

PUBLIC CONTRACTS APPEALS BOARD

Case 102

GPS.04.100.D06.BB – MST733/06 Food Preparation - Elemental 028®Extra Powder

This call for tenders was published in the Maltese Government Gazette on 27.10.2006 and was issued by the Contracts Department following a request transmitted to the latter by the Government Pharmaceutical Services (GPS) on 15.09.2006.

Two (2) tenderers originally submitted their offers.

The closing date for this call for offers was 27.11.2006 and the original global estimated value of the total contract covering three years was Lm 18,549.

Following the publication of the *Notification of Recommended Tenderers*, Messrs Alfred Gera & Sons Ltd filed an objection on 01.03.2007 against the intended award of the said tender to Messrs P & D Pharmaceuticals Ltd.

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:

Alfred Gera & Sons Ltd

Ms Anne Curmi

Government Pharmaceutical Services (GPS)

Ms Anna Debattista

Director GPS

Adjudication Board

Ms Miriam Dowling

Chairperson

Absent

Although the recommended tenderer, namely P & D Pharmaceutical Ltd, was informed about the public hearing, none of its representatives was present.

The appellants' representative, namely Ms Anne Curmi, followed the Chairman's brief introduction, by providing those present with a brief account of what prompted her Company to formally object against the award of the tender to another bidder.

Ms Curmi started by stating that they had offered a more advantageous price of Lm 3 less per 10 sachets. As a consequence, their offer was cheaper than that submitted by the recommended tenderer, namely P & D Pharmaceutical Ltd, by Lm 600 annually or Lm 1,800 over the 3 year contract period. She also pointed out that their product conformed to the tender specifications.

Ms Curmi explained that when GPS requested her Company to state whether they were in a position to supply the item in quantities as required by Government, Alfred Gera & Sons Ltd advised that, due to freight costs, they preferred to supply in two consignments yearly of approximately half the annual consumption (100 packs). She maintained that the tender did not stipulate the quantities that were to be supplied annually but only requested delivery on demand. However, the appellants' representative said that they were available for further discussion on this issue.

Ms Anna Debattista, Director GPS, responded by stating that the delivery conditions in the tender document *inter alia* specified that:

'Goods are to be supplied in consignments as requested by the Director Government Pharmaceutical Services, in the quantities stated on each requisition.'

She explained that they wanted to order the quantities according to the exigencies of the Department in order to keep stock at a minimum due to expiry problems.

Ms Debattista said that, in their offer, Alfred Gera & Sons Ltd specified that they would supply the product in minimum consignments of 100 x 10 x 100g. She claimed that in their current contract the appellants did not have a minimum order clause.

At this point, the Director GPS made reference to an e-mail that was sent to the appellants' representative on 3 January 2007 wherein it was stated that:

'With reference to above mentioned item and your offer dated 8/11/06, please note that minimum order indicated on offer is not acceptable to GPS. As such you are kindly being requested to state if you are in a position to supply item in quantities according to GPS needs.

Request is being made without any commitment whatsoever and an early reply would be greatly appreciated.'

In her reply Ms Anne Curmi wrote that:

'We would prefer to supply in approx 6 monthly consignments of approx 100 x 10 sachets per consignment. Shelf life remaining will be 1 year, so this should be acceptable. Otherwise for much smaller consignments freight costs will be increased.'

Here, Ms Curmi's attention was drawn to the fact that they should have indicated such increase in relevant costs in their offer.

Continuing, Ms Debattista said that in the tender document they requested a delivery period of 8 weeks. In their offers, the appellants and the recommended tenderer, indicated delivery periods of 14 – 16 weeks and 28 days respectively.

As far as payment conditions were concerned, Ms Debattista declared that all GPS tender documents specified payment terms of 150 days. She claimed that in their offer Alfred Gera & Sons Ltd stated that:

'Payment conditions acceptable to us are as follows:

"The contracting parties agree that interest in case of late payment shall start to accrue and shall become payable automatically without the necessity of a reminder after the expiry of a period of 90 days that shall start to run from the date of receipt of the goods or services rendered. The rate of interest is set at seven (7%) percentage points over the central intervention rate established by the Governor of the Central Bank of Malta in accordance with Legal Notice 233 of 2005."

Acceptance of our offer shall be deemed to be acceptance of the foregoing.'

In reply to specific questions made by the PCAB on the recommended tenderer's offer, the Director GPS said that P & D Pharmaceuticals Ltd had abided with all the tender conditions. She said that once no comments were made on payment terms and no minimum consignment was stipulated, this, automatically, implied that they had accepted these tender conditions.

In her concluding remarks, Alfred Gera & Sons Ltd's representative insisted that there should have been further discussions between her Company and the Contracting Authority to clear issues whilst maintaining that the price offered in their bid was more advantageous than that of the recommended tender.

During the hearing, the PCAB remarked that in such proceedings the Appeals Board had to ensure that all tenderers were treated equally and in a transparent manner and all parties abide with tender conditions and specifications. The attention of the appellants' representative was drawn to the fact that they had no right to submit a conditional tender or to hold discussions at adjudication stage. It was emphasised that, if necessary, such discussion could only take place before the submission of tenders and through the Department of Contracts. It was also pointed out that tenders were not evaluated solely on the merit of price. In fact, it was stated that even EU tenders were adjudicated on the basis of the 'Most Economically Advantageous Tender' (MEAT).

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 P & D Pharmaceuticals Ltd;
- 2 having noted that the delivery period requested in the Tender Document was supposed to be 8 weeks but instead the appellants included a period which covered 14 to 16 weeks;
- 3 having considered the fact that the payment terms as requested by the appellants in their bid were different than the terms stated in the Tender Document, including a payment of interest on overdue payments;
- 4 having also noted that the terms and conditions as stated in the Tender Document were adhered to by the successful bidder;

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 submit conditional tenders and then 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. the PCAB cannot accept the appellants' proposal for further discussions to be held between them and the contracting authority in order to clarify certain issues as if this Board were to accede to this request it would be itself going against the rules governing public procurement.

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