**PUBLIC CONTRACTS REVIEW BOARD**

## Case No. 295

**GHPST/808/10**
**Tender for the Supply of Beta Interferon 1A Injections**

This call for tenders was published in the Government Gazette on 10th September 2010. The closing date for this call with an estimated budget of € 119,520 was 27th September 2010.

One (1) tenderer submitted their offers.

Pharma MT Ltd filed an objection on 20th December 2010 against the decision taken by Government Health Procurement Services to disqualify its tender as not technically compliant and to cancel the tender.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr. Edwin Muscat and Mr Joseph Croker as members convened a public hearing on Wednesday, 1st June 2011 to discuss this objection.

Present for the hearing were:

**Pharma MT Ltd**

Mr Tony Nicholl Representative

**Government Health Procurement Services (GHPS)**

Ms Anne Debattista Director

**Evaluation Board:**

Ms Miriam Dowling Chairperson
Mr Mark Spiteri Member

After the Chairman's brief introduction, the appellant company's representative was invited to explain the motives of his objection.

Mr Tony Nicholl, representing Pharma MT Ltd, the appellant company, explained that by fax dated 15th December 2010 the Government Health Procurement Services had informed him that his company's offer had been disqualified as it was considered to be not technically compliant because the product offered had a remaining shelf-life of between two-thirds to five-sixths when the tender document stipulated at clause 12 of Volume 4 Section 2 - Declaration Sheet Medicinal Products – that the product "*must not be more than 1/6 expired upon delivery to Stores ... In case of medicinal containing blood products, shelf life must not be more than 1/3 expired upon delivery to Stores"*

Mr Nicholl referred to a synopsis that he drew up in relation to correspondence exchanged between the Chamber of Commerce and the Department of Contacts whereby, he claimed, an agreement had been reached so that the remaining shelf-life of medicines on delivery was to be changed from 5/6 to 2/3. He was not certain about the exact date of this agreement but he reckoned that it must have been sometime in December 2010.

Mr Nicholl presented a document dated February 2011 - namely after the closing date of the tender and which, as a consequence, it did not form part of his company's tender submission – sent by the manufacturer of 'biogen idec' which read as follows:-

> *"To Whom It May Concern*
>
> *We, the undersigned Biogen Idec, sole manufacturer of Avonex pre filled syringe, cannot guarantee the minimum shelf life as requested by the Government Health Procurement Services for the procurement of this product due to basic aspects of our production process as well as the lead time. However, we endeavour to supply the GHPS with the latest production batch available."*

Mr Nicholl informed that this product was manufactured by 'biogen idec' and that he had been supplying this product to the Government Health Procurement Services for the previous 10 years under the same conditions and that no problems were ever encountered with regard to deliveries since these were supplied every three months or so with an expiry dated of 18 to 24 months.

Ms Anne Debattista, Director Government Health Procurement Services, stated that over the years there had been only one supplier of this product, except for one instance when the importing company was going through a process of dissolution and two separate offers were received.

Ms Debattista explained that:

a) this product had a 24-month shelf-life and, according the conditions of the tender, which had the closing date of 27th September 2010, this product had to be delivered to store with a 5/6 - or 20 months - remaining shelf-life;

b) on two occasions during 2010 the appellant company had managed to deliver to store this medicine with a 5/6 remaining shelf-life;

c) the tender document for the supply of medicines was undergoing constant review so much so that after the issue of the tender under consideration, tenders for the supply of medicines were being issued requesting a remaining shelf-life of (a) 2/3 in the case of medicines with a certain shelf-life and (b) 5/6 in the case of medicines with a longer shelf-life;

d) moreover, in calls for tenders subsequent to the one under review, a new clause was being inserted stating that in cases where the authorisation body or the manufacturer submits written evidence in the quote that the lead time is two months or longer then the product must not be more than 1/3 expired upon delivery to stores; and

e) this tender had been issued under the condition that, upon delivery, the medicine could not have its shelf-life expired by more than 1/6 and, since Pharma MT Ltd did not meet that condition, the contracting authority opted to reject its offer as technically not compliant.

Mr Nicholl stated that, whilst his firm was the sole local representative of the manufacturer of this medicine, there was the possibility that parallel importer/s from overseas could submit quotes, albeit these would always be higher. The appellant company's representative explained that this medicine, which was issued to patients suffering from multiple sclerosis, had a very particular manufacturing process.

Ms Debattista remarked that whilst the recommendation of the Government Health Procurement Services at the departmental level was to clarify the matter with the bidder, especially in view of the fact that Government Health Procurement Services was putting more frequent orders of this medicine but in lesser quantities, yet, the General Contracts Committee had recommended the rejection of the offer and the cancellation of the tender.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellant company, in terms of their 'reasoned letter of objection' dated 20th December 2010 and also through their verbal submissions presented during the hearing held on 1st June 2011, had objected to the decision taken by the pertinent authorities;

- having noted all of the appellant company's representative's claims and observations, particularly, the reference made to (a) the fact that his company's offer had been disqualified as it was considered to be not technically compliant because the product offered had a remaining shelf-life of between two-thirds to five-sixths when the tender document stipulated at clause 12 of Volume 4 Section 2 - Declaration Sheet Medicinal Products – that the product "*must not be more than 1/6 expired upon delivery to Stores ... In case of medicinal*

*containing blood products, shelf life must not be more than 1/3 expired upon delivery to Stores"*, (b) a document dated February 2011 sent by the manufacturer of 'biogen idec' a product that the appellant company's representative had been supplying for the previous 10 years under the same conditions and that no problems were ever encountered with regard to deliveries since these were supplied every three months or so with an expiry date of 18 to 24 months and (c) the fact that whilst his firm was the sole local representative of the manufacturer of this medicine, there was the possibility that parallel importer/s from overseas could submit quotes, albeit these would always be higher than the ones submitted by his firm;

- having considered the contracting authority's representative's reference to the fact that (a) on two occasions during 2010 the appellant company had managed to deliver to store this medicine with a 5/6 remaining shelf-life, (b) the tender document for the supply of medicines was undergoing constant review so much so that after the issue of the tender under consideration, tenders for the supply of medicines were being issued requesting a remaining shelf-life of (*1*) 2/3 in the case of medicines with a certain shelf-life and (*2*) 5/6 in the case of medicines with a longer shelf-life, (d) this tender had been issued under the condition that, upon delivery, the medicine could not have its shelf-life expired by more than 1/6 and, since Pharma MT Ltd did not meet that condition, the contracting authority opted to reject its offer as technically not compliant and (e) whilst the recommendation of the Government Health Procurement Services at the departmental level was to clarify the matter with the bidder, especially in view of the fact that the Government Health Procurement Services was placing more frequent orders of this medicine but in lesser quantities, yet, the General Contracts Committee had recommended the rejection of the offer and the cancellation of the tender,

reached the following conclusions, namely:

1. The Public Contracts Review Board feels that the fact that the tender document for the supply of medicines was undergoing constant review, so much so that after the issue of the tender under consideration, tenders for the supply of medicines were being issued requesting a remaining shelf-life of (*1*) 2/3 in the case of medicines with a certain shelf-life and (*2*) 5/6 in the case of medicines with a longer shelf-life, is '*sui generis*' an admission that changes to formal conditions prevailing until a while ago had to be relaxed to reflect a wider acceptance of supply exigencies and manufacturing patterns.

2. Further to (1) above, this Board also feels that it cannot ignore the fact that the same contracting authority introduced changes in similar tender conditions following, *inter alia*, the tender under review, especially whilst bearing in mind that it was placing more frequent orders of this medicine but in lesser quantities.

3. Furthermore, the Public Contracts Review Board argues that at this stage it cannot overlook the fact that (a) the only bidder in this tender was the appellant company itself, (b) the only supplier of this type of product is the one represented by the appellant company, (c) this same product has been supplied every three months or so with an

expiry date of 18 to 24 months to the Maltese central government by the appellant company's representative for a period of ten years or so, namely under the same conditions and that, to date, no problems were ever encountered with regard to deliveries.

In view of the above this Board finds in favour of the appellant company and also recommends that, apart from being re-instated in the evaluation process, the deposit paid by the latter should be reimbursed.

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| Alfred R Triganza | Edwin Muscat | Joseph Croker |
| Chairman | Member | Member |

*10 June 2011*