

## PUBLIC CONTRACTS APPEALS BOARD

### Case No. 198

#### **Advert No. 325/2009; CT/2360/2009; GPS 07119 T09 BB Supply of Olanzapine 5mg and 10mg Tablets and Capsules**

This call for tenders was published in the Government Gazette on 21.08.2009. The closing date for this call for offers with an estimated value of Euros 4,919,307 was 13.10.2009.

Three (3) different tenderers submitted their offers.

On 10.03.2010 *Messrs Charles De Giorgio Ltd* filed an objection after its offer was adjudicated administratively/technically non-compliant because the shelf-life of the product offered was not according to tender specifications and conditions.

The Public Contracts Appeals Board (PCAB) made up of Mr Alfred Triganza (Chairman) with Mr Anthony Pavia and Mr Edwin Muscat, respectively, acting as members convened a public hearing on 05.05.2010 to discuss this objection.

Present for the hearing were:

#### **Charles De Giorgio Ltd**

Mr David Stellini	Representative
Mr Ivan Laferla	Representative
Dr Antoine Cremona	Legal representative
Dr Julienne Portelli Demajo	Legal representative

#### **Europharma Ltd**

Mr Michael Peresso	Representative
Mr Oliver Scicluna	Pharmacist/representative

#### **V.J. Salomone Pharma Ltd**

Dr John Gauci	Legal Representative
Ms Jackie Mangion	Representative
Ms Deborah Campbell	Representative of Actavis Malta Ltd

#### **Government Hospital Procurement Services**

Ms Anne Debattista	Director
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#### **Evaluation Committee**

Ms M Dowling	Chairperson
Mr Sonia Bonnici	Member
Mr David Baldacchino	Member
Mr Mark Spiteri	Member

#### **Department of Contracts**

Mr Francis Attard	Director General
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After the Chairman's brief introduction, the appellant was invited to explain the motives of the objection.

Dr Antoine Cremona, legal representative of Messrs Charles de Giorgio Ltd, the appellant Company, while acknowledging that this issue did not directly concern his client's case, stated that Annex II – Item Description – indicated 'Olanzapine 5mg and 10mg tablets/capsules or orally disintegrating tables' which meant that the tenderer did not have the option to bid for one of the two dosages but the tenderer had to bid for both dosages and that the option applied only as to the formulation, i.e. whether intablet / capsule form or in a disintegrating tablet form.

Ms Anne Debattista, Director Government Hospital Procurement Services held the view that a tenderer could bid for either the 5mg or the 10mg dosage or for both. This version, when analysed thoroughly, was contradicted by the PCAB.

Dr Cremona explained that his client was tendering for both the 5 mg and the 10 mg tablet/capsule and that his client had been supplying the Health Department with this product for a period of about 15 years.

Dr Cremona remarked that his client's offer was adjudicated as administratively/technically non-compliant because 'the shelf-life is not as per tender specifications and conditions'. He explained that the tender document did not request an absolute shelf life – e.g. of 2 or 3 years - but a relative shelf life, i.e. five-sixths of the product's total declared shelf life. He added that the conditions were such that, on the date of delivery to Government Hospital Procurement Services, the product still had to have five-sixths of its life, which life could vary according to the brand or type of the product.

Dr Cremona then referred to Annex VI – Technical and Special Conditions – 11 'Shelf life' which stated that the "*shelf life of the product must be clearly indicated in the Tender document submitted. Goods received at Government Health Procurement Services must not have their shelf life expired by more than one-sixth of their total declared shelf life. Any infringement in this respect will render the tenderer liable to a penalty of 5% of the value of the consignment, together with any other damages suffered by the Government Health Procurement Services. When five-sixths of the total shelf life is less than 2 years, the tenderer must clearly state this on the tender documents. Products with a longer shelf life will be given preference. The Government Health Procurement Services reserves the right to refuse any consignment which does not satisfy these conditions.*"

Dr Cremona declared that, in the tender submission, his client had indicated a minimum shelf life of 18 months, which he claimed was in full compliance with tender conditions because the minimum of 2 years was a preference and not a mandatory requirement.

At this point, Ms Debattista intervened to explain that the reason why the Government Hospital Procurement Services did not indicate an absolute shelf life in order not to reduce or stifle competition since that would have eliminated certain brands producing the 'same' type of product but with varying shelf lives.

To a direct question posed by Ms Debattista, Dr Cremona stated that the shelf life of the product submitted by his client was 36 months but that his client was guaranteeing a minimum shelf life of 18 months. Following this, Ms Debattista declared that she learned of the product's shelf life from the package insert of the sample which indicated a shelf life of 36 months and she even confirmed that that matched the shelf life indicated in the information on the basis of which the product had been registered. She added that the information given in the tender submission had to be corroborated by the information pertinent to the product being offered and she claimed that, in this case, there was a discrepancy.

Dr John Gauci, legal representative of Messrs VJ Salomone Pharma Ltd, an interested party, argued that, according to the tender specifications, a product with a total declared shelf life of 36 months, as the one offered by the appellant company, should have been offered with a minimum shelf life of 30 months (five sixths of 36 months) and not with a minimum shelf life of 18 months as submitted by the said appellants.

Ms Debattista agreed with what Dr Gauci had stated and added that that was exactly what she had been trying to explain in the sense that the 18 months minimum shelf life indicated by the appellant company in its tender submission amounted to half or three sixths of the product's total declared shelf life as against the five sixths, in this case 30 months, requested in the tender specifications. She declared that the way the appellants presented their product in its tender submission rendered it non-compliant with tender specifications and conditions. At this juncture, Ms Debattista recalled a similar case which dealt with the shelf life of a product, which hearing was held by the PCAB on the 22<sup>nd</sup> January 2010.

Dr Cremona intervened and alleged a measure of inconsistency in the adjudication process in the sense that, whereas, in the case of the appeal lodged by Europharma Ltd, it was stated that the contracting authority was not obliged to verify information from websites, in his client's case, the contracting authority seemed to have verified information submitted against that displayed on websites.

By way of conclusion, Dr Cremona contended that the product offered by his client was compliant with tender specifications and the event that other tenderers could have offered a product with a longer shelf life should certainly have not led to the disqualification of his client's tender.

On her part, Ms Debattista rejected the allegation that the GHPS acted inconsistently and added that as part of the evaluation process the contracting authority did resort to websites to corroborate information submitted. She reiterated the point that, contrary to the argument put forward by the appellant company, it would be detrimental to competition should the Government Hospital Procurement Services request a definite shelf life as that would automatically rule out certain products because the shelf life of medicinal products manufactured under different brands tended to vary to a certain extent.

At this point, Ms Debattista expressed her satisfaction that, over the past few years, more medicinal products were being registered resulting in more competition and better prices. She added that this was a 3 package tender and that the evaluation process was at technical evaluation stage and that this bid was disqualified on

technical grounds and not on the merits of price, which was to be considered at the third stage of the process.

In concluding her intervention, Ms Debattista stated that there was absolutely nothing wrong with the product offered by the appellant company and, as a matter of fact, it was not adjudicated as unfit but as technically non-compliant. She remarked that another condition was that goods received at the Government Hospital Procurement Services must not have their shelf life expired by more than one sixth of their total declared shelf life.

Mr David Stellini, intervening on behalf of the appellant company, stated that the product offered by his firm, *Zyprexa*, had been in use locally for about 15 years and that his firm had been awarded several contracts by the Health Department and that a minimum shelf life of 18 months had invariably been indicated. Mr Stellini added that another reason why his firm had indicated an 18-month minimum shelf life was because his firm kept a stock of this product to supply the department when it ran short of this product.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellants, in terms of their ‘reasoned letter of objection’ dated 10.03.2010 and also through their verbal submissions presented during the public hearing held on 5.05.2010, had objected to the decision taken by the General Contracts Committee;
- having taken note of the fact that whilst (a) Dr Cremona’s interpretation of facts which sustained that the tenderer did not have the option to bid for one of the two dosages but the tenderer had to bid for both dosages and that the option applied only as to the formulation, i.e. whether in tablet / capsule form or in a disintegrating tablet form, (b) Ms Debattista’s interpretation of same held that a tenderer could bid for either the 5mg or the 10mg dosage or for both;
- having also taken note of Dr Cremona’s remarks as to the fact that (a) the tender document did not request an absolute shelf life – e.g. of 2 or 3 years - but a relative shelf life, i.e. five-sixths of the product’s total declared shelf life and that (b) the conditions were such that, on the date of delivery to Government Hospital Procurement Services, the product still had to have five-sixths of its life, which life could vary according to the brand or type of the product;
- having heard appellant Company’s legal representative state that (a) in the tender submission, his client had indicated a minimum shelf life of 18 months, which he claimed was in full compliance with tender conditions because the minimum of 2 years was a preference and not a mandatory requirement and (b) the shelf life of the product submitted by his client was 36 months but that his client was guaranteeing a minimum shelf life of 18 months;
- having taken into consideration Ms Debattista’s claim that the information given in the tender submission had to be corroborated by the information pertinent to the

product being offered claiming that in the appellant Company's submission there was a discrepancy;

- having also considered (a) Dr Gauci's remarks relating to the appellant Company's offer, (b) Ms Debattista's agreement with Dr Gauci's interpretation claiming also that, contrary to the argument put forward by the appellant company, she opines that it would be detrimental to competition should the Government Hospital Procurement Services request a definite shelf life as that would automatically rule out certain products because the shelf life of medicinal products manufactured under different brands tended to vary to a certain extent, and (c) Dr Cremona's reiteration that the fact that other tenderers could have offered a product with a longer shelf life should certainly have not led to the disqualification of his client's tender;
- having also noted Mr Stellini's comments,

reached the following conclusions, namely:

1. The PCAB considers favourably the appellant company's reasoning, namely that, Annex VI - Technical and Special Conditions – 11 'Shelf life', should be interpreted as it is supposed to be.
2. The PCAB feels that the fact that the shelf life, as declared by the appellant company, and the relative information, seen by the contracting authority, did not tally, in that such relative information indicated a longer shelf life, should not have been sufficient reason to disqualify the tender and, at best, could have given ground to a clarification.
3. The PCAB, being in full cognisance of the content of Annex VI – Technical and Special Conditions – 11 'Shelf life', cannot but agree with appellant company's submission with regards to the fact that the quality of its product was technically compliant with tender specifications (as verified by Ms Debattista) and that, whilst it could have well resulted that other tenderers may have offered a product with a longer shelf life, yet this should certainly not have necessarily led to the outright disqualification of its offer, especially when one considers that it is specifically stated that "Products with a longer shelf life will be given preference".

As a consequence of (1) to (3) above this Board finds in favour of the appellant Company.

In view of the above and in terms of the Public Contracts Regulations, 2005, this Board recommends that the deposit submitted by the said appellants should be reimbursed.

Alfred R Triganza  
Chairman

Anthony Pavia  
Member

Edwin Muscat  
Member

18 May 2010