REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 32/2014 OF 4TH AUGUST, 2014

BETWEEN

NAIROBI ENTERPRISES LTD .....APPLICANT

AND

KENYATTA NATIONAL HOSPITAL..... PROCURING ENTITY

Review against the decision of Kenyatta National Hospital, in the matter of Tender No. KNH/T/01/2014-2016 for Supply and Delivery of Pharmaceuticals.

BOARD MEMBERS PRESENT

1. Mr. Paul Gicheru - Chairman
2. Mr. Hussein Were - Member
3. Mrs. Josephine W. Mong'are - Member
4. Mrs. Gilda Odera - Member
5. Mr. Nelson Orgut - Member

IN ATTENDANCE

1. Philip Okumu - holding brief for Secretary
2. Shelmith Miano - Secretariat

PRESENT BY INVITATION

Applicant - Nairobi Enterprises Ltd

1. Mr. O. P. Chaudhry - Operations Manager

Procuring Entity - Kenyatta National Hospital

1. Muriuki D. Mwenda - Advocate,
2. Mulondo V. Wataro - Advocate
3. Dome Obura - Legal Assistant.

Interested Parties

1. Dr. J. W. Kamama - Sales Manager, Kulal International Ltd
2. James Kyalo - Representative, KAM Pharmacy
3. Becky Muatini - Key Accounts, Highchem Marketing
4. Phanice Mbeta - Representative, Nairobi Pharmaceuticals
5. M. Khan - Director Operations, Sunpar Pharmaceuticals
6. Aggrey Kamba - Business Devpt Manager, Autosterial (E.A)Ltd
7. Ephantus Kamau - Business Devpt Manager, Regal Pharmaceuticals.

THE BOARD'S DECISION ON THE REQUEST FOR REVIEW

The Request for Review was filed before the Board on 4th August, 2014 seeking for review of the decision by the Procuring Entity on **Tender No. KNH/T/01/2014 – 2016** – Award of Tender for Supply and delivery of pharmaceuticals.

The Procuring Entity filed its response on 8th August, 2014 opposing the Request for Review.

When this Request for Review came up for hearing, the Applicant purported to appear in person through one Mr. O. P. Chaudhry who described himself as the Applicant's Operations Manager while the Procuring Entity was represented by the firm of M/s Mulondo, Oundo, Muriuki & Co. Advocates.

The Board noted at the start of the proceedings that the Applicant had filed a notice seeking to withdraw its Request for Review through a letter to the Board dated 18th August, 2014.

The Board however sought to confirm from Mr. Chaudhry whether he is the one who had signed and filed the Request for Review and the notice of withdrawal and whether he had any letter of authority from the Applicant confirming that he was its employee and/or appointing him in writing to act as its agent and represent it before the Board for any purposes relating to the proceedings.

Mr. Chaudhry informed the Board that the Request for Review and the notice of withdrawal had both been signed by one Mr. Amos Mongony who was allegedly one of the Applicant's employees.

The Board sought to know from Mr. Chaudhry the whereabouts of Mr. Amos Mongony who had filed the original Request for Review and the subsequent notice of withdrawal but who was not before the Board. Mr. Chaudhry first confirmed that he had left Mr. Mongony in the office but upon being given time to contact Mr. Mongony to appear before the Board and after a short adjournment, Mr. Chaudhry informed the Board that Mr. Amos Mongony could not be reached on his cell phone and was on his way to Eldoret. Mr. Chaudhry however admitted that he did not have a letter of authority from the Applicant authorizing him to participate or prosecute the Request for Review or to participate in the proceedings before the Board.

The Board notes that a Request for Review acts as a stay of proceedings of a procurement process once it has been filed. Under Section 94 of the Public

Procurement and Disposal Act, 2005, a Procuring Entity is prohibited from concluding a tendering process once the Board is served with a Request for Review. This means that in compliance with the order of stay the Procuring Entity has not been able to conclude the process of the tender since 4th August, 2014.

The Board is also aware that under Regulation 83 of the Public Procurement & Disposal Regulations 2006, a party may withdraw its Request for Review at any time before the Hearing. However, a party may not use the provisions of Regulation 83 to abuse the legal process by halting a procurement process without any intention to pursue the matter to its logical conclusion.

The Board further finds that though the right to withdraw a Request for Review exists, the Board must satisfy itself that the party seeking to withdraw or prosecute the Request for Review is the person who filed it or has authority to do so. Mr. Chaudhry did not satisfy the Board that he filed the Request for Review and the notice of withdrawal or that he was authorized by the Applicant which is a corporation to appear and act on its behalf for any purposes relating to this Request for Review.

The Board is satisfied that the purpose of filing this Request for Review by the Applicant was purely to buy time. The Applicant still continues to enjoy a business relationship with the Procuring Entity, a fact that was confirmed by Mr. Chaudhry.

This is a clear case of an abuse of the Board/Review process. The Board cannot therefore act on the Request to withdraw the Request for Review for want of Authority by the person purportedly appearing for the Applicant. The Board is satisfied that in the circumstances of this case, the only option left to it is to dismiss the Request for Review for want of prosecution since the Applicant had notice of today's hearing date and ought to have sent a duly authorized agent to

act for and represent it for the purposes of the proceedings including the Request to withdraw the Request for Review.

The Board notes that the Procuring Entity has incurred considerable expenses by engaging an advocate to represent it before the Board who filed quite an elaborate response running into 542 pages.

The Board is therefore persuaded that this is a proper case to award costs to the Procuring Entity.

The Board therefore orders as follows:

1. The Request for Review filed by the Applicant on 4th August, 2014 in respect of tender NO. KNH/T/01/2014 – 2016 is hereby **dismissed** for want of prosecution. The Procuring Entity may therefore proceed with the procurement process.

2. The Applicant will forthwith pay to the Procuring Entity costs in this matter which are assessed at the sum of **Kshs. 150,000** and supply the Board with a receipt evidencing such payment within **7 days** from the date of this order.

Dated at Nairobi on this 26th day of August, 2014.

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CHAIRMAN
PPARB

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SECRETARY
PPARB