Appeal No. PPRA/AP-50/2024
Government of Pakistan
Public Procurement Regulatory Authority
(Appeal & Review Petition Secretariat)
1st Floor, FBC Building, G-5/2, Islamabad

ORDER

M/s Friends Traders

...the "Appellant"

Vs.

Pakistan Institute of Medical Sciences (PIMS), Islamabad & Others

...the "Respondent"

Date of Hearing(s)	
22.11.2024 **12.11.2024**	*Mr. Amir Javed, Advocate, Mr. Danish Afridi, Mr. Felix Xia, Mr. M. Usman Ayaz, Mr. Nouman Lodhi, Mr. Sikandar Lodhi, Mr. Qaiser Choudhry, Mr. Shahab* ***(On behalf of the Appellant)*** *Mr. Waseem Arif Bahaddar, Advocate Supreme Court* ***(On behalf of the Respondent)*** *Mr. Saleem Iqbal, Advocate, Mr. Husnain Kazmi* ***(On behalf of PEMDA)***

APPEAL UNDER RULE 48(7) OF THE PUBLIC PROCUREMENT RULES, 2004 AGAINST THE IMPUGNED INCLUSION OF THE DISCRIMINATORY CONDITION OF COUNTRY OF ORIGIN, COUNTRY OF MANUFACTURE IN THE SBD'S OF SUBJECT RESPONDENTS IN VIOLATION OF RULE 10(2) R/W RULE 32 OF THE PUBLIC PROCUREMENT RULES, 2004

The above-mentioned learned counsel(s) and representative(s) of the parties tendered appearance before the Appellate Committee and presented their arguments at length.

2. At the very outset of hearing, the learned counsel of the Appellant i.e., M/s Friends Traders, submitted that the

Appellant No.1 is a registered firm with registrar of firms on 03.06.2010 under the provisions of the Partnership Act, 1932. The appellant firm has its business standing and profile since the year 1972. With almost five decades of business profile the appellant firm enjoys reputation for professional excellence and integrity in its affairs with clients which includes big hospitals and entities both in public and private sectors. Similarly M/s Mindray (Pvt.) Ltd. (Appellant No.02) is an international Medical Brand from China involved in the manufacturing and supply of medical equipments.

3. The counsel of the appellant also submitted that the appellant is an authorized distributor of M/s Mindray in Pakistan supplies products which include, Patients monitors, OT lights, OT Tables, Anesthesia machines, Infusion and Syringe Pumps and digital X-Rays etc. Mindray is a world renowned brand and its products are duly certified by United States Food and Drugs Regulatory Authority, Conformity European Mark and Ministry of Health and Welfare, Japan. Given the world well recognized certifications, products of Mindray are purchased and installed across the world including the United States and across Europe. Appellant No.1 has successfully supplied and installed the above-mentioned equipment's of Appellant No.02 in number of nationally renowned big hospitals including Agha Khan Hospital, Karachi.

4. The counsel of the appellant further submitted that the respondent no. 02 & 03 i.e., Infrastructure Development Authority of the Punjab (IDAP / the Respondent), while acting as client for PIMS, Islamabad, is advertising / publishing medical equipment tenders within the federal territory, has introduced following tender containing an impugned and discriminatory clause related to the "Country of Origin and Manufacturer", which is sheer violation of Rule 10(2) & 32 of the Public Procurement Rules, 2004 ("PP Rules, 2004").

a. Tender for commissioning & Maintenance of Infusion Pumps (Package #13) for ongoing scheme "Establishment of 200 Bedded Accidents & Emergency Centre at PIMS Islamabad, which includes Country of Manufacturer USA / Europe / Japan / Australia / New Zealand / Canada.

5. The counsel of the appellant further argued and submitted that the respondent issued a tender for procurement of Syringe & Infusion Pumps on 3rd August 2024 with a bid submission deadline of 29th August, 2024. The Pre-Bid meeting held on 20th August 2024. During the Pre-Bid meeting, the appellant firm submitted a grievance petition under Rule 48(2) of the PP Rules, 2004 on 19th August 2024, raising objections to the inclusion of country-specific conditions and specifications. Further, the learned counsel of the appellant referred to a reply of the respondent dated 26th August 2024, wherein, the respondent acknowledged the imposition of restrictions on the country of manufacturer and origin, citing

it to be the nature of life-saving equipment. This admission highlights the inherently discriminatory and disadvantageous nature of the clause, as it unjustifiably limits competition and indeed clear violation of Rule 10(2) & 32 of the PP Rules, 2004. Hence, the Appellant being aggrieved, filed the instant Appeal.

6. On the other hand, at the first instance, learned counsel of the respondent i.e., Infrastructure Development Authority Punjab (IDAP) raised preliminary objections and argued that the instant Appeal has been filed prematurely and the Appellate jurisdiction of this August Forum cannot be invoked untimely. Further argued that the applications of the appellant was properly answered, however, the applications of the appellant were not lawfully termed as the 'grievance petition' as enshrined under Rule 48(2) of the PP Rules, 2004. The language employed in the said Rule clarifies that any bidder aggrieved by the act of any procuring agency after the submission of his bid may lodge a written complaint, however, the appellant is never turn out to be and qualifies as bidder, hence liable to be dismissed on this score only.

7. Moreover, the counsel of the respondent submitted that IDAP came into existence pursuant to the enactment called as the Infrastructure Development Authority of Punjab Act, 2016 ("the Act"). The purpose for the establishment of the Authority was to provide for a modern, progressive, effective, autonomous and a credible organization to establish, planning,

designing, construction and maintenance of infrastructure in the Province of Punjab in line with the best international practices and currently the IDAP is engaged in number of public sector projects (Hospitals etc.) all over the Punjab. This includes, but is not limited to, the enforcement of all prevalent procurement laws and policies as directed by the Government of Punjab as well as the Punjab Procurement Regulatory Authority of Punjab and ensuring there compliance by all contracting parties in letter and spirit.

8. The counsel of the respondent also submitted that although the answering respondent is a provincial entity but due to its proficiency, capability, and competency in undertaking the public projects, the Ministry of National Health Services, Regulations & Coordination, Government of Pakistan as issued an office memorandum dated 30th December, 2021 titled as "ADMINISTRATIVE APPROVAL OF THE PROJECT ESTABLISHMENT OF TWO HUNDRED BEDS ACCIDENT AND EMERGENCY CENTRE AT PAKISTAN INSTITUTE OF MEDICAL SCIENCES, ISLAMABAD", subsequent to the authorization issued by Ministry of Planning, Development and Special Initiatives, Government of Pakistan ("PD & SI") on the basis of decision of Meeting held on 29th November, 2021 in CDWP whereby the said project was approved and designed and execution was assigned to the answering respondent.

9. The counsel of respondent further submitted that the appellant have laid challenge to primarily, the exclusion of Country of manufacturer i.e. China from a Tenders within federal territory for supplying "Tender for Commissioning & Maintenance of INFUSION Pumps (Package 13) for ongoing Scheme "Establishment of 200 Bedded Accidents & Emergency Centre at PIMS Islamabad" and includes Country of Manufacturer i.e. USA / Europe / Japan / New Zealand / Australia / Canada for which the Appellant No.1 submitted its application dated 20.08.2024 before the answering respondent stating therein removal of country of manufacturer will limit to participate in the said tender, for which the answering respondent vide its response dated 26.08.2024 has categorically mentioned that the requirement and specific guidelines of sponsoring department has to be comply with especially in the case of critical care / lifesaving equipment, where the safety and reliability of equipment is of a paramount importance keeping in view of the established standards set forth by the sponsoring department as enshrined in the Standard Bidding Documents.

10. The counsel of the respondent argued that the instant appeal have laid challenge inclusion of Country in the absence of any uniformed policy of the Ministry of PD & SI or any of deliberations thereof either from the central Development Working Party (CDWP) or from ECNEC in this behalf, thus

inclusion of Country of Manufacturer, i.e. China as a policy decision is an un-ripped right which has never been accrued. Further, the SBDs have been introduced by the PIMS in line with guidelines of the Ministry of National Health Services, Regulations & Coordination, Government of Pakistan mentioning therein, that Supply of Medical Gases & allied items must be from the UK / USA / Germany/ Japan/ Italy or equivalent only to some extent and not having any universal application all over world, and even otherwise no adverse action has been taken against the Appellant from which it may feel aggrieved. Therefore, the challenge brought to implement the inclusion of a country of manufacturer at this stage is rather premature and the instant Appeal, merits dismissal on this score alone.

11. The counsel of the respondent further argued that the appellant seeks to challenge the lawful actions of the answering respondent for adhering to the specifications of the items for procurement purposes as were not only defined in the Invitation for Bids dated 3rd of August, 2024 and also as per the Bidding Documents April 2024 of the answering respondent but on the contrary, despite knowing it all the appellants have tried to build their case on unfounded grounds, the same being devoid of an merits. The afore-titled Appeal is misleading, self-contradictory, and vexatious;

therefore, the same being not maintainable under the law and is liable to be dismissed.

12. The counsel of the respondent added that it is crucial to emphasize the significant concerns related to the quality and reliability of medical device procurement. These concerns arise from variations in manufacturing standards, inadequate regulatory compliance, and potential inconsistencies in after-sales support. Ensuring that medical equipment adheres to stringent international quality benchmarks is essential for patient safety and effective healthcare delivery.

13. The counsel of the respondent further added that the decision to limit the country of manufacturer to specific nations is based on several critical factors. Countries such as the USA, Europe and Japan maintain robust regulatory environments that safeguard the quality and safety of medical devices. These regions have a long-standing history of research and development in medical device manufacturing, contributing to their established reputations for quality and reliability. The Product Vocabulary of Medical Store (PVMS), available on the website of the Ministry of National Health Services Regulations & Coordination, explicitly lists the country of as the USA, Europe or Japan. Equipment sourced from these countries typically meets stringent safety standards, ensuring compliance with international benchmarks.

14. It is relevant to mention that the Pakistan Electro-medical Equipment Manufacturers and Distributors Association (PEMDA) through its Secretary General submitted an application of joinder dated 06.11.2024, wherein, they taken a stance that PEMDA represents the traders, importers and manufacturers of electro-medical equipment in Pakistan and is mandated to look after and watch their legal interests. Therefore, PEMDA through the said application, requested to make them a party in the instant case and to provide the copy of Appeal and all other related documents filed by the appellant. As per the said request, the Appellate Committee (the Committee) directed to issue a pre-admission notice to the PEMDA dated 11.11.2024 and a complete copy of the instant appeal was also provided in this regard.

15. On the day of hearing, the learned legal counsel of PEMDA attended the hearing and raised objections on the maintainability of the instant Appeal and submitted that the procuring agency (i.e. IDAP) does not come within the jurisdiction of the Authority as it was established under the Infrastructure Development Authority of the Punjab Act, 2016 and the same is also a Provincial Department and its registered office is in Lahore. Further, that IDAP is not a procuring agency as defined under Section 2(j) of PPRA Ordinance, 2002. Moreover, since the prospective bidders were informed that the procurement shall be conducted through e-PADs of Punjab

Procurement Regulatory Authority only, and the bids were opened at IDAP, Lahore, therefore, the PPRA Islamabad does not have the territorial jurisdiction on the procurement process conducted in Lahore, Punjab.

16. The counsel of PEMDA submitted that on 20.08.2024, the Appellant filed a reservation before the General Manager, Healthcare Projects, IDAP, instead of filing a complaint addressed to the Grievance Redressal Committee as required under Rule 48(2) of the PP Rules, 2004. Furthermore, the Appellant filed an appeal against the impugned inclusion of the Discriminatory Condition of origin, country of manufacturer, however, as per Rule 48(7) of PP Rules, an Appeal could only be filed against the decision of GRC.

17. The counsel of PEMDA also submitted that the tender was published on 03.08.2024 and the appellant filed a reservation on 20.08.2024 i.e. after 17 days of the publication of tender. The procuring agency responded to the reservation on 26.08.2024. Later on, the Appellant filed the instant Appeal on 19.09.2024 i.e., after 24 days of the receipt of reply from IDAP. This shows that the Appellant was never serious with the procurement process and submission of bid, hence, the Appellant is not an aggrieved party as defined under the law.

18. From the other side, objecting to the abovementioned arguments / submissions, the learned counsel of the Appellant

submitted that the PEMDA (the applicant) is neither a necessary party nor a proper party in this Appeal and is merely an association with no connection to the procurement process or the grievances of the Appellant. Further, the case record clearly shows that the Appellant as a genuine party was unfairly excluded from the procurement process due to the unlawful conditions added in violation of Rule 10(2) and Rule 32 of PP Rules, 2004, giving the appellant the right to file the instant Appeal. Moreover, the PEMDA association being neither the procuring entity nor an aggrieved bidder, has no grounds to be heard as this would lead to endless litigation, undermining the legal framework for appeals and grievance petitions.

19. It is significant to mention that despite issuance of several notices to the Respondent No.1 i.e., Pakistan Institute of Medical Sciences, Islamabad ("PIMS"), no one appeared on behalf of the said Respondent on any date of hearing(s) fixed. Therefore, the Committee decided to proceed ex-parte against the Respondent No.1.

20. After perusal of all the available record and arguments made by the parties, the Committee observed that in the instant case the Respondent / the procuring agency mentioned discriminatory clause related to the "Country of Origin and Manufacturer", which is sheer violation of Rule 10(2) & 32 of the PP Rules, 2004. However, the Committee is of

the view that in any case, the specifications shall not be brand specific or have a specific country of origin. It violates the spirit of Rule 4, Rule 10 as well as Rule 32 of the PP Rules, 2004. Even mentioning number of countries of origin is not in consonance and spirit of the PP Rules, 2004. Since it has a restraining effect on the number of prospective bidders, merely to products originated in specifically mentioned countries, and thereby limits competition.

21. Furthermore, as provided under Rule 10(3) of the PP Rules, 2004, in case, the procuring agency is convinced that the use of or, a reference to a brand name or a catalogue number is essential to complete, an otherwise incomplete specification, and no other sufficiently precise or understandable way of describing the characteristics of the goods, works or services to be procured is provided, the words "or equivalent" shall be used, after recording specific justifications in writing therein. The procuring agency shall be responsible to define the parameters of "equivalence" for all participants to procurement process, to ensure transparency.

22. Moreover, with regard to the application of joinder dated 06.11.2024 and the submissions made by the counsel of PEMDA, the committee opined that the same is not tenable as the said party is not effected or aggrieved by any act of the procuring agency as well as the appellant.

23. Foregoing in view the above, the Committee is of the opinion that in the tender called in question, the respondent has violated Rule 4, Rule 10 and Rule 32 of the PP Rules, 2004. Further, it is crystal clear that as per Rule 50 of the PP Rules, 2004, any violation of procurement rules shall amount to mis-procurement.

24. Therefore, the Appeal in hand is hereby **allowed** and the Respondent / the procuring agency is advised to reinitiate the whole procurement process strictly in line with the Public Procurement Rules, 2004 to ensure fairness and transparency.

(Dr. Muhammad Aslam Waseem)
Director General (Legal)
(Member)

(Sheikh Afzaal Raza)
Director (M&E)
(Member)

(Hasnat Ahmad Qureshi)
Managing Director (PPRA)
(Chairman of the Committee)

Each page of the order has been signed by all members of the Appellate Committee. The order comprises of thirteen (13) pages.