

PUBLIC CONTRACTS APPEALS BOARD

Case No. 243

Adv No CT/A/436/2009; CT/2664/2009; GPS 07292TO9BB Tender for the Supply of Beta Interferon 1A Injections

This call for tenders was published in the Government Gazette on 24 November 2009. The closing date for this call for offers was 19 January 2010.

The estimated value of this tender was Euro 563,760.

One (1) tenderer submitted their offers.

Pharma.MT Ltd filed an objection on 17 June 2010 against the decision taken by the Contracts Department to the Contracts Department to (i) to reject its offer since it was found non-compliant due to the shelf-life of the product not being according to tender specifications and (ii) to cancel the tender.

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, 10 November 2010 to discuss this objection.

Present for the hearing were:

Pharma.MT Ltd

Dr Gerald Montanaro Gauci	Legal Representative
Mr Tony Nicholl	Representative

Government Health Procurement Services (GHPS)

Ms Anna Debattista	Director
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Adjudicating Board

Ms Miriam Dowling	Chairperson
Ms Miriam Azzopardi	Member

Contracts Department

Mr Francis Attard	Director General
Mr Franco Agius	Procurement Manager

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

Dr Gerald Montanaro Gauci, legal representative of Pharma.MT Ltd, the appellant company, opened his intervention by referring to Case No. 198, which he considered quite similar to the case in hand, and presented notes on the correspondence dated the 29th September and 3rd November 2010 exchanged between the Chamber of Commerce and Government (Department of Contracts) on the issue, among others, of the shelf life of medicinals.

Dr Montanaro Gauci submitted the following explanations:

- (i) his client had been supplying this product to the Health Department since 1994 and it had always been delivered with a remaining shelf life of two thirds (2/3);
- (ii) the shelf life of the product was 24 months and this product, due to its particular nature, had to be kept in quarantine prior to distribution;
- (iii) his clients had always fulfilled their contractual obligations over the years;
- (iv) Annex VI – Tender Technical and Special Conditions - Clause 11 of the tender document provided as follows:

The shelf life of the product must be clearly indicated in the Tender documents 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.

- (v) in Case No. 198, it had resulted that the product was going to be delivered with half (1/2) its shelf life whereas his client was offering a product with 2/3 of its shelf life remaining.

Mr Tony Nicholl, also representing the appellant company, remarked that:

- (a) although the product's shelf life was not clearly indicated in Annex III 'Financial Offer', it was readily available on the SPC of the product which had

already been submitted to the department with the sample since they were the current suppliers;

(b) worldwide, there was one manufacturer of this very specialised product, used for multiple sclerosis patients, and, upon manufacture, this product had to be held in quarantine for about 3 months prior to distribution so as to ensure its stability and, as a consequence, the product could not be delivered upon manufacture;

(c) there was an arrangement with the manufacturer to retain a stock of this product at all times so that the appellant company would avail itself of such stock whenever the department so requested since, occasionally, orders were placed by the latter in an erratic pattern;

(d) although the deliveries had to be effected between 6 to 8 weeks, in urgent cases, the appellant company even managed to deliver supplies within one week;

(e) in the circumstances, the appellant company could not adhere to the 5/6 remaining shelf life requested in the tender.

The Chairman PCAB observed that it appeared that the tender document did not reflect the realities on the ground. On the other hand, the PCAB's Chairman also saw it pertinent to remark that the tenderer could have sought a clarification from the contracting authority regarding the shelf life provision in the tender document with the view to enable the modification of that particular condition which, at that stage, would have made it possible for it to be applicable to all tenderers and this for the sake of transparency and level playing field.

On her part Ms Anne Debattista, Director GHPS, submitted that:

- i. there was an instance when the contracting company, to which Mr Nicholl was a party, had folded and the department was left with no supplier for a period of time and that was the cause when this medicine had ran out of stock;
- ii. the appellant company was the current supplier of this medicine and it has been the supplier for a number of years and, as such, it was not required to submit a sample with this tender;
- iii. the appellant company obtained this medicine from the same source even if this manufacturer, over the years, had changed its name a couple of times;
- iv. although it appeared that there is one manufacturer of this type of medicine, the department did not resort to a direct order but preferred to issue a tender because it argued that one could not vouch in absolute terms that there is no other similar manufacturer worldwide. Furthermore, the department also argued that there could also be more than one distributor/agent of this medicine;

- v. there was only one offer as a result of this call for tenders;
- vi. the department's initial decision was to recommend the rejection of the said tender as the only offer received was deemed to be technically non compliant in view of the fact that the shelf life offered was not in conformity with specifications;
- vii. always acting through the Contracts Department, a second recommendation was made for the contracting authority to opt for the negotiated procedure, obviously with the appellant company since it was the only participating tenderer;
- viii. the department had attempted to seek a clarification from the appellant company with respect to the information given on the shelf life of the product in *Annex III*, however, the Contracts Department had advised the cancellation of the tender.

When the PCAB questioned the use of lodging an appeal in such circumstances, Mr Nicholl explained that, by letter dated 11th June 2010, the Contracts Department informed him that his company's offer was not compliant and that the tender was being cancelled but no mention was made as of the proposal to go for the negotiated procedure. Mr Nicholl added that, in those circumstances, his company's only option was for its representative to lodge an appeal. At this point Mr Nicholl remarked that, had he known that the negotiated procedure was being contemplated, he would not have appealed at all.

Mr Francis Attard, Director General (Contracts), under oath, offered the following explanations:

- (i) once the contracting authority had categorically adjudicated the tender as non compliant, the Contracts Department saw no purpose in seeking any clarifications and, as a result, that is why the cancellation of the tender was recommended;
- (ii) procedurally, the negotiated process commenced (a) following the cancellation of the tender which decision and motivation has to be communicated to all participating tenderers and (b) only after the appeal procedure would have been exhausted;
- (iii) the negotiated procedure consisted of a meeting with all participating tenderers where the shortcomings of each tenderer would be divulged and, at that same meeting, a tender document would be handed over to tenderers, this time, to be submitted within 15 days instead of the usual 52 days. This, continued Mr Attard, would be regarded like a fresh call for tenders and, in the process, the contracting authority could amend the original tender document if it turned out that it was impossible to obtain the supply with those original specifications.

(iv) albeit, in this case, there happened to be only one participating tenderer, yet, the full process had to be followed.

Ms Debattista, intervened and stated that, being fully aware that the hearing was dealing with this particular tender, she saw it pertinent to remark that the department was adjudicating another tender for this same product and the appellant company was indicating that it could offer the product with a remaining shelf life of between 5/6 and 2/3.

Ms Debattista stated that (a) it was normal practice for medicinals to be subjected to quarantine prior to distribution and (b) in cases when medicines would have been supplied not strictly according to the specified shelf life, then, generally, the contractor who would have had to undertake to exchange any eventual expired stock, will have to do so unless all the stock would have already been consumed, in which case there would be no need for such action to be taken.

Dr Montanaro Gauci appealed to the PCAB to apply to this case the same line of reasoning that it applied to Case No. 198.

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 17 June 2010 and also through their verbal submissions presented during the public hearing held on 10 November 2010 had objected to the decision taken by the General Contracts Committee;
- having taken note of the appellant company’s (a) claim that they had been supplying this product to the Health Department since 1994 and it had always been delivered with a remaining shelf life of two thirds (2/3), (b) remark in connection with the fact that although the product’s shelf life was not clearly indicated in Annex III ‘Financial Offer’, it was readily available on the SPC of the product which had already been submitted to the department with the sample since they were the current suppliers, (c) claim that, worldwide, there was one manufacturer of this very specialised product, used for multiple sclerosis patients, and, upon manufacture, this product had to be held in quarantine for about 3 months prior to distribution so as to ensure its stability and, as a consequence, the product could not be delivered upon manufacture, (d) claim that the appellant company had an arrangement with the manufacturer to retain a stock of this product at all times so that the company would avail itself of such stock whenever the department so requested since, occasionally, orders were placed by the latter in an erratic pattern, (e) claim that, in the circumstances, the appellant company could not adhere to the 5/6 remaining shelf life requested in the tender, (f) claim that in the letter dated 11th June 2010 sent by the Contracts Department, the latter informed the appellant company that its offer was not compliant and that the tender was being cancelled; (g) claim that no mention was made in the letter mentioned in the preceding reference as regards the proposal for the evaluation process to continue through a negotiated procedure and (h) claim that, in the

circumstance, the company had no other alternative but to file an appeal against the decision reached by the Contracts committee insisting that had the company known that the negotiated procedure was being contemplated, it would not have appealed at all;

- having also taken note of the contracting authority's (a) reference to the fact that there was an instance when the contracting company, to which Mr Nicholl was a party, had folded and the department was left with no supplier for a period of time and that was the cause when this medicine had ran out of stock, (b) reference to the fact that the appellant company was the current supplier of this medicine and it has been the supplier for a number of years and, as such, it was not required to submit a sample with this tender, (c) claim that, although it appeared that there is one manufacturer of this type of medicine, the department did not resort to a direct order but preferred to issue a tender because it argued that one could not vouch in absolute terms that there is no other similar manufacturer worldwide, (d) reference to the fact that there was only one offer as a result of this call for tenders and (e) reference to the fact that, whilst the department's initial decision was to recommend the rejection of the said tender as the only offer received was deemed to be technically non compliant in view of the fact that the shelf life offered was not in conformity with specifications, yet, acting through the Contracts Department, the same contracting authority opted for a negotiated procedure (with the appellant company since it was the only participating tenderer) to be embarked upon;
- having duly considered DG Contracts' (a) explanation of issues relating to the process to be followed in a negotiated procedure, (b) claim that once the contracting authority had categorically adjudicated the tender as non compliant, the Contracts Department saw no purpose in seeking any clarifications and, as a result, that is why the cancellation of the tender was recommended and (c) reference to the fact that, albeit, in this case, there happened to be only one participating tenderer, yet, the full process had to be followed

reached the following conclusions, namely:

1. The PCAB expresses the view that, at tendering stage, the tenderer could have formally sought a clarification from the contracting authority regarding the shelf life provision in the tender document with a view to enable the modification of that particular condition which, at that stage, would have made it possible for such modification to be made applicable to all tenderers and this for the sake of transparency and a level playing field amongst all bidders.
2. The PCAB agrees with DG Contracts' rendition of facts and explanations submitted by the latter during the hearing, especially the fact that, although it may sound bureaucratic, yet, even within the context of this tender, the full process had to be followed.
3. The PCAB places emphasis on the fact that, over the years, it has, repeatedly, pronounced itself that, despite one's reservations as to the mandatory requirements of a given term or condition as stipulated in a tender document,

unless otherwise agreed with the pertinent contracting authority via the Department of Contracts, a tenderer cannot simply renege on fulfilling such requirements in an arbitrary manner and then expect for one's submission to proceed in a normal manner with the evaluation process.

As a consequence of (1) and (3) above this Board finds against the appellant company.

In view of the above and in terms of the Public Contracts Regulations, 2005, this Board, while fully cognisant of the responsible manner in which this appeal has been filed, yet, in full cognisance of the parameters envisaged in the same regulations, recommends that the deposit submitted by the said appellants should not be reimbursed.

Alfred R Triganza
Chairman

Edwin Muscat
Member

Carmel J Esposito
Member

17 November 2010