

**IN THE
PUBLIC PROCUREMENT APPEALS AUTHORITY
AT DAR ES SALAAM
APPEAL CASE NO. 07 OF 2019-2020**

BETWEEN

**M/S CONSORTIUM OF LES GENES (PTY) &
OBEROI (PTY) LIMITED.....APPELLANT**

AND

MEDICAL STORES DEPARTMENT.....RESPONDENT

RULING

CORAM

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|-------------------------------------|----------------|
| 1. Hon. Justice (rtd) Souda Mjasiri | - Chairperson |
| 2. Eng. Stephen Makigo | - Member |
| 3. Dr. Leonada Mwangi | - Member |
| 4. Ms. Florida Mapunda | - Ag.Secretary |

SECRETARIAT

- | | |
|---------------------------|-----------------|
| 1. Mr. Hamisi O. Tika | - Legal Officer |
| 2. Ms. Violet S. Limilabo | - Legal Officer |

FOR THE APPELLANT

Mr. Love Majoka - Managing Director



FOR THE RESPONDENT

1. Mr. Christopher Kamugisha - Chief Legal Counsel
2. Mr. Abdul Mwanja - Director of Procurement
3. Mr. Marco Masala -SADC Pooled procurement Project Manager

This Appeal was lodged by M/s Consortium of Les GENES (Pty) and OBEROI (Pty) Limited (hereinafter referred to as "**the Appellant**") against the Medical Stores Department (MSD) (hereinafter referred to as "**the Respondent**"). The Appeal is in respect of Tender No. IE-009/2018/2019/HQ/G/101 for the Supply of Pharmaceuticals and Medical Supplies from Manufacturers to Southern African Development Community (SADC) Member States under Framework Agreement (hereinafter referred to as "**the Tender**").

The Tender was conducted using the International Competitive Tendering procedures specified in the Public Procurement Act, 2011 as amended (hereinafter referred to as "**the Act**") as well as the Public Procurement Regulations, Government Notices No. 446 of 2013 and No.333 of 2016 (hereinafter referred to as "**the Regulations**").

After going through the record of Appeal submitted to the Public Procurement Appeals Authority (hereinafter referred to as "**the Appeals Authority**"), the background of the Appeal may be summarized as follows:

The Respondent through the Daily News newspaper dated 23rd April 2019 invited eligible Pharmaceutical and Medical Supplies Manufacturers to participate in the Tender.

The initial deadline for the submission of tenders was set for 21st May 2019 but was later on extended twice to 5th and 11th June 2019 respectively. Eighty (80) tenders including the Appellant's were received on or by the deadline.

The Tenders were then subjected to evaluation which was conducted into three stages namely; preliminary, technical and Financial analysis. Eleven Tenders including that of the Appellant were disqualified at the Preliminary evaluation stage for being non responsive to the requirements of the Tender Document. Specifically, the Appellant's Tender was disqualified for containing two anti-bribery policies of two companies, two bid securing Declarations and for failure to submit a valid Manufacturing license. The remaining sixty nine (69) tenders were found to be responsive and were therefore subjected to detailed evaluation and financial analysis. Finally, award of the tender was recommended to different firms for different Pharmaceuticals and Medical Supplies to different countries. The Tender Board at its meeting held on 30th July 2019 approved the award as recommended by the evaluation committee.

On 9th September 2019, the Respondent informed all tenderers, its intention to award the Tender to various proposed bidders. The letter also informed the Appellant that its tender was unsuccessful because it contained two anti-bribery policies of two companies, two Bid Securing

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Declarations; neither a valid Manufacturing license nor evidence of Good Manufacturing Practice (GMP) were submitted as required. Dissatisfied with the reasons given, on 13th September 2019, the Appellant lodged its application for administrative review to the Respondent's Accounting Officer challenging its disqualification. On 19th July 2019 the Respondent's Accounting Officer issued its decision which dismissed the application. Aggrieved further, on 2nd October 2019, the Appellant filed this Appeal.

SUBMISSIONS BY THE APPELLANT

The Appellant's grounds of Appeal may be summarized as follows:

1. That, Clause 3.1 of the Instruction to Tenderers (ITT) allowed bids by Joint Ventures or consortiums with no limit on the number of the companies. The modification made by the Respondent under the Tender Data Sheet (TDS) to exclude Joint Ventures or Consortium is misleading. What the Respondent was bound to do in the TDS was to state the limits of the Consortium or Joint Ventures but not to prevent them to participate in the Tender. In addition, all forms including anti- bribery and Bid Securing Declaration in the ITT have provisions for Joint Ventures and Consortium.
2. That, it is illogical that such a large framework contract which is above USD 1 billion would not allow Joint Ventures and Consortium for maximum participation and competition, especially for SADC companies which are mostly Small and Medium Enterprises (SMEs).

3. That, since the Appellant tendered as a Consortium, it had to submit two separate anti-bribery policies and two bid securing declarations because the companies in the bid were two.
4. That, the Respondent proposed award of the Tender to M/s Laborate Pharmaceuticals India Limited which is a disreputable Manufacturer known for making fake and sub-standard drugs, that's why prices for its products are below the market prices. The company has also been implicated for supplying counterfeit products in India and Ghana.
5. That, the Respondent is proposing award of the Tender to some bidders such as M/s Laborate Pharmaceuticals India Limited and M/s Milan Laboratories whose annual sales volume is not five (5) times the estimated contract value as provided under ITT clause.
6. That, it is not certain whether the Respondent has comprehensively and uniformly assessed all tenders based on the criteria stated in the Tender Document. For instance M/s Reyoung Pharmaceuticals Company Limited, China and M/s Bal Pharma Limited have been proposed for award of the Tender without quoting the Duty Delivery Paid (DDP) contrary to the ITT. Bidders who did not quote their prices DDP ought to have been disqualified.
7. That it appears that the evaluators assessed only prices of the bidders without considering other aspects.

8. That the Respondent did not read out prices of the bids during opening ceremony of the Tenders contrary to Clause 25.3 of ITT.

Finally, the Appellant prayed for the following orders:-

- i. Its bid should not be disqualified for being a Consortium;
- ii. Its bid should not be disqualified for being an agent;
- iii. Financial and experience capability of Manufacturer be considered for bidders bidding as authorized agents of the manufacturers; and
- iv. The Respondent to re-evaluate Tenders taking into account all criteria listed in the TDS.

REPLY BY THE RESPONDENT

The Respondent's reply was preceded by a Preliminary Objection that; ***the grounds/reasons for Appeal are incompetent for lack of decision sought to be challenged.***

Without prejudice to the above, the Respondent's reply to the grounds of Appeal may be summarized as follows;

1. That, the Appellant did not comply with Clause 4 of the TDS which spelt clearly that Joint Ventures, Consortium or Associations were not applicable.
2. That, evaluation process of the Tender was done in accordance with the Evaluation Guidelines issued by the Public Procurement Regulatory Authority (PPRA), the Act as well as the Regulations.

3. That, bidders agreed during the Opening Ceremony of the Tenders that prices and items should not be read out as there were many tenders (80 Bidders).

Finally, the Respondent prayed for dismissal of the Appeal with costs.

At the hearing of the Appeal and during framing of issues, the Counsel for the Respondent prayed to withdraw the Preliminary Objection (PO) raised in their reply to the grounds of Appeal. The Appellant did not object to the prayer. The Appeals Authority granted the request as prayed. The above notwithstanding, the Appeals Authority observed in the course of perusal of the tender proceedings, that there was a Point of law for determination before embarking into the merits of the Appeal. This related to Appellant's eligibility to bid for the Tender while it was not a manufacturer as required by the Tender Document; and by bidding as a Consortium in the Tender while the Tender Document excluded the participation of Joint Ventures, Consortium or Associations. Based on the above, the Appeals Authority deemed it prudent to determine the legality of the Appellant's Tender. Therefore it invited both parties to address it as to "*whether or not the Appellant was eligible to tender.*"

SUBMISSIONS BY THE APPELLANT

The Appellant submitted that it is true that the Tender advertisement supported the argument that the Tender was meant for Manufacturers. However, there are a number of factors to be considered before one could conclude on the matter. It argued that the Tender Document contained

various forms, such as Manufacturer Authorization, Bid Securing Declaration and the Bid Form which by necessary implication indicates that bidders who were not Manufacturers were allowed to bid for the Tender. For instance by having the Manufacturer Authorization Form, entails that an Agent or Dealer was eligible to Tender.

With regard to the Consortium, the Appellant submitted that the Tender Advertisement did not restrict participation of the Joint Ventures, Consortium or Associations. If at all the Tender Advert intended so, it would have explicitly stated so. However, this is not the case.

With regard to Clause 3.1 of the ITT, the Appellant submitted that what was restricted under the Clause were not Joint Ventures, Consortium or Associations, rather its number, which according to it, were limit less. It argued further that in the SADC region there are only two primary manufacturers of drugs. Therefore, it was impossible to get sole Manufacturers to bid, adding that what the Respondent needed in the Tender were drugs and not otherwise. It rested its submissions by arguing that immediately after it had purchased the Tender Document, it wrote to the Respondent seeking for clarification on participation of Joint Ventures, Consortium or Associations in the Tender. However, the Respondent did not respond to its letter. The Appellant also called the Respondent on various occasions, but the Respondent did not pick up the phone. It would therefore be unjust to disqualify the Appellant for such reason.

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SUBMISSIONS BY THE RESPONDENT

On his part, Counsel for the Respondent submitted that the Tender Advertisement and Clause 1.3 of the ITT were clear that the Tender was meant for Manufacturers and not Dealers, Joint Ventures, Consortium or Associations. Since the Appellant is not a Manufacturer it was not eligible to tender. He therefore prayed for the dismissal of the Appeal.

ANALYSIS BY THE APPEALS AUTHORITY

Having heard submissions by the parties, the main issue for consideration and decision is whether or not the Appellant was eligible to tender for this Tender.

In resolving this issue, the Appeals Authority revisited the Tender Advertisement issued by the Respondent and observed that Clause 3 to the Advert invited tenders from manufacturers of Pharmaceuticals and Medical Supplies to bid for the Tender. The Clause reads:-

*Clause 3. "The Medical Stores Department Tender Board on behalf of the Government of Tanzania now invites sealed tenders from **eligible Pharmaceuticals and Medical Supplies manufacturers** for carrying out the Supply of Pharmaceuticals and Medical Supplies to SADC Member states under Framework Agreement".*

The above Clause was amplified under Clauses 1 and 3 paragraph 4, of the TDS which reads:-

“The subject of procurement is *Supply of Pharmaceuticals and Medical Supplies from Manufacturers to SADC Member states...under Framework Agreement*”.

It is the considered view of the Appeals Authority that, it is on the basis of the above cited provision, various Clauses of the ITT and the TDS required bidders to submit with their Tenders evidence in respect of the following requirements:-

- i. A copy of a valid manufacturing License, Clause 9 (d) of the TDS*
- ii. A Certified copy of Registration certificate of product tendered from Regulatory Authority in the country of Manufacture to supply the goods-Clause 10 paragraph (a) of the TDS and Clause 13 paragraph 2 of the TDS.*
- iii. Copies of documentary evidence to prove that the Pharmaceuticals and Medical Supplies tendered are manufactured according to Good Manufacturing Practice (GMP) as per Clause 10 paragraph (b) of the TDS.*
- iv. A statement of installed manufacturing capacity, Clause 13(a) of the TDS.*

The Appellant in this Tender is not a Manufacturer but an Agent. The Appeals Authority is of the considered view that the Appellant being an agent did not meet the above mentioned criteria. The Appellant lacked the pre-requisite requirements set forth in the Tender Document as a Manufacturer. The Appeals Authority considered the Appellant's argument that there were no

provisions in the Tender Document that restricted participation of agents or dealers since the Tender Forms allowed submission of Manufacturers' Authorizations. The Appeals Authority is of the view that this argument has no basis. Forms are used depending on the instructions issued under the ITT and TDS. As the ITT and TDS restricted the tender to Manufacturers alone, the Manufacturer Authorization forms were of no significant use in this Tender.

The above notwithstanding, the Appeals Authority revisited Clause 3.1 of the ITT as modified by Clause 4 of the TDS and observed that the Clause excluded participation of bidders under Joint Ventures, Consortium or Associations. We observed that, apart from being not a manufacturer, the Appellant submitted its bid as a Consortium. The Appeals Authority is of the view that the Appellant did not comply with the above mentioned clauses of the ITT and TDS.

In relation to the Appellant's argument that it had sought for clarification from the Respondent on the participation of the Joint Ventures, Consortium and Associations but did not receive any response, the Appeals Authority is of the view that the Appellant had the right to seek for administrative review pursuant to Sections 95 and 96 of the Act and to appeal to this Appeals Authority under Section 97 of the Act. However, it did not do so.

The Appeals Authority also considered the Appellant's argument that the modification made under TDS for Clause 3.1 of the ITT was intended to restrict the number of Consortium and not otherwise and observed that the Appellant had misconstrued the relevant provision. This is because what was

modified under the TDS was the whole Clause 3.1 of the ITT and not part of it as the Appellant had contended. The Appellant misdirected itself on the interpretation of the said Clause.

Based on the above findings, the Appeals Authority's conclusion with regard to this issue is that Appellant was not an eligible bidder for this Tender, given that the Appellant was not a Manufacturer.

What reliefs, if any, are the parties entitled to


Having answered the first issue in the affirmative, the Appeals Authority hereby dismiss the Appeal. Order accordingly.

Each Party to bear its own costs.

This Ruling is binding on the Parties and may be executed in terms of Section 97 (8) of the Act.

The Right of Judicial Review as per Section 101 of the Act is explained to the Parties.

This Ruling is delivered in the absence of the Appellant and in the presence of the Respondent this 30th day of October 2019.


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HON. JUSTICE (RTD) SAUDA MJASIRI

MEMBERS:

1. ENG. STEPHEN MAKIGO.....

2. DR. LEONADA MWAGIKE.....