



Independent Review Panel

Decision No. 15/21

In the matter of:

Purpleblue Medical Ltd.

(Applicant)

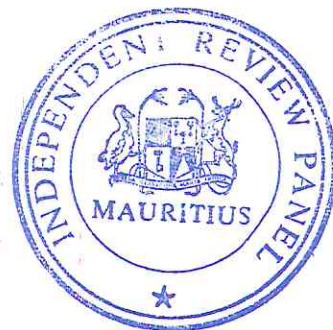
v/s

Ministry of Health and Wellness

(Respondent)

(Cause No. 16/21/IRP)

Decision



A. History of the case

On 9 December 2020, the Public Body (“the Respondent”), published a tender on the public procurement portal of Laboratory Equipment for Central Health Laboratory and other Laboratories bearing reference number: **MHPQ/EQ/2020-2021/Q18**.


B. Evaluation

A Bid Evaluation Committee was set up to evaluate the bids received and identify the lowest evaluated substantially responsive bid that meets the qualification criteria.

C. Notification of Award

On 20 July 2021, the Respondent in response to the Invitation for Bids, informed the Applicant, that pursuant to Directive No. 10 dated 09 November 2012 issued by the Procurement Policy Office; the contract has been awarded as shown hereunder:

Item No.	Description	Quantity	Bidder	Address	Contract Price (Rs) Excluding VAT
2	Electrophoresis Equipment	1 Unit	Proximed Ltd	Royal Road Cassis	1,780,000.00
4	LED Trinocular Teaching Microscope with Digital Camera	1 Unit			316,250.00
7	Fully Automated Blood Count Analyser	2 Units			1,200,000.00
10	Bench Top Water Deioniser	1 Unit			132,000.00
16	Clinical Chemistry Analyzer 1500-2000 tests/hr	1 Unit			600,000.00



D. Request for debrief

On 20 July 2021, the Applicant made a request for debrief on Item No. 7 – Automated Blood Count Analyser, Item No. 14 – Automated Blood Group Analyser and Item No. 18 – Fully Automated Immuno Analyser.

“We would like to enquire about the reason why we were not awarded the same.”

E. The Reply for debrief

On 06 August 2021, the Respondent made the following reply to the debrief and stated that:

“2. This Ministry carried out a competitive bidding exercise for the procurement of laboratory equipment.

3. You had submitted a bid for Items No 7, 14 and 18 in relation thereto. In your letter dated 26 April 2021 in response to this Ministry’s letter dated 22 April 2021, you indicated inter alia that “As we cannot price a tender at zero value, hence we decided on a nominal value on Rs8,000 per equipment”.

4. As your offer for the three items was of near zero value, it was more like a donation and therefore outside the scope of the said bidding exercise.

5. Please also note that your offer for item 14 is not technically responsive for not complying with line specifications 3.2, 3.13 and 3.16.”

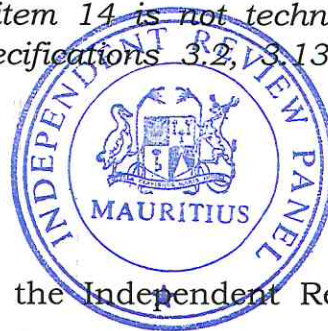
F. Grounds for Review

On 12 August 2021, the Applicant seized the Independent Review Panel for review on the following grounds:

“Item 7: Fully Automated Blood Count Analyser Model DxH900 Make Beckman Coulter (origin USA)

Item 18: Fully Automated Immuno Analyser Model Vitros3600 Make OrthoClinical Diagnostics (Origin USA)

- 1. Applicant complied with all the criteria as per the bidding documents and was technically compliant and substantially responsive.***




- 2. The Public Body failed to appreciate that the Applicant was technically compliant and substantially responsive to the bidding documents;**
- 3. The Applicant's bid was the lowest.**
- 4. The Public Body was wrong to have awarded Rs. 1,200,000 for Item No. 7 to its own prejudice to the successful bidder as compared to Rs. 16,000 as quoted by the Applicant;**
- 5. The Public Body was wrong to have bypassed its own explicit criteria as per the bidding documents to select the substantially lowest responsive bidder;**
- 6. The Public Body wrongly concluded that the cost of equipment was akin to a donation in as much as it failed to take into consideration the Total Cost of Ownership (TCO);**
- 7. The Public Body has acted in breach of Directive 52 of Section 7b of the Public Procurement Act and more specifically Section 37 (10A) of PPA 2006;**
- 8. The Public Body has remained evasive as to the status of Item despite Applicant being fully compliant and responsive thereto.”**

G. The Hearing

The Hearing was held on 25th August 2021. There was on record a Statement of Case filed by Applicant and Statement of Defence filed by the Respondent.

The Applicant was represented by Counsel Me D Jaypaul, whereas the Respondent was represented by Mrs P Dunpath, Assistant Parliamentary Counsel.

Mr S Banydeen, the Chief Executive Officer of the Successful Bidder was in attendance.



H. Findings

In the Statement of case dated 10th August 2021, the Applicant is moving at paragraph 30 of the said Statement of Case for the following:

- (a) A Special measure in the form of an injunction restraining and prohibiting the Respondent from proceeding with the award (presently under evaluation) of the tender issued on the 5th day of May 2021 on the Eprocurement Platform for the Item Fully Automated Immunoassay Analyser for the Central Health Laboratory bearing Procurement Reference Number MHPQ/EQ/2021-2021/Q48.
- (b) An order that the abovementioned procurement proceedings be stayed and/or suspended until this appeal is heard and determined by the Review Panel
- (c) The annulment of the decision of the Public Body not to retain the Applicant for Item 18 (Fully Automated Immuno Analyser)
- (d) An order awarding Item 18 (Fully Automated Immuno Analyser) to the Applicant
- (e) A declaration that the Public Body came to the wrong decision in allocating the bid to the Successful Bidder and in failing to allocate Item 18 (Fully Automated Immuno Analyser) to the applicant
- (f) An order for the Public Body to pay the sum of Rs.24,000 for the bidding process and the sum of Rs.91,968,200 on the sale of consumables and reagents for 5 years;
- (g) And any such orders as the review Panel may fit in the circumstances.



The Respondent in its Statement of Defence has raised a plea *in limine litis* which reads as follows:

Respondent moves that the present application be dismissed for the following reasons:

- a) The Application for Review has been lodged outside the prescribed delay;
- b) The grounds for review are frivolous and vexatious and Applicant has failed to comply with Sections 43 and 45 of the Public Procurement Act and the Public Procurement

Regulations 2008 given that it has not specified what breach of duty the Respondent has committed;

- c) The Tribunal cannot entertain prayer 30(a) and (b) given that the tender referred to therein constitutes a separate tender altogether and is not the subject matter of present review application;
- d) The Tribunal is not empowered to order the remedy prayed for at paragraph 30(d) of the SOC.

The Panel presumes that the word 'Tribunal' mentioned at paragraphs (c) and (d) of the Plea *Limine Litis* refers to the Panel.

On the day of hearing it was agreed that the Panel will first deal with the '*limine litis*' and give a ruling.

Counsel Mr D Jaypaul appearing for Applicant at the start of the arguments dropped prayers (c) , (d), and (e) as prayed for in the Statement of case.

Mrs Dunpath, Assistant Parliamentary Counsel, appearing for Respondent argued that the threshold of the tender subject matter of review before this Panel is one million and therefore Regulation 48(7) applies and according to her the application should have been made within 5 days from date of notification and the date of notification is dated 20/07/2021. Counsel also drew the attention of the Panel that the Statement of case is dated 10th of August 2021 whereas the application for Review 12th of August 2021. According to Counsel an application for Review should be accompanied by a Statement of Case and therefore a statement of case cannot be dated prior to the application for Review.

Mr D Jaypaul, Counsel appearing for the Applicant replied to argue that after the letter of Notification dated 20th July 2021, the Applicant on the same date wrote to the Public Body to enquire about the reason as to why it was not awarded.

When the Applicant did not receive any reply, it wrote through a letter dated 02/08/2021 under the hand and signature of its Attorney S S Murday and this time requesting for a debrief.

The Respondent replied on 06/08/2021.

Under the Public Procurement Laws there are various methods for an aggrieved bidder to challenge on particulars issues and apply for a review. This is what a division of this Panel extensively explained in

the case of Banker Shoes Ltd v National Transport Corporation (Decision No.13/21)

When one looks at the provision of Section 40 (3) of the Public Procurement Act, it is stipulated as follows:

'A Public body, in relation to a procurement contract, the value of which is above the prescribed threshold, shall notify the successful bidder in writing of the selection of its bid for award and a notice in writing shall be given to the other bidders, specifying the name and address of the proposed Successful Bidder and the price of the contract' *(the underlining is ours)*

Now what is the prescribed threshold?

'Regulation 38(3) provides: For the purposes of section 40(3) of the Act, the prescribed threshold shall be 15 million rupees'

In the present tender bid, the Panel notes that the value of the tender is not 15 million rupees and therefore the Public Body was not to bound give notice in writing to the other bidders specifying the name and address of the proposed Successful Bidder and the price of the contract, still it did it through its letter dated 20/07/2021.

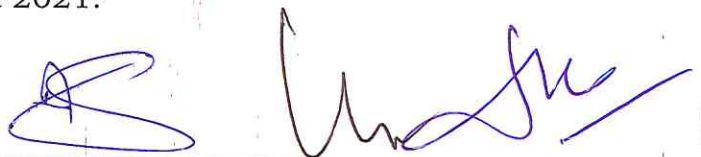
Section 45(2) (c) of the Act provides that an unsatisfied bidder shall be entitled to ask the Review Panel to review the procurement proceedings and the application shall be made within such time as may be prescribed. *(the underlining is ours)*.

For the purpose of prescribed time we refer to Regulation 48 (6) which provides that for the *purposes of section 45(1) (c) of the Act the threshold shall be 1 million ruppees*.

Regulation 48(7) provides that an application for review shall be made within 5 days of the date of the applicant becomes aware of alleged breach.

It is clear to the Panel that the Applicant became aware on the 20th July 2021 and therefore the challenge should have been made within 5 days which it failed to do so and this is fatal.

The Applicant now instead of applying for review within the delay as provided by the Regulation chooses to request for debriefing and the Public Body replied on 06 August 2021.'



Debriefing of unsuccessful bidders should not let them confused by application for challenge and review. In the opinion of the Panel these are two distinct and different issues for which the legislator has cared for under different provisions of the Public Procurement Act.

Under Regulation 38, the Public Body after identification of the successful bidder shall notify the bidder and promptly publish a notice of the award as provided under Regulation 71.

I. Conclusion

For the reasons mentioned above, the Panel is of the view that the application for Review has been made outside the prescribed delay and is therefore dismissed.



H. Gunesh

(Vice-Chairperson)



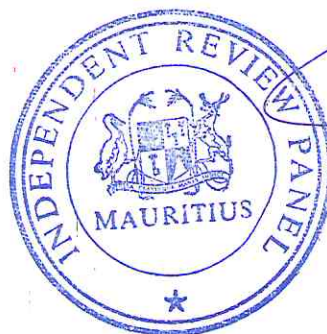
V. Mulloo

(Member)



A. Gathani

(Member)



Dated: 31 August 2021