GOVERNMENT OF SINDH
SINDH PUBLIC PROCUREMENT REGULATORY AUTHORITY

NO.AD(L-II)/SPPRA/RC-GRACE/2018-19 Karachi, dated the April, 2019

BEFORE REVIEW COMMITTEE OF SINDH PUBLIC PROCUREMENT REGULATORY AUTHORITY UNDER RULE-32 OF SPP RULES 2010.

(Appeal)

M/s Grace Pharmaceuticals

Versus

Health Department, Government of Sindh

(NIT ID # T00911-17-0001 dated 06.07.2018)

Facts and background

M/s Grace Pharmaceuticals, Karachi (hereinafter referred to as the appellant) vide letters dated 31.01.2019 lodged two appeals to the Review Committee of Sindh Public Procurement Regulatory Authority (hereinafter referred to as the Authority) wherein the appellant stated that they lodged complaints vide letters dated 07.12.2018 to the Complaints Redressal Committee (CRC) of Health Department (hereinafter referred to as the procuring agency) for redressing their grievances over unreasonably technical disqualification under drugs/ medicines tender in terms of Rule-31(3) of SPP Rules, 2010 (Amended Up to date) but the procuring agency's CRC instead of redressing grievances at their own level forwarded complaints to the procurement committee for review. The CRC could not decide their matter – within seven days of lodging of complaints in terms Rule-31(5) of SPP Rules, 2010 (Amended Up to date) – despite lapse of 25 days.

2. On receipt of the above appeals, the Authority vide its letter dated 14.02.2019 asked from the procuring agency to confirm that whether the appellant had not withdrawn its bid security(ies) as required under Rule-32(1) of SPP Rules, 2010 (Amended Up to date) or not; however, the procuring agency did not furnish any response against it.

3. Subsequently, the appellant vide letters dated 08.03.2019 submitted another request/ reminder in this Authority for reviewing the matter in accordance with Rule-32 of SPP Rules, 2010 (Amended Up to date). In turn, the Authority vide letters dated 08.03.2019 issued notices to the concerned parties for appearing before the Review Committee on 13.03.2019 at 01.00 p.m. Mr. Waheed Ahmed, Additional Secretary, Health Department (representative of the procuring agency) and Mr. Vijay Kumar, Proprietorship Member (representative of the appellant) appeared before the Review Committee.

Review Committee Proceedings

4. Chairperson of the Review Committee welcomed all the participants of the meeting and then introduced the members of the Review Committee. Then, the chair asked the appellant to present his case/ version before the committee.

5. Mr. Vijay Kumar (representative of the appellant) while arguing his appeal apprised the Committee that they lodged complaints to the procuring agency's CRC on two tenders: i. Drugs/ Medicines; and ii. Surgical/ Disposable Items, Sutures & Dental Items; and would like to brief the committee over their quoted items under medicines first and then surgical items as under:

- **Drugs/ Medicines – I.V Infusion Set (Item # CPC0677):** The product used to fall under surgical items but the procuring agency – during this tender – incorporated it under bid documents for drugs/ medicines. They quoted this product with brand 'Alpha' manufactured by Jiangxi Hongda Medical Equipment Group Ltd., which was a US FDA approved Chinese manufacturer of I.V Set. However, the procuring agency's Central Procurement Committee (CPC) disqualified their bid during technical evaluation stage on the reasons provided that *"firm non-responsive on financial soundness and the product information as required to check the efficacy and quality not provided"*. These reasons for their disqualification were inappropriate due to following:

  - **Financial Soundness:** They submitted copy of financial soundness certificate/ bank account maintenance certificate along with their bid as well as provided copy of the same to the procuring agency's technical committee – when called for clarification – during technical evaluation of bids;

  - **Product Efficacy:** They quoted the product – which was US FDA approved – in their bid and they were supplying this product to various leading hospitals like: SIUT; Civil Hospital Karachi; and Shifa Hospital etc. for last 10 years, which is enough evidence of satisfactory level of the product quality and efficacy; moreover, this product is US FDA approved and is being sold in US markets which is a key accreditation for the product's efficacy;

    - Mr. Saad Rashid (member of Review Committee) asked the appellant whether the efficacy report was requirement of the bid evaluation.

      - The appellant stated that the efficacy report was not the requirement of the bid evaluation; however, the procuring agency asked the bidders to submit the product's certificate of analysis report, which they submitted along with the bid.

    - The procuring agency highlighted that their CPC accepted their mistake for incorporating this product under drugs/ medicines – rather than surgical products – and had floated afresh NIT for procurement of this product;

      - The appellant accepted that this product had been retendered but the contract for supply of this product was also awarded by the procuring agency;

    - The chair pointed out when the product had been retendered by the procuring agency then how they could award the contract; if so then name of bidder/ awardee or copy of awarded contract should be provided;

      - The appellant could not provide the name of the contract awardee or copy of contract awarded by the procuring agency.

- **Non-filing of Tax Return:** The procuring agency stated that they had not filed tax returns since 2014. They had submitted copies of tax returns certificate along with their bid.

- **Drugs/ Medicines – Anti Rabies Vaccine (Item # CPC1581):**– They quoted the product with brand 'Rabio' manufactured by Liaoning Chend Da Biotechnology Co. Ltd., the WHO compliance Chinese manufacturer of Anti Rabies. However, the procuring agency's CPC disqualified their bid during technical evaluation stage on the reasons provided that *"financial soundness not reached and free sales certificate is not Embassy attested as per the bid documents criteria"*. These reasons for their disqualification were inappropriate due to the clarification made hereinabove, as well as provided below:

  - **Free Sales Certificate:** They submitted copy of valid FSC duly attested by the Embassy to the procuring agency along with bid documents as well as during technical proposals' scrutiny process, when called by the technical committee;

    - The chair asked the procuring agency to clarify why the appellant disqualified on the above grounds when they submitted the requisite document along with their bid;

      - The procuring agency requested the committee to provide them chance to present their procurement record in next meeting.

    - Mr. Saad Rashid highlighted that even a single mandatory point/ reason as referred by the procuring agency for disqualification of the appellant was valid then the appellant stood as disqualified, which the appellant agreed upon by adding that their other points – unnecessary or irrelevant to their disqualification e.g. filing of returns and FSC attested by the Embassy – should be clarified at this stage so that next time or tender it should not affect their qualification. The chair endorsed that their justified concerns would be cleared by the committee[i].

    - The chair asked the procuring agency to share copy of the letter sent to the FBR for verification of tax filed by the appellant;

      - The procuring agency clarified that they submitted a letter in FBR. In response, the FBR officials provided a list of all companies – filers and non-filers along with turnover. The FBR while using the NTN number – given by the appellant along with bid documents – confirmed that M/s Grace had not filed tax returns since 2014. *Moreover, the appellant was disqualified under this tender for drugs/ medicines on the grounds of lack of financial soundness i.e. PKR 1000 million – verified from tax returns – for pharmaceutical manufacturers & importers as per preliminary evaluation criteria # 7 of bid documents and same can be verified from the bid evaluation report posted on the Authority's PPMS website;*

    - Mr. Saad Rashid added that a proprietor, for instance having five different company names may have registered these companies under one NTN. If the procuring agency had asked the FBR to know the status of tax returns of Mr. Shahdev – the appellant who is the proprietor of M/s Grace – then

the FBR could have provided the exact position to the procuring agency. The Rules allow the proprietors to participate in the bidding process and the procuring agency should have expressly asked/ confirm the tax returns from the FBR with proprietor names. The chair also endorsed that the procuring agency could have asked the clarification or explanation from the appellant on this matter in terms of Rule-43 of SPP Rules, 2010 (Amended Up to date). *The committee directed the procuring agency to ask the bidders – in upcoming tenders – to bring and submit FBR certificate along with bid documents.*

- The representative of the appellant provided copies of NIT as well as tax returns filed by Mr. Shahdev Vankwani wherein the name of M/s Grace Pharma was mentioned but their *financial soundness was below the required level of instant tender.*

6. On the request of the procuring agency to provide them opportunity for additional time to bring and showcase relevant procurement record before the Committee, *it was unanimously decided to discuss and decide the instant matter in next Review Committee meeting to be scheduled on 21.03.2019.* Pursuant to this decision, the Authority vide letters dated 18.03.2019 issued notices to the concerned parties for appearing before the Review Committee on 21.03.2019 at 11.00 a.m. Mr. Waheed Ahmed, Additional Secretary, Health Department (representative of the procuring agency) and Mr. Vijay Sameed, Proprietorship Member (representative of the appellant) appeared before the Review Committee.

7. Subsequently, the chair asked the representative of the appellant to present their concerns on products under Surgical/ Disposable Items, Sutures & Dental Items. In turn, Mr. Vijay (representative of the appellant) highlighted that they were technically qualified under this tender but they have reservations over the procuring agency's approach to award the contracts, using combined scoring criteria, to those firms which did not fulfill the technical requirement of the tender and even offered higher rates as compared to them. He further explained that:

- **Surgical/ Disposable Items – Disposable Syringes 3ml, 5ml & 10 ml (Items # CPC0384, CPC1921, CPC1923):** All these products, as per terms and conditions of bid document, were required to be US FDA approved/ WHO prequalified. They fulfilled this criterion, for which they submitted supported documents along with their bid. However, the procuring agency awarded all these products to M/s LabLink Enterprises, which quoted products with brand 'Nipro' manufactured by P.T. Nipro Indonesia Jaya that was neither US FDA approved nor WHO prequalified. As per their knowledge, only Nipro Japan is US FDA approved/ WHO prequalified but not NIPRO Indonesia. Moreover, bidders which stood at 2nd and 3rd rank in total scoring under these items did not fulfill the criteria of US FDA approved/ WHO prequalified. Therefore, they are not satisfied from the score awarded to them under technical evaluation; bidders were awarded different number of marks against the same criterion and same documents, which effected the combined scores on which the contract was awarded.

  - Mr. Saad Rashid asked the procuring agency whether US FDA was mandatory requirement under the bid. In response, they clarified that US FDA was not the mandatory requirement but it was preferential clause having additional marks under technical evaluation.

- The appellant raised concerns that they were not awarded marks being US FDA approved;
    - The procuring agency stated that the brands 'Alpha' and 'Rabio' as quoted by the appellant was not US FDA approved in Pakistan; therefore, they were not assigned marks;
- The appellant highlighted that they import their products from a Chinese manufacturer, which is US FDA approved. They used to market/ sell those imported products in Pakistan with their own brand 'Alpha' and 'Rabio', which was registered in Pakistan.

- Mr. Ali Imam Qadri, Procurement Specialist SPPRA asked the procuring agency to clarify that US FDA approved was the requirement for a particular product or manufacturer;
    - The procuring agency clarified that they demanded US FDA approved manufacturer; if a firm imported these products and used or sold it with another brand then the criteria to evaluate that particular firm completely got change; however, it was revealed from the bid documents that the procuring agency demanded US FDA approved requirement for a product;
- The appellant highlighted that their manufacturer did not mention any brand name in the documents and same could be verified from the documents submitted along with their bid. Subsequently, the appellant requested the committee to leave their matter for products were either US FDA approved or not but the committee should check the record of M/s Lablink, which offered products with brand 'Nipro', manufactured by P.T. Nipro Indonesia Jaya that was not US FDA approved;
    - Mr. Ali Imam added that US FDA was not a key requirement for bidder's qualification but it was a preferential clause having 5 marks under technical evaluation criteria; if the products offered by M/s Lablink were not US FDA approved then they would be deprived of only those marks;
    - The appellant stated that there were 12 marks for products having US FDA approved, which includes 4 marks for accreditation and 4 marks for US FDA, and 4 marks for US market and same could be verified from the bid evaluation report as available on the PPMS website that showed M/s Lablink was awarded 8 marks due to US FDA approved. Overall, the procuring agency awarded them 19 marks as compared to 24 marks awarded to M/s Lablink;
- *While examining the documents presented by the procuring agency, the committee found that M/s Lablink quoted products having brand 'Nipro' manufactured in Indonesia; whereas they submitted US FDA approved certificate for Nipro Miami Florida;*
    - The procuring agency agreed that M/s Lablink offered products with 'Nipro' brand manufactured in Indonesia and they had submitted US FDA

certificate for Miami Florida, which was accepted on the grounds that company name/ brand was same.

- The committee asked the procuring agency that due to similar brand name in Indonesia and USA, they awarded marks for US FDA approved to M/s Lablink;
    - The procuring agency agreed on the above and added that the appellant changed their brand name without seeking certificate from the manufacturer or of US FDA. Due to change in brand name, certain changes might have emerged under product's packaging or material etc.
        - The appellant clarified that they import finished product with brand 'Alpha' – without add any changes at local level – and it can be verified from their documents – invoices and goods delivery etc.;
- Dr. Saadat Rashid (member of the committee) added that products approved by US FDA are indicated with brand name; therefore, they should produce the US FDA certificate;
    - The appellant stated that they have concerns over the brand quoted by M/s Lablink was US FDA approved or not;
- Mr. Saad Rashid added that if Nipro Indonesia certifies that they are doing business on behalf of US Florida, it should be sufficient.
    - The appellant raised concerns that it could not be possible as Nipro Thailand was recently banned for selling or marketing their products in US markets by US FDA, which can be verified from the report as presented to the committee.
- The chair added that the Nipro Indonesia cannot be equated with Nipro Florida or Japan etc. How the procuring agency treated Nipro Indonesia as US FDA approved without any concrete documentary evidence. The chair further added that the procuring agency did not check and verify products' manufacturing origin and respective products certification/ approval with US FDA. The document provided by M/s Lablink related to the Nipro Florida but not Indonesia. The concerns raised by the appellant on these grounds seem valid when they were not awarded marks on similar grounds.
    - The procuring agency agreed upon the above and further stated that they considered Nipro Indonesia as US FDA approved on the basis of product without considering its origin or manufacturing but they should seek confirmation about Nipro Indonesia US FDA approval.
- Mr. Ali Imam pointed out that the appellant offered competitive prices as compared to M/s Lablink but due to the 'combined scoring' – which is specifically used for procurement of consulting services as per SPP Rules – changed the winning position of the bidder who offered higher rates. The chair endorsed that the procurement method adopted under the instant procurement was a key issue, which has to be addressed on priority basis.

- **Surgical/ Disposable Items – Disposable Syringe 20ml (Item # CPC0386):** This product, as per terms and conditions of bid document, was required to be US FDA approved/ WHO prequalified. They fulfilled this criterion, for which they submitted supported documents along with their bid. However, the procuring agency awarded contract for this product to M/s Sindh Medical Store that is not US FDA approved/ WHO prequalified but the procuring agency awarded 4 marks; therefore, they achieved higher marks on aggregate scoring basis. There is difference of only one paisa between the bid quoted by them and M/s Sindh Medical Store.

    - In presence of Mr. Asad Ali (representative of Sindh Medical Store), the procuring agency presented the document – US FDA approved – to the committee for product quoted by M/s Sindh Medical Store. Mr. Asad stated that they import the product from China with manufacturer name in order to avoid confusion for product's US FDA approval, as earlier faced.

        - *The committee examined the document and found correct.*

- **Surgical/ Disposable Items – IV Chamber (Item # CPC1966):** This product was awarded to M/s LabLink Enterprises in violation of Rule-42 of SPP Rules, 2010 (Amended Up to date). The product quoted by M/s LabLink did not meet various requirements under technical evaluation criteria like: availability of 25% inventory of the total import of the quoted item during last year; and prior market experience. In fact, the product quoted by M/s LabLink has neither registration with the Drug Regulatory Authority of Pakistan nor on commercial sale; and the product was never imported to Pakistan before this tender. Moreover, they had quoted unit price as PKR 90; whereas M/s Lablink offered unit price as PKR 124.

    - The chair queried what action was taken by the CRC when they approached them.

        - The appellant stated that CRC forwarded the matter to the CPC and later on upheld the decision CPC.

Review Committee Observation

8. After hearing parties at length and perusal of record, Review Committee observed that:-

- The procuring agency should clearly mention financial soundness (turnover of minimum PKR 1,000 million) for a particular period – number of years – in the bid documents for drugs/ medicines; moreover, the procuring agency failed to present copy of letter submitted to the FBR for verifying tax returns, despite given two chances to present the same;

- The procuring agency should ask the bidders – in upcoming tenders – to bring and submit their FBR certificate with tax returns along with bid documents; and

- The procuring agency failed to prove that Nipro Indonesia is US FDA approved and advantage given to M/s Lablink on this ground was unjustified under product # CPC038, CPC1921, CPC1923, and CPC1966;

- The procuring agency needs to focus on product's manufacturer or company name to ascertain US FDA approval - rather than focus on a particular brand name. The procuring agency may relate the case from the US FDA approved certificate submitted by the

appellant that only showcases name of manufacturer as M/s Jiangxi Hongda Medical Equipment Group Ltd. rather than any product or particular brand; and

- The procuring agency had failed to finalize and announce its CRC decision within seven days and intimate the same to the appellant and the Authority within three working days in terms of Rule-31(5) of SPP Rules; moreover, the procuring agency was required to decide the complainant's matter through its CRC prior to awarding contract in terms of Rule-31(6) and Proviso of Rule-31(7) of SPP Rules;
- Although it is clearly mentioned in the NIT that the instant procurement would be carried out on single stage two envelope bidding procedure basis as specified under Rule-46(2) of SPP Rules, 2010 (Amended Up to date), but the procuring agency used QCBS method as per Rule-72(3) of SPP Rules, 2010 (Amended Up to date), which is applicable for only procurement of consulting services as per Rule-58 of SPP Rules, 2010 (Amended Up to date). For procurement of goods, works, and other services, Rule-46 of SPP Rules, 2010 (Amended Up to date) has to be followed.

Review Committee Decision

9. In light of the above observations and violation of Rules as mentioned under para-9, and after due deliberation, the Review Committee decided not to give its verdict on allocating correct marks to the appellant as this method was not covered under the rules. Moreover, the Review Committee unanimously declares the said procurement as **Mis-Procurement** in the light of SPP Rule-32(7)(g) and decided to refer the matter to the Competent Authority for proceeding further under Rule-32(A)(2) of SPP Rules, 2010 (Amended Up to date) read in conjunction with Section-2(i) of SPP Act, 2009 (Amended 2017).

(Member)
Saad Rashid
Private Member SPPRA Board
Representative Transparency International

(Member)
Asadullah Soomro
Private Member
SPPRA Board

(Member)
Shoaib Zafar
Nominee of Director General Audit Sindh

(Member)
Dr. Saadat Ahmed Memon
Director Procurement
Sindh Employees Social Security Institution
Independent Professional

(Chairman)
Muhammad Aslam Ghauri
Managing Director
Sindh Public Procurement Regulatory Authority

[1] Second meeting of the Review Committee