

PUBLIC CONTRACTS APPEALS BOARD

Case No. 171

Adv. No. 028/2009; CT/2149/2008; GPS 03148 T 07 DC Tender for the Supply of Paracetamol 500mg Tablets or Caplets

This call for tenders, which covered a contract period of three years and was for an estimated contracted value of € 66,044, was published in the Government Gazette on 23.01.2009. The closing date for this call for offers was 05.03.2009.

Five (5) different tenderers submitted their offers.

On 08.10.2009 *Ms Jane Mifsud (o.b.o Premiere Healthcare)* filed an objection following the decision taken by the Contracts Department to award the tender to *Pharmabart 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 18.11.2009 to discuss this objection.

Present for the hearing were:

Ms Jane Mifsud (o.b.o Premiere Healthcare)

Mr Kenneth Mifsud Representative

Government Pharmaceutical Services

Ms Anne Debattista Director
Mr Chris Treeby Ward Health Division Representative

Evaluation Committee:

Ms Miriam Dowling Chairperson
Ms Miriam Azzopardi Member

Pharmabart Ltd

Mr Alfred Barthet Representative

Department of Contracts

Mr Francis Attard Director General

After the Chairman's brief introduction, the appellant was invited to explain the motives of the objection.

Mr Kenneth Mifsud, representing Ms Jane Mifsud, the appellant, reported that by way of a letter dated 2nd October 2009, the Department of Contracts had informed them that their offer had been discarded since they did not submit the signed *Financial Identification Form*. Mr Mifsud explained that:

(a) he represented a small, family-run, entity and that he regarded it as rather unsafe to quote the account number on each and every tender that they participated in;

and

(b) in his view, the non-submission of the *Financial Identification Form* was not going to affect the core terms of the contract with regard to the supply and delivery of the goods.

The Chairman intervened and noted that the PCAB had just witnessed the appellant admitting that the requested form was not submitted. At this point the Chairman PCAB asked the appellant if he had sought the advice or guidelines either from the Contracts Department or from the contracting authority as to whether there would be any repercussions if this *form* was not submitted given that his entity was small and so forth.

Mr Mifsud remarked that they had participated in other tenders and no objections were ever raised in this regard. He added that, whereas the signed '*Financial Identification Form*', might have had a high degree of relevance in the case of large firms he did not consider it so relevant in the case of a tenderer who was an individual established in Malta.

The Chairman PCAB stated that, if the contracting authority, in the tender dossier, requested the submission of a document, or any other information for all that mattered, then that had to be submitted and stressed that it was not at the discretion of the tenderer to decide what to submit and what to omit. The PCAB placed emphasis on the fact that, in similar circumstances, there was no room for any cherry picking.

The Chairman PCAB proceeded by stating that the appellant's claim that his entity was small did not entitle it to be treated differently from the other bidders because it was the essence of the tendering system that all the bidders had to participate under the same conditions.

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 appellant, in terms of its 'motivated letter of objection' dated 08.10.2009, had objected to the decision taken by the General Contracts Committee;

- having taken cognisance of the appellant's representative's verbal submissions presented during the public hearing held on the 18.11.2009;

reached the following conclusions, namely:

1. The PCAB feels that the appellant did not observe any shortcomings on the part of the adjudication board because the latter had conducted its evaluation according to the tender conditions which, in turn, were influenced by local and EU regulations.
2. The PCAB noted that this was a clear case where the tenderer opted not to submit the requested document. The PCAB also argues that there is no point in emphasising more the fact that a tenderer is not allowed, at any stage, to exercise one's own discretion, e.g. deciding what to submit and what to ignore.
3. The PCAB opines that, if the appellant had any reservations about any issue, one could have easily resorted to addressing such issues by way of a clarification via the Contracts Department. Undoubtedly, not saying anything and then for one to decide to do what one feels pertinent is not acceptable.
4. The PCAB also feels that the appellant's claim, namely that the size of its entity was small, did not entitle it to be treated differently from the other bidders.

As a consequence of (1) to (4) above, this Board finds against the appellant and, in view of the above, and, in terms of the Public Contracts Regulations, 2005, this Board recommends that the deposit submitted by the appellant should be forfeited.

Alfred R Triganza
Chairman

Anthony Pavia
Member

Edwin Muscat
Member

23 November 2009