

PUBLIC CONTRACTS APPEALS BOARD

Case No. 31

CT 2622/2004, Advertisement 367/2004, GPS 07 024 T 04 MC Beta Interferon 1A Injections

The call for offers covering a three year-period was published in the Government Gazette (closing date 22.02.2005) following a request received by the Contracts Department from the Government Pharmaceutical Services (GPS) on 28.08.2004.

Following analysis of two (2) offers received, the Contracts Committee decided to reject the offer submitted by Messrs Interpharma Co. Ltd. because a sample of the product being considered was not submitted before the closing date and time.

The Public Contracts Appeals Board constituted of Mr Alfred Triganza (Chairman), Mr Anthony Pavia (Member) and Mr Edwin Muscat (Member), held a public hearing on 11th May, 2005 at the Department of Contracts, Floriana, to discuss the objection filed on 25.02.2005 by Interpharma Co. Ltd against the decision by the Contracts Committee.

During the public hearing, the following entities were represented as follows

Interpharma Co. Ltd.

Mr Tony Nicholl – Managing Director

Mr Anthony Muscat (Pharmacist) – Managing Director

Government Pharmaceutical Services (GPS)

Ms Anna Debattista (Director GPS)

Ms Miriam Dowling

Witness

Mr Mario Borg (Contracts Department)

The Chairman commenced proceedings by inviting representatives of Interpharma Co. Ltd to explain the motivation behind their objection.

Mr Tony Nicholl stated that Interpharma Co. Ltd had been supplying the Health Department with Beta Interferon 1A injections since 1998. He also claimed that Interpharma Co Ltd was awarded the last tender for the supply of this product as per letter of acceptance issued in 2001. Mr Nicholl claimed that in previous tenders, despite the fact that they did not submit a sample, their offers had always been successfully accepted.

Interpharma Co. Ltd's representative said that they did not submit a sample for this particular tender because it was a stock item. He declared that on the 16th February 2005, that is 3 days before the closing date of this tender they had supplied the Health Department with 844 injections of their product as per invoice number 160205. He claimed that this specific blood sample was particularly sensitive. As a matter of fact, due to very stringent storage conditions, which had to be adhered to, the Company would have had to incur 850 Euros just to airfreight it.

Mr Nicholl referred to the fact that the specifications stipulated that the injections were for intramuscular use. Their product could be given to patients and applied by themselves at home once a week. In so far as other products are concerned, patients are required to go to hospital every two days and to be attended to by the use of a drip.

The appellant's representative contended that there was no substitute for their product and authorities know this quite well and as a matter of fact the pertinent authorities had just confirmed fresh supplies via a direct order.

During his intervention, Mr Anthony Muscat, another representative of Interpharma Co. Ltd insisted that they did not submit a sample because it was a stock item. He said that in the tender specifications it was indicated that the injections had to be Beta Interferon 1A (Avonex ®) which was the *patent name* of their product. The appellant also declared that the specifications were based on their product.

Mr Muscat said that his Company did not differentiate between Departmental and Contracts Department Tenders. As a consequence, they thought that, being the 'present suppliers', and the fact that in the past their offers had always been accepted, they did not need to submit a fresh sample. He declared that in their second envelope they had specifically indicated that the sample was not being submitted because the Government Pharmaceutical Services (GPS) had, previously, already purchased the same product.

Ms Anna Debattista, representing the GPS, declared that the decision to disqualify the tender was taken by the Contracts Department and that the tenders had not yet been adjudicated. She claimed that the condition to submit a sample with each offer was standard for all tenders.

Ms Debattista said that the only instance where the Health Division was involved in this case after the issue of the tender was when they received a letter, dated 22

February 2005, sent by Mr Mario Borg (Department of Contracts) wherein the GPS were requested to confirm or otherwise the contents of Interpharma Co. Ltd. dated the same day. In this letter Mr Nicholl gave the reasons as to why they did not submit a sample.

In her e-mail dated 23 February 2005 and sent to the Department of Contracts, Ms Miriam Dowling (Health Division) replied that the current supplier was Interpharma Co. Ltd. Also, she confirmed that the delivery of injections had been affected as stated in Interpharma Co Ltd's letter and declared that the brand name of product was AVONEX. She concluded by stating that a sample was not submitted with the previous offer via tender GPS 07005To1MC. However, it was remarked that this tender was not a three-package system. Ms Debattista claimed that following this exchange of correspondence, nothing further happened until they were formally made aware of this objection.

The GPS' s representative stated that in the GPS' s Departmental Tenders it was indicated that 'present suppliers' at the time of offer did not need to submit a representative sample. In such cases tenderers were required to inform them accordingly and to indicate relative references.

With regard to Mr Nicholl's statement that they were given a *Direct Order*, she clarified that it was a six-month extension of previous contract and not a Direct Order.

Ms Debattista concluded by emphasising that GPS had not yet evaluated the offers of this tender and that, since the issue of this tender, their only involvement in this case was their reply to the Contracts Department's letter.

Mr Mario Borg, representing the Department of Contracts, gave his testimony under oath. He said that this tender was a three-package system and that it was accompanied by the mandatory Bid Bond (Package One). Mr Borg said that Interpharma Co Ltd's tender was disqualified because they failed to submit the sample as specified in the tender document. However, he pointed out that the Contacts Committee was not aware that the 'present suppliers' were Interpharma Co Ltd and that GPS were in possession of a sample of this same type of product. He affirmed that the Second Package had not yet been opened and therefore they were not aware of Interpharma's statement regarding the sample.

In reply to a specific question by the PCAB, Mr Borg stated that, in the prevailing circumstances, he would have accepted Interpharma Co Ltd's offer.

The Public Contracts Appeals Board,

- a. having taken cognisance of the fact that during the hearing there was clear indication that both the Adjudication Board and the Contracts Committee would find no objection to reinstate the appellant in the running once the procedure followed in (a) above gives rise to the conclusions referred to in the same point raised;

- b. being full aware of the monopoly enjoyed to date by appellant in so far as the supply of this particular product to the client in question, namely the Government Pharmaceutical Services (GPS). As a matter of fact it transpired that Messrs. Interpharma Co. Ltd. have been supplying Beta Interferon 1 A Injection since 1998 with the last consignment delivered to GPS as confirmed by the latter during the hearing on 16.02.2005;
- c. having taken into consideration the fact that (as stated by GPS officials during the hearing) so far as Departmental tenders are concerned, it has been GPS' s praxis to allow for the promotion of 'stock items' (such as Beta Interferon 1 A Injection, on a regular basis;

decided to uphold Interpharma Co. Ltd' s objection and allow for the tendering procedure to continue with the opening of the 2nd envelope.

Irrespective of the outcome of the opening of Envelope No.2, this Board decided that appellant should be reimbursed the amount of deposit paid in filing this objection.

A. Triganza
Chairman

A.Pavia
Member

E. Muscat
Member

6th June, 2005