

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 45 OF 2017 DATED 12TH MAY, 2017

BETWEEN

NAIROBI ENTERPRISES LIMITED.....APPLICANT

AND

KENYA MEDICAL SUPPLIES AUTHORITY.....PROCURING ENTITY

Review against the decision of the Kenya Medical Supplies Authority vide letter of notification dated 28th April, 2017, in the matter of Tender No. KEMSA/OIT 3/2016-2018 Supply of Pharmaceuticals.

BOARD MEMBERS PRESENT

- | | |
|---------------------|------------|
| 1. Mr.Paul Gicheru | - Chairman |
| 2. Mr. Hussein Were | - Member |
| 3. Neslon Orgut | - Member. |
| 4. Eng Weche Okubo | - Member |

IN ATTENDANCE

- | | |
|--------------------|-------------------------------|
| 1. Philemon Kiprop | - Holding Brief for Secretary |
| 2. Maureen Namadi | - Secretariat |

PRESENT BY INVITATION

Applicant - Nairobi Enterprises Limited

1. Oscar Litoro - Advocate, CM Advocates
2. Purity Mwangi -Advocate,CM Advocates
3. Andrew Kahwa - Advocate,CM Advocates
4. Raju Dhanani - Director
5. O P Chaunday - Operations Manager

Procuring Entity - Kenya Medical Supplies Authority

6. Kenneth Akide,SC - Advocate, Akide & Co Advocates
7. Jovia Bogere -Advocate, Akide & Co Advocates
8. Alex Musyoki - Lawyer, Migos-Ogamba Advocates
9. Miller Mageto -Lawyer, Migos-Ogamba Advocates
- 10.Charles Juma - Director Procurement
- 11.Caroline Gichinga - Procurement officer

Interested Parties

Medox Pharmaceuticals Limited

- 12.Julius Migos Ogamba - Advocate, Migos-Ogamba Advocates
- 13.Ong'anda Junior Arnold -Advocate,Migos-Ogamba Advocates
- 14.Alex Musyoki - Lawyer, Migos-Ogamba Advocates
- 15.Miller Mageto -Lawyer, Migos-Ogamba Advocates
- 16.Rakesh Patel - Director
- 17.Gaurav KP - Staff
- 1.Suprakash Mandal - CEO, Lab & Allied

BOARD'S DECISION

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

Introduction

KEMSA had set aside funds for use in the procurement of Pharmaceuticals during the financial year 2016/2018. The tender was an Open International Tender for procurement of Pharmaceuticals.

Tender Advertisement

The Tender was advertised in two dailies: The Standard Newspaper on 15thFebruary, 2017 and The Star Newspaper on 20thFebruary, 2017.

Tender Opening

The opening process was carried out on 9thMarch; 2017 at 10.00am. A total of Twenty Four (24) bidders submitted their bids.

Tender Evaluation

The Evaluation Committee comprised of Three (3) members. The evaluation process was carried out and completed on 30th March, 2017.

The evaluation process was carried out in four stages, prescribed in the tender document as follows;

- a) Preliminary Evaluation

- b) Technical Evaluation (Documents)
- c) Technical Evaluation (Product)
- d) Financial Evaluation

Preliminary Evaluation

The evaluation committee considered Twenty four (24) bids against the mandatory requirements, set out in ITT General Condition part 1 clause 29 and 32 of the Tender document, to assess compliance of bids to the statutory requirements.

- One (1) bidder No. 6 was disqualified, while twenty three (23) bidders' no. 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23 and 24 were found to be responsive and were recommended for technical evaluation of documents having met all the criteria set out in the tender document..

Technical Evaluation of documents

Twenty three (23) bidders 'were considered for technical evaluation based on the evaluation criteria set out in the tender document. This was carried out on an item by item basis.

- Item No 1: Only three(3) bidders 'bided for this item, one (1) bidder no. 17 was disqualified, while two (2) bidders' no. 7 and 10were recommended to proceed to product evaluation.

- Item No.2: Only four (4) bidders 'bided for this item, three (3) bidders' no. 13, 16 and 21 were disqualified, while one (1) bidder no. 19 was recommended to proceed to product evaluation.
- Item No.3: Only eleven (11) bidders 'bided for this item, two (2) bidders' no. 8 and 9 were disqualified, while nine (9) bidders' no. 1, 2, 11, 14, 15, 16, 18, 21 and 24 were recommended to proceed to product evaluation.
- Item No.4: Only four (4) bidders' bided for this item, one (1) bidder no. 3 was disqualified, while three (3) bidders' no. 4, 7 and 22 were recommended to proceed to product evaluation.
- Item No.5,6 and 7: **Item were Non-Responsive.**
- Item No.8:Only five (5) bidders 'bided for this item, two (2) bidder no. 15 and 18 were disqualified, while three (3) bidder's no. 1, 10 and 17were recommended to proceed to product evaluation.
- Item No.9:Only three (3) bidders 'bided for this item, two (2) bidders' no. 17 and 18 were disqualified, while one (1) bidder no.10 was recommended to proceed to product evaluation.
- Item No.10: Only four (4) bidders 'bided for this item, two (2) bidders' no. 9 and 17 were disqualified, while two (2) bidder's no. 2 and 24were recommended to proceed to product evaluation.
- Item No.11: Only four (4) bidders 'bided for this item, two (2) bidders' no. 9 and 17 were disqualified, while two (2) bidder's no. 2 and 24 were recommended to proceed to product evaluation.

- **Item No.12: Item was Non-Responsive.**
- **Item No.13:** One (1) bidder no. 22 was recommended to proceed to product evaluation.
- **Item No.14: Item was Non-Responsive.**
- **Item No.15:** Only two (2) bidders' bided for this item, one (1) bidder no. 13 was disqualified, while one (1) bidder no. 4 was recommended to proceed to product evaluation.
- **Item No.16: Item was Non-Responsive.**
- **Item No.17:** Only three (3) bidders' bided for this item, one (1) bidder no. 24 was disqualified, while two (2) bidders' no. 17 and 20 were recommended to proceed to product evaluation.
- **Item No.18: Item was Non-Responsive.**
- **Item No.19:** One (1) bidder no. 12 was recommended to proceed to product evaluation.
- **Item No.20: Item was Non-Responsive.**
- **Item No.21:** Only two (2) bidders' bided for this item, both bidders' no. 10 and 18 were recommended to proceed to product evaluation.
- **Item No.22: Item was Non-Responsive.**
- **Item No.23:** One (1) bidder no. 5 was recommended to proceed to product evaluation.
- **Item No.24: Item was Non-Responsive.**
- **Item No.25:** One (1) bidder no. 18 was recommended to proceed to product evaluation.
- **Item No.26,27,28 and 29: Items were Non-Responsive**

Technical Evaluation of products

- Item No 1: One (1) bidder no. 10 was disqualified, while One (1) bidder no. 7 was responsive and therefore recommended to proceed to financial stage.
- Item No.2: One (1) bidder no. 19 was responsive and therefore recommended to proceed to financial stage.
- Item No.3: Nine (9) bidders' no. 1, 2, 11, 14, 15, 16, 18, 21 and 24 were recommended to proceed to financial stage.
- Item No.4: All Three (3) bidders' no. 4, 7 and 22 were recommended to proceed to financial stage.
- Item No.5, 6 and 7: **Item were Non-Responsive.**
- Item No.8: All Three (3) bidder's no. 1, 10 and 17 were recommended to proceed to financial stage.
- Item No.9: **Item was Non-Responsive.**
- Item No.10: Both bidder's no. 2 and 24 were responsive and recommended to proceed to financial stage.
- Item No.11: Both bidder's no. 2 and 24 were responsive and recommended to proceed to financial stage.
- Item No.12: **Item was Non-Responsive.**
- Item No.13: One (1) bidder no. 22 was responsive and recommended to proceed to proceed to financial stage.
- Item No.14, 15 and 16: **Item was Non-Responsive.**
- Item No.17: One (1) bidder no. 17 was disqualified, while one (1) bidder no. 20 was recommended to proceed to financial stage.

- Item No.18: **Item was Non-Responsive.**
- Item No.19: The Only bidder no. 12 was responsive and recommended to proceed to financial stage.
- Item No.20: **Item was Non-Responsive.**
- Item No.21: One (1) bidder no. 10 was disqualified, while one (1) bidder no. 18 was responsive and recommended to proceed to financial stage.
- Item No.22: **Item was Non-Responsive.**
- Item No.23: The only bidder no. 5 was responsive and recommended to proceed to financial stage.
- Item No.24: **Item was Non-Responsive.**
- Item No.25: The only bidder no. 18 was responsive and recommended to proceed to financial stage.
- Item No.26, 27,28 and 29: **Item were Non-Responsive.**

Financial Evaluation.

Evaluation committee recommended the award per item to the lowest evaluated responsive bidders.

Recommendation for Award

Based on the above, the committee recommended award per item to the lowest responsive bidder as below;-

No.	Item Description	UOM	QTY	Unit Price	Total Price (Bidders Currency)	Awarded Supplier
1	Midazolam injection 1mg/1mL	5mL amp	90,000	USD 0.560	USD 50,400.000	Harley's Limited
2	Amoxicillin tablet 250mg (dispersible, scored)	Pack of 20s	1,200,000	USD 1.450	USD 1,740,000.00	Medox Pharmaceuticals Ltd.
3	Amoxicillin + clavulanic acid tablet 1g	Pack of 10s	250,000	USD1.080	USD 270,000.00	Crown Solutions Limited-Crown Healthcare Ltd
4	Clotrimazole vaginal tablet 500mg	Pack of 1s	258,000	USD0.220	USD 56,760.00	Universal Corporation Ltd
5	Crotamiton cream 10%	Item was Non-Responsive.				
6	Phenobarbital sodium injection 30mg/ mL	Item was Non-Responsive.				
7	Benzathine benzylpenicillin 900mg (1.2MU) vial PFI	Item was Non-Responsive.				
8	Ciprofloxacin solution for IV infusion 2mg/ mL (as	100ml bottle	5,000	USD 0.325	USD 1,625.00	Crown Solutions Limited-Crown

	lactate)					Healthcare Ltd
9	Phytomenadione (Vit K1) injection 1mg/1ml	Item was Non-Responsive.				
10	Carvedilol tablet 6.25mg	Pack of 30s	6,000	USD 0.550	USD 3,300.00	Sai Pharmaceuticals Limited
11	Carvedilol tablet 12.5mg	Pack of 30s	6,000	USD1.090	USD 6,540.00	Sai Pharmaceuticals Limited
12	Verapamil tablet 80mg pack of 84s	Item was Non-Responsive.				
13	Mupirocin ointment 2% (15g)	15g tube	3,000	KES 229.00	KES 687,000.00	Surgilinks Limited
14	Mometasone furoate ointment 0.1%	Item was Non-Responsive.				
15	Chlorhexidine gel 4% (as digluconate 7.1%)	Item was Non-Responsive.				
16	Lansoprazole dispersible tablet 15mg	Item was Non-Responsive.				
17	Omeprazole PFI 40mg vial	Pack of 5s	33,000	KES 640.00	KES 21,120,000.00	Madawa Pharmaceuticals Ltd
18	Atropine sulfate	Item was Non-Responsive.				

	eye drops 0.5%					
19	Digoxin Elixir/Oral Solution 50mcg/ml	60ml	492	KES 2,040.00	KES 1,003,680.00	The price realized was above the market .
20	Phenobarbitone Inj 60mg/ml Amp	Item was Non-Responsive.				
21	Sodium Bicarbonate Injection 8.4%, 10ml amp	Amp	28,837	USD 0.195	USD 5,623.215	Medisel Kenya Ltd.
22	Darrows Half Strength with Euro cap/Collapsible bag 500ml	Item was Non-Responsive.				
23	Glucose Inj 50% with Euro cap/Collapsible bag 50ml	Bottle	19,115	KES70.00	KES 1,338,050.00	The price realized was above the market.
24	Saline nasal drops 0.9% ,10ml (Plastic bottle)	Item was Non-Responsive.				
25	Haloperidol Decan. Inj. 50mg/ml, 1ml amp.	Amp	30,000	USD 3.990	USD 119,700.00	Medisel Kenya Ltd.
26	Warfarin 1mg tablets (Blister	Item was Non-Responsive.				

	pack)	
27	Warfarin 5mg tablets (Blister pack)	Item was Non-Responsive.
28	Dexamethasone + Neomycin eye Drops 0.1% /0.5%, 5ml	Item was Non-Responsive.
29	Hypromellose (Hydroxypropyl methylcellulose) 2% w/v, 10ml (artificial tears)	Item was Non-Responsive.

Note: Item no. 19 and item no. 23-prices realized were above the market price and therefore could be recommended.

The following items no. 5, 6, 7, 9, 12, 14, 15, 16, 18, 20, 22, 24, 26, 27, 28 and 29 were non responsive and there to be retendered.

The Professional Opinion

The Professional Opinion was prepared by Director Procurement on 11th April, 2017 recommending award as per the evaluation report the same was approved by Accounting Officer on 28th April, 2017.

THE REQUEST FOR REVIEW

The Applicant Nairobi Enterprises Limited filed this Request for Review on 12th May, 2017, challenging the procuring entity's decision declaring its tender as unsuccessful in the matter of Tender No. KEMSA/OIT 3/2016-2018. Supply and Delivery of Pharmaceuticals.

During the hearing of the Request for Review, the Applicant was represented by Mr. Oscar Litoro while the procuring entity was represented by Mr. Kenneth Akide, SC. The successful bidder M/s Medox Pharma Ltd was represented by Mr. Migos Ogamba Advocate while Mr. Shuprakash Mandal appeared on behalf of the interested party Lab & Allied Ltd.

The Applicant urged the Board to grant it the following orders:-

- 1) *THAT the Board be pleased to make a declaration that the decision of the Procuring Entity contained in the letter dated 28th April 2017 is unreasonable, unfair, illegal and void.*
- 2) *THAT the Board be pleased to annul and/ or cancel the purported decision by Respondent in the letter dated 28th April 2017 Ref No. KEMSA/PROC/OIT3/2016-2017 and any other decision awarding the Tender No. KEMSA/OIT 3/2016-2018 for Supply of Pharmaceuticals particularly the product known as Amoxicillin tablet 250 mg to any entity other than the Applicant.*

- 3) *THAT the Board restrains the Respondent from retendering in relation to Tender No. KEMSA/OIT 3/2016-2018 for Supply of Pharmaceuticals and from entering into contract with any other entity other than the Applicant in respect to the tender herein particularly for the bided item known as Amoxicillin tablets 250 mg.*
- 4) *THAT the Board be pleased to order the Respondent to award the Applicant the Tender No. KEMSA/OIT 3/2016-2018 for Supply Of Pharmaceuticals particularly in respect of product known as Amoxicillin tablet 250 mg forthwith.*
- 5) *THAT the Board be pleased to order the Respondent to avail and execute and conclude the contract with the Applicant for Tender No. KEMSA/OIT 3/2016-2018 for Supply of Pharmaceuticals in respect of product known as Amoxicillin tablet 250 mg forthwith.*
- 6) *THAT the Board be pleased to order the Respondent to pay the costs of these proceedings.*
- 7) *THAT the Honorable Board be pleased to make any or such other as the ends of justice may dictate.*

Although the Applicant raised several grounds on which it's Request for Review was premised, all the grounds of review were consolidated into one ground during the hearing of the Request for Review.

Grounds

1(I, ii, iii, iv, v, vi, vii, viii, ix, x, xi, xii, xiii, xiv, xv), 2, 3:1 Breach of Section 80(2) and 83 and 86 of the Public Procurement and Asset Disposal Act, 2013 and Regulation 52(1) and 62 of the Public Procurement and Disposal Regulations, 2006 and Clause 2(b) (ii) of part B (Technical Evaluation) of Section VIII (Stages of Tender and Tender Evaluation Criteria) of the Tender Document Breach of Article 47 and 50 of the Constitution.

These grounds of review were consolidated since they raise issues relating to the evaluation of the Applicant's tender and more particularly whether the Applicant provided a valid Retention Certificate for Amoxicillin tablet 250 mg (dispersible).

The Applicant's case

Mr. Litoro advocate who appeared on behalf of the Applicant relied on the Applicant's Request for Review together with the annexed supporting statement/the affidavit sworn by Mr. Raju Dhanani which was filed on the same day. He further relied on the Applicant's further Affidavit dated 22nd May, 2017 and which was filed with the Board on 23rd May, 2017.

Mr. Litoro conceded that the only issue in contention in this Request for Review was whether the retention certificate no. 1234 for the Amoxillin table 250mg (dispersible) provided by the Applicant in it's tender document was valid or not. He stated that the retention certificate a copy

of which the Applicant had produced and annexed at page 6 of the Applicant's Request for Review was obtained by the Applicant on 5th March, 2017 after the payment of the renewal fees on 27th February, 2017. The Applicant produced a copy of the said receipt as annexure RD-4 to its Request for Review.

Counsel for the Applicant further submitted that upon payment of the requisite amount of fees, it downloaded the Retention Certificate from the Applicant's website and included it as part of its tender document which it submitted to the procuring entity before the expiry of the tender closing date.

He acknowledged that the tender document required bidders to submit as part of their tenders a current registration certificate and retention certificate for the product they were bidding for. The Applicant however expressed surprise and stated that inspite of supplying the retention certificate, the procuring entity had proceeded to declare its tender for the product Amoxillin tablet 250mg dispersible as unsuccessful on the ground that the retention certificate supplied by the Applicant was invalid.

Counsel for the Applicant additionally stated that the evaluation process for this tender was conducted between 13th March and 30th March, 2017 and at no given time before 28th April, 2017 did the Applicant seek for clarification from the Respondent. He submitted that the retention certificate supplied by it to the Respondent was downloaded from the Pharmacy and Poisons Board's website and its expiry date was given on

31st December, 2016 and had a retention number and a QR code as required by the tender document.

He further stated that if the said certificate did not appear in the website of the Pharmacy and Poisons Board at the time when the Respondent was evaluating the Applicant's tender then the error/mistake was that of the Pharmacy and Poisons Board which had failed to update its website. He therefore contended that the Applicant could not be declared unsuccessful for a mistake which was not of its own making.

Counsel for the Applicant therefore urged the Board to dismiss the Applicant's Request for Review.

The Respondent's response

Mr. Kenneth Akide (SC) advocate who appeared on behalf of the Respondent opposed the Applicant's application and relied on the replying affidavit sworn by Mr. Philip Omondi the Respondent's acting Chief Executive Officer which was sworn on 18th May, 2017 and filed by the Board on 19th May, 2017. He further relied on the submissions he filed on behalf of the Respondent on 19th May, 2017. He submitted that the Respondent strictly followed the provisions of the Public Procurement and Disposal Act 2015 and the Regulations made thereunder while evaluating the Applicant's tender which went through the preliminary and the technical evaluation stages where it was declared unsuccessful since in the procuring entity's view the retention certificate supplied by the Respondent was invalid.

Counsel for the Respondent submitted that all the bids submitted to it went through the detailed examination at the technical evaluation stage which involved checking for the authenticity of the documents submitted and that as far as the retention certificate submitted by the Applicant was concerned, the Respondent checked from the portal of the Pharmacy and Poisons Board using the Quick Response (QR) Code Reader which is a matrix bar code that contains information above the item and the Quick Response (QR) Code Reader returned a verdict that the Applicant's retention certificate for the Amoxicillin tablet 250mg dispersible was scored invalid.

He submitted that the process of seeking the confirmation was part of carrying out due diligence that the Respondent conducted on all the bidders and further stated while relying on the letters marked as annexures PO -6(a) and PO- 6(b) appearing at pages 7 and 8 of the Respondent's replying affidavit that the Respondent wrote to the Pharmacy and Poisons Board inquiring about the validity of the registration status of the retention certificate being held by the Applicant and that the Pharmacy and Poisons Board responded by stating that the said certificate was approved on 3rd May, 2017 which was way after the subject tender had been awarded.

Counsel for the Respondent therefore urged the Board to find that the Respondent's decision was valid and therefore uphold the same.

The interested parties submissions

Mr. Julius Ogamba who appeared on behalf of the successful bidder supported the submissions made by Counsel for the Respondent and contended that the successful bidder submitted as part of its tender document to the Respondent a current product registration and retention certificate which was valid. He however stated while basing his submissions on various documents and particularly annexures RD 7 and RD 8 which annexed to the Applicant's further affidavit sworn on 22nd May, 2017 that the decision taken by the Respondent declaring the Applicant's tender as unsuccessful as correct because the Applicant supplied as part of its tender document a retention certificate which was not valid at the time that it submitted its tender.

He stated that the Respondent was therefore right in carrying out a search of the validity of the product retention certificate from the portal of the Pharmacy and Poisons Board through address number http://products.pharmacyboardkenya.org/ppb_admin. He additionally submitted that all the other bidders retention certificates were confirmed using the same process and that what the Applicant was seeking was preferential treatment.

Counsel for the successful bidder while relying on the Replying Affidavit sworn by Mr. Philip Omondi on 18th May, 2017 stated that the Pharmacy and Poisons Board had further confirmed in its letter dated 11th May, 2017 addressed to the Respondent that the retention certificate which was relied

upon by the Applicant in it's tender document had been approved on 3rd May, 2017.

He therefore urged the Board to dismiss the Applicant's Request for Review and direct the procurement process to proceed.

Mr. Suprakash Mandal who appeared in the proceedings on behalf of the interested party Lab and Allied Ltd associated himself with the submissions made by the Applicant and submitted that the interested party experienced a similar problem as that which befell the Applicant. He stated that although it's product was registered on 3rd June, 2016, it did not receive it's registration certificate until 6th March, 2017 which it incorporated as part of it's tender submitted to the Respondent but inspite of the certificate being made available to the Respondent, the Respondent declared it's tender as unsuccessful because a search conducted by the Respondent through the portal of the Pharmacy and Poisons Board website showed that the retention certificate was not available on the Pharmacy and Poisons Board website.

He finally stated that one of the probable reasons why it's registration status could not be confirmed from the website of the Pharmacy and Poisons Board's was that the website is sometimes slow and it was difficult for the Respondent to conduct a search using the QR code to confirm the validity of the retention certificate from the Pharmacy and Poisons Board.

The Applicant's Response

In a short response to the submissions made by Counsel for the Respondent and Counsel for the successful bidder, Counsel for the Applicant concurred with the submissions made by Mr. Mandal and also relied on his earlier submissions. He stated that the inquiry made by the Respondent and the response which was given by the Pharmacy and Poisons Board on 11th May, 2017 and both of which were produced and annexed to the Replying Affidavit of Mr. Philip Omondi as annexures PO 6(a) and (b) were dated after the evaluation had been carried out and could not therefore be relied upon to justify the rejection of the Applicant's bid since the inquiry and the response were being sought after the conclusion of the evaluation process. He submitted that the inquiry made by the procuring entity on 11th May, 2017 was an afterthought which the Board should take as an admission of the breach of the tender document and the law.

He therefore urged the Board to allow the Request for Review.

THE BOARD'S DECISION

The Board has considered the Applicants Request for Review, the affidavit in support thereof sworn by one Raju Dhanani on 12th May, 2017 together with all the annexures thereto. The Board has also looked at the Replying Affidavit sworn by Mr. Philip Omondi on 18th May, 2017 on behalf of the Respondent and has also looked at all the documents supplied to it by the Respondent pursuant to the provisions of Regulation 74(3) of the Public

Procurement and Regulations 2006 as amended in 2013. The Board has further read the Replying Affidavit sworn by Mr. Rakesh G. Patel on behalf of the successful bidder Medox Pharmaceutical Limited and the Applicant's further affidavit in reply to the Respondent's affidavit and has also considered all the written and the oral submissions made before the Board by all the parties.

As earlier stated in this decision, this Request for Review raised one issue for determination and this issue is whether the Applicant was rightly declared unsuccessful at the technical evaluation stage for providing an invalid retention certificate for the Amoxicillin tablet 250mg (dispersible).

The Board has looked at the tender document and more particularly Section VIII thereof headed "Technical Evaluation" and finds that the tender document inter-alia required bidders who were not distributors of the tendered products to inter-alia comply with the following requirement.

B) Technical evaluation

2. Bidders who are distributors

Documents submitted by distributors offering to supply pharmaceuticals under the contract will be subjected to a detailed examination to confirm the following;

**Manufactures Authorization that is both tender and item specific
Bidders who are distributors will be required to submit the following documents from their manufacturers in support of their bid:**

- i.
- ii. **Current product registration and retention certificates with QR codes from the Kenya Pharmacy and Poisons Board (Mandatory).**

The Applicant contended that it provided a retention Certificate issued on 5th March, 2017 whereas the Respondent contended that it had carried out due diligence and verified from the Pharmacy and Poisons Board online portal that the Applicant's Retention Certificate for the product was invalid

As the Board has previously held, where the authenticity or otherwise of a document contained in the tender document arises, the issue can only first be determined by turning to the tender document itself first.

The Board has noted from the Retention Certificate which the Applicant submitted as part of its tender document that the date on the top left hand corner of the tender document is not clear and that the date on the document could not be ascertained by looking at the document. The Board therefore holds that the only way that the procuring entity could verify the validity or otherwise of the said document was by using the means set out in the certificate for verifying its validity.

The certificate included by the Applicant in the tender document provided for the following means of verifying its authenticity in the last paragraph of the document.

NOTE: This certificate can only be verified online at http://products.pharmacyboardkenya.org/ppb_admin using the QR Code below.

The Respondent confirmed that it did this by searching the portal using the Quick Response (QR) Code Reader which returned the verdict that the certificate was invalid.

The Applicant attributed this to the existence of a possible error or omission in the Pharmacy and the Poisons Board portal but did not offer any evidence to support its contention that there was an error or omission in the said portal at the time the Respondent carried out the search.

Apart from the contents of the tender document the only other evidence available and which was placed before the Board at the hearing of the Request for Review was the letter dated 11th May, 2017 from the Pharmacy and Poisons Board signed by one Dr. F. M. Siyoi the Registrar of the said Board confirming that Nesmox 250mg tablets whose Retention Certificate No. 12134 the Applicant was relying upon was approved by the Pharmacy and Poisons Board on 3rd May, 2017. The Board further notes that in the absence of any other written confirmation or contradictory letter from the Pharmacy and Poisons Board, the letter from the said Board served as the only uncontradicted evidence on this issue.

The Board further notes that upon being served with the Replying Affidavit sworn by Mr. Philip Omondi containing the letter from the Pharmacy and Poisons Board, Counsel for the Applicant filed a further

affidavit in response to Mr. Omondi's Replying Affidavit. The Applicant did not in its said further affidavit seek to challenge the authenticity of the letter dated 11th May, 2017 from the Pharmacy and Poisons Board.

During the hearing of the Request for Review Counsel for the Applicant argued that the procuring entity should not have relied on the letter dated 11th May, 2017 since the same came long after the evaluation of the tenders had been concluded.

The Board is however of the respectful view that the Applicant was not disqualified on the basis of the letter dated 11th May, 2017.

To the contrary, the Applicant declared unsuccessful in the process on the basis of the search done using the Pharmacy and Poisons Board Portal. This process was applied to all bidders and the Board has noted from the evaluation report that the retention Certificate for one of the Applicant's other products namely the Amoxicillin + Clavulanic acid tablet 1g was found to be valid on the basis of the same search but the Applicant failed to be awarded the tender to supply the product only because it was not the lowest evaluated bidder.

The letter dated 11th May, 2017 was not therefore in the Board's view meant to be used in the evaluation of the tenders but to merely clarify the issue of the validity of the Applicant's retention Certificate. Nothing therefore prevented the Applicant from seeking a similar clarification and the Board notes that the Applicant did not even bother to write to the Pharmacy and

Poisons Board upon being served with the Respondent's Replying Affidavit sworn by Mr. Philip Omondi.

The above being the position the Applicant's Request for Review dated 12th May, 2017 and which was filed with the Board on the same day therefore fails and is dismissed in terms of the following final orders.

FINAL ORDERS

In view of the above findings and in the exercise of the powers conferred upon it by the Provisions of Section 173 of the Public Procurement and Asset Disposal Act 2015, the Board makes the following orders on this Request for Review:-

- a) The Applicant's Request for Review dated 12th May, 2017 in respect of Tender No. KEMSA/OIT 3/2016-2018 for the Supply of Pharmaceuticals be and is hereby disallowed.
- b) The procuring entity is therefore at liberty to proceed with the procurement process herein.
- c) On the issue of costs, the Board orders that each party shall bear it's own costs of this Request for Review.

Dated at Nairobi on this 31st day of May, 2017.

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CHAIRMAN

PPARB


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SECRETARY

PPARB