PUBLIC CONTRACTS APPEALS BOARD

Case No. 38

CT 2015/04 - Advert No 78/04, GPS 07208T03MC
Supply of Medical Oxygen in Cylinders of Various Volumes

This call for offers covering a three year period, published in the Government Gazette on the 26.03.2004, was issued by the Contracts Department following a formal request received by the latter on 25.11.2003 by the latter from the Government Pharmaceutical Services (GPS).

The estimated cost of this tender was Lm 92,146.

In total, two (2) offers were submitted by tenderers on closing date for submission of offers which was 20.05.2004 following an extension granted by the Director of Contracts.

Following notification by the Contracts Committee to Messrs Polidano Group Ltd that their offer had been disqualified (in view of the fact that the Company is not in a possession of a wholesaler's or manufacturer's license in order to carry out pharmaceutical activities), and subsequent correspondence between the Director of Contracts and the successful tenderer (Multigas Limited), Messrs Polidano Group Ltd. filed a Notice of Objection on 16.05.2005 against the said award, particularly, to the fact that the award in question would be extended from one to three years, provided the Marketing Authorisation is issued during the 1st year of contract.

The Public Contracts Appeals Board (PCAB) made up of Mr. Alfred Triganza (Chairman), Mr Anthony Pavia (Member), and Mr Maurice Caruana (Member), convened a public hearing on 22.07.2005 to discuss this objection.

Present for the hearings were:

Polidano Group

Mr Charles Polidano – Managing Director
Dr Anna Mallia – Legal Representative
Mr Tarcisio Mifsud - Consultant

Multigas Ltd

Mr Michael J Mallia – Managing Director
Dr Joe Caruana Scicluna – Legal Representative

Government Pharmaceutical Services

Dr John Cachia (Director Institutional Health; A/Director General, Health Department)
Ms Miriam Dowling (Chairperson, Contracts – Adjudicating Committee)
Ms Amanda Camilleri (Pharmacist)

Witness

Mr Edwin Zarb (Director General Contracts)
Ms Anna Debattista (Director GPS)
Mr Tonio Cassar (Director, Inspectorate & Licensing Enforcement, Medicines Authority)

After the Chairman's brief introduction, the representatives of Polidano Bros. Ltd. were invited to explain the motivation behind their objection.

Dr Anna Mallia, the appellant's legal representative, commenced her intervention by making reference to a letter dated 8 April 2005 wherein the Department of Contracts informed Polidano Bros Ltd that the tender for the supply of Medical Oxygen in Cylinders had been awarded to Multigas Ltd for one year only (albeit the tender had originally been issued for three years) for the price of Lm0.767 per cubic metre delivered. However, subsequently, they came across a notification (dated 27 April 2005) published on the Department of Contracts' Notice Board which stated that the period of the contract in question had been extended from one to three years under the proviso that the 'Marketing Authorisation' was issued during the first year of the contract. She continued by stating that, according to Regulation 25 of the Public Contracts Regulations 2003, such contracts could only be extended if the Director General Contracts *'considered that circumstances so warrant in the public interest.'*

Dr Mallia insisted that the decision was not made in the public interest because according to their calculations, Polidano Bros. Ltd.'s offer was cheaper than that of Multigas Ltd. by about Lm 3,000 over a period of 3 years. The appellant tabled a copy of all their calculations.

Polidano Bros. Ltd.'s legal representative mentioned the issue of tests by maintaining that in their tender Multigas Ltd. had indicated that they were going to carry out cylinder testing at ten year intervals whereas the tender specification stated that these had to be done every five years.

Dr Mallia said that according to the notification of the original award of contract for a period of one year, Multigas Ltd. had until 2 March 2005 to object to such decision. Multigas Ltd. decided to request the Director General (Contracts) to extend the contract provided that they obtain a *Marketing Authorisation* within the first twelve months, following the granting of the award. The appellant's lawyer stated that this was not according to the procedure as laid down in Regulation 103 of the Public Contracts Regulation 2003 (LN 299/2003) which clearly specifies that, whenever a tenderer is aggrieved by a proposed award of contract, an objection could be lodged. Thus, contended Dr Mallia, the Director General (Contracts) should have told Multigas Ltd. to appeal rather than accepting their suggestion and granting them an extension. Furthermore, she contended that the Regulation 5 (2) (j) of the Public Contracts Regulation 2003 was applicable for contracts which were about to expire and not for similar circumstances.

Polidano Bros. Ltd.'s legal representative placed major emphasis on the fact that her clients were contesting the extension because this decision was not taken in the public interest.

Mr Tarcisio Mifsud, a Consultant to Polidano Bros. said that the appellant had invested in state of the art, brand new, equipment that was imported from the USA and Europe, in order to enable the Company to manufacture and supply oxygen and nitrogen. Mr Mifsud claimed that they had obtained all the relative MEPA permits to be able to manufacture medical oxygen.

Mr Mifsud gave a detailed breakdown of Multigas Ltd.'s and Polidano Bros. Ltd.'s prices based on a volume of 33,744 cubic metres per annum as per tender document to substantiate their claim that according to their calculations their overall contract value in respect of known items (frequency of occurrence in respect of *loss of cylinders caps* and *cost of damages to cylinders* were unknown) was cheaper by Lm2,985. Furthermore, Mr Mifsud claimed that their calculations showed that the only item that Multigas Ltd. was cheaper on was the *unit price delivered to store/site* while Polidano Bros. was either cheaper or offering the same price for the other items, namely, *unit C.I.F. price, rental charges, costing for loss of cylinders caps, cost of damages to cylinders*.

With regard to the deposit, Mr Mifsud said that, were one to take into account the fact that Polidano Bros. Ltd. were requested to pay Lm 921 when lodging the Letter of Objection, then the value of the contract should have amounted to Lm 92,100. He said that on the basis of the above mentioned annual volume for three years at Lm0.65 per cubic metre (excluding VAT), then the value of contract and deposit of objection should have amounted to Lm 65,800 and Lm658 respectively. He argued that once the deposit requested was higher by Lm263, he assumed that there was an additional turnover of Lm 26,300. However, at this stage, the PCAB drew Mr Mifsud's attention about the fact that the deposit was calculated on the estimated value of tender and not on the awarded contract value.

On his part, Mr Mallia, representing Multigas Ltd., replied to comments made by Polidano Bros. Ltd.'s representatives' by stating that, in actual fact, it was the appellant who quoted for an imported product. Multigas Ltd's Managing Director declared that Multigas Ltd. was not an importer but a manufacturer of medical oxygen. Mr Mallia claimed that his company had been supplying medical oxygen to hospitals in Malta for many years and also supplied nitrogen to ST Microelectronics' plant in Kirkop. Moreover, Multigas Ltd.'s representative declared that they had invested in new equipment to comply with EU rules on medicinal products which became compulsory on 1 May 2004.

On a point raised earlier in the hearing by Polidano Bros. Ltd., Mr Mallia said that it was not true that his Company always had the monopoly in this sector because in the past, when Malta Drydocks used to produce oxygen, there were instances when the latter competed with them.

With regard to the question of cheaper pricing, Mr Mallia said that Advert 78/2004 requested quotes for the supply of gaseous oxygen based on an estimated quantity of 33,744 metres cubed of gas but with a proviso that any further amount could be purchased under the tender. The quote was to cover a delivered price and Multigas Ltd quoted a price per cubic metre of gas which was cheaper than that of Polidano Bros. by 5.8 cents, with both tenderers including cylinder rentals, lost cylinder caps and lost cylinders in their offers. In view of the fact that the notional number of cylinders could fluctuate each year, Mr Mallia claimed that Polidano Bros. Ltd could not base their cheaper claim on the fact that their cylinder rental rate was lower than that of Multigas Ltd.

Mr Mallia pointed out that this tender included delivery of cylinders for the first time and so they had organised an IT controlled system which would reduce the cylinder stocks held by the Health Department and increase those held at Multigas Ltd without any effect on the service. The level of rentals could not therefore be fixed at a definite level and used as an argument related to the price of gas requested in the advert.

Multigas Ltd' Managing Director declared that they could not submit claims for lost caps because cylinders supplied by the Company did not have such caps. Furthermore, he maintained that, for many years, there were no claims for lost cylinders as they were controlled under a bar-coded IT system that eliminated loss.

Mr Mallia argued that the price was irrelevant in this case because Polidano Bros. Ltd's offer did not meet the technical specifications as it lacked the necessary licences to manufacture and import medical oxygen. Furthermore, added Mr Mallia, MEPA's permit was issued on another company, MEI Trading, and this did not allow Polidano Bros. Ltd. to produce or sell medical oxygen. This was due to the fact that the necessary licences for the production or sale of such product had to be issued by the Health Authorities since MEPA's permits were only issued in connection with the construction of a building and plant.

Mr Mallia claimed that Multigas Ltd had reduced all their oxygen and nitrogen prices following considerable investment in new plant and equipment. A three-year contract in oxygen ensured a fixed price for the Health Department and this had to be seen against a background where the main raw material for oxygen production was electricity, the cost of which was certainly indicated to increase and not to decrease. The current tender had been in operation, through extensions, for 7 years without any price movement, reflected Mr Mallia.

Contrary to what was stated by Polidano Bros Ltd.'s representatives, Mr Mallia emphasised the fact that Multigas Ltd's offer was the most economically advantageous and that the award of contract to Multigas Ltd was in the public interest. Regulation 25 listed various criteria which had to be taken into consideration where the award was made to the most economically advantageous offer, claimed Mr Mallia. These included, but were not limited to:- *'price, delivery date, delivery period or period of completion, running costs, cost-effectiveness, quality, aesthetic and functional characteristics, technical merit, profitability, after-sales service and technical assistance'.*

At this stage, Mr Mallia denied that Multigas Ltd. was ever given any concession whereby the validity period of testing was raised from 5 to 10 years. He contended that they had drawn the attention of the authorities about the fact that the 10-year testing was stipulated under existing regulations. It was also claimed that other strong reasons for awarding the contract to Multigas Ltd were evident and 'inter alia', these included the fact that Multigas Ltd had a track record, both as a producer and supplier, of 50 years totally accident-free.

Mr Mallia contended that Multigas Ltd was supplying its own local medicinal oxygen from its own plant and site which were specifically set up for the safeguarding of the production, quality control and distribution of this delicate health product. According to the Company's Managing Director, the Company holds very large stocks of this product in liquid state and can cater for any type of emergency. It also has a specific arrangement with the world's largest gas multinational, *Air Liquide* of France, where the latter would supply nitrogen and oxygen to Multigas Ltd should a shortage result in Malta, for whatever reason.

This attention of this Board was drawn to the fact that Polidano Bros. Ltd.'s offer was for imported oxygen in cylinders. Mr Mallia claimed that the importation of gas was dependant on various factors most of which would be out of the local importer's control, such as, bad weather conditions when vessels could not sail to or from Malta. Hence, he questioned whether it would be in the public interest to take such risks on running short of hospital oxygen.

Mr Mallia claimed that medical oxygen was a pharmaceutical product and was subject to the extensive and strict regulations related to such products. Multigas Ltd had in place all the required quality control, technical personnel and after-sales technical assistance back-up and it was very much in the public interest to award the tender to them and not to any importer with no experience in this field.

Multigas Ltd. Managing Director also claimed that they had also enjoyed Quality Certification ISO 9002 status since 1994. Moreover, it was stated that it had also been certified to the rigorous Good Manufacturing Practice (GMP) standard; it had a manufacturing license issued by the Medicines Authority and is awaiting confirmation for its *Market Authorisation* certification. He emphasised that these were the most essential ingredients in the exercise of this business and they far outweigh most other considerations when one was assessing what was "economically advantageous" or in the public interest as laid down in regulation 25 cited above.

In his last remarks Mr Mallia said the tender had originally been issued for three years, but the tender was then awarded for only one year since the Health Authorities could only waive the *Market Authorisation* requirement for one year. However, he explained that as their prices were based on a three-year period, not on one year only, they asked the Contracts Department to issue the contract for three years provided the *Market Authorisation* was obtained during the first year of the contract term. Furthermore, they recommended that if the *Market Authorisation* was not obtained during the first year, the contract would revert to the one-year agreement. The Contracts Department accepted their suggestion, and the award of the contract was issued accordingly.

Mr Mallia said that, whilst they were in possession of the *Manufacturing License*, the *Good Manufacturing Practice (GMP)* and that their application for the *Marketing Authorisation* was at a very advanced stage and would be issued shortly, Polidano Bros. Ltd. had not yet submitted the application for the *Marketing Authorisation* or specified their *Qualified Person (QP)* or possessed a *wholesale dealers' licence* to import and sell medicinal oxygen. It was pointed out that the process for the issuing of the *Marketing Authorisation* by the Medicines Authority was long in view of the need to examine in great detail the dossier submitted by applicant companies and queries that could possibly arise.

When Mr Edwin Zarb, Director General Contracts, took the witness stand, the PCAB asked him whether it was normal practice for the Department of Contracts to accept a suggestion by a successful bidder for the extension of a contract and, if the reply were to be in the negative, was it possible for him to explain why the exception in this particular instance.

Mr Zarb replied that, usually, extensions were given on termination of contracts. He explained that in this particular case the tender was issued for a period of three years and that, originally, the contract was awarded for one year only and the reason given by GPS was that the tenderer did not have the *Marketing Authorisation*. Following this, on 21 February 2005, his Department received a request from Multigas Ltd to reconsider their decision so that the one year period would be extended to 3 years under the proviso that they obtained the Marketing Authorisation within the first year of the contract, failing which contract would be reverted to one year. He said that Multigas Ltd' request was accepted after being informed by the Government Pharmaceutical Services that they found no objection to award tender accordingly.

With regard to the fact that in their letter sent to Polidano Bros. they had indicated the price offered by the selected bidder, Mr Zarb said that it was standard procedure to give such information to unsuccessful bidders when a contract was awarded.

When the Director of Contracts was specifically referred to clause 3 of the Specifications & Conditions in the tender document which stated that

Quote

'The tenderer shall quote separate unit prices as stipulated on the schedule attached for the 1st , 2nd, and 3rd year respectively from the date stipulated in the L.A.

Adjudication of offers will be based on the total of these three prices.

The Director Government Pharmaceutical Services reserves the right to award the tender for the 1st year only, or for the 1st and 2nd year, or for the 1st, 2nd and 3rd year, from the date of the Letter of Acceptance'

Unquote

Mr Zarb said that if it were not for the *Marketing Authorisation*, once the tender was issued for three years, the contract would have been awarded for three years and not for one year and extended for two years.

Ms Anna Debattista, Director GPS, testified that as oxygen was considered as a medicinal product, there were certain requirements. Government bought only from those suppliers which had a wholesale dealer's licence.

On cross-examination by the PCAB, she declared that Polidano Bros Ltd's offer had been disqualified because they did not have a wholesale dealer's or manufacturer's licence in order to carry out pharmaceutical activities, claiming also that, during the adjudication of this tender the GPS continued to periodically check with the Medicines Authority about the licensing status of both suppliers.

When cross-examined by Dr Anna Mallia regarding their recommendation for the extension, Ms Debattista said that, in actual fact, this was not an extension because the tender was issued for three years and according to Letter of Acceptance 88/2005 dated 7 April 2005, which she quoted textually:

'This contract shall run for a period of twelve (12) months commencing on the date of receipt of this letter to be extended for a further two (2) years at the same rates and conditions, provided that you obtain the Marketing Authorisation for this item, within the first year of the contract failing which the contract will revert to one year.'

She confirmed that the Director GPS and the Director General Health were consulted by the Contracts Department and jointly decided not to object to Multigas Ltd.' s proposal.

At this point, the PCAB drew her attention that the extension of this tender was regulated by clause 4 of the Specifications & Conditions of the tender which specified that:

'In instances where the Department deems fit, the Director, Government Pharmaceutical Services may, with the consent of the contractor, extend the contract period by a further six (6) months at the same price rates and under all the original contract conditions.'

Ms Debattista replied in the affirmative but said that they took into consideration various factors, such as, (a) the medical oxygen was a vital medical product, (b) the long time taken in the adjudication process and (c) the licenses required.

At this stage, Dr Joe Caruana Scicluna, Multigas Ltd's legal advisor, pointed out that according to clause 3 Specification and Conditions the tender could have been awarded for one (1), two (2) or three (3) years, subject to obtaining the Marketing Authorisation.

Mr Tonio Cassar, Director Inspectorate and Enforcement, Medicines Authority commenced his testimony by explaining that a manufacturing licence of a medicinal product covered the wholesale distribution of locally manufactured products. He confirmed that Multigas Ltd had a manufacturing licence for the production of medical oxygen, while Polidano Bros. Ltd did not have the wholesaler dealer's licence. According to Mr Cassar, the appellant had applied for the wholesaler dealer's licence in November 2004 and this application was still under consideration as the pertinent authorities were still waiting for further documentation from the company.

Mr Cassar said that Multigas Ltd. applied for the *Marketing Authorisation* for oxygen on 11 March 2005. He declared that the assessment of the application was ready, and the Medicines Authority should issue the necessary licence by the end of this month. He confirmed that Polidano Bros. Ltd. had not yet submitted a formal application for the *Marketing Authorisation*. At this point, Dr Mallia claimed that Polidano Bros. Ltd had already made informal contacts with the Medicines Authority with a view to submit the *Marketing Authorisation* application, and could get it in a year's time.

Following specific questions asked by the PCAB, Mr Cassar replied that, according to EU directive and Medicines Act and subject that everything was according to requirements, the maximum period to issue the *Marketing Authorisation* was 210 days.

Mr Cassar concluded his intervention by stating that every manufacturer should have a qualified person who had to be a technical person with at least two years experience, having a science degree and that usually this person was a pharmacist. Amongst other responsibilities, such a person was responsible for the certification of products, their release on the market and that the product was according to specifications. He said that unless the qualified person was not approved according to the Medicines Act no licence would be issued.

At this stage, the public hearing was concluded and the PCAB proceeded with its deliberations before reaching its decision.

The Board,

- having noted that the appellant, in terms of his "reasoned and motivated letter of objection" dated 18th May, 2005, and also through his verbal submissions presented during the public hearing held on the 22nd July, 2005, had:-

    a. objected to the decision taken by the General Contracts Committee *"to amend its original decision dated 8th February, 2005 and extend the period of the contract from one to three years maintaining the original proviso that this extension is subject to the issue of the Marketing Authorization during the first year of the contract";*

    b. contested the issue that the decision referred to in (a) above, namely to extend the contract period from one to three years, was actually taken "in the public interest", in line with the terms of the provisions of regulation 5 (2) of the Public Contracts Regulations, 2003 (legal notice no.299 of 2003 which, *inter alia,* empower the Director of Contracts " *(j) to approve extensions in the duration of contracts awarded by him if he considers that circumstances so warrant in the public interest";*

    c. mentioned cost, financial, commercial and other reasons (listed in Polidano Bros. Ltd's letter under reference and also backed by the costings schedule presented during the said public hearing) in support of the appellant's contestation that the decision to extend the contract period was not in the public interest;

- having examined clauses 3 and 4 of the "Specifications & Conditions" of the Tender which respectively regulate (i) the contract period award (clause 3) and (ii) the contract extension modalities (clause 4), reproduced hereunder:-

    Clause 3: *The tenderer shall quote <u>separate unit prices as stipulated on the schedule attached</u> for the 1st., 2nd., and 3rd. year respectively from the date stipulated in the L.A. Adjudication of offers will* *be based on the total of these three prices. The Director Government Pharmaceutical Services reserves the right to award the tender for the 1st year only, or for the 1st and 2nd year, or for the 1st, 2nd and 3rd. year, from the date of the Letter of Acceptance."*

Clause 4: *"In instances where the Department deems fit, the* ***Director Government Pharmaceutical Services*** *may, with the consent of the contractor, extend the contract period by a further six (6) months at the same price rates and under all the original contract conditions"*

- having noted that in terms of the notice dated 9th February, 2005 and exhibited in the offices of the Director of Contracts, the public was notified that, on 8th February, 2005, the General Contracts Committee had recommended, and the Director General (Contracts) had endorsed *inter alia* the recommendation to award Tender CT 78/2004 (Supply of Medical Oxygen in Cylinders) to Multigas Ltd for the price of Lm0.767 per cubic metre, specifying that the contract was awarded "for 1 year only";

- having also noted that in terms of the said published notice, tenderers were informed of the modalities to be followed in the event they objected to the listed awards, including the award of the tender under reference

- having obtained from both (a) the Director General (Contracts) and (b) the Director Government Pharmaceutical Services, confirmation to the effect that the decision to award the contract *"for a period of twelve (12) months …… to be extended for a further two (2) years at the same rates and conditions, provided that you obtain the Marketing Authorisation for this item, within the first year of the contract failing which the contract will revert to one year" (cfr.* Letter of Acceptance dated 7 April 2005 addressed to Multigas Ltd) was taken in the light of the representations and recommendations made by Multigas Ltd in terms of their letter dated 21st February, 2005 following the award of the contract to Multigas Ltd in terms of the notice published on 9 February 2005

reached the conclusion that the decision taken by the Director General (Contracts) to extend the contract period *"for 1 year only,* as published in the notice dated 9th Febraury, 2005, by *"a further two (2) years at the same rates and conditions"* as quoted in the Letter of Acceptance dated 7 April 2005 addressed to Multigas Ltd, was not in accordance with the stipulated conditions of the tender, in so far as (a) the contract period award options and (b) the contract period extension modalities are concerned (namely, clauses 3 and 4 of the "Specifications & Conditions" of the Tender) and, in consequence, the Board decided to uphold the appellant's objection to the decision taken to extend the period contract from one (1) year to three (3) years in terms of the 5th paragraph of the Letter of Acceptance issued on 7 April, 2005.

The Board also decided that the appellant should be refunded the deposit paid in conjunction with this appeal.

Alfred R. Triganza	**Anthony Pavia**	**Maurice Caruana**
Chairman	Member	Member

Date: *1st August 2005*