



GOVERNMENT OF SINDH
SINDH PUBLIC PROCUREMENT REGULATORY AUTHORITY



NO.AD (L-II)/SPPRA/CMS-2991/2021-22/0858

Karachi, dated the 1st March, 2022

To,

The Secretary,
Health Department,
Government of Sindh,
KARACHI.

Subject: DECISION OF THE REVIEW COMMITTEE OF SINDH PUBLIC PROCUREMENT REGULATORY AUTHORITY.

The undersigned is directed to refer to the subject cited above and to enclose herewith a copy of the Authority's Review Committee decision (**M/s AGFA Health Care V/s Section Officer PM & I Cell Health Department**, held on 09.02.2022, for taking further necessary action under intimation to this Authority, at the earliest.


ASSISTANT DIRECTOR (Legal-II)

A copy is forwarded for information and necessary action to:

1. The Additional Secretary PM & I Cell Health Department Karachi.
2. The Section Officer, PM & I Cell Health Department Karachi.
3. Assistant director (I.T), SPPRA (**with advice to post the decision on the Authority's website in terms of Rule-32(11) of SPP Rules, 2010**)
4. The Staff Officer to the Chairman / Members Review Committee.
5. The Appellant.



GOVERNMENT OF SINDH
SINDH PUBLIC PROCUREMENT REGULATORY AUTHORITY



No.AD (L-II) SPPRA/CMS-2991/2020-21

Karachi, dated the 23rd February, 2022

BEFORE REVIEW COMMITTEE OF SINDH PUBLIC PROCUREMENT REGULATORY
AUTHORITY UNDER RULE-32 OF SPP RULES 2010
Decision of the Review Committee Meeting Held on 09.02.2022

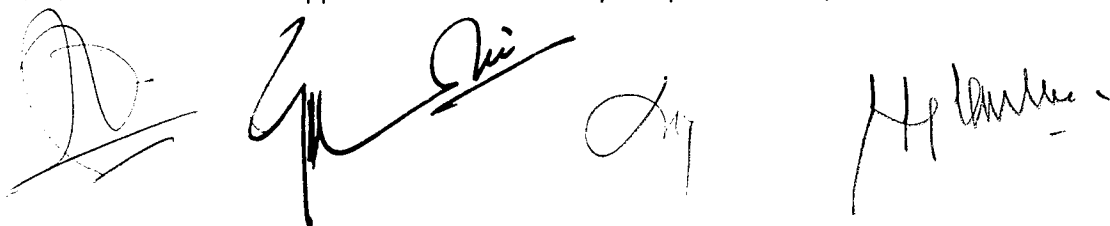
Appellant	M/s AGFA Health Care
Procuring Agency	The Section Officer PM&I Health Department Karachi.
PPMS ID # Reference No.	T00911-21-0002 /KRY.NO./3299/2021 dated
Appeal Received in Authority Dated	01.02.2022
Complaint of the Appellant Addressed to the Secretary Health Department, (Chairman Complaint Redressal Committee)	Dated:18.1.2022
Dated of Posting Notice Inviting Tender	26-08-2021
Date of Opening of Bids Technical Opening Date of Opening of Bids Financial Opening	17.09.2021 20.10.2021
Date of Posting Bid Evaluation Report	03-11-2021
Date of Posting Contract Documents	Not posted yet for the works on which complaint was filed.
SPPRA Observations communicated on	11.1.2022
Estimated Cost of NIT Total	Not mentioned in NIT, Contract will be signed under frame work contract agreement
Total works in NIT	Total No of Work are 8
Appellant Related work	Work No 6. X-Ray films / Chemical and Contrast Media (Radiology items). (codes Related to the appellant XCM 0001, XCM 0002, XCM 0003, XCM 0004, XCM 0005,
Issue involved	Non-Acceptance of the bid of the bidder
Complaint of the Appellant Addressed to the Secretary Health Department, (Chairman Complaint Redressal Committee)	Dated:18.1,2022
CRC Decision	Not Received

Complaint of the Bidder:-

1. The appellant has submitted that the Central Procurement Committee had recommended his firm M/s AGFA Pakistan for the award of contract after detailed evaluation of bids. However, the procuring agency has awarded the work against the recommendation of the Central Procurement Committee.
2. The bidder has submitted that the procuring agency has not accepted his bid even being the lowest.
3. The bidder has claimed that the procuring agency wants to award the work to the Fuji Films which submitted higher rates and does not possess the required experience.
4. The appellant also submitted that M/S Fuji Films has been awarded the work in contravention of the unanimous decision of the Central Procurement Committee.
5. The appellant claimed that his bid was the lowest but the procuring agency has not issued the letter for award of work according to the terms and conditions of the bidding documents.
6. The appellant also claimed that the procuring agency had called for specific experience but the procuring agency awarded score to M/S Fuji Enterprises on general experience which was against the SPP Rules, in contravention of fairness, in violation of transparency.
7. The appellant submitted that the procuring agency changed the Bid Evaluation Report, did not inform the change of Bid Evaluation, and awarded the work to M/S Fuji films without giving the fair opportunity of hearing and defense to the appellant.
8. The appellant submitted that the decision of CRC was without legal authority as it was decided after the lapse of legal time of 7 days in terms of Rule 31 (5) of the SPP Rules.
9. The appellant prayed that the decision of CRC and subsequent change in BER and issuing of work orders were without lawful authority of law and were of no legal effect and same might be set aside and his firm might be considered for the issuance of work order as recommended by the Central Procurement Committee.

The procuring agency's version:-

1. The procuring agency submitted that two bidders had participated in the items objected by the complaint namely M/S AGFA Pakistan (PVT) LTD and M/S Fuji Film Pakistan.
2. The procuring agency submitted that bids of both bidders were evaluated according to Evaluation Criteria mentioned in the bidding documents and as per Physical Examination of samples provided by the Technical Experts.
3. It was also informed that after hoisting of BER on SPPRA website, M/S Fuji Film Pakistan submitted grievances against the Bid Evaluation Report. After hearing the parties, the Complaint Redressal Committee decided to refer back the matter to CPC for specific correction after awarding 02 more marks to the complainant subject to the verification of record.
4. The procuring agency also informed that according to the decision of CRC, the Central Procurement re-evaluated the bids and awarded 2 marks to M/s Fuji Enterprises. Consequently, M/s Fuji was awarded the work as recommended by the CPC.
5. The procuring agency was asked whether the appellant was informed about the change in BER. The procuring agency's representative said that the appellant was well aware of the decision of CRC, but the review committee noted that the procuring agency failed to prove the intimation in-writing to complainant.
6. The procuring agency was asked whether the appellant was given the chance of defense for change in BER. The procuring agency submitted that the complainant was neither called for CRC nor was informed because the appellant had not filed any complaint. Hence, he was not called for hearing.



Observations of the Review Committee:-

Violation of Natural Justice by disregarding the legitimate expectation of the appellant:-

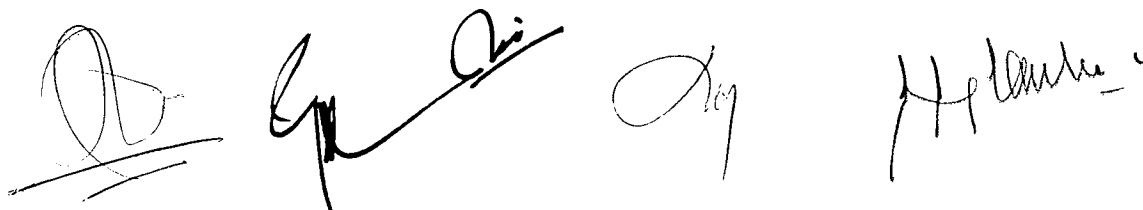
1. The Review Committee observed that the announcement of Bid Evaluation Report and subsequent declaration of lowest bidder had created a legitimate expectation for the appellant. Although mere reasonable or legitimate expectation of an appellant may not by itself be a distinct enforceable right yet failure to consider and give due weight age to it may render the decision arbitrary.
2. The Review committee was of the view that if the authority proposes to defeat a person's legitimate expectation, it should afford him an opportunity to make a representation in the matter. However, in the instant matter, the appellant who was declared as a successful bidder by the CPC when the Bid Evaluation Report was made public.
3. The Review Committee held that rescinding the earlier Bid Evaluation Report without hearing the affected appellant is clear violation of the principle of natural justice.

Illegal Decision of the Complaint Redressal Committee:-

4. The Review Committee also observed that the decision of Complaint Redressal Committee was illegal and without legal authority. The Rule 31(5) provides the time limit for CRC decision and subsequent remedy of approaching the Review Committee in case the Complaint Redressal Committee fails to decide the matter within seven days. For convenience and easiness, the Rule 31(5) is reproduced as under:

31 (5) [The complaint redressal committee shall announce its decision within seven days and intimate the same to the bidder and the Authority within three working days. If the committee fails to arrive at the decision within seven days, the complaint shall stand transferred to the Review Committee which shall dispose of the complaint in accordance with the procedure laid down in rule 32,]2 [if the aggrieved bidder files the review appeal within ten (10) days of such transfer.

5. The Complaint Redressal Committee had legal authority to decide the complaint of M/s Fuji within seven days. After the lapse of seven days, the complaint had transferred to the Review Committee and the authority of the Complaint Redressal Committee had ceased. M/S Fuji was required to approach the Review Committee within 10 days of the transfer of the Review Appeal. However, M/s Fuji had never applied to the Review Committee within legal time of ten days. Hence there was no legal worth of the complaint of the bidder after the expiry of appeal period as provided in the rules. Interestingly, the Complaint Redressal Committee announced its decision on the complaint of M/s Fuji on 24.12.2021 after the lapse of about 40 days which was illegal and without legal Authority.
6. **The Change in the decision of CPC on the basis of CRC was also illegal and against the SPP Rules. As described above, the decision of CRC was illegal and without legal Authority.** It is well settled principle of law that no superstructure or legal right can be based upon the foundation, which is void in nature, Therefore, on account of the decision of CRC the change in decision of CPC cannot be protected. The Complaint of the appellant was liable to be set aside as the CRC could not announce its decision within time and M/S Fuji had also not approached to the Review Committee as enunciated in the Rule 31(5) of the SPP Rules 2010(amended-up-to date). **Furthermore, the Review Committee regretfully noted that BER was changed and contract was awarded to M/S Fuji as per the letter of Chairman of CPC letter No. nil dated 06.01.2022 the same letter was just signed and communicated by the Chairman without signatures of other members of CPC which shows the letter was arbitrary and was against the SPP Rules, transparency and Natural justice.**



Lack of publication of BER:-

7. The procuring agency had not announced the change in BER publicly nor hoisted the changed BER on PPMS website even the same was not communicated with the appellant which is against the SPP Rules. The procuring agency is under legal obligation to intimate the Bid Evaluation Report to the all bidders who participate in the procurement process. The Rule 45 is reproduced as under:

45. Announcement of Evaluation Reports – Procuring agencies shall announce the results of bid evaluation in the form of a report giving reasons for acceptance or rejection of bids. The report shall be hoisted on website of the Authority and that of the procuring agency if its website exists and intimated to all the bidders at least three (3) working days prior to the award of contract.)

8. The representative of the procuring agency contended that the appellant was well aware of the changes in BER. Hence, no intimation was sent. It is well settled principle of law that any change in procurement orders shall be made in a manner similar to the original procedure.
9. As the intimation of change in BER was not given, the bidder was deprived of knowing the reasons for non-acceptance of his bid which is violation of Rule 51 of the SPP Rules 2010 (amended up-to-date) which stipulates for debriefing meeting in case the bidder wanted to know the reasons for the non-acceptance of his bid.

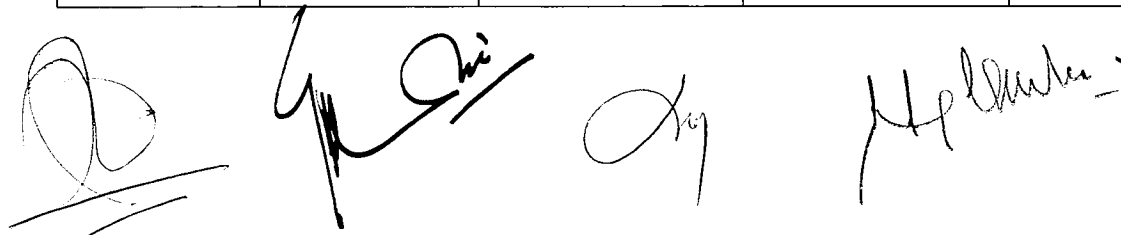
Violation of Transparency:-

10. The Review Committee observed that the procuring agency had openly violated the transparency and had not followed the transparent mechanism while the procuring agency was changing the BER and was awarding the contract to M/s Fuji instead of appellant as recommended by the CPC. The committee noted that Government has set up and maintain a Public Procurement Portal accessible to the public for posting and exhibiting matters relating to public procurement. Subject to the provisions of rules, each procuring entity is required to cause the procurement related information to be exhibited as required under the SPP Act or the rules made there under on the Portal referred above. However, in the instant matter the procuring agency failed to upload the changes on the public portal "PPMS".

Non-appearance of the official of the procuring agency:-

11. The Review Committee also observed that, under Rule 32(8), it was necessary for the head of the procuring agency or his nominee not below the rank of BS-19 to appear before the Review Committee. However, the head of the procuring agency did not appear before but lower rank officers were nominated to appear before the Review Committee
12. The Review Committee also observed that the procuring agency illegally awarded the contract to M/s Fuji Enterprise on higher rates as compared to the rates submitted by the appellant.

Item Code	SIZE	Rate submitted by M/s Fuji	Rate submitted by M/s AGFA Pakistan	Difference of rate
XCM 0001	10X12	Rs.145	Rs.132	Rs.13
XCM 0002	10X14	Rs. 189.00	Rs.171.90	Rs.17.1
XCM 0003	14X17	Rs. 290	Rs.259.90	Rs.30.1
XCM 0004	14X17	Rs. 290	Rs. 259.90	Rs. 30.1
XCM 0005	8X10	Rs.96	Rs.88.95	Rs. 7.05

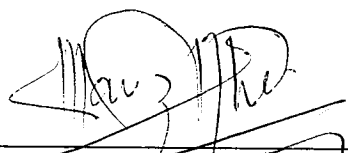


13. From the perusal of record, the Review Committee observed that that the procuring agency has signed the contract. However, during the meeting of the Review Committee, the officials of the procuring agency wrongly informed that contract has not been signed which shows that officers of the procuring agency has misrepresented the facts which is the violation of the principles of transparency.

Decision of the Review Committee:-

Given the proceedings, findings, observations and after due deliberation, in exercise of power conferred by the Rule 32(7) (g), the Review Committee:

1. Declares the decision of CRC illegal and void ab-initio and subsequent change in BER and signing of contract against the SPP Rules. The decision of CPC wherein M/s AGFA was recommended must be implemented in letter and spirit.
2. Declares the instant procurement of (Codes Related to the appellant XCM 0001, XCM 0002, XCM 0003, XCM 0004, XCM 0005, of Work No 6. X-Ray films / Chemical and Contrast Media (Radiology items) **as Mis-Procurement.**
3. Declares that since the procuring agency has breached its obligations under the Act, Rules and Regulations, orders the payment of compensation by the officer(s) responsible for mis-procurement for cost incurred by the bidder on preparation of bid in terms of Rule 32(7)(e) of the SPP Rules 2010(amended up-to-date)
4. Decide to refer the matter to the Competent Authority i.e. Secretary, Health Department, Government of Sindh Karachi for initiation of disciplinary action against the official(s) of the procuring agency responsible for Mis-procurement and against the officers who misrepresented the facts before the Review Committee.



Member
(Manzoor Ahmed Memon)
Member SPPRA Board



Member
(Munir Ahmed Shaikh)
Independent Professional



Member
(G. Muhiuddin Asim)
Representative of P & D Board ,P&
Development Department Karachi



Chairman
(Abdul Haleem Shaikh)
Managing Director
(Sindh Public Procurement Regulatory Authority)