

## **PUBLIC CONTRACTS APPEALS BOARD**

### **Case No. 213**

**Adv. No. NP 24/2009; CT/2714/2009**

### **Tender for the Supply of Clindamycin HCL 150mg Tablets/Capsules**

This call for tenders was published in the Government Gazette on 12.01.2010. The closing date for this call for offers was 26.01.2010.

The estimated budget for this tender was € 16,888.

One (1) tenderer had originally submitted their offers

VJ Salomone Pharma Ltd filed an objection on the 13.05.2010 following notification received from the Contracts Department wherein the tenderer was informed that its offer was found non-compliant since “shelf life offered is not as that stated in the tender specifications and conditions”.

The Public Contracts Appeals Board composed of Mr Alfred Triganza as Chairman and Mr. Edwin Muscat and Mr. Carmel J Esposito as members convened a public hearing on Wednesday, 4 August 2010 to discuss this objection.

Present for the hearing were:

#### **VJ Salomone Pharma**

Dr Albert Grech	Legal Representative
Ms Vanessa Said Salomone	Representative
Ms Jackie Mangion	Operations Manager

#### **Government Health Procurement Services (GHPS)**

Ms Anne Debattista	Director
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#### **Adjudicating Board**

Ms Miriam Dowling	Chairperson
Ms Miriam Azzopardi	Member

#### **Department of Contracts**

Mr Francis Attard	Director General (Contracts)
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After the Chairman's brief introduction as to how the hearing was going to be conducted, the appellant was invited to explain the motive/s of the objection.

Dr Albert Grech, legal representative of VJ Salomone Pharma Ltd, the appellant Company, explained that by letter dated 7<sup>th</sup> May 2010, the Department of Contracts informed his client that his tender was found non-compliant because the shelf-life offered was "not as that stated in the tender specifications and conditions". Dr Grech stated that he found it hard to draw up his case in view of the scant information given by the Department of Contracts and, all the more, because his client was contending that he adequately satisfied the product's self-life requirement and he even went beyond what was requested in the tender document in that regard.

Dr Grech then referred to Annex VI – Technical and Special Conditions – 11 'Shelf life' which stated that:

*"The shelf life of the product must be clearly indicated in the Tender document submitted. Goods received at Government Health Procurement Services must not have their shelf life expired by more than one-sixth of their total declared shelf-life. Any infringement in this respect will render the tenderer liable to a penalty of 5% of the value of the consignment, together with any other damages suffered by the Government Health Procurement Services. When five-sixths of the total shelf life is less than 2 years, the tenderer must clearly state this on the tender documents. Products with a longer shelf life will be given preference. The Government Health Procurement Services reserves the right to refuse any consignment which does not satisfy these conditions."*

Dr Grech added that, in the tender submission, his client had indicated that the product it was offering had a shelf-life of 60 months and even entered a note to explain what would happen in certain circumstances that might arise. Dr Grech also mentioned the ruling dated 18<sup>th</sup> May 2010 given by the PCAB in respect of Case No. 198 CT/2360/09 which concerned the question of the shelf-life of a medicinal product.

Ms Anne Debattista, Director GHPS, remarked that the case being referred to by Dr Grech had quite a different background. She contended that, in this particular instance, the reason for disqualification was the inclusion on the part of the tenderer of certain parameters which did not feature in the published tender document and she went on to quote what the appellant stated in his submissions:

*"Please note that the shelf life of the product supplied is dependent on when the official order is confirmed. Manufacturing of this product takes place 2-4 times a year. Since this product has a 60 month full shelf life, the likelihood of expiry should not be an issue and we therefore confirm that we will replace stock in the event of expiry. However, the replacement will be on a pro-rata basis, depending on the short shelf life supplied. A 6-8 week delivery together with a 5/6th remaining shelf life may also be possible if a monthly forecast is given to us. This will enable us to plan our orders with production."*

Ms Debattista maintained that the restriction which read “*the replacement will be on a pro-rata basis, depending on the short shelf life supplied*” was unacceptable to GHPS.

The Chairman PCAB observed that it appeared that the appellant Company was undertaking to replace any stock that might expire, even though that was unlikely given the long shelf-life of the product.

Ms Vanessa Said Salomone, also representing the appellant Company, offered the following explanations:

- this product was manufactured two to four times a year, which was more or less the normal frequency with which manufacturers produced a medicinal product, and that the manufacturer kept a buffer stock in the warehouse;
- the 6 to 8 weeks delivery period, which was rather difficult when the product was manufactured two to four times a year, was still complied with;
- the moment the product was manufactured, the shelf-life of the product would start its countdown;
- the combination of the 6 to 8 weeks delivery period and the 5/6ths remaining shelf-life was also possible if the contractor would be furnished with a forecast of the orders so as to coordinate the orders with production;
- 5/6<sup>th</sup> of 60 months shelf-life worked out at 50 months or over 4 years, which was quite long when considering that the contracting authority was also considering products with a minimum 5/6<sup>th</sup> shelf-life of 2 years;
- ‘pro-rata’ replacements meant that if, for some reason, the contractor would supply part of a particular order with a less than the stipulated 5/6<sup>th</sup> remaining shelf-life then, if that part of the consignment (or part thereof) were to expire, the contractor was undertaking to replace that expired part of the order which originally did not conform with the 5/6<sup>th</sup> remaining shelf-life requirement. Such replacements were to be effected out of new manufactured batches - which normally took place 2 to 3 times a year and
- if the order was placed at the same time that the product was manufactured then the contracting authority would get the product with a 60 month shelf-life and that demonstrated the relationship between the date of placing the order and the shelf-life of the product.

Ms Debattista informed the PCAB that the annual consumption of this product was established at 114,800 capsules (Annex II) and that the GHPS usually put an order for this product every six months.

The Chairman PCAB observed that when one considered that the product had a 60 month shelf-life, the contractor was undertaking to effect replacements on a ‘pro-rata’ basis and that GHPS put orders at a six-monthly interval, then it would appear that

there were adequate safeguards that ensured that the contracting authority's interests were protected.

Ms Debattista explained that the statement that a 6 to 8 week delivery period was difficult to meet was not correct because, in the previous year, there were instances when VJ Salomone delivered this same product after 4 weeks, after 13 days and even after 2 days after the confirmation of order when the delivery period was fixed at 4 to 14 weeks after order confirmation. She further explained that until such time that the tender in question was awarded, the GHPS had to issue a departmental tender to bridge the gap which tender was awarded to VJ Salomone with the same 6 to 8 weeks delivery period and, in that instance, VJ Salomone did not impose any restrictions on the contracting authority. Ms Debattista confirmed that GHPS did not have any problems with VJ Salomone with regard to deliveries and that was the reason why GHPS became wary of the restriction inserted by the tenderer in the sense that it would make replacements on a 'pro-rata' basis.

The Chairman PCAB remarked that rather than a restriction, he considered the proposal put forward by the contractor as a further safeguard in the interest of the contracting authority. He added that it could be the case that the contractor, in the absence of being furnished with a forecast of the dates of orders, felt that one should make provision to cover that element of uncertainty. The Chairman PCAB remarked that given that (a) GHPS would place an order, roughly, every six months, (b) that the product was manufactured between 2 (6-monthly) and 4 (3-monthly) times a year, (c) that the product offered, having a 60 month shelf-life, after manufacture, could be stored for a period of up to 10 months (1/6<sup>th</sup> of its shelf-life) prior to starting the countdown of its 5/6<sup>th</sup> remaining shelf-life as requested in the tender, the chances that GHPS would end up with an expired product were quite remote.

Ms Debattista agreed that such an eventuality was rather remote so much so that the last consignment of this product would expire in November 2014. She added that during the execution of the previous contract there were instances during 2008 that the appellant Company delayed deliveries by 113 days, 115 days and 135 days but, on the other hand, during 2009 the appellants honoured three of the orders within 2 days, 13 days and 4 weeks. Ms Debattista confirmed that the appellant Company's submission was all in order and, in fact, it was identical to the current contract awarded to the same appellants, except for the 'pro-rata' replacement restriction. Ms Debattista remarked that, during 2007 and 2008, GHPS placed orders every six months but in 2009 GHPS decided to reduce the stocks it was holding in store and, as a result, placed four orders but for less quantities.

Dr Grech remarked that, occasionally, there were problems on the part of the manufacturer, such as machinery breakdown, which delayed production and, consequently, the delivery of the product. Dr Grech said that such circumstances were beyond the control of his client and, in any case, the contract imposed penalties for such delays.

Ms Said Salomone insisted that it was hard to adhere each and every time to the 6 to 8 weeks delivery period and the 5/6<sup>th</sup> remaining shelf-life restriction in the absence of a forecast of the dates of orders and that they had spelled out this sense of unease in the tender submission and to put the mind of the contracting authority at ease they were

undertaking to make replacements on a 'pro-rata' basis. Ms Said Salomone concluded that their proposal ensured that the contracting authority would always end up with a product having a shelf-life in conformity with the tender conditions.

Ms Debattista remarked that although the annual consumption of this product was quite stable, the placement of orders was dependent on when the demand actually occurred. She added that the GHPS did keep a buffer stock of medicines - even though it had been reduced over the previous 18-month period – and even the supplier and the manufacturer kept buffer stocks. Ms Debattista said that contrary to what the appellant Company was claiming, the 6 to 8 weeks delivery period was quite reasonable considering that certain contracting authorities overseas requested delivery periods of between 2 to 14 days.

Ms Debattista admitted that the contracting authority did not feel the need to ask for clarifications from the tenderer as to what it actually meant by 'replacements on a pro-rata basis' for the simple reason that the tender document did not provide for that type of restriction.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellants, in terms of their 'reasoned letter of objection' dated 18.05.2010 and also through their verbal submissions presented during the public hearing held on 04.08.2010, had objected to the decision taken by the General Contracts Committee;
- having taken note of the appellant Company's representatives' points raised, particularly, (a) the fact that the appellants' bid more than adequately satisfied the product's self-life requirement considering that the product it was offering had a shelf-life of 60 months, (b) the fact that this product was manufactured two to four times a year, which was more or less the normal frequency with which manufacturers produced a medicinal product, and that the manufacturer kept a buffer stock in the warehouse, (c) the fact that the combination of the 6 to 8 weeks delivery period and the 5/6ths remaining shelf-life was also possible if the contractor would be furnished with a forecast of the orders so as to coordinate the orders with production, (d) the fact that 'pro-rata' replacements meant that if, for some reason, the contractor would supply part of a particular order with a less than the stipulated 5/6<sup>th</sup> remaining shelf-life then, if that part of the consignment (or part thereof) were to expire, the contractor was undertaking to replace that expired part of the order which originally did not conform with the 5/6<sup>th</sup> remaining shelf-life requirement and (e) the fact that replacements mentioned in 'd' were to be effected out of new manufactured batches - which normally took place 2 to 3 times a year, ;
- having also taken note of Ms Debattista's (a) reference to the fact that , in this particular instance, the reason for disqualification was the inclusion on the part of the tenderer of certain parameters which did not feature in the published tender document, (b) claim that the restriction which read "*the replacement will be on a pro-rata basis, depending on the short shelf life supplied*" was

unacceptable to GHPS, (c) statement wherein, inter alia, she confirmed that GHPS did not have any problems with VJ Salomone with regard to deliveries and that was the reason why GHPS became wary of the restriction inserted by the tenderer in the sense that it would make replacements on a 'pro-rata' basis and (d) agreement to the fact that such an eventuality – that of ending up with expired stock - was rather remote so much so that the last consignment of this product would expire in November 2014;

reached the following conclusions, namely:

1. The PCAB opines that, considering the fact that the appellant Company was undertaking to replace any stock that might expire, albeit this was unlikely given the long shelf-life of the product, should have been considered as a positive sign rather than instigating an adverse reaction by the adjudication board.
2. The PCAB also feels that 5/6<sup>th</sup> of 60 months shelf-life worked out at 50 months or over 4 years, which was quite longer than the time period of time forming part of the tender document's specifications' requirements and the fact that GHPS put orders at a six-monthly interval, the contracting authority has more than adequate safeguards to ensure that it would be receiving supplies according to the terms set out in the tender document

As a consequence of (1) to (2) above this Board finds in favour of the appellant Company.

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

Alfred R Triganza  
Chairman

Edwin Muscat  
Member

Carmel J Esposito  
Member

*13 August 2010*