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SCHEDULE 1

FORM 4

REPUBLIC OF KENYA

PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND

APPEALS BOARD

APPLICATION NO.7/2004 OF 23rd JANUARY, 2004

BETWEEN

BDR PHARMACEUTICALS INTERNATIONAL LTD.

(APPLICANT)

AND

KENYA MEDICAL SUPPLIES AGENCY (KEMSA) MINISTRY OF

HEALTH

(PROCURING ENTITY)

Appeal Against the decisions of the Tender Committee of the Ministry of Health (KEMSA) dated the 3rd, 5th, 17th and 22nd of December, 2003, in the matter of Tender No. MOH/2/2003-2004 for the Supply of Pharmaceutical Items.

BOARD MEMBERS PRESENT

1. Mr. Richard Mwongo (Ag. Chairman)
2. Prof. N. D. Nzomo
3. Ms. Phyllis Nganga
4. Eng. Daniel Njora
5. Mr. Adam Marjan
6. Mr. Kenneth N. Mwangi (Secretary)

RULING ON PRELIMINARY ISSUE AS TO WHETHER THE APPLICANT IS PROPERLY BEFORE THE BOARD

The Applicant lodged an appeal against the award of the Procuring Entity in respect of the aforementioned tender for the supply of pharmaceutical products to the Ministry of Health. The tender was for international competitive bidding and was advertised on 18th July, 2003. The tender closing and opening date was 29th August, 2003. The Applicant is a foreign company registered in India.

The Procuring Entity made an award in respect of the said tender and notified the Applicant vide a letter dated 23rd December, 2003. The letter of notification was addressed to the Applicant at its address in India. One of the Applicant's complaints is that it was notified of the award on 3rd January, 2004, a date which was after the expiry of the tender validity period (see Ground 1 (vii)).

On first submission of their memorandum of appeal with the Secretariat of the Board on 22nd January, 2004, the Secretary declined to accept the appeal documents. The Secretary's letter of 22nd January, 2004, gave the reason for non-acceptance as follows:

“...The application cannot be submitted for discussion to the Public Procurement Complaints Review and Appeals Board because it does not comply with Regulation 33 (1) of the Exchequer and Audit (Public

Procurement) Regulations, 2001. The notification is dated 23rd December, 2003, which exceeds the twenty-one days appeal period stipulated in the said regulations”.

The Applicant, being dissatisfied with this reason, immediately wrote and delivered a response to the Secretary on 23rd January, 2003. The Applicant argued amongst other things, that the 21 days became effective, if at all from the date of receipt of notification on 3rd January, 2004. Upon receipt of the response, the Secretary permitted the filing of the appeal documents “subject to approval by the Board”. It is this filing that is the subject-matter of the preliminary issue as to whether the Applicant’s appeal is properly before this Board.

On 10th February, 2004 the parties appeared before the Board. At the close of the hearing on the preliminary issue, and after some deliberation, we gave our decision to the effect that the appeal was not properly before us. We indicated that the reasons for our decision would be issued in due course, by notice. We now give our analysis of the matter and the reasons for our decision.

The Applicant was represented by Ms. Jan Mohammed, counsel, and the Procuring Entity was represented by its own officers. Counsel for the Applicant stated that the Applicant’s letter of 22nd January, 2004 raises the key issues in the argument. She argued that a proper reading of Reg 33(1) does not in any way concern time limitations for filing of an appeal to the Board. All

that Reg 33 (1) does, is merely to provide for the minimum time frame of twenty-one (21) days, before the expiry of which a procurement contract may not be signed. That minimum time-frame, it was urged, is not an appeal window. Accordingly, argued the Applicant, if, for the sake of argument, the procuring entity had stated in the notification letter that the contract will be signed within forty (40) days from notification of award, would that mean that the appeal window would be expanded to forty days? In the view of counsel, the answer would be, yes. In addition, counsel argued that under Reg 33 (1) both the successful and unsuccessful tenderers have to be notified of the award.

In the present case, the notice of award was dated 23rd December, 2003. That notice having been received on 3rd January, 2004, time for lodging an appeal could only start to run upon receipt of notification. Counsel conceded that the Applicant had appointed a local representative for purposes of the tender. That representative admitted having collected the notice of award from the Procuring Entity on 29th December, 2003, which he then posted to the Applicant in India. Counsel stated that normal postage rules would require giving a four (4) day leeway for receipt of a letter, hence the receipt on 3rd January, 2004.

Counsel further argued that even if one took 21 days as an appeal window period, since the appeal had, in fact, first been lodged on 22nd January, 2004, the Applicant was still on time. This is so since the notification was received on 3rd January,

2004. Counsel argued that the Civil Procedure Act should apply in respect of procedures, including time procedures for the Board, because no other procedural rules have been established by the Board. Under the Civil Procedure Act, the rules provide for a more generous time-frame for service and receipt of notice. For example, it was argued, time stops to run during the December Christmas holidays, from about 18th December, under the Civil Procedure rules. Counsel drew an analogy of the court vacation that starts in mid-December to January, as an example of how the Board may construe the running of time. In addition, Counsel argued that the letter of notification of award was invalid since it does not comply with Reg 33 (1), both in respect of expiry of tender validity, and in that it does not disclose the successful bidder's name, the unit price for each item, and the reasons for Applicant's lack of success.

The Procuring Entity's argument was simply that they know nothing about the Civil Procedure Act, and that they followed the existing Procurement Regulations. They are not aware that time stops running in December. They are officially aware only of gazetted public holidays and official non-working days. Indeed, they were working as late as 24th December, 2003, to ensure that they made the awards before tender validity expired on 27th December, 2003. Further, the Procuring Entity stated that they were aware that Mrs. D. Patel had been appointed the local representative of the Applicant, and of several other tenderers in this tender. A letter of her appointment was shown to the Board. Mr. Patel, her husband, had collected, and his driver had signed for, the notifications of award for both Uni-Impex

(Import and Export) Ltd. (the Applicant in Appeal Nos. 4 and 5) and the Applicant herein, on 29th December, 2003. Although the Applicant's notification letter was addressed to the Applicant in India, the envelope was addressed so as to be collected by the known local representative of the Applicant.

The Procuring Entity produced the tender mail despatch register, from which it was evident that some tenderers collected their notifications on 24th December, 2003, whilst others collected them as late as 8th January, 2004. On account of this discrepancy, the Applicant in reply, additionally argued that notification was not simultaneous contrary to Reg. 33 (1).

In our view, the crux of the matter before us is whether or not the Applicant lodged their appeal on time. Other issues go to the merits of the case. It is therefore necessary first to establish the date of effective notification of the award to the Applicant, and thereafter determine whether the appeal was lodged on time. This will also necessitate an analysis of Reg 33 (1) to determine whether or not it impacts upon the running of time for purposes of an appeal.

Regulation 33(1) reads as follows:

“Prior to the expiry of the period of the tender validity or extension thereof, the procuring entity shall notify the successful tenderer that its tender has been accepted and shall simultaneously notify the other tenderers of the fact, **and the notification of award**

to the successful tenderer shall specify the time, not being less than twenty-one days within which the contract must be signed.”

An analysis of this provision shows that it may be broken down into several parts as follows:

- a) a procuring entity must notify successful and unsuccessful tenderers of the award ;
- b) the notification in (a) above, must be effected before the period of tender validity or any extension thereof expires;
- c) the said notification must be made simultaneously to successful and unsuccessful tenderers;
- d) the said notification must specify the time within which the contract must be signed;
- e) the time period for signing the contract shall not be less than twenty one days from the date of such notification.

The component parts of that regulation that are critically relevant to this case are (d) and (e). It is clear from these parts that the minimum period, from the date of the award to the date when signing of a contract becomes permissible, is 21 days. In procurement practice, and since the promulgation of the Regulations, this period has been known as the “appeal window period”. This means that this is the period during which an aggrieved tenderer may properly, and without hindrance whatsoever, lodge an appeal against the decision of a procuring entity. This minimum period of twenty-one days is, notably, a statutory minimum period. In procurement law and practice, at

any date after the twenty-first day from the date of notification of award, a procuring entity and a tenderer are entitled to sign a binding contract relating to the procurement.

The question then, is, does this provision create a time limitation for filing of an appeal? Reg 33 (1) is not to be read in isolation. It must be read together with Regulations 33(2), 33(4) and 40(3).

Reg 33(2) clearly provides that a contract becomes constituted between the winning tenderer and the Procuring Entity, directly upon the notification of the award to the winning tenderer. However, the force and effect of the contract, which under normal circumstances is presumed under common law contract principles, is suspended for 21 days by the statutory provisions of Reg 33 (1). In other words, the normal common law provisions as to the effect of offer and acceptance in regular tenders, does not apply in public procurement tendering owing to the 21 day suspension of the contract coming into effect by the statute. In our opinion, the rationale for this suspension of the usual common law principles of contract, is to allow for a "window" for aggrieved bidders, to seek administrative review of tender adjudications made by tender committees of public procuring entities. Without the suspension, notification would consummate a contract impeachable only in court. The window of 21 days for complaints or appeals is followed by a window for the decision of the Appeals Board, again within a limited period of 30 days from the date of notification of the complaint. This is expressly provided for under Reg 33(4), by which the award of a

contract may become the subject of an appeal under the provisions of Regulation 42.

Reg 33(4) reads as follows:

“Where the award of contract is the subject of appeal under the provisions of Regulation 42 and the Appeals Board fails to render its decision within the period stipulated under that regulation, the procuring entity shall advise the successful tenderer to proceed with the works services or delivery of the goods”.

And Reg 42 (6) is the relevant provision as to the duration allowed for rendering the Board’s decision. It provides that:

“The Board shall, within thirty days from the date of the notice prescribed under Regulation 42 (3), issue a written decision concerning the complaint. . .”.

In addition to the fact that an award may be the subject of administrative review by this provision, it is evident that the focus on proceeding with public procurements is paramount. Hence, even where the Appeals Board fails to comply with the statutory time limitations for rendering its decision in such appeal, the contracted procurement shall proceed (Reg 33 (4)). Time, therefore, appears to be of the essence at each and every stage of the procurement process. Thus, any argument that appears to run counter to the intentions of expedition and finality in the procurement process, is to be treated with due

circumspection and caution. Clearly, therefore, it could not have been the intention of Parliament acting through the Minister that aggrieved bidders be allowed time without limit to lodge appeals against awards in public procurement. Nor should there be elasticity of time prior to commencement of procurements. Public entities are just as anxious to get on with procurements as tenderers are to commence and complete performance in return for payment. Accordingly, the need for justice for bidders, and the application of procedures to that end, must not be construed or applied in such a way as to defeat the public interest element or purpose of public procurement. It must be remembered that the whole purpose of the Public Procurement Regulations is not to impede, hamper or unreasonably slow down public procurement. On the contrary, the object of the Regulations is aptly stated in Regulation 4 as follows:

“The purpose of these Regulations is **to promote economy and efficiency in public procurements** and to ensure that public procurement procedures are conducted in a fair transparent and non-discriminatory manner . . .”

As earlier stated, under normal contract law, an accepted offer constitutes a contract which can only be challenged in a competent court in civil proceedings. To avoid the complexities and delays inherent in court proceedings, Parliament through the Minister devised administrative review proceedings under this Board, so as not to hamper public procurement.

Regulation 33 (1) also has to be read together with Regulation 40(3). This Regulation provides that:

“Once a procuring entity has concluded and signed a contract with the successful tenderer, a complaint against an act or omission leading up to that stage shall not be entertained through administrative review.

Clearly, this provision ousts administrative review of any public procurement proceedings in respect of which a contract has been concluded and signed. In our view, this provision, read together with Regs 33(1) and 33(2) leads to several inevitable conclusions. These are that:

- a) tender awards become conclusive, having full force and effect, once the award contract has been lawfully signed between the procuring entity and the tenderer. Upon signature such tender awards are not impeachable under administrative review;
- b) the earliest opportunity under statute when such tender awards may attain unimpeachability under administrative review proceedings, is twenty-one (21) days after the date of the notification of the award;
- c) the 21 day period, between the date of notification of the award and the earliest date when such tender awards become administratively unimpeachable by way of administrative review, is the period open to aggrieved

tenderers to appeal. This is what is commonly called the "appeal window";

- d) the latest date on which administrative review must be finalised is 30 days from the date of notification of a complaint which has been lodged within the appeal window.

Given the foregoing conclusions, we hold that Reg. 33(1) provides a twenty one (21) day appeal window within which an appeal must be filed with the Board. In the absence of an appeal within that period, it is open to the procuring entity and the winning tenderer to sign a contract based on the award. It is also open, after that period, for the Procuring Entity to proceed to require performance of the contract if there is no appeal. It would therefore be inappropriate to permit appeals to be filed after the statutory twenty-one day appeal window period, because this may have the effect of disturbing expedition and finality in the procurement process. That process demands that public procurement do proceed in a timely fashion without undue hindrance, except in accordance with the Regulations.

Now, to go back to the facts presented in this case. It is not disputed that the letter of notification of award was collected by the Applicant's agent on 29th December 2003. The Applicant alleges that this was then mailed to them, and was received on 3rd January 2004. In our view, the need for postage was a form of conduct or action to which only the Applicant, as principal, and its agent, were privy. As far as the Procuring Entity was concerned, and it stated as much, it was aware that the agent was acting fully for the principal. There was written evidence of


agency. Once the notification letter was received by the agent on 29th December, 2003, the Procuring Entity had fulfilled its duty of notification, and had no further control over the notification letter.


We concur with the Procuring Entity that notification was effected on the Applicant, as principal, upon receipt of the notification letter by the agent on 29th December 2003. Time for the appeal under the appeal window pursuant to Reg. 33(1), then began running. Counsel's argument that time freezes from about mid-December, has no support. Twenty one (21) days from the date of notification ended on Monday 19th January 2004. The appeal was first filed on 22nd January 2004, three days late. From the stand point of time, therefore, we find that the appeal was filed late.

The only matter now outstanding is whether the notification of award was invalid since the tender validity had expired. It is not disputed that the tender validity as advertised was 120 days from the closing date of the tender. The tender closing and opening date was 29th August 2003. The tender validity therefore would have expired 120 days thereafter. That leads to Saturday, 27th December 2003, which was an official non-working day, as construed pursuant to Sec. 57 (a) and (b) of the Interpretation and General Provisions Act, Cap 2. Accordingly, the next working day for government offices was Monday, 29th December, 2003. This was the day on which notification of award was given to the Applicant and this was in order.

Taking into account all the foregoing, we find that the notification was given whilst the tender was still valid, and that the appeal was filed late. Accordingly, the appeal is not properly before the Board, and cannot be heard. These proceedings are, therefore, hereby terminated.

Delivered at Nairobi on this 10th day of February, 2004.


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Ag. CHAIRMAN Sgd 27.02.04
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SECRETARY
PPCRAB