



PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS AUTHORITY

**REPORT ON APPLICATION FOR ADMINISTRATIVE REVIEW IN RESPECT TO
THE PROCUREMENT FOR SUPPLY, INSTALLATION AND COMMISSIONING OF
AN INTEGRATED CHEMISTRY AND IMMUNOASSAY ANALYZER**

ENTITY: BUTABIKA REFERRAL HOSPITAL

APPLICANT: ELSMED EAST AFRICA LTD

FEBRUARY 2021

1.0 BACKGROUND

1. On 17th August 2020, Butabika Referral Hospital (hereinafter referred to as the entity) initiated the procurement for supply, installation and commissioning of an Integrated Chemistry and Immunoassay Analyzer at an estimated cost of UGX 488 Million.
2. On 26th August 2020, the Contracts Committee approved the bidding document, the open domestic bidding method and Evaluation Committee indicated in Table 1.

Table 1: Evaluation Committee

No.	Name	Designation
1.	Mr. John Bazimenyera	Principal Laboratory Technician
2.	Mr. Timothy Wabusa	Biomedical Engineer
3.	Mr. Williams Kibedi	Senior Procurement Officer

3. On 8th September 2020, the Entity advertised the bid notice for supply, Installation and commissioning of an Integrated Chemistry and Immunoassay Analyzer in the New Vision Newspaper with the deadline for bid submission on 6th October 2020.
4. On 6th October 2020, the Entity received and opened bids from five bidders as indicated in Table 2 below:

Table 2: Bids Submitted

No.	Name of Bidder	Price Read Out(UGX)
1.	Microheam Scientifics and Medical Supplies Ltd	499,200,000
2.	Advanced Medical Solutions Ltd	498,589,120
3.	Crown Health (U) Ltd	490,000,000
4.	Medisell (U) Limited	900,000,000
5.	Elsmmed East Africa Ltd	485,000,000

5. The Evaluation Report dated 10th November 2020, indicated that the following four bidders were eliminated at the various stages indicated in Table 3:

Table 3: Reasons for Elimination of Bidders

No.	Name of bidder	Stage and Reasons for Elimination
Preliminary Examination Stage		
1.	Microhaem Scientifics and Medical Supplies Ltd	The Power of Attorney was not specific to the procurement.
2.	Advanced Medical Solutions Limited	The Power of Attorney was not specific to the procurement.
3.	Elsmmed East Africa Ltd	No transaction Tax Clearance submitted
Financial Comparison		

No.	Name of bidder	Stage and Reasons for Elimination
4.	Medsell (U) Ltd	2 nd best evaluated bidder

6. On 10th December 2020, the Contracts Committee approved the evaluation report and awarded the contracts for supply, installation and commissioning of an Integrated Chemistry and Immunoassay Analyzer to Crown Health (U) Ltd at UGX. 490Million VAT exclusive.
7. On 11th December 2020, the Entity displayed the best evaluated bidder Notice with the removal date of 24th December 2020.

2.0 THE ADMINISTRATIVE REVIEW PROCESS

2.1 APPLICATION TO THE ACCOUNTING OFFICER

1. On 23rd December 2020, Elsmmed East Africa Ltd applied for Administrative Review before the Accounting Officer on the ground below:

The bidder was not properly evaluated on the requirement of a Transaction Tax Clearance Certificate since its a foreign company and hence was not required to provide it to participate in the bidding process. The Evaluation Committee sought clarification from the bidder and a Transaction Tax Certificate from URA submitted to the Entity.

2. On 12th January 2021, the Accounting Officer rejected the application for failure to meet the requirement of a Transaction Tax Clearance Certificate from URA.

2.2 APPLICATION TO THE AUTHORITY

1. On 27th January 2021, Elsmmed East Africa Ltd applied for an Administrative Review before the Authority on the ground that:

The applicant was not properly evaluated on the requirement of a Transaction Tax Clearance Certificate yet its a foreign company and hence was not required to provide it to participate in the bidding process. The Evaluation Committee sought clarification from the bidder and a Tax Clearance Certificate from URA submitted.

2. On 27th January 2021, the Authority wrote to the applicant and Elsmmed East Africa Ltd instituting an Administrative Review and requesting submission of process documents.

3.0 DISPOSAL OF APPLICATION

1. In investigating the application for Administrative Review, the Authority analysed the following documents:
 - i. Procurement requisition;
 - ii. Bid notice;
 - iii. Bidding document issued;
 - iv. Records of bid receipt and opening;

- v. Bids submitted;
- vi. Evaluation report;
- vii. Minutes of Contracts Committee;
- viii. Best evaluated bidder notice;
- ix. Application for administrative reviews before the Accounting Officer and the Authority by Elsmmed East Africa Ltd; and
- x. Submissions by the parties.

2. On 4th February 2021, the Authority held a hearing which was attended by persons indicated in Table 4 below:

Table 4: Members Present at Administrative Review Hearing

S/No	Name	Title / Role
Officials from the Butabika Referral Hospital		
1.	Dr. Juliet Nakku	Ag. Executive Director/ Accounting Officer
2.	Ms. Olive Kakooza	Principal Hospital Administrator
3.	Mr. Gad Twikirize	Chairperson Contracts Committee
4.	Mr. Joseph Mwanje	Head Procurement and Disposal Unit
Representatives of Elsmmed East Africa Ltd		
1.	Mr. Shaffik Kanabi	Representative Elsmmed E.A-Uganda
2.	Mr. Bernard Mugenyi	Advocate
3.	Mr. Robert Ojambo	Advocate
Representatives of Crown Health (U) Ltd		
4.	Mr. Paul Gihinji	Chief Executive Officer

4.0 SUBMISSIONS BY THE PARTIES

4.1 SUBMISSIONS BY THE APPLICANT

The Applicant made the following submissions:

1. Elsmmed East Africa Ltd was not properly evaluated on the requirement of a Transaction Tax Clearance Certificate since its a foreign company incorporated in Israel and hence the requirement of a Transaction Tax Certificate to participate in the bidding process was not applicable.
2. The Evaluation Committee sought clarification from the bidder and a Tax Clearance Certificate from URA for its locally registered company submitted but found non-responsive to the requirement. The Entity did not fairly evaluate its bid since the applicant was a foreign company. In addition, the Entity would have realized value for money in the procurement since the bidder offered the lowest price among the five bidders.

4.2 SUBMISSIONS BY THE ENTITY

The Entity made the following submissions:

1. Elsmmed East Africa Ltd submitted a bid which was evaluated and eliminated at preliminary stage for lack of a Transaction Tax Clearance Certificate from URA in accordance with clause 3.2 (e) Evaluation Methodology and Criteria. The Applicant is registered in Uganda as a foreign company and registered to pay taxes with a TIN 1014765859 which meant that it had an obligation to file tax returns and pay taxes.
2. The Entity sought clarification from the bidder in respect to a Transaction Tax Clearance Certificate and in response a Certificate dated 21st October 2020 was submitted though issued after bid closing and hence did not meet the requirement of providing evidence of fulfillment of the obligation to pay taxes as required in the bidding document.
3. During evaluation, the Entity sought guidance from URA in respect to submission of a Transaction Tax Clearance Certificates by foreign bidders and was informed that there is no such exemption in any tax law in Uganda. Based on the guidance from URA, the bid by the Applicant was rejected and found non-responsive to the requirement.

5.0 RESOLUTION OF THE GROUND BY THE AUTHORITY

The Applicant alleged that Elsmmed East Africa Ltd was unfairly eliminated for failure to submit of a Transaction Tax Clearance Certificate since it is a foreign company and the requirement of tax clearance was not applicable to it.

Issue extracted by the Authority:

Whether the Entity properly evaluated Elsmmed East Africa Ltd's bid in respect to the requirement of submission of a Transaction Tax Clearance Certificate.

Findings:

1. The Evaluation Report and the notice of best evaluated bidder indicated that the bid by Elsmmed East Africa Ltd was eliminated at preliminary stage for not including a Transaction Tax Clearance Certificate.
2. The Applicant submitted that its bid was not properly evaluated on the requirement of submission of a Transaction Tax Clearance Certificate since it is a foreign company and hence was not required to provide one to participate in the bidding process.
3. In addition, it submitted that the Evaluation Committee on 3rd November 2020 sought clarification to submit evidence of fulfillment of obligations to pay taxes (Specific Transaction Tax Clearance from URA issued before bid closing on 6th October 2020).
4. On 4th November 2020, the Applicant in response indicated that Elsmmed East Africa Ltd was a foreign company and hence had no obligation to file tax returns in Uganda. The applicant submitted a Transaction Tax Clearance from URA of its branch registered in Uganda issued on 21st October 2020.

5. ITB 32.1 of the bidding document stated that *“the Procurement and Disposal Entity shall examine the legal documents and other information submitted by bidders to verify the eligibility of bidders and supplies and related services in accordance with ITB clauses 4 and 5.”*
6. ITB 4 .1 of the bidding document provided that a bidder and all parties constituting the bidder, shall meet the following criteria to be eligible to participate in public procurement: (e) *“the bidder has fulfilled his obligation to pay taxes and social security contributions in Uganda where applicable”*.
7. The preliminary examination criteria in the bidding document under Section 3: Evaluation Methodology and criteria on page 34 under paragraph 3.2 (e) indicated that:
“The documents required to provide evidence of eligibility shall be: (c) Fulfilment of obligation to pay taxes (specific Transaction Tax Clearance from URA ”
8. ITB 30.1 of the bidding document provided that,
“The Procuring and Disposing Entity’s determination of a bid’s compliance and responsiveness is to be based on the contents of the bid itself”.
9. ITB 30.2 of the bidding document provided that,
“A substantially compliant and responsive bid is one that conforms to all the terms, conditions, and specifications of the Bidding Documents without material deviation, reservation, or omission”.
10. The Authority reviewed the bid by Elsmed East Africa Ltd and established that there was no Transaction Tax Clearance Certificate enclosed therein.
11. The Applicant submitted that being a foreign company, the requirement of the Transaction Tax Clearance Certificate would not be applicable and hence was not properly evaluated. In addition, the Entity would get value for money if awarded the tender since it offered the lowest price among all the bidders.
12. During the hearing, the Entity submitted that since the bidder did not include a Transaction Tax Clearance Certificate in its bid, it failed to meet the requirement and hence eliminated from further evaluation. The Evaluation Committee sought clarification from the bidder in respect to a Transaction Tax Clearance Certificate to which the applicant submitted a Transaction Tax Clearance Certificate issued on 21st October 2020 which was after the bid submission deadline of 6th October 2020 and hence found its bid non-responsive.
13. The Authority reviewed the Israeli Tax Authority website at www.gov.il and established that the Authority does not issue Tax Clearance Certificates or their equivalent. The Authority found the Tax Clearance Certificate submitted was for the branch office in Uganda which was not the bidder.

14. The bidder was Elsmmed East Africa Ltd, 20 Hamagshimim Street, Petach Tikva Israeli as evidenced by the Bid Submission Sheet and the registration Certificate number 514882786 by the Israeli Corporation Authority (Registrar of Companies and Partnerships).
15. The Authority found that the requirement of a Transaction Tax Clearance Certificate was not applicable to Elsmmed East Africa Ltd since it was a foreign company and the evaluation criteria on providing evidence of eligibility of “*fulfilment of obligation to pay taxes (specific Transaction Tax Clearance from URA)*” was not applicable since it was domiciled outside Uganda.
16. The Entity did not properly evaluate the bid by Elsmmed East Africa Ltd on the requirement of a Transaction Tax Clearance Certificate stated in the bidding document and wrongly found it non-responsive to the requirement since it was a foreign company not required to comply with the requirement of submission a Transaction Tax Clearance Certificate from URA.

Decision of the Authority on the Ground

The Authority finds **merit** in the ground raised since the Evaluation Committee did not properly evaluate Elsmmed East Africa Ltd’s bid with respect to the requirement of a Transaction Tax Clearance Certificate.

6.0 DECISION OF THE AUTHORITY

In accordance with Section 91 (4) of the PPDA Act, 2003 and in light of the findings above, the application for Administrative Review by Elsmmed East Africa Ltd is **upheld**.

The Entity is advised to re-evaluate the bids received and refund the Administrative Review fees in accordance with Regulation 11 (2) of the PPDA (Administrative Review) Regulations, 2014.