

PUBLIC CONTRACTS REVIEW BOARD

Case 1095 – CFT 021-6543/2017 – Tender for the Supply of Modified Infant Formula Neocate or Neocate LCP

The Publication Date of the Call for Tenders was 21 July 2017 whilst the Closing Date for Call of Tenders was 10 August 2017. The Estimated Value of the Tender, (Exclusive of VAT) was € 126,000.

Two (2) Bidders have submitted offers for this Tender.

On 2 October 2017, Associated Drug Company Limited filed an Objection against the decision of the Central Procurement and Supplies Unit to award the Tender to Cherubino Limited for the price of € 130,500 (Exclusive of VAT) against a deposit of € 600.

On 31 October 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 – Associated Drug Company Limited

Mr Nicholas Falzon	Representative
Ms Christina Meli Bugeja	Representative
Ms Kimberley Zammit	Representative

Recommended Bidder – Cherubino Limited

Dr Francis Cherubino	Representative
Dr Danica Caruana	Legal Representative

Contracting Authority – Central Procurement and Supplies Unit

Ms Sharon Vella	Member, Evaluation Board
Mr Mark Zammit	Representative
Dr Stefan Zrinzo Azzopardi	Legal Representative

Dr Danica Caruana, the Legal Representative for Cherubino Limited, opened the Public Hearing by asking why there were two cheques dated 29 September 2017 and 3 October 2017, attached with the Objection.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board replied that, the reason was that Associated Drug Company Limited did not deposit the correct amount for their objection. Technically, he continued, that the Public Contracts Review Board could have rejected the Appellant's Appeal.

Dr Danica Caruana, the Legal Representative for Cherubino Limited, replied that the Objection period had expired and thus, the difference to be paid as deposit should not have been accepted. She quoted Clause 273 of the Public Procurement Regulations which *inter alia* stated that:

“The Objection shall only be valid if accompanied by a Deposit Equivalent to 0.50 per cent of the Estimated Value set by the Contracting Authority of the whole Tender”

Dr Caruana, continued by saying that in previous similar circumstances, the Appellant was given the blame and that he was obliged to check the correct amount of deposit which he had to pay. The Regulations were clear and were not subject to interpretation. She expected the Public Contracts Review Board to take a decision on this matter.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board, said that this Board decided to continue with the proceedings. If the Public Contracts Review Board decided differently then, the Public Hearing would not have convened.

At this stage, the Chairman of the Public Contracts Review Board invited the Appellants to state their case before this Board.

Mr Nicholas Falzon, representing Associated Drug Company Limited opened by saying, that the way the Tender was structured did not allow them to attach the document. In that, the Central Procurement and Supplies Unit referred to, as the missing document which was not submitted by the Appellants.

Associated Drug Company Limited argued, that they complained with the Central Procurement and Supplies Unit regarding the matter. If the Tender was prepared correctly, there would have been no reason why they should have been penalised.

Dr Stefan Zrinzo Azzopardi, the Legal Representative for the Central Procurement and Supplies Unit remarked that there were enough fields for the Appellants to submit all the necessary documents and there was no difficulty to do so.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board asked whether these documents could have been attached in previous Tenders.

Dr Stefan Zrinzo Azzopardi, the Legal Representative for the Central Procurement and Supplies Unit answered that the problem was only relatively for this Tender. In that, even if the said documents were presented by the Appellants, the problem was still that the workings would not have tallied. This was the reason why the Appellants were disqualified.

Mr Nicholas Falzon, on behalf of Associated Drug Company Limited said that the Tender Document stipulated that, if they had provided a letter from the mother company, saying that these products required two months to be released, as an alternative of following the normal limitations of the expiry date, it would have sufficed. Mr Falzon added that, he had the documents available with him as an evidence for further reference.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board remarked that other Bidders have submitted this Document when making their offers.

Mr Nicholas Falzon, representing Associated Drug Company Limited said that it could be the case that other Bidders did not have the disputed document available.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board countered that what this Board's concern was; the documents submitted by all Bidders.

Mr Nicholas Falzon, representing Associated Drug Company Limited argued that they could not be penalised for not having enough time, to submit the required documents.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board asked whether there were any members of the Evaluation Board, who were present for further questioning. Dr Stefan Zrinzo Azzopardi, the Legal Representative for the Central Procurement and Supplies Unit, replied in the affirmative.

At this point, Ms Sharon Vella, a Senior Pharmacist within the Central Procurement and Supplies Unit who was also a member of the Evaluation Board, holding ID Card Number 160982 M was summoned by the Public Contracts Review Board to testify under oath before the latter.

Following Ms Vella's testimony, Dr Stefan Zrinzo Azzopardi, the Legal Representative for the Central Procurement and Supplies Unit remarked, that the Tender was evaluated on the documents submitted. The mechanism was clear and that was the manner in which the Appellants have presented their offer.

Mr Carmel Esposito, a member of the Public Contracts Review Board asked, whether it would have made any difference, if the document was uploaded. Dr Stefan Zrinzo Azzopardi, the Legal Representative for the Central Procurement and Supplies Unit, replied in the affirmative.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board asked whether this could have been sent through the electronic system. Dr Stefan Zrinzo Azzopardi, the Legal Representative for the Central Procurement and Supplies Unit replied that this could have been attached, with the uploaded documents.

Mr Nicholas Farrugia, on behalf of Associated Drug Company Limited pointed out that the system used by the Contracting Authority allowed for only one document to be uploaded.

Dr Danica Caruana, the Legal Representative for Cherubino Limited, argued that this Public Hearing should not have been appointed since the deposit was not valid and hence neither the Objection.

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.

This Board,

Having noted this Objection filed by Associated Drug Company 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 021-6543/2017 listed as Case No 1095 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: Mr Nicholas Falzon

Appearing for the Contracting Authority: Dr Stefan Zrinzo Azzopardi

Whereby, the Appellant contends that:

- a) The “*Lead Time*” prior to the release of his product is two months or even more, as duly confirmed by the Market Authorisation Holder.

In this regard, the Appellant insist that the “*Tendering System*” did

not allow him to submit such confirmation, which would have asserted that his offer was compliant with Article 24.1 of the Tender Dossier.

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 31 October 2017, in that:

- a) The Central Procurement and Supplies Unit contends that the Evaluation Board could only assess the Appellant's offer on the information submitted by the latter and in this regard, the Contracting Authority confirms that the declaration from the Market Authorisation Holder was not submitted. The same Contracting Authority also maintains that, even so, had the Appellant submitted such declaration, his offer would have still not been compliant due to the fact that the Appellant stated the incorrect "*Remaining Shelf Life*" of the product and therefore, the Evaluation Board had no other option but to deem the Appellant's Bid as being non Technically Compliant.

This same Board also noted the Testimonies of the witness namely, Ms Sharon Vella duly summoned by the Public Contracts Review Board.

After having examined the relative documentation and heard submissions made by the parties concerned, this Board would like to respectfully refer to the opening remarks made by the Recommended Bidder, in that the Appellant did not affect the correct amount of deposit with this Appeal, hence Clause 273 of the Public Procurement Regulations should apply and thus dismiss this Appeal.

In this regard, this Board is fully aware of such a regulation. However, in arriving at the decision to hear this Appeal, the same Board took into consideration the fact that the Central Procurement and Supplies Unit itself had misguided Associated Drug Company Limited as to the amount of deposit which had to be paid on Appeal and at the same instance, as and when the Appellant was made aware of such a discrepancy, the latter paid the difference due. In this regard, this Board justifiably opines that the Appellant should not be deprived of his right of Appeal for following incorrect instructions given by the Contracting Authority. On the other hand, if the latter gave the correct amount of deposit to be filed on Appeal and yet the Appellant did not pay the correct amount, then the situation and decision of this Board would have been different and in this regard, the latter decided to hear the Appeal filed by Associated Drug Company Limited.

1. With regards to the Associated Drug Limited's Grievance, this Board opines that there are two main issues pertaining to this Appeal which merit consideration, namely "*The Appellant's Submitted Information*" and "*Certification from the Marketing Authorisation Holder*", which are being considered as follows:

i) Submissions by Associated Drug Limited

This Board would like to refer to Clause 24.1 of the Tender Document which clearly laid out the following conditions:

"Products having a shelf life as per SPC of 24 months or more, must not be more than 1/3rd expired upon delivery to Stores. Products having a shelf life as per SPC which is less than 24 months must not be more than 1/6th expired upon delivery to Stores. In cases where the Marketing Authorisation Holder (MAH)/Manufacturer submits written evidence in the quote that lead time prior to release is 2 months of more, the product must not be more than 1/3rd expired upon delivery to Stores."

Under Section 3.4 – Product Details, the Appellant stated that the “Remaining Shelf Life” of his product, on delivery, will be 12 months as clearly shown hereunder:

3.3	Total Product Shelf Life of Product (If Applicable)	18 Months
3.4	Remaining Shelf Life on Delivery (If Applicable)	12 Months

If none of the offers received are compliant to Article 24.1 of the Special Conditions, the Contracting Authority still reserves the right to consider offers, provided that any expired stock is collected and credited.

It is credibly evident that Appellant did not heed the conditions as laid out in Article 24.1 in that, “for products having a total shelf life of less than 24 months, the supply thereof must not be more than one sixth expired upon delivery”.

In the case of Associated Drug Limited, the total product shelf life was 18 months, as duly declared by the same, in his offer so that, to enable his offer to be compliant in accordance with the

mentioned article, a maximum of one sixth of the total product shelf life was allowed to represent expired stock upon delivery, which should be 15 months remaining shelf life. In this regard, the Appellant, quite clearly, stated that his product remaining shelf life is 12 months, which is incorrect and not compliant with this basic condition contained in Article 24.1 of the Tender Document. Thus his offer, which was correctly assessed by the Evaluation Board, was to be considered as technically non-compliant.

In this respect, as stated on numerous occasions, this Board would like to emphasize the importance which the Tender Document should be given so that prior to the submission of his offer, the Appellant had the sole responsibility to verify that the Bid conforms with all the dictated requirements of the Tender Document.

This Board would also like to point out that if Associated Drug Company Limited was not certain of any conditions as laid out in the Tender Document, it had the opportunity to seek clarifications prior to the submission of its offer, however such a remedy was not availed of by Appellant. In this regard, this Board confirms

the decision taken by the Evaluation Board in the Award of the Tender.

ii) With regards to Associated Drug Company Limited's claim that the Tendering System did not allow him to submit an electronic attachment with his offer, this Board would like to respectfully refer to similar claims made by other Appellants, on other Appeals and wherein this Board, after having heard credible testimonies made by professional Technical Witnesses well versed in their field, credibly established that the present E-Tendering System does not create stumble blocks with regards to the submissions of attachments through the system itself and at the same instance, this Board was not provided with credible proof or evidence justifying the Appellant's inability to submit such attachments.

In this regard, this Board would have expected Associated Drug Company Limited to raise this issue prior to the submission of its offer as it was fully aware that in such circumstances, the attachment of a declaration from the Market Authorisation Holder was essential for the Bid to justify the "*Lead Time*" for his product's release. Even so, this Board would like to point out that the Appellant's Offer was technically non-compliant in the first

place and the decision of the Evaluation Board to discard his offer was fair, just and transparent.

In view of the above, this Board finds against Associated Drug Company Limited and recommends that the deposit paid by the latter should not be refunded.

Dr Anthony Cassar
Chairman

Mr Lawrence Ancilleri
Member

Mr Carmel Esposito
Member

7 November 2017