

PUBLIC CONTRACTS APPEALS BOARD

Case No. 242

Adv No CT/A/298/2009; CT/2318/2009; GPS 89004TO9MS Tender for the Supply of Bromazepam 3mg Tablets

This call for tenders was published in the Government Gazette on 28 July 2009. The closing date for this call for offers was 10 September 2009.

The estimated value of this tender was Euro 97,782.49.

Four (4) tenderers submitted their offers.

Vivian Corporation Ltd filed an objection on 30 July 2010 against the decision taken by the Contracts Department to the Contracts Department to (i) to disqualify its offer as non-compliant since the shelf-life of the product was not according to tender specifications and (ii) to award the tender to Krypton Chemists Ltd.

The Public Contracts Appeals Board composed of Mr Alfred Triganza as Chairman and Mr. Edwin Muscat and Mr. Carmel J Esposito as members convened a public hearing on Wednesday, 10 November 2010 to discuss this objection.

Present for the hearing were:

Vivian Corporation Ltd

Dr Karl Briffa	Legal Representative
Ms Joanna Cremona	Representative
Ms Denise Borg Manche	Representative

Krypton Chemists Ltd

Mrs Lorraine Arrigo	Representative
Mrs Pat Engerer	Representative

Government Health Procurement Services (GHPS)

Ms Anna Debattista	Director
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Adjudicating Board

Ms Miriam Dowling	Chairperson
Ms Miriam Azzopardi	Member

Contracts Department

Mr Francis Attard	Director General
Mr Franco Agius	Procurement Manager

After the Chairman's brief introduction the appellant company was invited to explain the motives which led to the filing of the objection.

Dr Karl Briffa, legal representative of Vivian Corporation Ltd, the appellant company, explained that on the 23rd April 2010 the Contracts Department informed the appellants that their offer did not contain the shelf life of the product. Dr Briffa went on to make the following submissions by:

- referring to PCAB Case No. 198 where, according to Dr Briffa, the PCAB had decided that the shelf life of the product was not sufficient reason to preclude a tender from qualifying to the next stage of the tendering process;
- stating that, over a span of three years, his client's offer would result in a saving of about €31,000 to the department when compared to that offered by the recommended bidder;
- arguing that, in their bid, his clients had indicated that the shelf life of the product was five years and that the product was going to be delivered with a minimum 40 month remaining shelf life. Dr Briffa argued that 40 months was by far longer than the minimum of 2 years stipulated in Clause 11 of Annex VI which provided as follows:
 - the shelf life of the product must be clearly indicated in the Tender documents 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
 - in case of medicinals containing blood products, the shelf-life must not be more than two-thirds expired
- claiming that his client had met the tender specifications and, if anything, preference should have been given to tenderers who provided a product with a longer shelf life.

Ms Anne Debattista, representing the contracting authority, stressed that one had to consider each case on its own merits because what applied to one case did not necessarily apply to another case. Ms Debattista remarked that, albeit the appellant company did, in fact, indicate the shelf life of the product as requested, which was 5 years, yet the said appellant company also indicated that the product would be

delivered with a 40 month remaining shelf life which worked out at 2/3 and not 5/6 of the product's shelf life and, as a consequence, the offer was not technically compliant since it was in violation of Clause 11 of Annex VI.

Dr Briffa pointed out that, as indicated in Clause 11, the contracting authority would even accept this medicine with a remaining shelf life of less than 2 years while his client was offering the product with a minimum remaining shelf life of 40 months. The appellants' legal advisor added that that did not mean that the deliveries, or part thereof, were going to have a remaining shelf life within the 5/6 limit set in the tender document. Moreover, Dr Briffa stressed that the tender document even provided for penalties in case the contractor infringed the shelf life conditions.

The appellant company's advisor explained that the condition that deliveries were to be made within 6 to 8 weeks from the date of order was creating difficulties so much so that the department used to accept products with 2/3 remaining shelf life – prior to the introduction of the 5/6 remaining shelf life. Dr Briffa informed the PCAB that discussions were underway between the Chamber of Commerce and the Department of Health and the two sides seemed to agree to stick to the 6 to 8 week delivery from date of order but to revert back to the 2/3 remaining shelf life instead to the current 5/6.

Ms Debattista explained that, by and large, the department was placing an order on a 6 monthly basis, meaning that there would be about six orders of this product over the 3 year contract period although, having said that, one had to keep in view that, in some cases, consumption had a rather irregular pattern. She further explained that penalties were contemplated in case of breach of conditions and, in case a product was delivered with less than 5/6 of its shelf life, the contractor undertook to exchange any expired stock or to credit it.

At this point, the Chairman of the PCAB questioned the logic behind the decision to reject a product with a minimum 40 month remaining shelf life when the department placed an order for this same product every 6 months. He remarked that it could be the case that the department was applying the same tender conditions and specifications irrespective of the fact that different medicines had different characteristics and that what was reasonable in the case of one medicine might turn out to be unreasonable in the case of another medicine, implying that a one-size-fits-all approach was proving to be rather inappropriate.

Ms Debattista remarked that the decision of the adjudicating board was strictly in accordance with the provisions of Clause 11 of Annex VI, which were the published conditions. She acknowledged that the tender conditions and specifications were under constant review and that they were being amended whenever it was considered reasonable to do so.

Dr Briffa reiterated that the 2/3 remaining shelf was in line with previous practice and that the new 5/6 limit was under discussion between the Chamber of Commerce and the department. Dr Briffa called upon the PCAB so that, in this case it would apply the same line of reasoning as it did in Case No. 198, i.e. that in the particular circumstances of his client's case strict adherence to the 5/6 minimum remaining shelf life was not reasonable ground for the disqualification of the bid.

Ms Pat Engerer, representing the recommended tenderer, intervened to remark that, in her opinion, the published tender conditions and specifications were applicable to all the tenderers and therefore all tenderers had to adhere to them.

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 9 August 2010 and also through their verbal submissions presented during the public hearing held on 10 November 2010 had objected to the decision taken by the General Contracts Committee;
- having taken note of the appellant company’s representative’s (a) argument that in their bid they had indicated that the shelf life of the product was five years and that the product was going to be delivered with a minimum 40 month remaining shelf life which was indeed by far longer than the minimum of 2 years stipulated in Clause 11 of Annex VI, (b) claim that they had met the tender specifications and, if anything, preference should have been given to tenderers who provided a product with a longer shelf life and (c) claim that the condition that deliveries were to be made within 6 to 8 weeks from the date of order was creating difficulties so much so that the department used to accept products with 2/3 remaining shelf life prior to the introduction of the 5/6 remaining shelf life;
- having also taken note of the contracting authority’s representative (a) claim that, albeit the appellant company did, in fact, indicate the shelf life of the product as requested, which was 5 years, yet the said appellant company also indicated that the product would be delivered with a 40 month remaining shelf life which worked out at 2/3 and not 5/6 of the product’s shelf life and, as a consequence, the offer was not technically compliant since it was in violation of Clause 11 of Annex VI, (b) state that by and large, the department was placing an order on a 6 monthly basis, meaning that there would be about six orders of this product over the 3 year contract period although, having said that, one had to keep in view that, in some cases, consumption had a rather irregular pattern and (c) remark that the decision of the adjudicating board was strictly in accordance with the provisions of Clause 11 of Annex VI, which were the published conditions;
- having this Board, during the hearing, expressed reservations concerning the (a) logic behind the evaluation board’s decision to reject a product with a minimum 40 month remaining shelf life when the contracting authority placed an order for this same product every 6 months and (b) fact that it could be the case that the department was applying the same tender conditions and specifications irrespective of the fact that different medicines had different characteristics and that what was reasonable in the case of one medicine might turn out to be unreasonable in the case of another medicine, implying that a one-size-fits-all approach was proving to be rather inappropriate;

- having thoroughly deliberated on the recommended tenderer's representative's remark that the published tender conditions and specifications were applicable to all the tenderers and, as a consequence, all tenderers had to adhere to them,

reached the following conclusions, namely:

1. The PCAB expresses the view that, whilst it is true that it seems awkward for this Board to maintain that an offer for the supply of a product with a minimum 40 month (2/3 of 5 years) remaining shelf life - when the contracting authority regularly places an order for this same product every 6 months - should be rejected in view of the fact that this threshold should have been 50 months (5/6 of 5 years), yet it is also a fact that the appellant company had every chance to clarify its position 'a priori' and not select to, arbitrarily, submit what it could offer, even if this contravened the parameters stated in the tender specifications (Clause 11 of Annex VI).
2. The PCAB feels that, unless modifications to tender specifications are made through timely amendments applicable to all bidders, the original published tender conditions and specifications shall remain valid and applicable to all the tenderers thus ensuring a level playing field throughout.
3. The PCAB, regardless of the above, draws the attention of the contracting authority to be in future more pragmatic in instances such as those transpired in this hearing where, administratively and operationally, specifications seem to be, by far, out of sync with reality.

As a consequence of (1) and (3) above this Board finds against 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 not be reimbursed.

Alfred R Triganza
Chairman

Edwin Muscat
Member

Carmel J Esposito
Member

17 November 2010