PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 10 OF 2017 DATED 27TH JANUARY, 2017

BETWEEN

QUESTA CARE LIMITED..... (APPLICANT)

AND

KENYA MEDICAL SUPPLIES AUTHORITY ..... PROCURING ENTITY

SIMA PHARMACEUTICALS LIMITED.....INTERESTED PARTY

Review against the decision of the Kenya Medical Supplies Authorityin the matter of Tender No. KEMSA/GOK-CPF/HIV-16/17- OIT 001 for the supply and delivery of ARV medicines - adults.

BOARD MEMBERS PRESENT

1. Mr. Paul Gicheru - Chairman
2. Mr.Hussein Were - Member
3. Mr. Peter B. Ondieki, MBS - Member
4. Mr. Nelson Orgut - Member
5. Mrs.Rosemary Gituma - Member

IN ATTENDANCE

1. Stanley Miheso - Holding Brief for Secretary
2. Maureen Namadi - Secretariat

PRESENT BY INVITATION

Applicant – Questa Care Limited

1. Peter Njeru	- Advocate, Kaplan & Stratton
2. Benjamin Ng'eno	- Advocate, Kaplan & Stratton
3. Mark Kolonya	- Advocate, Kaplan & Stratton
4. Hiran Mehta	- Director, Questa Care Ltd.
5. Kalyan Kamau K	- Referal Head, Mylan Laboratories
6. Nilesh Saluja	- AMB, Mylan Laboratories

Procuring Entity – Kenya Medical Supplies Authority

1. Julius Migos Ogamba	- Advocate, Migos-Ogamba Advocates
2. Ong'anda Junior	-Advocate,Migos-Ogamba Advocates
3. Alex Musyoki	- Lawyer, Migos-Ogamba Advocates
4. Miller Mageto	-Lawyer, Migos-Ogamba Advocates
5. Beatrice Rosana	- OAO
6. Fredrick Wanyonyi	- DMS/CS
7. Charles Juma	- Director Procurement
8. David Natta	-Procurement Manager
9. John Kabuchi	- Procurement Manager
10.Edward Buluma	-Procurement Manager
11.Caroline Mugo	- Procurement officer

Interested Parties

1. George K Kamau	- Advocate, Simba Pharmaceuticals

2. Ravi Menon - CEO, Simba Pharmaceuticals
3. Naresh Kumar - Director, Simba Pharmaceuticals
4. Alaka Patel - Director, Cosmos Limited
5. J.P. Joshua Prabhu -Country Manager, Aurobindo Pharm

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;

BACKGROUND OF AWARD

Tender No. KEMSA/GOK-CPF/HIV-16/17-OIT 001 for Supply and Delivery of ARV Medicine-Adult.The National AIDS and STI Control Program received an allocation under Counterpart Financing for the procurement of program commodities valued at Kshs. 2,128,172,314.00 for the FY 2016/2017.

Authority to Initiate Procurement Process

The procurement request was received from the National Treasury vide letter Ref No. EA/FA/240/107/ (5) dated 13th September, 2016.

Budget Allocation

The funds to meet this procurement have been set aside in the budget at an estimated budget of Kshs 1,126,950,699.00

Tendering Process:

This was an Open International Tender for procurement of ARV Medicine-Adult. The tender was subjected to the requirements of Section 96, 97 and 98 of the Act under open tender.

The Tender was advertised in two dailies: the Standard News Paper on 11th October, 2016 and the Star on 13th October, 2016 and was to close/open on 24th November, 2016.

However, an extension of the closing date was granted which was published in the Standard Newspaper on 18th November, 2016 with a new closing date of 8th December, 2016. The extension was occasioned by a clarification sought by a prospective bidder and a response was made vide Clarification No. 1 dated 1st November, 2016. Subsequently, the Chief Executive Officer approved the extension vide an email dated 15th November, 2016. The extension was granted Pursuant to Section 75(5) of the Public Procurement and Asset Disposal Act (PPADA) 2015.

A total of Seven (7) Bidders submitted their bids.

Tender Evaluation

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

a. Preliminary Examination.

b. Technical Evaluation.

i) Documentary Compliance of the Tenderer.

ii) Technical Evaluation of the Product (Sample)

c. Financial Evaluation.

d. Post Qualification.

Preliminary Examination

The evaluation committee considered Seven (7) bids as per 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.

- All Seven (7) bidders' no. 1, 2, 3, 4, 5, 6 and 7 were found to be responsive and were recommended to proceed to technical evaluation of documents having met all the criteria set out in the tender document.

Technical Evaluation of documents

Seven (7) bidders were considered for technical evaluation of documents based on the evaluation criteria set out in the tender document. This was done on an item by item basis.

- Item 1: Five (5) bidders bided for this item; One (1) bidder no. 3 was disqualified, while Four (4) bidders' no. 1, 2, 4 and 6 were recommended to proceed to the next stage of evaluation.

- Item 2: Two (2) bidders bided for this item; both bidders, no. 5 and 7, were recommended to proceed to the next stage of evaluation.

Technical Evaluation of products

Six (6) bidders were considered for technical evaluation of products based on the evaluation criteria set out in the tender document.

- Item 1: One (1) bidder no. 6 was disqualified, while Three (3) bidders' no. 1, 2 and 4 were recommended to proceed to financial evaluation.
- Item 2: Both bidders, no. 5 and 7, were recommended to proceed to financial evaluation.

Financial Evaluation.

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

Recommendation for Award

Based on the above, it is my professional opinion that, the tender be awarded as below;

Item No.	Item Description	Unit of Issue	Quantity	Unit Price (Usd)	Total Price (Usd)	Awarded Supplier

1.	Tenofovir300mg /Lamivudine 300mg/Efaviren z 600mg Tablets	Pack of 30's	1,500,001	6.75	10,125,006.75	Simba Pharmaceutica ls Limited
2	Atazanavir 300mg/Ritonavi r 100mg, Tablets	Pack of 30's	50,000	15.47	773,500.00	Surgilinks Limited

REQUEST FOR REVIEW

This Request for Review was lodged by Questa Care Limited on 27th January, 2017, against the decision of the Kenya Medical Supply Authority dated 19th January, 2015 in matter of tender No. **KEMSA/GOK-CPF/HIV-16/17- OIT 001** for the supply and delivery of ARV Medicines – Adults.

The Applicant urged the Board to order that:

1. ***The decision of the Procuring Entity awarding Tender No. KEMSA/GOK - CPF/HIV - 16/17 - OIT 001 for the supply and delivery of ARV Medicines - Adults to the successful bidder be annulled.***
2. ***The Procuring Entity's decision in respect of the award for Tender No. KEMSA/GOK - CPF/HIV - 16/17 - OIT 001 for the supply and delivery of ARV Medicines - Adults be substituted by the Review Board's decision that the Applicant qualified in the technical***

evaluation phase and therefore the Applicant's bid for the supply and delivery of ARV Medicines – Adults, is successful.

3. *Alternatively, the Respondent be directed to re-evaluate the tenders in accordance with the Law and the criteria set out in the Tender document.*
4. *The costs of this request for review be awarded to the Applicant.*

The Applicant Quest Care Limited filed this Request for Review on 27th January, 2017 challenging the procuring entity's decision declaring it's tender as unsuccessful in the matter of Tender No. KEMSA/GOK-CPF/HIV-16/17 – OIT 001 for the supply and delivery of ARV medicine adults.

During the hearing of the Request for Review, the Applicant was represented by Mr. Peter Njeru while the procuring entity was represented by Mr. Julius Ogamba Migosi. The successful bidder M/s Simba Pharmaceuticals Limited was on the other hand represented by Mr. George Kamau Advocate.

The Applicant in the Request for Review sought for the following orders:-

a) The decision of the procuring awarding Tender No. KEMSA/GOK-CPF/HIV-16/17 – OIT 001 for the supply and delivery of ARV medicines – adults to the successful bidder be annulled.

b) The procuring entity's decision in respect of the award of Tender No. KEMSA/GOK-CPF/HIV-16/17 – OIT 001 for the supply and

delivery of ARV medicine – adults be substituted by the Review Board's decision that the Applicant qualified in the technical evaluation phase and therefore the Applicant's bid for the supply and delivery of ARV medicines – adults is successful.

c) Alternatively, the Respondent be directed to re-evaluate the tenders in accordance with the law and the criteria set out in the tender document.

The Board has read the Applicant's Request for Review, the responses filed by the procuring entity and the successful bidder together with the further affidavit filed by the Applicant on 9th February, 2017 together with all the documents accompanying the said further affidavit. The Board has also read the written submissions filed by all the said parties and the oral submissions made by them.

The Board notes that although the Applicant's application was lengthy and extended upto 26 paragraphs and covered a total of 386 pages excluding those in the further affidavit, the Request for Review and the submissions made revolved only around two issues namely:-

i) **Whether the Applicant's tender was rightly disqualified from the procurement process on the ground that it failed to properly label it's sample.**

ii) **Whether the Applicant is entitled to benefit from the margin of preference in the evaluated price.**

ISSUE NO. I

Whether the Applicant's tender was rightly disqualified from the procurement process on the ground that it failed to properly label it's sample.

On the first issue framed for determination, the Applicant was disqualified at the preliminary evaluation stage vide a letter dated 19th January, 2017 appearing at page 367 – 368 of the Applicant bundle of the Request for Review.

The said letter reads as follows in part:-

RE: TENDER NO: KEMSA/GOK-CPF/HIV-16/17-OIT 001 – SUPPLY & DELIVERY OF ARV MEDICINE – ADULTS

We regret to inform you that your tender supply & delivery of ARV medicine –Adults was unsuccessful due to the following reasons:-

Item 2:

- *The manufacturing site indicated on the product is Mylan Laboratories Limited Plot No. 564/A/22, Road No. 92 Jubilee Hills Hyderabad – 500034, Telenagana, India is not among the WHO prequalified sites but an office address.*

  The primary and secondary packaging site Quest Care Limited is only the final stage of the manufacturing process.

  The requirement is that the manufacturing site should be WHO prequalified.

- *The GMP certificates provided in the tender document were as follows:-*

- *F-4 & F-12 MIDC Sinnar District Madhya Pradesh, India 422113 by PPB/GMP/F/2015/149*
- *Plot No. H 12 & H 13 MIDC Waluj Aurangabad 431136, Maharashtra India.*
- *The site indicated on the sample label is Plot No. 564/A/22, Road No. 92 Jubilee Hills Hyderabad – 500034, Telengana India and does not appear on the WHO prequalification list as one of the prequalified manufacturing site as required.*

It is clear from a reading of the said letter and this was conceded by Counsel for the procuring entity tht the Applicant was disqualified from the evaluation process because it failed to accurately declare on it's label the World Health Organization (WHO) site at which it's product would be manufactured.

The procuring entity instead stated that the manufacturing site indicated on the product was Mylan Laboratories Limited Plot No. 564/A/22, Road No. 92 Jubilee Hills Huderabad 500034, Telenanga India which was not a WHO prequalified site but an office address.

Counsel for the Applicant contested this submission and stated that the requirement in the tender document was to indicate the name and address of the manufacturer but not the WHO site where the product would be manufactured.

The Board has looked at the tender document and particularly items 11 marked labeling instructions and also clause 12 headed case identification.

It is clear from clause 11.1 (k) and 12.1(i) that what the document required to be labeled was the "name and address of the manufacturer's ".

There was no requirement whatsoever in the tender document requiring bidders to indicate the WHO site at which the product would be manufactured.

The Board has looked at the sample provided by the Applicant to the procuring entity and which was produced and annexed to the Request for Review as annexture HM5 and finds that the Applicant labeled it's product as follows:-

"Mfd by/fab par: Mylan Laboratories Limited Plot No. 564/A/22 Road No. 92, Mylan Jubilee Hills Hyderbad – 500034 Telangana India".

The label continued to give the Applicant particulars after the above description as follows:-

Pkg. at

QUEST CARE LIMITED Plot No. 209/7184 Homabay Road Terminus, Gate No. 19, Industrial area, Nairobi manufacturing license No. BU201500629".

The above two descriptions give the name and address of the manufacturer that are visible and clear to the open eye.

They both fulfilled the requirements of clauses 11.1(k) and 12.1 (i) set out at pages 68 and 69 of the tender document.

By purporting the introduce the requirement that bidders must indicate the WHO site of manufacture, the procuring entity was introducing an extrinsic criteria into the tender document contrary to the provisions of Section 80(2) of the Public Procurement and Asset Disposal Act which provides as follows:-

Section 80(2): The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and in the tender for professional services, shall have regard to the provisions services, shall have regard to the provisions of this Act and statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered".

In the case of Richardson Company Ltd –vs- The Registrar High Court of Kenya (2008 – 2010) PPLR page 232

The Board held that a procuring entity cannot use a criteria other than the one set out in the tender document while interpreting the provisions of Section 66(2) of the repealed Public Procurement and Disposal Act. The said Section is in the same terms as Section 80(2) of the new Public Procurement and Asset Disposal Act. The Board stated as follows while considering the issue:-

"The Board has examined the tender documents and noted that the financial evaluation parameters were not set out in the tender documents. At the hearing, the procuring entity stated that those parameters are set

out in the International Financial Reporting Standards (IFRS). However the tender documents did not provide that those parameters or the IFRS would apply. As the Board has held severally, a procuring entity can only use the criteria set out in the tender document for evaluation. This is clearly stated in Section 66(2) which states as follows... ... ...".

Inview of the above findings, the Board therefore holds that the Applicant was wrongly declared unsuccessful at the preliminary evaluation stage and this ground as set out in the issue number 1 succeeds and is allowed.

ISSUE NO. II

Whether the Applicant is entitled to benefit from the margin of preference in it's evaluated price.

On the second issue framed for determination, the Board has looked at the evaluation report and finds that the Applicant was not given any preference in it's price. This was for the obvious reason that it did not proceed to the financial evaluation stage.

During the course of the proceedings Counsel for the procuring entity at first argued that the Applicant was not entitled to the benefit of the preference scheme. This submission however changed midstream and Counsel for the procuring entity at least conceded that the Applicant would be entitled to a preference of 10% if it had reached the financial evaluation stage.

The provisions of part Xii of the Public Procurement and Asset Disposal Act now makes it mandatory for procuring entities to give preference to bidders in appropriate cases.

Section 155 of the said Act provides as follows:-

1) **Pursuant to Article 227(2) of the Constitution and despite any other provisions of this Act or any other legislation, all procuring entities shall comply with the provisions of this part**

2) **Subject to availability and realization of the applicable international or local standards, only such manufactured articles, materials or supplies wholly mined and produced in Kenya shall be subject to preferential procurement.**

3) **Despite the provisions of subsection preference shall be given to:-**

a) **Manufactured articles, materials and supplies partially mined or produced in Kenya or where applicable have been assembled in Kenya; or**

b) **Firms where Kenyans are shareholders.**

4) **The threshold for the provisions under subsection.**

   (b) Shall be above fifty-one percent of Kenyan shareholders.

5) **Where a procuring entity seeks to procure items not wholly or partially manufactured in Kenya.**

a) **The accounting officer shall cause a report to be prepared detailing evidence of inability to procure manufactured articles, materials and supplies wholly mined or produced in Kenya; and**

b) **The procuring entity shall require successful bidders to cause technological transfer or create employment opportunities as shall be prescribed in the Regulations.**

Though Counsel for the procuring entity argued otherwise the provisions of Section 155(3)(b) grant preference to firms where Kenyans are owners. The Applicant stated, and this was not disputed by the procuring entity, that the Applicant firm is wholly owned by Kenyans and falls within the definition of a manufacturer within the aforestated provision and the other relevant provisions. The Board has looked at page 163 of the Applicant's Request for Review and has established that the Applicant is a Kenyan registered firm bearing registration No. CPR/2013/117151.

The Board has also read the CR 12 issued by the Registrar of Companies appearing at page 289 of the Request for Review which shows that the shareholders of the said company were the following individuals of Kenyan origin.

Names	**Description**	**Address**	**Nationality**	**ordinary shares**
Deepak Jitendra Kothari	Director	14461-00800 Nairobi	Kenyan	630
Bina Deepak Kothari	Director	14461-00800 Nairobi	Kenyan	70
Hiren Kishor Mehta	Director	14461-00800 Nairobi	Kenyan	230
Hemal Hiren Mehta	Director	14461-00800 Nairobi	Kenyan	70
		Total shares		1,000

The Board does not therefore entertain any doubt that the Applicant is entitled to preference.

The Board will however out of abundant caution state the percentage of the preference the Applicant is entitled to since that is the function of the procuring entity acting based on the law. The Board further wishes to state that financial evaluation is in the first instance the duty of the procuring entity and will not therefore usurp that function at this stage and will await any dispute in future by any aggrieved party should any sum party feel dissatisfied.

All in all however the Board holds that the Applicant is entitled to preference in the evaluation of it's financial bid and this ground of review as framed in the above issue succeeds and is allowed.

Inview of the Boards findings on the two issues this Request for Review succeeds in the following terms.

FINAL ORDERS

Inview of all the foregoing facts and circumstances 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 decision of the procuring entity awarding Tender No. KEMSA/GOK-CPF/HIV-16/17 - OIT 001 for the supply and**

delivery of ARV medicine – adults to the successful bidder Simba Pharmaceuticals Limited is hereby annulled.

b) The Applicant is allowed back into the evaluation process and the procuring entity is directed to evaluate the Applicant's technical and financial bids.

c) In evaluating the Applicant's financial bid, the procuring entity is directed to give the Applicant preference as prescribed under part XII of the Public Procurement and Asset Disposal Act which prescribes the grant of preferences and reservations under the Act.

d) The procuring entity shall complete the re-evaluation exercise including the making of an award within fourteen (14) days from todays date.

e) Inview of the orders made above, the Board directs that each party shall bear it's own costs of this Request for Review.

Dated at Nairobi on this 16th day of February, 2017.

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CHAIRMAN

PPARB

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SECRETARY

PPARB