

**REPUBLIC OF KENYA**  
**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD**

**REVIEW NO. 9/2015 OF 29<sup>TH</sup> JANUARY, 2015**

**BETWEEN**

**MEDIPHARM EAST AFRICA LTD .....APPLICANT**

**AND**

**NATIONAL COUNCIL FOR  
PERSONS WITH DISABILITIES ..... PROCURING ENTITY**

Review against the decision of the Tender Committee of National Council for Persons with Disabilities in the matter of Tender No: NCPWD/PROP003/2014/2015 for Supply and Delivery of Therapeutic Sunscreen Lotions with Sun Protection Factor (SPF) 50+ for children and (SPF) 50+ for adults for persons with Albinism.

**BOARD MEMBERS PRESENT**

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

## IN ATTENDANCE

Mr. Philemon Chemoiywo - Secretariat  
Ms. Shelmith Miano - Secretariat

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## PRESENT BY INVITATION

### **Applicant - MEDIPHARM EAST AFRICA LIMITED**

Mr. Alex Masika - Advocate  
J. Aluvivia - Secretary, Masika Advocate  
Leah Kiambi - Manager  
F.B.I Oketch - Assistant Manager

### **Procuring Entity - NATIONAL COUNCIL FOR PERSONS WITH DISABILITIES**

Mr. Fredrick C. Omondi - Senior Legal Officer  
Mr. Alex P. Munyere - Program Officer

### **Interested Parties**

Mr. Andrew Wandabwa - Advocate, Zintech Ltd & Armick Ltd  
Mr. Richard Mulwa - Sales, Armick Ltd  
Mr. Julius Otieno - Advocate, Wandabwa Advocates  
Mr. Eric Osingo - Clerk, Wandabwa Advocates  
Mr. Vinod Guptan - Director, Abacus Pharma (A) Ltd  
Mr. Edga Magero - Manager, S.D.I

## **BOARD'S DECISION**

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

## **BACKGROUND OF AWARD**

The National Council for Persons With Disabilities (NCPWD) received funds from the Government for the Persons With Albinism (PWAs) programme. Consequently, the Council in liaison with the Ministry of Medical Services and the Ministry of Gender, Children & Social Development formed a technical working group to identify the requirements for the programme.

### **Advertisement**

Tender NO. NCPWD/PROP003/2014/2015 for the Procurement of Sunscreen Lotions was advertised on 15<sup>th</sup> October, 2014 in the *Daily Nation* and in the *Standard* newspapers.

### **Closing/Opening:**

The tenders were closed/opened on 29<sup>th</sup> October, 2014 at 11.00 am. During the tender opening the following observations were made;

- Twelve bids were received
- The following four bids had no samples;
  - a) Blootex Limited
  - b) Copper Silicon Ltd.

c) Lizzol Chem. Company Limited

d) Ammash Enterprise Company Ltd.

• ~~One company Japmor Enterprise Ltd submitted only one sample for adults~~

• Four companies did not bring their bids in sealed separate envelopes as per requirement. They included;

(1) Orca Investments

(2) Copper Silicon Ltd.

(3) Blootex Ltd.

(4) Ammash Enterprise Company Ltd.

• The following three firms had no security bonds:

a) Copper Silicon Ltd

b) Blootex Ltd

c) Ammash Enterprise Company Ltd

The following six bids were declared non-responsive and were therefore not submitted for technical evaluation:

NO	NON RESPONSIVENESS	NAME OF COMPANY
1	Lack of samples	Blootex Limited
		Ammash Enterprise Company Ltd
		Lizzol Chem. Company Limited
		Copper Silicon Ltd.
2	Lack of bid bonds	Copper Silicon Ltd.
		Ammash Enterprise Company Ltd.

		Blootex Ltd.
3	No bids in Sealed Separate envelopes	Orca Investments
		Blootex Ltd.
		Ammash Enterprise Company Ltd.
		Copper Silicon Ltd.

The tender documents for each bidder, together with their samples, were packed and sealed to await the evaluation exercise.

## TECHNICAL EVALUATION

### Criteria for evaluation

The criteria and its accompanying notes were as follows:

	CRITERIA	Y	N	MKS	
1	<b>Product name</b> The name of the dosage form (cream, lotion, spray)			2	<i>If products indicates cream, lotion or spray award full 2 marks or Zero for not.</i>
2	<b>Status of approval in the country of origin (where applicable)</b>			3	<i>If the product records indicates country of manufacturing</i>
3	<b>Sun Protection Factor( SPF)</b>			3	<i>If SPF is indicated on the sample</i>
4	<b>Samples</b>			5	<i>Proof of sample availability</i>
5	<b>Sample label in English Language</b>			2	<i>If sample label in English language</i>
6	<b>Documentary evidence of conformity of the goods</b>			3	<i>Conformity of Standards of manufacturing</i>
7	<b>Water Resistance of the product</b>			2	<i>Ensure it is well labeled</i>
8	<b>Tender security (Bid Bond)</b>			8	<i>From recognized financial institution</i>
9	<b>The net quantity of the product (by volume in milliliter, or weight in grams.)</b>			2	<i>Quantities must be 200 ml</i>
10	<b>Active Pharmaceutical Ingredients OR equivalent</b> <ul style="list-style-type: none"> <li>• Avobenzonone Not More Than 6%.</li> <li>• Dioxybenzone Not More Than 3%</li> </ul>			8	<i>1 mark for each of the eight mentioned</i>

	<ul style="list-style-type: none"> <li>• Octocrylene Not More Than 10%</li> <li>• Octylmethoxycinnamate Not More Than 17.5%</li> <li>• Zinc Oxide Not More Than 25%</li> <li>• Titanium Dioxide Not More Than 25%</li> <li>• Homosalate Not More Than 15%</li> </ul>				
	<ul style="list-style-type: none"> <li>• Octylsalicylate Not More Than 5%</li> <li>• Vitamin E</li> </ul>				
11	The proportions of those ingredients either expressed as a percentage in terms of weight/weight or weight/volume or expressed as a weight in a stated weight of volume or the product using metric units of measurements i.e mg/g, mg/ml			8	<i>Metric units well indicated</i>
12	Recommended storage conditions. NOTE. Store below 30° c as applicable. Stability date to support said storage conditions should be provided.			8	<i>Must be well indicated</i>
13	Batch or lot number of the product			5	<i>Well labeled on the sample</i>
14	Expiry date of the product (should at least be 2/3 of the inferred shelf life)			5	<i>Must be at least 2/3 to expiry period</i>
15	Directions for use of the product (The directions for use for a primary therapeutic sunscreen should include statements to the effect that the product should be applied to the skin in generous amounts over all of the exposed areas 20 minutes before sun exposure, it should be reapplied every two hours or more often when sweating, and should be reapplied after swimming or toweling)			6	<i>Clear instructions as criteria</i>
16	Required warning statements (Note: The labels of both primary and secondary therapeutic sunscreens should include warning statements to the effect that the product should be kept out of the eyes and should not be used on broken, damaged or diseased skin. Spray-sunscreens should also include a warning not to inhale the product)			8	<i>Statements should be clearly marked</i>
17	Trade name of the product (where applicable)			2	<i>Should be indicated</i>
	<b>TOTAL MARKS</b>			<b>80</b>	

## FINANCIAL

	CRITERIA	Y	N	Mks	
18	Bank statement			6	<i>Recent (not older than 3 months)</i>
19	Audited accounts			6	<i>For three financial years</i>
20	PIN			2	<i>Availability of pin</i>
21	Certificate of Compliance			3	<i>If available from KRA</i>
22	Certificate of registration/Incorporation			3	<i>If available</i>

The summary of scores evaluated for each bidder was as per the table below:

Refer To Table above	Medi Pharm E.A Ltd	Sunken Int Ltd	Kensionary M. S. Ltd	Abacus Pharma (A) Ltd	Zintech Ltd	Armick Ltd
1-22	85	87	85	85	94	94

## QUOTATIONS FOR EACH BID

	Company	Quantity	Unit Cost (In Ksh)		Total
			Children	Adult	
1	Medipharm East Africa Ltd	20,000	1,505.00	1,417.00	
2	Suken International Ltd	20,000	2,530.00	2,420.00	
3	Kensionary Marketing S Ltd	20,000	1,680.00	1,500.00	
4	Abacus Pharma Ltd	20,000	2,146.00	1,960.40	
5	Zintech Ltd	20,000	2,190.00	2,250.00	
6	Armick Ltd	20,000	2,400.00	2,200.00	

Upon further evaluation of tender documents the committee noted as follows:

- ~~No. 3 Medipharm East Africa Limited had not indicated the label (GOK) on their sample and its tender document had no bank statement attached.~~
- No. 4. Suken International Ltd had no bank statement; they had a recommendation from Equity Bank which was dated March, 2013.
- No. 5 Kenshionery Marketing Systems Ltd had no bank statement but had an introductory letter from Equity Bank with details similar to those in the introductory letter from Suken International Ltd. including dates.
- No. 6 Abacus Pharma Ltd. had no bank statement
- No. 8 Zintech Ltd. had all requirements
- No. 12 Armick Ltd. had all the requirements and had an added advantage because they had a certificate for AGPO (Access to Government Procurement Opportunities).

### **RECOMMENDATIONS ON EVALUATION**

In view of the technical and financial evaluation, the committee recommended that tender number NCPWD/003/2014/2015 be awarded as follows: -

1. ZINTECH Ltd. to supply Sunscreen lotions for the children
2. ARMICK Limited to supply Sunscreen Lotions, for adults.



These awards were based on technical and financial evaluation and access to government procurement opportunity. Armick Limited is duly registered under the disadvantaged group - Women Category.

### **THE TENDER COMMITTEE'S DECISION**

The Tender Committee at its meeting held on 16<sup>th</sup> January, 2015 approved award of the tender for Supply and Delivery of Sunscreen Lotions to ARMICK Ltd. and Limited ZINTECH for adults and children, respectively.

### **THE REVIEW**

The Request for Review was lodged on 29<sup>th</sup> January, 2015 by M/s Medipharm East Africa Limited against the decision of the Tender Committee of National Council for Persons With Disabilities in the matter of Tender No: NCPWD/PROP003/2014/2015 for Supply and Delivery of Therapeutic Sunscreen Lotions with Sun Protection Factor (SPF) 50+ for Children and (SPF) 50+ for Adults for Persons with Albinism

The Applicant was represented by Mr. Alex Masika, Advocate, while the Procuring Entity was represented by Mr. Fredrick C. Omondi, Advocate. The Interested Parties, M/s. Zintech Limited and M/s. Armick Limited were represented by Mr. Andrew Wandabwa, Advocate.

The Applicant raised two grounds of Appeal and urged the Board to make the following orders:

- a) Annul in whole the decision of the tender committee of the Procuring Entity.*

*b) Award the tender to the Applicant.*

*c) The Procuring Entity be condemned to pay costs of this Request for Review to the Applicant.*

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## **APPLICANT'S CASE**

In its submission to the Board, the Applicant stated that the Procuring Entity, through the Tender Committee's decision of 16<sup>th</sup> January 2015 unfairly disqualified the Applicant on the ground that the sample provided was improperly labelled. This, the Applicant believed, was the only reason it was disqualified even though the Procuring Entity did not expressly state as such in the letter of notification.

The Applicant submitted that it had complied with all the mandatory requirements to the tender in question but had unfortunately been disqualified. It further submitted that the criteria for labelling had been illegally imported into the evaluation process contrary to Section 66(2)(3)(b) of the Public Procurement & Disposal Act, 2005 (hereafter referred to as "the Act") and Regulation 16 of the Public Procurement & Disposal Regulations, 2006 (hereafter referred to as "the Regulations") made under it. It maintained that the issue of labelling was part of the "special conditions of contract" which could only be addressed later when a contract had been signed and that, even if the labelling was part of the tender document, it could not be used to disqualify the Applicant since it did not form part of the requirements in the instructions to bidders. The

Applicant asserted that labelling of samples attracted only two (2) marks in the technical evaluation and therefore it could not go into the substance of the tender. What was required was for the sample to be labelled in the English language and nowhere in the tender document was the sample required to bear the words *NCPWD/Government of Kenya*, the Applicant maintained.

The Applicant argued that in a normal pharmaceutical production line the bottles are produced in batches and packed in boxes, a situation not anticipated in this instance where just a bottle sample was required to be provided adding that the Applicant was passed at the preliminary stage.

The Applicant lamented that the Procuring Entity unfairly evaluated its tender failing to declare it the lowest evaluated bid and in so doing ended up wrongly awarding the tender to the Applicant's competitors. According to the Applicant, this arose due to the Procuring Entity mixing up preliminary evaluation with technical evaluation. Referring the Board to Section 2.22 at page 29 of the bid document (special conditions of contract) which talked about incorporation, VAT and bank statements all supposed to be evaluated at the preliminary stage, the Applicant submitted that those conditions were evaluated at the technical stage. The Applicant therefore contended that the Procuring Entity had imported preliminary evaluation criteria and used it in the technical evaluation.

With regard to financial evaluation the Applicant maintained that its bid was the lowest with a price difference in excess of Kshs 29 million, an amount the government would have saved had the Applicant been awarded the tender.

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With regard to being furnished with a summary of evaluation pursuant to Section 44 and 45 of the Act, the Applicant pointed out that the Procuring Entity failed to respond to the letter of 27<sup>th</sup> January 2015 from the Applicant, an act the Applicant interpreted to mean that the Procuring Entity was hiding something.

The Applicant concluded its submissions by asking the Board to find that it had suffered loss by being denied the tender and prayed for the whole decision of the Tender Committee to be annulled and costs awarded to the Applicant.

#### **THE PROCURING ENTITY'S RESPONSE**

In response, Counsel for the Procuring Entity, Mr. Fredrick Omondi, stated that his client had submitted the full technical evaluation report, including the minutes, in good faith because it had nothing to hide and that its action was in line with Section 2 of the Act in terms of transparency and integrity. He went on to state that he was relying on the affidavit of Hon. Mohammed Hussein sworn on 5<sup>th</sup> February, 2015 and another one by Alex Parsaloi Munyere also of the same date and the relevant Act, No. 14 of 2013 on the rights of persons with disabilities.

The Procuring Entity affirmed that on Page 28 of the Tender Document (Special Conditions of Contract) it was clearly stated that the labelling for both the inner and outer package should bear the words "*Free Sunscreen Lotions, NCPWD Government of Kenya*" as opposed to what the Applicant submitted. According to the Procuring Entity, the Applicant disregarded a critical condition, and as stated by Alex Parsaloi in his affidavit, this condition was inserted to specifically prevent a repeat of what had happened in the previous supply done in the year 2013 where the supply of similar products ended up in commercial shops to the detriment of persons with albinism. This condition, the Procuring Entity added, was applied across the board and that the Applicant had not shown how the condition discriminated against the Applicant. The Procuring Entity submitted that the Applicant was simply trying to delay the procurement process for monetary gain and in the interim period people with albinism will continue to suffer and that this should not be allowed.

The Procuring Entity went on to say that the Applicant failed to submit bank statements as required in the tender document to its detriment and should not be heard to complain that the special conditions ought to apply only after the contract has been concluded. On the issue of lowest bidder, the Procuring Entity urged the Board to distinguish between lowest evaluated bidder and lowest bid price. It argued that the Applicant's bid failed to meet the conditions provided for in the Tender Document and therefore the issue of the Applicant being the lowest bidder or lowest quoted price did not arise, the Applicant having been disqualified at the

Preliminary stage. The Procuring Entity concluded by stating that Section 64 of the Act was complied with in full and urged the Board to dismiss the Request for Review with costs to the Procuring Entity.

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### **THE INTEREST PARTY'S RESPONSE**

Mr. Andrew Wandabwa, Advocate for the two successful bidders, M/s. Zintech Ltd. and M/s. Armick Limited, submitted that the Applicant had been rightfully disqualified for failing the criteria of sample labelling as set out in the tender document. He referred the Board to the addenda issued in Clause 2.6 of Instructions to Tenderers and Special Conditions of Contract Clauses 2.4.1 and 2.4.2 requiring bidders to read and comply with these conditions. He also referred the Board to Page 28 (Special Conditions of Contract) Reference Item 8.7 which stated that the inner and outer packaging should bare the word "Free Sunscreen lotions, NCPWD Government of Kenya" and added that this was incorporated in the Instructions to Tenderers and therefore the Applicant ought to have complied with it.

The Interested Party also stated that evaluation was to be done in two stages, first at the preliminary and also at the detailed technical evaluation stage and that the Applicant had admitted that its sample did not bear the required labelling. It went on to state that there is nothing in the reading of Sections 64 and 66 of the Act to stop the evaluation committee from disqualifying a bidder on a preliminary basis notwithstanding that an earlier evaluation might have been done. The evaluation committee may

have looked at the bid at the technical stage and if it emerged that some fundamental preliminary requirements had not been complied with, nothing stops the Committee from “doing the right thing”, as in this case, to reject the Applicant’s bid at that stage, added the Interested Party.

The Interested Party averred that failure to label was not a minor deviation which could be overlooked reinforcing the Procuring Entity’s response that a past procurement of sunscreen lotions ended up in shops hence labelling became a fundamental test of ensuring that the product did not end up the same way. It averred further that the Applicant submitted a sample that did not comply with Special Conditions of Contract and cannot therefore escape from being bound by those conditions by simply stating, ‘they come after signing of contract’. The requirement for bank statements as contained on Page 29 of the Tender Document (Special Conditions of Contract) which was to be submitted together with audited accounts and the Applicant cannot in one breadth accept that the audited accounts were compulsory and in the other, bank statements were not.

#### **THE APPLICANT’S REPLY**

Whilst the Applicant conceded that the General Conditions of Contract and the Special Conditions of Contract were part of the Tender Document, it contested the application of these conditions in the technical evaluation criteria of the tender and maintained that these conditions only applied after the contract has been signed and is in place. It objected to the Interested Party’s contention that if during technical evaluation an issue

came up that would have been evaluated during preliminary evaluation that it should be evaluated further. The Applicant reiterated its bid had qualified at preliminary stage and that the same criteria could not be used to disqualify it at the technical evaluation stage.

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### THE BOARD'S FINDINGS

The Board, having carefully considered oral and written submissions of the parties and examined all the documents that were submitted to it, has identified two issues for determination in this Request for Review as follows:

- i) Whether the Applicant was unfairly disqualified for failure to submit a sample labelled in accordance with the requirements of the Tender Document and for failure to submit bank statements.
- ii) Whether the Procuring Entity failed to provide the Applicant with the summary of evaluation as requested in their letter of 27<sup>th</sup> January 2015.

The Board will now determine the above issues.

1. **As to whether the Applicant was unfairly disqualified for failure to submit a sample labelled in accordance with the requirement of the tender document and for failure to submit bank statements:**



The Board notes the provision in the Tender Document at Page 14 Clause 2.22 Preliminary examination under 2.22.1 which states, *“The Procuring entity will examine the tenders to determine whether they are complete, whether any computational errors have been made, whether required sureties have been furnished, whether the documents have been properly signed, and whether the tenders are generally in order. ”*

This also appears at pages 28 and 29 under Special Conditions of Contract Clause 2.22 that listed documentary evidence the bidder was required to provide, as follows:

### **2.22 Preliminary Evaluation**

*Bidders were required to provide documentary evidence listed below:*

- *Certificate of incorporation/registration*
- *Up-to-date tax compliance certificate*
- *VAT registration*
- *PIN No.*
- *Evidence of past a performance from established organization*
- *Reliable communication services.....*
- *Copies of audited accounts for the last three years*
- *Bank statement*
- *Status of approval in the country of origin*

*Financial evaluations page: 35 of the tender documents*

*Fs=20\*Fm/f.....*

At page 28 Special Conditions of Contract listed 3.7.1, 3.12.1, 3.18.1 and 8.7 and below that, five other conditions were put down which included *“The inner and outer packaging should bear the words “Free Sunscreen lotions NCPWD Government of Kenya”* but not referenced in the same way that the first four conditions had been done.

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At page 34 of the Tender Document, Evaluation criteria technical included the examination of samples with the marks to be awarded.

The Board observes that the way the Tender Document was compiled does not clearly stipulate whether the labelling of the sample was to be examined against the evaluation criteria at Page 34 or was to be complied with after contract award. Consequently, the Board finds that the tender document was not set out in a manner to enable meaningful preliminary and technical evaluations to be carried out.

The Applicant admitted that there was no difficulty in the labelling of the sample in the manner the Procuring Entity proposed if indeed the Procuring Entity thought that this was necessary before the contract was signed. Equally, there was no difficulty supplying bank statements, in addition to the Audited Accounts, if it believed that these were necessary. Nevertheless, the Applicant went ahead to provide the sample labelled in the manner it thought fit and went ahead to ignore the submission of bank statements. It is not lost to the Board that the conditions under Clause 2.22 which included the submission of both audited accounts and bank statements had to be fulfilled by all bidders.

What the Board finds to be unclear is whether what is listed under clause 2.22 on page 29 are meant to be assessed at the preliminary evaluation stage or these are the requirements to be assessed at the technical evaluation stage.

Section 66 of the Act is clear on evaluation criteria and it states as follows:

*“66(1) .....*

*(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.*

*(3) The following requirements shall apply with respect to the procedures and criteria referred to in subsection (2) –*

*(a) the criteria must, to the extent possible, be objective and quantifiable; and*

*(b) each criterion must be expressed so that it is applied, in accordance with the procedures, taking into consideration price, quality and service for the purpose of evaluation.”*

Regulation 49 of the Regulations states that:

*“49. (1) Upon completion of the preliminary evaluation under Regulation 47, the evaluation committee shall conduct a technical evaluation by comparing each tender to the technical requirements of the description of goods, works or services in the tender document.*

*(2) The evaluation committee shall reject tenders which do not satisfy the technical requirements under paragraph (1).”*

The Procuring Entity, while preparing the Tender Document, should have clearly indicated what requirements in the Tender Document constitute mandatory requirements. The Tender Document ought to have also stated what requirements ought to be met by bidders and at what stage.

The Board has carefully examined the Tender Document that was relied upon by the Procuring Entity in this case and finds that the said document mixed up the requirements to be evaluated at the preliminary evaluation stage and those which ought to have been evaluated at the technical evaluation stage.

Whereas the Tender Document indicates the preliminary requirements which were to be met at that stage, the same requirements are however replicated as some of the requirements which were to also be evaluated at the technical evaluation stage and marks were assigned for these items.

The Tender Document further indicates that the items listed under clause 2.22 were made part of the Special Conditions of Contract which were to be met by a tenderer at the time of execution of the contract, if a bidder was successful.

In view of the above factors, the Board finds that the tender document which was prepared for the purposes of the subject

Procurement process was not satisfactory and cannot give rise to an award of a tender to any of the bidders.

The Board finds the Tender Document to be ambiguous in terms of setting out clearly what was to be evaluated at the Preliminary and the Technical stages of the tender evaluation. It was not therefore possible for the Procuring Entity to objectively evaluate the tenders using such an ambiguous document.

The Board, in considering this issue has made reference to its decision in Application No. 36 of 2008 (Midroc Water Drilling Co. Ltd v National Water Conservation & Pipeline Corporation). In the review cited, the Board held as follows:

- i) "The evaluation process was flawed and the Procuring Entity could not have achieved the objectives of promotion of integrity and fairness of procurement procedures as envisaged in Section 2 of the Act.**
- ii) There was no criteria set out, procedure for evaluation and basis for tender evaluation report to show how the Procuring Entity arrived at results for technical and financial evaluation."**

The Board allowed the Request for Review in the cited Application and ordered the Procuring Entity to re-tender.

Similar to the cited Application, this ground for review succeeds.

2. As to whether the Procuring Entity failed to provide the Applicant with the summary of evaluation as requested in their letter of 27<sup>th</sup> January 2015:

The time between the Applicant's request for the evaluation report and the time the Applicant filed the Request for Review, on 29<sup>th</sup> January 2015 is, admittedly, quite short. The Procuring Entity appears to have concentrated on filing the response to the Request for Review rather than acting on the Applicant's letter of 27<sup>th</sup> January 2015. The Procuring Entity, in filing its response included confidential documents such as the complete evaluation report and minutes of the evaluation committee. The filing of confidential documents in the Procuring Entity's response offends Sections 44 and 45 of the Act. The relevant sections state as follows:

"44(1): -

*During or after procurement proceedings, no procuring entity and no employee or agent of the procuring entity or member of a board or committee of the procuring entity shall disclose the following –*

*(a) Information relating to a procurement whose disclosure would impede law enforcement or whose disclosure would not be in the public interest;*

*(b) .....*

45(3): -

*After a contract has been awarded or the procurement proceedings have been terminated, the procuring entity shall, on request, make the records for the procurement available to a person who submitted a tender, proposal or quotation or, if direct procurement was used, a person with whom the procuring entity was negotiating.*

*(4) The procuring entity may charge a fee for making the records available but the fee shall not exceed the costs of making the records available."*

It is clear that the Applicant accessed confidential material that bidders to this tender were not entitled to.

The Board notes that the Procuring Entity subjected six responsive bidders, including the Applicant, to both technical (criteria 1-17) and financial (criteria 18-22) evaluations in one go and omitted using the financial evaluation criteria at Page 35 in arriving at the winning bids. The Board also notes the curious comment by the evaluation committee in respect of the second successful bidder, M/s. Armick Limited, to the effect that "it is duly registered under the disadvantaged group - Women Category". It was clarified to the Board during submissions by parties that this tender was an open tender not reserved for any particular group. The comment by the evaluation committee was therefore uncalled for.

The Board finds that the entire tender process was substantially compromised by the actions of the Procuring Entity in terms of a poorly constructed tender document, adoption of evaluation criteria other than the one specified in the tender document and the submission of confidential documents in its response to the Request for Review. It is the view of the Board that the process is so tainted that were the Board to order a re-evaluation, not much would be achieved in view of the information that has already come out into the open through the confidential documents the Procuring Entity included in its response to the Request for Review.

#### **GENERAL REMARKS OF THE BOARD**

The Board wishes to observe that the Procuring Entity's Tender Document does not provide for a meaningful and objective evaluation criteria. The Tender Document requires an overhaul to make it clear what needs to be evaluated at the preliminary stage and the technical stage. The Board takes a dim view of the fact that the financial evaluation criteria was not applied in the tender evaluation process as envisaged in the Tender Document. Further the award was to two bidders instead of one successful bidder contrary to Section 66(4) of the Act which provides that the successful tender shall be the tender with the lowest evaluated price. The orders that the Board is about to give takes these facts into account.



## **DECISION OF THE BOARD**

Accordingly, and for all the above reasons either singularly or cumulatively, and in exercise of the powers conferred upon it by Section 98 of the Act the Board makes the following orders:-

- 1. The Request for Review as filed on 29<sup>th</sup> January 2015 is allowed.**
- 2. The award of the subject tender to the two successful bidders, namely Zintech Ltd. and Armick Ltd. is hereby annulled.**
- 3. The Procuring Entity is hereby directed to amend the Tender Document taking into account the findings of the Board and tender afresh for the supply and delivery of therapeutic sunscreen lotions with sun protection factor (SPF) 50+ for children and (SPF) 50+ for adult persons with albinism.**
- 4. The Procuring Entity is directed to complete the entire process, including the making of an award, within 45 days from the date of this decision.**

5. Since the parties will have another opportunity to participate in this Tender again, the Board makes no orders as to costs.

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Dated at Nairobi this 25<sup>th</sup> day of February, 2015

  
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**CHAIRMAN**  
**PPARB**

  
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**SECRETARY**  
**PPARB**