

## PUBLIC CONTRACTS REVIEW BOARD

Case No. 408

GHPST/928/11

**Tender for the supply of Cyclosporin 100 mg capsules**

This call for tenders was published in the Government Gazette on the 28<sup>th</sup> October 2011. The closing date for this call – which attracted no fewer than two (2) tenderers - with an estimated budget of € 119,952.77 was the 14<sup>th</sup> November 2011.

Messrs Cherubino Ltd filed an objection on the 3<sup>rd</sup> April 2012 against the decision of the Government Health Procurement Services to recommend for award the tender to Messrs VJ Salomone Pharma Ltd.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr. Joseph Croker and Mr Paul Mifsud as members convened a public hearing on Friday 11<sup>th</sup> May 2012 to discuss this objection.

Present for the hearing:

### **Cherubino Ltd**

Dr Adrian Delia	Legal Representative
Mr David Basile Cherubino	Representative
Dr Marcello Basile Cherubino	Representative
Mr Francis Basile Cherubino	Representative

### **V J Salomone Pharma Ltd**

Dr Arthur Galea Salomone	Legal Representative
Dr Tiziana Filletti	Legal Representative
Mr Adrian Salomone	Representative
Ms Jacqueline Scerri	Representative
Mr Michael Sultana Loporto	Representative

### **Government Health Procurement Services**

Mr Franklin Camilleri	Pharmacist
Ms Bernardette Rossi	Department of Pharmaceutical Affairs

### **Evaluation Board**

Ms Miriam Dowling	Chairperson
Mr David Baldacchino	Member
Mr Mark Spiteri	Member
Ms Sonya Bonnici	Member
Ms Audrey Sciberras	Secretary

### **Contracts Department**

Ms Marisa Gauci	Representative
-----------------	----------------



In his opening intervention, the Chairman Public Contracts Review Board suggested to those present that, considering that both Case Ref. GHPST/410/11 (PCRB No. 407) and Case Ref. (PCRB No. 408) dealt with the same subject matter it would have been more practical for the Board to convene both hearing sessions together thus avoiding unnecessary duplication. Nevertheless, the Chairman Public Contracts Review Board placed emphasis on the fact that the cases will be decided upon separately.

Following preliminary clarifications all parties agreed with the Board's proposal.

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

Dr Adrian Delia, legal representative of Cherubino Ltd, the appellant company, made the following submission:-

- i. his client was informed by letter dated 28<sup>th</sup> March 2012 that the firm's offer had been disqualified for not offering *Neoral* and that the tender was recommended for award to V J Salomone Pharma Ltd;
  - ii. in this call for tenders the contracting authority amended the technical specifications applicable to tender GHPST/410/11 in such a way as to exclude generic products by eliminating reference to 'bioequivalence' so much so that the amended specifications read as follows, namely,  

*'Cyclosporin 100 mg soft gelatine capsules in a microemulsified formulation (Neoral (R), Novartis). The capsules should be presented in blister packs'*
  - iii. therefore, the contracting authority ended up issuing a tender requesting only the originator drug so much so that the reason given by the Government Health Procurement Services in the letter of rejection dated 28<sup>th</sup> March 2012 was that his client's product was not up to specifications since he did not offer *Neoral*® - the originator drug;
  - iv. his client's product was the only generic drug that not only provided evidence of bioequivalence but also met the bioavailability test, namely the way in which the originator capsule was made up and presented;
  - v. his client had submitted documentary evidence to this effect but, apparently, it was overlooked by the contracting authority;
- and
- vi. it was not regular to issue a call for tenders for one particular product/brand

At this point the Public Contracts Review Board made the following observations and comments:-

- a. the cancellation date of the first call for tenders (GHPST/410/11) was communicated to bidders on the 16<sup>th</sup> December 2011;

- b. the date of publication of this second call for tenders was 28<sup>th</sup> October 2011;
- c. the issue of urgency did not justify this kind of action especially given the length of time taken to adjudicate the first call for tenders and that in an emergency one could have recourse to a direct order;
- d. the Government Health Procurement Services should not have issued a fresh call for offers when an identical call for tenders was still being evaluated and which was subject to appeal;

and

- e. as a consequence, the call for tenders with reference number GHPST/928/11 should be considered null


At this point the hearing was brought to a close.

This Board,

- having noted that the appellants, in terms of their 'letter of objection' dated 3<sup>rd</sup> April 2012 and also through their verbal submissions presented during the hearing held on the 11<sup>th</sup> May 2012, had objected to the decision taken by the pertinent authorities;
- having noted all of the appellant company's representative's claims and observations, particularly, the references made to the fact that (a) the appellant company was informed by letter dated 28<sup>th</sup> March 2012 that the firm's offer had been disqualified for not offering *Neoral* and that the tender was recommended for award to V J Salomone Pharma Ltd, (b) in this call for tenders the contracting authority amended the technical specifications applicable to tender GHPST/410/11 in such a way as to exclude generic products by eliminating reference to 'bioequivalence', (c) the contracting authority ended up issuing a tender requesting only the originator drug so much so that the reason given by the Government Health Procurement Services in the letter of rejection dated 28<sup>th</sup> March 2012 was that the appellant company's product was not up to specifications since he did not offer *Neoral* ® - the originator drug, (d) the appellant company's product was the only generic drug that not only provided evidence of bioequivalence but also met the bioavailability test, namely the way in which the originator capsule was made up and presented, (e) the appellant company had submitted documentary evidence to this effect but, apparently, it was overlooked by the contracting authority and (f) it was not regular to issue a call for tenders for one particular product/brand,

reached the following conclusions, namely:

1. The Public Contracts Review Board contends that the sole fact that the cancellation date of the first call for tenders (GHPST/410/11) was communicated to the bidders on the 16<sup>th</sup> December 2011 when, at the same time, the date of publication of this second call for tenders (GHPST/928/11) was the 28<sup>th</sup> October 2011, rendered the issue of the second call as a vitiated exercise in its own right. Undoubtedly, this Board observes that the issue of urgency did



not justify this kind of action especially given the length of time taken for the first call for tenders to be evaluated.

2. The Public Contracts Review Board contends that the Government Health Procurement Services committed a huge administrative and operational error when it resolved to issue a fresh call for offers when an identical call for tenders was still being evaluated and which was subject to appeal according to the legal provisions governing public procurement.
3. This Board cannot but express its reservations on the pertinent authority's 'modus operandi' when similar administrative blunders are allowed to happen.

In view of the above, this Board considers the issue of this second call - reference number GHPST/928/11 - as null and void and recommends that the said appellant company be reimbursed the deposit it paid to lodge the appeal.



Alfred R Triganza  
Chairman



Joseph Croker  
Member



Paul Mifsud  
Member

28<sup>th</sup> May 2012