

PUBLIC CONTRACTS REVIEW BOARD

Case No. 348

GHPST/1022/10

Tender for the Supply of Fluorescine Ophthalmic Strips

This call for tenders was published in the Government Gazette on 29th October 2010. The closing date for this call with an estimated budget of €13,189.53 was the 29th November 2010.

Three (3) tenderers submitted their offers.

Cherubino Ltd filed an objection on the 30th June 2011 against the decision by the Ministry of Health, the Elderly and Community Care to disqualify its tender submission as technically not compliant and to recommend award to V.J. Salomone Pharma Ltd. since unable to strip open offered without compromising sterility.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr Edwin Muscat and Mr Carmel Esposito as members convened a public hearing on Wednesday, 2nd December 2011 to discuss this objection.

Present for the hearing were:

Cherubino Ltd

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| Dr Francil Basile Cherubino | Legal Representative |
| Mr Thomas Dimech | Representative |

V.J. Salomone Pharma Ltd

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| Mr Christopher Treeby | Ward Representative |
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Ministry of Health, the Elderly and Community Care

Government Health Procurement Services

Adujdicating Board

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| Ms Miriam Dowling | Chairperson |
| Ms Josette Camilleri | Secretary |
| Mr Mark Debono | Member |
| Ms Antonia Azzopardi | Member |
| Mr Franco Mercieca | Member |

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

Dr Francil Basile Cherubino, legal representative of Cherubino Ltd, the appellant company, made the following submissions:

- i. by letter dated 23rd June 2011 the Government Health Procurement Services had communicated to his client that the company's offer was not successful since one was unable to strip open item offered without compromising sterility;
- ii. his client held that the contention of the contracting authority was unfounded and, to reinforce its claim, the company had sought further information from its overseas supplier, HUB Pharmaceuticals, a renowned entity in this field, which in turn submitted that:

“The HUB Pharmaceuticals Bioglo strip is properly opened by following the directions on the box, then our strip is maintained in a sterile form. The instructions indicate that the paper pouch is to be torn about the midway point of the pouch by tearing each side of the pouch towards the middle without tearing the strip itself. The one end is held between two fingers of one hand and the other end held between two fingers of the other hand and pulled apart. This leaves you with holding the exposed end of the strip that has not been touched by human hand because you are holding part of the pouch and the "non" dye end of the strip with the dye end exposed at the other end.”
- iii. what, apparently, happened was that, in opening the strip, the contracting authority's users did not follow the instructions displayed on the product such that it was being opened from the upper part instead of from the middle part of the pouch;
- iv. if opened according to instructions, the strip would retain its sterility, which, admittedly, was essential since the strip was used on the patient's eye;
- v. his client's representative, also present at the hearing, offered to perform a demonstration on his lap top to the Public Contracts Review Board and to the members of the adjudicating board as to the proper way the product the company he represented was offering was to be opened; and
- vi. contended that his client's product was fully compliant and the cheaper one at €11,583.

Ms Miriam Dowling, chairperson of the adjudicating board, informed the Public Contracts Review Board that, albeit Ing. Karl Farrugia, CEO, Central Procurement and Supplies Unit – Ministry of Health, the Elderly and Community Care, was supposed to attend the hearing, yet, although he had indicated that he would be present he failed to turn up at the hearing.

At this point the Chairman made it clear that the Public Contracts Review Board did not take lightly the attitude of witnesses not turning up at its hearings when notified to do so and warned that the Public Contracts Review Board had the legal means to compel a witness to attend its hearing. The Public Contracts Review Board was making it clear that, in future, it will not be tolerating any similar behaviour by Ing. Farrugia and, should this happen again it will avail of the powers it has been vested with in order to ensure that its operations are in no way arbitrarily disregarded by any party.

Mr Franco Mercieca, a member of the adjudicating board, remarked that:

- a. he could not recall whether the appellant's 100 sample strips were provided in their original box but he confirmed that as an evaluator he was not given the instructions as to how the item offered by the appellant company had to be opened;
- b. the 100 pouches provided by the appellant company were given out to medical staff, the ultimate users, to try them out and the general comment they received from these users was that they generally complained that, on tearing the upper part of the pouch, the strip came into contact with their fingers and, thus, the sterility was compromised; and
- c. he did not exclude the likelihood that the staff who used the sample strips provided by the appellant company opened them in the same manner as they used to open such strips that had hitherto been provided to them, namely by tearing open the upper part of the pouch instead of the middle part and thus compromising the sterility of the strip.

Ms Dowling remarked that the instructions as to how to open the pouch containing the strip was made available by the appellant company on lodging the appeal and she even went through the original tender submission of the appellant company but could not trace these instructions.

Dr Cherubino stated that the instructions as to how to open, which he claimed must have somehow been submitted with the tender submission, was not, in itself, a technical specification, namely, his client did, after all, provide the item requested up to specifications, so much so that the tender document did not stipulate that the product had to be opened in a particular manner.

Mr Thomas Dimech, also representing Cherubino Ltd, performed a brief laptop demonstration to the Public Contracts Review Board and to the members of the adjudicating board as to how this strip should be opened.

Mr Mercieca remarked that the contracting authority would not be contrary to the use of the strips provided by the appellant company now that they have been furnished with these specific instructions as to how the strips had to be opened which, as demonstrated, did not appear to compromise the sterility of the strips.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellant's company, in terms of the reasoned letter of objection dated 30th June 2011 and through the verbal submissions made during the hearing held on the 2nd December 2011, had objected against the decision by the Ministry of Health, the Elderly and Community Care to disqualify its tender submission as technically not compliant and to recommend award to V.J. Salomone Pharma Ltd. since unable to strip open offered without compromising sterility;
- having noted the appellant firm's representatives claims and observations regarding the fact that (a) by letter dated 23rd June 2011 the Government Health Procurement Services had communicated to the appellant company that its offer was not successful since one was unable to strip open item offered without compromising sterility, (b) the contention of the contracting authority was unfounded and, to reinforce its claim, the company had sought further information from its overseas supplier, HUB Pharmaceuticals, (c) what, apparently, happened was that, in opening the strip, the contracting authority's users did not follow the instructions displayed on the product such that it was being opened from the upper part instead of from the middle part of the pouch, (d) if opened according to instructions, the strip would retain its sterility, which, admittedly, was essential since the strip was used on the patient's eye, (e) the appellant company's representative, also present at the hearing, offered to perform a demonstration on his lap top to the Public Contracts Review Board and to the members of the adjudicating board as to the proper way the product the company he represented was offering was to be opened, (f) the appellant company's product was fully compliant and the cheaper one at €11,583 and (g) the instructions as to how one should open a pouch was not, *per se*, a technical specification and, as a consequence, no one could deny that the appellant company had provided the item requested up to specifications, especially in consideration of the fact that the tender document did not stipulate that the product had to be opened in a particular manner;
- having considered the contracting authority's representative's submissions, namely that (a) evaluators were not given the instructions as to how the item offered by the appellant company had to be opened, (b) the 100 pouches provided by the appellant company were given out to medical staff, the ultimate users, to try them out and the general comment the evaluation board received from these users was that they generally complained that, on tearing the upper part of the pouch, the strip came into contact with their fingers and, thus, the sterility was compromised, (c) one could not exclude the likelihood that the staff who used the sample strips provided by the appellant company opened them in the same manner as they used to open such strips that had hitherto been provided to them, namely by tearing open the upper part of the pouch instead of the middle part and thus compromising the sterility of the strip, (d) the instructions as to how one should open the pouch containing the strip was made available by the appellant company on lodging the appeal and (e) the contracting authority would not be contrary to the use of the strips provided by the appellant company now that they have been furnished with these specific instructions as to how the strips had to be opened

which, as demonstrated during the hearing, did not appear to compromise the sterility of the strips,

reached the following conclusions:

1. The Public Contracts Review Board does not take lightly the attitude of witnesses not turning up at its hearings when notified to do so and warned that it had the legal means to compel a witness to attend its hearing. Furthermore, the same board was making it clear that, in future, it will not be tolerating any similar behaviour by Dr Karl Farrugia and, should this happen again, it will avail of the powers it has been vested with in order to ensure that its operations are in no way arbitrarily disregarded by any party.
2. The Public Contracts Review Board agrees with the appellant company's contention, namely that what, apparently, happened was that, in opening the strip, the contracting authority's users did so from the upper part instead of from the middle part of the pouch.
3. The Public Contracts Review Board, whilst acknowledging that the instructions as to how one should open the pouch containing the strip was made available by the appellant company on lodging the appeal, yet it also concurs with the appellant company's claim that the instructions as to how one should open a pouch was not, *per se*, a technical specification and, as a consequence, no one could deny that the appellant company had provided the item requested up to specifications, especially in consideration of the fact that the tender document did not stipulate that the product had to be opened in a particular manner.
4. This Board also acknowledges the fact that the contracting authority would not be contrary to the use of the strips provided by the appellant company now that they have been furnished with these specific instructions as to how the strips had to be opened which, as demonstrated during the hearing, did not appear to compromise the sterility of the strips.

In view of the above this Board finds in favour of the appellant company and recommends that, apart from the appellant company's offer being reinstated in the tendering process, the deposit paid by the latter should be reimbursed.

Alfred R Triganza
Chairman

Edwin Muscat
Member

Carmel Esposito
Member

9th December 2011