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SECTION27 calls for transparent ARV tender process

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Transparency and fairness must be enforced in 2010 ARV tender process

High Court finds part of 2008 ARV tender procedurally unfair
Company with lowest prices unfairly excluded from bidding
Questions raised as to motive for company's exclusion

Invitations to bid for the next tender antiretroviral (ARV) tender are expected to be announced shortly. As previously indicated, SECTION27 supports the Minister of Health?s intention ? as indicated in his budget speech of 13 April 2010 ? to procure ARV medicines ?at the lowest possible cost from whatever source that can guarantee us the lowest prices?. It is with this in mind that we are concerned about the findings in Aurobindo Pharma (Pty) Ltd v The Chairperson, State Tender Board and Others,[1] a case which addressed one aspect of the 2008 tender for ARV medicines.

On 19 May 2010, the North Gauteng High Court handed down its judgment in this case which considered a challenge by Aurobindo ? a local subsidiary of a major Indian-based generics manufacturer ? to its disqualification from participating in the 2008 efavirenz tender. Efavirenz is a key ARV medicine that is used by over two-thirds of people accessing ARV treatment in the public sector.

In his judgment, Justice Prinsloo came to the conclusion ?that there was a lack of procedural fairness in the process?.[2] In other words, Aurobindo should not have been disqualified from participating. In addition, he found that Aurobindo would most likely have been awarded the efavirenz tender because its prices were significantly lower than those of its competitors:

It appears to be probable that, if the point scoring system had been correctly applied, the applicant could have been awarded the tenders in respect of each of the products tendered for, in that its tendered prices were significantly lower than the prices of its competitors. Had this happened, the tax payer may also have been saved a considerable amount of money.[3]

The 2008 efavirenz tender was awarded to the following companies:

MSD (Pty) Ltd ? 200mg capsules (100% of tender);
Adcock Ingram Healthcare (Pty) Ltd ? 600mg tablets (70% of tender); and
Pharmacare Ltd (t/a Aspen Pharmacare) ? 600mg tablets (30% of tender).

At the time of bidding, Aurobindo had secured Medicines Control Council (MCC) registrations for both products and had been licensed by Merck & Co. ? MSD?s parent company ? to bring generic efavirenz products to market. It was the only licensed generic company that had secured MCC approval for the 200mg product.

In a follow-up tender in mid-2009, which ? like the 2008 tender ? was to run until 31 May 2010, Aurobindo was awarded the contract for 50mg and 200mg versions of efavirenz. Interestingly, its 200mg product was to be delivered to the state at R142.50 for 30 days? supply ? some 52% lower than MSD?s 2008 price (R297.22) for the same product.

The judgment in Aurobindo v State Tender Board raises serious questions regarding the motive for Aurobindo?s exclusion from the process. Was the disqualification simply a technical error, or rather a deliberate attempt to exclude Aurobindo? If the latter, was the exclusion made to benefit any other company? At the very least, National Treasury needs to answer these questions, particularly in the light of the upcoming 2010 ARV tender and the urgent need for the Department of Health to be able to procure medicines at the best available prices.

Why was Aurobindo disqualified?

The official reason provided for Aurobindo?s disqualification is that the company ?failed to submit a letter from the manufacturer confirming a firm supply of the items offered?. It was common cause that the products were to be manufactured by Aurobindo?s parent company in India.

Aurobindo argued that, as the authorised importer, it was not obliged to provide such a letter. It based this argument on its reading of the questions posed to potential bidders in the tender documentation. In expressing no firm view on whether such a letter should have been attached, Justice Prinsloo agreed as follows:

At worst for the applicant, the questions referred to, read with clause 7(a) , are ambiguous and create confusion which, if not responded to in a satisfactory manner, should have prompted the Bid Adjudication Committee to seek clarification rather than to disqualify the bid as unresponsive.

Why was this unfair?

MSD ?also failed to comply with a condition that could invalidate its bid ? but was afforded an opportunity to rectify the mistake before ? the evaluation took place.?[4] Its bid failed to provide particulars relating to price structure explanations ? information on foreign currency, foreign exchange rate, import percentage and minimum order quantity. Yet instead of invalidating the bid, MSD was provided with an opportunity to supply the mandatory information ? which it duly did.

In defending this unequal treatment, the Chief Director: Contract Management, National Treasury and the Minister of Finance ? in the answering affidavit put up on their behalf ? argued that after Aurobindo?s disqualification, MSD was ?the only remaining tenderer offering [efavirenz 200mg] and it was necessary to ensure that the award was made.?[5] A further, even less convincing argument, was also made ? and dismissed by Justice Prinsloo.[6] He therefore concluded as follows:

The present case may not involve ?subterfuge and deceit? but it is common cause that was afforded the opportunity to augment its tender after the closing date and before the evaluation date. This opportunity was also granted to to overcome the problem caused by the disqualification of . In my view there was no equal evaluation of tenders in this case so that the tender process was ?stripped of an essential element of fairness? ?. Moreover, given the ambiguous nature of the questions posed to ?, this is clearly a case where it would be ?fair to ask a tenderer to explain an ambiguity in its tender? and ?fair to allow a tenderer to correct an obvious mistake? and ?fair to ask for clarification or details required for the proper evaluation of the tender? ?.

What is the impact of the case on the ARV supply in the public sector?

By the time the case was argued in court on 28 April 2010, the 2008 ARV tender had almost expired ? it was used to procure medicines for the period 1 June 2008 to 31 May 2010. Because of this, the application to review and set aside the tender had ?for practical purposes, become moot.? In addition, setting aside such a tender may have had a serious impact on the supply of ARV medicines. With this in mind, Aurobindo decided to abandon the application and only focus on the issue of costs. To be able to make a decision on who should carry the costs of the litigation, Justice Prinsloo had to make a determination as to whether the tender process was flawed.

In short, therefore, this decision has no practical impact on the supply of ARV medicines in the public sector. However,

it does raise concerns about the manner in which National Treasury conducted the 2008 ARV tender, what will be done to determine why this happened, and how the state will ensure that the upcoming 2010 ARV tender is not similarly flawed. As already indicated above, there is an urgent need for the state to be able to procure medicines at the best available prices. This requires fair tender rules and a fair application of those rules, as well as a guarantee that the various bid committees are appropriately constituted.

For more information, please contact Jonathan Berger on 011 356 4112, 083 419 5779 or berger@section27.org.za

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[1] Case no: 59309/2008 (19 May 2010)
[2] At paragraph 51
[3] At paragraph 20
[4] At paragraph 40
[5] At paragraph 48
[6] See paragraph 48
n/a

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