

SCHEDULE 1

FORM 4

REPUBLIC OF KENYA

PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND APPEALS BOARD

APPLICATION NO. 29/2006 OF 31ST MAY, 2006

BETWEEN

SYNER-MED PHARMACEUTICALS KENYA LTD APPLICANT

AND

MINISTRY OF HEALTH (KEMSA) PROCURING ENTITY

Appeal against the decision and award of the tender committee of the Kenya Medical Supplies Agency dated the 17th May, 2006 in the matter of Tender No. KEMSA/ONT 12/2005-2006 for supply of Pharmaceutical Drugs.

BOARD MEMBERS PRESENT

Mr. Richard Mwongo	-	Chairman
Mr Adam S. Marjan	-	Member
Mr. John W. Wamaguru	-	Member
Mr. P. M. Gachoka	-	Member
Ms. Phyllis N. Nganga	-	Member
Eng. D. W. Njora	-	Member
Mr. J. W. Wambua	-	Member
Mr. Kenneth N. Mwangi	-	Secretary, Director, Public Procurement Directorate

IN ATTENDANCE

Mr. I. K. Ruchu	-	Secretariat
Mr. P. M. Wangai	-	Secretariat

PRESENT BY INVITATION FOR APPEAL NO. 29/2006

Applicant, Syner-Med Pharmaceutical Kenya Ltd

- Mr. Alex S. Masika - Advocate, from Nchogu, Omwanza & Nyasimi Advocates
- Mr. Jaoko Ogoye - Lawyer, from Nchogu, Omwanza & Nyasimi Advocates
- Mr. Francis Meshuko - Accounts Assistant
- Dr. Mandeep Sokhi - Pharmacist

Procuring Entity, Kenya Medical Supplies Agency

- Dr. C. K. Kandie - Chief Executive Officer
- Mr. Fredrick Wanyonyi - Corporation Secretary
- Mr. Stanley T. Kirimi - Management Consultant – Procurement
- Mr. Edward Buluma - Procurement Manager
- Mr. J. Kieni - Senior Procurement Officer
- Mr. John kabuchi - Procurement Officer

Interested Candidates

- Mr. Daniel Mungai - Sales Representative, Veteran Pharmaceutical
- Mr. Bhawesi Kotech - Director, Sai Pharmaceuticals
- Mr. Robin Kamau - Sales Manager, Medisel (K) Ltd
- Mr. George Kimani - Sales Representative, Dawa Ltd
- Mr. B. P. Shah - Manager, Jet Chemicals
- Mr. L. Ochula - Representative, Syner-Chemie Ltd
- Mr. Tobias Malenya - Marketing Coordinator, Kam Pharmacy
- Mr. Spencer Chisery - Business Development Manager, Glaxosmithkline
- Mr. Sammy Opiyo - Director, Sphinx Pharmaceuticals
- Mr. Kioko Muasya - Marketing Manager, Sphinx Pharmaceuticals
- Mr. Givan Okalo - Administrator, Europa Health Care
- Ms. Shalin Vora - Manager, Regal Pharmaceuticals

BOARD'S DECISION

Upon hearing the representations of the parties and upon considering the information in all the documents before it, the Board hereby decides as follows:-

BACKGROUND

The Procuring Entity re-advertised open tender for procurement of pharmaceutical drugs on 6th January, 2006 in the media after failing to get responsive bids in a previously advertised tender No. KEMSA ONT5/2005-2006.

The tenders closed/opened on 6th February, 2006 in the presence of the bidders' representatives who chose to attend and attracted the following bidders:-

1. Veteran Pharmaceuticals Ltd.
2. Goodman Agencies Ltd
3. Surgipharm Ltd
4. Europa Health Care
5. Ms Pharma
6. Ranbaxy Laboratories Ltd
7. Salama Pharmaceuticals
8. Jet Chemicals (K) Ltd
9. Elys Chemicals
10. Sphinx Pharmaceuticals
11. Regal Pharmaceuticals
12. Assia Pharmaceuticals
13. Harleys Ltd
14. Infusion (K) Ltd
15. Medivet Products (K) Ltd
16. C. Mehta and Company
17. Kam Pharmacy
18. Glaxo Smithkline
19. Howse and McGeorge Ltd
20. Universal Corporation
21. Sai Pharmaceuticals Ltd

22. Zadchem Pharmaceuticals
23. Axim Pharmaceuticals Ltd
24. Kulal International Ltd
25. Medisel (K) Ltd
26. Syner-Med Pharmaceuticals
27. Cosmos Ltd
28. Bulk Medical Ltd

The Procuring Entity appointed a committee comprising of the following members to carry out technical evaluation:-

Dr. Hezekiah Chepkwony	-	Chairman
Mr. Cornelius Amoth	-	Secretary
Dr. Dominic Mutie	-	Member
Dr. Josphat Mbuva	-	Member
Dr. Wanjau Mbuthia	-	Member
Dr. Maureen Nafula	-	Member
Ms. Dorcas Kwayera	-	Member

Evaluation Process

The evaluation process was divided into three stages:

- Preliminary examination
- Technical evaluation - Documents
- Technical evaluation - Products

Preliminary Examination

Documents submitted by the bidders were subjected to a preliminary examination to confirm the following:-

1. Tender form, dully completed and signed
2. Original Bid Bond
3. Value of bid bond was 2% of bid amount
4. Bid Bond was valid, 30 days beyond tender validity period
5. Business questionnaire, duly completed demonstrating compliance with requirements

6. Copy of certificate of incorporation
7. Copy of VAT Registration Certificate
8. Copy of PIN Certificate
9. Copy of Tax Compliance Certificate

The results of the preliminary examination are detailed below:-

CRITERIA	1	2	3	4	5	6	7	8	9	10	11	12	13	14
Valid Tax Compliance Certificate	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Certificate of Incorporation	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
VAT Certificate	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
PIN Certificate	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Business Questionnaire duly filled	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Original Bid Bond	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Value 2% of Bid Bond	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Valid for 120 days	Yes	Yes	Yes	Yes	NO	Yes	NO	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Tender form duly completed	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
	FAIL	PASS	PASS	PASS	FAIL	PASS	FAIL	PASS	PASS	PASS	PASS	PASS	PASS	PASS

CRITERIA	15	16	17	18	19	20	21	22	23	24	25	26	27	28
Valid Tax Compliance Certificate	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	NO	NO	Yes	Yes	Yes	Yes
Certificate of Incorporation	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	NO	Yes	Yes	Yes	Yes	Yes
VAT Certificate	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	N/A	Yes	Yes	Yes	Yes	Yes
PIN Certificate	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	N/A	Yes	Yes	Yes	Yes	Yes
Business Questionnaire duly filled	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	NO	Yes	Yes	Yes	Yes
Original Bid Bond	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	NO	NO	Yes	Yes	Yes	Yes
Value 2% of Bid Bond	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	NO	NO	Yes	Yes	Yes	NO
Valid for 120 days	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	NO	Yes	NO	Yes	Yes
Tender form duly completed	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
	PASS	PASS	PASS	PASS	PASS	PASS	PASS	PASS	FAIL	FAIL	PASS	FAIL	PASS	FAIL

Bidder No.1 Veteran Pharmaceuticals Ltd was disqualified from further evaluation for failing to sign the tender form.

Bidder No. 5, MS Pharma, No. 7, Salama Pharmaceuticals, No. 23, Axim, No. 26 Syner-Med, and No. 28 Bulk Medicals were disqualified for providing bid bonds that were not valid for the full tender validity period.

Bidder No. 24, Kulal International Ltd was disqualified for failing to provide a bid bond.

Technical Evaluation – Documents

Twenty one (21) sets of documents were presented to the technical evaluation committee by the secretariat for Evaluation. The following criteria were examined in the Technical Evaluation – Documents.

- a) Tenderer has a Good Distribution Practice (GDP) Certificate/Wholesale dealers/Manufacturing licence from Pharmacy & Poisons Board.
- b) Certificate of superintendent pharmacist provided.
- c) Manufacturer's Authorization provided.

The findings and recommendations were as follows:-

- i) Bidder numbers 2, 3, 4, 6, 9, 10, 11, 12, 13, 14, 16, 17, 18, 19, 20, 21, 22, 25, and 27 met all the regulatory documentary requirements and qualified to proceed to stage two of product evaluation.
- ii) Product bid for by bidder No.8, Sodium Hypochlorite was not regulated by Pharmacy & Poison's Board but by Kenya Bureau of Standards Suppliers. They were successful at the examination of documents stage and had products that had a minimum weighted technical score of 95% and therefore were recommended for Financial Evaluation.

Technical Evaluation - Products:-

Item No. 2: Calamine lotion 100 ml,

Four samples were received and after analysis all of them were not accepted.

Item No. 3: Cerftrianxone 1g, powder for injection.

A total of nine(9) samples were received for analysis and the result was as follows:-

- i) Samples 5XM3, 3UF7, 1AZ9, 6FU4, 6XC4 and 8KP2 met all the requirements for GMP (Good Manufacturing Practice), product registration and the minimum weighted technical score of 95% and were therefore acceptable.
- ii) The diluent for sample 2TG8 was difficult to break. Sample was therefore not acceptable.
- iii) Samples 9JQ1 and 8HS2 were analyzed and found to be acceptable, but bidders had failed at the preliminary stage. The samples were therefore not acceptable.

Item No. 4: Methylated Spirit

Three (3) samples were received and after analysis the result was as follows:-

- i) Sample 7GT3 met all tender specifications including the minimum score of 95%. The sample was acceptable.
- ii) Sample 8ZG2 did not state the active ingredient and therefore was not acceptable.
- iii) Sample 8HS2 was analysed although the bidder had been disqualified at preliminary stage. The samples were therefore not acceptable.

Item No. 24: Sodium Hypochlorite Solution.

Three (3) samples were received and after analysis the results were as follows:-

- i) Sample 7GT3 met the minimum weighted technical score of 95%. The sample was acceptable.
- ii) Sample 8HS2 was analysed although the bidder had been disqualified at the preliminary stage. The sample was therefore not acceptable.

Financial Evaluation

During financial evaluation, samples were un-coded by the secretariat to reveal bidder identity. The committee recommended the award to the lowest evaluated bidders as in the table below:-

ITEM NO	ITEM DESCRIPTION	SUPPLIER	QTY	VALUE
5	Clotrimazole	Regal Pharmaceuticals	200,000	KShs.2,000,000
3	Ceftriazone 1g	Harleys Ltd	126,300	US\$69,465
4	Chlorpropamide	Cosmos Ltd	8,000	US\$59,200
25	Spironolactone	Howse & McGeorge Ltd	200	KShs.2,806,000
23	Silver Sulfadiazine	Elys Chemicals	15,186	US\$27,334.80
21	Phenytoin Sodium	Medisel Kenya Ltd	2,200	KShs.550,000
14	Methylated Spirit	Sphinx Pharmaceuticals	34,600	14,013,000
19	Paracetamol	Sphinx Pharmaceuticals	331,200	KShs21,196,800
24	Sodium Hypochlorite	Sphinx Pharmaceuticals	112,900	KShs17,725,300
11	Doxorubicin hydrochloride	C. Mehta & Co.	1,440	KShs1,480,320
8	Dextrose	Infusion (K) Ltd	829,300	KShs26,537,600
10	Digoxin	Glaxosmithkline	19,800	US\$188,100
6	Cyclophosphamide	Sai Pharmaceuticals Ltd	5,000	KShs720,000

The Kenya Medical Supplies Agency Tender Committee at its meeting held on 17th May, 2006 awarded the tender as follows:-

ITEM NO	ITEM DESCRIPTION	SUPPLIER	QTY	VALUE
5	Clotrimazole	Regal Pharmaceuticals	200,000	KShs.2,000,000
3	Ceftriazone 1g	Harleys Ltd	126,300	US\$69,465
4	Chlorpropamide	Cosmos Ltd	8,000	US\$59,200
25	Spironolactone	Howse & McGeorge Ltd	200	KShs.2,806,000
23	Silver Sulfadiazine	Elys Chemicals	15,186	US\$27,334.80
21	Phenytoin Sodium	Medisel Kenya Ltd	2,200	KShs.550,000
14	Methylated Spirit	Sphinx Pharmaceuticals	34,600	14,013,000
19	Paracetamol	Sphinx Pharmaceuticals	331,200	KShs21,196,800
24	Sodium Hypochlorite	Sphinx Pharmaceuticals	112,900	KShs17,725,300
11	Doxorubicin hydrochloride	C. Mehta & Co.	1,440	KShs1,480,320
8	Dextrose	Infusion (K) Ltd	829,300	KShs26,537,600
10	Digoxin	Glaxosmithkline	19,800	US\$188,100
6	Cyclophosphamide	Sai Pharmaceuticals Ltd	5,000	KShs720,000

THE APPEAL

The appeal was lodged by Syner-Med Pharmaceuticals Kenya Limited on 31st May, 2006 against the Procuring Entity's award of 17th May, 2006. The Applicant was represented by Mr. Alex S. Masika, Advocate while the Procuring Entity was represented by Mr. Fredrick Wanyonyi.

The appeal was based on two grounds which we deal with as follows:-

Ground 1

The Applicant alleged that the Procuring Entity breached regulations 13(1)(a), 27(1), 30(1), 30(5) and 30(7).

During the hearing the Applicant submitted that it had tendered to supply four different items namely:-

- a) Calamine 15%
- b) Ceftriaxone 1G powder for injection
- c) Methylated spirit
- d) Sodium hypochlorite solution

For items (a), (c) and (d) a bid bond of Ksh.785,888.00 was secured by Imperial Bank Limited which was 2% of the total aforementioned three products amounting to Kshs.39,294,400.00 and issued on behalf of Syner-chemie Ltd a sister company of the Applicant. For item (b) the Applicant submitted a bid bond in its name amounting to Kshs.118,722.00 secured by Southern Credit Banking Corporation Limited, which was 2% of the total tender sum for this product amounting to Kshs.5,936,100.00. This bid bond was used by the Procuring Entity to disqualify the Applicant from the tender. According to the tender document, the tender validity period was ninety (90) days and the bid bond was to remain valid for thirty (30) days beyond the tender validity period i.e 120 days. The last paragraph of the bid bond indicated that it would be valid for thirty (30) days beyond tender validity period and therefore the date of 3rd March indicated therein was an error. The error was noted and corrected by the parties in a meeting held in April 2006 between the Procuring Entity and the Applicant at KCB Training School. Further the Procuring Entity should have invoked Regulation 30(1) to clarify the anomaly contained in the bid bond of the Applicant. The Applicant argued that the Halibury's Law of England on correction of errors should apply. If the bid bond secured by Southern Credit Bank was defective, the Procuring Entity should have considered the other bid bond secured by the Imperial Bank Ltd for the items indicated in the tender.

The Procuring Entity in its response stated as follows:-

According to the Regulations the terms 'tenderer' and 'candidate' are defined as follows:-

- (a) 'tenderer' means a person submitting a tender
- (b) 'candidate' means a person submitting a tender in Public Procurement.

Regulations 13 (1) (a-e) outlined the minimum qualifications to be met by candidates to qualify to participate in Public Procurement. In accordance with Regulation 27(1) the Procuring Entity included a condition in the tender document that the tenderer must submit tender security in form of bid bond in the prescribed form and amount specified.

Section 14(1) of the tender document required the tenderers to furnish a tender security and those tenderers who failed to furnish the required tender security were to be disqualified from participating in the tender.

The Procuring Entity further urged that the Applicant's tender document was signed by an official of Syner-Med and there was no signature by an official of Syner-Chemie. In addition the official records showed that the tender was purchased and issued to Syner-Med Pharmaceuticals, the Applicant but not Syner-Chemie.

During verifications of the tender documents, the Procuring Entity noted that the Applicant's tender security issued by Southern Credit Bank amounting to Kshs.118,722.00 was to expire on 3rd March, 2006 with a validity period of 26 days instead of 120 days as required. Its tender was non-responsive and was therefore disqualified. During a pre-bid conference held on 18th January, 2006 which was attended by the Applicant, it was made clear to all bidders that bids were to remain valid for 120 days. The meeting held at KCB Training School referred to by the Applicant was for discuss delivery schedule for a previous tender which had been awarded to it.

The Board is satisfied that the bid securities submitted by the Applicant were both not in accordance with the tender requirements.

The Imperial Bank bid bond was issued on behalf of Syner-Chemie Ltd a third party company that was neither a tenderer nor a candidate as described in the tender documents or in the Regulations.

The Southern Credit bid, bond was properly issued on behalf of the Applicant. However, the bid bond was defective in several aspects; with regard to its deficient validity period and the dating of the actual instrument. As a prescribed format had been provided by the Procuring Entity under the tender conditions No. 14.3, we are satisfied that the bank's addition and alteration of the bid bond could not be a mistake but routine act of its volition in amending the prescribed form. Accordingly, the Applicant's arguments seeking to rely on Halibury's Laws of England are inapplicable.

With regard to the Applicant's argument that it was acting as agent for Syner-chemie Ltd, there was no evidence from the tender documents or from the submissions of the Applicant that there was in fact an agency relationship that had been disclosed to the Procuring Entity.

Accordingly, this ground of appeal fails.

Ground 2

The Applicant alleged that they were unlawfully evaluated and the criteria employed in the evaluation was flawed and irregular as it did not indicate how the total marks were to be earned. As a result, the tender was conducted in a manner incompatible with universal principles of fair and open competition. As a result Regulation 30(7) was breached.

In its submission the Applicant urged that the Procuring Entity had not challenged the bid bond secured by Imperial Bank in the sum of Kshs.785,888.00. Further the letter of 24th April, 2006 addressed to the Applicant did not raise any query on its bid bond and it appeared from the last paragraph of the letter that the Applicant's tender had proceeded for further evaluation.

The Procuring Entity reiterated that the Applicant's tender was non-responsive and it was therefore disqualified during preliminary

examination. The bid bond of the Applicant did not comply with Tender conditions No. 14.4 and was therefore rejected.

We find that the Procuring Entity properly exercised its right to reject the bid bond of the Applicant in accordance with Tender Conditions No.14.4 on account of failure in compliance with a mandatory tender condition. The Applicant having failed to be responsive at preliminary examination, it was not entitled to participate in the rest of the tender evaluation.

This ground therefore fails.

Ground No. 3 and 4

These are statements to which no breaches have been cited and are in substance concerned in ground 1 and 2.

Taking into consideration all the information above, the appeal fails and is hereby dismissed. The tender process may proceed.

Delivered at Nairobi on this day of 4th July, 2006


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CHAIRMAN
PPCRAB


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SECRETARY
PPCRAB