

IN THE INDEPENDENT REVIEW COMMITTEE HEARING ("IRC")

HELD AT MBABANE

In The Matter Between;

KS DISTRIBUTORS (PTY) LTD

APPLICANT

AND

PRINCIPAL SECRETARY OF THE MINISTRY OF HEALTH

1st RESPONDENT

ATTORNEY GENERAL

2ND RESPONDENT

**RULING ON ADMINISTRATIVE REVIEW PROCEEDINGS IN TERMS
OF SECTION 49 OF THE PROCUREMENT ACT 2011 ON TENDER**

NO. 5 OF 2019/2020

QUORUM:

MR. LUCKY HOWE

: Chairman

MR. RUDOLPH MAZIYA

: Member

DR. THEMBA NTIWANE

: Member

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1. PARTIES & REPRESENTATION

- 1.1 The Applicant is KS Distributors (Pty) Ltd, a company duly registered in accordance with the company laws of the Kingdom of Eswatini with its principal place of business located in Matsapha, in the Manzini District. During the administrative review hearing, the Applicant was represented by its Mr. Magagula of Magagula Attorneys.
- 1.2 The Respondent is the Ministry of Health, a Government department based in the Ministry of Justice and Constitutional Affairs Building alongside the Mhlambanyatsi Road in Mbabane, Hhohho District. The Ministry was represented by Mr. Sibonginkosi Dlamini, Crown counsel in the office of the Attorney General.

2. ISSUES IN DISPUTE

- 2.1 The dispute between the parties emanates from a decision by the Respondent to reject a tender from the Applicant under tender No. 5 of 2019/2020, Lot 8, items 5, 6 and 7.
- 2.1.1. In first instance, the applicant alleges that the 1st Respondent rejected its application to supply refuse bags on the ground that product samples the Applicant provided did not meet thickness specifications of the tender which were stated as 50 microns on the tender documents.
- 2.1.2. In the second instance, the Applicant alleges that the 1st Respondent gave three different reasons for rejecting its tender application at different stages of the tender process.

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2.1.3. The Applicant furthermore alleges that the 1st Respondent intended to award the tender to Duzas Investment (PTY) Ltd on reason that the company presented thicker product samples of 70 microns thickness

2.1.4. The position of the Respondents is that while the product samples which were presented by the Applicant were of the required 50-micron thickness as specified by the tender, they turned out to be of light texture

2.1.5. Respondents submit that Duzas Investment won the tender because the company provided product samples which exceeded the quality standard specified in tender documents and that the decision to considered the higher quality standard was made at the tender evaluation stage of the tender process.

3. **BACKGROUND INFORMATION**

3.1 The first sitting of the Committee was held on July 12, 2019 in the boardroom of the Eswatini Public Procurement Regulatory Authority (“ESPPRA”). In attendance was the Attorney of the Applicant and officials from KS Distributors, the Applicant as well as other Tenderers who attended as interested parties. Also in attendance were Attorneys from the office of the Attorney General and officials from the Ministry of Health, the 1st Respondent and Procuring Entity

Several issues were discussed including but not limited to the following issues:

- (i) Introduction of the committee members.
- (ii) Introduction of all parties involved in the matter.

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- (iii) Rights of the parties to legal representation.
- (iv) Procedure to be adopted during the administrative review hearing.
- (v) Exchange of documents between the parties.
- (vi) Documents required by the committee prior to hearing the application.
- (vii) Date, time and venue for the hearing of the review application.

3.2. A hearing of the case was held on August 6, 2019 in the boardroom of the Eswatini Public Procurement Regulatory Authority (“ESPPRA”). In attendance was the Attorney of the Applicant and officials from KS Distributors, the Applicant. Also in attendance were Attorneys from the office of the Attorney General and officials from the Ministry of Health, the 1st Respondent and Procuring Entity. Issues considered included:

- (i) Introduction of the committee members.
- (ii) Introduction of all parties involved in the matter.
- (iii) Declaration of conflict or potential conflict by all parties concerned.
- (iv) Rights of the parties to legal representation.
- (v) Procedure to be adopted during the administrative review hearing.
- (vi) Exchange of documents between the parties.
- (vii) Documents required by the committee prior to hearing the application.

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4. THE APPLICANT'S CASE

- 4.1. Mr. Magagula the Attorney representing the Applicant, submitted that the thickness requirements of refuse bags specified by tender No. 5 of 2019/2020 was 50 microns. He indicated that this information was contained in the Statement of requirements and price schedule section of the tender. Mr. Magagula noted that the 50 micron thickness was the only product thickness specification requirement that was communicated to all bidders
- 4.2. He argued that by submitting product samples of 70 microns thickness relative to the specified 50 micron, the company which won the tender should have been disqualified for reason of failure to comply with tender specification requirements. Mr. Magagula noted that the tender did not provide room for providing samples which were thicker than 50 microns. He noted that the 1st Respondent restated the need for tenders to strictly adhere to indicated tender specification requirements through a letter which was communicated to bidders on March 7, 2019. According to Mr. Magagula the last paragraph of the letter warned bidders to: **“Please be advised that all samples that will not meet packaging, labelling and quality standards, indicated in the technical specification shall be rejected”**. Mr. Magagula submitted that the Applicant could have submitted product samples of 70 micron thickness but choose to adhere strictly to the 50 microns specification requirement in order to avoid the possibility of rejection of its application.
- 4.3. In his submission, Mr. Magagula also noted that the 1st Respondent gave different reasons at different stages of the tender process for rejecting the Applicant's tender.

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4.3.1. The initial letter informing the Applicant that its tender had been rejected did not give specific reasons why the tender was rejected except to say that the tender did not meet the requirements of the tender.

4.3.2. According to Mr. Magagula, the issue that product samples which were provided by the Applicant did not satisfy requirements of the tender because they were “too light” was reflected in the minutes of the Adjudication Committee

4.3.3. A reason given by the 1st respondent in answering affidavit was that samples provided by the Applicant had holes.

4.4. Mr. Magagula also argued that prices quoted by the company which was awarded the tender were consistently and significantly higher across all items under lot 8 (see table below):

LOT 8	QUOTED PRICES IN LILANGENI		PRICE DIFFERENCE
	APPLICANT	WINNER OF TENDER	
5	123.45	235.54	112.09 (91.8%)
6	123.45	182.33	58.88 (47.7%)
7	121.45	180.00	58.55 (48.5%)

4.5. The Applicant concluded its case by requesting the Independent Review Committee to award it payment of compensation for any reasonable costs incurred by it in submitting the complaint which is arising from an unlawful decision of the 1st Respondent.

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- 4.6. The Applicant furthermore requested that the Independent Review Committee set aside the decision of the 1st Respondent to award the tender to Duzas Investment (PTY) Ltd and award it to KS Distributors (PTY) LTD instead

5. **THE RESPONDENT'S CASE**

- 5.1. The 1st Respondent in its answering affidavit confirmed that the Applicant did submit tender documents and product samples. The Respondent however disputed that the Applicant was shorted listed but rather stated that the Applicant qualified for next stage of the tender process.
- 5.2. The Respondents similarly disputed the fact that samples the Applicant submitted complied with tender specification noting that the product had holes and were of light texture. The Respondents further submitted that characterization of the samples provided by the Applicant as being light was made by the members of the Evaluation Committee through physical examination relying on previous experience.
- 5.3. The Respondents argued that while the Applicant submitted samples with the thickness of 50 microns which was specified by the tender, the company which won the tender provided samples with great thickness of 70 microns. The Respondents submitted that the decision to accept products samples with a thickness of 70 microns was approved by the Evaluation Committee after adjudication because it represented higher quality than all other competitors. The Respondents further submitted that samples provided by the applicant were not suitable for carrying waste and bio-hazardous materials

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- 5.4. The Respondents submitted that item 6 under Lot 8 was not awarded to any tender but is being re-tendered.
- 5.5. In response to submission by the Applicant that quoted prices for products provided by the company which won the tender were much higher than those provided by the Applicant, the Respondents argued that the quality of products is actually more important than the issue of price. The respondents further submitted that the tender was awarded to the winning company because it provided higher quality of product samples.
- 5.6. On the question of relief requested by the Applicant, the Respondents argued that the Independent Review Committee does not have powers according to the procurement Act of 2011 to order refunds of administrative review costs and to award tenders.
- 5.7. The Respondents concluded their arguments by requesting the Independent Review Committee to dismiss the application of the Applicant or refer the tender for re-tendering if the application is upheld

6. ANALYSIS OF ISSUES

- 6.1 The Independent Review Committee derives its powers to make a determination on any complaint lodged with the agency under Section 51 (1) and (3) of the Public Procurement Act 2011. In terms of Section 51 (1), it is provided that;

“Unless the application is dismissed, the Independent Review Committee shall-

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(a) Immediately institute an investigation

(b) Issue a written decision, within fifteen working days after the submission of the application.

6.2. Section 51 (3) of the Act provides that;

“The decision shall state-

(a) whether the application is upheld, in whole or in part or dismissed;

(b) the reasons for the decision; and,

(c) any corrective measures that are to be taken or remedies ordered in accordance with section 52.”

6.3. A primary question for this application is whether or not it was correct, fair and acceptable for the 1st respondent to consider a higher quality standard of 70 microns thickness as a basis for awarding Lot 8, items 5, 6 and 7 under tender No. 5 of 2019/2020 as opposed to the 50 microns which was specified in tender documents

6.4. A secondary question is whether or not the Independent Review Committee has powers to award payment of compensation to the Applicant in lieu of costs incurred in submitting this application

6.5. The Committee has given due consideration to all submissions made by the respective parties on this particular issue and notes that both parties to the case agree that the tender required 50 microns as a measure of thickness of refuse bags the 1st respondent seeks to procure through tender No. 5 of 2019/2020.


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6.6. The Committee observes that both parties to the case agree that the Applicant submitted product samples in compliance with the thickness of 50 microns which was specified in tender documents

It is our opinion that the Applicant complied with product sample thickness specification requirements of the tender. Both parties to the case agree that tender documents specified 50 microns to be a measure of thickness for the tender. Both parties to the case also agree that the Applicant submitted samples according the thickness of 50 microns which was specified in tender documents

6.7. Parties to the case disagree on fairness and acceptability of the quality standard which was applied by the 1st respondent in determining the winner of the tender. The Applicant rejects actions of the 1st Respondent to use 70 microns as a measure of thickness other the 50 microns which was reflected in the tender documents. The Applicant argues that the 1st Respondent compromised fair competition among bidders by changing thickness measure of products late in the tender process. The 1st Respondent submitted that a decision was made to consider a high thickness standard after the adjudication stages of the tender process because of the value the 1st Respondent placed on higher quality standards. The 1st respondent argues further that the product thickness of 50 micron was indicated as an approximation suggesting that there was flexibility for bidders to submit product samples with higher thickness than 50 microns as it was in the case of the company that won the tender.

6.8. Awarding a tender based on a different measure than the one stipulated in published tender documents constitutes a deviation and hence an amendment. **According to section 71 (2) of the Public Procurement Procedures of 2016,**

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any clarification shall be copied to all tenderers. Subsection (2) of the same provision states that any amendment shall be issued in writing and the same information shall be provided to all tenderers at the same time. The spirit of these subsections is that all tenderers should be informed of changes to tender specifications and they all should be privy to information on changes in tender specification information.

6.9. It is our view that applying different products thickness standards in determining the winner of the tender under Lot 8 compromised fairness and constitutes a material violation of procurement procedures.

6.10. Information on the color codes (black, yellow and red) of the different items of refuse bags provided by representatives of the 1st Respondent during the hearing indicate that black bags are used for general waste which is not considered to be bio-hazardous in nature. This indicates that a bag with a thickness of 50 micron is appropriate for carrying general waste. Using a bag with thickness of 50 for this purpose represents value for money particularly because it comes at a lower cost than one with a thickness of 70 micron. The opinion is that it is not justifiable to procure a 70 microns thickness bag for carrying general waste which can safely be contained in a 50 microns thickness bag.

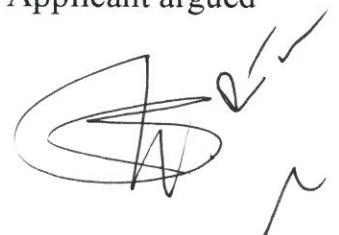
6.11. Parties to the case disagree on the legitimacy of the reasons that have been advanced by the 1st Respondent for rejecting the Applicant's application. While the 1st Respondent submitted that it rejected the Applicant's application because it has holes, the Applicant argued that the issue of holes is not legitimate because it was not advanced in the letter with which the 1st Respondent communicated the outcome of the tender evaluation but was only indicated later

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in the answering affidavit. The Independent Review Committee together with both parties to the case, conducted an examination of all 20 black product samples of 50 micron thickness submitted by the Applicant to the tender committee of the Procuring Entity. The exercise found only one bag with big holes and 2 with small holes. Product samples with holes accounted for only 15% of the total product samples submitted by the Applicant. The one sample with big holes was characterized by the Applicant as damages and not defects. Product samples submitted by the tender winning company were also examined. Only 3 black product samples were submitted, 2 large bags and one small bag. 2 of the samples were defective, one with large holes and one with small holes. Of the defective bags, one was a 70 micron bag. One of the winning tenderer's red 70 micron bags, was incidentally found to have a fist sized defect, witnessed by all present.

6.12. Reasons given by the 1st Respondent for rejecting the Applicant's application were found to be inconsistent across different circumstances of the tender process. Characterization of product samples which were submitted by the Applicant as having holes is inaccurate given that the majority (85%) of the product samples were found to be without holes upon examination by both parties to the case and members of the IRC. The findings of the samples provided by the winning tenderer, give a percentage of 67.7% defects, including a thicker, 70 micron bag. It is therefore our opinion that the reasons given for rejection of the Applicant's application are not legitimate

6.13. Parties to the case also disagreed on powers of the independent Review Committee to award compensation to the Applicant in lieu of costs incurred as a result of placing this application and to award a tender. The Applicant argued

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that the Committee does have powers to award payment of compensation and went to cite a precedent of a matter between **Swaziland Textbooks & Stationary (PTY) LTD and the Ministry of Education and Training** in which the Committee made a similar award. With respect to the powers of the Independent Review Commission to award a tender, the Applicant made reference to remedies by Independent Review Committee in **section 52 (1) b** which states that the IRC may annul in whole or in part or revise an unlawful act or decision of the Procuring Entity or substitute its own decision for such a decision, other than any act or decision bringing a contract into force

6.14. It is our view that section 52 (c) of the Procurement Act of 2011 confers powers to the Independent Review Committee to require the payment of compensation for any reasonable costs incurred by a tenderer submitting the complaint in connection with the procurement proceedings as a result of an unlawful act or decision of the procuring entity.

6.15. It is also our view that section 52 (b) of the Procurement Act of 2011 confers powers to the independent Review Committee to annul in whole or in part or revise an unlawful act or decision of the Procuring Entity or substitute its own decision for such a decision other than bringing a contract into force. This means that The IRC can make a decision regarding a course of action including directing the Procuring Entity to implement a decision the IRC has prescribed save issuing a contract.

6.16. It is our opinion that the Principal Secretary did not apply his mind in dealing with the complaint of Applicant. It appears that He aligned himself to the Tender Committee of the Procuring Entity and as such

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neglected as well as failed to perform the due diligence required of him as part of his oversight function as the Controlling Officer of the procuring entity.

7. CONCLUSION

- 7.1 Having considered the respective submissions of the parties hereto, it is our conclusion that the 1st Respondent's intention to award Tender NO. 5 of 2019/2020 to DUZAS Investment (Pty) Ltd is improper and unlawful in the circumstances of the matter.
- 7.2 Evaluation of tenders against published specifications that are known by all tenderers is a basic procurement principle which all procurement entities should know and must follow. Violation of this basic tenet of procurement and the attempt to cover to it up is suspect of intentional violation of procurement procedures even though no evidence of corrupt act has been identified.

8. AWARD AND/OR ORDER

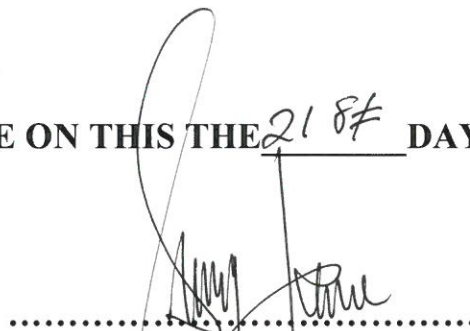
- 8.1 **The order we make in the matter is that;**
- 8.1.1 **The intention by the Ministry of Health to award Tender No: 5 of 2019/2020 to Duzas Investments (Pty) Ltd is set aside meaning that the complaints of the Applicant are upheld in whole.**
- 8.1.2 **The Respondent is directed to award the tender to the best qualifying tenderer based on value for money and the thickness of 50 microns as**

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stated in the tender documents and not on the 70 microns thickness. The 1st Respondent is also directed to take into consideration that characterization of the product samples that were provided by the applicant had holes was not correct but that majority of samples did not have holes as observed by both parties to the case and the IRC

8.1.3. The 1st Respondent to pay compensation to the Applicant in lieu of direct and reasonable costs incurred by the applicant in connection with these administrative review proceedings.

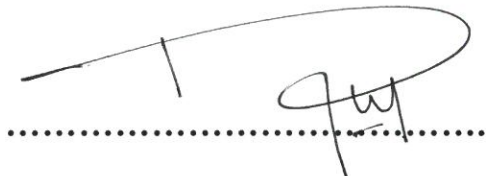
DATED AT MBABANE ON THIS THE 21st DAY OF AUGUST 2019.

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L. HOWE

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T. NTIWANE

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R. MAZIYA