PUBLIC CONTRACTS REVIEW BOARD

Case 1413 – CT 2340/2018 – Tender for the Supply of Human Biosynthetic Insulin Preparations for Injection in Cartridges (LOT 3)

The tender was published on the 29th May 2019 and the closing date for submissions was the 2nd July 2019. The estimated value of Lot 3 of the tender (exclusive of VAT) was € 477,750.

On the 25th October 2019 Charles de Giorgio Ltd filed an appeal against Central Procurement and Supplies Unit Ltd as the Contracting Authority objecting to his disqualification on the grounds that the award of the tender was wrong and illegal. A deposit of € 2,389 was paid.

There were three (3) bidders.

On 9th January 2020 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Mr Lawrence Ancilleri and Mr Carmel Esposito as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellants – Charles de Giorgio Ltd

Dr Clement Mifsud Bonnici	Legal Representative
Mr Mark Mallia	Representative
Ms Clare Calleja	Representative

Recommended Bidder – V J Salomone Pharma Ltd

Dr Roderick Zammit Pace	Legal Representative
Ms Vanessa Said Salomone	Representative
Mr Philip Pace	Representative
Mr Emil Wiech	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 Edith Sciberras	Member Evaluation Committee
Mr Adrian Spiteri	Member Evaluation Committee
Dr Ian Ellul	Member Evaluation Committee
Mr Karl Farrugia	Representative
Ms Clarissa Captur	Representative

Department of Contracts

Dr Franco Agius Legal Representative

Dr Anthony Cassar Chairman of the Public Contracts Review Board welcomed the parties and invited submissions and saying that as there were appeals on three lots of the same tender these will be heard concurrently.

Dr Clement Mifsud Bonnici Legal Representative of Charles de Giorgio Ltd said that this tender dealt with the supply of Insulin. The ground for appeal is easily identifiable but the rationale behind it is complex. A principle long held by the Public Contracts Review Board (PCRB) is that in health procurement the safeguarding of patients' safety is a supreme point. The product selected in the tender Gensulin is derived from a biological source and therefore more onerous scrutiny is required than in the case of a pharmaceutical product. Gensulin is produced in Bangladesh by a company called Beximco and released in Poland by Bioton. It is not approved by the European Medicines Agency (EMA) or the Food and Drug Administration (FDA) in the United States, and was approved on a purely national basis only in Poland before that country joined the European Union. It is not registered anywhere else in the EU, except in Malta where it is registered under article 126 of Directive 2001/83 of the EU which allows registration for public health reasons. In filing this appeal Appellants' company feels that they have an obligation not only to the market but also to patients in general.

Dr Franco Agius Legal Representative of the Department of Contracts stated that this is a simple matter to decide. The product is licensed by the medical authorities to be sold in Malta – once the product is legally authorised and complies with medical requirements it therefore cannot be excluded from the call for tenders. The PCRB is not the competent body to decide if the licensing of a product is correct and they cannot overrule a declaration by the medical authorities that the product is safe to be sold on the Maltese market.

Dr Alison Anastasi (398384M) called as a witness by the PCRB stated on oath that she is the Head of Operations, Procurement at the CPSU. She testified that she was not involved in the process in this tender but only in checking the specifications of the product. She confirmed that the members of the evaluation committee were Ms Monica Sammut, Ms Edith Sciberras, Mr Adrian Spiteri and Dr Ian Ellul, and that this the specifications of this tender were the same as issued in past tenders.

Ms Monica Sammut (42482M) called as a witness by the PCRB testified on oath that she was the Chairperson of the evaluation committee. She stated that no medical consultants had been consulted to advice during the evaluation of the tender, and that none of the members of the evaluation team had any experience in the field of diabetes. At no stage of the tender evaluation were any consultations held with medical consultants regarding the likely outcome of switching patients to a different medication.

Professor Stephen Fava (154262M) called as a witness by the PCRB testified on oath that he is a specialist in diabetes endocrinology and head of the department of diabetes endocrine at Mater Dei Hospital, apart from being a University professor. He testified that he had not been consulted by CPSU, DPA or DMO on the drafting of the tender in question, nor consulted by the evaluation committee on the product properties of Gensulin. In the past he had attended a lecture sponsored by a company by the name of Bioton, at which attendees had been presented with data and hand outs on the product. He stated that he was not completely convinced that the product being offered was completely similar or interchangeable with the product currently in use as certain data was missing. Clinicians using a new product must be convinced of the interchangeability of a new product with an existing one.

Witness continued testifying that he was not totally convinced, but it would be less of a concern, if he were to use Gensulin on new patients although he would still like to see more data confirming that the product would have the same effect on patients. One needs to see studies on the effects of bio-similarity between the two products to see if they have the same effect in meeting all medical requirements.

According to the witness the fact that Gensulin was listed as approved in Malta does not mean that it is the same as the product currently in use or that it meets all the requirements and he would expect a new product to be approved by the EMA before being used as that gives a guarantee of efficacy and safety. If a product is registered as a bio-similar it allays concerns about similarity. EMA approval gives the assurance that more rigorous tests have been carried out – if a product is registered only in Malta it does not give the same assurance. He confirmed that in his view medical practitioners should always be consulted before a tender is issued as things change all the times in medical matters – to his recollection it was about eight years since he had last been consulted on a tender.

Dr Franco Agius asked for the testimony of Prof Fava to be interrupted as he wished be recorded verbatim that:
"The Department of Contracts wishes to object to the line of questioning be put to witness as the appeal is not based on this, that the issue as to how questions are put is not reflected in the letter of appeal. The line of questioning deals exclusively with the regulatory checking or scrutiny that the awarded drug has undergone. Reference to patients' safety is exclusively limited to this context, hence arguments related to interchangeability of medicines, switching over patients to new products are not part of the merits of this appeal. In conclusion such arguments and line of questioning should not be allowed."

Dr Clement Mifsud Bonnici asked that the following be recorded verbatim:
"On behalf of Appellants Dr Mifsud Bonnici respectfully does not agree and submits that this objection is based on a wrong reading of the letter of objection. The ground of objection relates to the safety and well-being of patients and does not discriminate between current and new patients. As to the matter of interchangeability reference is made to paragraph 9 of the letter which raises the issue as to whether there is the same functional and therapeutic effect of the other products on the market"

The Chairman stated that after hearing the submissions made, the Board refers to paragraph 9 of the letter of objection which reads "As the Appellants shall prove during the sitting before this Honourable Board, the administration of Gensulin is not in the patients' safety and well-being, and moreover, does not guarantee the same functional and therapeutic effect of other products on the market which have been duly authorised by the EMA". On the basis of this the Board will hear representations made on the safety aspect of the product on patients.

Proceeding with his testimony Prof Fava stated that changeover to Gensulin cannot be done automatically because if the effect is different it will cause problems to patients and health risks like loss of control and hypoglycaemia. With new patients the risk arises if the new medicine is less effective but witness would prefer to see more data before passing judgement. The existing guidelines suggest that the risk is to be considered individually on a case by case basis and close monitoring.

Questioned by Dr Agius, witness said that in his department there are five consultants and a number of junior doctors who to his knowledge have not been consulted on the new product in this tender. He had personally contacted a Mr Philip Pace from the supplier company seeking further information on the new product but he had a very poor response regarding more data. Witness was not aware if the Directorate for Pharmaceutical Affairs had consulted his unit prior to the issue of the tender.

Dr Mifsud Bonnici sought the Chairman's permission to produce a bundle of seven documents of a non-technical or scientific argumentation nature.

Dr Agius objected to the presentation of fresh documents at this sitting.

Dr Mifsud Bonnici pointed out that these seven documents were in the nature of an invitation to a symposium, some press releases and quarterly financial reports from Bioton. These had not been included in the bundle of documents produced on the 6th January through a mere oversight, and he pointed out that the order from the Board ordering production of documents ahead of this sitting was sent only on the 30th December 2019.

The Chairman pointed out that a general order of the Board to produce documents well ahead of a hearing was in fact issued around four months previously and certainly not on December 30th.

There was a discussion involving all parties as to accepting or objecting to the production of fresh documents and the effect of further delays in the hearing of this case.

The Chairman pointed out that if there was going to be a second hearing then he would propose an early date as the Board does not wish to prolong a decision on this tender.

Dr Marco Woods Legal Representative of the CPSU and Dr Agius jointly objected on legally valid points to the production of fresh documents. The appeal was filed three months ago – on 25th October 2019. In November, by e-mail, (tabled as Doc 1) the Board ordered all parties to submit documents. The original date of the appeal was 12th December and therefore accepting documents this late goes against the principle of equality of arms, and the request should be rejected.

An off-the-record discussion between the parties took place regarding the admissibility or otherwise of documents CDG 17 to 23.

On resumption of the hearing Dr Mifsud Bonnici gave details of the contents of documents CDG 17 to 23 whereupon the Chairman stated that the Board would allow the documents to be entered as evidence.

Dr Agius and Dr Woods jointly wished it to be recorded that document CDG 23 has a covering date of 17th September 2019 whilst in effect the correct date on the proper document is 17th September 2010. With regard to documents CDG 22 and 23 it was submitted that these are out of date as they do not reflect the current situation and should be discarded as not relevant. With regard to CDG 20 this should also be discarded as it was factually incorrect.

Dr Roderick Zammit Pace Legal Representative for VJ Salomone Pharma Ltd stated that he objects and endorses the objection to document CDG 22 and CDG 23 as they are out of date and not relevant and the notes to CDG 22 indicate that Bioton is in a joint venture with Marvel which is factually incorrect. As regards the totality of the documents, said Dr Zammit Pace, the Board is reminded that the issue under consideration is whether the decision of the Contracting Authority (that the bid is compliant) is correct. The documents presented have no relevance to the decision regarding compliance. Documents DCG 17, 18 and 19 refer to a medical symposium and again have no relevance to the tender compliance. As regards documents CDG 20 and 21 the interested party objects to them on the ground that the premise by Appellants that the product is manufactured in Bangladesh is factually incorrect and cannot be considered. Entirely without prejudice to the objections made, in the event that the Board were to allow production of these documents as evidence, to ensure equality of arms and ultimately for the truth to prevail, the interested party would require two weeks to produce documents rebutting statements made even in the covering notes.

Ms Eliza Milewicz (CST 367380) called as a witness by the Contracting Authority testified on oath that the only facility where the product Gensulin was produced by Bioton for the global market is Poland.

In reply to a question she confirmed that the entire manufacturing process is carried out in Poland.

At this stage the Chairman said that documents CDG 20 and 21 will be disregarded and the Board retains the right to consider the other documents.

Ms Antonia Formosa (373667M) called as a witness by the PRCB testified on oath that she was the Director of the Directorate for Pharmaceutical Affairs (DPA). She stated that her role in the tender was to submit the specifications after consulting with medical consultants as part of the process. This consultation is not done on every tender – only when there is the need of a change of medicine.

Questioned by the Chairman witness stated that no consultations were undertaken for this specific tender. DPA only consulted when a change of product or specifications was proposed.

Continuing her testimony witness said that she was not sure when the consultants were last consulted on technical specifications. Specifications in question are there and unless something happens that needs change they remain in place. Witness confirmed that she was not asked by consultants to change specifications. Medical consultants are not aware when a tender was going to be issued.

Dr Ian Ellul (296980M) called as a witness by the PCRB testified on oath that he is a Pharmacist and Doctor in Paediatric Medicine and was a member of the evaluation team. He stated that he serves regularly on evaluation committees and that the recommended product meets the specifications of the tender.

Mr Adrian Spiteri (139581M) called as a witness by the PCRB testified on oath that he was a chemist by profession and apart from this occasion he had served on other evaluation committees. He stated that the recommended product meets the technical specifications of the tender.

Ms Edith Sciberras (360068M) called as a witness by the PCRB testified on oath the she was a chemist by profession and had served on this and other evaluation committees. She stated that the product was compliant with the tender specifications.

Dr Alison Anastasi, recalled to give further testimony, stated that the specifications for the tender were received from the DPA. If changes were needed before the tender was issued the CPSU requested the DPA to consult with the clinicians, which they had requested in this tender. The product Gensulin was licensed for use in Malta – the process for licensing is that the medical authorities refer to approval documents from other countries as a basis to register the product in Malta. No testing of the product takes place locally unless there are doubts on the product. Witness tabled a copy of the website database page indicating that Gensulin was registered in Malta (Doc 2).

In reply to further questions witness stated that in instances where a new product does not meet the needs of particular patients the exceptional medical treatment policy (L.N. 58/2018) is used to treat that patient. According to the specifications in the tender the products that could compete in the market are not bio-similar but bio-equivalent insulin.

Witness referred to a meeting of clinicians at the Health Ministry, which included Prof Fava, Dr Mario Cachia and others which concluded that since it was the bio-equivalence of a product that was being considered there would be no problem for patients but there must be a regulated changeover, say over six months, rather than an overnight change. Witness confirmed that Gensulin is a bio-equivalent product to the one in use (human insulin). She had seen documents from the DPA confirming that bio-equivalent medicines met the pharmaceutics and dynamics of competing medicines.

Witness was at this stage ordered by the Board to produce the notes of the meeting referred to in advance of the next sitting.

Dr Denis Vella Baldacchino (560962M) called as a witness by the Public Contracts Review Board testified on oath that he was the Chief Medical Officer. He was shown Doc 2 tabled earlier and stated that he cannot refuse to accept a product authorised by the Health Authorities. In reply to a question witness stated that he is not aware if any product registered by the medical authorities had ever been withdrawn from the market.

At this stage the Chairman proposed the deferment of the hearing to the 23rd January 2020 at 08.30 hrs and noted that the Director of Contracts and the Contracting Authority will produce representatives of the Medical Authority and Bioton as witnesses.

End of the first hearing.

Second Hearing

On the 23rd January 2020 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Mr Lawrence Ancilleri and Mr Carmel Esposito as members convened a public hearing to resume further discussions on this case.

The attendance for the public hearing was as follows:

Appellants – Charles De Giorgio Ltd

Dr Clement Mifsud Bonnici	Legal Representative
Mr David Stellini	Representative
Mr Mark Mallia	Representative
Ms Claire Calleja	Representative

Recommended Bidder – V J Salomone Pharma Ltd

Dr Roderick Zammit Pace	Legal Representative

Ms Vanessa Said Salomone	Representative
Mr Philip Pace	Representative
Mr John S Forte	Representative

Contracting Authority – Central Procurement and Supplies Unit

Dr Marco Woods	Legal Representative
Ms Julia Pirotta	Secretary Evaluation Committee
Ms Edith Sciberras	Member Evaluation Committee
Mr Adrian Spiteri	Member Evaluation Committee
Dr Ian Ellul	Member Evaluation Committee
Mr Karl Farrugia	Representative
Ms Doriella Cassar	Representative

Department of Contracts

Dr Franco Agius	Legal Representative

Dr Anthony Cassar Chairman of the Public Contracts Review Board welcomed the parties and reminded them that this was the second hearing on this appeal and as agreed at the end of the first hearing invited the production of witnesses.

Dr Clement Mifsud Bonnici Legal Representative for Charles de Giorgio Ltd requested permission to make a preliminary plea, stating that after the first hearing an email was sent from Ms Antonia Formosa (a witness at the first hearing) to the Chairman of the Board amplifying points on her testimony. This was highly irregular although probably well meant.

The Chairman said that he agreed that such an action was highly irregular and he had instructed that the email be circulated to all parties in this case.

The second point made by Dr Mifsud Bonnici was regarding an exchange of e-mails between Dr Anastasi and Ms Formosa regarding this case where again it was a highly irregular move for two witnesses to communicate with each other about the case when it was *'sub judice'*.

The third point raised by Dr Mifsud Bonnici concerned a letter he had received from Dr Roderick Zammit Pace on behalf of Bioton SA stating that the former had made false allegations and was causing damage to his clients' reputation. This action was unheard of between lawyers representing parties in the same case and it was the first time this had happened to him. The letter referred particularly to the claim that Gensulin was manufactured in Bangladesh and that Bioton had been associated with a company by the name of Marvel in trying to obtain EMA approval for their product. These statements were based on documentation in the public domain and were obtained through the internet. The first allegation had been withdrawn as soon as evidence was provided at the first hearing that it was incorrect. Dr Mifsud Bonnici felt aggrieved by the letter which he tabled for the Board's consideration and attention.

Dr Zammit Pace Legal Representative of VJ Salomone Pharma Ltd said that in view of the declarations made at the previous hearings Bioton feel that certain of them were defamatory and Charles de Giorgio Ltd had to be warned to stop making use of false or careless information. The internet should not be used for this purpose. The letter made no reference to the proceedings before this Board and was not intended to stop Appellants continuing with their appeal.

Dr Mifsud Bonnici pointed out that his client had to rely on information obtained from the internet due to the lack of transparency why the product is accepted only in Poland but not in Europe generally.

The Chairman said that the letter and the points made thereon had been noted by the Board.

Ms Helen Vella (77367M) called as a witness by the Public Contracts Review Board testified on oath that she was the Licensing Director at the Medicines Authority. She stated that Gensulin is registered in Malta under Article 126a and that if the product is recognised by another European Union state it can be recognised locally but there are guidelines on registering a product. Gensulin is generic in nature and is not an original product – Malta did not test the product but relied on the tests carried out in Poland

Witness went on to explain that Article 126a is used mainly by small countries which rely on the assessments and findings of another country as proof that a product is authorised elsewhere in Europe. Registration under Article 126a does not require technical details about the product – market authorisation is sufficient to allow such registration. If the market basis of a product is generic then it is considered as bio-equivalent.

Questioned by Dr Mifsud Bonnici witness stated that under the prevailing rules a product is referred to as bio-similar but before 2005 it was described as generic. Article 126a, in line with the policy criteria, states that public health is a sufficient reason to justify acceptance of a product, with no study requirements regarding the safety and efficacy of a product. There are several European guidelines from the EMA and the International Council for Harmonisation (ICH) but these were not considered in approving Gensulin. It normally takes about a minimum of 45 days to approve a product under this article but in the case of Gensulin witness did not have the relative information to hand. Points that are included in the policy guidelines include shortages of a product, no parallel imports, availability of all documentation, full marketing authorisation and that the product is not centrally authorised.

Prof Jozef Drzewoski called as a witness by the Contracting Authority testified on oath that he is Professor of Medicine at the Medical University of Lodz specialising in diabetes and clinical pharmacology, with an extensive research background of some 400 publications and 25 books to his name. He has worked on diabetes for forty years and has used Gensulin and other brands of insulin over the years. He started prescribing Gensulin in 2001 and is still using

it in 2020 as he considers it a good product. Referring to a letter from Bioton SA to the PCRB dated 21 January 2020 (Doc VJS4) witness tabled three study reports:

- Study report on Bioton by Jan Taton and others (Doc 23/1)
- Study report on Bioton by W Turkie (Doc 23/2)
- Study report by Prof J Drzewoski on Bioton (Doc 23/3)

Referred to study report 23/1 by Taton witness stated that the author and others were comparing the bio-similar Gensulin with original pharmaceutical product to assess its pharmacokinetic (describes fate of drug on body) parameters and compares them. If it registers values between 85 and 125 then these two compounds are bio-equivalent. This is a rule. This study showed no difference in parameters when comparing Gensulin with Humulin and the conclusion was that the two insulins show the same pharmacokinetic properties.

In study report 23/2 W Turkie set out to compare Gensulin with recombinant insulin – (Human Actrapid) with the result indicating the same pharmacokinetics as other insulins.

Study 23/3 was similar to the previous two comparing Gensulin with Humulin. The parameters did not differ significantly and therefore there was bio-equivalence. 24 persons were tested in this study and somewhere between 15 and 24 persons in the other two tests.

Witness went on to state that having used Gensulin for some twenty years he had never noticed any serious problems or complications – in fact it was as effective and safe as other market products. There was no difference between human insulin and analogs – in type 2 diabetes patients notice no difference or if there is some difference it is of no clinical importance. One should never switch from one human insulin to another human insulin.

At this stage witness tabled his *Curriculum Vitae* (Doc 23/4).

Questioned by Dr Mifsud Bonnici witness said that bio-similar means that a biological product is nearly identical to an original product but not always 100% the same whilst generic is 100% identical – bio-similar is used for a biological product whilst bio-equivalence means that it has the same pharmacokinetic properties. Referred to Doc DG14, witness stated that he was not an expert in European regulations as it was not a field of interest to him but one has to follow its guidelines and read the protocol. Witness confirmed that the study he had carried out (Doc 23/3) had been sponsored by Bioton SA themselves. The parameters in this study indicated that the product was nearly similar in every respect.

At this stage Dr Mifsud Bonnici requested that a full copy of Prof Drzewoski's study be made available.

In reply to further questions from Dr Mifsud Bonnici witness stated that he had not consulted the full study by W Turkie (Doc 23/2) but simply read it and was not aware of which company had sponsored it. Witness agreed that the range of the results in Turkie's study exceeds the

parameters permitted by the EMA (85 to 125) and then gave a technical medical explanation why the figures disagree. When asked on what basis he reached his conclusions witness agreed that he was surmising and assuming facts. In his study Turkie had concentrated on pharmacokinetics and had not investigated the pharmacodynamics of the product (effect of drugs on the body). Gensulin had a market share of 25% to 32% in Poland.

Dr Mifsud Bonnici requested that the full report of the Turkie study be made available. (Tabled as 23/5)

Prof Drzewoski sought leave from the Chairman to clarify a certain point made in his earlier testimony. He stated that a pharmacokinetic parameters concentration of 100 to 140 does not mean that the 85 to 125 range is exceeded as these measures referred to other parameters – the latter figures are not stated in the study as it is generally accepted that these parameters are met.

Questioned by Dr Agius Legal Representative for the Director of Contracts witness confirmed that Gensulin qualifies as a bio-equivalent product – statistical data shows no difference between the products as no difference was noted in the parameters therefore one must assume that the range was not exceeded.

Referring to Doc 23/3 witness confirmed that this was an extract from the study he had prepared in the dossier presented to the medical authorities in Poland when the product was launched – it was highly confidential and not published in full.

Dr Mifsud Bonnici commented that this information was published on the website of the EMA and was generally available.

In reply to further questions by Dr Agius witness stated that the products being discussed were identical in safety, efficacy and tolerance and he therefore must conclude that the products are very similar and the results within the range discussed earlier.

Ms Antonia Formosa (373667M) called as a witness by the Public Contracts Review Board confirmed on oath that she was the Director of Pharmaceutical Affairs.

Before giving her testimony the Chairman said that it was highly irregular for a witness to write to the Chairman of the Board after the close of her testimony and he had directed that her communication was copied to all the parties appearing in this case.

In her testimony witness confirmed on oath the contents of the e-mail message she sent to the Chairman on the 10th January 2019 (tabled as Doc 23/6) and stated that the e-mail was meant to clarify her earlier testimony on points that she could not recall at the time of the first hearing.

Mr Adam Polonek called as a witness by the Contracting Authority testified on oath that he is a member of the Board of Directors of Bioton SA. He stated that there are no restrictions in marketing Gensulin anywhere in Europe and its use was authorised in Malta. He confirmed the

contents of docs VJS1, VJS2 and VJS 3 tabled earlier. He confirmed that the production capacity of Bioton was sufficient to meet the requirements specified in the tender document.

In reply to a question witness stated that the professional background of both the signatories of documents VJS1 to VJS 3(mentioned above) is in finance. Witness further stated that no other medical authorities in EU member states had assessed or authorised the use of Gensulin.

Mr Emil Wiech called as a witness by the Public Contracts Review Board stated on oath that his role in Bioton SA was as a Chemistry Manufacturing Control specialist and he had been employed there for over one year. Referred to doc VJS 1 to 3 witness confirmed that the product was registered in Malta but that no data had been submitted to the medical authorities in Malta by Bioton. Witness was not involved in the registration process of the product in Malta. Referred to the statements of registration of the product in the documents mentioned above, witness agreed that the product could be referred to as technologically bio-equivalent.

Questioned by Dr Mifsud Bonnici witness stated that in the year 2000, when Poland was still not in the EU, the term generic was used as the term bio-similar was not then in use. Since 2006 harmonisation rules came into force but Bioton made the business decision to keep the product 'national' and since 2009 there has been permanent market regularisation of documents and harmonisation regulations.

Questioned by Dr Agius witness said the Malta medical authorities had not requested Bioton to produce the medical dossier regarding bio-equivalence – the dossier was scrutinised by the Polish authorities to Euro standards.

Dr Mifsud Bonnici requested that all summary reports be made available to the Appellants but the full reports to be made available to any approved experts that may be appointed in this case.

Dr Zammit Pace said that the dossier was made up of several reports made to medical authorities and were covered by confidentiality.

Dr Mifsud Bonnici requested disclosure of all published documents. The question as to whether there was bio-equivalence of the product was a very complicated matter – once that was established it would be much clearer to decide the case.

Dr Agius said that the tender document underwent a long process before it was issued. The PCRB cannot decide on the merits of the quality of the product – its remit is to ensure that the Public Procurement Regulations are observed. The terms of the tender were not being contested and therefore they are binding.

Dr Zammit Pace noted that the Board need to go back to the start of the process. Article 3 of the Medicines Act refers to a licensing authority. Subsection 2 of article 3 refers to its function to establish standards to ensure quality, safety and efficacy and to ensure compliance with international obligations entered into by Government. The competence is vested in the

licensing authority not on any expert. Malta is tied to European laws that follow Poland's decision regarding harmonisation and minimum standards.

Dr Mifsud Bonnici said that the overriding principle is the patients' safety and well being – this is a sensitive topic and needs expert independent eyes to scrutinise all documents. Article 126a is a derogation to cover certain circumstances, and depending on another medical authority's findings is a light touch to a very complex subject. In the past the PCRB has not shied from appointing experts (e.g. Cyclosporrin case) and should do so now. The starting point remains the overriding principle of patients' safety.

Dr Zammit Pace said that it is the role of the Medicines Review Board to hear appeals on the quality and safety of medicines. There are over 2000 products similarly approved by the section 126a method and as to patients' safety, depriving them of a product also comes under such heading. The PCRB would be acting *'ultra vires'* in deciding this case since the tender does not deal with patients' safety, or indeed with the matter of bio-equivalence. Marketing authorisation is given by a competent authority and the role of the PCRB is to scrutinise the contracting authority. Proof of bio-equivalence is not specified in the tender document and one should not expect the PCRB to do the Appellants' work.

Dr Agius said that the judicial route was always open through Section 469a of the laws of Malta and not through the PCRB. It is not up to the Board to decide if Gensulin is a bio-equivalent product – this was outside its competence and could lead to the Board being asked to review other products in future.

Dr Mifsud Bonnici concluded by saying that the Medicines Act did not cater for remedies. The Board should consider and take its time but it needs the opinion of an expert.

The Chairman said that all the testimonies had been heard now and that part of the hearing was closed and only the legal submissions where still outstanding. He proposed a short recess to enable the Board to discuss the next stage.

On resumption of the hearing the Chairman said that the Board is entitled to appoint expert witnesses at any time and in any circumstances. The Board's priority was at all times the well being of patients but in this case does not feel it should appoint an expert on a technical matter that is not within its own competence. He directed that there will be a further hearing on the 6th February 2020 at 8.30am. He then thanked the parties for their submissions and declared the hearing closed.

End of Minutes of Second Hearing

Third Hearing

On the 6th February 2020 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Mr Lawrence Ancilleri and Mr Carmel Esposito as members convened a public hearing for further submissions.

The attendance for the public hearing was as follows:

Appellants – Charles De Giorgio Ltd

Dr Clement Mifsud Bonnici	Legal Representative
Mr David Stellini	Representative
Mr Mark Mallia	Representative
Ms Claire Calleja	Representative

Recommended Bidder – VJ Salomone Pharma Ltd

Dr Roderick Zammit Pace	Legal Representative
Ms Vanessa Said Salomone	Representative
Mr Philip Pace	Representative
Mr John Forte	Representative

Contracting Authority – Central Procurement and Supplies Unit

Dr Marco Woods	Legal Representative
Mr Karl Farrugia	Representative
Dr Alison Anastasi	Representative

Department of Contracts

Dr Franco Agius	Legal Representative

Interested Parties

Ms Antonia Formosa

The Chairman welcomed the parties and before the start of proceedings referred to the letter recently sent by him to all the parties concerned in this Case and noted that any further attempts to communicate with the Chairman or the Board, except during the actual course of a hearing, will be dealt with appropriately.

Dr Clement Mifsud Bonnici Legal Representative of Charles De Giorgio Ltd stated that the point of this appeal was to challenge the decision of the Contracting Authority in the award of the tender. The Public Contracts Review Board in past Cases 1028, 1057, 1065, 1136 and 1306 established the overriding principle of patients' safety immaterial as to whether the tender met the Public Procurement Regulations (PPR). Extensive literature had been submitted in this case

and it was now up to the CPSU to consider it with their medical people and up to the PCRB to decide thereon. The Appellants concerns were that biologics by their very nature are more sensitive and therefore require specific guidelines on their development.

Gensulin is a product that is not approved by the EMA and only approved in Poland in 2000 – still the only country to register it after a lapse of twenty years. The EMA has set its own guidelines in the development of biologics and bio-similars and has high and demanding standards. Appellants have tabled the expert studies of a number of international scientists, namely:

- Doc CDG 11 – study by Heinemann
- Doc CDG 12 - study by Owens
- Doc CDG 13 - study by Tieu
-

which were all independent studies and not funded by any manufacturing company. All agree and confirm that the problem of bio-similars in the insulin market is the need to meet regulatory obligations to get approval.

Gensulin is a bio-similar to Humulin and other insulins which along with other named brands are available in the market but have not been subjected to rigorous testing and regulatory observation and scrutiny. Within the European Union and the United States higher standards are demanded which are difficult to achieve. Tabled Doc CDG 9 deals with the failed application by Marvel Life Sciences to the EMA for product approval – this was the only documented case of a bio-similar product rejected by the EMA. Bioton was not involved in the application to the EMA but was partially involved in the production of the Marvel product which was put up for approval.

One must define what Gensulin is – is it a biologic, an originator product or a bio-similar? This distinction, said Dr Mifsud Bonnici, is crucial because once Bioton claim that Gensulin is a generic it must be bio-equivalent to other products mentioned earlier. One is then bound by the EMA guidelines (tabled as Doc CDG 14) which deal with the development of bio-similar products in the context of insulin.

Miss Antonia Formosa claimed in the email of the 10th January that Gensulin is bio-similar not bio-equivalent to other products; however no documents were produced to back this statement. The two sworn statements presented by Bioton directors were prepared by persons with a financial background and are therefore of no technical value. Studies submitted to the Polish authorities to obtain authorisation were not disclosed neither were the summary reports and both witnesses Ms Formosa and Dr Anastasi failed to confirm that the product is bio-similar while Prof Drzewoski in his testimony stated that he was not involved in drafting the protocol – he just overlooked the study and also confirmed that it was funded by Bioton. In any case, that study looked at only one preparation for this product when there are three. Turkie's paper (Doc 23/2) does not compare Gensulin with Humulin but with another brand; Taton' study (Doc 23/1/) does not publish results – it merely gives a list of tables; the paper by Franek

(Doc23/7(1)) is on ergonomics and does not deal with the product whilst the Nabrdalik study (Doc 23/7(2))is irrelevant to this case as it compares Gensulin with analogs. Although these papers were the basis for the statement that Gensulin is a bio-equivalent the issues were not exhaustively addressed and it cannot be deduced that Gensulin has bio-equivalence to Humulin.

In Malta, Gensulin was approved under Section 126a procedure – what this Article does is that it covers approval under exceptional circumstances as, for example, shortage of a product. Ms Helen Vella in her testimony stated that the Malta Medical Authority did not evaluate the technical data and offered no proof that the product is bio-equivalent. European Directives have specific provisions and obligations to enable a product to be registered in a member state. According to the records of the European Commission it is not recorded that the product has been registered in Malta (Doc CDG4). Bioton claim that although Gensulin has been in use for twenty years it was a business decision not to register with the EMA. They also claim that they have a market share of 25% which means that 75% of the market is taken by originator products, and they still have not addressed the claim that Gensulin is on the list of medicinal products threatened by lack of availability according to the authorities in the Republic of Poland (Doc CDG 7).

To sum up, Dr Mifsud Bonnici said the key points of his submission are that:

- The product is not approved by the EMA
- There was no data review before approval under Section 126a – it was merely a ticking of boxes exercise
- Bio-similars are a tricky subject and one wonders why in 20 years Bioton have not sought EMA approval for Gensulin
- The bio-equivalence of Gensulin has not been proven
- Section 126a does not trigger any obligation to approve a product registered in Poland.

Dr Franco Agius Legal Representative for the Department of Contracts said that the remit of the Board is not to be concerned with the bid but with the technical specifications of the tender. No proof has been offered that the Contracting Authority's decision is wrong. Once the specifications are published they cannot be ignored by a bidder and submissions thereon must be in line with those specifications. Ms Formosa testified that the submission, made outside of these proceedings, confirmed that the tender terms had been drafted in agreement with Dr Cachia. There was a remedy available to Appellants prior to tendering which they could have used if they were unhappy with the terms. The Medicines Authority had decided to register the product Gensulin and there is no reason why the Government of Malta should not obtain it – if one disagreed with the decision to register a product there is the general remedy of Section 469a of the laws of Malta, which again was not used by Appellants. The point regarding the market share is totally irrelevant. Three witnesses at an earlier hearing confirmed that the product meets the tender recommendations. As regard the possible shortage of the product, once the tender is awarded should Bioton fail to comply with the terms, the Government has courses open to it to take action. One of the witnesses confirmed that Gensulin is a bio-

equivalent to the originator and no proof has been put forward to the contrary. The role of the PCRB is not to determine whether a product is bio-equivalent or not but merely to adjudicate if the tender decision is compliant – it is up to the competent medical authority to determine the safety and efficacy of the product.

Dr Roderick Zammit Pace Legal Representative of JV Salomone Pharma Ltd stated that Appellants' letter of objection was the instrument that triggered these proceedings. Paragraph 5 of that letter identifies the evaluation decision on the terms of the tender as the principal grounds for the appeal. Appellants have produced no arguments or evidence to demonstrate that Gensulin does not satisfy the terms of the tender. The safety aspect of a medication and patients' safety is taken for granted but in a number of cases quoted by Appellants the tender particularly specified the safety aspect while the Cyclosporrin case referred to earlier looked at bio-equivalence as a tender requirement. In the present case the tender demanded the production of the registration certificate issued by the licensing authority of Malta and it has been confirmed and established that the marketing authorisation by the medical authorities is already in place – once the MMA issued that certificate the evaluation committee cannot set it aside. Appellants are not impugning the tender decision by the evaluation committee but the decision of the medical authorities – the PCRB is not the vehicles for this.

Regarding the safety aspect Dr Zammit Pace said that that was the only issue Appellants could have raised. No evidence was produced that the product is not safe – patients' safety and well being is an objective criteria and not something to be bandied about. There are studies by experts for this purpose and the claim that Gensulin is not authorised by the EMA and the FDA is not relevant as it was not a tender conditions – in any case the FDA has no jurisdiction in Europe. The tender technical specifications define the marketing authorisation as requesting the issue of a licence for medicinal products to be placed on the market in Malta and granted by the Medicines Authority in accordance with the Medicines Act 2003 and by the EMA – this was sufficient for the evaluation committee to award the tender subject to meeting all other requirements. Both Gensulin and Humulin are registered under one of the three national procedures and therefore the argument that the former medication is not safe as it is not authorised by the EMA falls by the wayside. The entire pharmaceutical sector is highly regulated at EU and national levels. European Directive 2001/83 as amended has as an essential aim the safeguarding of public health through a stringent regime across all member states and which places them under an obligation to respect the directive. The Board was referred particularly to recitals 2,3,7,8,11,12 and 15 of the Directive which stress the importance of not hindering the pharmaceutical industry or trade and also ensures the safety of products' standards and protocols for protecting public health by applying uniform tests throughout the member states.

It is agreed and it has not been contested that on Poland joining the EU in 2004 Gensulin was deemed to meet the requirements and continues to be marketed with no restriction on its export. In Appellants letter of objection there is the misleading claim that authorisation was by way of derogation. What Poland accepted as part of its accession treaty was likewise accepted by Malta. However the validity of the market authorisation was extended indefinitely in 2009 not

by derogation but through renewal. Article 24 of Directive 2001/83 as amended by Directive 2004/27 has been amended over the years but what was applicable in 2004 was that there could be renewal of the authorisation after five years through undergoing a consolidated review and confirmation of the quality, safety and efficacy of the product including any variations. Gensulin went through this process and in 2009 its market authorisation was renewed indefinitely thus completely dealing with the issue of the product's safety.

The MMA issued the authorisation for Gensulin under Article 4, sub article 2 which transposes Article 126a. Appellants challenged the decision to register the product on the basis that there is no justifiable public health reason. Witness Ms Helen Vella confirmed that when registering Gensulin under this procedure the Medical Authority followed Government regulations in line with the policy and that there were no deviations from this policy. Appellants themselves filed papers confirming that Government policy is based on two key factors – accessibility (i.e. more than one product) and affordability (which is in the public interest) and there are over 2000 products registered under Article 126a. The reference to bio-similarity is something for the national approving authorities and not for the evaluation committee to consider. Gensulin was registered as a generic in 2000 when the term bio-equivalence rather than bio-similarity was used. There is no procedure to challenge Poland's registration except through complicated procedures which has not happened and therefore it is perfectly in order for Malta to register that authorisation.

Dr Mifsud Bonnici, in reply, said that the safety of patients is implied in a tender and does not have to be stated and he trusted the PCRB to deliberate on this point. In a past case before this Board Ms Antonia Formosa stated that authorisation by the EMA was their guiding and leading point. There is a difference between duty and entitlement to register a product and one wonders why Bioton did not apply for European recognition after a lapse of 20 years.

Dr Franco Agius stated that patients' safety is inbuilt in the technical specifications of a tender. Appellants could have contested this point through seeking a remedy – since this was not availed of it means they accepted the terms of the tender. Evidence given by Ms Formosa in another case was not part of these proceedings and cannot be considered.

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

End of Minutes of Third Hearing

Decision

This Board,

having noted this objection filed by Charles de Giorgio Ltd (hereinafter referred to as the Appellants) on 25 October 2019, refers to the claims made

by the same Appellants with regard to the tender of reference CT 2340/2018 (Lot 3) listed as case No. 1413 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 Clement Mifsud Bonnici

Appearing for the Contracting Authority: Dr Marco Woods

Appearing for the Department of Contracts: Dr Franco Agius

Whereby, the Appellants contend that:

a) **The product offered by the preferred bidder is not approved by the European Medicines Agency (EMA) and was only approved on a purely national basis in Poland only, so that it is not registered elsewhere in the EU, except in Malta. In this regard, Appellants maintain that the Authority has not carried out the necessary research and advice from specialists to ensure and safeguard the patients' safety and wellbeing.**

b) **Appellants contend that Appellants' product is not bio-equivalent to the original product but is rather bio-similar.**

This Board also noted the Contracting Authority's 'Letter of reply' dated 15 November 2019 and its verbal submissions during the hearings held on 9 January 2020, 23 January 2020 and 6 February 2020, in that:

a) **The Authority maintains that the preferred bidder's product meets all the requirements stipulated in the tender document and is the cheapest.**

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

Dr Alison Anastasi duly summoned by the Public Contracts Review Board

Ms Monica Sammut duly summoned by the Public Contracts Review Board

Prof Stephen Fava duly summoned by the Public Contracts Review Board

Ms Eliza Milewicz duly summoned by Central Procurement and Supplies Unit

Ms Antonia Formosa duly summoned by the Public Contracts Review Board

Dr Ian Ellul duly summoned by the Public Contracts Review Board

Mr Adrian Spiteri duly summoned by the Public Contracts Review Board

Ms Edith Sciberras duly summoned by the Public Contracts Review Board

Dr Denis Vella Baldacchino duly summoned by the Public Contracts Review Board

Dr Helen Vella duly summoned by the Public Contracts Review Board

Prof Josef Drezwoski duly summoned by Central Procurement and Supplies Unit

Mr Adam Polonek duly summoned by Charles de Giorgio

Mr Emil Wiech duly summoned by the Public Contracts Review Board

This Board also took consideration of the documents submitted by interested parties.

This Board, after having examined the relevant documentation to this appeal and heard lengthy submissions made by all the interested parties, including the testimony of thirteen witnesses, during the three sessions held on 9 January 2020, 23 January 2020 and 6 February 2020, opines that, the issues that merit consideration and which are within the remit of this Board are:

a) **Whether the successful product conforms with all the requirements of the Medical Authorities and**
b) **The safety and wellbeing of the patients.**

<u>Conformity with the Medical Authorities</u>

1. **From the submissions and credible testimonies, this Board justifiably established that the product is manufactured in Poland. In this regard, Appellants' allegation that the product was manufactured in Bangladesh is not correct.**

2. **From submissions made by the licensing director of the Medicines Authority of Malta, this Board was made aware of the procedure adopted by same Authority for the registration of 'Gensulin', in that, it applied article 126a of directive 2001/83EC which states that:**

"Article 126a;

In absence of a marketing authorisation or of a pending application for a medical product authorised in another Member State in accordance with this Directive, a Member State may for justified public health reasons authorise the placing on the market of the said medicinal product."

Furthermore, Dr Helen Vella explained in detail what is meant by the said article 126a of the directive, as follows:

"Xhud : *il-126A mhux kullimkien imma jintuza iva*

Chairman : *Meta tghid mhux kullimkien, ghaliex? Ghax jew fl-Ewropa jew le*

Xhud : *Ghaliex huwa Artikolu li jintuza minn pajjizi zghar fejn ghandhom problema ta' numru ta' prodotti awtorizzati. Jigifieri il-legislation qeghda hemm ghal kull pajjiz. Mhux kulhadd juzah bl-istess extent. Ahna pajjiz zghir*

Avukat : *Inti kkonfermajtilna li l-prodott Gensulin huwa registrat biex jinbiegh hawn Malta*

Xhud : *Iva*

Avukat : *Dak xi jfisser ghall-Medicines Authority Maltija?*

Xhud : *Ifisser li l-prodott ghandu authorisation u jista' jitpogga fuq is-suq*

Avukat : *Issa dik l-authorisation fil-qofol taghha xi tfisser? Tfisser li l-prodott huwa sigur?*

Xhud : *On the basis of the assessment li sar minn pajjiz Ewropew iehor fuq l-istess guidelines u l-istess standards u l-istess ligi, jista' jitpogga fuq is-suq bl-istess mod bhal kull prodott iehor awtorizzat*

Chairman : *Jigifieri dejjem noqghodu nibbazaw fuq l-assigurazzjoni li sar f'pajjiz iehor*

Xhud : *Fuq Article 126A iva. Imma hemm artikoli ohra fejn noqghodu fuq li jghidu pajjizi ohra*

Chairman : *Ok.*

Avukat : *Meta kontu ghaddejin bil-process ta' registrazzjoni tal-prodott Gensulin, x'dokumentazzjoni pprezenta l-prodottur li kien jipproduci l- Gensulin lilkom? Xi pprezentalkom biex jirregistra hawn Malta?*

Xhud : *Id-dokumenti li hemm miktuba fil-policy*

Avukat : *Tista tghidilna x'inhuma?*

Xhud : *Huma proof li huwa authorised xi mkien iehor fl-Ewropa, in line mal-legislation, jigifieri in line mar-requirements tal-acquis tad-direttiva, jipprezentalna l-SPC li huwa s-summary of product characteristics tal-prodott li huwa basically document ghall-healthcare professionals. Package leaflet kif kien awtorizzat at that time in Poland. Hemm hafna documents. Ghandna application form bl-informazzjoni li jaghtuna, qeghda fuq il-website"*

From the above testimony, this Board is comfortably satisfied that the registration of 'Gensulin' was carried out in accordance with the EU Directive 2001/83 EC, article 126a, so that the product 'Gensulin' is properly registered and can be placed on the market in Malta.

3. **This Board was also informed that the necessary research on 'Gensulin' was carried out since the product had a marketing**

authorisation licence in another European country and that meant that the product was scrutinised as to quality, safety and efficiency.

<u>Patients' Safety Issue</u>

4. **This Board also took into consideration the testimony of Professor Drezwoski, a well noted scholar in internal medicine, diabetes and clinical pharmacology who acknowledged the patients safety on the application of 'Gensulin'**

"Chairman : *With regards to the patient's safety*

Witness : *I told you that I have been using Gensulin for 20 years and I never, I never observed any serious complication associated with Gensulin products. Because I am not talking only about specific product. Of course sometimes you know because it is insulin so it is the most powerful hypoglycaemic drug and sometimes it happened that you know people complain of hypoglycaemia but usually they not need assistance of another person*

Dr Agius : *In your experience when using Gensulin, does Gensulin have the same efficacy and safety of the other products on the market?*

Witness : *I am sure of that. You know they are absolutely similar as far as effect and safety is considered because there was a study comparing Gensulin Polish product. In Poland we have two producers of human insulin, Bioton and Polfatormine, but Bioton is definitely the leader. But from my practice, there is no difference between human insulin and analogs. It is important to know whether analogs have real advantage over human insulin and I am in the group of clinicians and scientists who in people with Type 2 diabetes do not see any significant difference concerning the impact of metabolic control and hypoglycaemic events or weight gain, no difference at all. If is, it is small and not of clinical importance."*

In this regard, this Board is comfortably assured that the product 'Gensulin' is a safe product and no proof was presented by Appellants to deem otherwise.

5. **The product 'Gensulin' has been on the market for quite a long period of time, after obtaining the necessary marketing authorisation and this Board notes that no negative report was presented to this Board to doubt the product's safety features, so that, taking into consideration the vast technical testimony made by well qualified medical personnel,**

there arose no issues that the product 'Gensulin', presents any hazard to the wellbeing of the patient.

6. **The remit of this Board is to determine whether the evaluation process was carried out in a just and transparent manner. In this regard, this Board would point out that the technical specifications stipulated in the tender document are not being contested by Appellants. At the same instance, this Board also notes that the Evaluation Committee was composed of the ideal combination of Evaluators in order to assess the offers for this particular tender.**

7. **From the documentation and with special reference to the evaluation report, this Board confirms that the preferred bidders' offer is in full conformity with the technical specifications, being the cheapest compliant offer.**

In conclusion, this Board opines that:

a) **The product 'Gensulin' had the marketing authorisation licence for a substantial period of time and no negative reaction on the application of the product was proved to exist to date, from any medical authorative source.**

b) From the testimony of the witnesses, it has been established that 'Gensulin' complies with all the technical specifications so requested in the tender document.

c) The Evaluation Committee, which was composed of properly qualified professionals in the field of Pharmacology, carried out the evaluation process in a fair and transparent manner.

d) The product 'Gensulin' is registered in Malta by the Medicine Authority through article 126a, the latter of which allows a European Union Country to recognise a product registered in another European Union Country, so that Malta relied on the testes carried out in Poland. It must be noted that prior to the granting of a marketing authorisation licence, the necessary scrutiny tests were carried out in Poland.

e) Since the application of the product in Poland, no negative results have been reported so that, this Board is comfortably assured that the wellbeing of the patient is strictly protected.

f) It would also point out that the Appellants did not present any evidence to demonstrate that 'Gensulin' did not satisfy the tender's technical specifications.

g) **This Board is convinced that the safety factor is inbuilt in the technical specifications of the tender and 'Gensulin' is compliant with such specifications. If, on the other hand, Appellants wished to contest such specifications, they had the remedies prior to the submission of their offer. In this regard, this Board noted that Appellants accepted the conditions as laid out in the tender dossier by not availing themselves of such remedies.**

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 the deposit paid by Appellants should not be refunded.**

Dr Anthony Cassar
Chairman

Mr Lawrence Ancilleri
Member

Mr Carmel Esposito
Member

18 February 2020