

## PUBLIC CONTRACTS APPEALS BOARD

### Case No. 39

#### CT 2254/04 - Advert No 127/04, GPS 07209T03MC Supply of Medical Oxygen in Bulk

This call for offers covering a three year period, published in the Government Gazette on the 15.06.2004, was issued by the Contracts Department following a formal request, dated 25.03.2004, made by the Government Pharmaceutical Services (GPS).

The estimated cost of this tender was Lm 653,632.

The Government Pharmaceutical Services appointed an Adjudication Board consisting of

- M. Dowling                      Chairperson
- Ing. J. Muscat                  Member
- Mr. A. Camilleri                Member
- Ms. M. Mejlak                  Clerk

to analyse the two offers received (within the context of the three package system) on closing date for submission of offers which was 09.09.2004, following an extension granted by the Director of Contracts.

On 17.06.2005, the Contracts Committee formally notified Messrs Polidano Group Ltd that their tender was not among the selected ones qualifying to the next phase, namely the analysis of prices, since their company "*is not in possession of a wholesale manufacturing license for carrying out pharmaceutical activities.*"

As a result, Messrs Polidano Group Ltd. filed a Notice of Objection on 23.06.2005 against the said decision.

The Public Contracts Appeals Board (PCAB) made up of Mr. Alfred Triganza (Chairman), Mr. Anthony Pavia (Member) and Mr Maurice Caruana (Member), convened a public hearing on 22.07.2005 to discuss this objection.

Present for the hearings were:

#### **Polidano Group**

Mr Charles Polidano – Managing Director  
Dr Anna Mallia – Legal Representative  
Mr Tarcisio Mifsud - Consultant

#### **Multigas Ltd**

Mr Michael J Mallia – Managing Director  
Dr Joe Caruana Scicluna – Legal Representative

## **Government Pharmaceutical Services**

Dr John Cachia (Director Institutional Health; A/Director General,  
Department of Health)

Ms Miriam Dowling (Chairperson, Contracts – Adjudicating Committee)  
Ms Amanda Camilleri (Pharmacist)

## **Witnesses**

Mr Mario Borg (Department of Contracts)

Ms Anna Debattista (Director, Government Pharmaceutical Services (GPS))

Mr Tonio Cassar (Director, Inspectorate & Licensing Enforcement,  
Medicines Authority)

After the Chairman's brief introduction, the representatives of Polidano Bros. Ltd. were invited to explain the motivation behind their objection.

At the beginning of the sitting, on the request of Polidano Bros. Ltd.'s legal representative, namely Dr Anna Mallia, it was clarified that the words '*not among the selected ones*' were used because this was a 'Three Package Tender'. Also it was established that there was only another bidder, namely, Multigas Ltd.

Following this clarification, Dr Mallia made reference to a letter dated 17 June 2005 wherein the Department of Contracts informed Messrs Polidano Bros Ltd that their tender for Medical Oxygen in Bulk was '*not among the selected ones since their company was not in possession of a wholesale manufacturing licence for carrying out pharmaceutical activities.*' She said that from a legal point of view, this kind of licence did not exist because there was either a manufacturing licence or a wholesale dealer's licence.

The PCAB summoned Mr Tonio Cassar (Director, Inspectorate & Licensing Enforcement, Medicines Authority) who confirmed Dr Mallia's statement that a 'wholesale manufacturing licence' was not specified in the law. He was of the opinion that it must have been written by someone who did not have a technical background of the subject.

Mr Cassar also explained that in order to obtain a licence, an applicant needed to have a Good Manufacturing Practice (GMP). Also he declared that at this moment Polidano Bros. Ltd. had neither a *Manufacturing licence* nor a *Wholesale dealer's licence*. However, he confirmed that the appellant had already applied for the latter type of licence.

The same witness proceeded by stating that the issue of licences was regulated by various Legal Notices under the Medicines Act such as

- LN 143/2004 for Manufacturing Licence;
- LN 154/2004 for Importation and Distribution Licence (Wholesale Distribution) *and*
- LN 378/2004 – referring to specific Amendments.

Dr Anna Debattista Director, Government Pharmaceutical Services, testified that the recommendation by the GPS to the Contracts Department showed that there was a slash between the words “wholesale” and “manufacturing” which indicated that they were two separate licences.

The last public official who took the witness stand was Mr Anthony Borg from the Department of Contracts, who confirmed that he was the writer of the letter sent to Polidano Bros. Ltd. Mr Borg declared that he had erroneously left the slash out, which was written on the side of the page, through an oversight. His attention was drawn by this Board to the fact that this was a vital slash because it indicated two different licences.

This Board informed Mr Borg also that Dr Mallia had drawn the PCAB’s attention regarding the fact that the Regulation quoted in the letter should have been No 102 of the Public Contracts Regulations 2003 and not No 82 of the Public Contracts Regulations 2005.

Mr Michael Mallia of Multigas Ltd. intervened by claiming that the formal objection filed by Polidano Bros. Ltd contained statements attributed to his company which were unfounded and totally incorrect. The relevant facts were clearly known to the Health Authorities and therefore points (d) to (h) of the said letter were considered as not relevant or applicable to Multigas Ltd.

Mr Mallia declared that they had been manufacturing bulk medical oxygen for many years and Polidano Bros. Ltd. had stated that they “will shortly be the only ones in Malta who can manufacture bulk medical oxygen”. He insisted that Polidano Bros. Ltd.’s claim that Multigas Ltd. was only in possession of a licence enabling the latter to import but not to produce was completely fictitious as they had a manufacturing licence.

As regards point (a) of the objection, Mr Mallia said that the two tenders were distinct and separate because:

- they referred to supply of medicinal product under completely different states (liquid & gas), packaging (road tankers or bowsers and cylinders) and temperatures and pressures; and
- the two tenders were also subject to different procedures. The offer for medicinal oxygen in cylinders had a “one-envelope” procedure which therefore entailed opening of the whole offer in one go, irrespective of the “technical status of any tenderer.” On the other hand, the offer for bulk medicinal oxygen (in road tankers) was subjected to the “three-envelope” procedure which involved a bid-bond in envelope one, after which the technical offer in envelope two would be opened. If this technical offer was found to meet the health requirements, which Mr Mallia claimed that in Polidano Bros. Ltd.’s case it did not, then the commercial offer in envelope three would be opened.

Finally, Mr Mallia responded to Polidano Bros. Ltd’s statement, namely that they had “all the relative MEPA permits to be able to manufacture medical oxygen” by stating that this Authority could only issue permits for the setting up of structures and

machinery and that permits to manufacture medical oxygen could only be issued by the Health Authorities.

At this stage, the public hearing was concluded and the PCAB proceeded with its deliberations before reaching its decision.

The Board,

- having noted that appellant's offer was adjudicated as non-compliant with the technical specifications, and was discarded unopened since it was not considered eligible to pass on to the next stage of the tender procedure (the consideration of the financial package – "Package Three");
- having also examined appellant's verbal and written reasons (in terms of the letter dated 23 June 2005) for contesting the decision taken to discard the Company's offer;
- having perused the findings and recommendations of the Adjudication Board in terms of the report dated 9 June, 2005, in particular, that section of the report which, following the evaluation of appellant's bid, recommends as follows (reproduced hereunder):-

*"Recommendations: Offer was not taken into consideration as agent is not in possession of a wholesale/manufacturing license for carrying out pharmaceutical activities.*

*Offer is not acceptable (Red 48).*

*Not recommended . For the opening of envelope 3."*

- having secured confirmation that the possession of a wholesalers or a manufacturers licence for the carrying out of pharmaceutical activities was a basic and indispensable requirement on the part of all tenderers to qualify for consideration;
- having obtained from the Director Inspectorate and Enforcement (Medicines Authority), verbal evidence under oath to the effect that the appellant was not in possession of a wholesalers licence or a manufacturers licence;

upheld the decision reached by the Adjudication Board, as endorsed by the Contracts Committee, namely, that Messrs. Polidano Group Ltd.'s offer did not qualify for further adjudication, given that it did not meet an important requirement of the Specifications and Conditions of the tender, namely the possession of a wholesalers licence, and should therefore be discarded during this stage of the proceedings .

In consequence, the Board has decided to reject the complaint raised by the appellant and authorises the tender award procedure to continue with the exclusion of appellant's bid.

**Alfred R. Triganza**  
Chairman

**Anthony Pavia**  
Member

**Maurice Caruana**  
Member

*Date: 1<sup>st</sup> August 2005*