PUBLIC CONTRACTS APPEALS BOARD

Case No. 181 and Case No. 182

Case No. 181 - Objection 1

Advert No. CT 256/2008 – CT 2209/2008 – GPS.02.191.T.07.MH
Call for the Supply of ISPAGHULA HUSK

Objection filed by Charles de Giorgio Ltd

Case No. 182 - Objection 2

Advert No. CT 256/2008 – CT 2209/2008 – GPS.02.191.T.07.MH
Call for the Supply of ISPAGHULA HUSK

Objections filed by Pemix Ltd

The closing date for this call for tenders which, was for a contracted estimated value of € 87,125.55, was 22.01.2009.

Three (3) different tenderers submitted their offers.

Following the publication of the 'Notification of Recommended Tenderers', Messrs *Charles de Giorgio Ltd* and *Pemix Ltd*, respectively and, separately, filed a formal objection (Ref. 181 – notice of objection dated 13.11.2009 *and* Ref. 182 – notice of objection dated 17.11.2009) against the award of the tender in caption to Messrs *Clinipharm Co Ltd*

The Public Contracts Appeals Board (PCAB) made up of Mr Alfred Triganza (Chairman) with Mr Anthony Pavia and Mr Carmel Esposito, respectively, acting as members, convened a public hearing on the 20 January 2010 to discuss these objections.

Present for the hearing were:

Charles de Giorgio Ltd.
Mr David Stellini — Managing Director

Pemix Ltd.
Mr Joe Camilleri — Managing Director
Ms Maria Gatt — Medical Field Manager

Clinipharm Co Ltd
Mr Kevin Farrugia — Managing Director
Dr Patrick Valentino — Legal Representative

Government Health Procurement Services (GHPS)

Ms Anne Debattista	Director, GHPS

Evaluation Committee

Ms Miriam Dowling	Chairperson
Ms Sharon Zerafa	Member

Department of Contracts

Mr Francis Attard	Director General (Contracts)

Hearing

At the beginning of the public hearing, the Chairman, Public Contracts Appeals Board (PCAB) made a declaration wherein he stated that until about eight (8) years ago he was employed with Pemix Ltd, one of the appellant companies. Yet, continued the PCAB Chairman, since then, he did not have any connections whatsoever with this company. At this point the PCAB Chairman asked all those interested parties present at the said hearing to state whether they had any objection for him to chair these proceedings as, should they have had any reservations he was willing to step aside. All those present replied in the negative. At this point the PCAB Chairman thanked all those present for their confidence.

At the commencement of proceedings, the PCAB Chairman explained that since these two objections concerned the same call for tenders it was decided that a joint hearing should be held. Notwithstanding, elaborated the Chairman, the parties concerned were also informed that in spite of this, the two cases would be dealt with and decided upon separately.

The Chairman, PCAB then invited the representative of Messrs Charles de Giorgio Ltd and Pemix Ltd to explain the motive which led them to lodge their respective objections.

Objection raised by Charles de Giorgio Ltd

Mr David Stellini, General Manager, Charles de Giorgio Ltd, explained that their offer was disqualified because they offered a product with a shelf-life of 18 months.

With regard to the recommended tenderer's offer, namely that of Clinipharm Co Ltd, he maintained that the 3% discount granted on deliveries of 9,000 packs should not have been taken into consideration in the computation of their financial offer because such a quantity was equivalent to the estimated yearly consumption and Government Health Procurement Services (GHPS) did not purchase full year quantities at one go. Furthermore, Mr Stellini said that their offer was cheaper than that of the proposed bidder because the latter's offer was the third most expensive offer.

Apart from the above, he alleged that, as already explained in their motivated letter of objection dated 13 November 2009, the offer of the recommended tenderer was deficient/ incomplete for the following reasons, namely,

- the tenderer did not indicate the pack size which according to the technical specifications had to be between 3.5g and 5.0g;

- the tenderer did not include the *Total CIF Price for 3 years* and the *Total delivered to stores price for 3 years*;

- the tenderer did not submit any sample;

- the three years shelf-life of the Clinipharm Co Ltd's product was dubious because this was equivalent to the total shelf life of the product and this was not 5/6th remaining at the time of delivery as requested in the tender; and

- no *Customs Tariff Number* was indicated.

Mr Stellini said that the procedure being followed by the GHPS in the award of contracts was different from that being adopted by the Contracts Department. He claimed that, in case of Departmental Tenders, if the delivery period and the shelf life was not in accordance with the specifications, bidders were asked whether they could meet the delivery period or the 5/6th shelf life, and if the reply given was in the affirmative, they would be awarded the tender. However, in the case of tenders administered by the Contracts Department, it was a fact that whenever tenderers are not 100 % compliant with the specifications, they are immediately being disqualified. He elaborated that, until very recently, the praxis was that tenderers could deviate from specifications and were still awarded the contracts. Yet, recently, the Department of Contracts decided that tenders had to be 100% compliant otherwise they would be rejected. He was of the opinion that, once this tender was filled in accordance with the previous praxis, it should qualify.

In reply to a specific question by the PCAB, Messrs Charles de Giorgio Ltd's representative, declared that they had access to Clinipharm Co Ltd's offer because when an offer was not straightforward and/or clear, in this case it had the discount element, it was scanned and uploaded on the Department of Contracts' website, and therefore it was in the public domain.

Objection raised by Pemix Ltd

Mr Joe Camilleri, Managing Director, Pemix Ltd, concurred with almost all the points mentioned by Mr Stellini. He said that, considering the fact that their product was Spanish and the packaging had to be produced, specifically, for Malta's product, they sought advice from their Spanish principals regarding the delivery period. Mr Camilleri stated that his firm was advised to increase the delivery period as suggested in the tender specifications by two weeks. Yet, Mr Camilleri continued, despite the fact that they drew their principals' attention that this would render their offer non-compliant with the specifications, the same principals advised Ms Maria Gatt, Pemix Ltd's Medical Field Manager, to write whatever they thought it was relevant and suitable for their offer.

Mr Camilleri said that none of the tenderers was 100% compliant and they could not understand how a tender could be awarded to a tenderer whose offer was about €10,000 more expensive than theirs.

In reply to a specific question by the PCAB, Ms Gatt confirmed that there were several other occasions where the delivery periods did not match those specified in the tender and yet they were awarded the tender. She claimed that there were instances where they were asked whether they agreed to extend the binding period even though this was different from that requested in the tender document.

Government Health Procurement Services (GHPS)

Ms Anne Debattista, Director GHPS, sustained that not all tenders had the same requirements and conditions. She said that, in this particular instance, the tender document under Clause 11 *Shelf Life* of the *Special Conditions* under the *Technical Conditions* it was specified that:

> *"The shelf life of the product must be clearly indicated in the Tender documents submitted. Goods received at the 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."*

Ms Debattista said that Charles de Giorgio Ltd's offer was disqualified because they offered a shelf-life of a minimum of 18 months, which was half the shelf life of the product.

As regard Pemix Ltd's offer, the Director GHPS confirmed that they had the cheapest offer. However, she said that their offer was not recommended for award because in the Evaluation Board's report it was stated that the '*Status of product (medicine or food supplement) has not been determined yet*' and that delivery period indicated in their offer was 12 – 14 weeks which was not as specified in the tender document, that is, 8 – 12 weeks.

The PCAB intervened and drew Ms Debattista's attention that the only reason given by the Department of Contracts in their letter dated 11 November 2009 as to why the appellant Company's offer was not recommended was that "*the tender submitted by* them "*was not successful as it was technically non-compliant since the submitted delivery period was not as requested in the tender dossier*".

Continuing, Ms Debattista stated that, on the basis of the same arguments that the offer of the recommended tenderer was incomplete, Pemix Ltd's offer could not, therefore, be classified as being fully compliant because it also had missing information in respect of Customs Tariff Number and % (rate) of Customs Duty and VAT.

The PCAB said that this was irrelevant to the case because the only reason for exclusion that was communicated to Pemix Ltd was that concerning the delivery period.

When the PCAB asked Ms Debattista to elaborate on the issue regarding the status of the product, she explained that in the tender there were two forms: one for medicinal products (ANNEX IV) and the other for non medicinal products (ANNEX V). She said that in case of the latter, Clause 5.2 *Medical Devices, Food Supplements, Chemicals and Disinfectants* under *A. Technical Conditions* of *ANNEX VI TENDER TECHNICAL AND SPECIAL CONDITIONS* stipulated that:

> *The necessary documentation as determined by the competent authority in Malta is to be submitted by the tenderer.*

She said that once Pemix Ltd's product was offered as a food supplement, they had to abide by this requirement.

At this point, Ms Gatt intervened to explain that when in September 2009 they contacted the Malta Standards Authority (MSA) about the matter, the latter informed them that they could not declare it as a food product unless the Medicines Authority certified it as a non-medicinal product. Ms Debattista remarked that, when MSA were approached by Pemix Ltd, the Evaluation Board's report had already been drawn up. Ms Gatt replied by stating that they received a declaration from the Medicines Authority confirming that this product was non medicinal on the same day they received the letter from the Contracts Department regarding the delivery period.

With regard to delivery period, Ms Debattista said that in this particular tender Annex II: Item Description stipulated that:

> *"DELIVERY: Within 8 to 12 weeks from confirmation of order at GHPS Marsa Stores*
>
> *In instances when the delivery period of the recommended offer is in excess of that indicated above, GHPS reserves the right to request prospective tenderer to reduce delivery period. It is at the discretion of GHPS to accept deliveries in excess of 12 weeks.*
>
> *Minimum order quantities are not acceptable to GHPS. It is at the discretion of GHPS to accept or reject offer."*

She confirmed that in this case they did not ask Pemix Ltd whether the product could be delivered within the period stipulated in the tender because they did not submit the necessary documentation regarding the classification of their product as a non medicinal product. Ms Debattista pointed out that she always exercised her discretion or sought clarification after obtaining necessary approval from the Director General (Contracts).

As regards the allegation made by appellant Company, namely that the Clinipharm Co Ltd's tender was not fully compliant, Ms Debattista clarified that:

- the shelf life indicated was 3 years;
- the recommended tenderer, being the current supplier, did not need to submit a sample with their offer because *para (i)* of *Clause 7.1 Medicinal Products*

under *Samples and Literature* stipulated that '*Only present supplier at the time of offer need not submit a representative sample';*

- with regards to
    - the prices, the recommended tenderer wrote the amount of *Unit C.I.F. Price* under 1st Year, 2nd Year and 3rd Year and under *Unit Price delivered to stores/site* they wrote *A/B* (As Above)
    - pack Size - on *Annex IV - Declaration Sheet for Medicinal Products* they clearly indicated 3.5g / sachet per 4.31g sachet
    - delivery period of 8 – 12 weeks was compliant
    - the product 'per se' it was registered as a medicinal product

Ms Debattista also stated that nobody was contesting the fact that the offer by Clinipharm Co Ltd was more expensive than that of Pemix Ltd or that of Charles de Giorgio Ltd. She explained that central Government placed orders for similar stock depending on consumption and that Clinipharm Co Ltd gave a 3% discount on deliveries of 9,000 packs of 30 sachets. At this point, the PCAB drew Ms Debattista's attention to the fact that if GHPS ordered less than 9,000 packs the discount would not be applicable.

The Director GHPS said that the local regulatory authorities, namely the Medicines Authority and Malta Standards Authority, registered this product as medicinal or food supplement on the basis of manufacturers' documentation because, although the active ingredient was the same, this could be presented by manufacturers either under the medicines regulations or food regulations. She maintained that such approval would not be issued if part of the analysis carried out by the local regulatory authorities showed a discrepancy somewhere.

When asked to state whether they were after a medicinal product or a food product, she replied that they wanted Ispaghula Husk, which was fibre preparation for constipation.

In reply to a specific question by the PCAB, Ms Debattista said that in this case the customs tariff had no relevance because if the product (medicinal or food) was imported from an EU country it was zero rated (0%) and if it was imported from outside the EU it was liable to Customs Duty. Mr Stellini intervened by stating that this was the reason why, in their opinion, Clinipharm Co Ltd should have written down the % rate in their offer.

Ms Debattista said that although the *Total CIF Price for 3 years* was not indicated, it was sufficient for bidders to indicate the unit price because orders were made according to requirements and since in *Annex III – Financial offer* it was specified that '*Prices must be worked out as requested, otherwise offer may not be considered'*.

On Mr Stellini's request, Ms Debattista said that the total annual consumption was 271,200 sachets and the proposed bidder quoted a price of €2.89 whilst Messrs

Charles de Giorgio Ltd quoted a price of €2.48 per pack (1 pack = 30 sachets of 3.5g each). Mr Stellini said that, in their offer, Clinipharm Co Ltd did not indicate whether the €2.89 referred to one sachet or one pack and that was the reason why they were stating that their offer was incomplete.

Clinipharm Co Ltd

Dr Patrick Valentino, legal representative of Clinipharm Co Ltd, said that he was preoccupied because

(i) their tender was uploaded on the website *and*
(ii) Messrs Charles de Giorgio Ltd did not appeal against not being awarded the tender but because his client's offer was allegedly deficient/ incomplete.

As regards the global price, the lawyer said that in the tender document it was stated that, if the prices were not worked out, the offer 'may not be considered' (not "*shall not be considered"*). He contended that the GHPS was interested in the unit price and not the global price because the amount of orders varied according to requirements. The PCAB intervened to draw the recommended tenderer's legal advisor's attention to the fact that the discount factor was also subject to deliveries of 9,000 packs of 30 sachets.

When Dr Valentino stated that if they took into consideration the discount their offer would be the cheapest, Ms Debattista clarified that the offer of the recommended bidder would still not be the cheapest because the prices were worked out according to the Central Bank of Malta's middle rate of exchange at the closing date of tender. However, their offer was considered fully compliant.

With regard to the shelf life, Dr Valentino said that this was one of the factors that were taken into consideration during the evaluation process because whenever the product is delivered to GHPS the tender specifications demanded that it should still have 5/6th of the total shelf life of three years remaining.

Mr Kevin Farrugia, Managing Director of Clinipharm Co Ltd, said that the MA Registration Number indicated in their offer confirmed that this product qualified as a medicinal. He explained that there had to be a rigorous process for a product to be classified as such because the Medicines Authority had to analyse various dossiers and documentation submitted by foreign principals / suppliers before issuing the MA registration number. On the other hand, if the product was a food supplement, the tenderer had to submit supporting documentation from the MSA confirming such classification.

Ms Gatt intervened to state that when Pemix Ltd passed on the product to MSA they were informed that they had to submit a declaration from the Medicines Authority that it was considered as a non-medicinal product. She said that, subsequently, MSA issued a certificate that the product was classified as a food supplement.

Continuing, Mr Farrugia said that *Annex II: Item Description* specified that

> *"A complete and detailed quality control analysis report showing that the consignment/s being supplied comply with the B.P./B.P.C./E.P./U.S.P. standards (or a quality control analysis report acceptable to the Director of Public Health, if the former is not available) is to be submitted with each consignment"*

Therefore, proceeded Mr Farrugia, if the product was 'medicinal' it had to comply with the above *Pharmacopoeia* standards and if it was not medicinal, tenderers had to provide a certificate from MSA that it satisfied Public Health requirements. Yet, regardless of all this, argued the recommended tenderer's representative, in this particular instance, the necessary documentation was not submitted by the tenderer.

Mr Farrugia said that, once his Company's offer was fully compliant, he could not understand why their offer should not be accepted.

Mr Stellini reiterated that for many years there had been the praxis that if the shelf life and delivery periods were not according to those specified in the tender document they were not disqualified. He said that during a meeting held at the Department of Contracts, towards the end of last year, those present were informed that if a tender document was not filled in completely and accurately (including delivery periods and shelf life) such offers would be considered as not compliant and, as a consequence, disqualified.

Witnesses

At this point Mr Francis Attard, Director General (Contracts) was asked to take the witness stand. He gave his testimony under oath.

On cross examination by Mr Stellini, Mr Attard confirmed that a meeting was held in November or December 2009. Elaborating on the type and scope of meeting, Mr Attard declared that this information meeting was not held, specifically, for 'medicinal' tenders only but it was a general meeting wherein they explained to all interested parties how tender forms had to be filled in because it was being noted that a number of bidders were not abiding by the tender conditions. The Director General (Contracts) contended that it was illegal to ask bidders to amend tenders at evaluation stage.

In reply to specific questions by the representatives of Clinipharm Co Ltd, the Director General (Contracts) confirmed that no new regulations were issued and that the scope of holding this information meeting was to address the deficiencies being noted in the tenders submitted. It was emphasised that this was an informative meeting wherein it was explained how tenderers should fill in the tender documents and that it had nothing to do with the selection process.

When asked by the PCAB to confirm or otherwise, the Director General (Contracts) did not exclude the possibility that in previous tenders the conditions were not mandatory as regards delivery periods and so, in such circumstances, it was possible to accept amendments.

When Mr Attard was asked by the PCAB to state whether the financial offer of Clinipharm Co Ltd, as submitted at Annex III, was acceptable, the reply given was that the most important was the unit price. Mr Stellini intervened to remark that, in accepting this situation, a precedent was being created because it was being implied that a tender would not be disqualified if the total price or customs tariff was not filled in. Mr Attard said that only those tenderers who did not abide by the tender conditions were disqualified. Furthermore, in reply to a specific question by the PCAB, the Director General (Contracts) said that if there was no specific condition in the tenders that specifically stated that in those instances where such information was not filled in a tender would be disqualified, such tenders would not be disqualified.

With regard to the reason why the recommended tenderer's financial offer was uploaded on the Department of Contracts' website, Mr Attard testified that there were certain instances where the bidder's financial offer was so complicated, even to record it on the schedule that they had to scan the relevant document and upload it on their website. This was done for transparency's sake and to avoid arbitrary interpretations.

At this point Ms Anna Debattista, Director GHPS was asked by the PCAB to take the stand.

Mr Stellini asked Ms Debattista to confirm whether, in the past, various Contracts Department's tenders were awarded to them even though the delivery period and shelf life were different from those stipulated in the tender conditions. Under oath, the Director GHPS replied by stating that the Department had always adjudicated tenders within the parameters of the relative published tender conditions. It was explained that clauses with the words '*may be considered'* or '*reserves the right'* permitted them to request prospective tenderers to amend offers. She emphasised that such line of action was always taken after obtaining the Director General (Contracts)'s approval.

In reply to Mr Stellini's statement that the procedure adopted for Departmental Tenders was different from that of the Contracts Department's tenders, Ms Debattista said that any question was asked within the parameters of the tender conditions.

During Ms Debattista's testimony Dr Valentino stated that the delivery period was not the decisive factor because there were other elements which were more important, such as, the price and the quality of the product. In reply to a specific question by the recommended tenderer's lawyer, Ms Debattista said that, in their evaluation, they took into consideration (a) the Department's requirements, (b) the tender conditions and, particularly, (c) the patients' needs because these would suffer most if tenders were not awarded.

Mr Camilleri said that the fact that on 10 August 2009 they were requested to submit a certification from MSA gave one to understand that they were considering their offer. The PCAB commented that if such supporting documentation was not submitted with the tender as stipulated in the tender conditions, no Evaluation Board had a right to ask for mandatory documentation that was missing or to amend offers after closing date of tender.

Referring to the question of submission of the said certificate, Ms Debattista clarified that GHPS wrote to Pemix Ltd in August 2009 because the file was received at GHPS

for adjudication in July. Furthermore, she explained that they contacted the tenderer after the closing date because there was a clause in the tender which stated that they had a 6-week period from the closing date of the respective tender or from the date of request from the Director General of Contracts / Director GPS within which they could obtain certain information.

Mr Camilleri said that it was impossible for them to submit the requested certification within such a short period because the procedure was lengthy.

Dr Valentino pointed out that, according to the tender requirements, the product had to be in conformity with the tender specifications.

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 letters of objection' dated 13.11.2009 (*Case No. 181*) and 17.11.2009 (*Case No. 182*) respectively, and also through their verbal submissions presented during the public hearing held on the 20.01.2010, had objected to the decision taken by the General Contracts Committee;

- having noted that the appellant tenderer (Case No. 181) was claiming that the procedure being followed by the GHPS in the award of contracts was different from that being adopted by the Contracts Department with the former being more lenient than the latter, wherein tenderers whose bid is not 100 % compliant with the specifications are immediately being disqualified;

- having also noted that the appellant Company (Case No. 182) claimed that, despite its manifested concern that their offer could be rendered as non-compliant, yet these were convinced by their foreign suppliers to extend the term of the delivery period by two weeks;

- having considered the fact that both appellants claimed that, in other similar instances, where the delivery periods as presented by various tenderers did not match those specified in the tender yet they were awarded the tender;

- having also thoroughly considered the content of Clause 11 paying particular attention to the phrases (a) "*Goods received at the 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"*, (b) "*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"* and *(c)"The Government Health Procurement Services reserves the right to refuse any consignment which does not satisfy these conditions."*, especially within the context of the Director GHPS's own admission wherein she stated that Charles de Giorgio Ltd's offer was disqualified because

they offered a shelf-life of a minimum of 18 months, which was half the shelf life of the product;

- having noted that, albeit Pemix Ltd's offer was the cheapest, yet according to the Ms Debattista's claim, the delivery period indicated in their offer was 12 – 14 weeks which was not as specified in the tender document, that is, 8 – 12 weeks;

- having also heard that, in spite of the fact that it was not an official reason for Pemix Ltd's offer to be declined, yet, internally, the Evaluation Board's report had submitted that the said tenderer's offer also failed to state the status of the product, namely whether the latter was a medicine or food supplement, which rendered the appellant Company's offer (Case No. 182) incomplete;

- having also considered the fact that, subsequent to the submission of their offer, and, following a specific request made by the GHPS to Pemix Ltd, the latter had sought a clarification from local authorities in order to provide pertinent clarification as to whether their product was to be classified as a medicine rather than a food supplement or vice versa, a declaration they eventually received from the Medicines Authority confirming that this product was non medicinal, ironically, on the same day they received the letter from the Contracts Department regarding the delivery period;

- having heard Ms Debattista claim that, in this particular tender, *Annex II : Item Description* stipulated that ... "*DELIVERY: Within 8 to 12 weeks from confirmation of order at GHPS Marsa Stores" ... "In instances when the delivery period of the recommended offer is in excess of that indicated above, GHPS reserves the right to request prospective tenderer to reduce delivery period. It is at the discretion of GHPS to accept deliveries in excess of 12 weeks"*, giving particular attention to the phrases (a) DELIVERY: Within 8 to 12 weeks from confirmation of order at GHPS Marsa Stores, (b) GHPS reserves the right to request prospective tenderer to reduce delivery period *and* (c) It is at the discretion of GHPS to accept deliveries in excess of 12 weeks ;

- having heard Director GHPS explain that clauses with the words '*may be considered*' or '*reserves the right*' permitted the GHPS to request prospective tenderers to amend offers;

- having also noted Director GHPS state that the Department did not ask Pemix Ltd whether the product could be delivered within the period stipulated in the tender because they did not submit the necessary documentation regarding the classification of their product as a non medicinal product;

- having taken full cognizance of the claim made by GPHS's representative with regard to the recommended tenderer's offer;

- having taken note of the Director GHPS's reply wherein, when asked to state whether they were after a medicinal product or a food product, she replied that they wanted *Ispaghula Husk*, which was fibre preparation for constipation;

- having reflected on the points raised by Dr Valentino and Mr Farrugia in defence of the recommended tenderer's offer, as well as, the comments and arguments made by both the appellant Companies and the GHPS;

- having taken particular note of the recommended tenderer's reference to "*A complete and detailed quality control analysis report showing that the consignment/s being supplied comply with the B.P./B.P.C./E.P./U.S.P. standards (or a quality control analysis report acceptable to the Director of Public Health, if the former is not available) is to be submitted with each consignment",* which, according to the said tenderer implied that, if the product was 'medicinal' it had to comply with the above *Pharmacopoeia* standards and if it was not medicinal, tenderers had to provide a certificate from MSA that it satisfied Public Health requirements;

- having also heard comments relating to the content of a meeting held at the Director General (Contracts) wherein, whilst the appellant Company (Case Ref. 181) claimed those present were informed that if a tender document was not filled in completely and accurately (including delivery periods and shelf life) such offers would be considered as not compliant and, as a consequence, disqualified, yet the DG (Contracts), under oath, albeit confirming that a meeting was held in November or December 2009, yet also declared that this information meeting was not held (a) as a result of some new regulations being issued ***and*** (b) for 'medicinal' tenders only, but it was a general meeting wherein they explained to all interested parties how tender forms had to be filled in because it was being noticed that a number of bidders were not abiding by the tender conditions;

- having reflected on Dr Valentino's statement wherein he stated that the delivery period was not the decisive factor because there were other elements which were more important, such as, the price and the quality of the product;

- having also noted Mr Camilleri's claim that it was impossible for them to submit the requested certification within such a short period because the procedure was lengthy,

reached the following conclusions, namely:

1. The PCAB acknowledges that, whilst the conditions of the tender specifications reflect the requirements and parameters as desired by the contracting authority, yet these should be stated in a way as to render such specifications unequivocal. Furthermore, content should not be essentially contradictory with contracting authorities using terms like "shall", "may" and so forth and then having Evaluation Boards ending up applying such instances with forced rigidity. This is tantamount to utter incongruence in 'modus operandi' as well as utter confusion amongst participating tenderers.

2. The PCAB is not convinced that the GHPS was fully in tune as to whether to follow previously acknowledged praxis in similar tenders or abide by stringent observance of conditions as observed in this particular instance. The PCAB cannot comprehend how, in one instance, a contracting authority claims that a particular document is considered mandatory, so much so that, eventually, the

non-submission of same by a participating tenderer is enough reason for the latter to be excluded from the adjudication process, when, at the same time, prior to formally doing so, the same contracting authority goes as far as to request the same tenderer to submit a certification from MSA.

The Board reiterates the stand taken during the same hearing wherein it adversely commented against such 'modus operandi' placing major emphasis on the fact that, if such supporting documentation was not submitted with the tender as stipulated in the tender conditions, no Evaluation Board had a right to ask for mandatory documentation that was missing or to amend offers after closing date of tender. It is the PCAB's opinion that all this reflects that the GHPS was confused as to which adjudication methodology to follow, namely, the one said to have been observed previously which used to be more flexible or the one being observed now which 'seems' to be more stringent giving leeway solely to the contracting authority depending on its own circumstances, such as, not previously anticipated depletion or slow movement of stock levels.

3. The PCAB finds the content of Clause 11 as, somewhat, contradictory. Tender specifications should clearly reflect what is acceptable or not, but not evidence contradictory phrases such as "*must not have their shelf-life expired by more than one-sixth of their total declared shelf-life" ...* followed by "*when five-sixths of the total shelf-life is less than 2 years, the tenderer must clearly state this on the tender documents" ...* and, this duly followed by *"The Government Health Procurement Services reserves the right to refuse any consignment which does not satisfy these conditions"*. In the PCAB's opinion, such phrases could create confusion as to whether the application of parameters are to be abided by 100% by a participating tenderer and, possibly, face exclusion should the latter refrain from doing so, whilst the contracting authority could, possibly, become flexible with its own declared parameters in case where it suits itself, e.g. sudden depletion of stock levels.

4. Regardless of (3) above, the PCAB cannot agree with both appellants' arbitrary way of deciding when and how one should deliver or submit formal supporting documentation. Praxis should not preclude observance of tender specifications and conditions.

5. The PCAB, whilst agreeing in principle with appellant Company (Case Ref. No. 182) that the taxpayer should not pay unduly for something which one could buy cheaper, yet also acknowledges that the lowest price principle in public procurement is not to be taken as the only guidance, e.g. in similar circumstances, the most economically advantageous tender principle often applies.

6. The PCAB considers the fact that, albeit not officially stated as a non-compliant issue, yet the fact that an Evaluation Board, during the adjudication process, could not trace whether the product being offered by appellant Company (Pemix Ltd) was a medicine or food supplement, as pivotal within the context of the tender specifications in question. The non-submission of the said document is considered by this Board as a clear oversight by appellant Company.

7. This Board is of the opinion that one could say that, in this instance, the GHPS's Evaluation Board's 'modus operandi' left to be desired and, through its inconsistent approach, namely confusing (a) praxis resorted to until recently with (b) rigid observation of tender specifications as demanded by the Contracts Department, has given rise to an anomalous scenario. Yet, this Board has always maintained that tenders should be governed by tender documents' specifications and not praxis. As a result, considering that during the hearing nothing convinced the PCAB against the recommended tenderer's suitability to be awarded the tender, this Board finds no reason to overturn the Evaluation Board's award recommendation

As a consequence of (1) to (7) above, this Board:

1. cannot uphold the objection (Case No. 181) as lodged by appellants

2. cannot uphold the objection (Case No. 182) as lodged by appellants

Albeit this Board finds against appellants, yet it is also fully cognizant of the fact that both appellants could have been somewhat misguided as to which 'modus operandi' one should follow even though this Board acknowledges only one specific 'modus operandi', namely that based on observation of tender specifications and not praxis. As a consequence, in view of the above and in terms of the Public Contracts Regulations, 2005, this Board recommends that the deposit paid by both *Messrs Charles de Giorgio Ltd* (Case No. 181) and *Messrs Pemix Ltd* (Case No. 182) should be refunded.

Alfred R Triganza	Anthony Pavia	Carmel J Esposito
Chairman	Member	Member

9 February 2010