

SCHEDULE 1

FORM 1

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO.40/2007 OF 2ND JULY, 2007

BETWEEN

VESTERGAARD FRANDBSEN (SA) APPLICANT

AND

**THE PROCUREMENT AND SUPPLY CHAIN MANAGEMENT
CONSORTIUMPROCURING ENTITY**

Request for Review for the Decision of the Procurement and Supply Chain Management Consortium of the Award dated the 15th Day of June 2007 in the Matter of Tender No.IFT No. GFATM-R4-06/07-RNT-015 Supply and Delivery of Long Lasting Insecticidal Treated Bed Nets (LLIN's – 2) of February, 2007.

PRESENT:

Mr. Richard Mwongo	-	Chairman
Mr. Adam S. Marjan	-	Member
Ms Phyllis N. Nganga	-	Member
Mr. John W. Wamaguru	-	Member
Eng. D. W. Njora	-	Member
Mr. Paul M. Gachoka	-	Member
Mr. Joshua W. Wambua	-	Member

SECRETARIAT

C. R. Amoth	-	Holding Brief
P. K. Ouma	-	Secretariat

Present by Invitation

Vestergaard Frandsen (SA), the Applicant

- Mr. Francis Muchoki - Vestergaard Frandsen (SA), Representative
- Mr. Martin Munyu - Advocate, Iseme, Kamau & Maema
- Ms Karen Mate - Pupil Iseme, Kamau & Maema Advocate
- Ms Millie Jalega - Pupil, Iseme, Kamau & Maema Advocate

The Procurement and Supply Chain Management Consortium, Procuring Entity

- Mr. Robert Nyamweya - Procurement Manager, Procurement & Supply Chain Management
- Dr. Charles Kandie - Chief Executive Officer, Kenya Medical Supplies Agency
- Mr. David Muttu - Procurement Manager, Consortium/ PSCMC
- Ms Nazima Malik - Partner Advocate, Kaplan & Stratton
- Mr. Mahat Somare - Associate, Kaplan & Stratton
- Dr. Ayub Manyu - DOMC/Ministry of Health

Interested Candidates

- Mr. A Shah - Director, A to Z Textile Mills
- Mr. B. Haria - Director, A to Z Textile Mills
- Mr. Iqbal Kanji - Marketing, A to Z Textile Mills
- Mr. Sylvester Kazi - Export Manager, A to Z Textile Mills
- Mr. Ahmednasir Abdullahi - Advocate, for A to Z Textile Mills
- Mr. Nakanishi - Vector Control Dept., Sumitomo Chemical
- Mr. James Wangai - Consultant, Sumitomo Chemical
- Ms Milka Njunge - Business Dept. Manager, Sumitomo Chemical

RULING ON PRELIMINARY OBJECTION

The Request for Review in this matter was filed on 2nd July, 2007 by Vestergaard Frandsen SA against an award dated 15th June, 2007 communicated to them by the Procurement and Supply Chain Management

Consortium. The tender was for the Supply of 900,000 Long Lasting Insecticidal Nets (LLINs 2). It was a Restricted National Tender, and letters of invitation dated 28th February 2007, were sent out to three firms. The tender closed/opened on 28th March after three firms, namely, A to Z Textile Mills, Sumitomo Chemical Company Limited and the Applicant, submitted their tenders.

The Consortium was represented by M/s Nazima Malik, Advocate, whilst the successful bidder, A to Z Textile Mills, was represented by Mr. Ahmednasir Abdullahi, Advocate. The Applicant was represented by Mr. Kamau Karori, Advocate.

Two preliminary objections were raised at the hearing. The first was dated and filed on 6th July, 2007 by the Procurement and Supply Chain Management Consortium (herein after named "the Consortium"). It essentially asserted that the Consortium is not a Procuring Entity as defined in the Public Procurement and Disposal Act, 2005, and the Regulations of 2006, and therefore cannot be sued in these proceedings. Consequently, that the Request for Review was incurably and fatally defective and bad in law.

The second objection dated and filed on 23rd July, 2007, by the successful bidder A to Z Textile Mills, was to the effect that the Consortium was not a juristic person with legal *persona* and therefore capable of being sued in any legal proceedings.

The objections were argued as follows:-

The Consortium argued that under Section 3(1) of the Public Procurement and Disposal Act, 2005, a Procuring Entity is defined as a "public entity" making a procurement under the Act. Further, a "public entity" is specifically defined in the Act, and the Consortium does not fit under any of the descriptions highlighted therein.

Counsel further argued that under the tender documents, there was no role for the Consortium in the use of public funds, except as an agent of the purchaser. In this case, the purchaser was clearly defined in the Instructions to Tenderers Clause 1.1 as the person named in the Tender Data Sheet Clause 1.1. That body was the Global Fund, Kenya Programme, Nairobi, which fact the Applicant had recognized in paragraph 2 of its statement in support of its Request for Review. In the Tender Data Sheet clause 1.1, the

Consortium had been defined as the authorized Purchasing Agent of the Global Fund, Kenya Programme, Nairobi .

Counsel submitted that the business of agency did not fit under Section 3 of the Act or Regulation 3 of the 2006 Regulations, as the Consortium did not use any public assets. The agency was at all times disclosed to all parties and there was no basis upon which the Consortium could be enjoined in the suit.

Further, the Consortium conceded that under the Invitation for Tender, it was acting as agent for the Ministry of Health. It had prepared the tender documents for the Ministry of Health and not for the Global Fund, and had an express agreement with the Government in this regard. It further conceded that the procurement was required to be conducted under the Procurement Act and Regulations. The Consortium availed a copy of the Agreement with the Government, and also pointed out that it had received the authority of the Ministry of Health, pursuant to a letter dated 26th February, 2007 to act as agent in the restricted tender under reference. The Ministry of Health was therefore the proper party to be sued in these proceedings.

In his objection, Counsel for the successful bidder supported the objection of the Consortium. Counsel submitted that their own objection went to the root of the Board's jurisdiction since the Request for Review, as framed, disclosed that the Consortium was devoid of legal *persona*. The contracting parties could not bestow legal *persona* on the Consortium as this could only be bestowed by law.

Further Counsel referred to Sections 3(1) and 4(1) of the Act which, he argued, did not include the Consortium as a public entity, yet the Act applies only with respect to procurement by a public entity. None of these provisions bestowed legal *persona* on the Consortium.

Counsel also referred to Section 28 of the Act, under which a procuring entity is entitled to appoint agents. That agent must, however, be a legal person, since an agent that has no existence in law cannot contract. Thus, the Consortium, not being a legal person with an existence in law could not be sued.

On these contentions Counsel relied on the following judicial authorities:-

Fort Hall Bakery Supply Co v Frederick Muigai (1959) EA Pg 474 and HFCK v Embakasi Youth Development Project (2004) 2 KLR. In both of these cases the Court held that a party which, in the eyes of the law has no legal existence, is no party at all; and that only a juristic person, that is, an entity endowed with legal personality can have *locus standi* before the court and be the subject of such rights and liabilities as may be declared by the Court.

This being the position in this case, the Board had no jurisdiction and had to lay down its tools. Counsel also referred to two other authorities, namely, Surepan Sadhan Bose v Ketan Surendra Somaia HCCC 164 of 2004 and Owino Okeyo & Co. Advocates v Pelican Engineers & Construction Co. (2006) eKLR in which one of the parties lacked legal persona.

Counsel therefore submitted that the Request for Review was incurably defective *ab initio* and consequently, the Board had no jurisdiction to entertain the Applicant.

In response Counsel for the Applicant submitted that the Applicant had sought a review of the Consortium's decision of 15th June 2007. None of the parties had argued that the Consortium did not make that decision. Further, it was the Consortium that communicated the decision on the award, and it did not indicate therein that the award was made on behalf of any particular person or body.

In the Reply to the Preliminary Objection filed on 20th July, 2007, Counsel had annexed a letter showing that under a previous similar tender for Long Lasting Insecticidal Nets in 2005, the Consortium had indicated that it was acting for and on behalf of the Ministry of Health. In the present letter of notification, the agency arrangement was not indicated. In addition, Counsel had downloaded a page from the Consortium's website on 20th July 2007, in which the following statement in respect of services they offered was found:

“.....The Consortium buys and delivers all items under the Global Fund grants including large quantities of pharmaceuticals, HIV test kits, malaria bed nets and re-treatment chemicals medical consumables and equipment

Counsel therefore asserted that the Consortium was involved in purchasing of the insecticidal nets under tender. This position was further supported by the letter of the Ministry of Health dated 13th June 2007, in which the Consortium was authorized to “initiate the procurement process immediately in accordance with the Public Procurement and Disposal Act, 2005”.

Counsel further submitted that the Consortium had, during its arguments on the objection, taken conflicting positions which disclosed that even it was unclear on its actual status in the procurement process. For example, the Consortium began by identifying its principal in this procurement as the Global Fund, and then changed its position and stated that it was acting for the Ministry of Health when that fact in the Invitation to Tender was pointed out. Finally, its own representative stated that they were acting for the Government. Since it was not clear to the Consortium who their principal was, it would be expecting too much of the Applicant to determine who its principal was as the true identity of the principal was still unclear, even at the hearing.

In reaction to the second objection, Counsel pointed out that the submission that the Consortium did not exist in law, complicated matters further, as it could not be established who would be expending or using the public funds granted to Kenya under the Global Fund. In these circumstances, where the facts are not clear, there can be no basis for a preliminary objection as conclusively held by the courts commencing with the case of Mukisa Biscuit Manufacturing Co. Ltd v West End Distributions Ltd (1969) EA 696 at Pg 701. The court stated in that case as follows:-

“ A preliminary objection is in the nature of what used to be called a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuses the issues....”.

Counsel submitted that the facts stated in the tender documents and relied on by bidders were correct. Any other facts from sources outside of those in the tender documents could not be relied upon to establish the preliminary objection. Since the tender documents did not refer to the Procuring Entity

but only to the purchaser and its authorized agent, that was the basis upon which the review was filed.

Counsel also submitted that the suggestion that the Consortium was non-existent was incorrect. He pointed out that under Regulation 3, a procuring entity includes:-

“ any body that uses public assets in any form of contractual undertaking including public private partnership under Regulation 2”

and,

“Public Private Partnership” means:

“an agreement between a procuring entity and a private party under which

(a) the private party undertakes to perform a public function or provide a service on behalf of the procuring entity

The Consortium, having conceded that it was providing services for the Ministry of Health, this amounted to offering a public function or providing a public service on behalf of the Procuring Entity. The Consortium therefore falls within the definition of Procuring Entity. As the invitation to bid and tender documents provided for the Act and Regulations to apply, this gave the Board the right to supervise the procurement process.

Further, once the Consortium had fully responded to the request for review of the Applicant, they were the best placed body under the law to make representations to the Board concerning the complaints of the Applicant, and they had not indicated that they were in any way incapable of so doing. They were involved in preparing the tender, and engaged in the procurement at every stage thereof, and therefore are the best placed to be before the Board.

Counsel distinguished the Fort Hall Bakery case by pointing out that, there, it was the plaintiff who did not have legal personality, whereas here, the Consortium had not stated that it had no legal *persona*. Thus, a third party was under no obligation to inquire into the legal personality of the Consortium.

Counsel also referred to the following judicial authorities:

Hershom v Bernet 3(QBD) which held that if it is unclear who the principal is, the agent is taken to be the principal; and R Ex parte Ministry of Finance and the Commissioner of Insurance v Lutta Kasamani T/A Kasamani & Co Advocates and United Insurance Co. Ltd (2006) e KLR in which the Court of Appeal stated (at Page 5) as follows:-

“.... A defect in form in the title or heading of an appeal, or a misjoinder of parties are irregularities that do not go to the substance of the appeal and are curable by amendment”

Finally, counsel submitted that the Consortium had not argued that any prejudice would be suffered by it on account of its being enjoined. Thus, it would be improper for the Board to reject the review in such circumstances.

In reply, Counsel for the successful bidder repeated its objection, and stated that third parties fail to inquire into the legal capacity of the parties they are dealing with at their own peril. The objection raised by the successful bidder was not a mere technicality, but a question of the Board's jurisdiction. Thus, the question that arose is whether there is a competent body against which the Board can issue any orders.

Counsel for the Consortium in her reply pointed out that since the Applicant had clearly indicated in the Request for Review that the Consortium was the purchasing agent, this was the mutually agreed fact upon which the Consortium based the preliminary objection, in line with the Mukisa Biscuits case. The Applicant had not named either the Global Fund as the purchaser or the Ministry of Health as the Procuring Entity, despite their being named in the Tender Document and Invitation for Tender.

Further, as Section 28 permits the appointment of procuring agents, if the legislature had intended for the procuring entity and the agent to be sued, the statute would have said so. The procuring agent and the procuring entity cannot therefore be treated as one and the same entity. Since the purpose of the Act and Regulations is to ensure that public funds are properly accounted for, there must be a public body before the Board, whose accountability is in question. In this case, no such body has been named in the Request for Review.

Since only an agent is before the Board, it would set a bad precedent for agents to be held responsible for the acts of principals who have been disclosed.

The Board has carefully considered the submissions of the Counsel on the objection, and carefully perused the documents provided by the parties.

Before we proceed to consider the objections, it is necessary to observe that the Board's mandate arises under the Public Procurement and Disposal Act, 2005 and the Regulations, 2006. The objects of the Act as stated in Section 2 are as follows:-

“...The purpose of this Act is to establish procedures for procurement and disposal ... by public entities to achieve the following objectives:-

- (a)
- (b) to promote competition and ensure that competitors are treated fairly
- (c) to promote integrity and fairness of those procedures
- (d) to increase transparency and accountability in those procedures
- (e) to increase public confidence in those procedures
- (f)

It is against the backdrop of these objectives that the Board must consider complaints made to it for administrative review.

Under Section 93, there are three pre-requisites for a person to seek administrative review. He must first be a candidate; secondly, he must claim to have suffered, or risk suffering, loss or damage arising from the procurement proceedings; and thirdly, the suffering or damage must emanate from a breach of a duty imposed on a procuring entity by the Act or the Regulations.

A perusal of the Request for Review alleges the existence of all the above factors, to qualify the Applicant as an aggrieved bidder that is properly before the Board. This point has not been contested by the parties and is therefore common ground. The substance of the objections, however, is that the Applicant has sued the wrong party, which party is not a legal entity capable of being sued.

It is therefore necessary to understand how the Consortium, named as the Procuring Entity in the Request for Review, features in this procurement.

By an Agreement (“the Agreement”) dated 6th June 2006, the Government, through the Ministry of Finance contracted with the Consortium defined therein as consisting of the following four members:

1. Kenya Medical Supplies Agency (KEMSA),
2. The Crown Agents for Oversea Governments and Administrations Ltd (“Crown Agents”),
3. Deutsche Gesellschaft for Technische Zusammenarbeit (GTZ) GMBH (“GTZ”), and
4. John Snow Inc. (“JSI”)

All of these members are indicated to have their respective registered offices in Nairobi, United Kingdom, Germany and USA.

By Clause 1.1 under the identification of parties provision, the “Client” is defined in the description of parties as the Government of the Republic of Kenya therein described as “the Principle Recipient of the Global Fund Grants”. Under Clauses 1.1 and 1.2 of the Agreement the Client appoints the Consortium “to perform Procurement and Supply Chain Management services under the Global Fund funded programs in Kenya”. The period of performance of the services is 24 months with effect from 6th June, 2006. The “services” are described in Appendix A of the Agreement.

By Clause 4, the contract price is stated to be 50% of each supply contract based on an estimated US\$ 91,892,328 procuring value, disbursements estimated at US\$ 940,000 and a supply chain management fee of 3.0% of the contract value where the procurement is carried out by a third party.

Under Clause 6.1 of the Agreement, the members of the Consortium are liable to the Client for the correct and timely fulfillment of the obligations thereunder. Under Clause 16.1 the Client can terminate the Agreement by thirty days notice if the Consortium does not remedy a failure in the performance of its obligations under the Agreement, within thirty days after being notified in writing.

The services to be performed under the Agreement are set out in the seven page Appendix A to the Agreement. They include:- To carry out procurement of health sector goods in accordance with the procurement strategy set out in Section 1, which requires the Consortium to apply procurement procedures consistent with the Government of Kenya Procurement Regulations, 2001. It is noted that those Regulations have been succeeded by the 2005 Act, and 2006 Regulations. In addition, the Consortium was required under Section 2 to issue tenders, in the case of restricted tendering, in accordance with criteria to be agreed with the Ministerial Tender Committee (MTC) of the Ministry of Health.

Further, Section 2 of Appendix A requires that:-

“Tenders will be evaluated by the Consortium jointly with the technical team appointed by the Permanent Secretary Ministry of Health and recommendations submitted to the MTC for adjudication and approval....

The Tender Committee will adjudicate and approve recommendations for contract award and refer the minutes of the meetings to the Consortium for subsequent notifications of award

The Consortium acting as agents of the Principal Recipient, will place contracts to suppliers and expedite deliveries”.

The Agreement was signed by the Permanent Secretary, Treasury, and a representative of each member of the Consortium, respectively, and formally witnessed by the Permanent Secretary to the Ministry of Health and the Acting Director of the National Aids Control Council. Pursuant to the Agreement, the Consortium received a letter from the Permanent Secretary Ministry of Health, dated 7th August, 2006 (Pg 7 of the Consortium’s Memorandum of Response) stating as follows:-

“Please urgently undertake the procurement of the following commodities for malaria control as for the CCM approved procurement plan of Global Fund Round 4 malaria grants KEN-202-905-M-0 (see attached). Find also attached the technical specifications for the respective commodities and conform to the same”.

Annexed was a list of commodities including Long Lasting Insecticidal Nets with performance criteria.

By a letter dated 26th February, 2007, the Secretary to the Ministry of Health Ministerial Tender Committee communicated the MTC's approval of 23rd February, 2007 for the Consortium to use Restricted Method of procurement for procurement as follows:-

“2 Restricted Method of Procurement:

Procurement of LLINs from the following firms:

- A to Z Textile Mills Ltd
- Sumitomo Chemical Co. Ltd
- Vestergaard Frandsen SA ...”

On the strength of the Ministry of Health's MTC approval, the Consortium issued an Invitation to Tender (Pg 3 of the Consortium's Memorandum of Response) addressed to each of the three identified suppliers. The invitation reads in part as follows:-

“ 2. The Procurement and Supply Chain Management Consortium (PSCMC), on behalf of the Ministry of Health, herewith invites sealed tenders for:

Supply and delivery of LLIN's as follows:-

Long Lasting Insecticidal Bed Nets (LLINs) 900,000 pieces. This tender will be conducted through the Restricted National Tender (RNT) procedure specified in the Government of Kenya (GOK) Public Procurement and Disposal Act, 2005, and the Global Fund's Guidelines on Procurement and Supply Management, November, 2006”. (Emphasis ours)

On their part, the Global Fund's Guidelines require that recipients must procure their products in accordance with National and International laws, and so the reference to the use of the Kenyan law in the Invitation for Tender was appropriate.

As indicated by the Consortium during the hearing, it prepared the tender documents, and was acting as agent for the Ministry of Health. It is also clear, from the foregoing, why Counsel for the Consortium stated that it was also acting for the Government. The correct position, of course, is that the Consortium was acting pursuant to the Agreement of 6th June, 2006 with the Government.

The Board found all this background information to be necessary for a proper understanding of how the Consortium found its way into the procurement, and the relationship between it and other parties to the procurement. Based on the Agreement and the various communications recited above, the Board finds that the Consortium was acting as the Procuring Agent of the Ministry of Health. This is as permitted by Section 28 of the Act. We will return to this point later in this ruling.

We now deal with the issue raised in the second objection, which is: Whether the Consortium has legal capacity to be sued in these proceedings.

The Board agrees with Counsel for the successful bidder that a body with no legal *persona*, and therefore no capacity, cannot be sued as adequately demonstrated by the judicial authorities cited, and in particular the Fort Hall Bakery Case

Upon perusal of the Agreement, the Board noted that it was entered into by each member of the Consortium. By Clause 6.1, entitled "Liability of the Consortium", each member was made liable as follows:-

"..... The members shall be liable to the Client for the correct and timely fulfillment of the obligations relating to their share of the inputs and arising during the implementation phase"

Whilst each member was stated to be registered in their various countries, there was no indication that the Consortium, as a group of persons associating together for a consideration, is registered. It might have been expected of the Consortium to be formed, for example, as a partnership pursuant to the Partnership Act (Cap 29), and registered under the Registration of Business Names Act (Cap 499), for purposes of recognition as a composite entity, or under some other statute. These points were not pursued or clarified, and no searches were tendered to show the Consortium's status, one way or another.

Further, the Board noted that the objection was raised by the successful bidder, which in effect was tantamount to its alleging that the award to it was made by a body that had no legal capacity, and therefore could not itself confer any rights or obligations known to the law. However, the successful bidder did not take this point up in its arguments, and chose to leave that issue to the Board.

The Board also noted that, although the Consortium was best placed to clarify the position on its legal capacity, it chose to maintain an un-helpful silence on the point, opting instead not to engage on the issue. The Board did not, therefore, benefit from the Consortium on this issue, either.

This notwithstanding, the Board also noted that the Consortium did give instructions to its Counsel to act for it, in its name, and Counsel filed a seven page Reply to the Request for Review dated 10th July, 2007. This was signed by them as "Advocates for the Procurement and Supply Chain Management Consortium". Other than contending that it was not a Procuring Entity, nowhere in its said reply was there any suggestion or objection to the effect that it was not a legal person, or that it had no legal capacity.

The Board is therefore not satisfied that sufficient information has been tendered to demonstrate that the Consortium has no legal capacity. For example, the Board noted the existence of the Agreement with the Government signed by all members of the Consortium. "Consortium" is defined in the Collins English Dictionary as follows:

"an association of financiers, companies etc, especially one formed for a particular purpose"

By so signing the Agreement between them, there is nothing to prevent it being held probable that the members had properly entered a partnership, which is merely defined as "the relation which subsists between persons carrying on a business in common with a view to profit" (Sec 3(1) Partnership Act, Cap 29). If this may be the situation, and there was nothing to preclude this conclusion, then Sec 6 of the Partnership Act would apply. That section provides as follows:-

"Persons who have entered into partnership with one another are, for purposes of this Act called collectively a firm, and the name under which their business is carried on is called the firm name".

In the case of Owino Okeyo & Co. Advocates v Pelican Engineers & Construction Co (2006) e KLR, at Pg 5 the Court pointed out that it is not registration that gives life to a partnership, for there might be delay in effecting registration. The Court stated that:

“So also with a partnership it comes to life by legal recognition, through the act of two or more persons getting together”

Notwithstanding what we have said here, the Board does not hold that there is in fact a subsisting partnership, and only discusses this point to disclose the inconclusiveness of the information availed.

In the Fort Hall Bakery and HFCK cases, there was clear evidence of non-registration of the associations of persons stated in the suits. Here, there has been insufficient or in-adequate evidence to disclose the true status or position of the Consortium.

Accordingly, we do not find that this is an appropriate case in which to find that the Consortium has no legal capacity. We are therefore unable to uphold the second preliminary objection, which is hereby dismissed.

We go now to the first objection which raises the issue: whether the Consortium is a Procuring Entity within the meaning of the Act.

As stated earlier, we found that the Consortium was acting as a Procuring Agent of the Ministry of Health. The question that then arises is whether the agent is the proper person to be sued in the review proceedings?

Section 28(1) permits a procuring entity to appoint a procurement agent. Under section 28(2) such agent must be pre-qualified by the Public Procurement Oversight Authority. No arguments were tendered regarding their pre-qualification by the Authority. However, Section 28(3) provides as follows:-

“..... Where the procuring agent is undertaking procurement on behalf of a Procuring Entity, the procuring agent shall comply with the provisions of the Act and the Regulations”. (emphasis ours)

This is a mandatory provision that requires the agent, in all respects, to comply with the law in the same manner as a procuring entity would. The agent must therefore keep in mind the objects of the Act as to the promotion

of fairness, transparency, competitiveness, accountability and increasing public confidence in the procurement procedures.

A critical perusal of the tender documents revealed that, in preparing the tenders, the Consortium as agent, misrepresented the true position on the procurement process. Some of the misrepresentations led to the confusion which is the subject of the first preliminary objection herein. It would therefore be improper for the Board to glibly over-look these taking into account the overall objects of the Act, and the fact that the Applicant itself did comply with the requirements for filing a review.

In the Instructions to Tender and Tender Data Sheet Clause 1.1 the Consortium indicated the Global Fund, Kenya Program Nairobi, as the Purchaser. This had the effect of misguiding tenderers as to who was the entity making the procurement under the Act. It also resulted in several other mistakes, such as those under the following critical clauses of the Instructions to Tenderers.

Clause 11.1 The tenderers were to seek clarification from the Global Fund or its agent.

Clause 26.1 Tenders were to be opened by the Global Fund or its agent and tender opening minutes prepared by the Global Fund or its agent.

Clause 29 The Global Fund or its agent was to examine the tenders.

Clause 32 Global Fund or its agent was to evaluate the tenders.

Clause 33 The Global Fund or its agent was to determine the lowest evaluated responsive tender.

Clause 34 The Global Fund or its agent was to award the contract.

Clause 37 The notification of award was to constitute the formation of the contract (contrary to Section 67(3)).

Clause 38 The Global Fund or its agent was to send the successful bidder the contract form for signing and return to the Purchaser.

Despite these provisions, the agent was, as earlier stated, in fact making purchases for the Ministry of Health using funds granted to the Government as the Principal Recipient from the Global Fund. In addition, Section III General Conditions of Contract (GCC) defined the purchaser as the person named in the Special Conditions of Contract (SCC), which, under SCC Section 1, was indicated to be the Global Fund Kenya Program Nairobi. The "Contract" was defined in the GCC as "the agreement entered into between the Purchaser and the Supplier".

All the aforesaid tender provisions were contrary to various provisions of the Act and the Regulations, which the agent was bound to comply with, and which had the effect of misleading the tenderers. Neither the Global Fund nor the Consortium were, in fact, the purchaser in this procurement.

Taking into account the foregoing, the answer to the question as to who, under these circumstances, is the procuring entity, can now be answered. The answer takes into account Regulation 19(3), which provides as follows:-

"(3) The Procuring Entity shall be responsible for the actions and performance of the procuring agent". (emphasis ours).

Clearly, there is embedded in this provision a statutory and ongoing mandatory requirement for the procuring entity to stand in the place of the agent, *in continuum*.

Notwithstanding the agency, Regulations 19(4) and 19(6) limit the scope of the procuring agent's mandate, and some of the critical functions are stated to be retained by the Procuring Entity. The obvious object of these provisions to ensure that the inherent responsibility and identity of the Procuring Entity and its committees as the responsible public entity remain intact and at the fore throughout the procurement process. On the contrary, it was observed, for example, that the notification letter to the Applicant communicating their failure in the tender, and the various clauses in the tender documents, failed to clearly disclose the involvement of the Ministry of Health.

The Board notes that it is incumbent upon a procuring agent, when making tender documents or any communications with any parties concerning procurement, to clearly and unequivocally disclose the principal and the fact that it is the Procuring Entity's agent. This is in tandem with the objects of

the Act as to transparency, accountability and the promotion of integrity, independence and confidence in the procurement process.

The Board therefore agrees with the Consortium that the Consortium is not the Procuring Entity under the circumstances. However, the Board does not consider that the Applicant's Request is therefore fatally defective on this point alone, given the circumstances already highlighted, including the fact that the Consortium had the conduct of the procurement proceedings and has already filed a reply to the Request for Review.

Accordingly, the Board hereby determines, pursuant to Section 96(d) of the Act, that the Ministry of Health shall be a party to this review. That section permits the Board to determine who the parties to a review are. Section 96 (d) provides that:

"The parties to a review shall be:


(a)

(d) such other persons as the Review Board may determine"

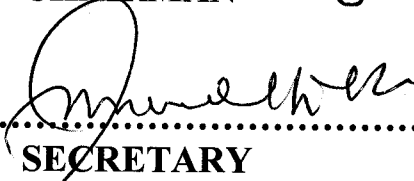
The Ministry of Health is therefore hereby substituted for the Consortium, as the statutorily essential, and responsible, party. The Consortium, as agent and technical arm of the Procuring Entity in this procurement, shall attend the hearing for purposes of the reply to the Applicant's Request for Review.

Hearing to be held at 2.00 p.m. Wednesday 01/08/2007.

Dated 30th day of July, 2007

Signed  Date 30.07.07

CHAIRMAN

Signed  Date 30.07.07

SECRETARY