

PUBLIC CONTRACTS APPEALS BOARD

Case No. 123

Adv No 83/2007 - CT 2054/2007 - GPS 08.117.TO6AL
Tender for Supply of Bandages Crepe 15cm

This call for tenders was published in the Government Gazette on 27.02.2007.

The closing date for this call for offers was 10.04.2007 and the estimated contract value was Lm 26,610.14.

Fourteen (14) different tenderers submitted their offers.

Following the publication of the Notification of Recommended Tenderers, *Messrs Indistrea* filed an objection on 29.10.2007 against the intended award of the tender in caption to *Messrs Technopharma 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 18.04.2008 to discuss this objection.

Present for the hearing were:

Indistrea Ltd

Dr Antoine Cremona	Legal Representative
Ms Maria Attard	

Technopharma Ltd

Dr Noel Naudi	Legal Representative
Mr Michel Grech	

Government Pharmaceutical Services

Ms Anna Debattista	Director
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Adjudication Board

Ms Miriam Dowling	Chairperson
Mr Paul Pace	Member

After the Chairman's brief introduction relating to this case, the appellants', Messrs Indistrea's, legal representative, Dr Antoine Cremona, was invited to explain the motive which led to the filing of their objection.

The appellants' legal representative said that in his clients' opinion, the adjudication carried out, which led to the rejection of his clients' bid, was factually incorrect because their offer was in conformity with the specifications expressly stipulated in the tender document. He contended that the adjudication was based on criteria which were not included in the call for tenders published by the Contracting Authority in terms of LN 177 of 2005 - Public Contracts Regulations, 2005. Dr Cremona sustained that the remit of any Adjudication Board should be limited to what was specifically requested in the tender specifications.

The lawyer explained that, following the publication of the recommendations of the General Contracts Committee on 19 October 2007, his clients asked the Department of Contracts to furnish them with the reasons as to why their bid was excluded. He said that Messrs Indistrea were provided with an extract of the Adjudication Board's report which indicated that their bid was rejected for the following reasons:

“Recommendations: Unbranded wrapper does not contain brand or manufacturer. Does not produce adequate compression no document that bandage is washable and resistant to ointments. Not recommended.”

Dr Cremona said that the appellants felt aggrieved by this decision and so they decided to file a notice of objection which was subsequently followed by a reasoned letter wherein they explained their objection in detail. He said that their appeal was based on the following three grounds:

- a. Dr Cremona said that the specifications stipulated that the *‘wrapper or container of each individual bandage is to be labelled with the type of bandage..’*. He exhibited an identical sample of the bandage submitted with their offer to prove that they had complied with such requirement. The lawyer explained that the wrapper clearly indicated the type of bandage, namely *‘Nylastic Bandage’* and contained also the details of the manufacturer – *‘Previs Srl – Via Postale Vecchia, 87, Trissino (VI)’*. He insisted that in the specifications, no mention of a brand or manufacturer was made. However, he remarked that the wrapper still showed the manufacturer's address
- b. Dr Cremona said that the bandages offered by the appellants were manufactured in accordance with all the listed specifications in the tender document including the yarn count, the weft threads and the structure and composition of the bandage. The specifications, *inter alia*, stipulated that the bandages had to be made from 65% cotton and 35% polyamide. He pointed out that the specifications did not make any reference to any parameters according to which the *‘compression’* of the bandage should be determined. In actual fact it was only specified that *‘bandages should produce adequate compression and support’*.

The appellants' legal representative also said that when the matter was referred to the manufacturers it resulted that they were not aware of any

scientific test that could be carried out to establish whether a bandage provided 'adequate compression' or not. He said that, from research carried out, the compression resulted from its composition and structure

- c. Dr Cremona contended that this ground presented another instance where the General Contracts Committee (GCC) had recommended the exclusion of the appellants' bid for failing to produce documentation which was never requested. The lawyer emphasised that there was no requirement in the tender document requesting bidders to submit documentation that the bandage was washable and resistant to ointments. He contended that his client had provided exactly what was requested.

When Dr Cremona was asked by the PCAB to confirm whether the appellants' bandages were washable and resistant to ointments, the reply given was in the affirmative.

Ms Anna Debattista, Director Government Pharmaceutical Services (GPS), commenced her reply by quoting from the specifications and conditions of the tender issued by the Department of Contracts for the supply of Nylastic Bandages 15cm x 4.5m. She exhibited a number of samples of bandages provided by the appellants and the recommended tenderer.

Ms Debattista said that Messrs Indistrea's bid indicated that the product offered was *Prevideal* while the samples were labelled '*Nylastic Bandage*'. The Director GPS claimed that the samples should have been labelled with the same brand name. She emphasised that it was imperative for the Department to know at evaluation stage the exact product that was being offered. At this point, Dr A Cremona intervened by stating that the specifications stipulated that '*the wrapper or container of each individual bandage is to be labelled with the type of bandage*' and did not specify that they had to be labelled with the brand name.

When asked by the PCAB to state whether

- (i) the specifications stipulated that the wrapper had to be labelled with the brand name, and
- (ii) they requested a type or a brand

Ms Debattista replied that they

- (a) had to ensure that the sample was exactly the same product that would be supplied by the tenderer who would be awarded the contract, and
- (b) requested a bandage not a brand, respectively.

On the issue of compression, Ms Debatista acknowledged that 'adequate' was subjective once it had been stated that compression could not be tested.

With regard to the appellants' third grievance, the Director GPS claimed that there was no symbol on the sample indicating that it was washable. However, she agreed

that, in the specifications tenderers were not specifically, requested to submit relevant documentation.

Mr Paul Pace, who was the only technical member of the Adjudication Board, was the main witness in these proceedings. He gave his testimony under oath.

Mr Pace testified that during the adjudication stage, the Board members were always guided by the tender specifications and conditions, and confirmed that this tender was recommended for award to that bidder who had the cheapest technically compliant offer.

On cross examination by the PCAB, the witness said that the wrapper of the bandage which was not labelled by the name of the manufacturer was considered unbranded. He claimed that in this case the appellants' wrapper was labelled with the type of bandage and not with the brand name. The witness insisted that for health and safety reasons of the ultimate user, namely, the patient, (a) the Department did not purchase unbranded products and that (b) all goods supplied after award stage had to be identical to the samples provided at tendering stage. When his attention was drawn by the PCAB that such requirement should have been clearly stipulated in the specifications, the witness continued insisting that the samples should have been branded.

At this point, Ms Maria Attard, intervening on behalf of Engenuity, clarified that their wrappers were actually branded but the samples had been provided unbranded because they were only requested to indicate the type of bandage. Dr Cremona added that, ironically, his clients had removed the brand name from the wrapper because they were of the opinion that their offer could be excluded if they indicated the brand. Moreover, he said that they thought that all tenderers' samples were going to be unbranded so that, during their evaluation, the adjudicators would not be conditioned by the brand. The lawyer claimed that he was of the opinion that the tender specifications were written correctly as these were precisely intended for brand names not to be disclosed at that stage.

Dr Cremona remarked that he could understand Mr Pace's concern. However, the problem was that the technical specifications did not comply with his perception. He said that his clients were excluded because they were compliant.

The appellants' lawyer sustained that it was not true that there was no correlation between the documents and the labels on samples. Here, he made reference to the *Quotation, Declaration Sheet and Information Sheet C* and various certificates where specific reference was made to *Nylastic* Bandages and/or *Prevideal* and/or *Previs S.r.l.*

Dr Antoine Naudi, legal representative of Technopharma Ltd, declared that the word 'Nylastic' was a brand name of his clients' overseas principal supplier and that it was registered as such in Italy and Germany. He claimed that, though this trade mark was not registered in Malta, his clients had been importing this product for more than ten years and therefore they could be considered as having exclusive rights.

With regard to Engenuity's product, Dr Naudi said that when he browsed through the Previs' website, a Company which was locally represented by Ms M Attard, he found that they had four types of bandages, namely

- *light elastic*
- *compression elastic*
- *gauze* and
- *cohesive*

He said that none of the bandages under '*compression elastic*' had 65% cotton and 35% *Polyamide* as requested in the tender specifications. Dr Naudi said that, however, the product that met this requirement was *Prevideal* that was found under *light elastic* type of bandages. Thus, he argued that, once the composition of the '*compression*' was not compliant with the tender specifications, their offer should have been rejected. At this stage Dr Naudi tabled all relevant documents that he had downloaded from the *www.previs.it* website.

Dr Cremona responded by stating that such information should not be taken from websites because such issues were already addressed in their offer. Furthermore, he said that it had to be decided whether the recommended tenderer wanted to attack the validity of the tender or defend the validity of the award.

The Director, GPS declared that she was not aware that *Nylastic* was a brand name and said that if this was the case, then the issue was similar to the Securitainers' case (PCAB Case No 85).

Following, Dr Naudi's remarks, Mr Pace explained that there were three types of bandages having a light, medium or high compression. On cross-examination by the PCAB, the witness declared that the Adjudication Board preferred *Nylastic* bandages because these provided from moderate to high compression. He also said that if the appellants' samples were branded they would have considered such offer but he pointed out that their product did not have the same compression as *Nylastic*. The witness said that previous suppliers were not obliged to submit samples but it was necessary for them to confirm that the products would be provided as previously supplied.

In his concluding remarks Dr Cremona said that from the outcome of these proceedings it was evident that, albeit the good intentions of the adjudicators, the evaluation process was not appropriately carried out as it did not reflect the requirements expressly stipulated in the tender specifications.

The PCAB pointed out that the specifications in the tender documents needed to be clearly specified since tenderers were not expected to assume what was the perception of the Department's requirements. The same Board (the PCAB) also questioned the fact that Adjudication Boards included one technical member only which, in this instance, meant Mr Pace.

Ms Debattista advised those present that the Department was in the process of analysing and reviewing the technical specifications and the composition of the

Adjudication Boards. The Director, GPS reiterated that the Department did not want a particular brand but a bandage that provided adequate compression.

Dr Naudi contended that as the Adjudication Board was expected to abide by the tender specifications, similarly the appellants were also obliged to submit samples of products offered. He maintained that if they were going to provide *Prevideal* they should not have submitted a *Nylastic* sample.

Dr Cremona clarified that his clients did not submit the samples with a *Prevideal* label because of the brand name issue. He claimed that, apparently, it might have been procedurally, administratively and logistically easier for the Department to retain the same supplier. Finally, the appellants' lawyer said that, in the prevailing circumstances, he was of the opinion that the PCAB should revoke the decision to award the tender to Technopharma Ltd and instead recommend the award thereof to Engenuity.

At this stage the public hearing was brought to a close and the PCAB proceed with the deliberation before reaching its decision.

This Board,

- having noted that the appellants, in terms of their 'motivated letter of objection' dated 05.11.2007, and also through their verbal submissions presented during the public hearing held on the 18.04.2008, had objected to the decision taken by the General Contracts Committee;
- having taken full cognizance of the fact that the PCAB's remit is limited to what was specifically requested in the tender specifications;
- having taken note of the reasons given to the appellants by the Department of Contracts as to why their bid was rejected;
- having also taken note of the appellants' legal advisor's comment wherein it was remarked that, in his clients' opinion, the General Contracts Committee (GCC) had recommended the exclusion of the appellants' bid for failing to produce documentation which was never requested in the tender document;
- having noted Ms Debattista's comments, the appellants' counter arguments as well as the replies given by the former to the PCAB's clarifying questions relating to branding issues, as well as to matters relating to the adequacy of the compression of the bandage supplied to the Adjudication Board, particularly, wherein, in the latter's case, the subjective element was pivotal in the adjudication process;
- having also reflected on Mr Pace's testimony during which the PCAB noted that (a) the role of the said witness in the holistic composite of the Adjudication Board was highly influential, being considered by the other fellow members as the most suitably technical person to give an opinion, (b) despite (a), the same witness gave substantial demonstration of non-observance to the tender documents' terms and conditions, claiming in the process that his major *raison d'etre* was that the Department did not purchase unbranded products, insisting that, as a consequence, the appellants' samples should have been branded, despite the DG GPS's earlier claim that in the tender document the Department had requested a 'type' not a 'brand';

- having also reflected on Ms Attard's and Dr Cremona's claim that (a) ironically, the appellants had removed the brand name from the wrapper because they were of the opinion that their offer could have been excluded had they indicated the brand and (b) they thought that all tenderers' samples were going to be unbranded so that, during their evaluation, the adjudicators would not be conditioned by the brand;
- having considered Dr Naudi's observation regarding the fact that 'Nyalistic' is a brand name which has been exclusively imported for more than ten years by his clients, namely Messrs Technopharma Ltd, and, all this, within the context as quoted by Ms Debattista's intervention wherein she quoted from the specifications and conditions of the tender issued by the Department of Contracts for the supply of Nyalistic Bandages 15 cm x 4.5 m, following which she stated that she was not aware that 'Nyalistic' is a brand name.

reached the following conclusions, namely:

1. the PCAB notes that, given all the issues raised during the hearing relating to the 'Nyalistic' brand, it cannot but be critical of the lack of in-depth detail entered into by whoever wrote the specifications;
2. the PCAB observes the questionable situation whereby, occasionally, certain Adjudication Boards, include only one technical member, thus making the latter extremely pivotal in the ensuing deliberation process;
3. considering everything, the PCAB cannot but note that certain call for offers are being requested regardless of the fact that, *ab initio*, the Contracting Authority in question would be already inclined towards a particular brand and rather than issuing a 'direct order', the same Authority would opt for an 'open call' based on the premise that there could still be a possibility for other participants who avail themselves from parallel trading opportunities.

As a consequence of (1) to (3) above this Board finds in favour of the appellants and recommends that a fresh call be made.

In view of the above 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

28 May 2008