



The Chairman made a brief introduction and invited appellant's representative to identify his client and to make the necessary submissions.

Dr Matthew Paris on behalf of the appellant said that his client was Promec Company Limited. He explained that his client was raising concerns about Clause 7.7 of the tender which he contended that discriminates against Maltese Companies. The clause states that *"A tenderer established in Malta must be duly licensed as a pharmaceutical wholesale dealer by the competent authority in Malta. When a tenderer is not established in Malta he may appoint a pharmaceutical wholesale dealer duly licensed by the competent authority in Malta in order to act on his behalf to import the medicinal product into Malta and to deliver the product to the Central Procurement and Supplies Unit. In this respect, Part II and Part III of Declaration in the Technical Section of the tender structure are to be duly filled in"* thus this clause discriminates in favour of foreign firms, both European or not who, can rely on the capacities of other licensed entities while Maltese firms are precluded from relying on the capacities of other entities that are duly licensed. He stressed that all companies bidding in tenders should be treated equally, and this has been confirmed many times by jurisprudence, by the Public Procurement Regulations and by the tender document itself. Article 52 of the Public Procurement Regulations allows economic operators to rely on the capacity of other entities. Even the tender document itself states that bidders can rely on the capacities of other entities. This is contradictory to the Clause 7.7. Certain safeguards are understandable but discrimination against Maltese companies is not just.

Engineer Karl Farrugia on behalf of the contracting authority said that the authority was for the opening of the market for bidder and was for implementing what was suggested by appellant provided that the Department of Contracts did not object because of sub-contracting and if the product imported is also registered here in Malta. The contracting authority had no difficulty in implementing this since it wanted to be more competitive unless there were specific objections by the Department of Contracts.

Dr Matthew Paris on behalf of the appellant said that he is not saying that sub-contracting would be resorted to but that there would be reliance on an other entity's licence. The appellant had to resort to this pre-contractual procedure because the period allowed for asking clarifications had lapsed. Whatever applied to foreign companies should hold good also to Maltese companies.

Engineer Karl Farrugia for the contracting authority said that this had no objection to implementing this principle.

At this point the hearing was closed.

**This Board,**

**Having noted Appellant's 'Pre-Contractual' objection, in terms of the 'Reasoned Letter of Objection' dated 23<sup>rd</sup> April 2014 and also through Appellant's verbal submissions during the hearing held on 13<sup>th</sup> May 2014, had objected to the wording as stated in Provision 7.7 of the tender document, in that:**

- a) **The mentioned provision 7.7 as stated in the tender document does in fact discriminate in favour of Foreign Companies. Appellant contends that this provision should be re-drafted to allow Maltese established tenderers to appoint**

**a pharmaceutical wholesale dealer duly licensed by the competent authority in Malta, in order to act on his behalf to import, the medicinal product into Malta and to deliver the product to the Central Procurement and Supplies Unit.**

- b) The re-drafting of the above mentioned clause will rectify the situation so that Foreign and Maltese tenderers will be treated equally.**

**Having considered the Contracting Authority's verbal submissions during the hearing held on 13<sup>th</sup> May 2014, in that:**

- a) It is the Contracting Authority's intention to abide by Appellant's contentions however, great consideration needs to be taken so as not to create a leeway for 'subcontracting'.**

**Reached the following conclusions:**

- 1. This Board opines that Proviso 7.7 of the tender document should be modified to address:
  - i) A level playing field for all bidding tenderers, whether Local and Foreign ones.**
  - ii) All bidders can rely on the capacity of other licensed operators.****
- 2. From the submissions made by both the Appellant Company and the Contracting Authority, this Board notes that there exists a consensus between the involved parties that there should be a re-drafting of proviso 7.7 of the tender document to rectify any form of discrimination between Local and Foreign Bidders.**

**In view of the above, this Board recommends the necessary modification to Proviso 7.7 of the tender document so that the tendering process can continue.**

**Dr. Anthony Cassar  
Chairman**

**Dr. Charles Cassar  
Member**

**Mr. Lawrence Ancilleri  
Member**

*26 May 2014*