

## INDEPENDENT REVIEW PANEL

In the matter of:

VNS Diagnostics Ltd

(Applicant)

v/s

Ministry of Health & Quality of Life

(Respondent)

(Cause No. 23/09/IRP)

### Decision

#### A. Background

1. The Ministry of Health & Quality of Life through open advertised bidding, dated 23 June 2009, invited bids from local and overseas firms for the supply of "Consumables for Dialysis". The reference for the procurement was AOB No. MHPQ/MDSP/08-09/Q15 (CPB/82/2009). The deadline for the submission of bids was 24 July 2009 up to 13.30 hrs at the Central Procurement Board and bids received were opened in public on the same day at 14.00 hrs.
2. Addendum No. 1 was issued in July 2009 and referred bidders to the correct page number in the bidding document with respect to bid security and performance security respectively.
3. The Central Procurement Board set up a Bid Evaluation Committee to examine and evaluate the five bids received. The Bid Evaluation Committee submitted its report on 13 August 2009 and from the report the following are observed:

- (i) Item 1: 276,000 units of dialysis kits and can kit is composed of (ix) items
  - (ii) Item 2: 12,000 units of dialysers  
Three bidders were considered to be responsive.
    - Atlantic Pharmaceutical option (i) and (ii)
    - Chem Tech
    - VNS Diagnostics Ltd
  - (iii) Item3: 160,000 vials of Heparin Injection (in 5ml vials)  
Three bidders were considered to be responsive.
    - VNS Diagnostics Ltd
    - Mascareignes Pharmaceuticals option (i) and (ii)
    - Atlantic Pharmaceuticals option (i) and (ii)
4. The Bid Evaluation Committee then made the following recommendations for an award:

Item 1: Atlantic Pharmaceuticals for its option (ii) and for a sum of US\$4,181,400 (Rs144,912,477.46)

Item 2: VNS Diagnostics Ltd for the sum of Rs2,763,960

Item 3: VNS Diagnostics Ltd for the sum of Rs3,296,000

The Central Procurement Board approved the recommendations of the Bid Evaluation Committee and informed the Public Body accordingly on 18 August 2009. Pursuant to Section 40(3) of the Public Procurement Act 2006 the Public Body notified the bidders accordingly on 20 August 2009.

5. VNS Diagnostics Ltd challenged the decision of the Public Body to award Item 1 to Atlantic Pharmaceuticals on 21 August 2009. The Public Body informed the Chairman of the Central Procurement Board about the challenge on 28 August 2009 and requested advice for reply. The aggrieved bidder was informed on the same day that the necessary information was being sought from the Central Procurement Board. The Central Procurement Board on 04 September 2009 detailed the shortcomings of the bid for Item 1 as proposed by VNS Diagnostics Ltd and justified the decision to award the contract to Atlantic Pharmaceuticals. The information was communicated by the Public body to the aggrieved bidder on 10 September 2009.
6. VNS Diagnostics Ltd still dissatisfied with the decision of the Public Body submitted an application for review to the

Independent Review Panel on 22 September 2009. Pursuant to Section 45(4) of the Public Procurement Act 2006, the Panel suspended the procurement proceedings for Item 1 until the appeal was heard and determined.

7. A hearing was scheduled for 12 October 2009 but was postponed to 21 October 2009 at the request of the Applicant so that a representative from abroad could come to depone.

#### **B. Grounds for Review**

The Grounds for Review are as follows:

*“Item 1 of tender is being awarded to Atlantic Pharmaceuticals whose bid does not meet tender requirements. Our offer has been rejected for unfounded and irrelevant reasons.”*

#### **C. The Evaluation Process**

The Bid Evaluation Committee appointed by the Central Procurement Board to carry out the evaluation process submitted its report on 13 August 2009. The Central Procurement Board approved the recommendations of the Bid Evaluation Committee on 18 August 2009.

#### **D. Submissions and Findings**

1. For the purpose of reaching a determination for this request for review, the Independent Review Panel considers that the letter of 04 September 2009 from the Central Procurement Board to the Public Body and subsequently communicated to the aggrieved bidder on 10 September 2009 has to be examined in details. The information contained in the letter are as reported in the Evaluation report dated 13 August 2009 of the Bid Evaluation Committee.

*“(a) the Bid Evaluation Committee has observed that the offer of VNS Diagnostics Ltd has the following shortcomings:*

- (i) samples submitted for sub items v, vi & viii are packed in single packet which is not acceptable as these are to be used separately during dialysis – this will bring contamination of the remaining items; and*

(ii) *sample submitted for Venous A V Fistula Needle does not meet specification as the sample does not have side eyes.*

(b) *the Bid Evaluation Committee has also reported that:*

(i) *the offer from Atlantic Pharmaceuticals is substantially responsive to tender documents;*

(ii) *“the products offered from Nipro Corporation are presently being used satisfactorily leading to good results in all our hospitals and clinics”, and*

(iii) *the price is fair and reasonable.”*

2. The Panel observes that the Evaluation Committee did not reject the sub items V, VI and VIII proposed by VNS Diagnostics Ltd on the basis of their quality or suitability for intended use. However, the fact that they were packed in a single packet was considered to be fatal for the bidding exercise. The Panel notes, however, that the preferred bidder Atlantic Pharmaceuticals has indicated in its bid (option II) that sub items nos. ii, iii and iv will be supplied packed together. The Panel considers that in the absence of clear indication regarding packing of sub items the bid of VNS Diagnostics Ltd could have been considered to be substantially responsive. At award stage the bidder should have been requested to pack them separately.
3. The specifications for sub item (vii) of Item I reads as follows “one pair A. V. Fistula Needles, with clamps. Gauze 16 (1000 units of gauze 17 to be included) with rotating wings and side eyes”.

The Bid Evaluation Committee observed and the aggrieved bidder does not dispute the fact that the Venous AV Fistula Needle it proposed does not have side eyes.

The Panel considers that the specifications are quite explicit that both needles must have side eyes. This was the understanding of the bidder and it added a remark to its bids: “Samples for A V Fistula needle submitted have side eye only in arterial needle. In case of award AV Fistula needles will be supplied with side eyes in both arterial and venous needle. There will be no additional cost incurred.”

4. A strict interpretation of clause 30.2 of the ITB indicates that the bid of VNS Diagnostics Ltd is not substantially responsive as it does not conform to the specifications with respect to back eyes on

the venous needle. The Panel notes that both needles are similar and that the quality of material provided is not disputed. The Panel cannot discuss the merits of the specifications as it is the prerogative of the Public Body to define them.

5. The specifications for sub item (i) of item 1 read as follows:  
“One Dialyser, one hollow fibre dialyser of synthetic or modified cellulose membrane”.

The aggrieved bidder has submitted a series of documents to the Panel and a paper in the Journal “Nephrol Dial Transplant (2004) vol. 19: 293-296” indicates that “cellulose diacetate” is classified as modified regenerated cellulose. From the notes of meeting, challenges concerning annual tender 08/09 Q15 for Dialysis Consumables (2009-2011) dated 02 October 2009 and submitted to the Panel on 21 October 2009 it is recorded at 1(i).

*“(i) According to the above supplier, the Dialyzers which are supplied by Atlantic Pharmaceutical being **Cellulose Diacetate** membranes are not of Modified Cellulose as requested.*

*According to the Committee, both Cellulose Diacetate and Cellulose Triacetate membranes are known to be of Modified Cellulose ones. Same has been verified and confirmed from various reliable sources.”*

7. The Panel has examined in details the bid proposed by Atlantic Pharmaceuticals. For sub item (i) of item 1 it has proposed: “One Nipro Sureflux N Dialyser with modified Cellulose Membrane”. As per the quantities required for the surface area of each membrane, it is proposing SF-110N, SF-130N, SF-150N and SF-170N. The material used for hollow fiber in the Sureflux series is triacetate. According to the literature provided by the aggrieved bidder itself triacetate is classified as modified/regenerated cellulose. The aggrieved bidder claims that Atlantic Pharmaceutical is proposing dialyser made out of “cellulose diacetate” is not substantiated by the documentary evidence made available to the Panel by the Central Procurement Board.

For all the reasons given above, the Panel considers that there is no merit in the application, which is accordingly dismissed.

**(Dr. M. Allybokus)**  
***Chairperson***

**(H. D. Vellien)**  
***Member***

**(Mrs. E. Hanoomanjee)**  
***Member***

**06 November 2009**