

PUBLIC CONTRACTS APPEALS BOARD

Case No. 216

Adv. No. 230/2009; CT/2141/2009; GPS 03.008.T09DC

Tender for the Supply of Teicoplanin 200mg Vials

This call for tenders was published in the Government Gazette on 16 June 2009. The closing date for this call for offers was 25 August 2009.

Two (2) offers were received from the same tenderer.

Charles de Giorgio Ltd filed an objection on the 20 November 2009 following notification received from the Contracts Department wherein the tenderer was informed that (a) its offer was rejected on being found non-compliant since "Form D was not filled and signed" and (b) the tender had been cancelled since none of the tenders were fully compliant with 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, 11 August 2010 to discuss this objection.

Present for the hearing were:

Charles de Giorgio Ltd

Dr Antoine Cremona	Legal Representative
Dr Julianne Portelli Demajo	Legal Representative
Mr David Stellini	Managing Director
Mr Ivan Laferla	Representative

Government Health Procurement Services (GHPS)

Ms Anne Debattista	Director
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Adjudicating Board

Ms Miriam Dowling	Chairperson
Ms Sharon Zerafa	Member

Department of Contracts

Mr Francis Attard	Director General (Contracts)
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After the Chairman's brief introduction the appellant was invited to explain the motive/s of the objection.

Dr Antoine Cremona, legal advisor of Charles de Giorgio Ltd, the appellant Company explained that his client had submitted two tenders, referred to as T1 and T2 in the Evaluation Report, and that this appeal had to do with tender T1. He added that, according to the Contracts Department letter dated 11th November 2009, his client's bid had been rejected because *Form D* was not filled in and signed. Dr Cremona pointed out that at the very beginning of *Form D* there was clearly indicated that this form had 'TO BE INSERTED IN ENVELOPE 3' and he agreed that it had to be included in envelope 3 since it contained details about the prices quoted. Dr Cremona stated that that was the reason why his client did not insert it in envelope 2 and that was the reason why the adjudicating board did not find it in envelope 2.

Dr Cremona remarked that his client felt that this was some kind of genuine mistake on the part of the Department of Contracts or of the adjudicating board and, as a result, he tried to sort it out through a clarification but the Department of Contracts insisted that in case of disagreement with its decision the bidder had to lodge an appeal.

Ms Anne Debattista, Director Government Health Procurement Services (GHPS), confirmed that there was an administrative oversight in the evaluation report because *Form D* had in fact to be submitted in envelope 3. She stated that this issue concerned administrative compliance. Ms Debattista remarked that this was one of the first tenders issued in the new format and that could have contributed to the oversight on the part of the adjudicating board.

Ms Debattista remarked that, according to the GHPS, apart from the admittedly erroneous reason relating to the non-submission of *Form D*, there was another reason for exclusion at technical evaluation stage concerning the shelf-life of the product.

Dr Cremona objected stating that his client had only been informed by the Contracts Department of the non-submission of *Form D* and that the issue concerning the shelf-life was only being raised then at the hearing. He insisted that this hearing should only deliberate on the reason for exclusion communicated to his client, i.e. the alleged non-submission of *Form D*, and that no other issues should be raised at that stage.

Ms Debattista remarked that it was the Department of Contracts which communicated the reason/s for exclusion to appellants. However, as far as the GHPS was concerned, the shelf-life issue had been made quite clear in the evaluation report. Ms Debattista even quoted from page 3 of the evaluation report:

“After discussing the individual conclusions of the Evaluators, the Evaluation Committee concluded that the following tenders – T1 and T2 - were technically non-compliant and should not be considered further.”

Mr Francis Attard, Director General Contracts, remarked that, unfortunately, it was often happening that following a call for tenders no tenders were being found compliant with the consequence that the tender would have to be cancelled and, if the tender concerned the provision of urgent/essential supplies or services, one had to

resort to the negotiated procedure. Mr Attard added that the negotiated procedure would be undertaken if no appeal were lodged or, in the case of an appeal being made, following the decision of the PCAB, whereby all the bidders would be given a new tender document and they would be invited to submit a new offer within 25 days taking care not to repeat the original shortcomings.

Mr Attard informed the PCAB that the Contracts Department, at the request of the bidder, would only provide that bidder with the part of the evaluation report that dealt with his offer but would not provide that bidder with the full evaluation report.

After verification it turned out that (i) the appellant Company was given the extract from the evaluation report that only dealt with the evaluation of its offer and (ii) in this case the appellant Company was the only tenderer – it submitted both offers, T1 and T2.

Ms Debattista reiterated that, as far as GHPS was concerned, i.e. irrespective of what the Contracts Department informed the appellant Company, there was the technical issue about the shelf-life of the product which was clearly indicated in the evaluation grids compiled by each of the three evaluators. The Director GHPS added that the technical non-compliance also emerged from page 3 of the evaluation report quoted earlier on.

Dr Cremona contended that during the hearing it had been established that the only reason for exclusion communicated to his client was the non-submission of *Form D*, which allegation turned out to be unfounded. As a consequence, he insisted that his client's bid should be reinstated in the tendering process and considered further for the award of the contract.

Ms Debattista referred to Annex VI – Technical and Special Conditions – clause 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.

In case of medicinals containing blood products, the shelf-life must not be more than two-thirds expired.”

Ms Debattista added that, according to the package insert and to the product registration, the sample presented with the appellant Company's offer had a shelf-life of 36 months unopened whereas in his tender submission the appellant Company had clearly indicated that it would be delivering at the GHPS the product with a 12 month

remaining shelf-life, which worked out at 1/3 of the product's full shelf-life whereas the tender specifications requested 5/6 remaining shelf-life. Ms Debattista remarked that the declaration of 12 months remaining shelf-life made by the appellant Company was manifestly in contravention of tender conditions – one third versus five-sixths remaining shelf-life - and that it left no room for any other interpretation and hence no need was felt for any clarifications in this respect.

Mr Stellini explained that on realising that the reason for exclusion was unfounded he had approached the Department of Contracts to revisit this case with a view to avoiding the filing of an appeal but his request was not met.

The Chairman PCAB observed that in this case (i) only one tenderer participated in the call for tenders and (ii) the issue of the shelf-life had not been communicated to the tenderer by the Contracts Department. He expressed the view that the contracting authority could have sought a clarification because, in any case, if, at a later stage, one were to resort to the negotiated procedure, as recommended in the conclusion of the evaluation report (page 6), then one would be dealing only with the appellant Company since it was the sole participating tenderer. The Chairman PCAB remarked that albeit the negotiated procedure should always be the last resort yet it was being observed that extensive use was being made of the negotiated procedure, which practice was rather disturbing.

Ms Debattista concluded that the GHPS had to evaluate tenders on the information submitted against the published tender specifications and conditions.

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 20 November 2009 and also through their verbal submissions presented during the public hearing held on 11 August 2010 had objected to the decision taken by the General Contracts Committee;
- having taken note of the points raised by the appellants' representatives, especially, (a) the fact that their bid had been rejected because *Form D* was not filled in and signed and this despite that this form had 'TO BE INSERTED IN ENVELOPE 3' since it contained details about the prices quoted, (b) the fact that they did not include this Form in envelope 2 when it was meant to be submitted in envelope 3 in view of the fact that it contained details about prices quoted, (c) the fact that, albeit the appellant Company tried to sort the issue out through a clarification, yet the Department of Contracts insisted that in case of disagreement with its decision the bidder had to lodge an appeal and (d) their objection to the fact that they had only been informed by the Contracts Department of the non-submission of *Form D* and that the issue concerning the shelf-life was only raised at the hearing;
- having also taken note of Ms Debattista's (a) admission that there was an administrative oversight in the evaluation report because *Form D* had in fact to be submitted in envelope 3, as stated by the appellants, (b) claim that there

was another reason for the appellant Company's exclusion at technical evaluation stage concerning the shelf-life of the product, (c) remark that it was the Department of Contracts which communicated the reason/s for exclusion to appellants and that, as far as the GHPS was concerned, the shelf-life issue had been made quite clear in the evaluation report, (d) claim that according to the package insert and to the product registration, the sample presented with the appellant Company's offer had a shelf-life of 36 months unopened whereas in its tender submission the appellant Company had clearly indicated that it would be delivering at the GHPS the product with a 12 month remaining shelf-life and (e) remark that the declaration of 12 months remaining shelf-life made by the appellant Company was manifestly in contravention of tender conditions – one third versus five-sixths remaining shelf-life - and that it left no room for any other interpretation and hence no need was felt for any clarifications in this respect;

- having taken note of Mr Attard's statement wherein he said that, unfortunately, it was often happening that, following a call for tenders, no tenders were being found compliant with the consequence that the tender would have to be cancelled and, if the tender concerned the provision of urgent/essential supplies or services, one had to resort to the negotiated procedure.

reached the following conclusions, namely:

1. The PCAB agrees with the appellant Company's decision not to submit 'Form D' in envelope 2 as this should have been inserted in envelope 3. The fact that the same contracting authority has admitted its error during the hearing supports the stand taken by this Board.
2. The PCAB feels that the fact that the issue concerning the shelf-life had not been communicated to the tenderer by the Contracts Department - thus depriving the said appellant Company from the right to adequately prepare itself for this hearing – should, normally, suffice for this Board to ignore the points raised on issues presented solely at this juncture. However, this Board feels that, regardless, the contracting authority could have, in the light of the way things transpired in this particular instance, sought a clarification from tenderer because it had two different claims made on the same issue by a tenderer in the same document.

It is becoming increasingly evident that adjudicating panels are regularly renegeing on their right to seek legitimate clarifications, thus, instead of contributing towards the smooth and effective running of a tendering procedure they end up stalling progress unnecessarily and causing huge financial and human capital problems amongst participating tenderers. Furthermore, rapidly taken decisions are leading to cancellations and negotiated procedures when, through a simple clarification exercise, the adjudicating process would be able to proceed in a smooth manner without tenderers having to lodge an appeal to justify what could be simply stated in a clarification note. This Board expects all parties to serve as 'gate keepers' and not simply seek the easiest way out without challenging anything.

3. The PCAB feels strongly about the fact that it seems to be turning into a quick fix solution for the General Contracts Committee to opt for cancellation of tenders and for the process to follow a negotiated procedure. This Board strongly points out that a negotiated procedure should always be seen as a last resort and not as a normal procedure and this in view of the fact that it could be wrongly interpreted with serious doubts being cast on one of the ultimate objectives, namely that of 'transparency', which should sustain all public procurement initiatives.

As a consequence of (1) to (3) 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

18 August 2010