

REPUBLIC OF KENYA
COMMISSION ON ADMINISTRATIVE JUSTICE
(OFFICE OF THE OMBUDSMAN)

ATI REVIEW APPLICATION NO. CAJ/ATI/AMREF/012/73/25-JK

REDDYS PHARMA..... APPLICANT

VERSUS

AMREF KENYA.....RESPONDENT

RULING

BACKGROUND

1. The Commission on Administrative Justice (Office of the Ombudsman) (herein after referred as *the Commission*) is established under Article 59(4) of the Constitution, and its constitutive Act; Commission on Administrative Justice Act, 2011 (hereinafter referred to as *the CAJ Act*). The Commission is charged with the twin mandate of enforcing administrative justice in the public sector by addressing all forms of maladministration and a second mandate of oversight and enforcement of the right of access to information as guaranteed by Article 35 of the Constitution, through the Access to Information Act, 2016 (hereinafter referred to as the *ATI Act*).
2. The Commission received an application for review under Section 14(1) (a), ATI Act, 2016 dated 27th January 2025 from the Applicant, Reddys Pharma. The Applicant avers that it was a bidder in tender no. **AMREF/04/9/2024/018** for the provision of cold chain laboratory samples transportation system valued at *Kenya Shillings Ninety One Million Two Hundred Thousand (Kshs. 91,200,000/=)* as advertised by the Respondent. Upon completion of the tender evaluation process the tender was awarded to Keshi Limited.

3. The Applicant filed an appeal with the Amref Appeal Committee dated 13th December 2024 disputing the tender Committee's decision to award Keshi Limited, on the basis of unfair treatment resulting to the Applicant's bid being disqualified. The Amref Appeal Committee heard the appeal and determined that the tender evaluation process was done fairly and in line with the requirements of the tender documents.
4. The Applicant filed a second Appeal dated 15th January 2025 and issued a request for information dated 17th January 2025. The request for information related to the following Clauses;
 - 1) Certified copy of actual product brochure provided by the successful bidder.
 - 2) Certified copies of Minutes of the Documents Evaluation Stage.
 - 3) Certified copies of Minutes of the Product Evaluation Stage.
5. The Respondent in their letter dated 20th January 2025 responded reiterating their position and stating that the Applicant's bid was non-responsive as it did not fully comply with the technical requirements of the bid. With regard to the requested documents, the Respondent indicated that they could not share internal documents with external parties due to data protection and confidentiality.
6. On 27th January 2025, the Applicant applied to the Commission for review of the decision by the Respondent to decline the request for information as per it's request dated 17th January 2025.
7. The Commission forwarded the request for information to the Respondent vide the letter dated 10th February 2025 notifying them of the request and requiring them to give an institutional report within seven (7) days pursuant to section 22(3)(a) of the ATI Act.
8. On 12th March 2025, the Respondent responded to the request providing the requested information in clause (2) and (3) but declined to provide the information under clause (1). The Request for Information under Clause (1) related to the product brochure belonging to the successful bidder and which document they relied upon during the evaluation process.

9. The Applicant issued a rejoinder dated 27th May 2025 acknowledging receipt of the requested information in clause (2) and (3) and further noting that information relating to clause (1) had not been provided. In his rejoinder, the Applicant further raised issues relating to unfair treatment of bidders, stating that the successful bidder was asked to provide the commitment letter during the evaluation process.
10. The Applicant further averred that it requires the product brochure belonging to the successful bidder to enable further investigations by the relevant agencies on claims that the solution offered by the successful bidder did not meet the specifications and evaluation criteria in the bid document.

ISSUES FOR DETERMINATION

After a careful analysis of the request for information and the response thereto by the Respondent, the Commission confirms that the Request for Information related to Clause (2) and (3) has been compiled with. The Request for Information related to Clause (1) is in issue.

The Commission therefore finds the following issues related to the disclosure of information of a Product Brochure are for determination:

- I. **Whether the requested information in clause (1) is third party information;**
- II. **Whether the requested information in clause (1) should be disclosed to the Applicant;**
- III. **The orders which the Applicant is entitled to.**
 - i. **Whether the requested information in clause (1) is third party information;**

11. *Article 35* of the Constitution guarantees the right of every citizen to access:

- a. Information held by the State; and***

b. Information held by another person and required for the exercise or protection of any right or fundamental freedom.

12. Section 14(1) of the Access to Information Act, 2016 grants any requester for information the right to apply to the Commission for review of a decision by a public entity or private body. The review can be premised on a decision regarding the following;

- a. Refusing to grant access to the information applied for;***
- b. Granting access to information in edited form;***
- c. Purporting to grant access, but not actually granting the access in accordance with an application;***
- d. Deferring providing the access to information;***
- e. Relating to imposition of a fee or the amount of the fee;***
- f. Relating to the remission of a prescribed application fee;***
- g. Granting access to information only to a specified person; or***
- h. Refusing to correct, update or annotate a record of personal information in accordance with an application made under section 13.***

13. The Applicant's request under clause (1) is for a certified copy of actual product brochure provided by the successful bidder during the evaluation process. In the Respondent's response to the Applicant, they declined to provide the information as they allege it contains third party information.

The Black's Law Dictionary defines a 'Third Party' as 'someone who is not a party to a lawsuit, agreement or other transaction but who is usually somehow implicated in it'.

14. In dealing with third party information, the ATI Act under Section 15 requires the information access officer to get a written consent from the third party authorizing the Information access officer to disclose the information failure of which he/she will be in breach of the law.

15. Therefore, the Commission concurs with the position by the Respondent that they cannot share third party information without a written consent from the third party.

ii. Whether the requested information in clause (1) should be disclosed to the Applicant;

16. **Article 227** of the Constitution provides that public procurement shall be conducted in accordance with a system that is fair, equitable, transparent, competitive and cost effective.

17. Section 67 of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as *PPAD Act*) limits access to particular sets of information as provided below;

Confidentiality

(1) During or after procurement proceedings and subject to subsection (3), no procuring entity and no employee or agent of the procuring entity or member of a board, commission or committee of the procuring entity shall disclose the following:

(a) information relating to a procurement whose disclosure would impede law enforcement or whose disclosure would not be in the public interest;

(b) information relating to a procurement whose disclosure would prejudice legitimate commercial interests, intellectual property rights or inhibit fair competition;

(c) information relating to the evaluation, comparison or clarification of tenders, proposals or quotations; or (d) the contents of tenders, proposals or quotations.

(2) For the purposes of subsection (1) an employee or agent or member of a board, commission or committee of the procuring entity shall sign a confidentiality declaration form as prescribed.

(3) This section does not prevent the disclosure of information if any of the following apply:

(a) the disclosure is to an authorized employee or agent of the procuring entity or a member of a board or committee of the procuring entity involved in the procurement proceedings;

(b) the disclosure is for the purpose of law enforcement;

(c)the disclosure is for the purpose of a review under Part XV or requirements under Part IV of this Act;

(d)the disclosure is pursuant to a court order; or

(e)the disclosure is made to the Authority or Review Board under this Act.

(4) Notwithstanding the provisions of subsection(3), the disclosure to an applicant seeking a review under Part XV shall constitute only the summary referred to in [section 68 \(2\)\(d\)\(iii\)](#).

(5)Any person who contravenes the provisions of this section commits an offence as stipulated in [section 176\(1\)\(f\)](#) and shall be debarred and prohibited to work for a government entity or where the government holds shares, for a period of ten years.

19. In considering the Applicant's request for information for the certified copy of actual product brochure provided by the successful bidder, the Commission acknowledges that due to the nature and complexities of the tender, the product brochure may contain information that would prejudice legitimate commercial interests, intellectual property or inhibit fair competition.

20. Section 67 of PPAD Act safeguards confidentiality for party's information in the procurement process but allows for disclosure in instances as provided for under Section 67 (3). It is important to further note that according to Section 67 (4) disclosure of procurement information is limited to the summary of information referred to Section 68 (2) (d) which provides the following;

(i) the name and address of the person making the submission;

(ii)the price, or basis of determining the price, and a summary of the other principal terms and conditions of the tender, proposal or quotation; and

(iii)a summary of the proceedings of the opening of tenders, evaluation and comparison of the tenders, proposals or quotations, including the evaluation criteria used as prescribed;

22. Furthermore, in assessing disclosure of information relating to procurement it is important to balance the competing interests as was elaborated in **the European Court of Justice decision in *Varec v Belgian State*[18] concerning disclosure of tender documents that:-**

“the adversarial principle does not mean that the parties are entitled to unlimited and absolute access to all of the information relating to the award procedure concerned which has been filed with the body responsible for the review. On the contrary, that right of access must be balanced against the right of other economic operators to the protection of their confidential information and their business secrets.

...the body responsible for the reviews provided for in Article 1(1) must ensure that confidentiality and business secrecy are safeguarded in respect of information contained in files communicated to that body by the parties to an action, particularly by the contracting authority, although it may apprise itself of such information and take it into consideration. It is for that body to decide to what extent and by what process it is appropriate to safeguard the confidentiality and secrecy of that information, having regard to the requirements of effective legal protection and the rights of defence of the parties to the dispute and, in the case of judicial review or a review by another body which is a court or tribunal within the meaning of Article 234 EC, so as to ensure that the proceedings as a whole accord with the right to a fair trial.”

23. The Commission further notes that the protection of commercial interests, including intellectual property rights of third parties is a legitimate limitation to the right to access information as provided for under Section 6 (1)(e) of the ATI Act which provides as follows;

‘Pursuant to Article 24 of the Constitution, the right of access to information under Article 35 of the Constitution shall be limited in respect of information whose disclosure is likely to;

(a)

(e) substantially prejudice the commercial interests, including intellectual property rights, of that entity or third party from whom information was obtained;

CONCLUSION AND DETERMINATION

Having made a careful analysis of all the facts and information provided by the Parties herein, the Commission, pursuant to the powers granted by section 23(3)

DETERMINES THAT:

1. **THAT** the Respondent has adequately responded to the Application for review dated 17th January 2025 save for the request touching on a certified copy of actual product brochure provided by the successful bidder.

Be that as it may, the issues raised by the Applicant touch on serious allegations of procurement irregularities and there is need to have the matter investigated so as to ensure there was prudent spending of public funds in line with Article 227 of the Constitution.

The institutions charged with the responsibility of investigating complaints of this nature are the Public Procurement Regulatory Authority under Section 9 (h) of the PPAD Act and the Ethics and Anti-Corruption Commission.

Dated, Signed and **Delivered** at **Nairobi** this...**18th**..... day of...**SEPTEMBER**.....2025



DOROTHY JEMATOR
ACCESS TO INFORMATION COMMISSIONER