

PUBLIC CONTRACTS REVIEW BOARD

Case 1404 – CT 2246/2018 – Tender for the Supply of Cyclin - Dependent Kinase 4/6 (CDK 4/6) Inhibitor

The publication date of the tender was the 6th February 2019 whilst the closing date was the 12th March 2019. The estimated value of the tender (exclusive of VAT) was € 3,909,330.

On the 28th October 2019 V.J.Salomone Pharma Ltd filed an appeal against Central Procurement and Supplies Unit as the Contracting Authority on the grounds that their bid was technically non-compliant. A deposit of € 19,547 was paid.

There was one (1) bidder and two (2) bids.

On 17th December 2019 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Carmel Esposito as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellants – V.J.Salomone Pharma Ltd

Dr Arthur Galea Salomone	Legal Representative
Mr Adrian Salomone	Representative
Ms Louisanne Caruana Scicluna	Representative
Mr Norbert Falzon	Representative

Recommended Bidder – V.J.Salomone Pharma Ltd

Dr Roderick Zammit Pace	Legal Representative
Dr Pier Luca Bencini	Legal Representative
Ms Vanessa Said Salomone	Representative
Mr Christopher Treeby Ward	Representative

Contracting Authority – Central Procurement and Supplies Unit

Dr Marco Woods	Legal Representative
Ms Monica Sammut	Chairperson Evaluation Committee
Ms Julia Pirotta	Secretary Evaluation Committee
Ms Kathryn Galea	Member Evaluation Committee
Dr Alison Anastasi	Member Evaluation Committee

Dr Anthony Cassar Chairman of the Public Contracts Review Board welcomed the parties to this unusual case and invited submissions.

Dr Galea Salomone Legal Representative for V.J.Salomone Ltd said that the firm he was representing were the agents for various principals. They represented both Pfizer and Novartis, on behalf of which firms they had submitted bids. Within the Appellants' organisation there existed a Chinese wall to fulfil their responsibility towards both firms. The interest in this appeal is that the CPSU has the prospect of a better product at a better price and hence the appeal against their decision.

At this stage the Chairman said that there would be a short recess for the Board to consider if this appeal should proceed.

After the recess the Chairman indicated that the Board would hear the appeal.

Ms Louisanne Caruana Scicluna (22172M) called as a witness by V.J.Salomone Ltd testified on oath that she was the administrator of the Novartis Business Unit and had 15 years experience of the tendering process. She explained how she had proceeded when submitting this tender and tabled Doc 1 to confirm that she had ensured that all necessary files had been submitted. After the tender closing date she had consulted the platform to check prices and that the tender package had been successfully uploaded (Doc 2) and was surprised to find that each price had been repeated three times. It transpired that the EPS screen indicated that only five files had been uploaded instead of the seven submitted by Appellants (Doc 3). One of the files that seemed to have disappeared was the one submitting the Summary of Product Characteristics (SPC) of the product.

Questioned by Dr Woods Legal Representative for the Central Procurement and Supplies Unit witness stated that the shot tabled as Doc 1 was in fact a shot of her own office computer screen.

Ms Kathryn Galea (162089M) called as a witness by the Public Contracts Review Board testified on oath that she was a member of the evaluation committee. She stated that the SPC file was not available on screen (tabled as Doc 3). She was the first person in the tender process who checked the files, downloaded them and found the mock-ups. She sent an internal clarification regarding this. Shown a document (Doc 4) by Dr Galea Salomone witness said that she did not see the message '*Unexpected end of archive*' at the top of the page.

After a short recess witness proceeded with her testimony and stated that a data error message appeared on the last file on the list and there were only five files on the evaluation committee's report again referring to Doc 4.

Ms Monica Sammut (42482M) called as a witness by the Public Contracts Review Board testified on oath that she was the Chairperson of the evaluation committee. She said that the SPC file was

not found and the mock-up folder could not be opened. They contacted the system developers through e-mail (Doc 5) seeking advice and were advised that the SPC file was not available for downloading as it was already corrupted when attached to the tender and that the system was working correctly. In reply to a question witness stated that the reason that the tender prices were reported three times is that if any errors were noticed the figures were repeated each time they re-opened the platform – this however did not change the offers.

The Chairman asked the parties if they agreed if the PCRБ carried out their own investigation on this point and there was general assent.

Mr Jason Grech (185071M) called as a witness by the Public Contracts Review Board testified on oath that he was responsible for the EPPS system at the Department of Contracts. Shown Doc 5 he stated that the developers confirmed and emphasised that the system was working correctly but the file sent was corrupted at the sending stage or the system was not used correctly. There were other occasions where corrupted files were received and this certainly was not a unique case. He had no way of knowing if there was anything wrong with remitters' computer.

Dr Galea Salomone said that from the testimony of Mr Grech it was evident that both parties are right in their submissions. As a consequence of some corruption two files were lost but one cannot exclude that the Contracting Authority's system was not working correctly. Appellants stand to lose if appeal is not upheld, and as a consequence it will cost the country double to obtain the same product.

Dr Woods said that the point made about the money aspect was irrelevant. Appellants claim that seven files were sent but actually only five were received – the SPC file being one of them. The system developers, European Dynamics, confirmed that there were no faults in the system and hence the origin of the problem was not with the Authority who applied the principle of self limitation in reaching their decision. Reference was made to Case 1276 which dealt with a similar situation and which held that the responsibility for missing documents falls on the bidders.

Dr Galea Salomone reminded the Board that they have discretion in assessing the costs of the hearing.

Dr Roderick Zammit Pace Legal Representative for V.J.Salomone Pharma Ltd said that from the technical aspect the expert confirmed that the error occurred at source. No evidence has been produced that there was any verification by the Appellants that the files were not corrupted, and all indications are that the corruption was at source. The lack of an SPC makes the tender not complaint.

The Chairman thanked the parties for their submissions and declared the hearing closed.

Decision

This Board,

having noted this objection filed by V. J. Salomone Pharma Ltd (herein after referred to as the Appellants) on 28 October 2019, refers to the claims made by the same Appellants with regard to the tender of reference CT 2246/2018 listed as case No. 1404 in the records of the Public Contracts Review Board awarded by Central Procurement and Supplies Unit (herein after referred to as the Contracting Authority).

Appearing for the Appellants: Dr Arthur Galea Salomone

Appearing for the Contracting Authority: Dr Marco Woods

Whereby, the Appellants contend that:

- a) They had submitted all the requested information through the EPPS system, whilst at the same instance the Authority is claiming non-receipt of same the SPC of the product]. In this respect, Appellants maintain that there must have been some files corrupted through the system and since they have checked that all the necessary files had been submitted from**

their end, the alleged corruption must have occurred at the receiving end of the system.

This Board also noted the Contracting Authority's 'Letter of reply' dated 12 November 2019 and its verbal submissions during the hearing held on 17 December 2019, in that:

- a) The Authority insists that the SPC file was not submitted and the Evaluation Committee had no other option but to disqualify Appellants' offer.**

This same Board also noted the testimony of the witnesses namely:

Ms Louisanne Caruana Scicluna duly summoned by V. J. Salomone Ltd

Ms Kathryn Galea duly summoned by the Public Contracts Review Board

Ms Monica Sammut duly summoned by the Public Contracts Review Board

Mr Jason Grech duly summoned by the Public Contracts Review Board

This Board has also taken note of the documents submitted by V. J. Salomone Pharma Ltd which consisted of:

Doc No. 1 – Screen shot of all files submitted by Appellants

Doc No. 2 – Screen shot of the E-Tender

Doc No. 3 – Screen shots of files received, through EPPS system

Doc No. 4 – Screen shot of EPPS screen

Documentation submitted by Central Procurement and Supplies Unit consisting of:

Doc No. 5 – Correspondence with server provider of EPPS system.

This Board, after having examined closely the relevant documentation to this appeal and heard submissions made by all the interested parties, including the testimony of the witnesses duly summoned opines that, the only issue that merits consideration is the alleged non-submission of the SPC file by Appellants.

- 1. With regard to Appellants' contention in that, they had submitted the SPC, this Board would respectfully point out that the evidence submitted by same to justify such a submission does not prove that the Authority received such documentation.**

- 2. With regard to the issue of corrupted files, this Board noted that Appellants are claiming that, since they had in fact, submitted the SPC, the incidence of corruption of the documentation occurred at the**

receiving end. In this respect, from the testimony of Mr Jason Grech, the person in charge of the operation of the EPPS system, it was credibly confirmed that the system itself was working in the correct manner at the time of Appellants' submissions. Furthermore, Mr Grech obtained the necessary information from the system developers namely, European Dynamics, the latter of whom confirmed that there were no faults in the system. In this respect, this Board feels that emails verifying the necessary checks carried out by the Authority and the reply from the system providers, illustrate the procedure and action taken by the Authority, as follows:

*“From: Sammut Monica at CPS-Health
Sent: Monday, 25 March 2019 11.01
To: Etenders at MFIN <etenders@gov.mt>
CC: Galea Kathryn at CPS-Health <Kathryn.galea@gov.mt>
Subject: urgent – re problems with epps CT2246/2018
Importance: High*

Good morning,

While evaluating the CT tender in caption we are encountering a technical problem as we are unable to open one of the folders in an attachment.

Basically it is 15229155873724.zip and the folder that we are not managing to open and view its content is: Kisqali Mock Up Folding Box.pdf.

I am attaching screen shots.

Can you kindly advise

It would be greatly appreciated it treated with urgency.

From: David at MFIN<David.gatt@gov.mt>***On Behalf Of Etenders at MFIN***
Sent: Tuesday, 26 March 2019 11:18
To: Sammut Monica at CPS-Health <monica.sammut@gov.mt>
Subject: RE: urgent-re problems with epps CT2246/2018

Dear Ms Sammut,

Kindly see reply from web developers below:

the file which is available for downloading in the online evaluation page is the file attached by the supplier during the preparation of his tender. We attempted to open the pdf file in speak using Adobe Reader and Foxit Reader and none of the aforementioned software managed to do it successfully. The pdf file appears to be corrupted. Please note that we have successfully opened the rest attached files of “V. J. Salomone Pharma Limited” with Tender ID:000109326.

Since no strange behaviour was observed during the unlocking of tenders and since the rest of the attachments can be downloaded and opened

successfully, it can be concluded that the file in the speak was already corrupted when attached to the tenders.

Regards,

*David Gatt
Procurement Manager
Department of Contracts*

From: *Sammut Monica at CPS-Health*
Sent: *Wednesday, 30 October 2019 10:05*
To: *: David at MFIN<David.gatt@gov.mt>>*
Subject: *RE: urgent – re problems with epps CT2246/2018*

Dear Mr Gatt,

Good morning,

Further to below, we would like to know if it is possible that maybe, there was a fault with EPPS at the time of uploading as we received an objection and bidder is claiming that they had submitted a folder with SPC.

As per page 3 of 1st attachment (where the bidder is claiming what was uploaded), the SPC folder is just underneath the mock-up folder – the one we raised our previous query since it was corrupted and could not be opened.

Can you kindly look into it as we have a PCRB.

Thanks and regards,

Monica

From: David at MFIN <David.gatt@gov.mt>
Sent: Thursday, 31 October 2019 10:40
To: Sammut Monica at CPS-Health <monica.sammut@gov.mt>
Subject: RE: urgent-re problems with epps CT2246/2018

Follow Up Flag: Follow up
Flag Status: Flagged

Dear Ms Sammut,

Kindly note the below reply from EPPS web developers;

we confirm again that the file which is available for downloading in the online evaluation page is the file attached by the supplier during the preparation of his tender. The pdf file of interest is corrupted.

We also confirm that no strange behaviour was observed during the unlocking of tenders and since the rest of the attachments could be download and opened successfully, the file in speak was already corrupted when attached to the tender.

Regards,

*David Gatt
Manager II
Department of Contracts ”*

3. From the above-mentioned verifications duly carried out by the Authority and the confirmation of the system suppliers, this Board is convinced that two corrupted files originated from source and in this respect, the Evaluation Committee, quite appropriately, applied the principle of self-limitation so that they had no other option but to deem Appellants' offer as administratively non-compliant.

In conclusion, this Board opines that,

- a) Two out of seven files, pertaining to Appellants' offer were corrupted at source and the Authority could not access same.**

- b) The necessary verifications were carried out by the Authority to ensure that no fault occurred from its end.**

- c) Appellants did not produce credible evidence to justify that the corruption of the two files occurred at the receiving end.**

In view of the above, this Board,

- i. does not uphold Appellants' contentions,**
- ii. upholds the Contracting Authority's decision in the award of the tender,**
- iii. directs that an amount of €14,547 from the deposit paid by Appellants, be refunded.**

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Carmel Esposito
Member

7 January 2020