REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 1/2010 OF 5TH JANUARY, 2010

BETWEEN

PLETHICO AFRICA LTD.....APPLICANT

AND

KENYA MEDICAL SUPPLIES AGENCY..... PROCURING ENTITY

Review against the decision of the Tender Committee of the Kenya Medical Supplies Agency, Procuring Entity dated 22nd December, 2009 in the Matter of tender KEMSA/OIT 17/2009-2010 for Supplies of Contraceptives

BOARD MEMBERS PRESENT

Mr. P. M. Gachoka	-	Chairman
Eng. C. A. Ogut	-	Member
Mr. Sospeter Kioko	-	Member
Mr. Akich Okola	-	Member
Mrs. Loise Ruhiu	-	Member

IN ATTENDANCE

Mr. C. R. Amoth	-	Board Secretary
Mr. P. M. Wangai	-	Secretariat
Ms. Kerina Rota	-	Secretariat

PRESENT BY INVITATION

Applicant, Pletheco Africa Ltd

Mr. Mohammed Nyaoga	-	Advocate, Mohammed Muigai Advocates
Mr. Muthomi Thiankolu	-	Advocate, Mohammed Muigai Advocates
Ms. Sara Omariba	-	Lawyer, Mohammed Muigai Advocates
Mr. Andrew Muirui	-	Pupil, Mohammed Muigai Advocates
Mr. Ali Abbas	-	General Manager
Dr. Philip Mwagiru	-	Consultant
Mr. Sanjeev Daamra	-	Manager
Mr. B. Philip Ashok	-	Vice President, Star Drugs & Research Labs Limited
Mr. H. S. Walja	-	Marketing Manager, Star Drugs & Research Labs Limited

Procuring Entity, Kenya Medical Supplies Agency

Mr. George N. Sichangi	-	Chief Executive Officer, Sichangi & Co. Advocates
Mr. Tim A. Liko	-	Partner, Sichangi & Co. Advocates
Ms. Zipporah M. Mwau	-	Senior Associate, Sichangi & Co. Advocates
Mr. Daniel Achach	-	Senior Associate, Sichangi & Co. Advocates
Mr. Patrick Anam	-	Lawyer, Sichangi & Co. Advocates

Ms. Irene Maithya	-	Lawyer, Sichangi & Co.Advocates
Mr. N'cruba Ojiambo	-	Advocate, Sichangi & Co. Advocates
Ms. Ruby Okoth	-	Advocate, Sichangi & Co. Advocates
Mr. Elisha Nyikuli	-	Advocate, Sichangi & Co. Advocates
Mr. Fred Wanyonyi	-	Corporation Secretary
Dr. N. Kuria	-	Program Manager
Mr. John Kabuchi	-	Procurement Manager
Mr. John Aduda	-	Quality Assurance Manager
Mr. B. Philip Ashok	-	Vice President Quality
Mr. H. S. Walja	-	Marketing Manager

Interested Candidates

Mr. Muriuki Mugambi	-	Advocate for Famy Care Ltd
Mr. Frankie Welikhe	-	Advocate for Famy Care Ltd
Mr K. Sasikumar	-	Vice President, Famy Care Ltd
Mr. Rahul Musule	-	Manager, Famy Care Ltd
Mr. Bhavesh P. Kotecho	-	Agent, Famy Care Ltd
Mr. Vinod Guptan	-	Sales Marketing Director, Harleys Ltd
Dr. Simon Muigai	-	Operations Manager, Infusion Medicare Ltd.

BOARD'S DECISION

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

BACKGROUND OF AWARD

This tender was advertised by the Procuring Entity on 8th October, 2009. It was for the supply of Contraceptives. The tenders were opened on 10th November, 2009 in the presence of bidders' representatives. The following eleven firms submitted their bids:

1. Infusion Medicare Ltd.
2. Laborex (K) Ltd
3. C. M. Mehta & Company Ltd.
4. Bayer Schering Pharma AG.
5. Impres.
6. Plethico Africa Ltd.
7. Angelica Medical Supplies.
8. Surgilinks Limited.
9. Harley's Limited
10. Famycare Ltd.
11. Renata Ltd.

EVALUATION

Evaluation was conducted in three stages namely, preliminary, technical and financial evaluation stages in that order.

Preliminary Evaluation was based on the following mandatory requirements:

1. Duly completed Form of Tender;
2. Bid Bond;

3. Tax compliance;
4. VAT Registration certificate;
5. PIN Certificate;
6. Duly Completed Business questionnaire;
7. A signed declaration of undertaking;
8. Duly completed business questionnaire;
9. Certificate of Incorporation

Two bidders, Bayer Schering Pharma AG and Renata Ltd were disqualified for failing to comply with all the mandatory requirements of the tender. The remaining nine bidders qualified for the technical evaluation.

Technical Evaluation

The technical evaluation involved evaluation of the documents and the products. Evaluation on documents was based on the following parameters:

1. Tender has a Good Distribution Network (GDP) certificate/wholesale dealer's/ manufacturing licence from Pharmacy & Poison's Board
2. Certificate of Superintendant Pharmacist Provided
3. Good Manufacturing Practice (GMP) certificate
4. Registration Status

earlier, in this cases the firm of Mohammed Muigai has purported to sign and act for the applicant in lodging the request. As such the request is incompetent since advocates do not participate in the procurement process.

At the hearing the parties agreed to argue the Preliminary Objection together with the Request for Review. The Board now deals with the Preliminary Objection as follows:-

1. **WHETHER THE REQUEST FOR REVIEW WAS FILED OUT OF TIME**

The Procuring Entity submitted that the parties were notified on 22nd December, 2009. It stated that all the bidders were called on phone and advised to collect the letter of notification. The Procuring Entity argued that time started running on 22nd December, 2009 and therefore the Appeal window closed on 4th January, 2010. It argued that the Applicant filed the Request for Review on 5th January, 2010 and it was therefore out of time.

In response, the Applicant argued that it received the letter of notification on 24th December, 2009. It further argued that Section 57 (c) of the Interpretation and General Provisions Act Cap 2 provides as follows:

"where an act or proceeding is directed or allowed to be done or taken on a certain day, then, if that day happens to be an

excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day".

It therefore argued that since it received its letter of Notification on 24th December 2009, time started running on 25th December, 2009. Accordingly, the last day for filing the Request for Review was 7th January, 2010. It submitted that the Request for Review which was filed on 5th January, 2010 was within time.

The Board has considered the submission of the parties and examined all the documents that were presented.

The Board notes that Section 67 (2) of the Public Procurement and Disposal Act, 2005 (hereinafter referred to as the Act) clearly provides that the Procuring Entity is to notify the successful and the unsuccessful bidders the outcome of the award at the same time. The Board notes that Section 37 of the Act clearly states that all communication must be in writing. In view of this clear position of the law, the Procuring Entity has an obligation to notify all Bidders at the same time in writing. The Board observes that the Procuring Entity did not adduce any evidence when it dispatched the letters of notification.

Accordingly, the Board has no option but to accept the evidence of the Applicant that it received its letter of notification on 24th December, 2009, the date on which it collected the letter from the Procuring Entity. Therefore, the last day for filing the Request for Review was 7th January, 2010 if the date of communication was 24th December, 2009.

The Board further finds that even if it was to accept the Procuring Entity's argument that it notified the parties on 22nd December, 2009, time for purposes of the appeal window started running on 23rd December, 2009 and therefore the last day for filing the Request for Review was 5th January, 2010. The Request for Review was filed on 5th January, 2010. Therefore, whichever way one looks at this limb of the Preliminary Objection, this Request for Review was filed within time. Accordingly, this limb of the Preliminary Objection fails.

2. WHETHER AN ADVOCATE CAN SIGN A REQUEST FOR REVIEW

The Procuring Entity argued that there was no competent tenderer before the Board. The Procuring Entity submitted that Section 93 of the Act provides that where a candidate has suffered loss or damage or risks suffering loss or damage it can seek for administrative review. Accordingly, it argued that it is only a candidate who can file a Request for Review and not an advocate.

The Procuring Entity submitted that Regulation 73 (1) of the Public Procurement and Disposal, 2006 (hereinafter referred to as the Regulations) clearly states that a Request for Review under the Act shall be lodged in form RB1 set out in the Fourth schedule to the Regulations. It referred to the Request for Review and pointed out it was signed by the Advocate and not the Applicant. It further submitted that Regulation 76 only allows a party to a Request for Review to be represented at the hearing by an Advocate but such an advocate could not sign the Request for Review on behalf of an Applicant.

In conclusion, the Procuring Entity argued that there was no competent Request for Review before the Board and urged the Board to dismiss the Request for Review.

In response, the Applicant opposed this ground of the Preliminary Objection and stated that Regulation 73 does not prohibit signing of a Request for Review by an Advocate.

It submitted that where an Act of Parliament requires an Applicant to sign the pleadings, there is an express provision clearly stating so. It cited the election petitions where there is a clear provision that it must be signed by the Petitioner.

The Applicant further submitted that Regulation 76 clearly provides for legal representation and therefore an Advocate could sign a Request for Review on behalf of an Applicant.

Finally, the Applicant referred the Board to Section 72 of the Interpretations and General Provisions Act Cap 2 of the Laws of Kenya which provides that a deviation of form that does not affect the substance of the matter is not fatal.

The Board has carefully considered the submissions of the parties and the documents that were presented before it.

It is not in doubt that the Request for Review was signed by the Advocate for the Applicant. The question that arises for determination is whether there is a competent Request for Review before the Board.

The Board notes that Section 93 of the Act states that a candidate who has suffered or risks suffering damage or loss may seek Administrative Review in such manner as may be prescribed.
The Board further notes that Regulation 73 provides as follows:-

"73. (1) A request for review under the Act shall be made in Form RB 1 set out in the Fourth Schedule to these Regulations.

(2) The request referred to in paragraph (1) shall-

(a) state the reasons for the complaint, including any alleged breach of the Act or these Regulations;

(b) be accompanied by such statements as the applicant considers necessary in support of its request;

(c) be made within fourteen days of-

(i) the occurrence of the breach complained of where the request is made before the making of an award; or

(ii) the notification under sections 67 or 83 of Act;

(d) be submitted in fifteen bound copies and a soft copy, pages of which shall be consecutively numbered;

(e) be accompanied by the fees set out in Part II of the Fourth Schedule which shall not be refundable.

(3) Every request for review shall be filed with the Secretary of the Review Board upon payment of the requisite fees.

(4)The Secretary shall acknowledge filing of the request for review".

The Board also notes that Regulation 76 allow parties to be represented at the hearing by an Advocate. According to the Procuring Entity such Advocate cannot file any documents on behalf of the parties and can only appear at the hearing. With due respect to the Procuring Entity, the Board cannot accept that argument. Regulation 76 does not define where the

legal representation by the Advocate commences and ends. Further, Regulation 73 does not state that the Request for Review can only be lodged by an Applicant who shall thereafter, if it wishes, appoint an Advocate to appear at the hearing.

The Board notes that this Request for Review clearly states who are the parties, the alleged breaches of the Act and Regulations and the remedies sought. The Board further notes that the primary purpose of pleading is to enable a party know the case or defence it is facing to avoid the element of ambush.

The Procuring Entity's only argument in this matter is that the Request for Review is signed by the Advocate. It is difficult to understand the prejudice the Procuring Entity has suffered.

Accordingly, this limb of the Preliminary Objection also fails.

In the circumstances, the Board dismisses the Preliminary Objection and will now proceed to consider the Request for Review on merit.

Grounds 1,2,3,4 and 5: Breach of Section 2, 64 and 66 of the Act and Clause 24 of section N of the Tender Document.

These grounds have been consolidated since they raise similar issues.

The Applicant submitted that its tender was responsive to all the mandatory specifications set out in the tender documents. It stated that the

decision of the Procuring Entity, not to award the tender to it was unreasonable and indeed unlawful in that it offended the provisions of Sections 2, 64 and 66 of the Public Procurement and Disposal Act, 2005 (Hereinafter referred to as the Act).

The Applicant further submitted that on receipt of the notification letter, it had on 24th December, 2009 written to the Procuring Entity requesting for reasons why it's tender was unsuccessful. It stated that in a reply dated 30th December 2009, the Procuring Entity gave reasons for failure of its tender as follows:

1. *The Progestin only Injectable containing 150mg Dimedroxy progesterone acetate had residue remains at the bottom after rigorous shaking.*
2. *The needle submitted with the 2ml sterile syringes was gauge 25 instead of the gauge 21 required.*

The Applicant objected to the further reasons included in the Procuring Entity's memorandum of response. It argued that had these been valid reasons for failure of its tender then the Procuring Entity ought to have included them in its reply letter of 30th December, 2009.

The Applicant stated that its product met all the required local and international standards of safety, quality and good manufacturing practices. It further stated that it had submitted, in its Tender Documents, all the certificates from the relevant bodies as evidence that its product met

all the required standards. The Applicant referred the Board to the following certificates which were included in its tender documents:

i. Certificates issued in accordance with the world Health Organisation (WHO) to the effect that the manufacturing plant meets the required standards;
ii. Certificate showing that the manufacturing facility observes good manufacturing practice (GMP) as laid down by WHO; and
iii. Certificate showing that its products had been tested in Australia and found to be compliant with the specifications of the tender.

The Applicant submitted that its product had been approved by the Pharmacy and Poisons Board which, it claimed, is the competent authority in the country, on questions of safety, quality and general performance of drugs. It urged the Board to note that this certificate was indeed the crux of the matter. This certificate, it added is so crucial that prior to issuing it, the Pharmacy and Poisons Board had to travel all the way to India in order to satisfy itself that the Applicant's product had indeed been manufactured in a factory that satisfied all the national and international standards for quality, safety and performance. The Applicant argued that it was therefore wrong for the Procuring Entity to suggest that its product was not compliant since the certificates were still valid.

The Applicant informed the Board that the product sample it had submitted to the Procuring Entity was a part of Batch No. 9020210. It stated

that in the manufacturing world, all items in the same batch are made from the same mixture and are subjected to a standard mechanized process and that they are bound to be completely similar. In such a case, it argued that it is not possible for part of the batch to fail the compliance test while another part succeeded. The Applicant argued that some samples from the batch which was part of the tender had been tested by other independent parties and found to be compliant. In this regard it referred the Board to an "expert opinion report" by a Dr. Philip Mwagiru and to a "Certificate of Analysis" from the University of Nairobi, both of which had found the product to be compliant.

It argued therefore that it was not plausible that its product had failed at the product evaluation stage while the other samples tested from the same batch had passed the tests.

The Applicant submitted that the organoleptic test criteria which the Procuring Entity had applied in testing its products was not objective and quantifiable. It explained that organoleptic is a test conducted on the basis of the five senses of touch, sight, smell, sound and taste. It stated that it was neither objective nor quantifiable as required under Section 66(3) (a) of the Act.

It further stated that the Section 66(3) of the Act is framed in mandatory terms and that therefore to the extent possible, the criteria must be objective and quantifiable. In this case, it argued that the test was very

subjective and could expose the unsuspecting public to danger if all the Procuring Entity did was to "shake and look" in deciding which drug passed the test. It argued that as a minimum the Procuring Entity should have tested the drugs in a scientific manner.

The Applicant denied that the various side effects related to the use of the drugs in question were as a result of the sediments like those purported to have been found in its sample. It explained that those are the general side effects associated with this drug which is commonly referred to as Depo Provera regardless of who manufactured it.

In regard to the needle gauge, the Applicant submitted that this issue was ousted by the principle of estoppel in view of the representation contained in the minutes of the pre-bid conference dated 17th December 2009. It argued that the specifications of needle gauge were communicated a week before the tender deadline thus denying the Applicant reasonable time to contact the manufacturers of the specified needle gauge. It averred that the late specifications must have been designed to favour some bidders.

Finally, the Applicant stated the issue of the needle gauge was a minor deviation and therefore correctable under Section 64(2) of the Act and should not have been a reason for disqualification of its tender.

In response, the Procuring Entity stated that the Applicant's tender had failed to meet some of the evaluation criteria. It argued that it carried out

evaluation of the samples provided by the bidders at a particular time. Therefore, any tests that were subsequently done by the Applicant were not relevant to the tender.

It submitted that the evaluation was carried out in accordance with the laid down criteria and argued that it was wrong for the Applicant to raise the issue of the subjectivity of the organoleptic test after the award.
It averred that this was an afterthought on the part of the Applicant.

The Procuring Entity through Dr. Aduda who had chaired its four member evaluation team, explained how the evaluation process was conducted. Dr. Aduda explained that when shaken, the product was supposed to form a uniform or homogenous suspension with no sediments at the bottom. This way, he further explained, the suspension could easily be drawn into a syringe without interfering with the dosage.

Dr. Aduda informed the Board that the evaluation team vigorously shook the Applicant's sample for a long time but the sediments still remained. He stated that the team worked jointly with one member shaking and then passing to another to continue with the shaking and all the members concurred that sediments remained in the Applicant's sample.

Dr. Aduda further explained that under the Regulations, the evaluation process had to be completed within 30 days. He stated that laboratory tests would take a long time. Therefore, the Procuring Entity usually uses the

organoleptic test first and after the award, a sample of the delivery of the successful bidder is subjected to the laboratory test.

The Procuring Entity further submitted that the manufacturer who was supplying drugs to the Applicant did not have a dedicated plant for manufacturing of hormones. It stated that this was a requirement under part 10 of Section M of the Tender Document. It further stated that in a letter dated 15th December 2009, it had written to the Pharmacy and Poisons Board requesting it to confirm whether the bidders were compliant with the following requirements:

1. Compliance with WHO Good Manufacturing Practice;
2. Proof that they have a dedicated plant; and
3. Duration within which the drug has been in the market.

It submitted that a reply received from the Pharmacy and Poisons Board had clearly shown that the Applicant's tender was not compliant with the requirements set out in 1 and 2 above.

The Procuring Entity further submitted that the Applicant did not provide evidence that it had serviced a contract of similar magnitude in the last five years as required under part 13 of the Section M in the tender document. The Procuring entity argued that it was wrong for the Applicant to claim that it ought to have been awarded the tender on the basis of its "lowest

price". It explained that the tender was to be awarded to the lowest responsive bidder and not the one with the lowest price.

Finally, the Procuring Entity submitted that the Applicant had supplied the wrong needle gauge thus rendering its tender as non-responsive. It referred the Board to a letter dated 4th October, 2009, which it clarified should have been dated 4th November, 2009, that had been written to the Bidders advising them that the needle to be supplied was "2 ml Reuse prevention syringe with a gauge 21 needle". It argued that the use of a gauge 25 for this type of injection would cause serious health risks and therefore it was not a minor deviation as argued by the Applicant.

The Successful Candidate, Famy Care Ltd, submitted that the Applicant, being a wholesaler and not the manufacturer of the drug in question was not qualified to comment on the quality of the drug. It argued that the Request for Review was therefore incompetent having been filed by an agent and not by the manufacturer itself.

It took issue with the Applicant's certificate of registration of the drug from the Pharmacy and Poisons board. It contended that it was rather suspect that the registration was obtained on 15th October 2009 while the tender had been first advertised on 5th October 2009.

The Successful Candidate averred that the manufacturer who was supplying the Applicant did not have a valid certificate in regard to Good Manufacturing Practices (GMP) which was a requirement of the tender.

The Successful Candidate argued that the organoleptic test was objective and was applied fairly to all the samples. Finally, it argued that the tender document had clearly indicated that the organoleptic test would be used to test the drugs and stated that the Applicant had not questioned it prior to the award of tender.

An interested candidate, Infusion Medicare Ltd, in its written submission stated that the tender evaluation and award process was marred by irregularities and lack of transparency. It argued that its bid had been unfairly rejected despite their price being Kenya Shillings Thirty Million lower than that of the successful bidder.

The Board has carefully considered the submission of the parties and examined the documents presented before it.

The Board notes that the tender was for supply of 3 items namely:

i) Injectable contraceptive kits
ii) Progesterone -only pills, and
iii) Emergency contraceptive pills.

The Board however notes that the Applicant had only tendered for item No. (i) above though the Request for Review was for the whole tender. The Board at this juncture observes that all the submission by the parties are in regard to item no (i) while no issues were raised in regard to the other two items which the Board notes were also awarded to the same Successful Candidate. Accordingly, the Board holds that this Request for Review only relates to item No. 1 namely supply of injectable contraceptive.

With regard to the evaluation process, the Board notes that the evaluation process was to be conducted in three stages as follows:

a) Preliminary Examination of the tender documents in which the Procuring Entity checked whether the bidders had supplied the following documents:

(i) Tender form duly completed, signed and stamped by the tenderer or his authorized agent. (Mandatory)

(ii) Declaration of undertaking attached. (Mandatory)

(iii) Original Bid Bond provided and valid for 120 days from the date of the tender opening. Value of Bid Bond should be 2% of bid amount. (Mandatory)

(iv) A valid certified copy of Tax Compliance Certificate. (Certified by KRA)

(v) Certificate of Incorporation

(vi) Business questionnaire duly completed and signed

(vii) Copy of the VAT Registration certificate

(viii) Copy of PIN Certificate.

Bidders who met the requirements in this stage qualified for technical evaluation.

b) Technical Evaluation was divided into two parts as follows:

i. Part 1: Examination of documents;

ii. Part 2: Product Evaluation

c) Financial Evaluation.

The Board notes that the bidders who passed part 1 on the examination of documents were to proceed to the product evaluation stage.

The Board has examined the evaluation report and notes that out of 11 bidders, 9 passed the preliminary examination and proceeded to the technical evaluation. The Board further notes that out of the 9 bidders who underwent the technical documentation test, only 4, including the Applicant, passed and proceeded to the technical-product stage. After technical product evaluation two bidders, namely Famy Care Ltd and

Angelica Medical supplies Ltd succeeded and hence proceeded to the financial evaluation stage. Famy Care Ltd won the tender as its price was lower than that of Angelica Medical Supplies Ltd.

The Board notes from the minutes of the evaluation committee that the Applicant, with three (3) others had met all the regulatory documentary requirements and thus qualified to move to the product evaluation stage. It is clear from the evaluation report that the Applicant was marked to have been compliant in regard to all the listed certificates/ documentation. The Board further notes that Section N of the tender document clearly provided as follows:

> *"Documentary evidence must be provided for all the requirements stated above to qualify for product evaluation".*

In view of the above, the Board finds that since the Procuring Entity had qualified the Applicant to proceed from document examination stage to the product evaluation stage, the argument raised in the memorandum of response and at the hearing, that the Applicant failed to submit certain documents is an afterthought and raises doubts on how the evaluation process was conducted.

As regards the product evaluation, the Board notes that Part 2 of the Section N of the tender document provided as follows:

Part 2: Tender Evaluation

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

1. *Evaluation of the organoleptic properties of the product.*
2. *Evaluation of the product packaging based on Good Mnaufacturing and Pharmaceutical properties of the particular dosage form and specifications under the section F of the Tender document.*
3. *Evaluation of the product labeling criteria based on technical specifications spelt out under section F of the tender document.*

The weighting of the product evaluation will be as follows:

Product Evaluation – 80%

Labeling and Packaging Evaluation – 20%

Products that are not registered or do not fulfill 100% of the organoleptic properties requirements will be disqualified from further evaluation. Product samples must meet a minimum of 75% of the labeling requirements, giving a minimum technical weighted average score of 95% to qualify for financial evaluation.

The Board notes that the product evaluation was done on the samples submitted by bidders using organoleptic test – i.e. use of the five senses of sight, sound, smell, taste and touch. In this tender, the test that was carried out was to shake the suspension drug and establish whether any sediments were left at the bottom of the vial.

The Board further notes Section 66(3) (a) states as follows:

> *"the criteria must, to the extent possible, be objective and quantifiable"*

The question that arises is whether the evaluation criteria was objective and quantifiable.

The Board notes that the members of the evaluation committee carried out the tests jointly with one member shaking and passing to another member who would continue with the shaking. In the process they were all observing and discussing the results before agreeing on a common verdict.

Regulation 16 (6) provides as follows:

> *"Each member of the technical evaluation committee shall evaluate independently from the other members prior to sharing his or her analysis, questions and evaluation including his or her rating with the other members of the technical evaluation committee".*

The Board finds that for the organoleptic criteria to be objective and quantifiable it was necessary for the Procuring Entity to do the following:

a) Appoint a technical panel (which it did);

b) Set out the parameters and define the methodology to be used ;

c) Develop an individual score sheet;

d) Prepare a summary of the combined results by each panelist

As the Board has already noted the evaluation panel did a joint evaluation and there was no individual score sheet thus rendering the whole evaluation process subjective.

With regard to the gauge of the needle, the Board notes that the Procuring Entity sent a clarification to the Bidders by a letter dated 4th November, 2009 which was erroneously dated 4th October, 2009. The Board further notes the Procuring Entity's submission to the effect that the bidders were called by phone and requested to collect copies of the said addendum. According to the evidence provided to the Board, only four of the eleven bidders collected the letter, two of them on 5th November, 2009 while the Applicant and another bidder collected their copies on 9th November 2009, a day before tender closing date. No evidence was provided to prove whether or not all the eleven bidders were called at the same time and why the Procuring Entity did not send the said addendum to the addresses of all the bidders who had purchased the tender document. It is noteworthy that the successful bidder was not among those who collected the letter though it supplied the correct needle size.

The Board notes that Clause 5.1 of the tender document states as follows:

> *"A prospective tenderer requiring any clarification of the tender document may notify the Procuring Entity in writing or by cable (hereinafter, the term cable is deemed to include telex and facsimile) at the entity's address indicated in the Invitation to tenders. The Procuring entity will respond in writing to any request for clarification of the tender documents, which it receives not later than ten (10) days prior to the deadline for submission of tenders, prescribed by the Procuring entity. Written copies of the Procuring entities response (including an explanation of the query but without identifying the source of the query) will be sent to all prospective Bidders that have received the tender document".*

Further Clause 6.1 of the tender document provided as follows:

> *"all prospective candidates that had received the tender documents will be notified of the amendment in writing or by cable , and will be binding on them"*

The Board finds that the issue of clarification on the needle gauge was not properly handled.

In view of the foregoing, the Board finds that the evaluation process was flawed and consequently these grounds of appeal succeed.

Grounds 6 and 7

These are not real grounds of appeal but a statement of loss and damage that the Applicant has suffered or risks to suffer which includes loss in business opportunity. The Board has on several occasions in the past ruled that costs incurred by tenderers at the time of tendering, are commercial risks borne by people in business and therefore each bidder carries its own costs.

In view of the foregoing, and having considered all the above matters, the Board decides as follows:-

i) That pursuant to section 98 (a) of the Act, the tender for item no. 1: Injectable Contraceptive Kit, to Famy Care Limited be and is hereby annulled.

ii) That pursuant to section 98(b) of the Act, the Procuring Entity may retender for the injectable contraceptive kit using the restricted method of procurement and invite all the bidders who participated in this tender.

iii) That the procurement process in respect of items 2 and 3 of the tender – Progesterone – only pill and Emergency contraceptive pill respectively may proceed.

Dated at Nairobi on this 1st February, 2010

Chairman, PPARB

Secretary, PPARB