

**IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM**

APPEAL CASE NO. 66 OF 2010

BETWEEN

SALAMA PHARMACEUTICAL LTD -APPELLANT

AND

MEDICAL STORES DEPARTMENT RESPONDENT

RULING

CORAM:

- | | | | |
|----|---------------------------|---|-------------|
| 1. | Hon. A.G Bubeshi, J.(rtd) | - | Chairperson |
| 2. | Mr. K.M. Msita | - | Member |
| 3. | Mr. M. R. Naburi | - | Member |
| 4. | Ms. E. J. Manyesha | - | Member |
| 5. | Ms. B.G. Malambuigi | - | Secretary |

SECRETARIAT

- | | | | |
|----|--------------------|---|--------------------|
| 1. | Mr. Patrick Assey | - | Procurement Expert |
| 2. | Mr. Moses Malipula | - | Accountant |

APPELLANT:

1. Mr S. Gulam Husein - Managing Director
2. H.M.S.Gulam Husein- General Manager
3. Shazeed Sharif - Business Development Manager

RESPONDENT:

1. Heri Mchunga -Procurement Manager ,
Pharmaceuticals
2. Mary Ringo - Procurement Officer

INTERESTED PARTIES

1. Mr. Ashok Maurya - Representative Hindustan Syringes & Medical Devices Ltd (Manager - Health Care Division)
2. Joseph Muhune - Chief Pharmacist -MOHSW
3. Gwantwa Mwaisaka - State Attorney -MOHSW
4. Daniel G. Makondo- Supplies Officer - MOHSW

This ruling was scheduled for delivery today 20th April 2010 and we proceed to deliver it .

The appeal at hand was lodged by **M/s SALAMA PHARMACEUTICALS LTD** (hereinafter to be referred to as "**the Appellant**") against **MEDICAL STORES DEPARTMENT** commonly known by its acronym "**MSD**" (hereinafter to be referred to as "**the Respondent**").

The said appeal is in respect of Tender No.IE-009/2009-2010/HQ/G/RES03 for the Supply of Disposable Syringes to Medical Stores Department (hereinafter to be referred to as "**the Tender**").

According to the documents submitted to the Authority, the facts of the Appeal may be summarized as follows:

The Respondent made an invitation through restricted bidding process to fourteen short listed suppliers for supply of disposable syringes. Invitation letters were sent out on 2nd November, 2009. The deadline for submission of tenders was set for 4th December, 2009.

Six suppliers submitted tenders as follows :

S. No	Name of a tenderer	Read out prices US \$
1.	Biocare Health products Limited	688,724.00
2.	Salama Pharmaceuticals Ltd on behalf of Neomedic Ltd of UK	441,446.40

3.	Revital Health care (EPZ) Ltd	349,568.00
4.	Alitom Medicare Ltd	393,208.00
5.	HV International FZC	465,729.00
6.	Hindustan Syringes & Medical Devices Ltd	505,940.00

Following Preliminary Evaluation, four out of the six tenders were found to be compliant and qualified for detailed evaluation. Two tenders were disqualified for non compliance with the Tender requirements.

After the detailed evaluation, the Tender Board which met on 29th January, 2010, approved award of the tender to Salama Pharmaceuticals Ltd at a Price of USD 441,446.40.

The Notice of Acceptance of the tender was communicated to the Appellant on the same day vide Letter referenced MSD/003/2009/2010/415. Notification to the unsuccessful tenderers was also made on the same day.

Having received the notice that they were unsuccessful, M/s Hindustan Syringes and Medical Devices was aggrieved and wrote to the Respondent through an unreferenced letter dated 2nd February, 2010, disputing the award of the tender to the Appellant.

The said tenderer claimed that the Appellant was not qualified for award due to:

- He had not printed the name of the primary manufacturer in China as required in the schedule of requirements.
- He did not have the required market experience of two years since he was pre-qualified by the World Health Organization in April 2009.
- The auto disable syringe to be supplied by them does not get disabled automatically.

On receiving the complaint, the Respondent suspended the procurement proceedings in respect of the Tender and notified all participating tenderers through letter referenced MSD/003/2009/2010/425 dated 3rd February, 2010.

The Accounting Officer carried out a review of the tender process and claimed to have discovered a number of irregularities in the evaluation process and the leakage of privileged information to the complainant.

Having discovered the said irregularities, the Accounting Officer made a decision to annul the tender process and ordered that the tender process be restarted. The decision was communicated to all tenderers through letter referenced MSD/01/164/10 dated 24th February, 2010.

On receiving the decision made by the Accounting Officer, the Appellant was aggrieved and on 5th March, 2010, wrote to PPRA a letter referenced

HQ/G/RES/03/02 requesting for administrative review of the decision.

The PPRA replied to the Appellant's complaint vide a letter referenced PPRA/IE/009/"D"/21 dated 11th March, 2010 indicating that they could not entertain the complaint since they did not have jurisdiction. The PPRA advised the Appellant to submit their complaint to the Public Procurement Appeals Authority (hereinafter to be referred to as "**the Authority**").

On the same date the Appellant lodged the appeal with this Authority.

SUBMISSIONS BY THE APPELLANT

The Appellant's submissions may be summarized as follows:

The Appellant first raised a procedural point concerning the Respondent's mandate to annul the tender process before proceeding to address the Authority on the merits of the appeal and submitted as follows:

That, according to Clause 38.1 of the Instruction to Bidders (hereinafter referred to as "**ITT**"), the Procuring Entity had power to accept or reject any tender and annul tendering proceedings at any time prior to the award of tender.

That, Clause 40.2 of the ITT and Section 55(7) of the Public Procurement Act of 2004(hereinafter referred to as the "**Act**") stipulated that the notification of award would constitute the formation of a contract

That, in their case the award of tender was communicated to them on 29th January 2010 and acceptance thereto submitted to the Respondent on 1st February 2010.

That, due to the averred provisions of the law, the Respondent did not have the mandate to entertain the complaint.

Reverting to the merits of the appeal the Appellant submitted as hereunder:

That, the allegations made by M/s Hindustan Syringes and Medical Devices were unfounded because the Appellant had submitted the lowest evaluated responsive tender and qualified to perform the contract satisfactorily in accordance with Clause 13.3 of the Instruction to Tenderers.

That, the Appellant's specific responses to the allegations made by M/s Hindustan Syringes and Medical Devices is as follows:

- a. That, the award made to the Appellant was on the basis of the positive evaluation by the Respondent with no labeling anomalies being noted during the evaluation process.

- b. That, the phrase “primary manufacturer” is not defined in the bid document. However, under Article 12.3(c) (VI) of the Tender Data Sheet, there is a requirement that the declaration of conformity state the name and address of each device manufacturer.
- c. That, in compliance with article 5.2 of Global Harmonization Task Force(GHTF), the sample of auto disposable syringes submitted to the Respondent contained the required information as it showed correctly the full name and the address of the manufacturer and that all the information required for identifying the manufacturer’s products were provided.
- d. That, on the Market experience of two years in Tanzania, Clause 14 – 13. 3 (b), (c) clearly requires the tenderers to have manufactured and marketed the specific goods covered by the tendering documents for at least two years and for similar goods for at least five years. There is no mention in the invitation that the experience has to be specific to Tanzania as claimed by M/s Hindustan Syringes and Medical Devices. Neomedic has been selling auto disable syringes since 2007 as evidenced by a sale made to UNFPA in May 2007(PO Number 00000014178 dated 18th May 2007).

- e. That on the allegation that the syringes of Neomedic do not get disabled automatically, the auto disposable syringes offered by the Appellant complied with the specifications given in the Schedule of requirements-Section VIII of the Tender document. Therefore the claim that Neomedic Limited syringes do not disable automatically is completely unfounded.
- f. That, all the allegations raised by M/s Hindustan Syringes and Medical Devices Limited were unsubstantiated against principles of fair play and justice.

That, the Respondent's reasons for annulment of the award due to inconsistencies between Technical Evaluation criteria used and the Schedule of Requirements in the Tender documents is not accepted as the contents of Document Number 20 proves that the Appellant fully complied with the requirements of Section VIII of the Schedule of Requirements and Specifications.

That, the Respondent's decision of re-floating the tender is objected due to the fact that there was public disclosure of all tenderers' pricing during the tender opening. The Appellant will be adversely affected by the decision to re-tender as all other tenderers will use the Appellant's price as a benchmark.

That, there is no reason for penalizing the Appellant as he intended to provide the Respondent with the best possible deal from the outset.

That, the decision to re-float the tender serves only to benefit those companies who had sought to extract a higher margin for the same product.

That, the Respondent's letter dated 24th February, 2010, shows that M/s Hindustan Syringes and Medical devices obtained privileged information about the Appellant's tender contrary to Section 42 of the Act and Regulation 99 of the Public Procurement (goods, works , non consultant services and disposal of assets by tender regulations of 2005) **(hereinafter to be referred to as GN 97)**

The Appellant therefore prayed that the Authority:

- a) Overturn the decision made by the Respondent to annul the award as relayed through letter referenced MSD/01/164/10/10 dated 24th February, 2010.
- b) Reinstate the award made to them by the Respondent through their letter referenced MSD/003/2009/2010/ 0415 dated 29th January 2010.

SUBMISSIONS BY THE RESPONDENT

In responding to the Appellant's procedural objection the Respondent submitted as follows:

That, at the time of making the decision, their understanding was that the contract would enter into force after signing of the contract in accordance with Regulation 97(3) of GN 97. However, after hearing the Appellant's submissions and examining the cited ITT Clauses 40.2 and Section 55(7) of the Act, the Respondent conceded that the Appellant's interpretation was right in that the contract entered into force after notification of award of the tender. He explained however, that the reason for their former position was due to problems of legal interpretation.

With regard to the merits, the Respondent submitted as hereunder:

That, Tenders were invited through restricted tendering process from 14 shortlisted suppliers

That, only six tenders were received and opened on 4th December, 2009.

That, an Evaluation Committee was appointed consisting of two members from the Respondent and one member from American based development partners Supply Logistics

That, due to the fact that two of the items in the tender were new products to the Respondent, it was

important to have quality assurance. Therefore the Respondent submitted the samples received from tenderers for technical evaluation to the Tanzania Food and Drugs Authority (who are responsible for control of safety of performance) and Muhimbili National Hospital (who is one of the largest consumers of the products).

That , the Technical Evaluation reports from the two institutions, were then forwarded to the Evaluation Committee for consideration in the final evaluation report.

That, the Tender Board meeting of 29th January, 2010, awarded all the four items to the Appellant. That notification letters to both the successful tenderer and the unsuccessful tenderers were prepared and sent out on the same day.

That, on 2nd February,2010, M/s Hindustan Syringes and Medical Devices submitted a complaint indicating that the Appellant was not qualified for award of tender due to the following reasons:

- That, Salama Pharmaceuticals (Agent for Neo medic) had not printed the name of the Primary Manufacturer in China of the submitted sample as required under Section VIII of the schedule of requirements and specification
- That Neomedic UK got WHO Prequalification status (POS) on 20th April ,2009, therefore his market experience of two years in Tanzania as

demanded by Clause 14-13.3 (b) was questionable.

- That the syringe offered by the Appellant does not disable automatically.

That, following receipt of the complaint the Respondent suspended the tender process and reviewed the matter.

That, during the review, it was found that the complainant had received privileged information regarding the Appellant's Tender and that, there were inconsistencies in the Technical Evaluation criteria and the Schedule of Requirements. This led the Respondent's Accounting Officer to annul the tender.

That, the decision by the Respondent's Chief Executive Officer to annul the tender was reached after a fair and careful consideration of the facts at hand and action taken was believed to be the best course of action under the circumstances.

The Respondent therefore prayed that the Authority should uphold the decision to annul the tender process and order for re-tendering.

ANALYSIS BY THE AUTHORITY

Having gone through the documents submitted and having heard the oral submissions from the parties

the Authority is of the view that the appeal is centred on the following key issues namely:

1. Whether the annulment of award was justified.

2. What reliefs, if any, are the parties entitled to?

Having identified the issues in dispute the Authority proceeded to resolve them as hereunder:

1.0 Whether the annulment of award was justified

In dealing with the objection raised, the Authority formulated two sub issues namely:

- i. Whether the Accounting Officer had jurisdiction to entertain the complaint.
- ii. Whether the Accounting Officer's decision to annul the award was proper at law.

i. Whether the Accounting Officer had jurisdiction to entertain the complaint.

With regard to the procedure, the Appellant made reference to a number of Clauses in the Respondent's Tender Document, amongst them ITT Clause 38.1 which empowers the Procuring entity to accept or reject any tender and to annul the tendering process prior to contract award. The

Appellant also argued that the said ITT Clause 38.1 only empowers the Respondent to reject tenders at any time prior to contract award. The Appellant cited ITT Clause 40.2 which recognizes that entry into force of a procurement contract is based on communication of award. He further submitted that according to Section 55(7) of the Public Procurement Act No 21 of 2004, (**hereinafter to be referred to as the Act**), the procurement contract had already been awarded to them as of 29th January, 2010, when they received notification from the Respondent through their Letter Ref MSD/003/2009/2010/415.

On the basis of the above cited provisions of the Law and the ITT, the Appellant stated that that the Respondent did not have the mandate to entertain the complaint after having awarded them the tender on 29th January 2010. The Appellant was also of the view that on 3rd February 2010, when the Respondent purported to suspend the tender process, there was already a contract in force between the Appellant and the Respondent. Hence the Respondent should not have entertained the matter as his powers were already ousted by Section 80(3) of the Act read together with ITT Clause 48.3.

In considering the Appellant's submissions, the Authority examined the legal provisions cited as hereunder:

ITT Clause 38.1: "Notwithstanding ITT Clause 36, the Procuring Entity reserves the right **to accept or reject any tender and to annul**

the tendering process and reject all tenders at any time prior to contract award or without thereby incurring any liability to the affected tenderer or tenderers” (emphasis added)

ITT Clause 40.2: “The notification of award will constitute the formation of the contract subject to the tenderer furnishing the performance security in accordance with ITT Clause 42 and the signing of the contract in accordance with sub clause 41.2” (emphasis added)

Section 55(7): “The Procurement Contract shall enter into force when a written acceptance of tender has been communicated to the successful supplier, contractor or consultant “(emphasis added)

The Respondent on the other hand submitted that they made their decision to review the matter on the basis of Regulation 97 (3) of the Public Procurement Regulations (goods, works, non-consultant services and disposal of public assets by tender) of 2005(**hereinafter to be referred to as GN 97**). Furthermore, the Respondent submitted that as an institution they are not conversant with the law. He however, conceded with the submissions raised by the Appellant in this regard.

Having considered the submissions from both parties and the related provisions of the Law and the Tender

Document, the Authority concurs with the Appellant that by the time the complaint was received from M/s Hindustan Syringes on 2nd February, 2010, the contract was already in force effective from 29th January, 2010, in terms of Section 55(7) of the Act.

Furthermore, had the Respondent been diligent enough, he would have observed that the Regulation 97(3) of GN 97 relied upon by them makes reference to another regulation 97(4) of GN 97 which is reproduced hereunder:

“97(4): Between the time when the notice referred to in sub regulation (1) was dispatched to the contractor, service provider or asset buyer and the entry into force of the Procurement/disposal contract **neither the Procuring Entity nor the contractor, service provider, or asset buyer shall take any action that interferes with the entry into force of the Procurement contract**” (emphasis added).

The Authority observes that the Regulation 97(4) of GN 97 was not accidental as it is intended to prevent the parties from doing anything which would interfere with the coming into force of the procurement contract. The purported annulment of the tender award by the Accounting Officer was contrary to the above cited regulation as it interfered with the coming into force of the procurement contract. Furthermore, the Respondent's reliance on Regulation 97(3) of GN 97 without recourse to

Section 55(7) of the Act exhibited sheer ignorance of the law.

Regulation 97(3) of GN 97 and Section 55(7) of the Act are obviously in conflict; whereas Regulation 97(3) of GN 97 provides that the contract will enter into force when the contract is signed, Section 55(7) of the Act indicates that the contract will enter into force when the Notice of Acceptance is communicated to the successful tenderer. Where the provisions of the Act are in conflict with the regulations then the provisions of the Act take precedence.

Having concluded that the contract entered into force on 29th January, 2010, the Authority proceeded to examine the provisions in respect of the review process.

The Appellant made reference to ITT Clause 48.3 read together with Section 80(3) of the Act and stated that on the basis of the above cited provisions, the Accounting officer did not have the mandate to review the complaint submitted by Hindustan Syringes and Medical devices. The Respondent conceded that they had misdirected themselves on this account and that the Accounting Officer had erred in entertaining the complaint submitted by Hindustan Syringes and Medical Devices.

The Authority, having considered the submissions made by both parties agrees with the Appellant that

the Respondent did not adhere to the procedure set out in the Tender Document Clauses 38, 40, and 42 of the ITT and as set out by the Law under Section 55(7) of the Act and that he did not have mandate to entertain the complaint in the way he did.

Had they observed the requirements of the law and the ITT, they would have directed the complainant M/s Hindustan Syringes and Medical Supplies to submit the matter to this Authority in accordance with Section 82(2) (a) of the Act and Clause 54(1) of the ITT.

In conclusion thereof regarding sub issue no 1, the Authority finds that the Respondent acted ultra vires namely he did not have jurisdiction to entertain the complaint.

ii Whether the Annulment of award was proper at law .

Having found that the Respondent did not have the mandate to entertain the complaint under sub issue (i) above, the Authority is of the settled view that the annulment of the tender was therefore a nullity at law.

On the basis of the findings in the two sub issues above, the Authority's conclusion in issue no 1 is that the annulment of the award was not justified.

Having sustained the Appellant's procedural objection, the Authority therefore did not find it

necessary to address the other issues raised by the parties and therefore proceeded to address the reliefs prayed for.

2.0 WHAT RELIEFS IF ANY ARE THE PARTIES ENTITLED TO?

The Authority considered the reliefs sought by the parties as hereunder:

APPELLANT'S PRAYERS

The Appellant submitted the following prayers:

The Appellant prayed that the Authority overturn the decision made by the Accounting Officer and reinstate the award made to them by the Procuring Entity.

In view of the Authority's conclusion under issue number one, the Authority upholds the Appeal and grants the prayer to reinstate the award made to the Appellant.

OTHER MATTERS OBSERVED BY THE AUTHORITY:

In the process of reviewing the documents a number of shortfalls were detected in the tender process which the Authority deemed it pertinent to point out as hereunder:

1) The Personal Covenants attached to the Evaluation Report indicate that these were signed on the 26th January 2010 after the Evaluation Process had been concluded. The records indicate that the said evaluation team was approved by the Director General on 5th December 2009 and given two working days to work on the report impliedly the evaluation was carried out starting 6th December 2009. The Authority reminds the Respondent that the requirement to sign Personal Covenants prior to carrying out the evaluation arises from the need to provide assurance of the integrity of the members of the Evaluation Committee and that they are qualified to do the evaluation objectively.

2) While perusing the Evaluation Report, the Authority observed that one of the requirements to be met by tenderers was the submission of an Anti Bribery Policy. However, in terms of importance during evaluation, this was considered to be a minor requirement contrary to what is prescribed by the

Law under the Seventh Schedule Section 4 which states

“Tenders which do not conform to these requirements **shall not** be considered” (**emphasis added**).The use of the word **shall** indicates that this is a mandatory requirement.

3) The Authority observes that, the notice of award was communicated by the Respondent to the Appellant on 29th of January, 2010, and on the same date the outcome was communicated to the unsuccessful tenderers. This was contrary to laid down procedure provided in the ITT which requires that unsuccessful bidders be notified **after submission of performance security. (Emphasis added)**.The consequence of notifying the unsuccessful bidders, as it happened in this case , would prevent the Procuring Entity from exercising the options provided under Clause 42(3), Regulation 97(11) and Regulation 97(9).

The Authority is concerned by the Respondent’s failure to comply with the procedures set forth in

their own Tender Document as has been observed in the first issue above.

4) The Authority is concerned with the issue of intergrity among the Respondent's staff as raised by the Director General in his memo to the Chairman of the Tender Board on 19th February 2010. It was indicated that M/s Hindustan Syringes & Medical Devices had access to privileged information in respect of the Appellant's tender contrary to Section 42 of the Act. The Authority commends the Director General for bringing the anomaly to light. However, it is expected that appropriate administrative measures will be instituted against the culprits.

5) The Authority observes that the Director General wrote an Internal Memo dated 19th February 2010 to the Chairman of the Tender Board recommending to the tender board on action to be taken to improve the Tender process. However, during the hearing it was submitted that no Tender board meeting was convened to deliberate on the recommendations and

that the Director General made the decision to annul the tender which was communicated to all the tenderers on 24th February 2010.

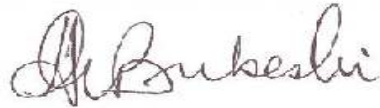
The Authority is of the view that this was Contrary to the Provisions of Section 31 of the Act as it represented usurpation of powers by the Director General since the Tender Board is the only organ empowered to make such decision.

6) The Authority, in perusing the Evaluation Report submitted by the Respondent, noted that Ms Mary Ringo, a member of the PMU Secretariat was also one of the members of the team which evaluated the disputed Tender but also sat on the Tender Board which deliberated on the adjudication of the said Tender. The Authority observes that this is contrary to Section 38 of the Act which requires that there be independence between the various organs performing the different tasks i.e. The Accounting Officer, the PMU, the Evaluation Committee and the Tender Board.

In conclusion therefore, the Authority upholds this Appeal and orders the Respondent to observe the law and proceed with the execution of contract as awarded.

Right of Judicial review as per Section 85 of the Act is explained to parties this 20th day of April 2010.

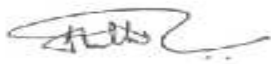


This Ruling is delivered in presence of both Appellant and the Respondent this 20th day of April, 2010.



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JUDGE (rtd) A.G. BUBESHI

CHAIRPERSON

MEMBERS

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1. Mr. K.M. Msita
 2. Mr. M.R. Naburi.....
 3. Ms. E.J Manyesha