

## **PUBLIC CONTRACTS APPEALS BOARD**

### **Case No. 24**

#### **CT 2152/2004, Advertisement 109/2004, GPS 17002T04BT Supply of Blood Collection and Filtration Systems**

The call for offers was published in the Maltese Government Gazette and the Official EU Journal on the 1<sup>st</sup> June 2004 following an official request received from Government Pharmaceutical Services on 2<sup>nd</sup> March 2004.

The estimated value of the tender was Lm615,660 covering a three-year term.

An Evaluation Committee consisting of:

Ms M Dowling	Chairperson
Mr P Mercieca	Member
Mr J Zahra	Member
Dr A Aquilina	Member

was set up to analyse offers received and proceed with the award of the tender.

Four tenders (eight options) were received and the Committee commenced the three-envelope procedure by analysing the compliance with the specifications listed in the tender document.

In its 'Preliminary Recommendations Report' dated 09.11.2004 the Committee concluded that offers submitted by Messrs Technoline Limited, Michele Peresso Limited and Pharmacos Ltd (Options 1 and 2) met specification requirements and were recommended to proceed to the next step, the opening of Envelope No. 3.

On the other hand, the same report found that the offer submitted by Messrs Drugsales Ltd did not meet the necessary specifications and hence was not recommended to proceed.

Following formal notification by the Contracts Committee of its failure to comply with tender specifications, Messrs Drugsales Ltd filed an objection against the General Contracts Committee's decision.

The Public Contracts Appeals Board (PCAB) met on the 19<sup>th</sup> January 2005 to discuss the objection raised by appellant.

Mr A Triganza chaired the appeal with Mr A Pavia and Mr E Muscat respectively acting as the other Board members.

During the hearing the following people participated in the proceedings:

Representing:

**Messrs Drugsales Ltd**

Mr Alfred Gera de Petri	Managing Director
Mr Philip Moran	Sales Manager
Professor Ian Refalo	Legal Representative

**Government Pharmaceutical Services**

Ms Anna Debattista	Director, Government Pharmaceutical Service (GPS)
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**Evaluation Committee**

Ms Miriam Dowling	Chairperson
Mr Paul Mercieca	Member
Mr James Zahra	Member

**National Blood Transfusion Centre**

Mr Angelo Degiorgio	Nursing Officer
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Prof. Ian Refalo, Legal Representative for Drugsales Ltd explained to those present that his clients' appeal was a simple one. Indeed, it related to the interpretation of the words used in one of the tender's specifications relating to the donation couches which were to be supplied on loan, precisely to the clause mentioned in Section B.5 Donation Couches, which specifically stated that the said couch *'should provide a comfortable position for the donor and should be fully motorised to offer reclining and upright positions for the donor body as well as height adjustment of the couch.'*

He remarked that, on analysing the wording, it was not clear what was being required by the client, arguing that one had to apply his mind to the proper interpretation of the words used in the call for tenders. Prof. Refalo placed major emphasis on the fact that at no point in the tendering process was the reference to the specifications of the couches clarified or amplified in any manner. As a consequence, it was only natural that the entity submitting its offer was in a way compelled to go by the natural meaning of the words as understood in the English language. Drugsales Limited's legal representative insisted on the fact that the way the text was drafted left no doubt whatsoever that the reference to motorizing mechanism was conditioning solely the reclining or upright positions of the donor body and in no way similarly applicable to the height adjustment. Prof. Refalo drew the attention of those present to the fact that Drugsales Ltd's insistence on the improper interpretation of the text referred to in the specifications was further validated by Prof. Peter Vassallo, an expert academic at the University of Malta, who when asked to give an unbiased formal opinion on the interpretation of the sentence relating to the clause (Section B.5) mentioned earlier, the latter stated that the wording of this sentence was ambiguous and that it could be interpreted in two ways, namely:

“a) that a comfortable position for the donor should be provided offering reclining and uprighting positions which are fully motorised - as well as height adjustment of the couch (which, by inference, would also be fully motorised);

or

b) that the donation couches should provide a comfortable position for the donor with fully motorised reclining and upright position. It should also provide height adjustment of the couch which need not necessarily be motorised. In this interpretation, ‘fully motorised’ would only qualify ‘reclining’ and ‘upright’ positions. The inference here is that ‘height adjustment’ need not specifically be ‘motorised.’ The phrase ‘as well as’ would mean ‘in addition to’ and therefore would separate ‘fully motorised’ from the second part of the sentence which refers to the height adjustment of the couch.”

Prof. Refalo contended that when one reflects on the points raised, taken within a context which could have easily contributed towards a certain level of ambiguity, even if unintentional, there is no doubt that his client’s offer should be retained valid and considered in accordance with specifications.

Prof. Refalo said that no one could exclude the possibility that the client’s intentions were to provide couches that also have fully motorised height adjustment. However, he insisted that Drugsales Ltd. should not be excluded for this reason because, apart from the fact that the wording used could have easily been misinterpreted, it was also a matter of minor relevance. Therefore, Drugsales Ltd’s offer was *bona fide*. Under the circumstances they are now offering to supply couches on loan having fully motorised height adjustment and this should be allowed.

Mr Gera de Petri complained about the fact that the reason as to why their tender was not among the selected ones was not given in writing but verbally over the phone. He failed to understand why in such instances the Department of Contracts does not furnish the tenderers with the specific reason or reasons in writing.

Drugsales Ltd’s Managing Director stated that in order to demonstrate how much this issue was solely based on different interpretation given to the same sentence, he wanted to assure this Board as well as the Evaluation Committee that his principals are in a position to satisfy the client’s needs by providing couches having fully mortised height adjustments and this at the same tendered prices.

Mr P Mercieca, a member of the Evaluation Committee, declared that the Committee’s intention was to have blood donation couches which are comfortable both to the donor and to the operator and which are also accessible to people with special needs. He said that the appellant’s couches were neither motorised nor did they have the necessary height adjustment. To prove his point Mr Mercieca quoted from Drugsales Ltd’s tender document (vide page 4 Section 2.3 para 8) and the literature as submitted by Baxter Healthcare Corporation, locally represented by Messrs Drugsales Ltd, which stated that:

*‘The four (4) legs are provided with adjustable leg levellers. If the chair is sitting on an uneven floor, the chair may “rock” diagonally. This “rocking” can be corrected by adjusting the leg levellers.’* and

*'The 4R4213 is fully upholstered donor chair, designed to provide a comfortable position for the donor, and features variable positioning for either arm, as well as reclining and upright body positions' respectively.*

He said that these types of chairs did not have motorised height adjustment as such but had only one time set-up (levellers) which was adjusted on installation. At this point, Mr Gera de Petri intervened by stating that his Company was misled by the wording used in the tender specification.

In reply to a specific question asked by this Board, Mr Mercieca declared that the motorised height adjustment feature was the only reason why Messrs Drugsales Ltd were not selected to proceed to the next adjudication stage.

According to Mr Gera de Petri the blood donation couches currently being used do not have a motorised height adjustment. Their company supplies these couches.

Mr Philip Moran, Drugsales Ltd's Sales Manager, said that the four legs on the couch were provided with adjustable levellers to alter the height of the couch or to allow stability on an uneven surface. Thus, he affirmed that the chairs could be adjusted to different levels for the donor/operators' comfort.

Mr Mercieca drew the attention of those present that it was not practical for anyone in the field to adjust the chairs' height for each donor.

This Board, having gone through the documentation submitted as well as the verbal evidence given during the hearing feels that:

- a. the text used in the specifications could have indeed given rise to misinterpretation due to the ambiguous nature of the semantics used;
- b. there seems to be no doubt regarding the '*bona fide*' of both the Evaluation Committee as well as that of Messrs Drugsales Ltd, each party justifiably interpreting particular specification clauses subjectively due to the insufficiently precise meaning of the text used;
- c. Messrs. Drugsales Ltd's misinterpretation of the actual spirit behind particular specifications could have easily been accentuated in view of the Company's previous lengthy track record in supplying similar equipment under previous conditions thereto applicable.

As a consequence,

- i. in consideration of the fact that the third envelope had to date not been opened, makes it still amply justified for anyone, including this Board, to rest assured that the element of transparency has remained intact;
- ii. further to (i) above Board believes that at this stage of the proceedings, which includes the public hearing convened to discuss Messrs. Drugsales Ltd's objection, the possibility that this Board may decide in favour of the

appellant, cannot be construed in any way as a disturbance of the element of total fair competition;

- iii. this Board feels that the appellant's claim is justified due to its '*bona fide*' nature.

Hence, this Board decides that in the light of evidence given and documentation submitted, the appellant should be allowed to re-submit the offer in line with agreed specifications under the same pricing conditions of the original offer submitted by the same Company.

Furthermore, this Board recommends that the appellant should be refunded the entire amount deposited in lodging this claim.

**A. Triganza**  
Chairman

**A. Pavia**  
Member

**E. Muscat**  
Member

28 January, 2005