

PUBLIC CONTRACTS REVIEW BOARD

Case 1022 – CT 2242/2015 – Tender for the Supply of Non Ionic Contrast Medium for Cardioangiography Containing 350-370Mg Iodine per ml

The Publication Date of the Call for Tenders was 11 December 2015 whilst the Closing Date for Call of Tenders was 21 January 2016. The Estimated Value of the Tender, (Exclusive of VAT) was € 1,134,300.00.

Three (3) Bidders have submitted six (6) offers for this Tender.

On 27 January 2017, Pharma-Cos Ltd filed an Objection against the decision of the Central Procurement and Supplies Unit to award the Tender to Alfred Gera & Sons Ltd for the price of € 685,512 for Lot 2 (Exclusive of VAT) against a deposit of € 8,316.

On 9 February 2017, the Public Contracts Review Board composed by Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Carmel Esposito as members convened a Public Hearing to discuss the Objection.

The Attendance for this Public Hearing was as follows:

Appellant – Pharma-Cos Ltd

Mr Elton Mamo	Representative
Mr Claudio Martinelli	Representative
Mr Marcel Mifsud	Representative
Ms Martina Pace	Representative
Dr Matthew Paris	Legal Representative

Recommended Bidder – Alfred Gera & Sons Ltd

Ms Anne Curmi	Representative
Ms Yanika Gatt	Representative

Contracting Authority – Central Procurement and Supplies Unit

Mr Tonio Farrugia	Chairperson, Evaluation Board
Ms Danika Agius Decelis	Member, Evaluation Board
Mr Adrian Spiteri	Member, Evaluation Board
Ms Alison Anastasi	Representative
Ms Federica Spiteri Maempel	Representative
Mr Mark Zammit	Representative
Dr Stefan Zrinzo Azzopardi	Legal Representative

Department of Contracts

Ms Alicia Vella-Lethridge	Procurement Manager
Dr Christopher Mizzi	Legal Representative

Other Interested Parties

Dr Adrian Delia	Legal Representative, Cherubino Ltd
Dr Danica Caruana	Legal Representative, Cherubino Ltd

The Chairman stated that since there were 2 objections filed against this award – one appellant, Pharma-Cos Ltd, was objecting to the award of Lot 2 while Cherubino was objecting against the cancellation of Lot 1 as well as the award of Lot 2, the two cases would be heard simultaneously with the relevant decisions being handed out separately.

Following this introduction by The Public Contracts' Review Board Chairman, Dr Anthony Cassar, the Appellants were invited to make their submissions.

Dr Adrian Delia, the Legal Representative for Cherubino Ltd, an interested party within this Appeal, requested whether it was possible for the Public Contracts Review Board to treat the objections filed from both Cherubino Ltd and Pharma-Cos Ltd together given that they were both objecting to the decision given with regards to Lot 2 by the Central Procurement and Supplies Unit for which the Public Contracts Review Board agreed following the approval of the Department of Contracts and Central Procurement and Supplies Unit's Legal Representatives.

Dr Matthew Paris, the Legal Representative for Pharma-Cos Ltd opened by saying that they were appealing on Lot 2 and therefore all of their submissions were related to this lot. The first part of their Objection was about a request for cancellation. Dr Paris referred to Article 8.1 of the General Rules Governing Tenders Version 1.13 issued on 26 August 2015 by the Department of Contracts which stated,

“Tenders must remain valid for a period of 90 days after the deadline for submission of Tenders indicated in the contract notice, the Tender Document or as modified in accordance with Clause 10.1. Any Tenderer who quotes a shorter validity period will be rejected.”

Dr Paris then proceeded to quote also Article 8.2 of the same version of the General Rules mentioned earlier which from *inter alia* state,

“The Director General Contracts may consider cancelling the Tender following consultations with the General Contracts Committee in the event that the Evaluation process had not been concluded by the end of the validity period of the submitted bids.”

In this context, continued Dr Paris, the Director General (Contracts) had the prerogative to decide to either cancel the Tender or else to operate another procedure. At that point he had to choose, either or as the conditions request from him.

The Appellants' Legal Representative then continued by quoting Article 8.3 of the same rules which said,

“In exceptional circumstances the Central Government Authority/Contracting Authority may request that tenderers extend the validity of tenders, without extending the validity of the Tender Guarantee (Bid Bond), for two further periods of four (4) weeks each. Such requests and the responses to them must be made in writing. A tenderer may refuse to comply with such a request without forfeiting his tender guarantee (Bid Bond). However, his tender will no longer be considered for award. If the tenderer decides to accede to the extension, he may not modify his tender.”

Once the Director General (Contracts) decides to cancel the Tender, the story would have finished there but if this does not happen, in exceptional circumstances, the same Director of Contracts must inform all Bidders whether they were interested in extending the offer which they made or not.

Dr Paris continued by expressing his perplexities when he was writing the Letter of Objection. These increased when he received the Reasoned Letter of Reply issued by the Department of Contracts and Central Procurement and Supplies Unit on 6 February 2017 which clearly indicates that this was not an exceptional circumstance.

Dr Paris continued by referring to point 1 of the same Reasoned Letter of Reply which *inter alia* stated,

“With respect to the first argument of the Appellant, it is the humble opinion of the defendants that the 90 day validity period of the Tender is set up in order to safeguard Tenderers themselves from being forced to accept contracts after long protracting Tendering Procedures.”

According to the Appellants, the Contracting Authority was telling them that the 90 days were being there only to safeguard the Tenderers’ submissions. There was a clear rule which stated that the validity of a Tender was for 90 days and following that, there was a clear way of what one could do.

Dr Paris was completely disagreeing with what his colleagues were saying in the Reasoned Letter of Reply that this was in not impacting on all Bidders in a way or another as in reality it was impacting on everybody since the rules are made by the Director General (Contracts) himself, these dictate the rules for everybody, hence all rules must apply for everybody including himself.

Dr Paris continued by referring to point 3 of the Reasoned Letter of Reply which *inter alia* stated,

“The fact that this case was not deemed as to qualify for exceptional circumstance in which written extension of the validity period is required from Bidders does not exclude the defendants from awarding the contract provided the award criterion set in the Tender Document is respected.”

The Appellants’ Legal Representative continued to explain that in this situation, there was no exceptional situation. In that case, the Director General (Contracts) had only one option at the end of the validity period of 90 days; to cancel the Tender since he was saying that there was no exceptional circumstance.

If there was a latter circumstance, the Director General (Contracts) had the right to make a request to all Bidders whether they would like to extend the Bid for four weeks. Following that, the Director General (Contracts) could have requested another four week extension as per Article 8.3 of the General Rules Governing Tenders.

Once the Director General (Contracts) decided that there were no exceptional circumstances, he had no other option but to cancel the Tender continued Dr Paris who continued by referring to Article 8.4 of the General Rules Governing Tenders version 1.13 dated 26 August 2015 which states,

“Following the further extension by eight (8) weeks, in accordance with Regulation 6.2 (c) of LN 296/2010, the non conclusion of the evaluation process will automatically lead to the cancellation of the Tender, provided that the Director General (Contracts) shall consult the General Contracts Committee.”

Dr Paris proceeded by saying that the Reasoned Letter of Reply issued by the Contracting Authority has confused him more since one had to understand the role of the Director of

Contracts which wasn't that of doing legal battles to substance what one couldn't save. The role of the Director of Contracts was a clear one and was to assure that all procedures are observed according to the rules which he had dictated himself.

After seeing such reply, Dr Paris felt that he had every reason to worry and lose faith in such institutions. He then referred to point 4 of the Reasoned Letter of Reply dated 6 February 2017 which *inter alia* stated that,

“It is the humble opinion of the defendants that in this case cancellation of the whole Tender procedure was not deemed appropriate notwithstanding the time-lag of the evaluation process.”

The Appellants noted that in this case, a time lag was being recognized but the Contracting Authority felt that there was no need to cancel the Tender. This was not a question of how one felt that it was right to do but it was a question of how and what the rules dictated. There was no prerogative in this context.

Dr Paris then continued referring to clause 5 of the Tender Document which *inter alia* stated,

“The award procedure as adopted by the defendants in this case for this Lot is according to the published provisions and the applicable legislation. This mode of practice has been in place for a number of years and in the most majority of cases awarded bidders opt to accept the contracts notwithstanding the validity period of offers have lapsed.”

He continued by saying that the Contracting Authority did not refer to which Lot and provision they were citing because these do not exist. Besides if things were been done wrong, these were continuing to be done wrong according to Pharma-Cos Ltd's Legal Representative who continued by emphasising that the rules were clear, they dictate which procedure had to be observed from the beginning to the end as requested by transparency.

The situation was a worrying one if the Director of Contracts was ready to deviate from the same rules which he dictated, continued Dr Paris since he was the person who is obliged by law to safeguard the procedures. He invited the Public Contracts Review Board to regulate the situation and assure that effectively the rules which dictate the procedure were observed.

The Appellants then referred to point 3 of the Reasoned Letter of Reply issued by the Department of Contracts and the Central Procurements and Supplies Unit on 6 February 2017 which *inter alia* states that,

“The automatic cancellation is a prerogative of the controlling arm of government to enforce cancellation in such circumstances on the Contracting Authorities”

This meant that what was automatic was a prerogative which was conflicting in the Appellant's eyes since they feel that either the Tender should be cancelled or else the Director of Contracts had the prerogative. One cannot have both things. It was the rules which were requesting the cancellation of the Tender and not Pharma-Cos Ltd since this was what they were dictating.

Dr Matthew Paris, the Legal Representative for the Appellants continued by saying that Article 6.2 (c) of the Public Procurement Regulations which state that the cancellation can only be deemed in two circumstances. The first one was at expiry of the validity period, although Dr Paris here asked at which stage of the validity period things were currently standing. If there was an extension of the validity period, the Appellants were sure that they

did not receive anything in this respect. If things stood at this instance, the Article mentioned stated,

“to consider the cancellation of the Tender in the event that the evaluation process has not been concluded by the end of the validity period of the submitted bids; any non-conclusion of the evaluation process by the end of the second extension to the validity period will automatically lead to the cancellation of the Tender

Provided that the Director shall consult the General Contracts Committee for its opinion;

Provided further that should the Contracts Committee not agree with the recommendation of the Director, the decision of the Director may be referred to the Minister for his approval;”

This instance would have happened following the expiry of the 90 day validity period and the two four-week extensions.

Dr Paris continued by saying that it seemed that the two four-week extensions were not requested since the Contracting Authority felt that there weren't the extraordinary circumstances which deserved the need for the eight week extension to be requested. Since there wasn't this need, the cancellation should have been made immediately and not at the end of the period.

Dr Paris reminded the Hall that fifty-two weeks have passed from the day of Tender submissions to the award of the Tender. The lack of cancellation of the Tender led to two breaches according to the Appellants;

- (i) Either there were extraordinary circumstances and therefore there was the need of the eight weeks of extension period but no party was notified with this request;
- (ii) The obligations to cancel the Tender which come out from the General Conditions and the Public Procurement Regulations were clearly breached by the Department of Contracts and its Director who was supposed to safeguard the procedures requested by the Tender Document

The Appellants were not requesting the Tender Cancellation capriciously but they were requesting so because the rules requested so and if the Public Contracts Review Board was allowing the Director of Contracts to breach the regulations which he himself had created therefore the situation created would become a difficult one where there will be no transparency and that the Public Procurement would be discretionary.

Dr Christopher Mizzi, the Legal Representative for the Department of Contracts countered that with regards the 90 day validity period is there to protect the interest of the economic operator wherein you cannot have a situation where you have Bidders who have submitted their bid and were bound for an indefinite time with prices which they would have given in another period.

The 90 days were there to protect the interests of the Bidders who were assured that there was a way out at the period lapse. Beyond the 90 days there were circumstances which allowed the Bidders to extend their validity which in this case did not happen because *sine qua non* it was not an exceptional case. If the 90 days period expired there was nothing in the General Rules which allow the Bidders to be awarded the Tender following a positive action by the latter.

At that point in time the Recommended Bidder can refuse to accept the Tender since he has the right to do so by the lapse of the 90 days. This procedure protects the Bidders, continued Dr Mizzi. The cancellation was automatic if the Director General (Contracts) decides so which was not the case this time since he proceeded with awarding the Tender.

If nobody eventually accepted the Tender, it was then obvious that the Tender was going to be cancelled. If you have Bidders who were awarded the Tender and they were ready to accept it, there was nothing which kept the Bidders from being awarded the Tender in that instance.

Dr Christopher Mizzi continued by arguing that when you have people which were signing the reciprocal acceptance of things wherein the Director General (Contracts) was awarding the contract and the other side was accepting it there was a renovation of how things were at the beginning.

Dr Matthew Paris, the Legal Representative for Pharma-Cos Ltd asked whether the Contracting Authority can indicate from where their arguments were coming out.

Dr Christopher Mizzi on behalf of the Department of Contracts replied that the General Rules clearly indicate these arguments which he was talking about. He insisted that following the lapse of the 90 day validity period the Director of Contracts can cancel the Tender following consultations with the General Contracts Committee. Therefore, it was crystal clear that the cancellation was not stated automatically from the General Rules but it was following the decision taken by the Director of Contracts. In this case the latter wanted to proceed with the award. The General Rules speak about the decisions which should have been taken and therefore the Director General (Contracts) had the discretion to choose which way he wanted to move.

Dr Adrian Delia, the Legal Representative for Cherubino Ltd said that Pharma-Cos Ltd were right in saying that what the Law stated was not comfortable with the words prerogative and automatic living together in the same circumstance. Besides, Pharma-Cos Ltd were also right in saying that Article 8.1 of the General Rules Governing Tenders Version 1.13 issued on 26 August 2015 clearly speak about the 90 days which militate in favour of the Bidders.

It was clear that the Law was stating that whoever bid for less than these 90 days should have been automatically excluded. If one was submitting a price, this must be guaranteed for 90 days otherwise the Bid was to be disqualified. The part of the law which safeguarded the Bidder was clear as it was also the part in the Law which said that the words “*automatic*” and “*prerogative*” cannot live together. Therefore, the Law was not written in a correct way.

Dr Delia wondered whether the decision was taken beyond the limits which in a way were creating a prejudice. In the Law there was a juridical interest which was either real or material and so far in the Public Hearing, he did not hear what was the complaint regarding the decision taken and its prerogative although there was the automatic which should have occurred and how the decision taken inflicted hurt on either party.

The Legal Representative for Cherubino Ltd did not hear how come following months of the 90 day expiry period there was nobody who drew the attention prior and not following the award since if it was automatic, his clients would have cried foul on the 91st day independently of the outcome of the Tender.

Dr Adrian Delia then referred to Clause 8.3 of the General Rules wherein if you have a Tender which clearly has two lots but there was only one Tender remaining. The latter clause clearly speaks about the cancellation of a Tender and not of a lot. Dr Delia wanted to see

from where the cancellation of a Lot comes out since the Department of Contracts has decided to cancel the Lot. A Tender either has to be cancelled or not.

In case that there were exceptional circumstances, no decision could have been taken in this instance which cancelled only one Lot because the pricing and the award criteria involved both lots. Cherubino Ltd felt that both the request by Pharma-Cos Ltd to cancel one lot and the decision of the Department of Contracts and the Central Procurement and Supplies Unit to cancel the other lot were wrong since there was no way that only one Lot should have been cancelled since the pricing involved both lots.

The Contracting Authority wanted to have two items of the same brand, continued arguing Dr Delia therefore one cannot submit a 100ml item and a 50ml item and choose one and not the other unless there was another Bidder who also submitted an offer with the same brand of the first one which does not exist in this case.

Therefore, the way which the Tender was issued there should have been never a decision whether the Tender should have been cancelled or not. This was an all or nothing issue otherwise one didn't have the real picture of the best price and whoever was submitting the price for both lots and having its bid taken into consideration altogether was not giving a good price.

Dr Adrian Delia, on behalf of Cherubino Ltd, questioned the ability of the Director of Contracts to cancel only one lot as requested by Pharma-Cos Ltd. In his opinion, this was not the case. Dr Matthew Paris, the Legal Representative for Pharma-Cos Ltd promptly denied this statement by Dr Delia and added that they were requesting the cancellation of Lot 2 since Lot 1 was also cancelled.

Dr Adrian Delia for Cherubino Ltd continued explaining that the argument in favour of Pharma-Cos Ltd was that since the Director of Contracts cancelled Lot 1 therefore Lot 2 should have also been cancelled, hence cancelling the whole Tender and strengthening Pharma-Cos Ltd's arguments.

The Public Contracts Review Board had to see whether there were the merits for both Lots and eventually the Tender to be cancelled. Dr Delia asked who was going to be hurt most effectively whether it was the Bidder who was prejudiced with what had happened, the Government who had to incur higher expenses than anticipated or the patient who have to choose a product which was not according to the request of the technical people who created the Tender when they said that they wanted two of the same brand, 100ml and 50ml.

It was true that the Law is not clear; it was true that the Department of Contracts had the prerogative; it was true that the automatic exists; it was true that there were the 90 days; but in this case nobody has spoken before and secondly there was simply no prejudice within the 90 days moreover since Pharma-Cos Ltd was the incumbent, hence the more the new Tender delays the more they can supply their items.

Dr Adrian Delia concluded that there was not also a judicial interest but also a practical interest to why Cherubino Ltd appealed against the decision taken by the Contracting Authority.

Dr Matthew Paris, the Legal Representative for Pharma-Cos Ltd countered that he still was not answered by the Contracting Authority with respect to under which Legislation they were substantiating their arguments since there was no comfort to what they were saying. The only comfort was in the word "*automatic*" and not the word "*prerogative*". The latter word

was used in the Objection submitted by Cherubino Ltd and neither in the Law nor in the Regulations.

The only words which were used in the Law were “*automatic cancellation*”. The Law neither did spoke about decision but spoke only about recommendation. The Director of Contracts did not have the prerogative to make recommendations but he was obliged to move towards cancellations following consultations with the General Contracts Committee as per Article 8.4 of the General Rules Governing Tenders and Article 6.2 of the Public Procurement Regulations.

Dr Paris continued that the Director of Contracts had no prerogative to do so and that the only entity which can object to the cancellation was the Minister of Finance. In the Reasoned of Reply issued by the Department of Contracts and the Central Procurement and Supplies Unit on 6 February 2017, the Contracting Authority stated that this was the norm which was not true because in 2016 only the General Contracts’ Committee took 292 decisions on recommendations taken by the Director of Contracts. In most of the occasion, Dr Franco Agius who was the colleague of Dr Christopher Mizzi was the Secretary of the General Contracts’ Committee. This shows that it was not true that the Director of Contracts had the prerogative but the Director of Contracts was obliged to consult the General Contracts Committee.

With regards to prejudice, the Legal Representative for Pharma-Cos Ltd argued that everybody was going to be prejudiced since in reality; in the moment that there was a breach of law everyone was going to be prejudiced because the Law had to assure that both the Director of Contracts, who was the person who directed the rules, and the Bidders were following the same. It was the general public who could suffer prejudice. No party had quoted from where they were sustaining their articles.

Dr Matthew Paris continued by agreeing with the argument issued by Dr Delia regarding the cancellation adding that he was right in saying that Article 18.3 (f) of version 1.13 of the General Rules Governing Tenders issued on 26 August 2015 said,

“Cancellation may occur where the duration of the evaluation has exceeded the stipulated time limit in article 8 of the General Rules Governing Tendering”.

Dr Paris continued by saying that this referred to the 90 days which was previously discussed. The only instance where the Director General (Contracts) had the unilateral right to take a decision was in case of exceptional circumstances as per Article 8.3 of the General Rules Governing Tenders. In the latter case, the Director of Contracts had the right to make two extensions of four weeks first and subsequently of another four weeks.

If then no decision was taken, the only way that the Director of Contracts had to take was to move according to Article 18.3 (f) of the General Rules Governing Tenders and therefore cancel the Tender.

Dr Christopher Mizzi, the Legal Representative for the Department of Contracts said that at this point, with regards to the automatic cancellation of the Tender, the Director General (Contracts) had to take the recommendation issued by the General Contracts Committee and finally decides according to the latter.

Answering to Dr Paris’ comments that it was the Minister who had to take the final decision, Dr Mizzi said that the Minister entered in cases of decisions below the threshold. With regards Tenders which fall above the threshold the responsibility falls under the Director General (Contracts).

In these circumstances, if the General Rules talk about recommendations of the General Contracts' Committee and eventual decisions, one cannot continue talking about automatic since a decision can go on either side and there was nothing wrong if the Director of Contracts tries to award the Tender and asks the Bidder whether he wants to accept the latter or not.

Once the 90 days have passed, there was nothing wrong in giving the onus of the decision to accept the Tender to the Bidder. This was not denying neither the rights of the Bidders and nor the rights of the Contracting Authority to be supplied with the requested items. If there was the chance to save the Tender, the latter was obliged to save the Tender as much as possible and not cancel it irrespectively of what happened.

Dr Matthew Paris, the Legal Representative for Pharma-Cos Ltd said that the only right which they had was to safeguard the Regulations and that the Director of Contracts had to do so. Dr Paris had no doubts that the Law was safeguarded many times but in this instance, the Director of Contracts did something which the rules did not permit.

Dr Christopher Mizzi, the Legal Representative for the Department of Contracts said that in this Tender we had a situation where the Director General (Contracts) had to cancel one of the lots since there were reasons on why this Tender had to be cancelled. This was not a question of being afraid to cancel the Tender.

Dr Matthew Paris, the Legal Representative for Pharma-Cos Ltd contended that in any case, the only way to go was to cancel the Tender. He wanted to answer Dr Delia regarding his comments of not taking action at the 91st day. There were many times where Bidders submit their offers and nobody come back to them. This was not correct.

Dr Paris then proceeded to discuss the Second Grievance which his clients had, namely the Award Criteria which as per Article 9.1 of the Tender Document stated that,

“The sole award criterion will be the price. The contract will be awarded to the cheapest priced Tender satisfying the administrative and technical criteria”

In reality, despite this, the same criteria were conditioned by other clear indications which were issued from the same Tender Document. If one had to see in Article 3.3 of the latter, this stated,

“Contracts will be awarded lot by lot, in accordance with the award criteria at Article 9. In such a case that the cheapest offer in each lot is not of the same brand, the Contracting Authority will choose the most favourable overall solution by choosing the cheapest overall combination from all the lots with offers having the same brand as per specifications in Section 4 of this dossier.”

Dr Paris contended that not only the General Conditions were breached, not only the Law was breach but also the Tender was breached because at the moment that one decided to cancel Lot 1, there was no other option but as Dr Delia correctly said cancelled Lot 2 since the Department of Contracts was obliged to choose the best cheapest overall combination from all.

If one had to see the decision as indicated in the Letter of Rejection dated 17 January 2017, Lot 1 was cancelled while Lot 2 was given to Alfred Gera & Sons Ltd. The Contracting Authority clearly did not observe Clause 3.3 of the Tender Document according to Pharma-Cos Ltd since the latter *inter alia* stated that,

“In such a case that the cheapest offer in each lot is not of the same brand, the Contracting Authority will choose the most favourable overall solution by choosing the cheapest overall combination from all the lots”

If one had to see what happened in Lots 1 and 2 this was definitely not the case, continued Dr Matthew Paris because in the moment that the Contracting Authority decided to cancel Lot 1, therefore a situation has been created where neither the same brand was chosen and nor the overall combination of the two.

In the moment that a product for Lot 1 was not chosen whilst a product for Lot 2, automatically the choice for both Lots did not fall on products of the same brand continued, Dr Paris.

Dr Adrian Delia, the Legal Representative for Cherubino Ltd continued that this was the case unless there was a situation where two Bidders incidentally offered products by the same brand and one Bidder submitted for a lot and another submitted for the other lot.

Mr Carmel Esposito, a member of the Public Contracts Review Board remarked that the decision was made prior to the cancellation and therefore this product could be used for both lots for which Dr Delia countered that the Recommended Bidder submitted an offer only for one Lot, therefore when the Contracting Authority chose the latter, the Tender was deemed to be invalid.

Dr Matthew Paris, the Legal Representative for Pharma-Cos Ltd referred then to Article 3.1 of the Tender Document was saying that,

“This Tender is divided into lots. Tenderers may submit a Tender for several lots, (one or more lots)”

He continued by saying that strictly Bidders could have submitted only for one Lot but then they were constrained when it came to Evaluation, therefore one could have Tendered for one Lot but then one couldn't do so at Evaluation stage unless the circumstance mentioned earlier by Dr Delia happens where two Bidders submit offers by the same Brand.

Dr Christopher Mizzi, the Legal Representative for the Department of Contracts explained that here there was a Tender wherein the Bidder can Bid for all Lots or else being selective and bid only for the Lots which were applicable to him. There was nothing which precluded Bidders from Bidding to a particular lot. Dr Matthew Paris, the Legal Representative for Pharma-Cos Ltd agreed with Dr Mizzi's statement.

The Legal Representative for the Department of Contracts continued by saying that he agreed also with Pharma-Cos Ltd that the Tender should have been awarded to the cheapest technically compliant Bidder.

Article 3.3 was a specific circumstance for this Tender wherein the Central Procurement and Supplies Unit together with the Department of Contracts agreed that in case that the two Lots were to be awarded, in order for the Lots to be awarded to the same brand, a mechanism was created on how a Tender can be awarded where one of the Lots could not be the cheapest, hence making an exception to the Award criteria so that you can combine the different lots with the same brand.

Dr Matthew Paris, the Legal Representative for Pharma-Cos Ltd rejected this statement and insisted that the Tender Document clearly indicated that they had to be of the same brand.

Dr Adrian Delia, the Legal Representative for Cherubino Ltd contended that if this was not the case, then everybody had to change the different arguments which they had to make. The Contracting Authority might had to do this for medical reasons and therefore they might have been right.

Dr Christopher Mizzi, the Legal Representative for the Department of Contracts said that there was a technical reason why this happened for which Dr Matthew Paris for Pharma-Cos Ltd replied that this was not being contested.

Dr Mizzi continued by saying that Article 3.3 therefore was triggered only if the two Lots were being awarded. If the final result show that it is only one lot which has been awarded, the mechanism created purposely for Article 3.3 loses its strength and this was clear.

Dr Matthew Paris on behalf of Pharma-Cos Ltd asked Dr Mizzi from where does this comes out. The latter quoted the contested Article 3.3 of the Tender Document wherein explained that the rule which was creating the exception was going back to the basics and saying that every lot is being awarded separately. This article awarded both lots and where both offers were not the cheapest, hence creating an exception to combine both brands and creating the mechanism called most favourable overall solution. Things started to happen when both lots are being awarded.

Dr Matthew Paris, the Legal Representative of Pharma-Cos Ltd argued that the Contracting Authority was trying to defend the indefensible.

Dr Christopher Mizzi, the Legal Representative for the Department of Contracts countered that in such a case, the provision is taking it for granted that more than one Lot is being awarded.

Dr Adrian Delia, the Legal Representative for Cherubino Ltd asked whether Dr Mizzi agreed that both Lots were to be awarded for the same brand for which the latter replied that this was to be the case if all Lots were awarded.

Dr Delia continued by saying that in the moment that the Contracting Authority requested products from the same brand, the price had to be comparative for both brands. There was a great difference in the denominations, one was for 100ml and the other was for 50ml. There was a discrepancy due to the way that the Tender Document was written in the pricing of the lots and that was the reason why both lots were considered together.

Dr Christopher Mizzi, the Legal Representative for the Department of Contracts said that the arguments raised by Dr Delia substantiate the fact why Lot 1 was cancelled. On the other hand, the discussion centred on the fact that Article 3.3 of the Tender Document was clear in the words each lot, hence taking it for granted that multiple lots were being awarded.

If the final result was that one Lot was being cancelled and only one Lot was being awarded, Article 3.3 was not applicable but the only thing which was to be applicable was the Award Criteria to the cheapest technically compliant offer.

Dr Delia, the Legal Representative for Cherubino Ltd argued that here one had to see what the Department of Contracts and the Central Procurement and Supplies Unit wanted, how the Tender Document was written agreeing with Dr Paris that it was written in a way which left many doubts and whether there were any breaches and their merits.

The Contracting Authority wanted two measurements; 50ml and 100ml but these were needed from the same brand as per Article 1 in Section 4 of the Tender Document. In case that for one Lot a Bidder was cheaper and the same was not in the other Lot, then the overall price should have been considered.

Therefore Dr Delia argued that the Contracting Authority should have never recommended for award a Bidder who made a Bid only for a single Lot and where no other Bidder provided an offer on the other Lot with the same brand as the Recommended Bidder. Dr Delia wondered how the pricing was judged when Alfred Gera and Sons Ltd did tender for a single lot.

Dr Matthew Paris, the Legal Representative for Pharma-Cos Ltd concluded by saying that the Tender should have been cancelled prior to the award stage.

At this stage, the Public Hearing was adjourned to Tuesday 21 February 2017 at 09:00 wherein the Public Contracts Review Board will transmit the decision taken for this Objection verbally and then distribute a hard copy of the same to all parties concerned.

This Objection,

Filed by both Pharma-Cos Ltd and Cherubino Ltd on 27 January 2017, refers to the Contentions made by Pharma-Cos Ltd with regards to Lot 2 of Tender of Reference CT 2242/2015 issued by the Central Procurement and Supplies Unit listed as Case No 1022 in the records of the Public Contracts Review Board.

Appearing for Pharma-Cos Ltd: Dr Matthew Paris

Appearing for the Contracting Authority: Dr Christopher Mizzi

Dr Stefan Zrinzo Azzopardi

Whereby:

a) **Pharma-Cos Ltd contends that, in accordance with Article 8.2 of the “General Rules Governing Tenders”, the Central Procurement and Supplies Unit was in breach of its own regulations, in that, the 90 days validity period expired, there were no notices of any extensions to this period, yet this same Tender was awarded 52 weeks after the issue of the same.**

In this regard, this Appellant maintains that in such circumstance, the Contracting Authority had no other option but to declare the Tender as “*automatically cancelled*”, taking into account the fact that Lot 1 has been cancelled and the price and criteria included both lots, the Appellant insist that Lot 2 should also be cancelled.

b) **Pharma-Cos Ltd refers to article 3.3 wherein the award criteria regarding the computation of the cheapest price. The clause makes it clear that the Central Procurement and Supplies Unit will choose the most favourable overall solution by choosing the cheapest overall combination from all the Lots with offers having the same brand.**

In this regard, this Appellant contend that since Lot 1 was cancelled and the Contracting Authority was to choose the best overall combination, then Lot 2 should also have been cancelled, since no combination was left to consider.

This Board also noted the Contracting Authority’s “*Letter of Reply*” dated 6 February 2017 and its verbal submissions during the Public Hearing held on 9 February 2017, in that:

- a) The Contracting Authority maintains that the 90 day period is there to protect the Bidders from being bound to specific conditions and pricing beyond that period. In this particular case, although the validity period lapsed, the Director General (Contracts), as was authorised, decided not to cancel the Tender and proceed with the award of the Tender for Lot 2.**

In this regard, the Director of Contracts had the discretion to choose. On the other hand, the latter would not be in breach of the Law if he asked the Bidder whether, although there was a much longer lapse of time, he is still willing to accept the award of Lot 2.

The Department of Contracts and the Central Procurement and Supplies Unit affirms that the decision taken by the Director General (Contracts) was not automatic but discretionary.

b) Since the two Lots were to be awarded and these had to be of the same brand, a computation was formulated where a situation arose when one of the Lots is not the cheapest. In this case, an exception would be made to the Award Criteria so that there will be a combination with the same brand.

In this regard, the Contracting Authority affirms that Article 3.3 is triggered only if this situation arises otherwise it is not effective. In this case, there was only one lot, so that the provisions in Article 3.3 are taking for granted that more than one lot is being awarded.

This Board, after having considered the merits of this case, arrived at the following conclusions:

- 1. With regards to the Appellant's First Contention, this Board, after having examined the relative documentation and heard submissions made by all parties concerned would like to respectfully refer to Article 8.2 of the "*General Rules Governing Tenders*" with specific reference to the procedure that should have been adopted in such a circumstance.**

The latter article states that the Director General (Contracts) may consider cancelling the Tender, in the event that the Evaluation

Process has not been concluded by the end of the validity period that is 90 days. At this particular stage, this Board justifiably points out that the Director of Contracts has the prerogative option to cancel, (but not automatically), the Tender.

Article 8.3 empowers the Contracting Authority to extend the validity of the Tender for two further periods of four (4) weeks each. This extension is to be notified to the Bidders in writing. In this regard, this Board notes that this procedure was not followed by the Central Procurement and Supplies Unit and that neither the Bidders were notified nor extensions were made to the validity period.

In accordance with Article 8.4, the non conclusion of the Evaluation Process would lead to the automatic cancellation of the Tender. In this regard, this Board justifiably notes that since no notifications of the extension of the validity period was made, the latter ended on the 91st day and since the Evaluation Process was not concluded by that date, the Central Procurement and Supplies Unit should have automatically cancelled the Tender.

In doing so, one has also to take into consideration the fact that Lot 1 of this Tender was cancelled. Although the Tender requested quotations for each lot, the two lots together formed an equation

whereby the Award Criteria, in relation to the cheapest offer, had to be computed in combination of both lots.

This Board acknowledges the fact that the Director of Contracts may consider the cancellation of the Tender and in this regard, this Board also opines that although the Contracting Authority had the option whether to cancel the Tender or not and if the latter option was taken, this has to be done in accordance with Article 8.4 of the “*General Rules Governing Tenders*”.

In this regard, there were no extensions to the validity period and the Evaluation Process was not concluded, hence this Board opines that the Tender Document comprising of Lot 1 and Lot 2 should have been cancelled.

This Board also takes into consideration the fact that 52 weeks had elapsed since the publication of the Tender so that there was sufficient time to regulate the Central Procurement and Supplies Unit’s position in compliance with Articles 8.1, 8.2, 8.3 and 8.4.

In this regard, this Board upholds the Appellants’ First Contention, in that, although the Director of Contracts had the discretion whether to cancel the Tender or not, the proper procedure in

accordance with Article 8 of the “*General Rules Governing tendering*” was not adopted.

2. With regards to the Appellants’ Second Grievance, this Board would like to refer to Article 3.3 of the Tender Document wherein it is dictated that,

“In such a case that the cheapest offer in each Lot is not of the same Brand, the Contracting Authority will choose the most favourable overall solution by choosing the cheapest overall combination from all the Lots with offers having the same Brand as per specifications in Section 4 etc”

It is hereby being understood that although the Contracts will be awarded Lot by Lot and the combination of the product must be from Lot 1 & Lot 2 provided that in case where the cheapest is not of the same Brand, the procedure to be adopted in so far as establishing the cheapest offer, the Contracting Authority will opt for a combination from the Lots of the same Board.

In this Regard, this Board interprets this important clause that the combination of the cheapest price will represent the cheapest from Lots 1 and 2 provided that they are of the same Brand. However,

this Board also notes that Lot 1 was cancelled and therefore, the computation of the cheapest offer was not possible. On the other hand, the offer made by Alfred Gera & Sons was only for Lot 2.

Although the Tender provided that Bidders may bid for the separate Lots, the actual Tender required two Lots; Lot 1 (50ml vials) and Lot 2 (100ml vials).

The cancellation of Lot 1 automatically discarded the intended computation of the cheapest offer on “*an overall combination*” basis due to the Cancellation of Lot 1, a situation arose wherein the Recommended Bidder quoted for Lot 2 and there were no further Bidders for Lot 1 as this was cancelled, hence the establishment of the cheapest offer was somewhat erratic.

This Board also points out that the awarding of Lot 2 only does not, in any way, satisfy the main objective of the Tender and in this regard, this Board does not confirm that Article 3.3 is triggered only if there were offers for both lots.

The issue is that the Tender requested two lots so that the cancellation of one Lot affected the Award Criteria with regards to the cheapest offer having the same Brand. This Board justifiably

opines that under the circumstance and due to the fact that Lot 1 was cancelled, Lot 2 should have been also cancelled. In this regard, this Board upholds the Appellants' Second Grievance.

3. This Board, in arriving at its decision regarding the Appeals filed by Pharma-Cos Ltd and Cherubino Ltd for Lot Number 2 took into consideration two basic facts as follows:

i) Although the Tender Document, as per Clause 3.1, allowed separate offers for each lot, the latter was comprised of a product consisting of two components, wherein each component listed under a separate lot.

In this regard, this Board respectfully points out that the Tender Requirements would not be complete with one Lot only, so that the cancellation of Lot 1 impaired the composition of the Tendered Product. If the Central Procurement and Supplies Unit intended to accept the award of one Lot only, as well, the latter should have denoted this eventual circumstance in the Tender Document.

ii) This Board noted the excessive length of time taken between the publication of the Tender and the date of the Award. In this regard, this Board justifiably feels that there was ample time for

the Contracting Authority to regulate the procedural state of this Tender by adhering to article 8 of the “*General Rules Governing Tenders*”

In view of the above, this Board recommends that:

- a) The “*Award*” of Lot 2 is to be cancelled;**
- b) The Tender is to be cancelled;**
- c) The Deposit paid by both Appellants should be refunded.**

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Carmel Esposito
Member

21 February 2017