

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

Dr Francis Cherubino, the Legal Representative for Cherubino Limited opened by saying that the discussion was about the shelf life which they had submitted in their offer. He referred to the reasons illustrated in the Letter of Objection issued by the Central Procurement and Supplies Unit on 28 September 2017 which were,

“As per Article 24.1 in the published Tender Dossier, the Remaining Shelf-Life Upon Delivery for a product Shelf-Life of 18 months, (as per SPC), must be 15 months and not 12 months, as declared in the Technical Offer form.”

Dr Cherubino continued by saying that if one had to refer to the Article mentioned in the Letter of Rejection, here there is a situation where the remaining shelf life of the submitted product had to be declared. The manufactured product has a shelf life. Before it is released in the market, there is a qualitative testing which determines what shelf life the product has.

Dr Francis Cherubino then quoted Article 24.1 from the Tender Document which *inter alia* stated,

“Further to Article 24.1 of the General Conditions, Product Shelf Life should be as follows:

Either

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 or more, the product must not be more than 1/3rd expired delivery to Stores”

The Appellant continued by saying that in their case, there were not more than 24 months of shelf life and thus one had to calculate that if the product has less than 24 months of shelf life, the same has to be less.

Dr Francis Cherubino explained that in this case, their product was subject to two or more months of shelf life. The Appellants have also evidence from the part of the manufacturer which the Tender says that it couldn't be submitted since it was the manufacturer who had to submit the quote.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board, asked what the quote was for which Dr Francis Cherubino, on behalf of Cherubino Limited, replied that it was the quote which the manufacturers gave to the Appellant who felt that it was not clear in the Tender Document.

Dr Cherubino then proceeded to continue quoting from Article 24.1 in the Tender Document which *inter alia* stated,

“In the case when the contractor delivers to the Central Procurement and Supplies Unit and on its part CPSU receives items that have shelf life conditions different to those listed above, the contractor shall notify in writing CPSU with the alternative shelf life conditions of the items on date of delivery of the said items. Any expired stock delivered to CPSU as aforesaid, shall be collected by the contractor in the case that the said stock expires and CPSU shall receive a credit equivalent to the price of the expired stock. CPSU shall notify the contractor in writing with a list of items supplied by the contractor that expired and the contractor is to collect the said stock within seven (7) working days from date when the list of expired items is notified to the Contractor. If the expired items are not collected within the seven (7) day period, CPSU shall debit the Contractor’s account to credit transaction equivalent to the cost of the expired stock and dispose of the expired items. All costs including the cost of disposal shall be charged to the Contractor’s account.”

Dr Francis Cherubino continued by saying that there were no time limitations issued in the Tender Document. If there were any problems with the shelf life stock, the Contractor had the onus to inform the Contracting Authority and oblige itself that any unused stock was to be credited to the Bidder and replace it with new stock.

The Tender was clear in this regard and if there was a situation where shelf life would not have been respected, the same obliges the Contractor to inform CPSU in writing without any further remedy. This was the norm within the Central Procurement and Supplies Unit, concluded Dr Cherubino.

Dr Stefan Zrinzo Azzopardi, the Legal Representative for the Central Procurement and Supplies Unit said that the first point which has to be established. The Evaluation Board had to make its considerations on what was submitted. When one sees the Tender Specifications presented, the Summary of Product Characteristics submitted indicate a total product shelf life was 18 months while the remaining shelf life submitted was of 12 months. The basic interpretations mentioned by the Appellant said that if one had to deduct one sixth of eighteen months, then the remaining shelf life had to be of fifteen months.

Dr Zrinzo Azzopardi continued by saying that the only comfort which the Evaluation Board had was through the declarations submitted in the Technical Specifications. It was the responsibility of the Bidder to convince the Contracting Authority that he had the best offer available. The Public Contracts Review Board’s task was not to correct things which occurred previously but to ensure that the Evaluation Board made its considerations in a correct and just way. The Central Procurement and Supplies Unit maintain that the latter could not make a different conclusion.

With regards to the “*either/or*” issue, Dr Stefan Zrinzo Azzopardi says that the Tender Document specifies what the Bidders had to deliver and that there was a basic difference from what has been evaluated previously since the amounts requested have increased. Both parts had to determine the correct Tender parameters in order for the supply to continue.

Dr Francis Cherubino, on behalf of Cherubino Limited, countered that they have submitted all the required information and that they did nothing wrong. One cannot compare two different packages and the information given was the correct one.

The Appellant also added that he disagreed with the Contracting Authority’s argument on the “*either/or*” issue since the General Conditions were clear and that there were no timings

mentioned. The Law was to be read as one and whole and the Bidders had to apply what does the Law says. Dr Francis Cherubino continued by saying that the “*or*” issue was clear and that the product will not be changed since they did not commit any errors.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board, asked whether there was any technical person present from the Central Procurement Supplies Unit for further questioning for which the reply from the latter was in the affirmative.

At this point, Mr Mark Zammit, an Advanced Pharmacist Practitioner within the Central Procurement and Supplies Unit, holding ID Card Number 425874 M was summoned by the Public Contracts Review Board to testify under oath before the same.

At this stage, the Public Hearing was adjourned to Tuesday 14 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 Cherubino Limited (herein after referred to as the Appellant) on 9 October 2017, refers to the Contentions made by the latter with regards to the award of Tender of Reference CFT 021-6246/17 listed as Case No 1097 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 Francis Cherubino

Appearing for the Contracting Authority: Dr Stefan Zrinzo Azzopardi

Whereby, the Appellant contends that:

- a) The “*Shelf Life*” of 12 months upon delivery, as quoted by the same, is correct. In this regard, Cherubino Limited refers to Article 24.1 of the Tender Document where the conditions stated, therein were all conformed by the Bidder.

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 2 November 2017, in that:

- a) The Central Procurement and Supplies Unit maintains that the Evaluation Board can only assess an offer on the submitted information of the Bidder. In this regard, the Contracting Authority insists that no evidence was produced by the Appellant to confirm that the product had a “*Lead Time*” of two months or more prior to the release, hence Cherubino Limited’s quoted 12 months “*Shelf Life*” of the product upon delivery, was incorrect.

This same Board also noted the Testimony of the witness namely, Mr Mark Zammit duly summoned by this same Board. The Transcript of the latter is herewith attached.

This Board, after having examined the relative documentations and heard the submissions made by both parties, including the Testimony of the Technical Witness who was summoned by this same Board, respectfully opine that the main issue of this Appeal directly relates to the information submitted by the Appellant in his Bid. In this regard, this Board refers 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 or more, the product must not be more than 1/3rd expired upon delivery to Stores”

Under Section 3.5, (Product Details), Cherubino Limited stated that the “Remaining Shelf Life” on delivery will be 12 months as clearly shown hereunder:

3.5	Total Product Shelf Life as per SPC	18 Months
3.6	Remaining Shelf Life on Delivery	12 Months

From the above submitted information, it is evidently clear that the remaining shelf life on delivery should have been 15 months, unless the Appellant provided evidence that his product required a “*Lead Time*” of 2 months or more prior to being released on the market. This Board justifiably noted that Cherubino Limited did not submit a declaration from the Market Authorisation Holder or the manufacturer confirming that their product required such period for release.

In this regard, if the Appellant had submitted such a declaration, then, Article 24.1, wherein it was stated that, “*In cases where the Market Authorisation Holder/Manufacturer submits written evidence in the quote that lead time prior to the delivery is two months or more*”, would have been applicable and consequently Cherubino Limited’s offer would have been compliant, as 1/3rd of the expired supply on delivery was allowed. However, in the absence of such a declaration, this Board credibly confirms the decision taken by the Evaluation Committee with regards to the Appellant’s offer as being technically non-compliant.

In this respect, as stated on numerous occasions, this Board would emphasize the importance of adherence to the conditions as duly dictated in the Tender Dossier. As the prospective Bidder, Cherubino Limited had the responsibility to verify that his offer conforms to all the dictated requirements of the Tender Document. In this particular case, Article 24.1 represented the prime conditions of the shelf life of the product, upon delivery.

This product and its “*shelf life*” played a vital role in this procurement, when one takes into account that the product is a “*life saving*” medicine used in CPRs on dying patients on whom the Central Procurement and Supplies Unit would not dare to apply expired medicines and in this regard, the same Contracting Authority wanted to ensure that the product is always available in an “*unexpired*” state. This Board was also credibly informed that such a medicine is present in every ward of the Hospital, and therefore, the necessity of “*shelf life*” of this particular product is of vital importance.

With regards to Cherubino Limited’s concern regarding the designation of a “*Contractor*”, as mentioned in Article 24.1, this Board opines that the latter word refers to the entity who was awarded the Tender and thus he is considered as the Contractor to the Authority. At the same instance, the

same article refers to the deliveries and it is only logical that whoever is going to deliver the product is the same Bidder who was successful in his Bid. In this regard, although the wording or phrasing of the sentence could have been more direct, there is enough clarity and evidence that the word “Contractor” refers to the successful Bidder.

In view of the above, this Board:

- (i) Does not uphold Cherubino Limited’s Contentions;**

- (ii) After having satisfactorily verified the procedure adopted by the Evaluation Board in its Evaluation Process, confirms the decision taken by the Central Procurement and Supplies Unit in the Award of the Tender;**

- (iii) In view of (i) and (ii) above, recommends that the deposit paid by the Appellant is not to be refunded.**

Dr Anthony Cassar
Chairman

Mr Lawrence Ancilleri
Member

Mr Carmel Esposito
Member

14 November 2017