

PUBLIC CONTRACTS REVIEW BOARD

Case 1040 – CT 2042/2016 – Tender for the Supply of Amifampridine (3, 4 – Diaminopyridine) Tablets

The Publication Date of the Call for Tenders was 1 April 2016 whilst the Closing Date for Call of Tenders was 12 May 2016. The Estimated Value of the Tender, (Exclusive of VAT) was € 299,750.

One (1) Bidder have submitted offers for this Tender.

On 27 March 2017, Cherubino Ltd filed an Objection against the decision of the Central Procurement and Supplies Unit to cancel the Tender against a deposit of € 2,248.

On 18 April 2017, the Public Contracts Review Board composed by Dr Anthony Cassar as Chairman, Mr Lawrence Ancilleri and Mr Carmel Esposito as members convened a Public Hearing to discuss the Objection.

The Attendance for this Public Hearing was as follows:

Appellant – Cherubino Ltd

Mr David Cherubino	Representative
Dr Francis Cherubino	Representative
Dr Danica Caruana	Legal Representative
Dr Adrian Delia	Legal Representative

Contracting Authority – Central Procurement and Supplies Unit

Ms Denise Dingli	Chairperson, Evaluation Board
Ms Federica Spiteri Maempel	Secretary, Evaluation Board
Mr Ian Ellul	Member, Evaluation Board
Dr Alexia Farrugia Zrinzo	Legal Representative
Dr Stefan Zrinzo Azzopardi	Legal Representative

Department of Contracts

Dr Christopher Mizzi	Legal Representative
----------------------	----------------------

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

Dr Stefan Zrinzo Azzopardi, the Legal Representative for the Central Procurement and Supplies Unit opened by stating whether the Appellants and the Public Contracts Review Board had any objections in view of the fact that the Head of Department for the Evaluators attended for the Public Hearing instead of the Tender's Technical Evaluator. No party objected with regards to this matter.

Dr Adrian Delia, the Legal Representative for Cherubino Ltd opened by referring to the Letter of Objection dated 17 March 2017 wherein it was stated that the Tender was cancelled under Article 18.3 of the General Rules Governing Tenders version 1.14 dated 4 January 2016. This Article states that,

“Cancellation may occur where:

- (a) The Tender procedure has been unsuccessful, namely where no qualitatively or financially worthwhile Tender has been received or there has been no response at all;*
- (b) The economic or technical parameters of the project have been fundamentally altered;*
- (c) Exceptional Circumstances or Force Majeure render normal performance of the Project impossible;*
- (d) All Technically compliant Tenders exceed the financial resources available;*
- (e) There have been irregularities in the procedure, in particular where these have prevented fair competition;*
- (f) The duration of the Evaluation has exceeded the stipulated time limit in Article 8 of the General Rules Governing Tendering”.*

Dr Adrian Delia continued by saying that there was no response since it was only one Bidder who tendered an offer for his Bid, namely Cherubino Ltd. The exclusion was either financial or qualitatively. The Reasoned Letter of Reply issued by the Department of Contracts and the Central Procurement and Supplies Unit on 12 April 2017 had only explained the historical facts of the case but did not indicate where Cherubino Ltd's offer lacked either financially or qualitatively.

Dr Stefan Zrinzo Azzopardi, the Legal Representative for the Central Procurement and Supplies Unit submitted that the discussion was about a medicine which was registered with the European Medical Agency. When a medicine was registered with the latter, the manufacturer had the right to appoint a company to represent her at a particular country which falls under the jurisdiction of the European Union.

It was a known fact that Cherubino Ltd was furnishing this type of medicine in Malta but there were facts which changed the latter's position at Evaluation Stage which led to the bidder being no longer recognised as the supplier of this medicine in Malta. This led to the Central Procurement and Supplies Unit having no option but to cancel the Tender.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board asked whether Cherubino Ltd was licensed to furnish the medicine in Malta for which Dr Stefan Zrinzo Azzopardi, the Legal Representative for the Central Procurement and Supplies Unit replied that he was going to summon a witness to make his statements regarding the matter.

Dr Adrian Delia, the Legal Representative for Cherubino Ltd, then asked whether all parties were in agreement that this was not a financial cancellation for which Dr Stefan Zrinzo Azzopardi, on behalf of the Contracting Authority replied that it was a qualitative exclusion since the Appellants were not recognised as the local suppliers for the medicine in question.

At this point, Mr Mark Zammit, an Advanced Pharmacy Practitioner at Mater Dei Hospital and the person in charge of the Technical Evaluators within the Central Procurement and Supplies Unit, holding ID Card Number 425874 M, was summoned by Dr Stefan Zrinzo Azzopardi to testify under oath before the Public Contracts Review Board.

At the end of Mr Zammit's testimony, the Director General of the Department of Contracts, Mr Anthony Cachia, holding ID Card Number 142658 M was summoned by Cherubino Ltd to testify under oath before the Public Contracts Review Board.

At the end of Mr Cachia's testimony, Dr Adrian Delia, the Legal Representative of Cherubino Ltd continued by arguing that the reason why the Tender was cancelled comes out from the Letter of Rejection issued by the Department of Contracts on 17 March 2017 and it is only the latter which can be discussed. It was crystal clear that the reason why Cherubino Ltd was excluded from this Tender was neither qualitatively nor financially.

Dr Delia continued by contending that in his testimony, Mr Zammit explained in detail why his clients were not capable of distinguishing between notification and registration but that they were capable of distinguishing between qualitative and regulatory because the wording does not count only in the world of Medicine but also in the Legal camp.

Therefore, when the first witness justly replied in the detail what the product was about, eventually the truth came out that the quality of the product was not inferior but it was of the same quality and if the distributor was a parallel distributor, in the package there might be an over labelling.

Dr Adrian Delia continued to argue that in this case the Maltese Government instead of paying € 5,000 to be registered as a parallel distributor in Malta is now paying € 450 in order to have more competition to get cheaper medicinals. The contended medicine is now offered at € 50,000 from the same Cherubino Ltd who are competing by themselves but because they have done the parallel trading, they managed to get the product at a cheaper price because the Maltese Government worked for it.

Dr Adrian Delia contended also that the difference in the packaging was that the paper given with the medicine contended also instructions in Maltese. This was all the overlabelling and the common Maltese man in the street who does not understand English can also read this manual. This was something which Cherubino Ltd will try to keep. The most important thing was that the cancellation should be reversed at this stage.

Cherubino Ltd continued to argue that when the cancellation occurred on 17 March 2017, they had the ability to offer, sell, market, tender and being awarded contracts with this product. The notification process was justly made through the European Medicines Agency. Mr Zammit was correct in saying that the notification was under Labomed, which is a company directed by the same Appellants.

Dr Adrian Delia insisted that by law, his clients can bid for this Tender and buy from his own company Labomed which has the notification process which was approved in February 2017, prior to the cancellation of the Tender. There was no clarification with regards to the contract in itself. In the other process there was correspondence showing that BioMarin kept supplying the product and saying that any obligations which there were between Cherubino Ltd and the Maltese Government were going to be fulfilled. Dr Adrian Delia concluded by saying that there were no valid reasons why the Tender had to be cancelled.

Dr Stefan Zrinzo Azzopardi, the Legal Representative for the Central Procurement and Supplies Unit replied that all the dates which were mentioned during this process are of a huge importance. It was important to note that at the moment when the Tender was submitted, the position of Cherubino Ltd was that their distribution agreement was cancelled. The process which led to the parallel notification happened way after the Tender was issued and was concluded only a year after the Appellant's offer was submitted

At this stage, the Public Hearing was adjourned to Tuesday 25 April 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 Board,

Having noted this Objection filed by Cherubino Ltd (herein after referred to as the Appellant) on 27 March 2017, refers to the Contentions made by the latter with regards to the cancellation of Tender of Reference CT 2042/2016 listed as Case No 1040 in the records of the Public Contracts Review Board, issued by the Central Procurement and Supplies Unit (herein after referred to as the Contracting Authority).

Appearing for the Appellant: Dr Danica Caruana

Dr Adrian Delia

Appearing for the Contracting Authority: Dr Christopher Mizzi

Dr Stefan Zrinzo Azzopardi

Whereby, the Appellant contends that:

- a) **The reasons given by the Central Procurement and Supplies Unit for cancelling the Tender were not correct. In this regard, the Appellant maintains that both as to quality and price, their product is fully compliant and in this regard, the Tender should have not been cancelled.**

This Board also noted the Contracting Authority's "*Letter of Reply*" dated 12 April 2017 and its verbal submissions during the Public Hearing held on 18 April 2017, in that:

- a) **The Central Procurement and Supplies Unit insists that, at Tendering Stage, at Evaluation Stage and even at Cancellation Stage, the Appellants did not possess the necessary requisites to market the medicinal product as requested in the Tender Document.**

In this regard, the Contracting Authority pointed out that since there was only one bid and that the Appellants were not in a position to supply the product required, they had no other option but to cancel the Tender.

This same Board also noted the Testimonies of the witness namely:

- 1. Mr Mark Zammit summoned by the Central Procurement and Supplies Unit;**
- 2. Mr Anthony Cachia summoned by Cherubino Ltd**

This Board has also taken note of the documents submitted by:

- 1. The Central Procurement and Supplies Unit which consisted of correspondence between BioMarin and Cherubino Ltd and BioMarin and the Contracting Authority itself**
- 2. Cherubino Ltd which consisted of correspondence between themselves and the Central Procurement and Supplies Unit**

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

- 1. This Board heard and noted the lengthy submissions made by all parties concerned and in particular, the testimony of the Technical witness. However, since the jurisdiction of this Board is to determine whether the adjudication process was carried in a proper, just and transparent manner, this same Board opines that the main issues in this particular case can be considered to be those mentioned in the Appellant's "*Letter of Objection*" dated 24 March 2017 and the Contracting Authority's "*Letter of Reply*" dated 12 April 2017. In this regard, this Board will consider the contentions made therein.**
- 2. With regards to Cherubino Ltd's contentions, this Board, after having examined the relative documentation and taken note of the Technical Expert's testimony opines that consideration thereof should be treated under two main issues, namely, "*Reasons for Cancellation of the Tender*" and "*The Procedure adopted by the Evaluation Board*", as follows.**

a) **“Reasons for Cancellation of the Tender”**

This Board refers to the “*Letter of Rejection*” dated 17 March 2017, wherein it was stated that the reasons why the Central Procurement and Supplies Unit had rejected Cherubino Ltd’s bid was that the latter was neither qualitatively nor financially worthwhile while quoting Article 18.3 of the “*General Rules Governing Tenders*” version 1.14 issued by the Department of Contracts on 4 January 2016, with the latter dictating the circumstances and eventualities as and when a Tender can be cancelled by the Contracting Authority.

After having heard the Technical Evidence submitted by the witness brought under oath by the Central Procurement and Supplies Unit, this Board is not credibly convinced that the reasons given by the Contracting Authority for rejecting the Appellant’s product, as being either non qualitatively nor financially worthwhile, are justifiably applicable as it has been established all along that there was nothing wrong or non-compliant with the product being offered. At the same instance, there was no credible submission suggesting that the price of the Appellant’s product was beyond the expectations.

In fact, this Board justifiably notes the testimony given by the Technical Expert whereby he confirmed that the product offered by Cherubino Ltd was compliant in both respects and that the reason why their offer was rejected was for other motives which will be considered later on.

The “*Reasoned Letter of Reply*” issued by the Contracting Authority and the submissions made during the Public Hearing, credibly establish that the actual reason why the Appellant’s offer was rejected was due to the fact that at the time of submission of the Tender and also during the Evaluation Stage, Cherubino Ltd did not possess the necessary official requisites to market the product.

In this regard, and as emphasised on numerous occasions, this Board opines that the Contracting Authority should have given the very specific reason for the rejection of the Appellant’s offer and consequently for the eventual cancellation of the Tender itself.

In this regard, this Board upholds Cherubino Ltd’s grievance and confirms that the reasons given when rejecting the latter’s bid

were incorrect. This Board also contends that in the “*Letter of Rejection*” there should also have been mentioned the real cause for cancelling the Tender.

In this regard, this Board opines that in quoting Article 18.3 of the “*General Rules Governing Tenders*” version 1.14 issued by the Department of Contracts on 4 January 2016, the Central Procurement and Supplies Unit did not specify properly the circumstances which justified the Tender’s cancellation.

b) “*The Procedure adopted by the Evaluation Board*”

This Board, on many occasions opined that the Evaluation Board members should carry out their duties in a just and fair manner yet they should also apply their utmost due diligence in their adjudications.

One of the prime factors in the due diligence process, is to ensure that the Recommended Bidder is competent in rendering his obligations in accordance with the dictated specifications at the quoted price.

With regards to Cherubino Ltd's contention that the Tender should not have been cancelled, this Board would like to primarily point out that the product consists of a medicinal which is centrally authorised and licensed by the European Medicines Agency so that in order for the product to be marketed, the Marketing Authorisation holder must have a local representative.

In this particular case, it has been justifiably established that the Marketing Authorisation Holder is BioMarin Ltd and that the latter had to have a representative in Malta. Through submissions and witnesses, it has also been affirmed that during the Evaluation Process, Cherubino Ltd did not have the representation of a "*Marketing Authorisation Holder*" and in this respect, the Appellant's product could not be marketed by the latter.

In this regard, this Board also took note of the correspondence which confirmed that the Appellant was not a representative of BioMarin Ltd, both at the time of submission of the Tender and at the time of Evaluation Stage.

In fact, the Appellant was not representing the Marketing Authorisation Holder with effect from 8 March 2016 whilst the closing date of the Tender was 12 May 2016; hence the representation agreement had been terminated prior to the closing date of the Tender and the Evaluation Period.

From the examination of the related documentation and testimony of the witnesses this Board is justifiably convinced that the Evaluation Board were faced with a situation where they could not award the Tender to the only Bidder who, in turn, was not authorised to market the Tendered product.

In this respect, this Board noted that there was only one Bidder for this Tender and under the circumstance, quite correctly and diligently, the Evaluation Board had no other option but to cancel the Tender. In this regard, this Board upholds the latter decision taken by the Central Procurement and Supplies Unit.

In view of the above, this Board finds that:

- i. The Product offered by Cherubino Ltd was financially compliant;**
- ii. Cherubino Ltd's product was also qualitatively compliant;**
- iii. The Reasons given by the Central Procurement and Supplies Unit for rejecting the Appellant's Bid were unfounded.**

This Board also recommends that:

- i. The deposit paid by Cherubino Ltd should be fully refunded;**
- ii. The Tender is to be cancelled**

Dr Anthony Cassar
Chairman

Mr Lawrence Ancilleri
Member

Mr Carmel Esposito
Member

25 April 2017