REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 10/2010 OF 17th FEBRUARY, 2010

BETWEEN

PREMIER MEDICAL CORPORATION LIMITED.....APPLICANT

AND

THE PROCUREMENT AND SUPPLY CHAIN MANAGEMENT CONSORTIUM.....PROCURING ENTITY

Review against the decision of the Procurement and Supply Chain Management Consortium dated 3rd February, 2010 in the matter of Tender No. GT ATM Rd4 Ph2 - 08/09 - ONT - 005 for Supply and Delivery of Rapid HPR2 Diagnostic Test Kit.

BOARD MEMBERS PRESENT

Mr. P. M. Gachoka	-	Chairman
Eng. C. A. Ogut	-	Member
Ms. Judith A. Guserwa	-	Member
Amb. C. M. Amira	-	Member

IN ATTENDANCE

Mrs. Pamela K. Ouma	-	Holding Brief for the Secretary
Ms. Kerina A. Rota	-	Secretariat
Mr. M. Mwololo	-	Secretariat (Intern)

PRESENT BY INVITATION

Applicant, Premier Medical Corporation

Mr.Timothy Naeku	-	Advocate, Bowry & Co. Advocates
Mr. Maurice Waswa	-	Advocate, Bowry & Co. Advocates
Mr. Muchiri Mwangi	-	Legal Assistant, Bowry & Co. Advocates
Dr. Verma		

Procuring Entity, the Procurement and Supply Chain Management Consortium

Ms. Nazima Malik	-	Advocate, Kaplan & Stratton Advocates
Ms. Christina Ndiho	-	Advocate, Kaplan & Stratton Advocates
Ms. Nkatha Murungi	-	Pupil, Kaplan & Stratton Advocates
Mr. David Muttu	-	Procurement Manager
Mr. James Ochuka	-	Procurement Manager
Mr. Abdulatif Ali	-	Deputy Head NPHLS
Mr. John Nyamuni	-	Programme Officer, DOMC-Ministry of Public Health and Sanitation –

Interested Candidates

Mr. Deepak Kothavi	-	Marketing, Surgipharm Limited
Mr. Wycliffe Owino	-	General Manager, Spin Spider Enterprise

BOARD'S DECISION

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

BACKGROUND

The Procuring Entity advertised the tender for the supply and Delivery of Rapid HPR2 Diagnostic Test Kits on 7th July, 2009 in the Daily Nation newspaper. The bids closed/opened on 6th August, 2009 and twelve bids were submitted. The bidders who submitted bids and the respective bid prices as at opening was as follows:

1. Angelica Medical Supplies Ltd - 162, 197.25 USD
2. Flambert Holdings Limited - 89,600.00 USD
3. Chemoquip Limited - 9,216,000.00 KES
4. PMC Medical (India) PVT Ltd - 70,400.00 USD
5. MKL Medispec Kenya Ltd - 10,880,000.00 KES
6. Spin Spider Enterprises - 96,204.80 USD
7. Zocom Limited - 99,993,600.00 KES
8. Macmed Healthcare Kenya Ltd - 88,320.00 USD
9. Highridge Pharmacy Wholesale Ltd - 85,760.00 USD
10. Medspan Laboratory Supplies - 8,960,000.00 KES
11. Surgipham Limited - 7,296,000.00 KES
12. Techno Relief Services - 69,478.40 USD

EVALUATION

The evaluation was carried out in three stages namely Preliminary, Technical and Financial.

Preliminary Evaluation:

The bids were evaluated for responsiveness on the following parameters:

i. Bid Form and Price Schedule Signed

ii. Bank Bid Security amount (2%)

iii. Bank Bid Security Validity (4/12/2009)

Two of the firms namely, Zocom Limited and MKL Medispec Kenya Ltd, were found to be non-responsive. M/s Zocom Limited had a Form of Tender that was not signed while M/s MKL Medispec Kenya Ltd submitted a tender security issued by an Insurance Company, contrary to the requirements of either a cashier's or certified cheque; a letter of credit issued by a reputable Bank; or a conditional Bank Guarantee issued by a reputable Bank as stipulated in ITT 19.3

Technical Evaluation:

The remaining ten bids were further subjected to a technical evaluation on the following parameters:

A. Documentary Evidence, Manufacturer/Manufacturer's Agent

i) Manufacturers Authorization

ii) Certificate of incorporation

iii) Original Technical Brochures/Technical Literature

iv) WHO pre-qualification of Diagnostics Programe/evidence of Published Peer Review Literature on performance of the product that is intended to be supplied in case of contract award

v) Technical Specifications

B. The sample

i) Brand Name

ii) WHO Pre-qualification of Diagnostics Programme

iii) Sensitivity (99%) and specificity (95%)

iv) Easy to use step by step procedure

v) Test provided as a complete kit with all materials/equipment/supplies required to perform the test

including swabs, assay buffer, lancets and capillaries/pipettes, etc

vi) Test Type: cassettes - with wells for specimen and buffer

vii) Results in 15 - 30 minutes

viii) Storage temperatures from 2^0 C to not less than 40^0 C

ix) Guaranteed shelf life of the kit = > at least 75% after delivery to named place of destination

x) Packaging: 20 - 25 tests per complete kit

xi) Test kit and all accessories to be suitably packed and labelled as complete kit

xii) Insets of relevant literature, including pictorial description of test preparation, explaining the test procedure, reading and interpretation of results and storage conditions.

The summary results of the technical evaluation were as tabulated below:-

No.	Bidder	Remarks	Pass/Fail
1.	PMC Medical (India)PVT Ltd	▪ Technical information on the outer package differs from the actual product insert/product literature ▪ No upper storage limit given, lower limit falls below the required temperature ▪ Kit is incomplete	Fails
2.	Macmed Healthcare Kenya Limited	▪ Kit incomplete, the lancet provided required additional gun device to function ▪ The blood collecting device is not a capillary but a loop device. This makes it difficult to collect sufficient blood for testing and this may easily lead to test misinterpretation	Fails
3.	Surgipham limited	▪ Responsive, meets minimum technical requirement	Pass
4.	Chemoquip Limited	▪ Kit is incomplete and does not have swabs and lancets ▪ Technical literature is not compatible with kit content i.e. some items mentioned in the literature	Fails

		are missing in the insert	
5.	Techno Relief Services	▪ The kit is not specific to HPR2 (Pf). The kit provided is a combination of Pf and Pv which is off-spec and therefore not acceptable ▪ It is not easy to use therefore making interpretation of results difficult ▪ Kit is incomplete i.e. swabs are not provided	Fail
6.	Flambert Holdings Limited	▪ Storage temperatures 2 - 30 degrees instead of the required 2 - 40 degrees	Fail
7.	Angelica Medical Supplies Ltd	▪ No technical brochures have been attached in the technical offer ▪ Product inserts in the sample are not sufficient ▪ Details on the product insert are not compatible with sample provided ▪ Storage temperature is 4 to 30 deg. C instead of 2 - 40 deg. C	Fail
8.	Spin Spider Enterprises	▪ The kit is incomplete: no swabs & Lancets ▪ Product insert are not compatible with kit content	Fail
9.	Highridge Pharmacy Wholesale Ltd	▪ Result interpretation is very difficult; therefore the kit is not easy to use ▪ T1 and T2 features on the test cassette are not explained in the literature insert ▪ Cassette characteristics do not conform to the literature insert	Fail
10.	Medspan Laboratory Supplies	▪ Not WHO pre-qualified ▪ No lower limit indicated, upper limit is indicated as 30 degrees which falls below the required specification ▪ Manufacturer's authorization for a KNH Tender for 2006/2007	Fail

Financial Evaluation

The technically responsive bid was further subjected to a financial evaluation and the result was as follows:

	Bidder	Unit Pack Price	Quantity	Total Price KES
1.	**Surgipharm Limited**	**1,425.00**	**5,120**	**7,296,000.00**

The bid was determined to be within the delivery period required and there were no additions or adjustments made as was the requirement of ITT 32.5 (a) (ii). In addition, in line with ITT 33, the tenderer declared the lowest evaluated was subjected to post qualification to determine if it was qualified to perform the contract satisfactorily. M/s Surgipharm Limited was found to be successful on post qualification.

Extension of Bid Validity

Bidders were requested to extend their bids and security validities to 4th March, 2010 and 6th March, 2010 respectively.

RECOMMENDATION

The Evaluation committee then recommended M/s Surgipharm Limited to be awarded the contract at their price of Kshs. 7,296,000.00

THE TENDER COMMITTEE DECISION

The Ministry of Public Health & Sanitation Tender Committee deliberated on the recommendation of the evaluation committee and awarded the tender to the recommended bidder M/s Surgipharm Limited at a cost of Kshs. 7,296,000.00

Bidders were notified of the award vide letters dated 3rd February, 2010.

THE REVIEW

The Applicant lodged the Request for Review on 17th February, 2010 against the decision of the Procurement and Supply Chain Consortium dated 3rd February, 2010 in the matter of Supply and Delivery of Rapid HPR2 Diagnostic Test Kits. At the Hearing, the Applicant was represented by Mr. Timothy Naeku, Advocate, while the Procuring Entity was represented by Ms. Nazima Malik, Advocate. The Interested Party Surgipham Limited was represented by Mr. Deepak Kothavi.

The Applicant requested the Board to make the following orders:-

"

1. ***The Public Procurement Complaints, Review Board be pleased to stay the award of the contract and suspend the procurement proceedings in such manner as it may deem just and expedient, pending the hearing and determination of this application for review.***

2. ***A declaration that the Applicant's tender was responsive and conformed to all the mandatory requirements in the tender document as required by Section 64 (1) of the Public Procurement and Disposal Act 3 of 2005.***

3. ***A declaration that the decision by the procuring entity to reject the Applicant's tender was unfair and without justification and contrary to Regulation 14 (2) (b) of the Public Procurement and Disposal Regulations, 2006.***

4. *A declaration that the Applicant met and satisfied all the requirements and criteria set by the procuring entity and qualified to be awarded the contract.*

5. *A declaration that the Samples Kit submitted by the Applicant had lancets and was therefore complete.*

6. *A declaration that the storage temperature of HRP2 kits submitted by the Applicant was 40 degrees as stipulated by the tender and not 30 degrees quoted by the 1st Respondent in its letter to the applicant dated 10th February, 2010.*

7. *A declaration that the 2nd Respondent was not the Tender with the lowest evaluated price having quoted a tender price of Kshs. 7,296,000/= which was higher that the equivalent sum of Kenya Shillings quoted by the Applicant, being 70,400 US Dollars and the award of the contract to the 2nd Respondent was a breach of the provisions of Section 66 (4) of the Public Procurement and Disposal Act 3 of 2005.*

8. *A declaration that the procuring entity has breached the provisions of Section 31, 34, 64 and 66 of the Public Procurement and Disposal Act 3 of 2005 in respect of the Applicant and as a result, the Applicant has suffered loss and damage owing to the aforesaid breach by the 1st Respondent.*

9. *Costs and incidental to this applicant be borne by the Respondents."*

On 11th March, 2010, the Applicant filed an affidavit to amend its prayers to include the following prayers:

1. ***THAT the Public Procurement Administrative Review Board be pleased to annul the procurement proceedings in their entirety.***

2. ***THAT the Public Procurement Administrative Review Board be pleased to substitute the decision of the procuring entity in the***

At the hearing, the Applicant made an application to amend the Request for Review to include those prayers. The Procuring Entity opposed that application and stated that the Board had no powers to allow the amendments.

Upon hearing the preliminary issue the Board ruled as follows:

> **The powers of the Board are set out in Section 98 of the Public Procurement and Disposal Act, 2005 (herein after referred to as the Act). The Board notes that though the said section does not expressly provide the power to allow an amendment of pleadings, it is clear that the Board has power to grant any of the remedies under Section 98(a), (b), (c) & (d) . The said section provides as follows:**
>
> ***"Upon completing a review, the Review Board may do any or more of the following……"***
>
> **Therefore, it is clear the Board has powers to issue any of the remedies upon concluding the hearing of a Request for Review. Accordingly, the Procuring Entity would not suffer any prejudice if the Request for Review is amended to include the prayers sought by the Applicant. At the conclusion of the hearing, the Board will determine the**

appropriate order to make in terms of Section 98. The Board therefore allows the amendments.

The Applicant raises five grounds of Review which we deal with as follows:

Grounds 1, 2, 3, 4 & 5 - Breach of Section 31, 34, 64, 66 of the Act and Regulation 34.

We combine these grounds as they raise similar issues on qualification and evaluation of the bids. The Applicant argued these grounds together.

The Applicant alleged that the Procuring Entity erred in disqualifying it and breached the provisions of Sections 31 (1) &(4) and 64(1) of the Public Procurement and Disposal Act, 2005 (hereinafter the "Act"). It submitted that the Procuring Entity had notified it that it was unsuccessful due to the following facts:

i) Its sample kit was incomplete as it had no lancets;

ii) It had not provided the lower limit of its storage temperature while its upper limit was 30^0 Centigrade; and

iii) The technical information provided in the outer package was inconsistent with the technical information provided on the product insert.

It stated that it had qualified to be awarded the tender as it had satisfied the criteria set out in the provisions of Section 31 of the Act and had submitted accurate and complete information about its qualification. It argued that it had submitted a complete sample kit which contained sterile lancets and that

it specified that the storage temperature was between 4^0 - 40^0 Centigrade and not an upper limit of 30^0 Centigrade as stated by the Procuring Entity. It averred that its outer package, product insert and the tender documents submitted indicated the storage temperature of its product. It further stated that the product insert lacked the storage temperature in the English language translation but was in the Portuguese and French language. It argued that the Procuring Entity should have considered that as a minor deviation as allowed under Section 64 (2) of the Act.

The Applicant submitted that the Procuring Entity erred in asserting that the technical information provided in the outer package was inconsistent with the one on the product insert. It further stated that the Procuring Entity failed to determine the Applicant's qualification using the criteria and requirements set out in the tender documents contrary to the provisions of Section 31 (4) of the Act. In addition, it argued that the Procuring Entity erred under Section 31 (7) of the Act by not adopting creative approaches such as the design of the product leading to the suppression of the efficiency of the procurement process. It argued that the Act laid emphasis on the aspect of the performance rather than the design of descriptive characters and that the Procuring Entity could have determined the aspects of the kit's performance as compared to the design as provided in Section 34 (4) of the Act.

The Applicant further submitted that the Procuring Entity failed to evaluate the tender as required by Section 66 of the Act. It argued that the evaluation and comparison of the tender was not done using the procedures and criteria set out in the tender document; that the criteria was not objective and quantifiable; and that the tender was not awarded to the lowest evaluated bid as required by Section 66 (4) of the Act. In so doing, it submitted that, the

Procuring Entity erred in failing to declare its bid responsive as it conformed to all the mandatory requirements of the tender document as required under Section 64 (1) of the Act.

The Applicant concluded by stating that the Procuring Entity erred by rejecting its tender without justifiable and objective reasons, contrary to Regulation 14 (2) (b). It stated that its bid was rejected on generalized grounds without specifying the particular technical information that was inconsistent.

In response, the Procuring Entity submitted that Clause 29.3 of the Instructions to Tenderers (ITT) provided that the Procuring Entity was to determine whether each tender was of acceptable quality, complete and was substantially responsive to the requirements of the tender documents. It added that Clause 6 (3) (d) of the Tender Data Sheet (TDS) required a tenderer to submit a sample that conformed to the technical specifications provided in the tender document and that it should be an exact representation of the product that was to be supplied.

The Procuring Entity further submitted that the Applicant's sample was non-responsive and incomplete as it did not contain lancets and the product insert indicated that the lancets were optional. It alleged that the Applicant failed to indicate whether it would provide lancets in all test kits should it be awarded the tender. The Procuring Entity added that Clause 6 (3) (d) of the TDS entitled it to disqualify a bidder who provided an incomplete tender. It added that the Applicant failed to proof that there was mischief on the part of the Procuring Entity in the evaluation process.

The Procuring Entity further stated that the Applicant's sample was inconsistent with the tender document requirements as it failed to meet the required storage temperature of the test kit of between 2^0 Centigrade to not less than 40^0 Centigrade. In addition, it stated that the Applicant's product insert did not indicate the lower or upper limits of temperature for storage. The Procuring Entity further submitted that the brochure provided by the Applicant contained four different HRP2 products and it was unable to determine which product the Applicant was to supply. It added that the brochure, which is a marketing tool, was not one of the documents required by the Procuring Entity in support of the bid. It averred that the storage temperatures provided in one of the products in the brochure had a maximum level of 30^0Centigrade in the Malaria Ag. Combo product.

The Procuring Entity affirmed that the lancet was not provided in the Applicant's Kit and the blood collecting device dropper was not referred to in the label of the packaging but was indicated in the product insert. The Procuring Entity stated that the inconsistency between the outer packaging and the product insert of the test kit made the sample non responsive. It added that during technical evaluation, the standard guiding information was to be determined from the product insert and not the package.

The Procuring Entity stated that the aspect of Sensitivity and Specificity was not applied to all the bidders including the Applicant. It added that the parameter was subjective as it was contained in the World Health Organisation (WHO) criteria and once a bidder was included in the WHO list, then the evaluation of its product on Sensitivity and Specificity was done. The Procuring Entity therefore exempted every bidder who appeared on the WHO list on the parameter of Sensitivity and Specificity. It stated that the successful

bid had a maximum storage of 37^0 Centigrade and that since no other bidder had quoted the required 40^0 Centigrade the Procuring Entity considered it as a minor deviation. It asserted that the Malaria prone regions have temperatures of between 35^0 - 37^0 Centigrade and none have temperatures of 40^0 Centigrade. Further, it stated that the temperature storage requirements were in the product insert of the successful bidder.

In response to the issues of breach of Section 34, the Procuring Entity submitted that paragraph 4 of the Technical Specifications; the specific test kit it required had to have a storage temperature of 2^0 Centigrade to not less than 40^0C. It added that Clause 6 (3)(d) of Section 2 of the Tender Data Sheet (TDS) required bidders to submit a sample that conformed to the technical specifications and that was similar to the product required. It argued that the criteria for evaluation were stipulated in Clause 29.3 of the ITT and the Act requires that the criteria be qualitative and quantitative. It further argued that under Section 64 (2) of the Act any clarification of the bids should not change the substance of the tender.

The Procuring Entity, in response to the alleged breach of Section 66 of the Act, stated that Section 66 (2) provided for the evaluation to be carried out using the procedure and criteria set out in the tender documents. It averred that the Applicant's tender failed to comply with the technical specifications to the tender and was rejected on that basis. It stated that the tender could therefore not be evaluated on price as it was non-responsive at the technical stage.

The Interested Candidate, M/s Surgipharm Limited stated that it had submitted samples as per the requirements and that it met all the tender requirements and hence the decision of the Procuring Entity should not be changed.

The Board has considered the submissions of the Parties and the documents before it.

The issue to be the determined by the Board is whether the evaluation of the bids was done in accordance to the requirements of the tender document.

The Board notes that ITT 6.3 provided for the documentation requirements for the eligibility of goods to be supplied. Clause 6.3 (d) stated as follows:-

> ***"The tenderer is requested to provide in support of their technical offer a sample for tests for each of the items offered under separate cover at or before the tender closing date and time. The sample is to be clearly labelled with the tenderer's name, tender reference and identification of the product. The sample requested is to be submitted as per the technical specification offered by the tenderer and shall represent exactly the product that is intended to be supplied in case of contract award.***
>
> ***If for reasons other than the tender specific labelling requirements, the sample is not consistent with the required technical specifications, then the offer for the particular item may be rejected.'***

The Board further notes that the evaluation was done based on the following parameters:

1. *"Documentary Evidence, Manufacturer/Manufacturer's Agent*
    - *Manufacturers Authorization*
    - *Certificate of incorporation*
    - *Original Technical Brochures/Technical Literature*
    - *WHO pre-qualification of Diagnostics Programme/evidence of Published Peer Review Literature on performance of the product that is intended to be supplied in case of contract award*
    - *Technical Specifications*
2. *The sample*
    - *Brand Name*
    - *WHO Pre-qualification of Diagnostics Programme*
    - *Sensitivity (99%) and specificity (95%)*
    - *Easy to use step by step procedure*
    - *Test provided as a complete kit with all materials/equipment/supplies required to perform the test including swabs, assay buffer, lancets and capillaries/pipettes, etc*
    - *Test Type: cassettes – with wells for specimen and buffer*
    - *Results in 15 – 30 minutes*
    - *Storage temperatures from 2 deg C to not less than 40^0 C*
    - *Guaranteed shelf life of the kit = > at least 75% after delivery to named place of destination*
    - *Packaging: 20 – 25 tests per complete kit*
    - *Test kit and all accessories to be suitably packed and labelled as complete kit"*

The Board notes that, on the issue of the provision of lancets the Applicant states in its outer package that it provided the lancets, yet the product insert indicates that the lancets were optional. The technical specifications offered indicated that the kit comprised of test cassette, buffer, sterile lancet & Swab and sample dispensing droppers. The Board further notes the Applicant's tender document has a page headed "components of First Response Malaria Ag. HRP2 Card Test" consisting of Cassette, Dropper, Silica Gel (Desiccant), Aluminium Pouch and the Developer label. The Board notes that the list excludes the lancets and swabs.

It is therefore clear from the foregoing that the Applicant did not provide the lancets.

The Board further notes that the sample to be provided was to support the technical proposal of the bids. The Board also notes that from the Manufacturers Authorization Form in the tender submitted by the Applicant, that it is a manufacturer of the First Response Malaria Ag.HRP2 Test Kits. The document gives the specification of the product to be supplied as the "First Response Malaria Ag. HRP2 Test Kit". The Applicant in its General Technical Specification Form submitted to the Procuring Entity had stated that the product it was offering was "First Response Malaria Ag. HRP 2 Card Test". The Board further observes that the outer package of the sample and the Product Literature had the same title name as the product being offered.

The Board further notes that the Applicant had provided a product insert, a brochure and an outer package of the product it was to supply. It is further observed that the brochure provided had four products namely Malaria Ag. Combo (pLDH/HRP2); Malaria Ag. (HRP2); Malaria Ag. (pLDH); and

Malaria Antibody P. f. P.v . The Board further notes that the brochure had features for the four different products and the Malaria Ag. (HRP 2) features were as follows:-

- ***"Clear background***
- ***Self contained test procedure (card test)***
- ***95.0% sensitivity and 99.5% specificity***
- ***Stable up to 40⁰ C***
- ***Detection of P.faclviparum in human blood, accurate parasite concentrations of 100/µ1 or less***
- ***High – tech membrane strip locks in visible test results at ambient conditions even months later***
- ***Long shelf life (24 Months)"***

The Board finds that the Applicant's outer packaging indicated that storage temperature was to be between 4⁰C to 40⁰C. The insert that was provided is in three languages namely, English, Portuguese and French. In the English version there is no mention of the temperature storage limits. In the General Technical Specifications the Applicant had responded to the requirement of Clause 1.5 that its product was stable from 4⁰ – 40⁰ C temperatures.

The Board observes that the Procuring Entity considered the Applicant's storage temperature ranges for its product, Malaria Ag. Combo (pLDH/HRP2) whose storage temperature was given in the brochure to be between 4⁰ - 30⁰ Centigrade, instead of the First Response Malaria Ag. HRP 2 Card Test" which indicated that it was stable up to 40⁰Centigrade. The Board notes that the Technical Evaluation Report indicates that the successful bidder had not attached the Original brochures and the technical specifications provided were not sufficient. In addition, its bid had an upper limit of 37⁰

Centigrade which the Procuring Entity considered closer to the specified 40^0 Centigrade.

The Board notes that the criteria for evaluation for Sensitivity and Specificity parameter was Sensitivity 95% or more at 100 parasites/μl for detection of plasmodium falciparum and Specificity 99% for plasmodium falciparum. The Board notes the evaluation grid contained in the Evaluation Report however reversed the criteria as follows, Sensitivity (99%) and Specificity (95%). The Procuring Entity had evaluated all the bids on this parameter. The Procuring Entity stated at the hearing that it did not penalise any bidder on this aspect and that all the bids were compliant on this parameter as they were in the WHO pre-qualified list. However, the Board notes that this aspect was not recorded in the minutes of the Evaluation Committee.

The Board further observes that the bid document of the Successful bidder had the Technical Specifications Form blank and only the signature was appended to it. The bidder did not specify or give a product description of the product it was submitting. The Board notes that the Procuring Entity evaluated and laid emphasis on the product insert in its evaluation and not the specifications detailed in the bid documents. The contract to be entered into between the winning bidder and the Procuring Entity would be based on the tender documents submitted by the bidder. In the absence of a brochure and proper description of the product being offered the final contract would be deemed incomplete.

As the Board has already noted, the grounds of review revolve around the manner in which the Procuring Entity conducted the evaluation process. The Board is alive to the High Court decision in MISC. Application No. 1014 of

2005 where Justice Ibrahim held that the Board should not constitute itself into an Evaluation Committee. The Board is aware that its mandate is set out in Section 93 (1) of the Act which states as follows:

> ***"93.(1) Subject to the provisions of this Part, any candidate who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the regulations, may seek administrative review as in such manner as may be prescribed."***

The Board has a duty to enquire whether a candidate who participated in a tender has suffered loss or risk suffering loss or damage due to breach of duty imposed on a Procuring Entity by the Act or Regulations. One of the cardinal duties imposed on a Procuring Entity is to carry out a fair and objective evaluation process using the criteria set out in the Tender Documents. To achieve the objectives of the Act as set out in Section 2, the tender specifications and criteria must be clear and objective. Further, the Procuring Entity must carry out the evaluation using the criteria set out in the tender documents.

As the Board has already noted, there are serious anomalies in the manner in which the evaluation process was carried out. One of such anomalies is arising from Clause 14.1(h) of the TDS which provides as follows:

> ***"In addition to the documents stated in Paragraph 14.1 (a) through (g), the following documents must be included with the Tender:***
>
> ***The Form(s) "Technical Specification" (Section VI) shall be completed by the tenderer with the required "Relative Information" duly signed and submitted with the Tender. The general indication "compliance" shall***

not be rendered sufficient; each regarding technical feature detail needs to be answered to. Even allegedly minor deviations need to be indicated."

The Board has noted that the Successful tenderer's bid did not comply with Clause 14.1(h) of the TDS on the Tender Specification Form, but only signed it. Having left that section of the tender blank, without providing the required information, then its bid was incomplete and was therefore non-responsive.

The Board further notes that the Applicant provided information relating to storage temperatures of 4^0 - 40^0 Centigrade. However, the Technical Evaluation Report states that the Applicant did not provide a lower temperature limit and that the upper temperature limit given was 30^0Centigrade. The Board finds that this observation by the Technical Evaluation Committee is not consistent with the information provided by the Applicant. In addition, the Board notes that though the Procuring Entity stated at the hearing that the criteria on Sensitivity and Specificity was not applied, the Technical Evaluation Report show that it was applied and the Applicant, among other bidders, were evaluated as non compliant yet they had complied with the tender requirements.

In view of all the above matters, it is clear that the evaluation process was not conducted in accordance with the criteria set out in the tender documents and hence was flawed.

Accordingly, these grounds of appeal succeed.

Taking into account all the above matters, the Request for Review succeeds. The Board directs, pursuant to Section 98 (a) of the Act, that the award to the successful bidder, Surgipharm Limited, be and is hereby annulled. The Board therefore directs the Procuring Entity to re-retender.

Dated at Nairobi on this 18th day of February, 2010

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Signed Chairman

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Signed Secretary