

## PUBLIC CONTRACTS APPEALS BOARD

Case No. 16

### **CT 2608/2001 - Tender for the Supply of CEFUROXIME 750mg Injections (Advert No391/2001)**

The call for offers, with an estimated value of Lm 106,401, covering a period of three years, was published in the Government Gazette on the 2<sup>nd</sup> November 2001 (original closing date was scheduled for 18<sup>th</sup> December 2001) following a request received by the Director of Contracts from the Government Pharmaceutical Services.

Nine offers were received with the cheaper valid offer being submitted by Messrs. Rodel Limited acting on behalf of Elpen Pharmaceutical Co. Inc. for a global CIF price including relative charges of Lm 82,808.17. This offer was followed by the one submitted by Messrs. Michele Peresso Ltd on behalf of Medochemie which amounted to Lm 85,926.59. Other offers were received from Messrs. Pharma-Cos Ltd., Faran Lab S.A., Kela Laboratoria N.V., Charles de Giorgio Ltd., Alfred Gera & Sons., Pharmachemic Trading and A.M. Mangion Ltd.

Originally, the offer submitted by Rodel Limited was rejected by the Adjudication Board (08.10.2002) on the pretext that the tenderer was not in possession of a valid CPP. However, following further deliberations between pertinent departments and exchange of views and official correspondence, the offer submitted by Rodel Ltd. was considered to be fully compliant with specifications and tender conditions (18.11.2003).

Yet, further contact by telephone between GPS and Rodel Ltd and correspondence sent to GPS by the said tenderer, gave the impression to the pertinent Government Department that Rodel's principals would not have been able to entertain their original offer. Consequently, the Adjudication Board decided to re-evaluate the tender and on 20.01.2004 recommended the offer submitted by Messrs. Michele Peresso as the cheapest and most valid offer following the exclusion of the offer submitted by Messrs Rodel Ltd.

Following publication of such recommendations Messrs. Rodel Ltd. filed an objection with the Director of Contracts on 23<sup>rd</sup> February 2004.

Present at the public hearing held at the Department of Contracts, Floriana, on 24<sup>th</sup> March, 2004 to discuss the objection filed by Rodel Ltd, on behalf of their principals Elpen Pharmaceutical Co. Inc., against the decision to award the tender in caption to Michele Peresso Ltd.were, representing

#### ***The Public Contracts Appeals Board:***

- Mr Alfred Triganza      Chairman
- Mr Anthony Pavia      Member
- Mr Edwin Muscat      Member

***Messrs Rodel Ltd***

- Dr Norman Vella

***Michele Peresso Ltd***

- Mr Michael Peresso

***Government Pharmaceutical Services***

- Ms Anna Debattista (Director GPS)
- Ms Miriam Azzopardi (Pharmacist – Member of the Adjudication Board)
- Ms Sarah Cutajar (Senior Principal, GPS)

Upon being invited by the Chairman to commence the introductory part of the proceedings, Dr Norman Vella stated that the offer of their principals Elpen Pharmaceutical Co. Inc., consisted of two quotations, 'A' and 'B'. He said that the average price of quotation 'B' for 3 years, which was cheaper than Quotation 'A', amounted to US\$ 183,383.20/3 = US\$ 61,127.73 (CIF Malta) per annum. If one were to include 1% provision for delivery, the price would amount to US\$61,739.01. He contended that Elpen's offer was cheaper since Michele Peresso Ltd's offer amounted to US\$64,064 (US\$ 1.12 X 57200 vials) per annum.

He said that following a fax transmission request sent on 18<sup>th</sup> November, 2003, by the Government Pharmaceutical Services (GPS), Elpen extended the binding period of their offer (comprising both options, Quotations 'A' and 'B') until the 18<sup>th</sup> January, 2004.

Dr Vella went on to state that his principal's product, a sample of which was submitted to the Adjudication Board, was deemed acceptable and in accordance with specifications.

Mr Michael Peresso, representing Messrs. Michele Peresso Ltd., said that he wanted to enquire whether Elpen's price was changed or remained the same after the extension period and whether an offer 'on behalf of' was considered acceptable to the Department of Health.

Ms Debattista, Director GPS, said that the original closing date of tender was 18<sup>th</sup> December 2001. Tenderers were requested to supply 57,200 vials of Cefuroxime 750mg Injections for three years. They had to quote separate prices for each year.

During her testimony, she confirmed that Elpen Pharmaceutical Co. Inc. had submitted two quotations marked 'A' and 'B' for this product with the same brand name *Zetagal*, in carton boxes x 1 vial ('A') and x 50 vials ('B') respectively. According to the schedule of prices the latter quotation was cheaper than the first. She said that the product was according to specifications and that Elpen's offer was the third cheapest. The first two cheapest offers were not recommended for acceptance.

Then, Ms Debattista made reference to Rodel's fax dated 4 November 2003 from which she quoted the following paragraph to substantiate her claim that Elpen's original prices were changed and that they could not supply the product by 50 vials:

*'Further to our telephonic conversation of today we confirm that our principals Elpen Pharmaceutical Co. Inc. cannot supply at present the above-mentioned product in the 50 vial presentation pack. However, they can offer the same product Zetagal 750mg x 1 vial at USD 1.12 per vial (CIF MALTA) which is equal to 1/50 of the offered price of USD56.06 for a pack of 50 vials corresponding to the third year (Dec. 2003 – Dec. 2004) of their quotation dated 3.12.01 under the above-mentioned tender.'*

Subsequently Rodel's offer was rescheduled accordingly. In reply to a specific question by the Public Contracts Appeals Board (PCAB), Ms Debattista declared that the global price was changed from Lm 82,808.17 to Lm 86,785.85, which figure was supported by relevant documentation. She declared that, as a result, Rodel's offer did not remain the cheapest acceptable. Michele Peresso's offer, which was the fourth cheapest, became cheaper and was recommended for acceptance.

It is pertinent to point out that this Board did not concur with Ms Debattista's statement that price schedule had to be updated to reflect the latest prices. This Board insisted that prices could not be changed after the opening of tenders.

When she proceeded with her testimony, Ms Debattista said that although the tender was issued in 2001, it could not be awarded earlier as they wanted to clarify the matter regarding the fact that Rodel offered the item 'on behalf of', which according to a Department of Health's Circular, such offers were not acceptable to the Department of Health. However, she explained that the matter had since been clarified and therefore this was no longer an issue in this case.

With regard to what was stated by Ms Debattista regarding the contents of the fax dated 4<sup>th</sup> November 2003, Dr Vella claimed that in her telephone conversation, Ms Miriam Azzopardi wanted his Company's principals, Elpen Pharmaceuticals Co. Inc., to confirm whether they could supply *Cefuroxime Sodium (Zetagal) 750mg* in the 50 vial presentation pack at the original price. The reply given was that Elpen, at that particular point in time, did not have the 50 vials pack in stock. However, they confirmed that they could only submit the single vial presentation pack. He said that the price of the product corresponded to the one offered for consideration in the third year, namely, US\$1.12 per vial for a pack of 50 vials after taking into account of the fact that the request was made on 4<sup>th</sup> November, 2003 and the closing date of tender was 18<sup>th</sup> December, 2001. He said that apparently there was some misunderstanding because when Ms Azzopardi phoned he thought that they wanted to buy such product through a direct order as they required it urgently. He added that, under normal circumstances, if and when clarifications were required, the Government Pharmaceutical Services always requested them in writing.

Ms Debattista replied by stating that she was convinced that Ms Azzopardi did not query about prices as was being alleged by Dr Norman Vella because her task was to evaluate products and to enquire about their specifications.

In her testimony, Ms Azzopardi insisted that in her telephone conversation with Dr Vella, she only enquired about the sample by 50 vials since they only had the sample by 1 vial. In view of the fact that the offer by 50 vials was being considered for acceptance, they wanted to enquire about the presentation of its outer package to ensure that it was according to specifications and conditions. She declared that in

their fax dated 4<sup>th</sup> November 2003 Rodel Ltd confirmed that Elpen could not supply the 50 vial presentation pack.

She confirmed that in their final report dated 20<sup>th</sup> January 2004, the Adjudication Board recommended Michele Peresso Ltd, since following the receipt of Rodel Ltd's fax dated 4<sup>th</sup> November 2003, the former tenderer became the third cheapest.

Ms. Sarah Cutajar's intervention aimed at stating that due to the fact that in the letter where the prices were changed, Dr Norman Vella had made specific reference to "Tender 391 – GPS.03.116.T.01.DC", one cannot but establish that this was a clear enough indication that it was not a direct order that he was referring to but to the actual tender in question.

In submitting his final oral statements, Dr Norman Vella continued to insist that the price of US\$ 61,739.01 relating to 'Quotation B' and forming part of Elpen's tender which was submitted with their letter dated 17<sup>th</sup> December 2001 was cheaper than the recommended tenderer's price of US\$64,064, that is, the offer submitted by Michele Peresso Ltd. He argued that Rodel Ltd's fax dated 4<sup>th</sup> November 2003 was superseded by GPS's fax dated 18<sup>th</sup> November 2003 in which they were asked to state whether they were prepared to extend the binding period of their offer up to 18<sup>th</sup> January 2004. The reply given by Elpen to this request was positive.

Mr Michael Peresso said that Rodel Ltd's fax dated 4<sup>th</sup> November 2003 clearly showed that the original prices in respect of this particular GPS tender were changed.

In its deliberations this Board took into consideration the fact that the problem that gave rise to this objection clearly arose out of the fax submitted by Rodel Ltd. and dated 4<sup>th</sup> November 2003.

It was admitted by both sides that the letter was the cause of confusion regarding the price of the goods which had been tendered for. Rodel Ltd. submitted that their intention in sending the fax was to inform the Department of Health about the availability of the injections concerned should the department require to place a direct order. On the other hand, the Health authorities stated that they understood the fax as referring to the Tender in question and assumed that the prices as originally quoted were being changed by the fax.

It is relevant that the fax in question clearly bore the reference of the Tender at present under contention.

It is felt that the Department of Health cannot be held to blame for having understood from the fax that the tender prices were being changed. It is also the opinion of the Board that the fax in question, whether willingly or not, was the cause of the misunderstanding.

On the other hand the Board must give the benefit of doubt to Rodel Ltd. and recognize the fact that the prices submitted in their original tender in fact had not been changed, and that the company's bid remained the most competitive.

During the hearing the representatives of the Department of Health explained to the Board that there was no particular problem regarding the stock of the injections in question as supplies could always be replenished through the issues of direct orders.

This Board therefore considers that a just solution to this objection would be to reissue the relative Tender and decides accordingly.

**Alfred Triganza**  
Chairman

**Anthony Pavia**  
Member

**Edwin Muscat**  
Member

12<sup>th</sup> April, 2004