

## **PUBLIC CONTRACTS REVIEW BOARD**

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### **Case 1094 – CFT 021-6364/2017 – Tender for the Supply of Hyoscine Hydrobromide 400mg Injections.**

The Publication Date of the Call for Tenders was 19 May 2017, whilst the Closing Date for Call of Tenders was 9 June 2017. The Estimated Value of the Tender, (Exclusive of VAT) was € 61,500.

Four (4) Bidders have submitted offers for this Tender.

On the 2nd October 2017, Cherubino Limited filed an Objection against the decision of the Central Procurement and Supplies Unit to award the Tender to Pharmabart Limited for the price of € 56,625.00 (Exclusive of VAT) against a deposit of € 400.

On 24 October 2017, the Public Contracts Review Board composed by Dr Anthony Cassar as Chairman, Mr Carmel Esposito and Mr Richard A Matrenza as members convened a Public Hearing to discuss the Objection.

The Attendance for this Public Hearing was as follows:

#### **Appellant – Cherubino Limited**

Dr Francis Cherubino	Representative
Dr Danica Caruana	Legal Representative

#### **Recommended Bidder – Pharmabart Limited**

Mrs Antoinette Vella Barthet	Representative
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#### **Contracting Authority – Central Procurement and Supplies Unit**

Mr Neil Bugeja	Member, Evaluation Board
Mr Ian Ellul	Member, Evaluation Board
Dr Stefan Zrinzo Azzopardi	Legal Representative

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

Dr Danica Caruana, the Legal Representative for Cherubino Limited said that her clients submitted an offer for this Tender which was; the cheapest and technically compliant. Whereas on 20 October 2017, they have received a Letter from the Central Procurement and Supplies Unit saying that their offer was refused for the following reason:

*“Conflicting information in relation to country of licensing. Offer states that country of licensing is Ireland while product offered relates to an English MA number”.*

Dr Caruana, continued by saying that this offer had to be adjudicated, according to Section 2.2 of the Technical Offer, in that; the Country of Licensing was the United Kingdom while the Market Authorisation Holder was Irish. Section 2.3 of the same said that, the Registration Number started with PL which meant, that their submitted product was registered in the United Kingdom.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board asked what the word PL meant. Dr Francis Cherubino, on behalf of Cherubino Limited replied that, the product was registered in another country, inside the European Union.

Dr Danica Caruana, the Legal Representative for Cherubino Limited continued by explaining that, there were a number of documents submitted in their offer, which included the Summary of Product Characteristics showing this number. If one had to see point 7 from their Technical Offer, it illustrated that the Market Authorisation Holder had an Irish address. The same information was evident in the mock-up submitted.

Dr Caruana continued by saying that the Central Procurement and Supplies Unit had requested also a clarification from Cherubino regarding the matter, with the latter confirming that the country of licensing was indeed the United Kingdom. There were no doubts that the product submitted; had an Irish Market Authorisation Holder and a British Licence.

Dr Stefan Zrinzo Azzopardi, the Legal Representative for the Central Procurement and Supplies Unit said that, if one had to look at the document referred to by Dr Caruana, one could see that the Market Authorisation Holder had to refer, to the place where the product was licensed. There was no doubt that Phoenix Labs was an Irish Company.

There was a lack of consistency, between the country which issued the license and the country which holds the Market Authorisation Holder. The difficulty, the Contracting Authority had, was that, the Technical Offer was inconsistent and could not be corrected, since it fell under Note 3. As a consequence of this, the product submitted by Cherubino Limited had a UK licence and a Market Authorisation Holder coming from a different Country. The Evaluation Board felt, that this was an administrative mistake for which there was no other option but to discard the Appellant's offer.

Dr Danica Caruana, the Legal Representative for Cherubino Limited said that if one had to talk about the Market Authorisation Holder in Clause 2.2, it was easy to refer to the country of licensing; but this was not clear in the Tender Document. From Clause 2.3, it was obvious that the license number stated that it was from the United Kingdom, given that the details available came from the latter country.

Dr Stefan Zrinzo Azzopardi, the Legal Representative for the Central Procurement and Supplies Unit said that the document could not be corrected. The Country of Licensing referred to by appellant's offer, was the Country where it was issued by the Market Authorisation Holder, it was a question to who was the latter. Dr Zrinzo Azzopardi asked who issued the license, whether it was Ireland or the United Kingdom.

Dr Danica Caruana, the Legal Representative for Cherubino Limited countered that the Tender Document was not clear.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board pointed out that there was a distinction between the countries mentioned.

Dr Francis Cherubino, on behalf of Cherubino Limited, remarked that first of all one had to refer to the Product Registration not to the licensing. One could not ignore the fact that this was found under the subheading of the Market Authorisation Details.

The Central Procurement and Supplies Unit could have asked for the Summary of Product Characteristics, the Package Insert Label and the Mock Up. Dr Cherubino wondered why therefore all these documents were requested. This was an ambiguous question and in view of the latter, the Appellants felt that they should be favoured.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board pointed out that despite the fact that the Heading read "*Market Authorisation Holder*", the subsections had all different information and therefore one had to agree that the Country of Licence was the country from where the licence of this product came.

Dr Francis Cherubino, on behalf of Cherubino Limited said that there was a Company License and a Product License. Section 2.1 referred to the Company while Section 2.2 referred to the Country. Dr Cherubino asked why he had to be submitted to the interpretation of the Evaluation Board.

Mr Ian Ellul, on behalf of the Central Procurement and Supplies Unit said that this was the first time, in the three years he has been working for the Contracting Authority that there was this ambiguity between Sections 2.2 and 2.3. In previous cases, Cherubino Limited was compliant to similar matters. The Market Authorisation Number was an Identification attached to the country from which the product was issued. The Market Authorisation Holder was the license holder.

Dr Danica Caruana, the Legal Representative for Cherubino Limited said that there was an agreement that the License number issued was a UK number.

Dr Francis Cherubino, on behalf of Cherubino Limited, pointed out that one had to remember that the principle of Substance over Form was clear in the Tender. The Technical Literature which the Appellants submitted showed many times that the product came from the United Kingdom and even the Contracting Authority understood this from the Clarification issued.

When one goes to register a product with the Medicines Authority here in Malta, the product is registered and not licensed. The Summary of Product Characteristics, Mock Up and Package Information Leaflet were all clear and so was the Heading of the Section. There was

no conflict of information as the Contracting Authority alleged in their Letter of Rejection dated 20 September 2017.

Dr Stefan Zrinzo Azzopardi, for the Central Procurement and Supplies Unit concluded by saying that the Appellants should have sought a Clarification themselves if they had any doubts. Sections 2.1, 2.2 and 2.3 all refer to different things. If the Public Contracts Review Board, felt that the Contracting Authority had to refer to the Basic English when writing the Tender Document, the latter was going to submit itself to any decision taken by this Board but if the Country of Licensing and the Company Address were the same, then the English used in this case was a different one.

At this stage, the Public Hearing was adjourned to Tuesday 7 November 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.

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**This Board,**

**Having noted this Objection filed by Cherubino Limited (herein after referred to as the Appellant) on 2 October 2017, refers to the Contentions made by the latter with regards to the award of Tender of Reference CFT 021-6364/2017 listed as Case No 1094 in the records of the Public Contracts Review Board, awarded by the Central Procurement and Supplies Unit (herein after referred to as the Contracting Authority).**

**Appearing for the Appellant: Dr Danica Caruana**

**Dr Francis Cherubino**

**Appearing for the Contracting Authority: Dr Stefan Zrinzo Azzopardi**

**Whereby, the Appellant contends that:**

- a) **Although his offer was the cheapest compliant one, his Bid was discarded due to the fact that the information submitted by same regarding the licensing of the product was allegedly conflicting. In this regard, the Appellant maintains that it was made clear, through the response to the Clarification note dated 26 June 2017, that the Contracting Authority was aware that his product had an Irish Market Authorisation Holder and a British License, which should be compliant in all respects.**

**This Board also noted the Contracting Authority's "*Letter of Reply*" dated 23 October 2017 and its verbal submissions during the Public Hearing held on 24 October 2017, in that:**

- a) **The Central Procurement and Supplies Unit insists that the Appellant's offer failed in the Technical Compliance Stage as there was inconsistency between the Country issuing the Licence and the Country holding the "*Market Authorisation Holder*". In this regard, since no correction to the Appellant's offer was possible, as the action fell under "*Notes to Clause 7*", Note 3 of the "*Instruction to***

***Tenderers***”, the Evaluation Board had no other option but to reject Cherubino Limited’s Bid.

- 1. This Board, after having considered the merits of this case, examined the relative documentation and heard submissions by the parties concerned, justifiably opines that the main issue of this Appeal is whether the information submitted by Cherubino Limited regarding the licensing of his product, satisfies the requirements, as dictated in the Tender Document. In this regard, this Board would like to respectfully refer to Section 2 of the Technical Offer under the heading of “*Market Authorisation Details*”.**

**In Section 2.1 of the Technical Offer, Cherubino Limited was requested to submit the “*Market Authorisation Holder*” in the Country of Licensing. This Board noted that in this particular section, the Appellant stated that the Market Authorisation Holder is Irish and the Country of Licensing is also Irish. This was credibly established and confirmed as being the information submitted by the Appellant.**

**At the same instance, this Board credibly notes that under Section 2.2 of the Technical Offer, Cherubino Limited stated that the Country of**

**Licensing is Ireland, whilst in fact; the submitted licence number indicated, was a British Licence. On the other hand, the information contained in these two mentioned sub sections of the Technical Offer did, in fact, create inconsistency in the submitted information.**

**In this regard, quite correctly, the Evaluation Board requested a clarification on the issue, via Clarification Note dated 26 June 2017, the response for which confirmed that the Country of Licensing is the UK and not Ireland.**

**At this particular stage of Evaluation, the Evaluation Board was faced with the Appellant's submission as containing conflicting and incorrect information from that contained in Cherubino Limited's original submission.**

**At this stage of consideration, one has to appreciate the basic fact that the Technical Offer, as indicated in the Tender Document, was regulated by Clause 3 of Section 7 of the "*Instruction to Tenderers*", whereby no modifications or rectifications to the original offers were allowed, hence leaving the Evaluation Board with no other option but to discard Cherubino Limited's offer as being non Technically Compliant.**

**The fact that under note 2.3, the Appellant indicated the Licence Number to denote that the Licence was British, does not, in any credible way, shift the onus on to the Evaluation Board to deduce the Country of Licensing. On the contrary, this Board opines that it was the responsibility of the Appellant to submit the correct information so as not to be inconsistent in his offer.**

- 2. With regards to Cherubino Limited's claim that the Principle of "*Substance Over Form*", should be applied in this case, this Board respectfully points out that the alleged principle should be applied in cases, where the substance of the Tender matter and the information requested thereof are complimentary, consistent and compliant and yet for trivial formalities, the offer submitted by the Appellants had to be discarded.**

**In this particular case, the information requested regarding the "*Country of Licensing*" and the "*Market Authorisation Holder*" was an important and vital technical feature of the product which makes the latter marketable with an assurance of safety and well-being to the user, so that the submission of such information had a weighted impact during the Evaluation Process. In this regard, this Board**

justifiably opines that the principle of “*Substance over Form*” is not applicable, in this case.

3. On a general note, this Board, after hearing all the submissions made during the Public Hearing, opines that no credible proof was produced by Cherubino Limited to justify that fact that under note 2.2 of the Technical Offer, he submitted that the Country of Licensing was Ireland and yet, at the same time, it was confirmed, through the response to the Clarification Note, that the Country of Licensing was the United Kingdom.

This Board would also point out that if the Appellant had any doubts regarding the interpretation of what was actually required under Section 2 of the Technical Offer, he could have sought a Clarification prior to submitting his offer. This Board notes that such a remedy was not availed of by the Appellant.

**In view of the above, this Board:**

- i) Upholds the decision taken by the Central Procurement and Supplies Unit to award the Tender to Pharmabart Limited;

**ii) Rejects the Contentions made by Cherubino Limited;**

**iii) Recommends that the deposit paid by the Appellant should not be refunded.**

Dr Anthony Cassar  
Chairman

Mr Carmel Esposito  
Member

Mr Richard A Matrenza  
Member

*7 November 2017*