PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 36/2014 OF 26TH AUGUST, 2014

BETWEEN

REVITAL HEALTHCARE (EPZ) LIMITED .....APPLICANT

AND

KENYA MEDICAL SUPPLIES AUTHORITY.....PROCURING ENTITY

Review against the decision of the Tender Committee of the Kenya Medical Supplies Authority dated 11th August, 2014 in the matter of **Tender No. GF ~~ATM – HIV – RD10 SSF – 13/14 – OIT – 025~~** for Supply and Delivery of Non-Pharmaceuticals **(Subject Item: Syringes 2pc – 5ml RUP with G21 Needle)**

BOARD MEMBERS PRESENT

Mr. Paul Gicheru	-	Chairman
Mrs. Gilda Odera	-	Member
Mr. Nelson Orgut	-	Member
Mr. Hussein Were	-	Member

IN ATTENDANCE

Ms. Pauline Opiyo	-	Secretary
Mr. Philip Okumu	-	Secretariat
Ms. Shelmith Miano	-	Secretariat

PRESENT BY INVITATION

Applicant.....Revital Healthcare (EPZ)Limited

1. Dr. John Khaminwa - Advocate
2. James Halwenge - Advocate
3. Faizah Sidi - Advocate
4. Esajee Muzaffer - Director
5. Lucy Caster Muoti - Quality Manager
6. Elijah Oluoch - Sales Manager

Procuring Entity.....Kenya Medical Supplies Authority

1. Julius Ogamba - Advocate
2. Daisy Rono - Advocate
3. Fredrick Wanyonyi - Corporate Secretary
4. Charles Juma - Procurement Director
5. Edward Buluma - Procurement Manager
6. John Kabuchi - Procurement Manager
7. Dorcas Kwayera - Quality Assurance Officer

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

1.0 Introduction

The Ministry of Health, through the National AIDS & STI Control Program (NASCOP), was in the process of implementing the Global Fund HIV SSF Grant in Kenya. The title is to expand HIV prevention, care and treatment services to reach universal access (80% coverage) to reduce both incidence and associated impact.

The Ministry authorised KEMSA to initiate the procurement of the supply and delivery of non-pharmaceuticals, under HIV/SSF. The Authority to initiate procurement was issued on 21st June, 2013. Initially, the tender was advertised on 27th March 2012 under year 1 (FY 2011/2012) and was found non-responsive and recommended for re-tendering.

The process was conducted through Open International Tender method / procedure. Advertisement was done on 13th May, 2014 in both the *Daily Nation Newspaper* and *The Standard Newspaper*, and tenders were closed /opened on 3rd June, 2014. Sixty five (65) tenderers bought the tender documents and twenty three (23) submitted their bids.

The subject item in this tender was Item No. 9 *"Syringes 2pc – 5ml Rup with G21 Needle"; unit of Measure: "Pack of 100s" and the Quantity being 1,080 packs.* The item attracted only three (3) bidders who submitted bids for it together with bids for other items in the tender.

The tender prices as read out during the tender opening were as follows:

Bidder Identification		Read-out Bid Price(s)				
	Name	Total Bid Amount	Tender Security	Unit Prices		
				Item	Item Description	Unit Prices
004	Tropa International Limited	KES 29,951,000	KES 700,000	09	Syringes 2pc – 5ml RUP with G21 Needle	KES 1,000.00
017	Bakpharm Limited	USD 495,760	USD 9,920	09	"	USD 4.50
019	Revital Healthcare (EPZ) Ltd	USD 10,476	USD 209.52	09	"	USD 4.20

Representatives from 10 companies were present during the public tender opening.

TENDER EVALUATION

The Tender Evaluation Team was appointed on 28th May, 2014 and comprised of representatives from the Ministry of Health and KEMSA. The evaluation team met and conducted the evaluation process from 6th to 17th June, 2014. The bids were evaluated on a stage by stage basis and each member filled and signed their own individual sheets.

STAGE A – PRELIMINARY EVALUATION

The twenty three (23) bids were subjected to a preliminary examination to determine the validity of the documents. This involved checking and confirming the following:

a) Duly filled and signed Tender Form;

b) Original Tender Security from Bank (not less than 2% of tender price, validity 120 days or up to 1st October, 2014 and beyond);

c) Copy of Company Registration Certificates/Certificate of Incorporation;

d) Valid Tax Compliance Certificate issued by the Kenya Revenue Authority (K.R.A.);

e) Duly filled and signed Declaration of undertaking (Integrity Statement).

The above were mandatory requirements as per the Tender Document (Section II: Tender Data Sheet (TDS) Clause ITT 7.1(a)), and therefore bidder(s) who failed to meet any of the criteria were to be disqualified from further evaluation.

The following three (3) bidders who quoted for the subject item were all found to be substantially responsive at this stage and were recommended to proceed to the next stage of evaluation:

Bidder No. 004:- Tropa International Limited

Bidder No. 017:- Bakpharm Limited

Bidder No. 019: Revital Healthcare (EPZ) Ltd

STAGE B – TECHNICAL EVALUATION

1. Documentary Compliance to the Tender:

This stage involved checking and confirming, for tenderers who were responsive at stage one, the following:

i) Technical Specifications duly completed and signed

ii) Duly signed Manufacturer's Authorisation (if tenderer is not manufacturer);

iii) Current Quality Certification GMP/ISO; (where applicable)

iv) Sample(s) submitted.

These were mandatory requirements as per the Tender Document and bidder(s) whose products failed to meet any of the criteria were to be disqualified from further evaluation.

Observation by the Evaluation Team:

Bidder No. 004 - Tropa International Ltd: - Manufacturer's Authorisations & Quality Certificates for the subject item were not provided, including for items Nos. 10, 11, 12, 13 & 14.

The Evaluation Team recommended that sixteen bids were responsive at this stage and were recommended to proceed to the next stage, including the remaining two bids for the firms that quoted for the subject item. These two firms were:

Bidder No. 017:- Bakpharm Limited

Bidder No. 019: Revital Healthcare (EPZ) Ltd

2. Technical Examination of the Products (Samples)

Item 9 - Syringes 2pc – 5ml RUP with G21 Needle:

Description	Complied (Y/N)	
	17	19
(a) Syringe Luer 5ml, with by packed needle 21G x 1.5" Auto Destruct (Re-use prevention), Sterile, Non-toxic, Non-pyogenic	Y	Y
(b) Needles should be of stainless steel. Must be sharp and should not bend on injection	Y	Y
(c) Syringe should be of Polyethylene (PEF) or polypropylene (PP) material	Y	Y
(d) Barrel should be sufficiently transparent to allow easy measurement of the volume contained in the syringe and detection of air bubble	N	N
(e) Syringe should have two pieces: barrel with Luer nozzle and piston	Y	Y
(f) Graduated scale on the barrel should be easy to read, with scale interval of 0.1ml and 1ml increment between graduation lines	N	N
(g) Graduation should be numbered in indelible ink	Y	Y
(h) Position of the Luer nozzle should be eccentric/concentric	Y	Y
(i) Syringes should not leak	Y	Y
(j) Plunger should be well fitting inside the barrel to allow for free and smooth movement	Y	Y
(k) Syringe is automatically disabled upon usage and the plunger breaks when pulled	Y	Y
RESPONSIVE (Y/N)	N	N

The evaluation team observed that Bidders Nos. 017 and 019 both provided samples with plunger slanting and not aligned with graduated scale in the barrel; and thus the team recommended that the procurement was non-responsive.

THE TENDER COMMITTEE'S DECISION

The Ministerial Tender Committee of the Ministry of Health met on 11th August, 2014 and did not award the contract for supply and delivery of the subject item.

REQUEST FOR REVIEW

This Request for Review was been lodged by M/s Revital Healthcare (EPZ) Limited against the decision of the Kenya Medical Supplies Authority of 15th August, 2014 in the matter of Tender No. GF ATM-HIV-RD10 SSF-13/14-OIT-025 for supply and delivery of non-pharmaceuticals **(Subject Item: Syringes 2pc - 5ml RUP with G21 Needle).**

The Applicant requests the Board for the following orders:-

i) **THAT the decision of the Respondent (Procuring Entity) to reject the Applicant's bid for the supply of 2pc-5ml Rup with G21 Needles dated 15th August, 2014 be set aside;**

ii) **THAT the Respondent's (Procuring Entity's) award of the tender to supply 2pc-5ml Rup with G21 Needles be set aside;**

iii) **THAT the Respondent (Procuring Entity) be compelled to accept the Report by the Kenya Bureau of Standards and re-evaluate the Technical Evaluation of the Applicant's bid based on the report by the Kenya Bureau of Standards and award the Tender to supply 2pc-5ml Rup with G21 Needles accordingly;**

iv) **THAT the costs of this Review be awarded to the Applicant.**

In this Request for Review, the Applicant was represented by Dr. John Khaminwa, Advocate while the Procuring Entity was represented by Mr. Julius Ogamba, Advocate. Both the Applicant and the Procuring Entity filed several documents in support and/or opposition to the Request for Review. Both parties additionally filed written submissions which both advocates representing the parties highlighted.

Dr. Khaminwa started off his submissions by stating that the Applicant's Request for Review only related to item 9 of the **Tender No. GF ATM-HIV-RD10 SSF – 13/14 – OIT – 025** for the supply and delivery of non-pharmaceuticals (subject item: syringes 2 pc – 5ml RUP with G2I Needle) whose value was approximately USD 4,536.

Counsel for the Applicant submitted that ordinarily and owing to the small value attached to this item, any other bidder in the Applicant's shoes would have decided to abide by the Procuring Entity's decision declaring its tender unsuccessful and moved on. The Applicant in this application was however dissatisfied with the decision of the Procuring Entity and in Dr. Khaminwa's words had decided to file this Request for Review as a matter of principle but not on account of the monetary value of the tender.

Counsel for the Applicant observed that Kenya as a Country was faced with several challenges such as tribalism, violence, corruption and bad governance all of which needed to be addressed. Dr. Khaminwa submitted that Procurement was one of the potential areas that if not well regulated can breed corruption and the Board should give any aggrieved party appearing before it a hearing and treat any complaint brought before it seriously no matter how small the monetary value of the Procurement was because this was an area that the Government can lose a lot of money and the ordinary man can suffer tremendously.

Upon making the above introductory remarks Dr. Khaminwa then proceeded to submit on the substantive grounds for Review which Mr. Ogamba also responded to. The Board will capture each party's submissions while considering the issue or the issues framed for determination

The Board has considered the Request for Review, the Responses thereto, the written submissions tendered by the parties and has identified the following one issue for determination in this Review:-

(i) *Whether or not the Procuring Entity breached the Provisions of Section 66 of the Public Procurement and Disposal Act, 2005 (hereinafter referred to as the Act) and the criteria in the tender document as regards the technical specification in respect to item No. 9 and Whether or not the Procuring Entity breached the Provisions of Regulation 16 of the Public Procurement and Disposal Regulations and the Provisions of Articles 27 (5), 35 (1) and 47 (1) of the Constitution of Kenya 2010.*

Having identified the above issue, the Board will now proceed and consider the arguments by the parties and render its decision on the above issue. All the grounds of review have been consolidated as they revolve around the issue of the evaluation criteria and the applicable procedures.

The Applicant contested the Procuring Entity's decision to declare its bid for item number 9 as being non-responsive on account of failure to comply with the technical specifications and stated that it had met all the requirements set out in the tender document contrary to the Procuring Entity's contention.

The Applicant argued that the Procuring Entity in its notification letter dated 15th August, 2014 had declared the Applicant's bid unsuccessful on the ground that the plunger for the Syringe 5ml with 21G needle Auto Destruct Plunger (Re-use prevention) was not well fitting inside the barrel to allow for free and smooth movement. This argument was premised on the allegation by the

Procuring Entity that the sample provided had its plunger slanting and was not aligned with the graduated scale on the barrel.

Though this was the only reason set out in the letter of notification dated 15th August, 2014 for the Applicant's disqualification, the Procuring Entity stated in its Replying Affidavit and in its written submissions that the Applicant's sample had also failed to satisfy the following additional criteria:-

(i) That the barrel was not sufficiently transparent to allow easy measurement of the volume contained in the syringe and the detection of the air bubble.

(ii) That the graduated scale on the barrel were not easy to read, with scale interval of 0.1 ml and 1ml increment between graduation lines.

Dr. Khaminwa however contested these reasons and pursuant to the provisions of Regulation 85 of the Public Procurement and Disposal Regulations (2006) the Board allowed the Applicant to call one Lucy Caster Muoti to demonstrate to the Board that the Applicant's sample infact met all the criteria on the basis of which its bid for item No. 9 had been declared unsuccessful.

Counsel for the Procuring Entity did not object to the Applicant's request to call Ms. Lucy Caster Muoti to demonstrate such compliance but instead requested the Board to allow the Procuring Entity to also be accorded an opportunity to call an expert to contradict any statement that may be made by Ms. Muoti in the event that it intended to contest any statement by her.

Ms. Lucy Caster Muoti who was led by Dr. Khaminwa in demonstrating that the Applicant's sample complied with the technical specifications set out in the tender documents requested to be provided with one of the samples

submitted to the Board to assist her in the demonstration. She stated that she was 27 years old and was the Quality Assurance Manager with the Applicant and was currently stationed in Mombasa. She also stated that she had a Diploma in Analytical Chemistry and was the holder of a Bachelors degree in Analytical Chemistry (industrial option).

She further stated that her duties as a Quality Manager was to first ensure that all the Applicant's products comply to specifications and that they abide by the Quality Management System which the Applicant was following as per the ISO 13485:2012 and ISO 9001:2008 Certifications.

While holding the sample submitted to the Procuring Entity in her hands, she stated that the syringe met all the three requirements. She demonstrated to the Board that the syringe was sufficiently transparent to allow for an easy measure of the volume contained in the syringe and detection of air bubbles. She also stated during her demonstration that the barrel of the sample of the syringe was graduated and that it was easy to read the graduation lines. She also stated that the syringe had its plunger slanting and the essence of this was to ensure that an air bubble would be retained in the syringe and would not be injected into the patient because if this happened it could kill the patient or cause a stroke or heart attack as the slant helps in eliminating the air bubble.

The Procuring Entity did not call any expert to controvert this account inspite of being allowed to do so by the Board.

According to Dr. Khaminwa the main dispute in this Request for Review revolved around the issue of Technical Specifications as laid out at pages 64-65 of the Tender Document with respect to Item No. 9 with particular emphasis o

on the three aspects /reasons in respect of which his client had been disqualified.

The Applicant relied on an exchange of email correspondences with the Procuring Entity in which the Applicant had provided the Procuring Entity with a Standardisation Mark No.18909 from KEBS issued on 6th August 2014 and which was expiring on 5th August 2015 and which confirmed that their hypodermic syringes fully met the technical specifications set out in the Tender Document but that explanation was declined by the Procuring Entity.

Dr. Khaminwa further submitted that the syringes manufactured by the Applicant had been approved by the World Health Organisation (WHO) and were being widely used in Europe and even nearer home in Tanzania and there was absolutely no reason for the Procuring Entity to reject the provided sample. The Applicant submitted that although it had had issues with the WHO regarding the quality of its syringes, this had already been resolved as evidenced in a WHO GMP Compliance Verification Certificate dated 25th October 2013 which expires on 24th October 2015. It was also the Applicant's contention that technical specifications at pages 64 and 65 of the Tender Document did not preclude syringes with slanting plungers from being submitted and instead the criteria stipulated in the Tender Document was that *the plunger should be well fitting inside the barrel to allow for free and smooth movement.*

Dr. Khaminwa stated that the slanting syringes of Revital Healthcare (EPZ) Limited are of international standard and are therefore safe and acceptable. He urged the Board allow the Request for Review.

In reply, Mr. Ogamba for the Procuring Entity relied on the Replying Affidavit sworn by Dr. John K. Munyu and which was filed on 2nd September 2014 and also on the submissions filed on 11th September 2014. He first urged the Board to take note of the fact that no award had been made in respect of item No. 9. He further pointed out that the Applicant had conceded that their syringes we actually slanting.

He also maintained that the syringe samples provided by the Applicant could not eliminate the air bubbles. He referred the Board to the technical specifications at pages 64-65 of the Tender Document and stated that it was not possible for a slanting plunger to be well fitting in the barrel to *allow for free and smooth movement* as required under the criteria on technical specifications.

Mr. Ogamba concluded his submissions by stating that since item 9 had not been awarded to any bidder, this item would have to be re-advertised as none of the bidders met the specifications for it. Regarding the allegation that Article 47 of the Constitution had been breached Mr. Ogamba asserted that the Procuring Entity had given reasons for failure by the Applicant's bid and therefore the Procuring Entity did not violate the provisions of the Constitution – in particular Article 47(2).

The Board has heard the submissions made by all the parties and has considered the documents filed by the said parties.

The Board has also perused the tender documents and finds that the technical specifications for the subject item which are set out at pages 64 and 65 of the Tender Document, inter alia provide as follows: _

Item 09: Syringe, 5ml with 21G needle Auto Destruct (Re-Use prevention)

- *Syringe Luer 5ml, with by packed needle 21G x 1.5" Auto Destruct (Re-Use prevention), Sterile, Non-toxic, Non-pyogenic.*
- *Barrel should be sufficiently transparent to allow easy measurement of the volume contained in the syringe and detection of air bubble.*
- *Syringe should have two pieces: barrel with Luer nozzle and piston.*
- *Graduated scale on the barrel should be easy to read, with scale interval of 0.1ml and 1ml increment between graduation lines.*
- *Plunger should be well fitting inside the barrel to allow for free and smooth movement.*
- *Should conform to KEBS/ISO Standards or equivalent*
- *Manufacturer must be KEBS/ISO certified or equivalent*

Submission of sample:

- *Submit a sample of one (1) box for evaluation*

The Board finds that the Procuring Entity did not indicate in its Evaluation Report that it had evaluated the Applicant's tender based on all the criteria that it had set out in the Tender Document.

The Board established from the documents submitted to it that the following criteria were not applied by the Procuring Entity, since their results are not reflected in the Procuring Entity's Evaluation Report:

- *That the sample should conform to KEBS/ISO Standards or equivalent*
- *That the Manufacturer must be KEBS/ISO certified or equivalent*

The Board holds that this is contrary to the Provisions of Section 66(2) of the Act, which states as follows:-

"Evaluation of Tenders

66(2) the evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and no other criteria shall be used"

The Board further finds that the Procuring Entity did not respond to the direct issue raised by the Applicant about its product being certified by the Kenya Bureau of Standards.

On the issue of whether the sample of the syringe provided by the Applicant met the criteria set out in the tender document, the Board finds that the requirement in the tender document was that the Plunger should be well fitting inside the barrel to allow for free and smooth movement, that it should be transparent to allow for easy measurement of the volume contained in the syringe to enable detection of air bubbles and it should have a graduated scale on the barrel and should be easy to read with scale interval of 0.1ml and 1ml intervals between graduation lines.

The Board has examined the sample supplied and has considered the explanation given by Ms. Lucy Caster Muoti and which it found reasonable and therefore accepts her explanation more so because her explanation was not controverted by any other expert and finds that the syringe submitted by the Applicant met all the above three requirements.

Before the Board concludes this matter, the Board finds that the Procuring Entity also acted in contravention of the provisions of the requirement of Regulation 16 of the Regulations.

Regulation 5 of the amended Regulations which amended the Provisions of Regulation 16 states that:

> *"The principal Regulations are amended by deleting Regulation 16 and substituting therefore the following new regulation:*
>
> *16(5) Each member of the evaluation committee shall evaluate the tenders or proposals received by the procuring entity 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 committee"*

The same Regulation 5 of the amended Regulations further states that:

"16(8) The report prepared under paragraph (7) shall include-

(a) the results of the preliminary evaluation, with reasons why any tender or proposal was rejected;

(b) the scores awarded by each evaluator for each tender or proposal;"

The Board has perused the Evaluation Report submitted to it by the Procuring Entity and notes that it is signed by six members of the Evaluation Committee, the report does not indicate whether the members first individually and independently carried out the evaluation and no reports of each individual member were attached.

Before concluding this matter, the Board accepts as correct the submissions made by Counsel for the Applicant that any person aggrieved by the decision of a Procuring Entity is at liberty to appear before this Board to have that grievance addressed and where this happens, the Board will not hesitate to hear and determine the complaint so long as the Procurement meets the threshold set out in the Act and the Regulations. The amount of the tender is not and will not in future be a relevant consideration so long as the Board is seized of the jurisdiction to hear the matter.

The Board also reiterates that while exercising any power conferred on it by the Act or the Regulations, a Procuring Entity is bound by the Provisions of Article 227 of the Constitution and Section 2 of The Public Procurement and Disposal Act, 2005.

Article 227 of the Constitution reads as follows:-

> *" When a state organ or any other public entity contracts for goods and services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost effective."*

Section 2 of the Public Procurement and Disposal Act set out the following as the objectives of the Act:

a) To promote maximum economy and efficiency;

b) To promote competition and ensure that the competitors are treated fairly;

c) To promote integrity and fairness of those procedures;

d) To increase transparency and accountability in those procedures and;

e) To increase confidence in those procedures."

The net effect of all this Constitutional and Statutory Provisions is that the procurement process and how it should be conducted is enshrined in the Constitution and Statute. A Procuring Entity while exercising the powers conferred upon it by the Constitution and the Act exercises such powers for, on behalf and in trust for the Public. Both the Constitution and the Act impose on a Procuring Entity the duty to the act fairly, equitably and transparently, to promote competition and act in a manner that promotes maximum economy, efficiency and saves costs. The Procuring Entity is also obliged to promote integrity in the procurement process.

For all the above reasons the Applicant's Request for Review is allowed to the extent set out in the following final orders.

THE FINAL ORDERS OF THE BOARD

As a result of the Board's findings above and in exercise of the powers conferred upon it by the provisions of Section 98 of the Act, the Board makes the following Orders:-

a) The Request for Review filed by the Applicant herein on 26th August 2014 be and is hereby allowed and the Procuring Entity's decision declaring the Applicant's tender non-responsive in respect of item No.9 of the subject tender is annulled.

b) The Procuring Entity is ordered to re-evaluate the tenders for Item No. 9 of **Tender No. GF ATM- HIV - RD10 SSF - 13/14 - OIT - 025 for Supply and Delivery of Non-Pharmaceuticals (Subject item: Syringes 2pc - 5ml RUP with G21 Needles)** under the technical specifications in the Tender Document in line with the findings of this Board within fourteen (14) days from today.

c) Prayer 2 of the Request for Review is however dismissed since the Procuring Entity did not award the tender in respect of item No. 9 and in the absence of such an award there can be no award to be set aside.

d) Each party shall bear its own costs of the Request for Review.

Dated at Nairobi on this 17th day of September, 2014.

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CHAIRMAN

PPARB

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SECRETARY

PPARB