

Bid amendments



AND THE DISQUALIFICATION OF UNRESPONSIVE BIDS

Aurobindo Pharma (Pty) Ltd v The Chairperson, State Tender Board; State Tender Board; The Chief Director, Contract Management, National Treasury; Minister of Finance; MSD (Pty) Ltd, Adcock Ingram Healthcare (Pty) Ltd; and Pharmicare Limited t/a Aspen Pharmicare in the High Court of South Africa, North Gauteng High Court, Pretoria, Case No: 59309/2008 [19 May 2010]

The court in this case confirmed that it was unfair for an organ of state to afford one bidder an opportunity to amend its bid *after* the close of tenders and *before* evaluation and not allow other bidders to do the same. This is particularly the case where an organ of state indicates in the bid documents that non-compliant bids will be disqualified.

In this case Aurobindo Pharma (Pty) Ltd, an unsuccessful bidder, did not apply for the review and setting aside of the tender award, but rather for a costs order against the third and fourth respondents (National Treasury and the Minister of Finance). Given the facts of the case, it was clear to Aurobindo Pharma (Pty) Ltd that a court was unlikely to set aside the award of the tender even if it was found to have been invalid. In brief, the tender involved the supply of antiretroviral drugs, the interruption of which would have had serious and prejudicial results.

In considering the costs application, the court nevertheless looked at the events that had taken place in the tender process and found that the unequal treatment of the bidders – in particular, asking one of the successful bidders for clarification regarding its bid and not doing the same with Aurobindo Pharma (Pty) Ltd – was procedurally unfair.

The case is a good example of an instance where certain parts of the bid documentation

were vague and ambiguous. In particular, bidders were required to complete a questionnaire which contained ambiguous questions. In such circumstances, the court held, it was particularly important for an organ of state to exercise caution before disqualifying a bidder on the ground of unresponsiveness or non-compliance with the bid documentation. Where bid documentation contains vague and ambiguous information or questions, an organ of state should approach bidders for clarification to ensure the fairness of the process and to avoid unwarranted disqualifications.

Organs of state should thus take care when drafting bid documentation, and should avoid formulating vague and ambiguous provisions. Disqualifying a bidder for failing to complete vague and ambiguous documentation accurately does amount to unfair treatment. In this case, it resulted in a costs order against the third and fourth respondents (National Treasury and the Minister of Finance).



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