

PUBLIC CONTRACTS APPEALS BOARD

Case 85

CT 2597/2005: Adv. No. CT 61/2006 – GPS12032TO5RA: Tender for the Supply of Securitainers sz. 26mm x 51mm

This call for tenders was published in the Maltese Government Gazette on 28.02.2006 and was issued by the Contracts Department following a request received from the Government Pharmaceutical Services (GPS) on 13.02.2006.

The closing date for this call for offers was 11.04.2006 and the global estimated value of the contract covering a period of three years was Lm 50,215.

Eight (8) different tenderers submitted their offers.

Following the publication of the *Notification of Recommended Tenderers*, Messrs Drugsales Ltd filed an objection on 15.06.2006 against the intended award of the said tender to Messrs Reactilab Limited (Lm 24,041.49 for the three year period under consideration).

The Public Contracts Appeals Board (PCAB) made up of Mr Alfred Triganza (Chairman) with Mr Anthony Pavia and Mr Edwin Muscat, respectively, acting as members, convened a public hearing on 26.07.2006 to discuss this objection.

Present for the hearing were:

Drugsales Ld

Prof Ian Refalo

Legal Representative

Mr Alfred Gera de Petri

Mr Andrea Gera de Petri

Ms Julia Gera de Petri

Reactilab

Dr Antoine Cremona

Legal Representative

Ms Maria Attard

Government Pharmaceutical Services

Ms Anna Debattista

Director, GPS

Adjudication Board

Ms Miriam Dowling

Chairperson

Mr Paul Pace

Ms Rose Aquilina

After the Chairman's brief introduction, Drugsales Ltd's legal representative was invited to give a resume' of what lead to the filing of their objection.

Prof Ian Refalo, representing the appellants', started by stating that his clients decided to file their objection in respect of the tender issued for the supply of Securitainers sz 26mm by 51 mm for the simple reason that this product was a British registered trade mark of Drugsales Ltd's principals, *Jaycare Limited*. A document was presented to the floor in order to enable appellants to corroborate their claim to the effect.

The appellants' legal representative argued that, on the basis of the fact that Securitainers was a product of Jaycare Ltd, the recommended tenderer, namely Reactilab, must have offered a similar product. As a matter of fact, the product offered by the recommended tenderer, was manufactured by RPC Containers Ltd of UK. The same complainant contended that if the Government Pharmaceutical Services (GPS) did not want *Securitainer* as a branded product, they should have requested tenderers to supply *Securitainers or similar products* in the tender document.

During the proceedings, Prof Refalo said that the *Commercial Law* in Malta made a distinction between (a) the registration and (b) the use of, a trademark. He explained that the use of a trademark would give the right to the ownership of a trade mark even if not registered while the registration of a trade mark would give more protection.

Dr Antoine Cremona, Reactilab Limited's legal representative, responded by stating that it was necessary for the appellants to prove that Securitainers was a trade mark registered in Malta since it appeared that this product was not a community trade mark. He explained that this product was used to store pills and nowadays the name 'securitainers' was used as common parlance for snap-cap container. Reactilab's lawyer argued that if it were only the appellants who could import such containers, then there could be no competition for this tender. At this point, Prof Refalo intervened to point out that, apart from his clients, other bidders could have competed and offered such product as, in view of competition, his clients could not have exclusivity on a particular product.

Continuing, Dr Cremona explained that in the *tender document* there was no direct reference to the trademark. He claimed that the word 'Securitainers' was only used in the title of the tender and that in the description reference was only made to snap-cap type of bottles.

The recommended tenderer's legal representative said that they acknowledged that *Securitainers* was the trade mark registered in England however he insisted that, in the industry, such containers were known as *securitainers*. Whilst submitting a document to the PCAB in order to substantiate his argument, Profs Refalo also remarked that it was not known whether any legal action had been taken on the matter.

The main witness in these proceedings was Ms Anna Debattista, Director GPS, who, in testifying, explained that when the call for tenders was issued, the term *Securitainers* was not intended as a trademark. She said that, in actual fact, the word 'Securitainers' was only mentioned in the heading of the tender and the specifications

clearly referred to *security containers*. She said that, according to records available, such tenders had always been issued in the same manner since 1988 and that all products purchased for this size of containers were *securitainers*.

The Director, GPS, contended that the specifications applied to all brands and not specifically to one particular brand. However, the witness concurred with the PCAB's opinion that one could not exclude the possibility that other bidders might have not participated in this tender because they did not supply 'Securitainers' as a branded product. Ms Debattista said that three out of eight tenderers (including the appellants) offered 'Securitainers' while the others offered security containers.

When specifically asked by Prof Refalo whether she knew that Securitainer was a trade name for Jaycare Ltd., Ms Debattista responded by stating that she did not manage to seek legal advice from the Department's lawyer about the legality of the trade mark because the latter was on leave. At this point, Mr Paul Pace, a member of the Adjudication Board, intervened by stating that they were not aware that *Securitainers* was a British trade mark because, if this were the case, they would have changed the title of the tender. He claimed that the word 'Securitainers' was widely used for this type of containers. Mr Pace, apart from declaring that all products offered were according to specifications and that they did not intend to purchase a proprietary item, contended also that, if this were the case they would have indicated such requirement in the specifications.

The Director, GPS concluded by declaring that the Department wanted to buy the cheapest product in terms of what was required according to the specifications.

In his concluding remarks, Dr Cremona said that when his clients had supplied the Health Department with the product (a different size) called *Snap Secure*, the employees at the stores referred to it as *Securitainer*.

At this stage, the public hearing was brought to a close and the PCAB proceeded with its deliberations before reaching its decision.

This Board,

- having noted that the appellants, in terms of their motivated 'letter of objection' dated 17.06.2006, and also through their verbal submissions presented during the public hearing held on the 26 July 2006, had objected to the decision taken by the General Contracts Committee, formally communicated via a letter, informing them that the tender submitted by them was not successful;
- having considered the reasons which lead to the appellants' objection;
- having also noted the references made during the hearing to issues like trade marks and proprietary products as well as non-exclusive representation of brand;
- having also considered the fact that Department officials had been erroneously referring to a specific brand (even if this was only in the title of the tender) in

successive tender documents when they were after a similar product even if this were to be supplied under a different brand name (or trade mark);

- having noted the fact that the same Director GPS admitted that there could have been the likelihood that potential bidders who could not supply *Securitainers* as a brand may have decided against participating in the Tender;

reached the following conclusions, namely that due to the fact that

1. the PCAB cannot be seen to breach or actually permit Company law (concerning trade marks) to be breached;
2. anyone who could have tendered but could not supply '*securitainers*' as a branded product may have been deprived from participating in the said tender;
3. it is possible that currently there could be taking place, formal litigation proceedings (overseas); in regard to potential breach of trade mark legislation.

In view of the above, this Board finds in favour of appellants and in terms of the Public Contracts Regulations, 2005, this Board recommends that the deposit submitted by the appellants should be refunded.

Alfred R Triganza
Chairman

Anthony Pavia
Member

Edwin Muscat
Member

August 23, 2006