

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 26/2010 OF 21ST APRIL, 2010

BETWEEN

INFUSION MEDICARE LTD.....APPLICANT

AND

KENYA MEDICAL SUPPLIES AGENCY.....PROCURING ENTITY

Review against the decision of the Tender Committee of Kenya Medical Supplies Agencies dated 6th April, 2010 the matter of tender No. KEMSA/RT9/2009-2010 for Supply of Contraceptives

BOARD MEMBERS

Mr. P. M. Gachoka	-	Chairman
Amb. Charles M. Amira	-	Member
Ms. Natasha Mutai	-	Member
Eng. C. A. Ogut	-	Member
Mr. Joshua Wambua	-	Member

IN ATTENDANCE

Mr. P. M. Wangai	-	Holding Brief for Secretary
Ms. K. A. Rota	-	Secretariat

PRESENT BY INVITATION

Applicant, Infusion Medicare Limited

- Mr. Kiingati Ndirangu - Advocate, Kairu Mbuthia and Kiingati
Advocates
- Ms. Kanini Nthiga - Pupil, Kairu Mbuthia and Kiingati
Advocates
- Dr. Simon Muigai - Manager
- Mr. Francis Muthiani - Manager

Procuring Entity, Kenya Medical Supplies Agency

- Mr. Willis Oluga - Advocate, Nyaberi & Co. Advocates
- Mr. Samuel Kamba - Advocate, Nyaberi & Co. Advocates
- Mr. Fred Wanyonyi - Corporation Secretary
- Ms. Charity Kagina - Procurement Advisor
- Mr. John Kabuchi - Procurement Manager

Interested Candidates

- Mr. Muriuki Mugambi - Advocate for Famy Care Ltd
- Mr. Josephat Maweu - Advocate for Famy Care Ltd
- Mr. Sasi Kumar - Vice President, Famy Care Ltd
- Mr. Rahul Musale - Manager, Famy Care Ltd
- Ms. Irene K. Ibutu - Administrator, Angelica Medical
Supplies Ltd
- Mr. Samjeev Kumar - Manager, Plethico Africa Ltd
- Mr. Mugodo - Legal Officer, Plethico Africa Ltd

BOARD'S RULING ON PRELIMINARY OBJECTIONS

At the commencement of the hearing, the Board noted that the Procuring Entity and the Successful Bidder had filed Preliminary Objections on the following grounds:-

1. Procuring Entity

- a) That the Application for review was filed out of time contrary to the Public Procurement and Disposal Regulations, 2006.
- b) That this Board has no jurisdiction to hear and determine this Application since the contract, the subject matter of this application, was entered into before the Procuring Entity was notified about the Request for Review

2. Successful Bidder

- a) That the Request for Review is time barred under the provision of Regulation 73(2) (c) (i) as the Request for Review is predicated on an allegation that the Procuring Entity inserted a provision in the tender document to favour one party.
- b) That the Board has no jurisdiction to entertain the Appeal to the extent that the contract, the subject matter of the Appeal, has been lawfully signed between the Procuring Entity and the Successful Bidder.

- c) The Request for Review is incompetent as it offends Section 93(2) (c) of the Act.

The Procuring Entity argued that the Request for Review was filed out of time contrary to Regulation 73 (2) (c) (ii) of the Public Procurement and Disposal Regulations 2006, (hereinafter the Regulations). It stated that although the Request for Review raised eight grounds, all the grounds, revolve around the issue of the certificate by the manufacturer which is captured in ground four. It further stated that the entire Request for Review was based on the ground that the Applicant was disqualified for failure to submit an inspection report, from a recognized Authority.

It argued that the Applicant purchased the documents on 10th March, 2010 and since the clause on the manufacturer was in the tender documents, the Applicant ought to have filed its Request for Review within fourteen days from that date. It stated that the Request for Review should have been filed by 24th March, 2010. It submitted that the filing of the Request for Review on 21st April, 2010 was out of time. Accordingly, the Request for Review should be dismissed.

The second limb of the Preliminary Objection was that the Board had no jurisdiction to hear and determine the Request for Review. The Procuring Entity cited Sections 68(2) and 93 (2) (c) of the Public Procurement and Disposal Act, 2005 (Hereinafter referred to as the Act). It argued that the Tenderers were notified of the outcome of the award

of the tender on 7th April, 2010. It stated that the fourteen days appeal window closed on 21st April, 2010 and by that time it had not been notified that a Request for Review had been lodged. Accordingly, it signed a contract with the Successful Bidder on 22nd April, 2010. The Procuring Entity argued that in view of the fact that the contract was signed in accordance with Section 68 of the Act, the Board had no jurisdiction to hear and determine the Request for Review.

On its part the Successful Bidder, stated that the Applicant purchased the tender documents on 10th March, 2010 and the tender was closing on 23rd March, 2010. It stated that the Request for Review was triggered by one thing only; that is the fact that Applicant failed to supply a certificate to show that their plant was dedicated to manufacturing of hormonal drugs only. It argued that the Applicant ought to have filed its Request for Review within fourteen days from 10th March, 2010, if it was not satisfied by the clause requiring bidders to supply a certificate from the manufacturer.

The Successful Bidder cited the following decisions to support its arguments;

- 1. *Application No.55/2009 of 10th December, 2009 between Voith Hydro GmbH & Co. and Kenya Electricity Generating Co. Ltd***
- 2. *Application No.18/2008 between Kobil Petroleum Ltd and Kenya Ports Authority***

The second limb of the Preliminary Objection was that the Successful Bidder had already signed a contract with the Procuring Entity. It stated that the contract was signed on 22nd April, 2010, which was on the 15th day after notification to the bidders.

It argued that the signing of the contract was done in accordance with Section 68 of the Act and therefore the Board had no jurisdiction to hear and determine the Request for Review.00

In response, the Applicant opposed the Preliminary Objections. It argued that the Request for Review was filed within time in accordance with Regulation 73(2) (c). It stated that the last day for filing the Request for Review was 21st April, 2010 and it filed the Request for Review on that date.

The Applicant further argued that all the issues raised by the Procuring Entity and the Successful Bidder relate to the issues of facts which could only be determined upon hearing the Request for Review on merit. It therefore urged the Board to dismiss the Preliminary Objections and allow the Request for Review to be heard on merit.

The Board has carefully considered the submissions of the parties and the documents that were presented before it. The Preliminary Objections by the Procuring Entity and the Successful Bidder raise the same issues namely;

1. Whether the Request for Review was filed out of time contrary to Regulation 73 (2) (c) (i).
2. Whether the Board has jurisdiction to hear and determine the Request for Review in view of the provisions of Sections 68 and 93 (2) (c) of the Act.

On the issue that the Request for Review had been filed out of time, the Board notes that the Request for Review raises eight grounds. The Board notes that these grounds raise issues of facts and it is not possible to make a determination without going into the merits of the Request for Review. The question on whether all the eight grounds are interrelated cannot be determined without hearing the Request for Review on merit. For the Board, to determine these issues it has to peruse the tender documents of the Bidders and confirm whether they complied with the tender requirements.

Therefore the Board finds that it is not possible to determine the issues at the preliminary stage as argued by the Procuring Entity and the Successful Bidder. Accordingly, this limb of the Preliminary Objections fails.

On the issue of the jurisdiction the Board notes that the relevant provisions are Sections 68 and 93 (2) (c) which provides as follows;

Section 68(2):

(1) "

(2) The written contract shall be entered into within the period specified in the notification letter under section 67(1) but not until at least fourteen days have lapsed following the giving of that notification.

(3) ”

Section 93 (2) (c)

The following matters shall not be subject to review under subsection (1):

“ (a) ”

(b) ”

(c) where a contract is signed in accordance with section 68”;

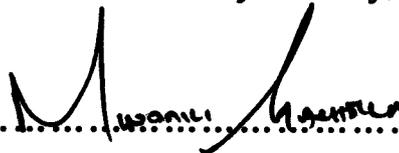
The Board notes that the Bidders were notified of the outcome of the award of the tender on 7th April, 2010. The Applicant acknowledged receipt of the letter of notification by its letter dated 7th April 2010. Therefore, the appeal window opened on 8th April, 2010 and was to close on 21st April, 2010. The Board notes that the Request for Review was filed on 21st April, 2010 which was within time. The Board further notes that as the Applicant admitted at the hearing, the Request for Review was filed at around 5.00 p.m. and it was not possible for the Secretary to the Board to effect service on that day. The Board further notes that an attempt was made to serve the Procuring Entity on 22nd April, 2010 but service was declined on the ground that service was being effected after the working hours.

The Board notes that the Procuring Entity signed the contract on 22nd April, 2010. It is therefore clear, that this Request for Review presents a unique situation where both parties may be right and their actions within the law. It is also clear that the Request for Review was filed on the last day of the Appeal window and that the Procuring Entity signed the contract on the next day which was the first day after the expiry of the Appeal window.

As the Board has already observed the Applicant wrote a letter dated 7th April, 2010 acknowledging receipt of the notification. The Applicant did not file its Request for Review until 21st April, 2010 at 5.00 p.m. This was on the last day and at the last minute. It is also observed that the Procuring Entity on the other hand signed the contract on the first day after expiry of the appeal window which is in with Section 68(2) of the Act. As a result of the signing of the contract in line with Section 68(2) of the Act, the jurisdiction of the Board is ousted.

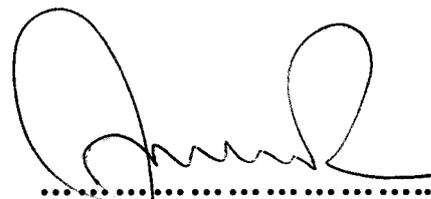
Accordingly, this limb of the Preliminary Objection succeeds and the Request for Review is hereby dismissed.

Dated this 18th day of May, 2010



.....

CHAIRMAN, PPARB



.....

SECRETARY, PPARB

