

PUBLIC CONTRACTS APPEALS BOARD

Case 101

Advert No 4/2006 - CT 2273/2005 - GPS.05.037.T.05.SC Supply of Aqueous Cream BP

This call for tenders was published in the Maltese Government Gazette on 13.01.2006 and was issued by the Contracts Department following a formal request to the latter by the Government Pharmaceutical Services (GPS) dated 30.03.2005.

Four (4) tenderers originally submitted their offers.

The closing date for this call for offers was 23.02.2006 and the global estimated value of the total contract covering three years was Lm 34,888.

Following the decision taken by the General Contracts Committee on the 16.02.2007 and the subsequent publication of the *Notification of Recommended Tenderers*, Messrs Vivian Corporation Ltd filed an objection on 26.02.2007 against the intended award of the said tender to Messrs Pharmachemic Trading AG.

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 04.04.2007 to discuss this objection.

Also present for the hearing were:

Vivian Corporation Ltd

Ms Joanna Cremona	Executive Director
Ms Maria Formosa	Tender Business Manager

Pharmachemic Trading AG

Mr Salvino P Farrugia	Managing Director
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Government Pharmaceutical Services

Ms Anna Debattista	Director GPS
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Adjudication Board

Ms Miriam Dowling	Chairperson
Mr Mark Spiteri	Member

Following the Chairman's brief introduction, *Vivian Corporation Ltd's* representative was invited to explain the motive leading to appellants' objection.

Ms Joanna Cremona, Executive Director, Vivian Corporation Ltd, started by stating that they had appealed from the General Contracts Committee's decision to award the said tender to Pharmachemic Trading AG because the price of their product appeared to be *prima facie* cheaper than that offered by the awarded tenderers. Ms Cremona claimed that the prices (submitted by appellants) per unit offered for the three years covering this contract were Lm 0.32, Lm 0.33 and Lm 0.34 respectively, whilst those offered by the awarded tenderer were Lm 0.34 for the first two years and Lm 0.345 for the third year.

Furthermore, Ms Cremona said that the product offered by Vivian Corporation Ltd was of a very high standard, it was according to specifications and it complied with BP standards. Also, she declared that her firm had been supplying such product to Central Government for the last 3 years and that the GPS had extended the contract for a further 6 months.

Vivian Corporation Ltd's representative said that their product was manufactured in Ireland and that it was classified as a pharmaceutical product, on which no VAT was payable. Ms Cremona declared that the products offered by them and by the recommended tenderer were not registered at tendering stage. However, she said that they had already submitted the necessary application with the Medicines Authority for its registration.

Mr Salvino P Farrugia, Managing Director, Pharmachemic Trading AG, responded by stating that when the tender for the 'Aqueous Cream BP' was issued, they asked their foreign suppliers for the 'Marketing Authorisation' for the said product. Mr Farrugia claimed that following this request, their supplier informed them that in England this product was considered as a beauty care product or as a cosmetic. He declared that in their offer the product was indicated as a 'cosmetic cream' and therefore they included 18% VAT, hence the higher price structure submitted. The recommended tenderer's representative said that when he verified with the Malta Customs Analyst about its classification, he was informed that in England it was classified as a beauty care product while in Malta it was considered as a medicinal.

On cross examination by the PCAB, Ms Anna Debattista, Director GPS, who was giving witness under oath, confirmed that albeit the prices offered by the parties concerned were as those stated by the appellants' representative, yet, she declared that whilst the appellants' prices were exclusive of VAT, those of the recommended tenderer were inclusive of VAT. Ms Debattista explained that this product was rated 0% VAT by the Customs authorities and so they had to remove the 18% VAT component from the prices submitted by the awarded tenderer. As a consequence, when they worked out the price schedule, it resulted that the recommended tenderers' prices were cheaper!

In reply to specific questions by the PCAB, the witness confirmed that both tenderers submitted samples, the quality of the products was acceptable and that both products were not registered locally.

Ms Debattista said that the *Aqueous Cream* was used in hospitals for its cosmetic property. She declared that the *Borderline Classification Committee* did not consider this product as a medicinal product.

Ms Debattista also testified that the tender document stipulated that delivery was to be effected within 8 weeks from the date of order and that orders were to be submitted in quantities stated on each requisition. She said that Pharmachemic Trading AG complied with the tender's requirements and that it had quoted deliveries of 6 – 8 weeks. On the other hand, Vivian Corporation Ltd quoted deliveries of 10 – 12 weeks and stated that they would submit 'Minimum order Quantity 21,600 tubes x 100gm'. However, the Director GPS remarked that the decision was primarily taken on the price factor.

At this stage the hearing came to a close and the PCAB members proceeded with their deliberations before reaching their decision.

This Board,

- 1 having noted that the appellants, in terms of their 'reasoned letter of objection' dated 01.03.2007, and also through their verbal submissions presented during the public hearing held on 04.04.2007, had objected to the decision taken by the General Contracts to award the tender to Messrs Pharmachemic Trading AG;
- 2 having noted the price consideration made by appellants as well as the claim made in respect of quality of product being offered;
- 3 having considered the fact that the products offered by both tenderers were not registered at the time the bidders submitted their bid implying that both tenderers were allowed to participate within a level playing field;
- 4 having also noted that the Adjudication Board had established that the products offered by both tenderers were according to the specifications listed in the Tender Document;
- 5 having observed the insistence shown by the appellants to alter the terms and conditions as stipulated in the Tender Document in order to make such terms more advantageous to their own Company

concludes, that

- a. the Director, Government Pharmaceutical Services' explanation and description of facts are considered credible enough and that the Adjudication Board treated all participants in an equitable manner;

- b. the PCAB cannot accept a scenario wherein bidders try to change or negotiate terms and conditions with a view to dictate their own and, in due course, alter those officially stipulated by the Contracting Authority in the Tender Document;
- c. any price adjustment aimed at including or excluding the VAT element will retain the successful bidder's offer as the most advantageous.

As a result of the above-mentioned points, this Board decides against the appellants and in terms of the Public Contracts Regulations, 2005, this Board recommends that the deposit submitted by the appellants in terms of regulation 83, should not be refunded.

Alfred R Triganza
Chairman

Anthony Pavia
Member

Edwin Muscat
Member

23 April 2007