

IN THE INDEPENDENT PROCUREMENT REVIEW PANEL (IPRP)

**IN THE MATTER OF AN APPEAL AGAINST THE DECISION BY THE
PROCUREMENT COMMITTEE OF A PROCURING ENTITY PURSUANT TO s65 OF
THE PUBLIC PROCUREMENT ACT 2004.**

BETWEEN

INSTANT MODERN CONSTRUCTION COMPANY Appellant

~and~

MINISTRY OF DEFENCE Respondent

RULING

INTRODUCTION

1. The appellant appeals against the undue disadvantage which he claims he has suffered of assorted medical drugs and laboratory reagents to the Ministry of Defence in the evaluation and awarding of the contract. . He further complained about the responsiveness of his bid and being dissatisfied with the bidding and evaluation process carried out by the respondent, the Manager of the appellant firm, one Mr Yahyah S Fofanah wrote a letter of complaint to the Independent Procurement Review Panel, hereinafter referred to as the IPRP, against the decision.

BACKGROUND

2. The appellant firm applied for and bid for a contract to supply the respondent with assorted medical drugs and laboratory reagents and submitted bids on 14th December 2009, along with a number of other firms. A total of 2 lots formed part of the bidding process and this review is concerned with both of those LOTS. As part of the bidding process, bid documents were obtained by the appellant firm. The appellant further submitted the bid documents along with seven other bidders in that regard. The appellant firm attended the bid opening ceremony, and subsequent to that bid opening ceremony, the technical evaluation committee, hereinafter referred to as "the Committee" carried out an evaluation exercise into the bids

submitted with respect to both lots and with respect to LOT 1 recommended the award of the contract to one Imres Pharmacy. With respect to LOT 2, the Committee recommended Ramesco General Supplies for the award of the contract. This was on account of the findings of the technical evaluation committee which concluded that the bid submitted by the appellant was technically non-responsive owing to a failure to meet the minimum technical evaluation criteria of the respondent as set out in the bidding documents. The appellant claims in its complaint that the actions of the Respondent are without any procurement justification and that he had been unduly disadvantaged. Despite writing to the Ministry about this issue, the Ministry has failed to alter its position.

3. However, the Committee, having recommended Imres Pharmacy for the award of the contract in respect of LOT 1, further recommended to the Procurement Committee that they may wish to consider an alternative bid from Goal Pharmaceuticals. It was for the Procurement Committee to act upon the report of the Committee which they did. They concluded that the recommendation of the Committee with respect to LOT 1 should be upheld and equally with respect to LOT 2, they concluded that the recommendations of the Committee should also be upheld.

THE LAW

4. The IPRP is established by s20 (1) of the Public Procurement Act 2004 with its power to determine procurement complaints provided for in s65 of the Act. Consequently its decisions must be in accordance with the law. The entire procurement process in Sierra Leone is governed by this same 2004 Act and its implementing regulations of 2006. Whilst the bidding documents and other relevant documents form part of the process, their relevance for the most part is limited to that of evidential relevance. However their importance is equally entwined in specific provisions of the law. Where a procuring entity fails to comply with the relevant law as alluded to above, such procurement as conducted would be null and void. This is made expressly clear in s1(1) of the Public Procurement Act 2004 and may equally amount to a breach of the Anti Corruption Act 2008.

THE ISSUES

5. The issues for determination in this appeal are.
 - i. Whether the technically responsive bidder as identified by the Technical Evaluation Committee was either correct or lawfully justified in law.
 - ii. Whether the reasons given for considering the appellant's bid as non-responsive is justified or lawful.
 - iii. Whether the appellant was unfairly disadvantaged in the procurement process.
 - iv. Whether the appellant has satisfied all the conditions required by law for the award of the contract for both LOTS as opposed to recommended winners.

DELIBERATIONS

6. At the start of the deliberations, it was established that there were no preliminary reasons as to why the review had to be suspended or refused. Most importantly, the application for review was accompanied by the relevant fee as provided for in s65 (2) of the Act. With respect to deadlines, the issue of primary concern, all deadlines have been complied with. A number of letters were written by the appellant with subsequent responses by the respondent. We shall deal with the admissibility of this complaint shortly and to consider whether s65 of the Public Procurement Act 2004 is engaged. At the start of the deliberations, our attention was drawn to a document which bore the name of the Peter Kamaray and Co, a firm of Chartered Accountants. That firm had prepared accounts for the appellant which forms part of the documentation in this case. The Chairman of this Panel is Mr Peter Kamaray and he is the head partner of Peter Kamaray and Co. Mr Kamaray himself was unaware of the involvement of his firm with the appellant. However once this discovery was made in the document and it became apparent that there was a possible conflict of interest situation, the Chairman decided to recuse himself from further involvement in the deliberations. The Panel continued its deliberations without the participation of the Chairman.
7. During the review process, the panel wrote to the Respondent on two occasions requesting them to furnish it with documents from their procurement records and they failed to do so. With respect to the first letter they claimed the Hon Minister of Defence was out of the country and no decision could be taken in his absence. The Panel again wrote to the Respondent advising them that the documents required

were public documents that they were required by law to disclose and the absence of the Minister was not a sufficient or acceptable reason for failure to comply with the provisions of law. They again failed to respond to this letter. The Panel was left with no alternative but to determine the complaint without any response or input from the respondent with regard to this complaint. This is most unsatisfactory for an entire government entity (a very important one) to have to wait upon a single individual (albeit the Minister) to return to Sierra Leone to give instructions for them to comply with the law, when there are other senior officials of the entity who are within the jurisdiction, including the Permanent Secretary. It is inconceivable that the Minister albeit out the country on official assignment is not in communication with senior officials of the entity, or the Ministry would allow important matters affecting the security of the state to be put on hold simply because the Minister was “out of town”.

8. The panel had an opportunity of perusing a number of documents. These are listed for expediency sake.
 - Letter of complaint to the IPRP dated 13th April 2010, which is marked as Exhibit A.
 - Letter of complaint to the Hon Minister of Defence dated 15th April 2010, which is marked as Exhibit B.
 - Letter from the Ministry of Defence to the Chairman IPRP, dated 16th April 2010, which is marked as Exhibit C.
 - Bundle of documents provided by the appellant with respect to LOT 1, marked as Exhibit D1-D19
 - Bundle of documents provided by appellant with respect to LOT 2 marked as Exhibit E1-E12
 - Letter from appellant to Chairman IPRP, dated 19th April 2010, marked as Exhibit F.
 - Letter from Respondent to the Appellant firm dated 14th April 2010 and marked as Exhibit G.
 - Letter of response to Exhibit G from the Appellant to the Respondent and marked as Exhibit H.
 - Report on the evaluation and recommendations of the Technical Evaluation Committee for the award of the contract with respect to LOT 1, which is marked as Exhibit J.
 - Report on the evaluation and recommendations of the Technical Evaluation Committee for the award of the contract with respect to LOT 2, marked as Exhibit K.

- Report of the Procurement Committee dated 25th January 2010 and marked as Exhibit L.
 - Letter of rejection of bid from the Respondent to the appellant dated 16th March 2010, which is marked as Exhibit M.
 - Receipt of payment of the administrative fee by the appellant dated April 2010 and marked Exhibit N.
 - Bidding documents marked as Exhibit O.
9. The appellant has raised a number of complaints in relation to this procurement and these complaints need to be set out properly. The complaints are listed in Exhibit A which can be summarised as follows:
- i. That their company and other bidders have been unfairly treated by the respondent for the past fifteen years;
 - ii. That their bid security presented was much higher than the one needed for the monthly supply;
 - iii. That they presented a valid store and import license instead of a registration certificate for the drugs tendered for and which are of primary importance. They further challenged that the eventual winners of the contract did not also present a registration certificate for every drug requested;
 - iv. That the reagents tendered for with respect to LOT 2 do not need an import license or registration certificate as some of them can be commonly found on the streets for sale;
 - v. That the reagents carry a difference in price between their company and the eventual winner of some two billion Leones. That an amount of four billion Leones will have more useful purposes.
10. It is expedient for the IPRP to now consider these various complaints. It is imperative that consideration of these complaints in respect of both LOTS is done individually. We shall start our deliberations on this case with respect to LOT 1.

LOT 1

11. It must firstly be recognised that the complaints as contained in Exhibit A appear to relate to both LOTS. Exhibits J and K indicate that the appellant did bid for both LOTS. As pointed out above, the issues in relation to LOT 1 will be considered first. In that regard, the IPRP will consider Exhibit J in order to discover the reasons for the rejection of the bid of the appellant. This is in line with the primary complaint of the appellant that he had been treated unfairly. From a scrutiny of Exhibit J, it is clear that the Committee considered the bid from the appellant as to its responsiveness or otherwise. Upon preliminary examination in order to ascertain completeness of bids and responsiveness to basic requirements, the committee made known its findings in the same Exhibit J. Such a course of conduct is entirely in line with Regulation 93 of the Public Procurement Regulations 2006. In addition the same regulation clearly states that **“the preliminary examination shall determine”** a number of issues in particular at paragraph (h), that all key documents and information have been submitted.
12. In Regulation 93(2) it is abundantly clear that **“any material deviations shall result in rejection of the proposal and such proposals shall not be subject to technical evaluation”**. Further Regulation 93(3) describes what a material deviation is in three sub-paragraphs. (i-iii). Sub-paragraph (ii) in particular describes a material deviation as one which would limit in any substantial way, inconsistent with the bidding documents, the procuring entity’s rights or the bidder’s obligation under any resulting contract”. In so far as the bid from the appellant being substantially responsive, the Committee observed that the bid from the appellant was not responsive for three main reasons:-
- i. That the appellant submitted licenses to import and wholesale pharmaceutical products instead of a certificate of Registration of drugs from the National Regulatory Authority (Pharmacy Board of Sierra Leone).
 - ii. That the bid securities tendered for both LOTS did not reach the mandatory 2% of the total contract value;
 - iii. That the appellant did not include in its submission a business profile as requested for in the bidding document.
13. The Committee further sought to establish the completeness of all the bids by determining the following:

- i. Whether all the items in the requirements of the bidding documents were quoted for and in the required quantities;
- ii. The validity of the bid security and to ascertain it is worth 2% of the total bid price;
- iii. That the submissions were generally complete.

As a result the committee further recorded its observations in Exhibit J with regard to the specific requirements alluded to above. It concluded that the bid from the appellant and two other bidders did not meet the basic requirements of the bidding documents as it contravened section C serial 66 (5) of the Public Procurement Regulations 2006. The Committee concluded that these bids would not be subject to further evaluation. It must be stated at this point that the bid from Goal Pharmaceuticals which was not subjected to further evaluation was with respect to LOT 2, Nest Pharmacy again was with respect to LOT 2 and Regency General Trading Company was with respect to both LOTS. The Committee further concluded that the bids from Imres Pharmacy, Goal Pharmaceuticals, Ramesco General Supplies and CC&S Enterprises were deemed to have been largely complete and as such responsive to the basic requirements of the bidding documents which therefore qualified them for further examination and evaluation. The Panel would now consider whether the course of conduct adopted by the Committee were arguably factually and legally correct.

14. Regulation 66(5) provides for the meaning of a substantially responsive bid in the following terms:

(5) A substantially responsive bid is one which conforms to all the instructions requirements, terms and conditions of the bidding documents, without material deviation, reservation or omission.

It is also noted that the provisions of sub-regulation (6) which is similar to regulation 93 in its description of the words "a material deviation, reservation or omission". However the IPRP is particularly concerned about sub-regulation (7) which provides:

"(7) Any bid which contains a material deviation, reservation or omission, and is therefore not substantially responsive shall be rejected and may not be subsequently be made responsive by the bidder or the Procuring Entity".

15. The documents before the IPRP have enabled it to consider the issue of the responsiveness or otherwise of the appellant's bid and whether the Committee was factually and legally correct in excluding the appellant's bid from further evaluation. In that respect the Panel has had regard to Exhibits D1-19 and these documents are now in detail. The first observation by the Committee was that the appellant did not produce a Certificate of Registration of Drugs from the National Regulatory Authority, the Pharmacy Board of Sierra Leone, but rather produced a license to import and wholesale pharmaceutical products. The appellant contends in Exhibit A that the license to import and wholesale Pharmaceutical products were requested for and they tendered that document which to them are of primary importance. Is that arguably correct?
16. The first and obvious question to ask is whether any such requests were made for a certificate of registration document. In that respect consideration needs to be had to the bidding documents which contain the information to bidders. That document is in the possession of the Panel and which has been marked as Exhibit O. This document states the instructions to bidders which must be complied with. On page 4 of this document, it states the required documentation that must accompany all bids. Amongst the various requirements is a Certificate from the Pharmaceutical Board, Sierra Leone as approved by parliament. The IPRP is of the view that a simple statement intitled "certificate from Pharmaceutical Board, Sierra Leone as approved by Parliament is vague and inadequate and does not specifically or fully identify the required document of certification. Entities shall at all times ensure that the required documentation is properly identified.
17. However at page 23 of the same exhibit O it is made clearer that a "Certificate of Product Registration from Pharmaceutical Board, as approved by Parliament is required. There is clearly no requirement for an import or wholesale license to be provided as part of the bid. The next question to ask is whether the import and wholesale license provided by the appellant is equal to or more important than the required certificate of product registration. It is noted that the appellant produced import and whole sale licenses from the Pharmacy Board which are marked as Exhibit D15-16. These two documents are issued in accordance with the provisions of ss38(1) and 45 of the Pharmacy and Drugs Act 2001. Are these documents substantially the same or equivalent to the certificate of product registration as required by the bidding documents?
18. In order to determine that issue, the Panel had to conduct a close scrutiny of the Pharmacy and Drugs Act 2001. Upon a proper consideration of the Pharmacy and

Drugs Act 2001, there is a clear provision for the registration of drugs which is provided for in s55 of the Act. In a situation where the drugs are not registered with the Board, an application can be made to the Board on the grounds that the drugs being imported are specialities which have not previously been registered with the Board. Once the application is made, and the Board is satisfied that the speciality is likely to prove beneficial, the Board then directs the speciality to be entered into the Register by the Registrar and a certificate is accordingly issued. Where obviously the speciality is registered with the Board already, a certificate to that effect ought to simply be issued in accordance with s55 of the Act. It is therefore the case that no license to import or wholesale pharmaceutical products was required for this procurement. What was required was a certificate of product registration which the appellant failed to produce. The Panel therefore considers the claim made by the appellant with respect to the production of import and wholesale licenses being more important is arguably not the case. They failed to produce what was required by the bidding documents and the law makes a clear provision for products to be registered with a certificate being issued to the effect.

19. The second reason proffered by the Respondent for concluding that the Appellant's bid was non-responsive, was on account of the low bid security tendered. In Exhibit D2 which is dated 14th December 2009 and which was submitted as part of the bid, the Appellant quoted a bid price of **US\$301, 502.28, per quarter**. Exhibit D5 which was also submitted as part of the bid is the bid security from the Guaranty Trust Bank Ltd which is for the sum of **US\$ 6,800**. ITB clause 13.1 provides that the bid security must be not less than two percent of the total bid price. In addition, Reg. 58 (2) provides: **"The value of any required bid security shall be expressed as a fixed amount and not a percentage. The amount shall be between two and five percent of the estimated value of the contract"**. This procurement is for an annual supply of drugs and the quarterly bid price of the appellant must be calculated for the duration of the proposed contract. When that is done, the total contract price in respect of this lot would be **US\$1,206,009.12**. 2% of the sum of **US\$1,206,009.12 is US\$ 24,120.82**. The bid security provided by the Appellant is far below the required figure and the Panel concludes that the Respondent was correct when it concluded that the bid security did not meet the minimum 2% of the total bid price. That reason for disqualification is upheld.
20. The third reason given is that the Appellant did not enclose a business profile as part of its bid. The bid documents (Exhibit O) at page 23 required a business profile detailing experience and track record in similar business. Although Page 4 uses slightly different wording which required business profile detailing previous transactions. Again there appears to be inconsistency in the use of terminology but

which we consider to be minimal. The purpose of a business profile is to ensure that those who are bidding for contracts of a specialised nature possess the necessary skill, experience and capacity to undertake the contract effectively. The Panel concludes that the Bid Data Sheet at page 24 qualifies the requirements at page 4. Did the Appellant produce a business profile? The Panel is of the opinion that the appellant did produce a business profile, which is marked as Exhibit D3 and D4. This was confirmed in Exhibit D1 which is aptly termed "letter of introduction". Again the Respondent fell into error in concluding that no business profile was submitted.

21. It is clear that of the three reasons advanced by the Respondent for excluding the Appellant from further evaluation, only two of those reasons are upheld. The other one is not upheld. The question the Panel now considers is whether both reasons which have been confirmed by the Panel for excluding the appellant are sufficient to constitute a material deviation from the bidding documents. The Panel is of the view that they are sufficient. In matters of public health, it is of vital importance that those who succeed in winning contract have the capacity and experience to undertake the contract. In addition, all legal rules must be followed. A bidder who fails to provide a certificate of registration from the National Regulatory Authority, the Pharmacy Board of Sierra Leone, for the products it wishes to bring into Sierra Leone cannot be said to have complied with the rules and regulations of the bidding process.
22. The reason for registration of pharmaceutical products is to ensure that public health is maintained and safeguarded and the experts in the Regulatory Authority are fully aware of the effects of a particular pharmaceutical product, after such products have been duly scientifically tested. In the absence of such a document, a bidder who eventually is awarded a contract cannot legitimately bring into Sierra Leone such unregistered products. Looking at the business profile, it is clear from this document that the appellant lacks the required expertise in so far as the supply of pharmaceutical products are concerned. Exhibits D3 and D4 provides details of contracts performed and none of the contracts on the list relates to the supply of drugs. In Exhibit D 1, the appellant had this to say in its letter of introduction: *"In this bid you will have the opportunity of having a bird's eye view of the range of activities we have carried out and also get a feel of the staff that is the power house of our outstanding performance over the years"*. That outstanding performance is in relation to various items of seed rice, construction work and none about pharmaceutical products.
23. The Panel concludes that despite the erroneous disqualification from further evaluation for two of the reasons given, the Panel is satisfied that the overwhelming reason for rejection and exclusion of further evaluation with respect to LOT 1 is fully justified on account of the failure alone of the Appellant to produce a certificate of

product registration of drugs with the Pharmacy Board as part of its bid, which is a very important criteria. For the avoidance of doubt, failure to produce a certificate of product registration before importation is illegal under the Pharmacy and Drugs Act 2001 as well as the Public Procurement Act 2004. Further s21 of the Public Procurement Act 2004 provides:- *“In order to be awarded a contract, or if prequalification proceedings are being held, in order to participate in the procurement proceedings, a bidder must qualify by meeting the criteria set by the procuring entity”*.

24. In this case one criteria set by the procuring entity which must be met is the requirement to produce a certificate of registration of drugs as required by law, i.e. The Pharmacy and Drugs Act 2001. Failure to produce such a certificate where required may constitute a breach of s21 of the Public Procurement Act 2004 and such a bidder is excluded from further evaluation. Further past performance is one of the criteria for the participation in a bid with a view to possible award of contract. On page 22 ITB Clause 11.3 stipulates in precise terms that: - *“Qualification requirements for bidders: Bidders must have demonstrated three years experience in the manufacturing and or distribution of similar goods in Africa.... To be qualified for the award of the contract, bidders..... must have proven record of successful accomplishment of similar contracts with the Government of Sierra Leone for not less than five years and submission of Certificate of Registration with the Pharmacy Board of Sierra Leone. All Drugs and reagents must be registered with Pharmacy Board of Sierra Leone”*. Further confirmation of these justifiable exclusion of the appellant from the process can be found in s53 of the Public Procurement Act 2004 which provides: - *“Following the opening of bids, the procuring entity shall first examine the bids in order to determine whether the bids are complete, signed, whether required documents to establish legal validity and required bid security have been furnished and whether bids are substantially responsive to the technical specification and contract conditions set forth in the bidding documents”*. The respondent were correct in law and factually to exclude the appellant from further evaluation with respect to LOT1 on the basis of their failure to meet the relevant criteria set forth in the bidding documents and according to relevant legal criteria.

LOT 2

25. The complaint with respect to this lot is similar to that of LOT 1. The same three reasons apply as set out in Exhibit A. With respect to this LOT, the appellant again failed to produce the Certificate of Registration of drugs, and its bid security again is below the required amount of 2% of the bid price. They did however submit a business profile. We will deal with these individually. With respect to his failure to produce the Certificate of Registration of drugs, the appellant in Exhibit A had this to say: - *“Besides, and this is very importance point to note, the reagents which are for LOT 2 do not need an import license or a registration certificate as some of them*

can be commonly found on the streets for sale". Such an answer is to say that the bidder now decides what criteria the procuring entity should employ in its procurement processes. It is not the bidder who chooses the criteria. The role of the bidder is simply to comply with the relevant criteria as set forth in the bidding documents and the law. The criteria at page 22 in relation to the reagents for LOT 2 were very clearly set out in the following terms. ***"All Drugs and reagents must be registered with Pharmacy Board of Sierra Leone"***. The appellant in this case chose not to comply with the required criteria simply because he formed the view that compliance was unnecessary as the goods were commonly sold on the streets. There can be no excuse for such failures. He only has himself to blame.

26. With respect to the bid security, Exhibit E2 reveals that the appellant's bid price was **US\$116, 142, per quarter**. Exhibit D5 which was also submitted as part of the bid is the bid security from the Guaranty Trust Bank Ltd which is for the sum of **US\$ 2200**. ITB clause 13.1 provides that the bid security must be not less than two percent of the total bid price. In addition, Reg. 58 (2) provides: **"The value of any required bid security shall be expressed as a fixed amount and not a percentage. The amount shall be between two and five percent of the estimated value of the contract"**. This procurement is for an annual supply of drugs and the quarterly bid price of the appellant must be calculated for the duration of the proposed contract, which is one year. When that is done, the total contract price in respect of this lot would be **US\$464,568**. 2% of the sum of **US\$464,568 is US\$ 9,291.36**. The bid security provided by the Appellant is far below the required figure and the Panel concludes that the Respondent was correct when it concluded that the bid security did not meet the minimum 2% of the bid price. That reason for disqualification is also upheld. Again he failed to satisfy the required criteria. Again he only has himself to blame. For all the reasons set out above, including his business profile which shows no evidence of experience in the supply of drugs, his exclusion from further evaluation from the process is fully justified.
27. Finally the Panel is of the view that the appellant has to qualify to be evaluated by fulfilling the required criteria, before he can claim entitlement to be awarded the contract. This is set out very clear in the law and the bidding documents. The IPRP is of the view that this appeal lacks merit and ought to be dismissed.
28. In the interest of transparency and fairness, the Panel has decided to consider whether the eventual winners of the contracts for both LOT1 and LOT 2 qualify to be awarded the contract. The Panel has borne in mind the fact that the other possible contenders for the contract did not complain, but in the context of decision taking, the Panel has the power to review all decisions taken by the Procuring Entity pursuant to s65(5) of the Public Procurement Act 2004. It is noteworthy to mention

that Public Procurement is no longer centralised as in the old days of the central tender board. The object of the 2004 Act was to decentralise public procurement to procuring entities. This simply means that procuring entities now have full authority to determine what criteria to employ in carrying out their procurement. It is not for the NPPA or the IPRP to dictate to procuring entities the manner in which to carry out their procurement. The IPRP would only interfere with decisions of procuring entities where they are clearly shown to be wrong, illegal, irrational or wholly unreasonable. The margin of discretion rests with the procuring entity and the IPRP would pay due deference to the right of procuring entities to take decisions with regard to their own procurement. With respect to LOT 1, careful consideration has been given to Exhibit J and Exhibit L. With respect to LOT 2, we have again carefully considered Exhibit K and Exhibit L.

29. It is clear from these three exhibits that the Committee carefully scrutinised the bids from the qualified bidders. One of the major issues raised in the evaluation process by the Committee was the issue of the price difference with respect to LOT 1. It is expedient for the Panel to deal with that issue. The Committee itself recognised that the bid price of Imres Pharmacy exceeds that of the nearest bidder by the sum of **USD 89,745.36** which is Goal Pharmaceuticals. This is a huge amount of money and a procuring entity would need to make a compelling case for awarding a contract to a higher priced bidder.
30. Further we are guided by s56(1) of the Public Procurement Act 2004, which provides that: “ *The contract shall be awarded to the bidder having submitted the lowest evaluated and substantially responsive bid which meets only those evaluation criteria as specified in the bidding document*”. This provision is clearly mandatory and no deviation from it is required or justified. The Procurement Committee is **bound** by the provisions of s56 of the Public Procurement Act 2004 and its implementing regulations to award the contract to the *lowest evaluated and substantially responsive bid which meets only those evaluation criteria as specified in the bidding document*. The Panel is aware that there have been problems with procuring entities trying to interpret this provision and it is evident that there are associated interpretation problems in so far as the provisions of s56 are concerned. It behoves the IPRP to now issue guidelines for procuring entities to follow when interpreting the provisions of s56.
31. s56 does not automatically import an interpretation that the lowest priced bidder must be awarded the contract. The wording of s56 suggests that the emphasis is not simply on the lowest priced bidder but the lowest evaluated and substantially responsive bidder. In layman’s terms, the purport of s56 on its true and appropriate construction is that the approach to s56 must be from the point of view of

consideration for award to those who have been evaluated and found to be substantially responsive. Being substantially responsive means in simple terms conformity in a substantial manner to the requirements of the bid documents and the relevant law. Where a bidder though evaluated is unable to show substantial compliance with the bid documents and the relevant law, however low his price is, he is not entitled to the award of contract. In other words there should not be anything to choose between the two bidders except the lower price. The criteria for responsiveness of bids are of vital importance if value for money is to be obtained in the procurement. It is fool hardy and not cost effective to award a contract to a bidder who is incapable of performance or incapable of effective performance simply because his price is low. His subsequent failure to perform would in all respects incur further costs.

32. With regard to this procurement, it is clear that the technical evaluation committee and the procurement committee gave detailed consideration and conclusions for their respective decisions. The IPRP would only interfere with such considerations where they are plainly wrong, unlawful or irrational. On the basis of the decisions reached, it cannot be argued that the decision reached by the technical evaluation committee and the Procurement Committee to award LOT1 to Imres Pharmacy is unlawful, irrational or plainly wrong. The inconsistencies about the time of establishment of Goal are not substantial enough on their own to justify awarding the contract to Imres Pharmacy bearing in mind the total cost of doing so which amounts to some US\$89,000. However

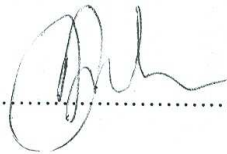
when taken cumulatively with the other reasons given which include the inadequate storage facilities of Goal Pharmaceuticals coupled with its inexperience in the supply of pharmaceutical products of this nature and quantity and the inconsistency about whether the drugs are registered with the Pharmacy Board and the fact that the quality of the drugs offered by Imres Pharmacy is of unquestionable character with its payment terms being in the best interest of the Entity, and the timeliness of its deliveries, it cannot be plainly wrong, unlawful or irrational to award the contract to Imres Pharmacy albeit at a higher price. In essence, for the reasons given particularly on the issue of storage, Goal Pharmaceuticals cannot be said to be substantially responsive. The truth of the matter is there is only one substantially evaluated bidder with respect to LOT 1. The Procurement Committee has said it all. **"Although money is very important, it is not the be all and end all when it comes to medical drugs and laboratory reagents. The lives of individual users must be protected"** The Panel endorses those findings.

33. With respect to LOT 2, no such issues arise that would cause the IPRP to interfere with the findings of the Committee and the Procurement Committee. For the reasons stated above the Panel makes the following findings.

UPON carrying out a detailed review into the issues raised by the complaint, **IT IS ORDERED THAT:**

1. The Complaint is **dismissed** and we find that the complaint has no merit.
2. The decision by the Procurement Committee to select Imres Pharmacy and Ramesco General Supplies for award of the contracts is upheld with respect to both LOT 1 and LOT 2.
3. The decision to exclude the appellant from further evaluation of his bid for both LOTS on account of his failure to comply with the stated requirements is upheld.
4. The contracts be awarded to Imres Pharmacy and Ramesco General Supplies within (fourteen) **14** days.
5. Costs of Two Million Leones {2,000,000.00} are awarded against the appellant.
6. This decision to be served on all interested parties and made public, forthwith.

Adrian Fisher
Member



Dated 26 April 2010