PUBLIC CONTRACTS REVIEW BOARD

Case 1142 – CFT 021-6810/2017 – Tender for the Supply of Omeprazole 40mg Powder for Infusion

The publication date of the call for tenders was the 17th October 2017 whilst the closing date of the call for tenders was the 6th November 2017. The estimated value of the tender (exclusive of VAT) was € 72,450.

There were three (3) bidders on this tender.

Europharma Ltd filed an appeal on 12th February 2018 against the Contracting Authority's decision that their tender had been rejected as it was considered non-compliant due to missing information. A deposit of € 400 was paid.

On 13th March 2018 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Carmel Esposito as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellant – Europharma Ltd

Dr Stefano Filletti	Legal Representative
Dr Kristine Busuttil	Legal Representative
Mr Michael Peresso	Representative
Mr Alex Fenech	Representative

Recommended Bidder - Drugsales Ltd

Dr Andrea Gera de Petri	Legal Representative
Mr Andrew Attard Montalto	Representative
Ms Gulia Attard Montalto	Representative

Contracting Authority – Central Procurement and Supplies Unit

Dr Stefan Zrinzo Azzopardi	Legal Representative
Ms Denise Dingli	Chairperson Evaluation Board
Mr Neil Bugeja	Member Evaluation Board
Dr Ian Ellul	Member Evaluation Board

The Chairman of the Public Contracts Review Board, Dr Anthony Cassar, invited the parties to make their submissions.

Dr Stefano Filletti, Legal Representative for Europharma Ltd, asked to produce a witness.

Dr Ian Ellul (296980M), an Evaluator on this tender, said on oath that the reason given for the Appellant's rejection of their bid was that they had failed to include the Marketing Authorisation number on the technical form and the Summary of Products Characteristics. Referring to the tender documents he confirmed that this was an essential requirement required by the Contracting Authority.

The next witness called to testify under oath was Mr Alex Fenech (205576M).

He confirmed that he was the person responsible at Europharma for dealing with tenders. He stated that the MA number had been left out since in the case of practically all tenders for medicinal products it was permitted, in instances where the items were not registered in Malta or Europe, to register them in Malta within 90 days of the award of the tender. He confirmed that this right to register a product that was not previously registered was included in Clause 21 section 2.1.iv of the tender document. Witness was unclear, when questioned, if the Appellant did have an MA number with the Malta Medicines Authority, and if the product had been produced in Greece.

The Chairman recalled Dr Ian Ellul to give further evidence regarding the procedure for registering medicinal products in Malta which he described as a lengthy process. He confirmed that in this particular case it was clear that the product originated in Greece.

Dr Stefano Filletti re-iterated that it was not necessary to have an MA number at the time of tendering as one could apply for it once the bid was successful. For this reason the tender should not have been rejected, more so as his clients' tender was 40% cheaper than the winning bid.

Dr Stefan Zrinzo Azzopardi stated that once the offer was technically non-compliant the financial aspect could not be gone into. The Appellant's offer had been rejected because the bid documents were incomplete. If the product had been, as stated, licensed in Greece, then the licence number should have been shown. Registration in Malta was, in this case, a red herring.

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

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This Board,

Having noted the Objection filed by Europharma Limited, (hereinafter referred to as the Appellant), on 12 February 2018, referring to the contentions made by the same Appellant with regards to the award of Tender of Reference CFT 021-6810/2017 listed as Case No 1142 in the records of the Public Contracts Review Board, awarded by the Central Procurement and Supplies Unit, (hereinafter referred to as the Contracting Authority).

Appearing for the Appellant: Dr Stefano Filletti

Dr Kristine Busuttil

Appearing for the Contracting Authority: Dr Stefan Zrinzo Azzopardi

Wherein the Appellant is contending that,

a) **Their main contention is that their offer was discarded due to the alleged fact that they did not submit the "*Marketing Authorisation*" (MA) number. Whilst insisting that they did submit such information, the Appellants' refer to section 2.1 (iv) of the Tender Document wherein**

such information can be produced within 90 days from the award of the Tender.

This Board also considered the Contracting Authority's "*Letter of Reply*" dated 20 February 2018 and its verbal submissions during the Public Hearing held on 13 March 2018, in that:

a) The Central Procurement and Supplies Unit maintains that the MA Number was clearly requested in the technical offer and that the Appellants' submission indicated the country of licensing but not the identification number of the product so that the information submitted by the latter was incomplete and this information formed part of the technical specifications whereby no clarification or rectification is allowed.

This Board also took into consideration the testimonies of the witnesses summoned by Europharma Limited, namely:

1. **Dr Ian Ellul;**
2. **Mr Alex Fenech**

This Board, after having examined the relevant documentation relating to this Appeal and heard submissions made by the interested parties, including the testimony of the technical witnesses, opines that the issue to be considered in

this particular case in the "*non-inclusion of the MA Number in Europharma Limited's submissions*"

One has to appreciate and acknowledge that the MA number represents the identification of the medical product but also confirms that the product has been authorised, after a lengthy procedure, for the application of same, by the Government of the respective Country. This Board would respectfully refer to the Appellants' "*Letter of Objection*" dated 7 February 2018, wherein it was stated that they had submitted the MA number in their offer.

From the testimony of the witness duly summoned by the Appellants, it was credibly established that such information, in actual fact, was missing and the only information given was that the Country of Licensing was Greece. Yet again, from the testimony of Mr Alex Fenech, representative of the Appellants, this Board noted that the same witness could not confirm whether Greece was the Country of Licensing via the following testimony:

Question: "*Il-fatt li l-prodott, inti għandek "Country of Licensing" li huwa l-Greċja. Il-fatt li huwa reġistrat il-Greċja, dak ikollu numru ta' reġistrazzjoni tal-Greċja?"*

Reply: "*Iva. Imma hija assumption li huwa reġistrat il-Greċja.*"

Through the above testimony, this Board confirms that if the product is registered in a Country, that particular Country gives an MA number to the product.

At the same instance, this Board noted the importance of the product having an identification number, which was credibly confirmed by the witness Dr Ian Ellul as follows:

"*Dik hija l-mankanza. Kif tixhed it-"Technical Form" section 2.3 u fejn hawnhekk tħalliet vojta, kif ukoll section 8 tal-SPC u hawnhekk ta'min ifakkar li kif imniżżel f'Direttiva 2001/83, li hija Direttiva mamma tad-Direttivi kollha tal-Ewropa li jirrigwardaw il-kamp farmaċewtiku, preċiżament articlu 11, hemmhekk jgħidlek li sezzjoni numru 8 tal-SPC, għandu jitniżżel dak l-"identifying code", in-numru.*"

At this stage of consideration, this Board would emphasize the importance of the application of the principle of "*self-limitation*", during the evaluation process. One has to acknowledge that the technical specifications are not capriciously dictated by the Contracting Authority and the main objective in doing so, is to ensure a fair level playing field for all prospective bidders, yet at the same time, such specifications will also serve as the yardstick to what is being requested by the same Authority.

In this regard, it is of the utmost importance that prospective bidders understand and abide by the technical specifications as laid out by the Contracting Authority, however, the latter should also respect the conditions and specifications as laid out in the tender document, during the evaluation process. If, on the other hand, such limitation is not respected, then the basic principles of public procurement collapse.

In this particular case, it has been credibly established that Europharma Limited failed to submit what was requested, that is the MA number of the product and this Board was not presented with any credible evidence as to why such information of the product was not submitted and even so, at the same instance, this Board was made aware and confirmed by the testimony of Mr Alex Fenech, that if the product does not bear the MA number, it is tantamount to missing and incomplete information in the Appellants' offer, so that quite appropriately, the Evaluation Board rejected the latter's offer due to technical non-compliancy.

The financial aspect of the Appellants' offer could not come into play, as the offer had failed the technical stage so that the financial issue cannot be considered.

This Board would respectfully refer to the fact that although Europharma Limited made reference to clause 2.1 (iv) (a) of the tender dossier, the same reference to this clause was not mentioned in their "*Letter of Objection*" dated 12 February 2018, however, this Board notes that reference to this clause in this particular grievance cannot be presented as a justification for the incomplete, if not, inexact information submitted by the Appellants and in this regard, this Board does not uphold Europharma Limited's grievances.

In view of the above, this Board:

i) **Confirms that the evaluation process was carried out in a fair, just and transparent manner;**

ii) **Upholds the decision taken by the Central Procurement and Supplies Unit in awarding the tender to Drugsales Limited;**

iii) **Recommends that the deposit paid by Europharma Limited should not be refunded.**

Dr Anthony Cassar	Dr Charles Cassar	Mr Carmel Esposito
Chairman	Member	Member
22nd March 2018		