004 WHO Scheme, and that bidders should not have used the 2003 WHO Scheme. In our view, any mandatory requirement, which may be used to disqualify a bidder entirely should be contained in the tender for use in the evaluation as per Reg. 30(7). That Regulation bars the use of criteria not stipulated in the tender documents. In our view, therefore, where a tender is silent and a bidder substantially meets other requirements, the silence in the tender document should not be construed against such bidder.

On the issue of turnover of US$ 10 million, we note that the evaluators qualified the successful bidder, Macmed Healthcare, on the basis that its tender was a joint venture. Accordingly, the successful tenderers' accounts must have been read together with those of its joint venture partner to realize the specified turnover, since its own individual accounts do not match such turnover.

The Board perused the tender documents of Macmed, and found, inter alia, the following:-

- Its Tender Form, which is the key legal instrument that identifies the offeror or tenderer submitting the tender, is in the name of Macmed alone, although contains a statement that it had been duly authorized to sign the bid for and on behalf of Joint Venture Macmed Healthcare (K) Ltd/Abbot Laboratories".

- In its Supplies Data Record form, a standard form in the tender document in which the supplier details are contained, there is no reference at all to the joint venture.

- It provided with it's bid a document called a Bid Support Statement on the letterhead of Abbot Laboratories South Africa (Pty) Ltd, Diagonostic Division. That document is signed by two persons for and on behalf of both joint venture members. It is an important document and we set it out hereunder:

"Abbot Laboratories South Africa (PTY) Ltd
Diagnostics Division
Abbot Place
219 Golf Club Terrace
Constantia Kloof 1709
P.O.Box 7208
Weltevredenpark
1715

To: The Government of Kenya
Ministry of Health
Nairobi/Kenya

Gentlemen and/or Ladies

Ref: IFT No. GF ATM – 04/05 – OIT 003, Supply and Delivery of Test Kits.

In accordance with the terms and conditions of bidding, we at Abbot Laboratories have pleasure in submitting our bid, through Macmed Healthcare (K) Ltd, drawing collectively on the individual strengths of both companies.

Macmed Healthcare is nominated as the lead party with the objective of:

- Securing the contract
- Submission of the bid
- Being the sole signatory of the bid
- Provider of the bid security

We at Abbot, accept responsibility for the production of the goods, and the supply thereof onto Macmed Healthcare (K) Ltd in order to be in compliance with the conditions of the tender.

Signed
For and on behalf of Macmed.
of Abbot
Health (K) Ltd

Signed
For and on behalf
Laboratories"

- However, the accounts attached to the tender, and which the evaluation committee relied upon are for a different company altogether whose name and address are:

  Abbot Laboratories Inc.
  100 Abbot Park Road, Abbot Park
  IL 60064 – 64000 USA

Amongst its list of directors and senior management in the American company, none of the directors of the joint venture partner of South Africa, feature at all.

The question that arises is whether the evaluation committee was entitled to rely on the accounts of the American based company. The Regulations are silent on joint ventures. However, the tender document at ITT 8.1 provides that a firm may submit a tender either individually or as a member of a joint venture. We have perused the World Bank's "Guidelines: Procurement under IBRD Loans and IDA Credits, 2004". At page 6 paragraph 1.10 of those Guidelines there is some guidance on joint ventures as follows:-

> "Any firm may bid independently or in joint venture **confirming several and joint liability**, either with domestic firms and or with foreign firms .." (emphasis added).
>
> It is clear that what is critical in joint ventures is that there must be evidence of the **joint venture partners or association**. This is reinforced by the legally accepted definition of joint venture as described in Black's Law Dictionary which is as follows:-

"A legal entity in the nature of a partnership engaged in the joint undertaking of a particular transaction for mutual benefit; an association of persons or companies jointly undertaking some commercial enterprise, generally all contribute assets and share risks."

Based on the joint venture letter cited above, the collaborating parties were Macmed Healthcare (K) Ltd. and Abbot Laboratories South Africa (Pty) Ltd. Thus, only the accounts of the two parties could be relied upon by the Evaluation Committee.

We therefore find that the accounts of the American based corporation, which has a distinct and disparate legal persona from the South African based limited liability company, should not have been used to establish the strength or annual turnover of the purported joint venture, to enable the successful bidder to achieve the turnover specified in the tender document. In our view, there is no evidence of joint venture with the American based company. Further, we note that the formal standard tender forms, namely, the Tender Form and the Supplier Data did not disclose any evidence whatsoever of joint venture. We hold that the Tender Committee in relying on the evaluation committee's findings of joint venture with the American company, Abbot Laboratories Inc., and post-qualifying the successful tenderer on annual turnover, acted fundamentally irregularly and in breach of Reg. 4.

2. The Post-Qualification, of Faram E.A. Ltd, which was the successful tenderer for Lot 2, revealed the following;-

- The Post Qualification Summary (General) report shows that Faram:

  a) Failed to comply with the Instructions to Tenderers Tender Data Sheet (TDS) 7.1 (I) (d)

  b) Failed to comply with Instructions to Tenderers Tender Data Sheet (TDS) 7.1(d) (ii) (b)

  c) Failed to comply with Instructions to Tenderers (TDS) 7.1 (d) (ii) (b) (iii).

At the hearing, the Procuring Entity in response to the Board's questions, confirmed that compliance with the Post-Qualification criteria was treated as mandatory for the responsive bidders.

3. The Post-Qualification of Intercross Agencies Ltd, which was the successful tenderer for Lot 4, revealed the following:-
   - The Post-Qualification Summary (General) report shows that Intercross failed to comply with the following Instructions To Tenderers and Tender Data Sheet (TDS):
     a) 7.1(a) A
     b) 7.1(a) B
     c) 7.1(a) C
     d) 7.1(d) (I) (a), b, c, d
     e) 7.1(d) (ii) (b) (I)m (ii), (iii) and iv)
     f) 7.1(d) (ii) (b) (ii)
     g) The submitted list of major contracts for last 5 years was unacceptable.

The Evaluation Committee noted as shown at pg 12 of the minutes of the Ministerial Tender Committee Meeting that none of the bidders were compliant, but nevertheless, recommended as follows:

> "In the absence of any other compliant bid, this (the Intercross bid) may be considered by the MTC for award and considering the relative low value of contract award and therefore the lower risk to the purchaser if the tenderer is unable to perform, the consortium recommends to award Lot 4 to this tenderer.....
>
> If however the MTC is not able to adjudicate as recommended, this lot will have to be retendered."
>
> In its adjudication on Lot 4 the Ministerial Tender Committee stated as follows at page 14:
>
> "4. Firm Awarded: M/S Intercross Agencies Ltd
> Total Price Awarded: Euro 119,232.00
> Remarks: Lowest Evaluated Responsive Bidder"

The award converts in Kenya shillings to an amount of KShs.12,380,000.

In our view, the irregularities aforesaid in the tender evaluation process are clear evidence that Regulation 4 was breached in its generality, in that the procedure was not conducted in a fair, transparent and non-discriminatory manner, as alleged by the Applicant and the Interested candidate. To the extent of such irregularities, we find that the Grounds 5 and 6 of the appeal succeed.

The upshot of the appeal is that grounds 1-4 fail and grounds 5 and 6 succeed. We consider that the irregularities amount to serious flaws in the tender process. With particular regard to the award of Lot 1, we note that the difference in price between the two tenders that reached post qualification stage, namely Farmco and Macmed, is US$ 920,000 equivalent to approximately Shs.69,000,000. This is no small amount by any standards and it is the core function of this Board to safeguard both the integrity of the tender process and funds intended for procurement for public purposes.

Accordingly, we hereby annul the tender awards on account of the said flaws. We do not consider it appropriate to make any orders in terms of the prayers sought by the Applicant to award the tenders to it, as there is no basis for such orders.

We have further considered the representations by the Consortium on behalf of the Procuring Entity that there are currently stock-outs of the items under tender. This, if correct, would result in a catastrophe of serious proportions in the country. Consequently we order that the Ministerial Tender Committee of the Procuring Entity may, if the need arises and to avert prolonged stock outs, procure up to 30% of the critical requirements needed during the period intended to be covered by this tender. Such procurement shall be from the tenderers who bid in this tender and upon the prices already quoted. The balance 70% of the procurement requirements, shall be re-tendered with expedition and strictly in accordance with the Regulations.

Dated at Nairobi this 18th day of May, 2005

Chairman	Secretary
PPCRAB	PPCRAB