

SCHEDULE 1

FORM 4

REPUBLIC OF KENYA

**PUBLIC PROCUREMENT COMPLAINTS, REVIEW AND
APPEALS BOARD**

APPLICATIONS NOS.47, 48 AND 49 /2005 OF 21ST

DECEMBER 2005

BETWEEN

WINDSOR INDUSTRIAL HOLDINGS LIMITED ... APPLICANT

AND

KENYA MEDICAL SUPPLIES AGENCY ... PROCURING

ENTITY

Appeal against the decisions of the Tender Committee of Kenya Medical Supplies Agency (KEMSA) dated 25th, 30th November 2005 and 1st December 2005 in the matter of the following tenders:

- | | |
|--------------------------|------------------------------------|
| 1. KEMSA OIT 1/2005-2006 | -Supply of Dispensary Kit 1 |
| 2. KEMSA OIT 4/2005-2006 | -Supply of Health Centre Kit |
| 3. KEMSA OIT 5/2005-2006 | -Supply of Pharmaceutical
Drugs |

BOARD MEMBERS PRESENT

Mr. Richard Mwongo Mr.	Chairman
Adam S. Marjan Mr.	Member
John W. Wamaguru Ms.	Member
Phyllis N. Nganga Mr.	Member
J.W.Wambua	Member
Ms. C.A.Otunga	Holding brief for Secretary

BOARD'S DECISION

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

BACKGROUND

These were open tenders advertised in the local dailies on 27th July and 12th August 2005 for supply of Health Center Kit 1, Dispensary Kit 1 and Pharmaceutical Drugs. The tender closing dates were as follows:

- | | |
|-----------------------------------|---------------------------------|
| 1. Supply of Dispensary Kit 1 | 7 th September 2005 |
| 2. Supply of Health Center Kit 1 | 7 th September 2005 |
| 3. Supply of pharmaceutical drugs | 12 th September 2005 |

FOR SUPPLY OF DISPENSARY KIT 1

The underlisted eight firms participated in this tender:

1. Ida Foundation
2. Ely's chemical industries Limited
3. Beta Healthcare International Limited
4. Misionpharma A/S
5. Harleys Limited
6. Cosmos Limited
7. Windsor Industrial holdings limited
8. Dawa limited

FOR SUPPLY OF HEALTH CENTER KIT 1

The underlisted eight bidders submitted bids for this tender:

1. Ida Foundation
2. Ely's Chemical Industries Limited
3. Beta Healthcare International Limited
4. Misionpharma A/S
5. Harleys Limited
6. Cosmos Limited
7. Windsor Industrial Holdings Limited
8. Dawa limited

FOR SUPPLY OF PHARMACEUTICAL DRUGS

The underlisted forty-four firms submitted bids for this tender:

	Name of bidder		Name of bidder
1	Autosterile (EA) Limited	21	Medisel Kenva Limited
2	Bakpharm Limited	24	Medox Pharmaceuticals Limited
3	Beta Health Care International Limited	25	Nairobi Pharmaceuticals Limited
4	Blodeal Laboratories Limited	26	Pharma Vision Limited
5	Bulk Medicals Limited	27	Philips Pharmaceuticals Limited
6	Cosmos Limited	28	Ranbaxy Laboratories Limited
7	Dawa Limited	29	Regal Pharmaceuticals Limited
8	Eipico Egyptian Pharmaceutical Industries Limited	30	Sai Pharmaceuticals Limited
9	Elvs Chemical Industries Limited	11	Sphinx Pharmaceuticals Limited
10	Europa Healthcare Limited	32	Sunnyland Pharmaceuticals Limited
11	Glaxosmithkline	31	Sunpar Pharmaceuticals Limited
12	Goodman Agencies	34	Supersleek Limited
1~	Harley's Limited	35	Surzilinks Limited
14	Indoco Remedies Limited	36	Surzinarm Limited
15	Infusion Kenya Limited	37	Syner-Med Pharmaceuticals Limited
16	Itans Pharmaceuticals Limited	38	Tablets (India) Limited
17	Jet Chemicals	39	U nifax Chemicals
18	Jos.Hansen&Soehne (EA) Limited	40	Universal Corporation Limited
19	Lord's Healthcare Limited	41	KAM Pharmacy Limited
20	Laboratory &Allied Limited	42	C.Mehta and Comnanv Limited
21	Management Solutions (K) Ltd T/A Pharma	43	Howse&Mc George Laborex Limited
22	Medivet Products Limited	44	Windsor Industrial Holdings Limited

THE EVALUATION

FOR SUPPLY OF DISPENSARY KIT 1

Out of the eight bidders who submitted bids, seven went through the detailed technical evaluation. These were:

1. Ida Foundation
2. Ely's Chemical Industries Limited
3. Misionpharma A/S
4. Harleys Limited
5. Cosmos Limited

6. Windsor Industrial Holdings Limited
7. Dawa limited

Beta Healthcare International Limited was disqualified for failure to provide tender security.

Samples were coded to conceal their identity before being taken for technical evaluation.

The seven bidders were taken through the next stages of evaluation that involved the examination of the bid documents for completeness and responsiveness and technical evaluation of the samples/ products. Firms whose samples did not meet the required minimum score of 80% were disqualified from financial evaluation.

RECOMMENDATION FROM THE TECHNICAL EVALUATION

Bidders code Nos GBST, GFTE, HRXY and GPTA scored at least 80% of samples with a minimum technical score of 80% and therefore qualified for financial evaluation.

FINANCIAL EVALUATION

Financial evaluation involved comparison of the prices offered by the four bidders who had passed the technical evaluation as follows:

Bidder code	Name	Total Price Quoted (Ksh.)
GBST	E1 s Industries Limited	160,893,270.00
GPTA	Dawa limited	161,450,700.00
GFTE	Cosmos limited	210,827,231.28
HRXY	Mission Pharma	211,585,827.30

The evaluation committee recommended Elys Chemical Industries Limited for award at the price of Kshs.160, 893,270.00 on account of being the lowest evaluated responsive bidder.

TENDER COMMITTEE'S DECISION

The Tender Committee in its meeting held on 25th November 2005 awarded the tender for supply of Dispensary Kit 1 to Elys Chemical Industries Limited at the price of Kshs.160, 893,270.00 being the lowest evaluated responsive bidder.

FOR SUPPLY OF HEALTH CENTER KIT 1

Out of the eight bidders who submitted bids, seven went through the detailed technical evaluation. These were:

1. Ida Foundation
2. Ely's Chemical Industries Limited
3. Misionpharma A/S
4. Harleys Limited
5. Cosmos Limited
6. Windsor Industrial Holdings Limited
7. Dawa limited

Beta Health Care Limited was disqualified for failure to provide tender security.

Samples were coded to hide their identity before the same were taken for technical evaluation.

The seven bidders were taken through the next stages of evaluation that involved the examination of the bid documents for completeness and responsiveness and technical evaluation of the samples/ products. Firms whose samples did not meet the required minimum score of 80% were disqualified and did not qualify for financial evaluation.

Bidders code Nos GBST, GFTE, HRXY and GPTA scored at least 80% of samples with a minimum technical score of 80% and therefore qualified for financial evaluation.

FINANCIAL EVALUATION

Financial evaluation involved comparison of the prices offered by the four bidders who had passed the technical evaluation as follows:

Bidder code	Bidders name	Price offered in Kenya schillings
GPTA	Dawa Limited	115,296,000.00
GBST	El s Industries limited	130,744,800.00
GFfE	Cosmos Limited	138,754,153.92
HRXY	Mission Pharma	146,952,798.98

The evaluation committee recommended the award of the tender to Dawa Limited on account of being the lowest evaluated responsive bidder at its price of Kshs. 115,296,000.00.

TENDER COMMITTEE'S DECISION

The Tender Committee in its meeting held on 25th November 2005 awarded the tender for supply of Health Centre Kit 1 to Dawa Limited at the price of Kshs. 115,296,000.00 being the lowest evaluated responsive bidder.

FOR SUPPLY OF PHARMACEUTICAL DRUGS

The evaluation was carried out in three stages as follows:

- a. Preliminary examination
- b. Technical evaluation- documents
- c. Technical evaluation -products

Preliminary evaluation involved confirmation of the following:

- a. Tender form duly completed and signed
- b. Adequate bid bond provided
- c. Value of bid bond is 2% of the bid amount
- d. Business questionnaire duly completed
- e. Copy of registration certificate
- f. Copy of trade license
- g. Copy of VAT registration certificate
- h. Copy of PIN certificate
- i. Copy of local authority license
- j. Copy of tax compliance certificate.

Out of the 44 candidates who submitted their bids, 39 bidders provided all the relevant documentation and therefore qualified for the next stage of evaluation. The following bidders were disqualified at this stage:

1. Unifax Chemicals
2. Beta Health Care International Limited
3. Auto sterile (EA) Limited
4. Sphinx Pharmaceuticals Limited
5. Sunnyland Pharmaceuticals Limited

Bidders Number 1 and 2 above were disqualified for failing to provide a bid bond whereas 3,4 and 5 failed to sign their tender form.

The Applicant quoted for the following items:

Item No.	Name of product	Item No.	Name of product
1	Acetylsalicylic acid 300mg Tablets, 1000s	4 ²	Diazepam 10mg/2ml Inj
2	Adrenaline 1mg/ml Arnpoule	44	Diclofenac Sodium 75mg/3ml Injection
3	.Albendazole 400mg Tablets	49	Erythromycin Stearate Tablets 1000'S,
5	Amodiaquine 50 mg/5ml suspension 1 litre	50	Erythromycin 125mg/5ml Powder for suspension, 100ml
6	Amoxicillin / 125mg/5ml, Powder for suspension 100ml	51	200gm Ferrous Sulphate Tablets 1000'S.
7	Amoxicillin 500mg + Clavulanic Acid 125mg Tablets	53	Folic Acid 5mg Tablets, 1000'S
8	Arnoxycillin / Clavulanic Acid	54	Fortified procaine penicillin 4miu
9	Amoxicillin 500mg capsules 500's	59	Griseofulvin 500mg Tablets 100'S
10	Amoxicillin 250mg capsules 1000'S	70	Ibuprofen 200mg Tablets 30'S
14	Benzyl Benzoate Emulsion 25%,100ml	73	Ketoconazole 200mg Tablets, 30'S
15	Benzyl penicillin 1 Miu Powder for injection	74	Lignocaine 2% injection, 30ml
21	Ceftriaxone 250 mg 1 g injection	75	Lysol 44% Cresol in soap solution
23	Cetrimide 15% + Chlorhexidine 1.5% Solution, 5 litres	79	Methylated Spirit 94% 5 litres
24	Chlorhexidine Gluconate 5% solution, 5litres	86	Metronidazole 200mg Tablets, 1000'S
25	Chlorpheniramine Maleate 10mg/ml, 1ml Ini	93	Nystatin 1000 iu/ml Oral suspension, :wml
27	Chlorpropamide 250mg Tablets 1000'S	98	Paracetamol Syrup 120mg/sml/1litre
32	Clotrimazole 1% Cream	108	Quinine 200mg Tablets 1000'S
33	Compound Magnesium Trisilicate 250/120mg Tablets	112	Salbutamol 2mg/5ml Oral Solution, 100ml
34	Co- trimoxazole 200 + 40 mg/ 5ml, suspension 50 ml	120	Tetracycline Eye Ointment, 5g tube
35	Co-trimoxazole 400 + 80 mg Tablets 1000'S	1 ²⁴	Vitamin K1 10mg/ml injection
41	Dextrose 50%		

Samples were coded and submitted to the technical evaluation committee for evaluation

PRODUCT EVALUATION

Evaluation was done on item per item. A summary of evaluation for the items under this appeal is as follows:

1. Acetylsalicylic acid 300mg Tablets, 1000S

This item attracted five bidders namely: Beta Healthcare International Limited, Laboratory & Allied Limited, MS Pharma, Regal Pharmaceuticals Limited and Windsor Industrial Holdings Limited. The Applicant submitted a sample, which was evaluated. However it did not quote its price and was therefore not financially evaluated. The evaluation team recommended Regal Pharmaceuticals Limited for award for being the lowest evaluated bidder.

2. Item NO.2: Adrenaline rmg/rnl Ampoule

This item attracted four bidders namely: Windsor Industrial Holdings Limited, Harleys Limited, Laboratory & Allied Ltd and Nairobi Pharmaceuticals Ltd. The Applicant did not indicate its price for this item in its form of tender. The evaluation team recommended Harleys Limited being the lowest responsive bidder.

3. Item NO.3: Albendazole 400mg Tablets

This item attracted ten bidders namely: Windsor Industrial Holdings Limited, Philips Pharmaceuticals Limited, Glaxosmithkline, Indoco Remedies Limited, Medox Pharmaceuticals Limited, Cosmos Limited, Laboratory & Allied Limited, Bulk Medicals Limited, Medisel Kenya Limited and Universal Corporation Limited. The Applicant was disqualified because it submitted only one tablet, which was not acceptable. The Evaluation team recommended the award to Medisel Kenya Limited being the lowest responsive bidder.

4. Item NO.5: Amodiaquine 50 mg/5ml suspension 1 litre

This item attracted nine bidders namely: Windsor Industrial Holdings Limited, Medivet Products Limited, Laboratory & Allied Limited, Regal Pharmaceuticals Limited, Elys Chemical Industries Limited, Bulk Medicals Limited, Dawa Limited, Biodeal Limited and Sphinx Pharmaceuticals Limited. The Applicant did not indicate the price for this item in its form of tender. The evaluation team recommended the award to Medivet Products Limited for being the lowest responsive bidder.

5. Item No.6: Amoxicillin / 125mg/5ml, Powder for suspension 100ml

This item attracted twelve bidders namely: Windsor Industrial Holdings Limited, Medivet Products Limited, Glaxosmithkline, MS Pharma, Elys Chemical Industries Limited, Laboratory & Allied Ltd, Regal Pharmaceuticals Ltd, Medisel (K) Ltd, Bak Pharm Ltd, Syner Med Pharmaceuticals, Sphinx Pharmaceuticals Limited and Harleys Limited. The evaluation team recommended the award to Elys Industrial Chemicals Limited being the lowest responsive bidders.

6. Item NO.7: Amoxicillin 500mg + Clavulanic Acid 125mg Tablets

This item attracted ten bidders namely: Windsor Industrial Holdings Limited, C.Mehta and Company Ltd, Glaxosmithkline, Egyptian International: Pharma, MS Pharma, Medisel (K) Ltd, Syner- Med Pharmaceuticals, Ranbaxy Labs Ltd, Goodman Agencies and Sunnyland Pharmaceuticals. The Applicant provided 375mg and was disqualified. The evaluation team recommended the award to Ranbaxy Labs Limited being the lowest responsive bidder.

7. Item No.8: Amoxicillin / Clavulanic Acid

This item attracted four bidders namely: Windsor Industrial Holdings Limited, Glaxosmithkline, Medisel (K) Ltd and Sunnyland Pharmaceuticals. The Applicant was the second lowest. The evaluation team recommended the award to Medisel (K) Limited being the lowest evaluated responsive bidder.

8. Item NO.9: Amoxicillin soomg capsules soc's

This item attracted seven bidders namely: Windsor Industrial Holdings Limited, Laboratory& Allied Limited, Regal Pharmaceuticals Ltd, Elys Chemicals Industries Limited, Dawa Limited, Sphinx Pharmaceuticals Limited and Harleys Limited. The Applicant was second lowest. The evaluation team recommended the award to Elys Chemical Industries Limited for being the lowest responsive bidder.

9. Item No. 10: Amoxicillin 2somg capsules 1000'S

This item attracted eleven bidders namely: Windsor Industrial Holdings Limited, Medivet Products Ltd, MS Pharma, Laboratory& Allied Limited, Regal Pharmaceuticals Ltd, Elys Chemicals Industries Limited, Dawa Limited, Biodeal Laboratories, Sphinx Pharmaceuticals Limited,

Harleys Limited and Goodman Agencies. The evaluation team recommended the award to Elys Chemical Industries Limited being the lowest evaluated responsive bidder.

10. Item No. 14: Benzyl Benzoate Emulsion 25%, 100ml

This item attracted eight bidders namely: Windsor Industrial Holdings Ltd, Medivet Products Ltd, KAM Pharmacy, Laboratory & Allied Ltd, Beta Healthcare Limited, Biodeal Laboratories, Syner- Med Pharmaceuticals and Sphinx Pharmaceuticals. The evaluation team recommended the award to Medivet Products Limited being the second lowest responsive bidder as the lowest bidder i.e. the Applicant had poor quality performance record.

11. Item No. 15: Benzyl penicillin 1 Miu Powder for injection

This item attracted four bidders namely: Windsor Industrial Holdings Limited, MS Pharma, Medisel (K) Ltd and Bak Pharm Limited. The Applicant was the second lowest evaluated bidder. The evaluation team recommended the award to Medisel being the lowest responsive bidder.

12. Item No. 21: Ceftriaxone 250 mg 1 g injection

This item attracted seventeen bidders namely: Windsor Industrial Holdings Limited, Philips Pharmaceuticals Limited, Sunpar Pharmaceuticals Limited, C.Mehta and Company Limited, Medox Pharmaceuticals Limited, Sai Pharmaceuticals Limited, Egyptian International Pharma, Howse & Mc George Laborex, laboratory & Allied, Bulk Medical Ltd, Beta Healthcare International Ltd, Medisel (K) Ltd, Syner-med Pharmaceuticals, Ranbaxy Labs Ltd, Harleys Ltd, Sunnyland Pharmaceuticals and Goodman Agencies. No recommendation for award was made.

13. Item No. 23: Cetrime 15% + Chlorhexidine 1.5% Solution, 5 litres

This item attracted nine bidders namely: Windsor Industrial Holdings Limited, Medivet Products Limited, KAM Pharmacy, MS Pharma, Regal Pharmaceuticals Limited, Elys Chemical Industries Limited, Biodeal Laboratories, Syner- Med Pharmaceuticals and Sphinx Pharmaceuticals. Applicant who was the lowest bidder was disqualified on the basis of past performance. The evaluation team recommended the award to Medivet Products Limited being the second lowest responsive bidder.

14.Item No. 24: Chlorhexidine Gluconate 5% solution, 5 litres

This item attracted eight bidders namely: Windsor Industrial Holdings Limited, KAM Pharmacy, MS Pharma, SurgiPharm Ltd, Elys Chemical Industries Limited, Biodeal Laboratories, Syner-Med Pharmaceuticals and Sphinx Pharmaceuticals. The Applicant who was the lowest evaluated bidder was disqualified based on poor past performance. The evaluation team recommended the award to Bidel Laboratories being the second lowest responsive bidder.

L5.Item No. 25: Chlorpheniramine Maleate 10mg/ml, 1ml Inj

This item attracted five bidders namely: Windsor Industrial Holdings Ltd, Laboratory & Allied Ltd, Nairobi Pharmaceuticals Ltd, Medisel (K) Ltd Harleys and Ltd. The Applicant was the third lowest bidder. The evaluation team recommended the award to Medisel (K) Ltd being the lowest responsive bidder.

r: 16.Item No. 27: Chlorpropamide 250mg Tablets 1000'S

This item attracted four bidders namely: Windsor Industrial Holdings Limited, Cosmos Ltd, Laboratory & Allied Ltd and Elys Chemical Industries Limited. The Applicant did not submit a sample. The evaluation team recommended the award to Cosmos Limited.

17. Item No. 32: Clotrimazole 1% Cream

This item attracted eleven bidders namely: U nifax Chemicals, Wind sor Industrial Holdings Limited, Medivet Products Ltd, Surgipharm Ltd, Cosmos Ltd, Laboratory & Allied Ltd, Regal Pharmaceuticals Ltd, Elys Chemical Industries Limited, Bulk Medicals Limited, Biodeal Laboratories and Universal Corporation Limited. The Applicant was lowest evaluated. The evaluation team recommended the award to Universal Corporation Limited.

18. Item No. 33: Compound Magnesium Trisilicate 2so/120mg Tablets

This item attracted five bidders namely: Windsor Industrial Holdings Limited, SAI Pharmaceuticals Limited, Regal Pharmaceuticals Limited, Elys Chemical Industries Ltd and Bak Pharm Limited. The Applicant who was the lowest bidder was disqualified for poor past performance. The evaluation team recommended the award to Sai Pharmaceutical s being the second lowest responsive bidder.

19.Item No. 34: Co-trimoxazole 200 + 40 mg/5ml, suspension 50 ml

This item attracted thirteen bidders namely: Windsor Industrial Holdings Limited, Medivet Products Ltd, GlaxoSmithkline, MS Pharma, Laboratory & Allied Ltd, Regal Pharmaceuticals Ltd, Elys Chemical Industries Limited, Beta Health Care Limited, Medisel (K) Limited, Biodeal Laboratories, Universal Corporation Limited, Sphinx Pharmaceuticals and Tablet India. The Applicant's sample among those of other bidders did not meet the minimum required score. The evaluation team recommended the award to Elys Chemical Industries Limited.

20. Item No. 35: Co-trimoxazole 400 + 80 mg Tablets 1000'S

This item attracted eleven bidders namely: Windsor Industrial Holdings Limited, GlaxoSmithkline, MS Pharma, Laboratory & Allied Ltd, Regal Pharmaceuticals Ltd, Elys Chemical Industries Limited, Dawa Limited, Beta Health Care Limited, Medisel (K) Limited, Biodeal Laboratories and Bak Pharm. The Applicant's sample among those of other bidders did not meet the minimum required score. The evaluation team recommended the award to Elys Chemical Industries Limited.

21.Item No. 41: Dextrose 50%

This item attracted two bidders namely: Windsor Industrial Holdings Limited and Infusion (K) Limited. The Applicant's bid was rejected because sample was plastic bags which have proved to be unreliable and had leakage problems. The evaluation team recommended the award to Infusion (k) Limited being the lowest bidder.

22. Item No. 42: Diazepam romg/zrnl Inj

This item attracted six bidders namely: Windsor Industrial Holdings Limited, Egyptian International, Pharma, Howse & Me George Laborex, Laboratory & Allied Limited, Nairobi Pharmaceuticals Ltd and Medisel (K) Ltd. Applicant's sample did not meet the required technical score of 80%. It scored 5%. The evaluation team recommended the award to Medisel (K) Limited being the lowest recommended bidder.

23. Item No. 44: Diclofenac Sodium 75mg/3ml Injection

This item attracted eleven bidders namely: Windsor Industrial Holdings Limited, Europa Healthcare, Indoco Remedies, Laboratory & Allied Ltd, Surgilinks Ltd, Intas Exports Limited, Bulk Medicals Ltd, Beta

Healthcare Limited, Medisel (K) Limited, Harleys Limited and Goodman Agencies. The Applicant's product was not registered as required and was disqualified. The evaluation team recommended the award to Medisel (K) Limited being the lowest responsive bidder.

24. Item No. 49: Erythromycin Stearate Tablets 1000'S,

This item attracted nine bidders namely: Unifax Chemicals Limited, Windsor Industrial Holdings Limited, C.Mehta & Co. Limited, Indoco Remedies, Laboratory & Allied Limited, Elys Chemical Industries Limited, Dawa limited, Syner- Med Pharmaceuticals and Harleys Limited. The sample for Applicant was disqualified on the basis of colour. The evaluation team recommended the award to Elys Chemical Industries Limited.

25. Item No. 50: Erythromycin 125mg/5ml Powder for suspension, 100ml

This item attracted nine bidders namely: Windsor Industrial Holdings Limited, Medivet Products Limited, Cosmos Limited, Laboratory & Allied Ltd, Regal Pharmaceuticals Ltd, Elys Chemical Industries Limited, Dawa Limited, Biodeal Laboratories and Bak Pharm. The Applicant's sample among others did not meet the required 80% minimum score. The evaluation team recommended the award to Elys Chemical Industries Limited.

26. Item No. 51: 200gm Ferrous Sulphate Tablets 1000'S.

This item attracted three bidders namely: Windsor Industrial Holdings Limited, Harleys Limited and Goodman Agencies. The Applicant's sample did not meet the required 80% score. The evaluation team recommended the award to Harleys Limited being the only responsive bidder.

27. Item No. 53: Folic Acid 5mg Tablets, 1000'S

This item attracted five bidders namely: Windsor Industrial Holdings Limited, Laboratory & Allied Ltd, Regal Pharmaceuticals Ltd, Elys Chemical Industries Limited and Bak Pharm. The Applicant's bid among others did not score required 80 %. The evaluation team recommended the award to Regal Chemicals Limited being the only responsive bidder.

28. Item No. 54: Fortified procaine penicillin 4miu

This item attracted four bidders namely: Windsor Industrial Holdings Limited, Medisel (K) Limited, Bak Pharm Limited and Harleys Limited. There were no recommendations for award. User department recommended that the purchase of the item be halted.

29. Item No. 59: Griseofulvin 500mg Tablets 100'S

This item attracted five bidders namely: Windsor Industrial Holdings Limited, SAI Pharmaceuticals Limited, Cosmos Limited, Laboratory & Allied Ltd and Elys Chemical Industries Limited. There were no recommendations for award.

30. Item No. 70: Ibuprofen 200mg Tablets 30'S

This item attracted ten bidders namely: Windsor Industrial Holdings Limited, U nifax Chemicals, SAI Pharmaceuticals, MS Pharma, Laboratory & Allied Limited, Regal Pharmaceuticals Limited, Elys Chemical Industries Limited, Bak Pharm Limited, Syner - Med Pharmaceuticals and Harleys Limited. The sample of the Applicant did not meet the minimum 80% score. The evaluation team recommended the award to Elys Chemicals Industries Limited being the lowest responsive bidder.

31. Item No. 73: Ketoconazole 200mg Tablets, 30'S

This item attracted seven bidders namely: Windsor Industrial Holdings Limited, Medox-Pharm, Cosmos Limited, Intas Exports Limited, Elys Chemical Industries Limited, Bulk Medical Limited and Harleys Limited. The Applicant was the fourth lowest bidder. The evaluation team recommended the award to Intas Exports being the lowest responsive bidder.

32. Item No. 74: Lignocaine 2% injection, 30ml

This item attracted two bidders namely: Windsor Industrial Holdings Limited and Medisel (K) Limited. The Applicant who was the lowest bidder was disqualified on the basis of poor past performance. The evaluation team recommended the award to Medisel being the second lowest bidder.

33. Item No. 7S: Lysol44% Cresol in soap solution

This item attracted five bidders namely: Windsor Industrial Holdings Limited, Biodeal Laboratories Limited, Syner - Med Pharmaceuticals, Sphinx Pharmaceuticals and Harleys Limited. The Applicant who was the lowest bidder was disqualified on the basis of poor past performance. The evaluation team recommended the award to Harleys being the second lowest responsive bidder.

34. Item No. 79: Methylated Spirit 94% 5 litres

This item attracted seven bidders namely: Windsor Industrial Holdings Limited, Unifax Chemicals, KAM Pharmacy, Beta Healthcare Limited, Biodeal Laboratories, Syner-med Pharmaceuticals and Sphinx Pharmaceuticals. No award recommendation was made and re-tender was recommended after the only technically responsive firm Biodeal Labs was disqualified for submitting an unsigned tender form.

35. Item No. 86: Metronidazole 200mg Tablets, 1000'S

This item attracted seven bidders namely: Windsor Industrial Holdings Limited, MS Pharma, Laboratory & Allied Ltd, Regal Pharmaceuticals Ltd, Elys Chemical Industries Limited, Medisel (K) Limited and Bak Pharm. The evaluation team recommended the award to Elys Chemicals Industries Limited being the only responsive bidder.

36. Item No. 93: Nystatin 1000 iu/ml Oral suspension, 30ml

This item attracted ten bidders namely: Windsor Industrial Holdings Limited, Medivet Products Limited, Cosmos Limited, Egyptian International Pharma, Laboratory & Allied Ltd, Lords Healthcare Ltd, Elys Chemical Industries Limited, Bulk Medical Ltd, Biodeal Laboratories and Sphinx Pharmaceuticals. The Applicant was the second lowest bidder. The evaluation team recommended the award to Elys Chemicals Industries Limited being the lowest evaluated bidder.

37. Item No. 98: Paracetamol Syrup 500mg/ml 1 litre

This item attracted nine bidders namely: Windsor Industrial Holdings Limited, Medivet Products Limited, MS Pharma, Laboratory & Allied Ltd, Regal Pharmaceuticals Ltd, Elys Chemical Industries Limited, Bulk Medical Limited, Beta Healthcare Limited and Sphinx Pharmaceuticals. The lowest bidder Laboratory & Allied Limited was disqualified on the basis of poor past performance. Applicants sample failed to meet the

minimum score. The evaluation team recommended the award to Regal Pharmaceuticals Limited being the second lowest bidder.

38. Item No. 108: Quinine Sulphate 200mg Tablets 1000'S

This item attracted five bidders namely: U nifax Chemicals, Windsor Industrial Holdings Limited, Cosmos Limited, Laboratory & Allied Limited and Elys Chemical Industries Limited. The Applicant was disqualified for providing sample for 300 mg strength and not 200mg as required. The evaluation team recommended the award to Elys Chemical Industries Limited being the lowest evaluated bidder.

39. Item No. 112: Salbutarncl 2mg/5ml Oral Solution, 100ml

This item attracted eleven bidders namely: Windsor Industrial Holdings Limited, Medivet Products Limited, GlaxoSmithKline, Cosmos Limited, Laboratory & Allied Ltd, Regal Pharmaceuticals Ltd, Elys Chemical Industries Limited, Bulk Medical Limited, Dawa Limited, Biodeal Laboratories and Sphinx Pharmaceuticals. The Applicant who was the lowest bidder was disqualified on the basis of poor past performance The evaluation team recommended the award to Biodeal Laboratories being the second lowest bidder.

40. Item No. 120: Tetracycline Eye Ointment, Sg tube

This item attracted three bidders namely: Windsor Industrial Holdings Limited, SAI Pharmaceuticals and Medisel (K) Limited. The Applicant who was the lowest was disqualified on the basis of poor past performance. The evaluation team recommended the award to SAI Pharmaceuticals being the second lowest bidder.

41.Item No. 124: Vitamin Ki iomg/rnl injection

This item attracted two bidders namely: Windsor Industrial Holdings Limited and Howse & McGeorge Laborex. The evaluation team recommended the award to Howse & McGeorge Laborex being the only qualified bidder.

TENDER COMMITTEE'S DECISION

The tender committee had two meetings on 30th November 2005 and 1st December 200S and awarded the tenders as follows:

Item no.	Name of bidder	Amount
1.	Regal Pharmaceuticals Limited	Kshs.275,500
2.	Harlevs Limited	4,557 dollars
3.	Medisel Kenya	Kshs.8, 278,785.60
4.	Not awarded as enough stock are available	
5.	Medivet Products	Kshs.21 600,000.00
6.	Elvs Chemical Industries Limited	US\$ 711.700
7.	Ranbaxv Laboratories Limited	224,000 dollars
8.	Medisel Kenya	Kshs.7,300,000
9.	Elvs Chemical Industries Limited	US\$ 54,000
10.	Elvs Chemical Industries Limited	US\$18 000
11.	Biodeal Labs Limited	KShs.100, 800.00
12.	Drug no longer recommended for use	
13.	Cosmos Limited	US\$21,200
14.	Medivet Products	Kshs.360,000
15.	Medisel Kenya	Kshs.7,654,500.00
16.	Re-tender	
17.	Sai Pharmaceuticals Limited	Kshs. 39 per pack
18.	Nairobi pharmaceuticals Limited	Kshs 58,300
19.	Cosmos Limited	US\$ 1,320
20.	Sai Pharmaceuticals Limited	Kshs.3,318,000
21.	Svner Med Pharmaceuticals	Kshs.6,251,850.00
22.	Medisel Kenya	Kshs 1,503,810.00
23.	Medivet Products	Kshs.9,310.00
24.	Biodeal Labs Limited	Kshs. 15,733,100.00
25.	Medisel Kenya	Kshs.240,300.00
26.	Elvs Chemical Industries Limited	24,750 dollars
27.	Use quotations	
28.	C.Mehta and Companv Limited	Kshs.19,914 per pack
29.	C.Mehta and Cornpanv Limited	Kshs.5,163 per pack
30.	Harlevs Limited	Kshs.5.24 per pack
31.	Ranbaxy Laboratories Limited	11 200 dollars
32.	Universal Corporation Limited	16.000 dollars
33.	Sai Pharmaceuticals Limited	Kshs.075. 800
34.	Elvs Chemical Industries Limited	501.704 dollars
35.	Elvs Chemical Industries Limited	35,1000 dollars
36.	Re-tender ordered	
37.	Harlevs Limited	88.000 dollars
38.	Sai Pharmaceuticals Limited	Kshs.26, 000
39.	Ouotations be used	
40.	Re-tender ordered	
41.	Infusion K Limited	Kshs.8, 643,600
42.	Medisel Kenya	Kshs.1, 624,350.00
43.	Medisel Kenya	Kshs. 1, 586,200.00
44.	Harley's Limited	Kshs. 1,444,606.88
45.	Re-tender ordered	
46.	Re- tender ordered	
47.	Universal Corooration Ltd (on request by user)	10 dollars

48.	Universal Corporation Limited	17,703 dollars
49.	Elvs Chemical Industries Limited	45,900 dollars
50.	Elvs Chemical Industries Limited	72,150 dollars
51.	Harlevs Limited	22,160 dollars
52.	Dawa Limited	Kshs. 2,430,000
53..	Regal Pharmaceuticals Limited	Kshs.215,040
54.	Not to be procured (its use discouraged)	
55.	Medisel Kenva	Kshs.489,270.00
56.	Harlevs Limited	2,330 dollars
57.	Harlevs Limited	26 650 dollars
58.	Award stopped	
59.	Award stopped	
60.	Infusion K Limited	Kshs. 5,600,000
61.	Re-tender ordered	
62.	Re-tender ordered	
63.	Infusion K Limited	Kshs.1, 426,000
64.	Cosmos Limited	US\$8800
65.	Medivet Products	Kshs.2, 400,000
66.	Medisel Kenva	Kshs 349,440
67.	SvnerMed Pharmaceuticals Ltd	Kshs.4,443,375
68.	Elvs Chemical Industries Limited	42,400 dollars
69.	Harlevs Limited	13,868 dollars
70.	Elvs Chemical Industries Limited	43,875 dollars
71.	Philips Pharmaceuticals Limited	Kshs.2, 820,000
72.	Philips Pharmaceuticals Limited	Kshs 4, 559,000
71.	Intas Pharmaceuticals limited	24,000 dollars
74.	Medisel Kenva	Kshs.2,616,900.00
75.	Stopped Award	
76.	KAM Pharmacy (on request from user)	Kshs. 179 per Unit
77.	Cosmos Limited	US\$49,400
78.	Sai Pharmaceuticals Limited	Kshs.174, 240
79.	Re-tender ordered	
80.	Cosmos Limited	US \$14,400
81.	Bakpharm Limited	US\$59,706.38
82.	Sai Pharmaceuticals Limited	Kshs 48,600
83.	R-tender ordered	
84.	Surgilinks Limited	Kshs 13,341,978
85.	Universal Corporation Limited	66,000 dollars
86.	Elvs Chemical Industries Limited	38,507 dollars
87.	Re-tender ordered	
88.	Medisel Kenya	Kshs 2,264,000
89.	Regal Pharmaceuticals Limited	Kshs 2,853,500
90.	Award stopped	
91.	Elvs Chemical Industries Limited	24,180 dollars
92.	Infusion K Limited	Kshs.16,171,200.00
93.	Elvs Chemical Industries Limited	185,094 dollars
94.	Universal Corporation Limited	15,543 dollars
95.	Harlevs Limited	25,000 dollars
96.	Regal Pharmaceuticals	Kshs. 9,900,000.00

97.	Elvs Chemical Industries Limited	48,128 dollars
98.	Refer award back to evaluation committee	
99.	Dawa Limited	Kshs. 9,435,000
100.	Re-tender ordered	
101.	Re-tender ordered	
102.	Nairobi pharmaceuticals Limited	Kshs.5,830
103.	Medivet Products	Kshs.6, 290,000
104.	Cosmos Limited	US \$5,400.00
105.	Re-tender ordered	
106.	Intas Pharmaceuticals limited	136,002 dollars
107.	Suspended award	
108.	Elvs Chemical Industries Limited	52,4 70 dollars
109..	SvnerMed Pharmaceuticals Limited	Kshs.1 952,000
110.	Glaxo SmithKline	13.300 dollars
111.	Elvs Chemical Industries Limited	4,900 dollars
112.	Biodeal Labs Limited	Ksh.6,046,875.00
113.	Re- evaluation	
114.	Re- evaluation	
115.	Glaxo SmithKline	171 000 dollars
116.	Re-tender ordered	
117.	Elys Chemical Industries Limited	223,200 dollars
118.	Biodeal Labs Limited	Kshs.720 000.00
119.	Medisel (K) Limited	1,421,250
120.	Re-tender ordered	
121.	Glaxo Smith Kline	2 850 dollars
122.	Re-tender ordered	
123.	Sai Pharmaceuticals Limited	Kshs.174,240
124.	Howse & McGeorge Laborex	Kshs. 80 per unit
125.	Re-tender	
126.	Harlevs Limited	34,500 dollars
127.	Re-tender (on request of user)	

THE APPEAL

The Applicant filed these appeals on 21st December 2005 against the Procuring Entity's award of the above tenders. The Board consolidated the three appeals on the grounds and the parties were similar.

The Applicant was represented by Mr. Elijah Njeru Mwangi, Advocate and Mr. Charles Kandie, Chief Executive Officer, Mr. Frederick Wanyonyi, Legal Officer, Mr. Edward Buluma, Procurement Manager and Dr. Maureen Nafula represented the Procuring Entity.

The Applicant sought an order of the Board to reverse the award of the tender to another firm and award to it having been the lowest price-wise and having met all the technical specifications.

The Applicant raised one ground of appeal touching on breach of Regulation 30 (8)(a) and (b) which we deal with as follows: -

Breach of Regulations 30 (8)(a) and (b).

During the hearing, the Applicant conceded to having submitted the wrong sample for Quinine Sulphate tablets and therefore withdrew Appeals Numbers 47 and 48/2005. The Board allowed the said withdrawal.

On appeal number 49/2005, the Applicant alleged that although it was the lowest bidder price-wise on eight items listed below it was not awarded any of them:

- i. Item No. 14: Benzyl Benzoate Emulsion 25%, 100ml
- ii. Item No. 23: Cetrimide 15% + Chlorhexidine 1.5% Solution, 5 litres
- iii. Item No. 24: Chlorhexidine Gluconate 5% solution, 5 litres
- iv. Item No. 33: Compound Magnesium Trisilicate 250/120mg Tablets
- v. Item No. 74: Lignocaine 2% injection, 30ml
- vi. Item No. 75: Lysol 44% Cresol in soap solution
- vii. Item No. 112: Salbutamol 2mg/gml Oral Solution, 100ml
- viii. Item No. 120: Tetracycline Eye Ointment, 5g tube

On 12th September 2005 the Applicant submitted one sample for the tenders for Supply of Kits and Pharmaceutical Drugs. It alleged that there had been a pre-bid visit in which an agreement was reached between the bidders and the Procuring Entity that candidates would bring a single sample for common items. The results of the one sample submitted would have applied for all the tenders.

The Applicant had been the previous supplier to Procuring Entity and all its products were properly registered by the Pharmacy and Poisons Board.

It urged the Board to disregard the Procuring Entity's arguments and award it the tenders where it was the lowest.

The Procuring Entity submitted that the tenders were advertised between 27th July 2005 and 12th August 2005. They closed on 7th and 12th September 2005 respectively and were opened thereafter in the presence of parties who chose to attend. An evaluation committee of competent officers was formed to evaluate the samples. The samples

were coded to conceal identity before they were taken to the evaluation committee.

The Procuring Entity further submitted that KEMSA was a state corporation and its core mandate was the timely procurement and distribution of quality drugs to all public health institutions. Further some of the bidders including the Applicant had caused the Procuring Entity to initiate the process of recalling rejected drugs, which had cost millions of shillings.

The Procuring Entity indicated that the items were awarded to the second lowest bidders after the Applicant's past performance was considered. Besides this, the Applicant failed to replace drugs that were found to be unfit for use.

The Procuring Entity also submitted that technical evaluation was based on product quality and supplier performance. Product quality considered the following attributes: physical appearance of the product, product composition, shape and colour of the product, labelling and packaging of the product, among others. Registration of products was also considered at this stage as it ensures safety of the product.

The Applicant was disqualified on the basis of quality and failure to submit a complete set of requirements and it cannot argue that another criteria was used to disqualify it. Most of the samples by the Applicant did not attain the required minimum score.

On the issue of past performance it submitted that the Applicant had been a previous supplier. However, the Applicant had proved to be an unreliable supplier for various reasons as listed below:

- a) The Applicant had supplied many products, which had failed in quality in the past. Once such failures were reported, the Applicant had defaulted in the replacement of the products.
- b) The Applicant had received large sums of public funds amounting to Kshs 143,655,853/30 for Health Centre KIT IIA and IIB in the tender for 2003/4 Financial year - in which 20% of the products failed on quality parameters.
- c) The Procuring Entity incurred huge sums of money in recalling and testing the Applicant's products.

- d) The Applicant had in the past-submitted samples of the required quality to be evaluated at the tendering stage, but supplied substandard products at the time of delivery.

To evaluate past performance, the Procuring Entity relied on the Public Procurement User's Guide to disqualify the Applicant. Clauses 2.8.2, 2.8.4, 2.8.5 and 2.8.6 thereof provide as follows:

"2.8.2 Whatever the method used, orders and contracts should be awarded to candidates with potential ability to perform successfully under the terms of the contract. This requires a prediction by the procuring entity of future performance. Obviously no absolute assurance of successful performance can be guaranteed, but the chance it will occur, can be appreciably increased by careful consideration of a number of factors. Before the award is made, the procuring entity must be in a position to make a positive judgement that the candidate will perform the contract in complete compliance with its terms, and this determination should be in writing. In this regard, the signing of a contract may be deemed to be a determination that the prospective candidate is responsible with respect to that contract.

2.8-4 A procuring entity unable to obtain enough information to permit an affirmative finding, must make a determination that the candidate is not responsible. The award of a contract to a candidate who subsequently defaults, is late in deliveries, or otherwise performs unsatisfactorily is a disservice to the public. Such awards are also unfair to other candidates who are capable of satisfactory performance, and they tend to discourage them from submitting tenders on future procurements.

2.8.5 Responsibility in the public procurement has been defined as "a candidate having the capacity and, the financial ability to perform as well as possessing the integrity, perseverance, and the tenacity to properly comply with all of the requirements of the contract in a timely manner". The procuring entity has a broad discretion in determining responsibility. In the absence of bad faith or a reasonable basis for the determination, the decision is solely within its jurisdiction. In a formally advertised procurement, responsibility is not considered until the apparent successful candidate has been designated.

In accordance with regulation 33 (3), inability by the successful tenderer for whatever reason to accept the award would require consideration of the next eligible candidate.

2.8.6 A prospective candidate must have adequate financial resources or the ability to obtain such resources as required during performance of the contract. He must be able to comply with all the required or proposed delivery or performance schedule, taking into consideration all existing business commitments. The candidate needs a satisfactory record of performance. Those, who are or have been seriously deficient in current or recent contract performance, when the number of contracts and the extent of deficiency each are considered (in the absence of evidence to the contrary or circumstances properly beyond their control) shall be presumed to be unable to meet this requirement. They must also have a satisfactory record of integrity and business ethics and be otherwise qualified and eligible i.e. not in violation of any law or order that require candidate compliance. "

In its rejoinder, the Applicant argued that in the pharmaceutical industry, minor failures of drugs were common since the conditions in which drugs are kept vary from one place to another. Since this was bound to happen, the Applicant was always in communication with the Procuring Entity and the manufacturers, to find ways of replacing failed drugs. However the Procuring Entity was not cooperative. Further, the Applicant is not a manufacturer and that is why the replacement might have taken longer periods at times.

It argued that cases of failure of drugs are so minor that they cannot be regarded as total failure of performance by a supplier.

The Procuring Entity was acting as though the Applicant had been debarred yet it had not followed the proper debarment procedure as envisaged in Regulation 46(3).

On the allegation that it had not submitted delivery schedules the Applicant argued that it had done so in a letter sent to the Procuring Entity after tender opening. The letter was however not dated.

KAM Pharmacy, SynerMed Pharmaceuticals and Dawa Limited as interested candidates, urged the Board to dismiss the appeal since it had no merit.

The Board now has to deal with the following issues raised by both parties in Appeal Number 49/2005:

- Whether the Applicant was the lowest evaluated bidder

- Whether the Procuring Entity was entitled to disqualify the Applicant based on past performance

The Board has studied the tender documents, evaluation reports, minutes of the Tender Committee and considered all the arguments. It has noted that Regulation 30(8)(a) requires that the tender with the lowest evaluated tender price should be awarded. In addition, it noted that the tender document contained the following Clauses:

"Award of Contract

25. Post-qualification

25.1 In the absence of pre-qualification, the Procuring Entity will determine to its satisfaction whether the tenderer that is selected as having submitted the lowest evaluated responsive tender is qualified to perform the contract satisfactorily.

25.2 The determination will take into account the tenderer financial, technical, and production capabilities. It will be based upon an examination of the documentary evidence of the tenderers qualifications submitted by the tenderer, pursuant to paragraph 12.3, as well as such other information as the Procuring entity deems necessary and appropriate.

25.3 An affirmative determination will be a prerequisite for award of the contract to the tenderer. A negative determination will result in rejection of the Tenderer's tender, in which event the Procuring entity will proceed to the next lowest evaluated tender to make a similar determination of that Tenderer's capabilities to perform satisfactorily.

26. Award Criteria

26.1 Subject to paragraph 10,23 and 28 the Procuring entity will award the contract to the successful tenderer(s) whose tender has been determined to be substantially responsive and has been determined to be the lowest evaluated tender, provided further that the tenderer is determined to be qualified to perform the contract satisfactorily."

The Board noted that the General Information to Tenderers especially Clauses 25.1 and 26.1 read together with the Procurement User's Guide clauses 2.8.2 and 2.8.6 provides that the Procuring Entity will determine to its satisfaction whether the tenderer that is selected as having submitted the lowest evaluated responsive tender is qualified to perform the contract satisfactorily.

The Board further observed that the Applicant was the lowest - price wise in the eight items listed in its submissions. However it was not the

lowest evaluated bidder. The Applicant was disqualified based on past \ performance and could therefore not be the lowest evaluated. Further, the Applicantitender document did not contain Delivery Schedules as required. In the circumstances, its tender should have been considered as non-responsive as soon as this anomaly was identified.

The Board also noted the fact that the Applicant had not performed satisfactorily under the previous contracts. Further, a sample exhibited by the Procuring Entity showed that the Applicant had supplied a disinfectant which normally is supposed to be orange in colour, but had turned black before expiry rendering it unfit for use. Consequently, the Procuring Entity concluded that the Applicant, if awarded the contract, could not perform satisfactorily.


In the circumstances, the Board concurs with the submission of the Procuring Entity that the Applicant would not performrrrLLContract satisfactorily if awarded.

Accordingly this ground of appeal fails.

Taking into account all the above matters, the appeal fails and is hereby dismissed.

Accordingly the procurement process is ordered to proceed.

Dated at Nairobi this 18th day of January 2006.


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CHAIRMAN
PPCRAB


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SECRETARY
PPCRAB

