

PUBLIC CONTRACTS REVIEW BOARD

Case 1897 – CT2116/2022 - Supplies – Tender for the Supply of Pazopanib Tablets

11th September 2023

The Board,

Having noted the letter of objection filed by Dr Mario de Marco and Dr Ryan Bezzina acting for and on behalf of V.J. Salomone Pharma Limited, (hereinafter referred to as the appellant) filed on the 12th June 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) filed on the 19th June 2023;

Having also noted the letter of reply filed by Dr Mark Attard Montalto, Dr Douglas Aquilina and Dr Samira Briffa on behalf of Attard Montalto & Aquilina Advocates for and on behalf of Drugsales Limited (hereinafter referred to as the Preferred Bidder) filed on the 22nd June 2023;

Having heard and evaluated the testimony of the witness Mr Boris Bergant (Representative of Novartis) as summoned by Dr Mario de Marco acting for V.J. Salomone Pharma Limited;

Having heard and evaluated the testimony of the witness Mr Vincent Saravaki (Representative of Novartis) as summoned by Dr Mario de Marco acting for V.J. Salomone Pharma Limited;

Having heard and evaluated the testimony of the witness Ms Louisann Caruana Scicluna (Representative of V.J. Salomone Pharma Limited) as summoned by Dr Mario de Marco acting for V.J. Salomone Pharma Limited;

Having heard and evaluated the testimony of the witness Dr Alison Anastasi (Representative of Central Procurement and Supplies Unit) as summoned by Dr Leon Camilleri acting for Central Procurement and Supplies Unit;

Having heard and evaluated the testimony of the witness Ms Edith Sciberras (Member of the Evaluation Committee) as summoned by Dr Leon Camilleri acting for Central Procurement and Supplies Unit;

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 18th July 2023 hereunder-reproduced.

Minutes

Case 1897 – CT 2116/2022 – Supplies – Tender for the Supply of Pazopanib Tablets

The tender was issued on the 24th August 2022 and the closing date was the 27th September 2022. The estimated value of the tender, excluding VAT, was € 1,204,128.

On the 12th June 2023 V.J.Salomone Pharma Ltd filed an appeal against the Central Procurement and Supplies Unit as the Contracting Authority objecting to their disqualification on the grounds that their offer was not technically compliant.

A deposit of € 6,021 was paid.

There were three (3) bids.

On the 18th July 2023 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Mr Lawrence Ancilleri and Dr Vincent Micallef as members convened a virtual public hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – V.J.Salomone Ltd

Dr Mario Demarco	Legal Representative
Dr Ryan Bezzina	Legal Representative
Mr Melchior Dimech	Representative
Ms Graziella Vella	Representative
Mr Steve Grech	Representative
Ms Loukia Samata	Representative
Ms Vanessa Said Salomone	Representative

Contracting Authority – Central Procurement and Supplies Unit

Dr Alexia Farrugia Zrinzo	Legal Representative
Dr Leon Camilleri	Legal Representative
Ms Monica Sammut	Chairperson Evaluation Committee
Ms Edith Sciberras	Evaluator
Ms Julia Pirota	Evaluator
Dr Alison Anastasi	Representative

Preferred Bidder – Drugsales Ltd

Dr Douglas Aquilina	Legal Representative
Ms Giulia Attard Montalto	Representative
Mr Reuben Demanuele	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 invited submissions.

Dr Mario Demarco Legal Representative for V J Salomone Ltd said that Appellant's bid price was the cheapest but his offer was deemed to be non-compliant for two reasons. The product offered by Appellant was packed in HDPE bottles but was not recommended for award as the alternative offer's product was packed in blister packs. The tender document does not exclude products other than in blister packs according to tender terms according to Clause 1.2.1 of Section 3. Clause 1.2.1 states that products must be supplied 'in the following containers' which specifically is in the plural form.

Applicant offered the product in HDPE bottles which is allowed in the tender and therefore is technically compliant. The alternative blister pack does not make supply in bottles not compliant and should not have been excluded.

Paragraph 6 of Section 1 states that the sole award criterion will be the price – in other words the cheapest price gets the order. The tender states that if prices are equal then the sequential order prevails but if the product in a bottle is cheaper it should get the order immaterial of the sequence. The CPSU claim that the sequential order is unconditional immaterial of the price – this does not arise from the tender and is non-sensical. On the other hand the preferred bidder claims that if the bid in blister packs falls within the last purchase price then it is automatically awarded the tender immaterial of the price of the bid in bottles – this interpretation arises from nowhere. Article 1.2.1 refers to pack sizes not the order of preference in the award. Appellant product should not have been declared technically non-compliant and the tender should certainly not have been awarded to the other side as their bid is more expensive.

Dr Alexia Farrugia Zrinzo Legal Representative for the Central Procurement and Supplies Unit (CPSU) said that on the first grievance the General Rules Governing Tender (GRGT) had to be followed during the evaluation process and mentioned the three stages of an evaluation. In Clause 1.2.1 the sequence outlined had to be followed as this established a hierarchy. Once a bid offered blister pack it would be evaluated first. There have been previous tenders on the same basis as this one and if Appellant had any objections to the terms of the tender there was a remedy possible under Regulation 262. On the second grievance the CPSU does not agree that the sole criterion is the price since the sole purpose of the tender is not the price.

Dr Douglas Aquilina Legal Representative for Drugsales Ltd said that the clause 1.2.1 being contested is a standard one in tenders and all parties know how it operates. There is an established order of preference. Appellant's argument renders the preferential clause irrelevant. The preference for blister packs is understandable even if more expensive.

Appellant requested the hearing of witnesses.

Mr Boris Bergant (PP A3990311 Slovenia) called to testify by V J Salomone Pharma Ltd stated on oath that he is a representative of the pharmaceutical firm Novartis and for 11 years he has carried out analytical analysis specialising previously in chemical packaging. He confirmed that Novartis has a relationship with Appellant firm. He explained the use and application of the product 'Votrient' and the different types of packaging of their products. Bottle sizes were optimised for different markets – in the case of Malta the 400gms tablets were packed in HDPE bottles of 30 tablets each. This was as a protection against humidity and guaranteed stability in the product which had a three year shelf life. This stability was comparable to the stability in blister packaging.

In reply to a question from Dr Farrugia Zrinzo witness said that he had no connection with the Appellant and had no involvement in the tender submission.

Mr Vincent Saravaki (PP 14GV42330 France) called to testify by the Appellant stated on oath that he is responsible for Global Regulatory Activities for Novartis in the EU. The product offered (Votrient) had full market authorisation in 2013. It is an originator product approved in the EU with a 36 month shelf life. The competitor's product has a 30 month shelf life.

Replying to a question from Dr Farrugia Zrinzo witness said that he had no involvement in any of the tender bids.

Ms Louisann Caruana Scicluna (22172M) called to testify by the Appellant stated on oath that for 11 years she has been managing Novartis distribution system. The product in question has been supplied regularly to the CPSU for seven years in bottles with no issues, complaints or problems.

In reply to a question from Dr Aquilina witness stated that the product is an originator product and Appellant was the only bidder at that time.

Dr Alison Anastasi (398380M) called as a witness by the Contracting Authority testified under oath that she is the head of Operations Procurement at CPSU and is a pharmacist by profession. She said that clause 1.2.1 laid down the sequence for packaging requirements. This clause was included because the POYC did not have the facility to repackage the product. The intention behind this clause is actual patient distancing and also the POYC project on unit dosing. Blister packs do not expose the product which is just spliced to dispense. If not packaged in blisters there will be issues with the licensing. The procedure is for good distribution practice and upholds licence holders requirements. The effect of the hierarchy system is that the Government ends spending more but benefits in terms of responsibility and inability in terms of the Medicines Act. If there is an offer in blister packs the evaluators would choose the compliant and cheaper one when sequence is indicated in the tender. If the price is over the estimated value then the offer is not considered; if there is no blister pack offered the bid is still accepted but certain waivers are sought from the Medicines Authority.

In reply to questions from Dr Bezzina, witness said that she had assisted in the research prior to the formulation of the tender and certain clauses had been adjusted following feedback from users. Thirty is the number of pills given at any one time in the course of the treatment.

Questioned by Dr Demarco witness agreed that the term 'last purchase price' was not defined in the tender. The estimated procurement value was indicated at € 1.2million but this was not restrictive on nor binding on the Authority. Witness confirmed that there were no issues ever with previous supplies by the Appellant to the CPSU but pointed out that the clause is not linked to health practice but to good distribution practice. Distribution is in 30 tablet bottles in line with good practice.

Dr Leon Camilleri on behalf of the CPSU questioned the witness. He was told that the treatment is usually approved for six months or more – currently one tablet is prescribed daily so 30 tablets is for a month's supply. If the price of a bid is exceeded then only competitive offers are evaluated. There have been no remedies under Regulation 262 sought on this tender.

In reply to a further question from Dr Demarco witness confirmed that the HDPE bottles offered by the Appellant satisfied the requirement of clause 1.2.1(i)(b) of Section 3 of the tender.

Ms Edith Sciberras (360068M) called as a witness by the Authority stated on oath that she is a Principal Pharmacist at the Ministry for Health with 25 years' experience and was one of the evaluators. She confirmed that the evaluation was carried out following the normal process and that Appellant had offered the product in bottles and Druggals in blister packs. On that basis the Evaluation Committee had recommended the latter product for award as it topped the sequence list.

In reply to a question from Dr Bezzina Legal Representative for the Appellant, witness said that there was no clause in the tender which excluded as non-compliant a bid that did not offer blister packs.

Witness confirmed to Dr Aquilina that the evaluation awarded the tender to the preferred bidder as it followed the laid down preference for blister packs.

Questioned by Dr Demarco witness confirmed that the bid offered meets paragraph 1.2.1 (b) of the tender specifications and is compliant.

This concluded the testimonies.

Dr Bezzina said that the bone of contention is how the product is delivered. The blister clause is clear – likewise the alternative packaging allowed and nowhere does the tender exclude non-blister packaging. Witness confirmed that bottles meet the criteria whilst Clause 6 states that the sole criterion is the price. The Authority decided that delivery in bottles is to be rejected when the tender clearly does not state so, conversely it states that other packaging may be offered. There is no one specific clause which excludes bidder. In Case 1768 the PCRB held that a different approach to the tender should have been stated. If the tender document is silent then the Authority was wrong to declare that Appellant was non-compliant. Their decision would have been acceptable had there been a case of equality of offers. Tender in Case 1286 had a similar clause but it was not awarded to the bid offering blister packs. Appellant's bid offered an originator product with no issues at a cheaper price – the fact that it is in bottles creates no issues as testified by witnesses, it met all the criteria, is the cheapest, the most cost effective and should be awarded the tender.

Dr Demarco said that the letter of rejection states that Appellant's bid is not compliant. The CPSU witnesses indicated that the product is technically compliant. For these reasons and those indicated in the letter of appeal there is no reason to declare the offer not compliant. The Board cannot read within the tender document what is not stated in the tender neither do the Public Procurement Regulations (PPR) create any reason to justify the DoC's interpretation .

Dr Aquilina said that Appellant should have sought clarification. Appellants interpretation of the tender totally ignores the sequence order. If the offer in blister packs is compliant there was no point in going further. Appellant although compliant did not meet the sequence and was not considered further.

Dr Mark Anthony Debono on behalf of the Department of Contracts said that it was not proven that the technical offer conforms and the appeal should be refused.

Dr Farrugia Zrinzo said that the Board had heard two witnesses testify about the product – the appeal was on the evaluation not on the product. The PPR lays down terms which the evaluation committee is obliged to follow. Clause 1.2.1 was interpreted correctly as it laid down the sequence to be followed and the hierarchy to be followed in the selection. Once one product met the specifications all other offers were put aside. Any issues arising from the terms of the tender could have been covered under a Regulation 262 appeal. PCRB Case 1228 dealt with a similar clause and held that it was the best way to administer medication. On the second grievance the award was not on price as the administrative and technical evaluations come first – clauses cannot be dealt with in a vacuum. There was self-limitation on the part of the evaluators and the correct outcome was achieved.

Dr Demarco said that Appellant was not contesting the hierarchy and hence the suggestion of a pre-remedy is irrelevant. The Authority claims that the correct interpretation is that a product in a blister pack within the tender estimated value automatically wins immaterial of other bids. The PCRB has the documents as drafted and have to assess if this interpretation is justified and if it was correctly interpreted.

Dr Leon Camilleri on behalf of the Contracting Authority made the point that the PCRB in Case 1228 had already decided on this point. The wording in the tender is clear 'it will be considered...'

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

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 18th July 2023.

Having noted the objection filed by V.J. Salomone Pharma Limited (hereinafter referred to as the Appellant) on 12th June 2023, refers to the claims made by the same Appellant with regard to the tender of reference CT2116/2022 listed as case No. 1897 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Mario de Marco & Dr Ryan Bezzina

Appearing for the Contracting Authority: Dr Leon Camilleri & Dr Alexia Farrugia Zrinzo

Appearing for the Preferred Bidder: Dr Mark Attard Montalto, Dr Douglas Aquilina & Dr Samira Briffa

Whereby, the Appellant contends that:

- a) ***1st grievance - The Appellant's bid ought not to have been declared as technically non-compliant, as the Tender document itself recognises the possibility of supply of products in container types other than blister packs -***

In terms of Clause 1.2.1 of Section 3 of the Tender document, entitled 'Specifications', it is stated that; *“in case of solid oral dosage forms (tablets/ capsules), medicinal products and food supplements must be supplied in the following containers and these will be considered in the following sequence order as follows:”*

It clear, therefore, that the Specifications do not automatically exclude the offer of a product in a container type which is not a blister pack. Rather, a sequential order is provided, as quoted hereabove, as to the manner in which different modes of packaging are to be considered, and there are no restrictions imposed for prospective bidders to participate with offers having a different mode of packaging other than that of a 'blister pack'.

In view of the fact that the administrative and technical criteria as described within the Specifications of the Tender expressly recognise the possibility of products being offered in other container types, i.e. not necessarily supplied in blister packs, then it ought to, follow that the fact that the Appellant submitted a product which is packed in HDPE bottles, which certainly falls within the definition of "any other container type", should not have resulted in the Appellant's bid being declared technically non-compliant.

It is humbly submitted that should the Contracting Authority wished to have the medicinal products forming the subject of the Tender to be supplied only in blister packs, then the Tender

document ought to have simply excluded such other container types, and not have these included as a method in which the products may be supplied.

In view of the fact that the Tender specifications do not exclude container types that are not blister packs, then it cannot be argued that the bid submitted by the Appellant was, technically non-compliant, since other container types (including HDPE bottles) were expressly included in the sequence order described under Clause 1.2.1 of the Specifications.

Respectfully, it is not appropriate for the Contracting Authority to argue that the Appellant's offer is not technically compliant because "an alternative product" in blister packs had been submitted, thereby giving the impression that it would have otherwise been declared technically compliant had there been no offer made with a blister pack. It is humbly submitted that the determination of technical noncompliance should be fixed and determined on the basis of the technical and administrative specifications described within a tender document, and not on any other factors. Whether alternative options were submitted by other competitors ought not to have any bearing on the determination as to whether the Appellant's offer was technically compliant or otherwise. To permit the possibility of submitting other modes of packaging, only to then be declared as technically non-compliant on the basis that a competitor submitted a bid through an alternative mode of packaging effectively results in the hindrance of competition and the principles of transparency and openness, which are the cornerstones of public procurement law.

b) ***2nd grievance - The Sole Criterion for the Award of the tender was the Price -***

Given, therefore, that the Appellant's offer should be deemed technically compliant in terms of Clause 1.2.1 of the Specifications, on the basis of the grievance as set out hereabove, the Appellant humbly submits that the Contracting Authority should have based its award on the basis of Clause 6.1 of Section 1 of the said Tender Document, which bases the award of technically and administratively compliant offers solely on the price. This Clause 6.1 of Section 1 provides that: *"the sole award criterion will be the price. The contract will be awarded to the tenderer submitting the cheapest priced offer satisfying the administrative and technical criteria."*

Once the Appellant's offer was technically and administratively compliant and the cheapest product offering, than the award should have been in its favour. The Appellant contends that to argue that price is irrelevant simply because there was an offer of a product in blister packs does not make economic and financial sense, and goes against the very criterion established for the award of the Tender.

Respectfully, the only sensible interpretation of the Tender Document read as a whole is that should a submission have been made with a blister packaging, at the same price as the Appellant's offer which was in another container type, the award should follow the sequence in Clause 1.2.1 of the Specifications and be made in favour of the blister packs. However, this is certainly not the case in the Tender subject to this Objection since the Appellant's offer is clearly and substantially cheaper than that of the awarded tenderer.

Moreover, it is also pertinent to stress the fact that the product offered by the Appellant, *Voltrient*, has been in supply since 2016 and is an originator product, whereas the product offered by the recommended bidder is a generic product. It is a well-known fact within the industry that generic products tend to be cheaper than originator products. In the case at hand, the Appellant's bid was substantially cheaper than that of the recommended bidder, notwithstanding the fact that the Appellant's product was an originator product, while the recommended bidder's was a generic product.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 19th June 2023 and its verbal submission during the hearing held on 18th July 2023, in that:

- a) **1st grievance** - The General Rules Governing Tenders in Clause 16 provide the 4 steps of an evaluation process. Part 1 and 2 are commonly known as the Administrative Criteria Evaluation, whilst Part 3 is the Technical Evaluation and Part 4 is the Financial Evaluation. These steps of the evaluation process are done sequentially, one after the other. Clause 1.2 of Section 3 - Specifications is clearly entitled '1.2 Other technical specifications' and the first sub clause provides a hierarchy / order of preference for containers/packaging/pack sizes in which the tablets are supplied, as quoted:

The fact that the quoted clause creates an order of preference (a, b, c, d) at technical evaluation stage is clear, unambiguous and a well-established fact since such clause is a standard clause in the procurement of all medicines (and food supplements).

This clause has been used for numerous years and has multiple purposes for the general good and the public interest, namely that:

- i. The clause gives unconditional preference to blister packs which as will be proven during this hearing, and as was proven to the satisfaction of this Board in Case 1228 of this Honourable Board, is the best way in which medicines are distributed to patients.
- ii. Secondly, if blister packs are not available, other containers will be considered in order to ensure that medicines are available for the patient's need. This avoids the cancellation of the tender due to having no submissions with blister packs, thus lengthening the procurement process and risking shortage of medication.

As stated, this clause was clear and unambiguous and was part of the Technical Criteria Section in the tender. Thus, since the objector's offer was not rejected at an administrative stage (and he had also accepted the content of the Tender Document and the General Rules Governing Tenders in their entirety, without reservation or restriction), and neither at a financial stage (since financial evaluation on the objector's offer did not even take place), and was only excluded on the basis of a clear clause in the technical specifications, then the evaluation committee was justified to state that the objector's offer was not recommended for technical reasons. Due to the fact that there

were blister packs on offer from a different supplier, and the offer met all the other tender criteria, the offer of the objector and all other similar offers were thus to be excluded. The offer of the objector was thus not automatically non-compliant on a technical ground upon submission and would have reached financial evaluation stage if there were no blister packs offered, but this was not the case since another economic operator, particularly, the recommended bidder, offered blister packs. This possibility should have been known a priori from the above cited tender clause, and submitting an offer with a container other than a blister pack was a risk which an economic operator could take.

If the objector had any difficulties with Clause 1.2.1 of Section 3 - Specifications, it had the remedy under regulation 262 of the Public Procurement Regulations at its disposal which it could use as it did unsuccessfully in Case 1228, on the same exact tender clause. The clause was clear and it was evident that preference at technical evaluation stage would be given to blister packs. Any action relating to the consequences of the clause in question, cannot be taken at a post evaluation stage but should have been taken within the rules established in regulation 262. Appellant's reference to any other tender in paragraph 2.1.7 of the objection letter, is inadmissible and should not be considered by this Honourable Board since it would be delving into the merits of another evaluation. The objection should revolve only on the evaluation to the tender number CT 2116/2022. If the objector had any difficulty with the outcome of any other evaluation, it should have sought recourse to this Honourable Board in a separate case. The outcome of an evaluation, not even if confirmed by this Board or any other competent court should never set any precedent, let alone an evaluation process which was not challenged.

- b) **2nd grievance** - In its second grievance the Objector argues that the sole award criterion was the price. Clause 6.1 of the tender states that *“The sole award criterion will be the price. The contract will be awarded to the tenderer submitting the cheapest priced offer satisfying the administrative and technical criteria.”*

The fact remains that the offer of the objector failed in the technical evaluation stage on the basis of a clear clause in the technical specifications section, irrespectively of whether the objector agrees with the clause in question, which was accepted as published once unchallenged. The fact also remains that in line with the normal and established sequence of the evaluation process, once an offer fails in the technical part of the evaluation, the offer does not move to the financial evaluation, and thus any comments on the economic and financial sense are irrelevant.

The evaluation committee is bound by the principle of self-limitation in evaluating the tenders, meaning that the only conditions upon which a tender can be adjudicated are the conditions stipulated in the tender document. The tender document; particularly Clause 1.2.1 of the Technical Specifications, does not state that the established order of preference should only be resorted to in case of equally priced offers.

The interpretation of the objector, as referred to above, is an extended interpretation of the objector, naturally to its advantage and could never be the interpretation of an evaluation committee for 2 main reasons, the first being that this would be a blatant breach of the fundamental principle of self-limitation, and the second reason being that if this was the case, the clause would not be in the technical section but in the financial section.

This Board also noted the Preferred Bidder's Reasoned Letter of Reply filed on 22nd June 2023 and its verbal submission during the hearing held on 18th July 2023, in that:

- a) **1st grievance** - That Clause 1.2 of Section 3 of the Tender entitled 'Other technical specifications' provides an order of preference for containers/ packaging/ pack sizes in which the tablets are supplied. The appellant submitted an offer of a product packaged in a bottle, which is therefore a container under (b), whilst Drugsales Ltd submitted an offer for a product in blister packs, which falls under (a). This Clause makes it clear that the Board was to give preference to blister packs over "*any other container type,*" and hence offers submitted under (b) were only to be considered if no offers under (a) had been submitted. Since the Appellant's offer was classified under section (b), it was not considered because there was a technically compliant offer made under section (a), and the Appellant was very well aware of this fact which was evident in the tender document. It is for this specific order of preference established at the technical evaluation stage that the offer made by the Appellant was correctly declared technically non-compliant. The Appellant is incorrect in arguing that this is wrong application of Clause 1.2.1, or that this has rendered the price offer irrelevant, or that Clause 1.2.1 is only triggered when two equal financial bids are submitted. That interpretation is nonsensical and goes contrary to the express wording of Clause 1.2.1. Clause 1.2.1 evidently sets up a ranking whereby products under section (a) with blister packs are preferred to bids under section (b), and so on. The price offer is not rendered irrelevant - if there are several offers under section (a), it is then price that will determine the preferred bidder. The Board should also bear in mind that blister packs are not some proprietary packaging, but are packaging which are freely available to all and do not in any manner limit competition. The Appellant could have submitted a bid with a product in blister packaging, but chose not to. In this regard, it is also to be noted that it is more expensive to use blister packaging than to use a bottle. The imposition of this hierarchy under article 1.2.1 of Section 3 of the tender document preferring blister packs, is standard practice and is fully justified, also as explained in section 6 of the reply by the CPSU. There are numerous objective advantages to blister lacks (sic) over other containers (such as bottles), including that blister packaging helps in preventing child access to such medication. Furthermore, medication in blister packaging is easier to use and maintains proper dosage protocols, for patients, unlike pills in a container or bottle. Pills in blister packaging also assures products quality as the pill remains protected and safeguarded with a seal until its administration at the very last moment. This

is not the same situation regarding pills in a container or jar, whereby nurses, doctors and patients are touching the packaging and moisturizing the pills and causing chemical migration, thereby not assuring the same quality control to the product.

- b) **2nd grievance** - With regard to this Second grievance raised by VJ Salomone Limited, the appellant company puts emphasis on the criteria of 'price' but ignores the equally important words included in the same sentence of Clause 6.1 of Section 1 of the Tender document which state that- '... submitting the cheapest priced offer, satisfying the administrative and technical criteria'

In this particular tender, the appellant company is trying to ignore the order of preference as laid out in article 1.2.1 of Section 3 of the Tender document, whereby certain products are considered in preference to others, as already explained. The consideration and order of preference as established in the tender document, under 'technical specifications' is a relevant criteria that needs to be given its desired relevance in assessing the tender in question. The tender was clear in stating that it would consider the offers in the sequential order as stated in article 1.2.1 of Section 3 of the Tender document. Therefore it would first verify whether any technically compliant bids were submitted in blister packs in terms of subclause (a). If so, it would proceed to carry out the financial evaluation and award on the basis of price of those bids submitted in terms of subclause (a). If no bids were submitted in blister packs, then the financial evaluation would have been carried out on the bids submitted in terms of subclause (b), or further subclauses depending on the bids which were submitted.

The Appellant is incorrect in arguing that this is the wrong application of Clause 1.2.1, or that this has rendered the price offer irrelevant, or that Clause 1.2.1 is only triggered when two equal financial bids are submitted. That interpretation is nonsensical and goes contrary to the express wording of Clause 1.2.1. Clause 1.2.1 evidently sets up a ranking whereby products under section (a) with blister packs are preferred to bids under section (b), and so on. The price offer is not rendered irrelevant - if there are several offers under section (a), it is then the price that will determine the preferred bidder. Furthermore, as already explained above, Clause 1.2.1 also has a proviso whereby the said ranking only applies if the offer is in line with or within the Last Purchased Price, which is a financial safeguard for the contracting authority in cases when a bid exceeds the Last Purchased Price. Drugsales Limited submitted an offer which complied in full with the requirements of the contracting authority, which was within the parameters of section (a) of Clause 1.2.1 and therefore was given precedence over other packaging, which was the best financial offer within that section (a), and which offer was also in line with or within the Last Purchased Price. Therefore Drugsales Limited gave the most financial advantageous offer within the required parameters, and was rightly awarded this tender.

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) Reference is made to tender document Section 3 – Specifications, paragraph 1.2.1 Medicinal products and food supplements which states:
*“i) in case of solid oral dosage forms (tablets/capsules), medicinal products and food supplements must be supplied in the following containers **and these will be considered in the following sequence order as follows:** a) Pack size of 120 units or less in blister packs b) Pack size of 120 units or less in any other container type”* (bold & underline emphasis added)
- b) It is therefore clear and unambiguous that the preferred method of ‘container’ / packaging for the product being acquired was the ‘blister pack’. Any other form of container type whilst still deemed desirable is not the preferred option of the Contracting Authority.
- c) As stated in PCRB case 1228, the Contracting Authority has every right to dictate technical specifications which are attainable and have measurable objectives when it was stated:
*“The above mentioned clause (same as Clause 1.2.1 of page 18 of tender dossier) does indicate the preferred mode of packaging, however, at the same time, it is also allowing the Contracting Authority to consider other packaging methods, so that, there are no restrictions for prospective Bidders to participate with offers having a different packaging mode other than that of ‘Blister Packs’. At this stage of consideration, this Board would respectfully point out that, **the Contracting Authority has every right to dictate technical specifications** which are attainable and have measurable objectives and yet, at the same instance, affording equivalent features; in this particular case being the mode of packaging of the medicines.”* (bold & underline emphasis added)
- d) PCRB case 1228 also analysed whether the ‘blister pack’ preferred mode of packaging is in fact superior, thereby strengthening the case the Contracting Authority is in fact sanctioned to prefer such mode of packaging. It was ascertained that *“In this regard, this Board would respectfully point out that through the documentation and literature presented by the witness, it is evidently 9 clear that there are credible medical reasons as to why ‘Blister Packing’ mode is preferred.....”*
- e) Once it has been established that the Contracting Authority is well within its powers to request such a technical specification, the main bone of contention revolves around the interpretation of clause 1.2.1 of page 18 of the tender dossier. This especially when correlated to the Criteria for Award as specified in page 6 of the tender dossier which states that *“the sole award criterion will be the price. The contract will be awarded to the tenderer submitting the cheapest priced offer satisfying the administrative and technical criteria.”*
- f) Facts of the case are the following
 - i. Appellant submitted a financial bid of €1,009,183.51 with a product satisfying specification ‘1.2.1 i) b)’ with the use of a HDPE bottle
 - ii. Preferred bidder submitted a financial bid of €1,056,091.00 with a product satisfying specification ‘1.2.1 i) a)’ with the use of a blister packaging

- g) Two schools of thought / lines of argumentation were presented during the hearing:
- i. Appellant's interpretation is that once it has been determined that the HDPE bottle, even though not the preferred mode of packaging, is still acceptable and its offer is cheaper than the other economic operator's bid, its own bid should have been awarded the tender as per the Criteria of Award of Section 1 of the tender dossier.
 - ii. Preferred Bidder's and Contracting Authority's interpretation is that once a compliant bid has been submitted with the preferred mode of packaging (i.e. blister pack) and the bid does not exceed the Estimated Procurement Value of €1,204,128.00, then this bid should be awarded the procurement process. If more than 1 bid were to be received for the 'blister pack' then the Criteria of Award (i.e. cheapest administrative and technical compliant offer) would be awarded the tender.
- h) This Board finds itself in agreement with arguments brought forward by Preferred Bidder when it states that *"The price offer is not rendered irrelevant - if there are several offers under section (a), it is then price that will determine the preferred bidder"*. This especially when one considers that the blister packs are not some proprietary packaging but these are well used and available in the open market with no specific restrictions on competition.
- i) The above point was also emphasized by witness Dr Alison Anastasi who stated that *"If the price of a bid is exceeded (i.e. is above the Estimate Procurement Value) then only competitive offers are evaluated"*. This means that if the Contracting Authority would have received offers satisfying clause '1.2.1 i) a)' but would have exceeded the Estimate Procurement Value, these bids would not have been preferred over bids satisfying clause '1.2.1 i) b)' but falling within the parameters of the Estimate Procurement Value.
- j) As already stated, the clause (1.2.1), in the Board's opinion is clear and unambiguous when it states *"..... and these will be considered in the following sequence order as follows:....."*
- k) It is also this Board's view that the 'technical non-compliance' in the letter of rejection dated 2nd June 2023, was clearly explained to the appellant when it stated *"Not recommended in view of an alternative product with a Pack size of 120 units or less in blister packs' in line with the sequence order to be considered as per Section 3 – Specifications Article 1.2.1 of the published Tender Document."*

Hence, this Board does not uphold 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,
- c) Directs that the deposit paid by Appellant not to be reimbursed.

Mr Kenneth Swain
Chairman

Dr Vincent Micallef
Member

Mr Lawrence Ancilleri
Member