

PUBLIC CONTRACTS REVIEW BOARD

Case 1891 – CT2163/2022 Supplies – Tender for the Supply of Chenodeoxycholic Acid 250mg Tablets

10th July 2023

The Board,

Having noted the letter of objection filed Dr Clement Mifsud Bonnici and Dr Calvin Calleja on behalf of Ganado Advocates acting for and on behalf of Pharmachemic Trading Agency Company Limited, (hereinafter referred to as the appellant) on the 20th March 2023;

Having also noted the letter of reply filed by Dr Alexia J Farrugia Zrinzo and Dr Leon Camilleri acting for Central Procurement and Supplies Unit (hereinafter referred to as the Contracting Authority) on the 24th March 2023;

Having heard and evaluated the testimony of the witness Dr Francis Cherubino (Representative of Cherubino Limited) as summoned by Dr Clement Mifsud Bonnici acting for Pharmachemic Trading Agency Company Limited;

Having heard and evaluated the testimony of the witness Dr Corinne Bowman (Member of the Evaluation Committee) as summoned by Dr Clement Mifsud Bonnici acting for Pharmachemic Trading Agency Company Limited;

Having heard and evaluated the testimony of the witness Mr Adrian Farrugia (Representative of Pharmachemic Trading Agency Company Limited) as summoned by Dr Clement Mifsud Bonnici acting for Pharmachemic Trading Agency Company Limited;

Having taken cognisance and evaluated all the acts and documentation filed, as well as the submissions made by representatives of the parties;

Having noted and evaluated the minutes of the Board sitting of the 6th July 2023 hereunder-reproduced.

Minutes

Case 1891 – CT 2163/2022 – Supplies – Tender for the supply of Chenodeoxycholic Acid 250mg Tablets

The tender was issued on the 14th January 2023 and the closing date was the 14th February 2023. The estimated value of the tender, excluding VAT, was € 1,082,750.

On the 20th March 2023 Pharmachemic Trading Agency Company Ltd filed an appeal against the Central Procurement and Supplies Unit as the Contracting Authority objecting to the decision on the award on the basis that an incorrect self-declaration had been made by the preferred bidder.

A deposit of € 5,414 was paid.

There were four (4) bids.

On the 6th July 2023 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Dr Charles Cassar and Dr Vincent Micallef as members convened a public hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – Pharmachemic Trading Agency Company Ltd

Dr Clement Mifsud Bonnici	Legal Representative
Mr Adrian Farrugia	Representative

Contracting Authority – Central Procurement and Supplies Unit

Dr Leon Camilleri	Legal Representative
Dr Alexia Farrugia Zrinzo	Legal Representative
Ms Monica Sammut	Chairperson Evaluation Committee
Dr Corinne Bowman	Evaluator
Ms Christianne Farrugia	Evaluator

Preferred Bidder – Cherubino Ltd

Dr Matthew Paris	Legal Representative
Dr Francis Cherubino	Representative
Mr David Cherubino	Representative

Department of Contracts

Dr Mark Anthony Debono	Legal Representative
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Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties and prior to inviting submissions stated that documents had been submitted by Appellant late on the 4th July and to which Dr Paris was objecting due to the lateness which was against the procedures set down by the Public Contracts Review Board. The Chairman said that the Board required Appellant to indicate which grievance these documents were tied to before deciding whether to allow them. This case was of a humanitarian nature and needs expediting but this must be balanced with transparency and a fair hearing.

Dr Clement Mifsud Bonnici Legal Representative for Pharmachemic Trading Agency Company Ltd (Pharmachemic) said that this appeal was not intended to stop competition and Appellant was not trying to stop the parallel trading route but there are other channels which could be used. However, if that route is chosen then an agreement of security of supplies has to be in place at the time of submission of bid. In this case this was not possible as Appellant has exclusivity arrangement and this channel is therefore closed to all others and reserved only to the Appellant. Other channels have to be used by other bidders. The lateness in submitting additional documents was caused by the requirement to obtain sanction to redact the copy of the Agreement.

Dr Matthew Paris Legal Representative for Cherubino Ltd said that the Public Contracts Review Board (PCRB) procedures lay down a three working days period for final submission of documents and this has not been observed. The least Appellant should have done would have been to seek sanction from the Board to submit documents late. The document is in German and what Appellant has done is to

shift the onus on the preferred bidder as there is not enough time to consult. Moreover, the document has to be made available to all parties and not solely to their lawyers. As far as this case is concerned the document filed is irrelevant to the case and changes nothing and should be expunged from the records.

Dr Leon Camilleri Legal Representative for the Central Procurement and Supplies Unit (CPSU) said that the Agreement is subject to German law and one doubts its relevance to this case since the same result could have been obtained through producing witnesses.

Dr Mark Anthony Debono Legal Representative for the Department of Contracts (DoC) said that the three day period for filing of document has to be observed. The PCRB regulates its own procedures according to Regulation 90(2).

Dr Mifsud Bonnici said that as much as the Board can regulate its own proceedings it can likewise change them if necessary when circumstances justify it. The relevance of the Agreement might become clear during the course of the hearing. There is a case for distribution to be limited to the lawyers – *Varec*; *Antea Polska* and *Southlease* Cases were quoted in support of this claim as they confirm that distribution of documents can be limited. In this case the document does not affect the clients - this disposes of this point. The proof is the document itself otherwise how can one explain exclusivity of supplies regarding the product offered.

Dr Paris stated that the preferred bidder has requested a copy of the letter sent by Appellant to the Authority requesting information on the product offered by the successful bidder. This is still not forthcoming.

This was subsequently supplied but Dr Debono, on behalf of the DoC, insisted that this information must be kept private. The Chairman pointed out that this information was already in the public domain and is no longer private.

After a short recess to enable the Board to consider the points raised, the Chairman stated that the Board had considered the submissions of all the parties regarding the issue of the Agreement between Leadiant Biosciences Ltd, Leadiant GmbH and Pharamchemic Trading Agency Company Ltd submitted by Appellant.

Regarding the point raised by Cherubino Ltd the Board has decided as follows:

1. On the point regarding the expunging of the document - since at this stage not even the Board has had an opportunity to familiarise itself with the contents of this document it will not in the circumstances meet the request made by Dr Paris, on behalf of Cherubino Ltd for its expunging; hence at this stage it will form an integral part in the acts of this appeal.
2. The second decision is regarding the request that the lawyers should communicate the contents of the Agreement to their clients. This Board feels that due to the technical nature of this document it would be restricting the absolute right of one of the parties in this case from participating equitably and justly if this document is not made available to the lawyers' clients. However, before dealing further with his case the Board is offering Appellant the opportunity of withdrawing this document from the acts of this case.

Dr Mifsud Bonnici on behalf of the Appellant was given the opportunity of filing a verbal note on this point.

Dr Mifsud Bonnici stated that Appellant has no objection to the Agreement being made available to the other parties subject to its use being restricted solely to this case. He then went on to emphasise

the importance of self-declarations in the tender process and say that the self-declaration made in this offer is not correct and must be closely scrutinised by the Board since a remedy was available to correct this. This is not stating that the Tender Evaluation Committee (TEC) should have checked the veracity of the self-declaration or that it should have dug deeper into it. The product in question is sensitive and is unique in Europe and merits to be dealt by the Board on a case by case basis precisely because of its sensitiveness.

Dr Leon Camilleri said that the role of the PCRB was solely to evaluate if the procurement by the TEC was correctly carried out. The CPSU accepts that this product is different but this does not change the outcome of the procedure to be followed based purely on evaluation and no other factors.

Dr Paris rebutted all the allegations made by the Appellant that an incorrect declaration had been made. The self-declaration was the only requirement and the preferred bidder is prepared to justify its correctness under oath. There are other remedies if the tender requirements are subsequently not fulfilled.

Dr Mifsud Bonnici requested the testimony of witnesses.

Before witnesses were heard Dr Paris made it clear that they he will object to questions of a commercially sensitive nature and only allow questions within the limits of Regulation 40 as far as brand name and model is concerned.

Dr Francis Cherubino (167384M) called to testify by the Appellant stated on oath that he is a Director of Cherubino Ltd and that he oversaw the bid offer. He said that Cherubino Ltd were prepared to accept the award on the tender on the basis of the brand offered as confirmed by the DoC.

Dr Paris objected to a question to witness on the source of supply of the product which he said was outside the scope of the tender.

Dr Mifsud Bonnici explained that the relevance of the question was in regard to the self-declaration which is worded in the present tense at the time of the submission of the tender. Other clauses in the tender refer to actions in the future. Bidder, therefore, is obliged to confirm the correctness of self-declarations at the time that the bid was placed.

Dr Paris repeated that the tender does not request the source of supply and Appellant is fishing for information. Dr Mifsud Bonnici insisted that the information was essential for the case to proceed.

The Chairman upheld Dr Paris' objection and said that the name of the source of the medication need not be divulged but the information was essential so the question should be put differently.

Resuming the testimony, in reply to a question from Dr Paris, witness said he was not at liberty to break confidences on the source but what was stated in the tender is correct and he is prepared to stand by it.

In reply to further questions from Dr Mifsud Bonnici witness repeated that there are confidential aspects and the answer submitted in the offer was exactly as requested in Clause 2.8 of Part 2 of the Technical Offer which he quoted verbatim. The medicine was being bought from a licensed company and will enable witness's Company to market the product.

Dr Mifsud Bonnici requested the Board to take note of the adverse inference of witness.

A Board Member noted that the Board notes the replies by witness and will take this into consideration.

Dr Paris objections to this line of questioning was upheld.

Referred to Clause 2.8 by Dr Mifsud Bonnici witness said that in replying to this question Cherubino Ltd was representing their supplier. Cherubino Ltd did not have a parallel distribution notice registered with the European Medicines Agency (EMA), nor did their supplier company as it was not required.

Dr Corinne Bowman (104674M) called to testify by the Appellant stated on oath that she is employed by the CPSU and was an Evaluator on this tender. She confirmed that neither Cherubino Ltd nor Target Healthcare Ltd (Malta) had filed parallel distribution notices registered with EMA with their offers.

Mr Adrian Farrugia (279668M) called as a witness by Appellant testified on oath that he was a Director of Pharmachemic Trading Agency Company Ltd and he was purchasing the product offered directly from the manufacturer as he has distribution agreement exclusive to his Company. The product requirements have to be forecast as this is not available as an off the shelf product. The Agreement gives exclusivity for the whole of Malta and no other operator has a parallel distribution agreement with EMA.

Replying to questions from Dr Paris witness said that his Company has an exclusive Agreement with a letter of access which will be offered when requested. He confirmed that the Agreement is subject to the laws of Germany, is solely between the two parties and is a private not public contract. Referred to Clauses 2, 2.1 and 3 of the Agreement witness stated that Clause 2.1 is the one that gives exclusivity whilst Clause 3 which does not limit actions by the principal is overridden by Clause 2.1 in regard to exclusivity.

Dr Mifsud Bonnici objected to his witness being asked questions of a legal nature as he should not be expected to deal with them.

On behalf of Appellant Dr Mifsud Bonnici renounced its right to examine a representative of Target Healthcare Ltd and this only because of the urgent and sensitive nature of this case.

This concluded the testimonies.

Dr Mifsud Bonnici stated that he would deal with the two crucial points of the appeal and the reasons why the Board should meet this appeal. A self-declaration places no obligation on the TEC or the bidder to check its veracity or to check if there are any agreements in place. The preferred bidder is fully aware of market operation and he knew that the declaration could not be correct. The self-declaration is very important and not a superfluous item and it is incorrect for the TEC to use it as the basis for its decision. Cherubino self-declaration could not be right as they had no guaranteed line of supply. Dr Cherubino in his testimony accepted the need for a parallel distribution agreement by the company he represents and therefore he had to deal directly with Leadiant, the manufacturer. The reluctance to give this information during his testimony is the reason that it is impossible since supplies are bound by an exclusive agreement with the Appellant. The avenue which Cherubino Ltd chose was therefore closed. Proof has been provided that no one else has parallel distribution notices in Europe (*vide* Docs PT6.1 and PT6.2). This explains the resistance by witness to reply to questions as Appellant proved that both channels – parallel importer or wholesaler - are closed. The declaration, therefore, must be incorrect. It had to be correct at the time of submission – compliance had to be *ab initio*. The Board must consider the refusal by witness to reply to question put to him.

Exclusivity, continued Dr Mifsud Bonnici, is legitimate and allowed under European law as it protects against free riders problem. CJEU Case C/248/1 para 16.b deals with the protection of exclusivity against free riders. Single distributor ensures continuity of supplies, leaves parallel distribution route still available and protects against cowboys destroying the market. A report on 'Future Proofing

Pharmacological Legislation Study on Medicines Shortages' (pages 96 and 97) puts forward the controversial claim that there should be restrictions on parallel distribution as it affects the security of supplies.

Dr Paris stated that the tender has clear parameters. A self-declaration has been requested, given and subsequently confirmed on oath. The tender specifications have all been met according to the testimony of Dr Bowman. The CPSU also confirmed it but the Appellant is the only one which will not accept it. In Clause 9.11 of the Special Conditions in the Tender subsequent registration was allowed, a letter of delegated responsibility had to be delivered with the first consignment – the tender should be judged on these basis. The need to abide by the tender document was reinforced by the judgement in *Leone Grech vs Director of Contracts et* with clear terms set out when documents have to be submitted. The preferred bidder in this tender satisfied the TEC that the tender request was met and it is only at the moment of execution that the rest has to be dealt with. In the *JV Healthcare* case the requirement that the parallel distribution notice was an *ab initio* requirement was discarded by the Court. The parallel distribution notice is not required at the bid stage but at contract execution.

No proof has been provided, said Dr Paris, that Cherubino cannot guarantee supplies; the only proof received is that the Appellant only can buy from his supplier. However, the exclusive agreement is not as exclusive as claimed as it only binds Pharmachemic but not the supplier – it is only an exclusive authorised distributor agreement and it does not exclude other parties being supplied. The Board is requested to consider Dr Cherubino's testimony and to review the work of the TEC. The self-declaration was the only obligation required of the bidder. If the CPSU request execution of the contract then other measures are available under the PPR. The fact that the PCRB's role is not to decide on a contract was confirmed by the Appeal Court.

Dr Camilleri said that the interest of the Authority was to obtain the medicine which in this case is urgently required. The evaluation is correct and it followed regulations and tender requirements. There is no need to deal with the aspect of exclusivity – this is simply a matter of checking if what was required has been provided. If the self-declaration satisfied the evaluators then there is no alternative except to accept it. It was established in *Cherubino vs Director of Contracts (2017)* that there is no need to be compliant at the time of the bid whilst in the *JV Healthcare* case it was held is that the requirement is that the parallel distribution notice can be submitted later than the tender bid. The registration is an obligation on the contractor not the bidder. It is not our role to decide from which source the product is obtained but if the tender terms have been met. Once the declaration was made the TEC had no reason not to recommend the award and there is no reason why the decision should not be confirmed.

Dr Mifsud Bonnici said that Dr Cherubino had declared that the declaration was made on behalf of another company. This raises the point that there should have been an eSPD filed for this sub-contract. This requirement has not been met. Self-declaration and Clause 9.11 which has been referred to are two separate things. The self-declaration which is worded in the present tense states that the licence is at hand at the time and this is not correct. The Board has to judge on all points and distinguish between procedure and substance. Appellant has provided proof that all avenues were closed to Cherubino and it is clear that Agreement indicates exclusivity and there is no point in claiming otherwise. Clause 2.1 makes it clear that there is exclusivity whilst Clause 3 is simply a single branding obligation.

Dr Paris said it was nonsensical to claim that a supplier is a subcontractor. The Board may perhaps be tempted to check if the Appellant had indeed submitted an eSPD in his bid. In any case Note 2 would solve this situation.

Dr Camilleri concluding by stating that the TEC was procedurally correct and this was accepted by Appellant. On wonders why then their decision is being challenged?

There being no further submissions the Chairman thanked the parties for their submissions and declared the hearing closed.

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 6th July 2023.

Having noted the objection filed by Pharmachemic Trading Agency Company Limited (hereinafter referred to as the Appellant) on 20th March 2023, refers to the claims made by the same Appellant with regard to the tender of reference CT2163/2022 listed as case No. 1891 in the records of the Public Contracts Review Board.

Appearing for the Appellant:	Dr Clement Mifsud Bonnici
Appearing for the Contracting Authority:	Dr Leon Camilleri & Dr Alexia Farrugia Zrinzo
Appearing for the Preferred Bidder:	Dr Matthew Paris

Whereby, the Appellant contends that:

- a) As shall be proven during these proceedings, Chenodeoxycholic acid Leadiant 250mg hard capsules is a medicinal product centrally authorised by the European Medicines Agency.
- b) In view of this and as shall be proven in these proceedings, the Appellant submits that the Recommended Bidder has made an erroneous, incorrect and inaccurate (if not misleading) self-declarations and commitments to the Contracting Authority in its bid.
- c) As a starting-off point, at the time of the submission of its bid, the Recommended Bidder had to submit a 'Tenderer's Declaration' whereby it was obliged to declare its acceptance of the terms and conditions embedded in the Tender *"in their entirety, without reservation or restriction [...] We offer to provide, in accordance with the terms of the tender document and the conditions and time limits laid down, without reservation or restriction, the requirements of this Call for Tenders (CfT)."*
- d) The Recommended Bidder did not have, at the time of submission of bids, the necessary authorisations and registrations to be able to place this product on the market and/or to be able to perform this Tender, if awarded.

- e) The Recommended Bidder is in a situation of impossibility of performing the performance conditions of this Tender.
- f) , Further, the award of this Tender to the Recommended Bidder is, for the above-mentioned reasons and others that may be brought in due course, contrary to the principle in the procurement of healthcare of guaranteeing the well-being and best interest of patient, including patient safety and the administration of treatment in a timely manner.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 24th March 2023 and its verbal submission during the hearing held on 6th July 2023, in that:

- a) On Registration At bidding Stage -

CPSU submits that the tender document is clear in stating that it is the contractor's duty to register the product and it is not a *sine qua non* condition that the product is registered at the time of tender submission.

Section 9.11 of the special conditions provides that *"For medicinal products registered by the contractor following the signing of the contract, a copy of the registration certificate issued by the Licensing Authority of Malta must be submitted to CPSU within 90 days from signing of the contract. If the product is not registered within the stipulated timeframe, the Contracting Authority will reserve the right to purchase the product on the account of the defaulting contractor until such time that the product is registered."*

The above is also reflected in Section 3 Article 1.2.1 (it) of the Tender Dossier which provides that: *"If the medicinal product being offered is not registered locally, it is hereby confirmed that product/s shall be registered within 90 days from award of Contract. Failure of this, the Contracting Authority reserves the right, at its own discretion, to purchase registered product on the account of the defaulting contractor until the product is locally registered."*

In the current case the product is centrally authorised and thus a simple procedure domestically would be required so that the product could be placed on the market in Malta.

- b) On the Self Declaration -

Moreover and without prejudice to the above submitted, the declaration number 2.8 of the technical offer form was a self-declaration and the tender document/technical offer did not ask for any supplementary documentation to corroborate or confirm the declaration.

The evaluation committee is bound by the principle of self limitation and thus has to limit its consideration to that is requested in the tender documents and the documents submitted in line with the tender documents and from that end, the recommended bidder was fully compliant and the evaluation committee would have been in breach of the principle of self-limitation and other

general principles of public procurement if it had to reject an offer for some consideration not forming part of the tender submission.

Moreover and without prejudice to all the above stated, the Technical offer form is filled in by the bidder, most times a legal person (a limited liability company) as was in all the bids in this tender process. The word 'I' in clause 2.8 of the technical offer form refers to the bidder, the company, and not the natural person ticking the boxes and filling the form, Thus if the bidder company is representing another company or is working in collaboration with another overseas and foreign company which has the product registered centrally with the EMA and is comfortable making such a self declaration that the company it is representing (being itself or else), is registered in Europe, in CPSU's humble view there is nothing which is incorrect.

If after the signing of the contract it transpires that the self declaration is incorrect in the sense that the recommended company (contractor) is not in a position to supply the product because it is not truly registered in Europe and eventually authorised in Malta, then the contractual provisions of breach of contract will be enforced.

This Board, after having examined the relevant documentation to this appeal and heard submissions made by all the interested parties including the testimony of the witnesses duly summoned, will now consider Appellant's grievances in their entirety.

- a) Initially, this Board will delve into the Distribution Agreement as presented by the Appellant between Leadiant Biosciences Ltd, Leadiant GmbH and Pharmachemic Trading Agency Company Ltd dated 7th July 2021.
 - i. Its relevance to proceedings was primarily questionable. This for arguments which will be discussed in the below sections. However, *ab initio*, this Board rejected the Preferred Bidder's objection to expunging the document as the Board was still unfamiliar with its contents and therefore relevance. Due to the urgency of the case, it was kept in the acts of the appeal to confirm completeness of proceedings and the case could continue to be heard in one sitting.
 - ii. Effective term of the agreement is for a duration of 2 (two) years from such date (i.e. 7th July 2021) subject to a number of clauses.
 - iii. The nature of the contract is private and subject to German law.
 - iv. Moreover, no proof was provided that the contract was still effective and valid. This could have easily been ascertained had a representative of Leadiant been present to provide their testimony under oath [or indeed if witness Mr Farrugia had been asked this question].
 - v. Therefore, it is this Board's conclusion, that the relevance, if any, that can be placed on this document is limited at best.

- b) Self Declaration – Clause 2.8 Technical Offer Form
- i. What the tender required was a self-declaration stating “*I confirm that the company I am representing is licensed by the competent authority in Europe to trade this medicinal product*”.
 - ii. Therefore, this Board opines, that no proof at bidding stage was required to be presented, other than this self-declaration. The preferred bidder in this case, duly provided the necessary declaration [which satisfied the evaluators].
- c) The tender document –
- i. Reference is made to paragraph 9.11 of Section 2 – Special Conditions. “*For a centrally authorised medicinal product, a copy of the delegated responsibility as issued by the Marketing Authorisation Holder (MAH) **is to be submitted with the first consignment**.....*” (bold & underline emphasis added) This is in the Board’s opinion a clear ‘post award’ requirement and needed not be presented at bidding stage.
 - ii. Paragraph 9.11 of Section 2 – Special Conditions goes on to state “*For medicinal products registered by the contractor following the signing of the contract, a copy of the registration certificate issued by the Licensing Authority of Malta must be submitted to CPSU within 90 days from signing of the contract.....*” Again, a clear ‘post award’ requirement.
- d) Reference is now made to a number of Court of Appeal judgements relevant to this case –
- i. Leone Grech v Jobsplus, Direttur Generali tal-Kuntratti u South Lease Limited (66/2023/1) of 31st May 2023 – paragraph 15 states: “*F’dan il-kuntest l-appellant jagħmel asserzjoni dommatika li iżda ma hijiex korretta. Ma huwiex dejjem illi oblatur “għandu jkun fil-pussess ta’ dak kollu necessarju u mitlub fis-sejba sad-data li jagħmel l-offerta tiegħu”: hemm każijiet fejn dan hu mehtieg iżda hemm ukoll każijiet fejn ma huwiex : jiddependi mill-kondizzjoniet tas-sejba. Fi kliem iehor, ma hijiex regola ġenerali kif jippretendi li hi l-appellant. **Il-kwistjoni hi x’kien mehtieg fil-każ partikolari tallum.***” (bold & underline emphasis added). As had been outlined in the paragraphs above, at bidding stage, what was required, was a Self-Declaration. The proof of ‘delegated responsibility’ and / or ‘registration certificate’, whichever is applicable was required at post-award basis.
 - ii. JV Healthcare Limited vs Cherubino Limited, Dipartiment tal-Kuntratti and Central Procurement and Supplies Unit (615/2022/1) of 12th June 2023. Of relevance is paragraph 21 which states “*Jekk dak li qiegħed jgħid ir-rappreżentant ta’ Cherubino – viż, illi “one needs the permit of the company through a letter of access to distribute the product” – huwa minnu, mela Cherubino għandha s-setgħa li ma thalli li hadd iehor jifta’ offerta. Dan huwa manifestament żbaljat u jmur kontra kull prinċipju ta’ konkorenza fis-suq billi jeskludi l-parallel importation/ distribution” and paragraph 27 which states “*Effettivament dan ifisser illi d-dikjarazzjoni li jrid id-dokument tas-sejba illi “I confirm that the company I am representing is licensed by the competent authority in Europe to trade this medicinal product” hija superflwa fi-ċirkostanzi tal-każ tallum. Ifisser ukoll illi l-premessa illi “The response provided by the preferred bidder in Spec 3.8 of its technical offer form is erroneous”, illi**

fuqha hija msejsa d-deċiżjoni tal-Bord ta' Reviżjoni, hija hażina; konsegwentement, id-deċiżjoni wkoll hija hażina.”

- iii. Cherubino Limited vs Dipartiment tal- Kuntratti et of 3rd October 2017 where it was stated that *‘Fuq dan il-punt, din il-Qorti tirrileva li l-kwistjoni ta' licenzji u ta' kif se jigi impurtat il-prodott offrut genwa Malta ma hijiex materja li ghandha tinteressa lill-awtorita' kontraenti jew lill-Bord. Kif jigi esegwit it-kuntratt meta jinghata mbux kwistjoni li jrid jidhol f'jha l-Bord. Din il-Qorti trattat punt simili fil-kawża Joe Micallef & Son Express Skip Services Ltd v. Id-Direttur tal-Anzjani u Kura fil-Komunita' u fis-sentenza tagħha tas-27 ta' Gunju 2014, stabbiliet dan il-principju. Gie osservat bekk fir-rigward: “...Whether or not the bidder is at the time of tender, capable of performing as promised is irrelevant in the light of the bidder's legal obligation to do so once its bid is accepted.” Mill-kumplex ta-cirkostanzi f'każ ta' sejba li ma tinsistix mod ieħor, mbux mehtieg li offerent ikun meta jitfa' l-offerta, f'pożizzjoni li jwettaq dak li l-obbliga ruhu li jwettaq, basta li dak li jkun jimpunja ruhu li jwettaq is-servizz skont id-dettami tal-ligijiet urgenti tal-pajjiż.”* The Board agrees with the Contracting Authority's argumentation that in the current case the product is centrally authorised and thus a simple procedure domestically would be required so that the product could be placed on the market in Malta. The tender allows for these to be made at post award stage.
- e) Once it is ascertained that all the requirements at bidding stage have been adhered to and the tender allows for certain ‘proof’ / ‘submissions’ to be made at post award stage, this Board cannot but reject the Appellant's grievances.

The Board,

Having evaluated all the above and based on the above considerations, concludes and decides:

- a) Does not uphold Appellant's Letter of Objection and contentions,
- b) Upholds the Contracting Authority's decision in the recommendation for the award of the tender to Cherubino Limited,
- c) Directs that the deposit paid by Appellant not to be reimbursed.

Mr Kenneth Swain
Chairman

Dr Charles Cassar
Member

Dr Vincent Micallef
Member