

PUBLIC CONTRACTS REVIEW BOARD

Case 1959 – CfT021-3367/23 (CPSU5144/2023) – Supplies – Tender for the Supply of Fludrocortisone Acetate 100 micrograms Tablets

7th February 2024

The Board,

Having noted the letter of objection filed by Mr Chris Powell acting for and on behalf of Target Healthcare Limited, (hereinafter referred to as the appellant) filed on the 20th October 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 25th October 2023;

Having heard and evaluated the testimony of the witness Ms Edith Sciberras (Member of the Evaluation Committee) as summoned by Dr Alexia J Farrugia Zrinzo 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 1st February 2024 hereunder-reproduced.

Minutes

Case 1959 – CPSU 5144/2023 CfT 021-3367/23 – Supplies – Tender for the Supply of Fludrocortisone Acetate 100 Micrograms Tablets

The tender was issued on the 17th March 2023 and the closing date was the 17th April 2023.

The estimated value of this tender, excluding VAT, was € 74,580.

On the 20th October 2023 Target Healthcare Ltd filed an appeal against the Central Procurement and Supplies Unit objecting to their disqualification on the grounds that its offer did not meet the tender requirements.

A deposit of € 400 was paid.

There were four bids.

On the 1st February 2024 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Dr Charles Cassar and Ms Stephanie Scicluna Laiviera as members convened a virtual public hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – Target Healthcare Ltd

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|------------------|----------------------|
| Dr Dario Demarco | Legal Representative |
| Mr Chris Powell | Representative |

Contracting Authority – Central Procurement and Supplies Unit

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|---------------------------|----------------------------------|
| Dr Alexia Farrugia Zrinzo | Legal Representative |
| Mr Daniel De Gaetano | Chairperson Evaluation Committee |
| Ms Sara Bonavia | Evaluator |
| Ms Edith Sciberras | Evaluator |

Preferred Bidder – Health House Pharma Ltd

Invited to attend but declined the offer

Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties and invited submissions.

Dr Dario Demarco Legal Representative for Target Healthcare Ltd stated that in the Appellant's view the evaluation process was flawed as it was prioritising price over everything else. There are two ways to interpret the tender. Article 1.2.1 indicates that packaging takes preference over price whilst Article 6.1 clearly states that the sole award criterion will be the price. The correct approach to Article 1.2.1 should be that consideration is taken of the packing combined with cost provided it is reasonable. Packaging in bottles meets and probably exceeds the benefits over blister packs. Appellant has offered the best value for money. Appellant contends that the Authority's reference to Case 1228 does not support their claim as there were other factors in that case, but especially the comment that both price and packaging should be considered. To have a fair process all factors in the tender should be considered.

Dr Alexia Farrugia Zrinzo Legal Representative for the Contracting Authority referred to the letter of reply and reiterated that the Evaluation Committee is bound by the specifications in the tender. Article 1.2.1 indicates a sequence on which the bids will be evaluated and that sequence was followed.

Ms Edith Sciberras (360068M) called to testify by the Authority stated on oath that that she is a Pharmacist and has been in the employ of the Government for 25 years, with seven years' experience in evaluating tenders. Clause 1(a) of Article 1.2.1 gives priority to offers in blister packs and on that basis the offer of Target was discarded. Both the offers of the Appellant and the preferred bidder were below the tender estimated value.

This concluded the testimony.

Dr Demarco in his final submission reiterated that to only consider the packaging is not the correct way to evaluate the tender and a holistic approach must be taken as recommended in the Salomone case that both price and packaging should be considered. There should be thought put into the process and a binary decision is wrong.

Dr Farrugia Zrinzo said that Article 1.2.1 was the basis for the evaluators decision. The preferred bidder was within budget and therefore the valuation was carried out in sequential order following the process adopted in Case CT 2116/2022. The evaluator's are bound by the principle of self-limitation. The Article is clear and if Appellant had any doubts on it remedies were available. The Evaluation Committee acted correctly and the decision should be confirmed.

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 1st February 2024.

Having noted the objection filed by Target Healthcare Limited (hereinafter referred to as the Appellant) on 20th October 2023, refers to the claims made by the same Appellant with regard to the tender of reference CfT021-3367/23 (CPSU5144/2023) listed as case No. 1959 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Dario Demarco

Appearing for the Contracting Authority: Dr Alexia J Farrugia Zrinzo

Whereby, the Appellant contends that:

- a) The reason for rejection of our offer was due to the product we offered being in an amber glass bottle of 100 tablets against the approved pack submitted by P&D Pharmaceuticals which is a blister pack of 120 packs or less. The rejection note states that a blister pack is preferred and judged favourably versus another container type.
- b) Section 6.1 of the tender dossier 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 tender states that if prices are equal then the sequential order prevails but as our submitted pack in a bottle is cheaper then renders the sequential specifications immaterial.
- c) With reference to the above-mentioned clause our offer (€70,900.00) was cheaper than the offer submitted by P&D Pharmaceuticals (€74,333.33) and has fully satisfied the administrative and technical criteria. Whilst the pack submitted is not the preferred package type it is still a technically compliant pack and such should be awarded to Target Healthcare (Malta) due to the sole criteria being the cheapest price. The glass bottles are allowed for supply and the fact that a blister pack has been submitted by another bidder does not make the supply of a bottle non-compliant.
- d) Furthermore, there is a demonstrated history of this pack being supplied against contract. As the pack we have submitted on this tender (CPSU5144/2023 021-3367/23) is the pack currently being supplied against the current active tender (021-1272/20 CPSU163075D20FB) and judging by

registration history was also the pack being supplied on the tender prior (CPSU163093D18FB 021-1131/18).

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 25th October 2023 and its verbal submission during the hearing held on 1st February 2024, in that:

- a) The General Rules Governing Tenders in Clause 16 provide the 4 steps of an evaluation process. These are: Part 1; Review of eligibility of tenderers Part 2: Review of exclusion (including Blacklisting) and selection criteria Part 3: Technical Compliance Part 4: Financial Evaluation.
- b) 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.
- c) The fact that the above 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).
- d) 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.
- e) The objector interprets clause 1.2.1 incorrectly, and states in its objection letter that the order of preference is only used when there are 2 offers or more with an equal price. This is not stated in the tender document and is only an extensive interpretation of the tender for the objector's benefit. The evaluation committee is bound by the principle of self-limitation and is therefore limited by what is written in the tender which cannot be interpreted extensively as the objector pretends. The tender document only states that "*these will be considered in the following sequence order as follows*" and does not refer to situations of equal prices. Had the tender drafters intended to refer to an order of preference in situations of equal prices, this would have been included in Section 1 Clause 6 of the Instructions to Tenderers, which deals with the Criteria for Award. This was not the case as the order of preference is found in Clause 1.2.1 within the Technical Specifications, and thus is assessed at a stage prior to the financial evaluation.
- f) The Criteria for Award in Section 1 of the Instructions to Tenderers is indeed clear that the sole award criteria is the price but it also states that "*the contract will be awarded to the tenderer submitting the*

cheapest priced offer satisfying the administrative and technical criteria". Due to the fact that there were blister packs on offer from a different supplier, and the offer in blister packs met all the other tender criteria, the offer of the objector and all other similar offers had thus to be excluded. This possibility should have been known a priori from the above cited tender Clause number 1.2.1, and submitting an offer with a container other than a blister pack was a risk which an economic operator could take.

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 witness duly summoned, will now consider Appellant's grievances.

- 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 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 €70,900.00 with a product satisfying specification ‘1.2.1 i) b)’ with the use of a bottle container
 - ii. Preferred bidder submitted a financial bid of €74,333.33 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 bottle [criterion a.2.1 i) b)], 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. 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 €74,580.00, 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 opines 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) Once the appellant has failed to argue the following statement *“Packaging in bottles meets and probably exceeds the benefits over blister packs.”*, by way of a call for remedies as per regulation 262 of the Public Procurement Regulations, such arguments becomes mute and irrelevant at this stage.

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 Charles Cassar
Member

Ms Stephanie Scicluna Laiviera
Member