

# **PUBLIC CONTRACTS REVIEW BOARD**

## **Case 1719 – CT2087/2021 – Framework Contract for the Supply of Foldable Injectable Lenses**

**9<sup>th</sup> May 2022**

The Board,

Having noted the call for remedies filed by Dr Alessandro Lia on behalf of Lia Aquilina Advocates acting for and on behalf of Prohealth Limited, (hereinafter referred to as the appellant) filed on the 23<sup>rd</sup> February 2022;

Having also noted the letter of reply filed by Dr Mark Anthony Debono and Dr Leon Camilleri acting for the Central Procurement and Supplies Unit (hereinafter referred to as the Contracting Authority) filed on the 1<sup>st</sup> March 2022;

Having heard and evaluated the testimony of the witness Mr Mark Bondin (Representative of Prohealth Limited) as summoned by Dr Alessandro Lia acting for Prohealth Limited;

Having heard and evaluated the testimony of the witness Mr Mario Vella (involved in tender preparation) as summoned by Dr Alessandro Lia acting for Prohealth 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 5<sup>th</sup> May 2022 hereunder-reproduced.

### **Minutes**

#### **Case 1719 – CT 2087/2021 – Framework Contract for the Supply of Foldable Injectable Lenses**

##### **Remedies before Closing Date of a Call for Competition**

The tender was issued on the 4<sup>th</sup> February 2022 and the closing date was the 10<sup>th</sup> March 2022. The value of the tender, excluding VAT, was € 412,800.

On the 23<sup>rd</sup> February 2022 Prohealth Ltd filed an application for a remedy against the Central Procurement and Supplies Unit as the Contracting Authority objecting to the restrictive terms of the tender.

A deposit of € 2,064 was paid.

On the 5<sup>th</sup> May 2022 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a public virtual hearing to consider the appeal.

The attendance for this public hearing was as follows:

**Appellant – Prohealth Ltd**

Dr Alessandro Lia	Legal Representative
Mr Jason Busuttil	Representative
Mr Mark Bondin	Representative

**Contracting Authority – Central Procurement and Supplies Unit**

Dr Leon Camilleri	Legal Representative
Ms Rita Zammit	Representative
Mr Mario Vella	Representative

**The Department of Contracts**

Dr Mark Anthony Debono	Legal Representative
Mr Nicholas Aquilina	Representative

Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties. He noted that since this was a virtual meeting all the parties agreed to treat it as a normal hearing of the Board in line with Article 89 of the Public Procurement Regulations. He then invited submissions.

Dr Alessandro Lia Legal Representative for Prohealth Ltd requested hearing of witnesses.

Mr Mark Bondin (652380M) called as a witness by Appellant testified on oath that he is a former theatre nurse now employed by Appellant. Witness was familiar with the terms of the tender requirements regarding the specification on the lenses. He stated that the numerical data combination stated in the tender can only be met by one supplier – Alcon. All other suppliers will fail on one point or another. The present supplier for Appellant is Bausch & Lomb a global company of great repute with a superb product range. The extreme sizes required in the tender apply to only very few patients and are rarely called for. The diopter range requested cannot be fully met by Bausch & Lomb. Alcon is the incumbent supplier of these lenses and has been for a great number of years.

Questioned by Dr Camilleri Legal Representative for the CPSU, witness stated that Alcon is the only supplier of the sizes combination requested in the tender.

Mr Mario Vella (409066M) called as a witness by Appellant stated on oath that he was involved in the tender preparation. The specifications were based on current use going back some twenty years. The reason for such a wide range of sizes is to provide the best possible service to patients.

Questioned by Dr Camilleri witness said that the range of sizes is based on maximising the use for patients and a consultant could not halt an operation because a particular size was not available.

This concluded the testimonies of the witnesses.

Dr Lia said that in medical tenders the paramountcy of patients was always used. The specifications under Note 3 makes it impossible to compete as it has been impossible to compete for twenty years. The argument that the Authority wants to carry on with current use is not valid in tenders. It has been argued that the specifications used are necessary but this does not hold water in Public Procurement Regulations terms which cannot be discriminatory nor tailor made for one supplier. For the small minority requiring particular sizes direct orders can be used whilst the tender should be open to all other economic operators – this will also affect the financial aspect. The Authority’s requirements are not acceptable as they discriminate in favour of one economic operator.

Dr Camilleri said that witness Mario Vella explained the clinical need of the product. One cannot forecast the use of particular lenses and a full range must be made available. The need of patients is important and it behoves the Authority to give them the best possible service.

Dr Lia said that Appellant’s first request is that the tender be suspended. The two requests in one single tender could be split up into lots and so could the specifications. Other avenues are available if certain products are only available from Alcon. The alternative course is to cancel the tender. If the Authority maintains that the tender is too complicated to be split up into lots then there is the risk that the *status quo* will prevail.

Dr Camilleri said that medical products are specific and it was not the competency of the Board to decide on this point.

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

End of Minutes

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**Hereby resolves:**

The Board refers to the minutes of the Board sitting of the 5<sup>th</sup> May 2022.

Having noted the call for remedies filed by Prohealth Limited (hereinafter referred to as the Appellant) on 23<sup>rd</sup> February 2022, refers to the claims made by the same Appellant with regard to the tender of reference CT2087/2021 listed as case No. 1719 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Alessandro Lia

Appearing for the Contracting Authority: Dr Leon Camilleri

Whereby, the Appellant contends that:

- a) Section 3 of Tender Dossier, Item 1 –
  - i. these specifications refer to one supplier, namely ALCON, the current supplier to Mater Dei Hospital.
  - ii. Some of the specifications cannot be met by any other supplier apart from the incumbent economic operator.
  - iii. That the extremities of the ranges listed are used in very rare circumstances. This is in hinderance to open competition.
  - iv. That the Contracting Authority could have easily split the tender into 2 Lots, with the first being for the mostly used ranges and the second for the products which only Alcon can provide.
- b) Section 3 of Tender Dossier, Item 2 –
  - i. Here again, the specifications refer to one supplier, namely ALCON, the current supplier to Mater Dei Hospital.
  - ii. Re “length” criterion – all operators provide 12.5mm and not 13mm. 13mm is only provided by ALCON.
  - iii. UV filter covering wavelength up to 400nm is also a characteristic only present in the product provided by ALCON.
  - iv. Diopter range of -5.0D to +30.0D is also a range offered only by ALCON
  - v. That the Contracting Authority could have easily split the tender into 2 Lots, with the first being for the mostly used ranges and the second for the products which only Alcon can provide.

This Board also noted the Contracting Authority’s Reasoned Letter of Reply filed on 1<sup>st</sup> March 2022 and its verbal submission during the virtual hearing held on 5<sup>th</sup> May 2022, in that:

- a) Prohealth not only need to prove that the technical specifications are impeding competition but also that this is being done without proper justification as per regulation 53(6) of the PPRs.

- b) That in the medicinal and pharmaceutical sectors, technical specifications have a particular importance more acute in public procurement to that which may be attributed to other sectors.
- c) That even though it is the responsibility of Contracting Authorities to promote open competition, in this case it is also true that they need to procure what they need, this in order to provide the necessary service in the best interest of the patient.
- d) That the tender dossier does not refer to any particular brand and that the product with same specifications can be purchased from multiple manufacturers.
- e) That even if this product can only be purchased from one manufacturer, open competition is still not undermined as parallel imports of pharmaceutical products is permitted and is legal.

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 consider Appellant's grievances as follows:

- a) Reference is made to the testimonies under oath of both Mr Mark Bondin and Mr Mario Vella, whereby it transpires that:
  - i. The ranges and specifications listed in the tender dossier for both 'Item 1' and 'Item 2' are very wide ranging. This so that the patients can receive the best possible service.
  - ii. The extremities in the ranges are very rarely called for but it is essential that the Contracting Authority has access to them.
  - iii. Such practices have been ongoing for quite some time, approximately twenty (20) years, as confirmed by Mr Mario Vella.
- b) The relative regulation that is most relevant to this case is Regulation 262 (1)(c) of the Public Procurement Regulations whereby: *"Prospective candidates and tenderers may, within the first two-thirds of the time period allocated in the call for competition for the submission of offers, file a reasoned application before the Public Contracts Review Board **to remove discriminatory technical specifications** which are present in the call for competition, in the contract documents, in clarifications notes or in any other document relating to the contract award procedure"* (bold & underline emphasis added)
- c) The Board agrees with the argumentation as brought forward by the Contracting Authority when it states that "even though it is the responsibility of Contracting Authorities to promote open competition, in this case it is also true that they need to procure what they need, this in order to provide the necessary service in the best interest of the patient." However, this Board is also of the opinion that if the Contracting Authority has within its disposal ways and means on how to, on one hand acquire what is needed, whilst also helping and aiding in the promotion of open competition in the other, it should aim to do so, within what is practically and lawfully allowable.
- d) Finally, this Board agrees with the argumentation of the Appellant that in this specific case, the tender in question could have easily been issued in separate lots, one (1) to cater for the most used

/ generic specifications and other/s to cater for the extremities or 'less' used specifications. With this approach technical discrimination would be removed and open competition restored.

Hence, this Board upholds the Appellant's grievance.

**The Board,**

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

- a) To uphold the Appellant's concerns and grievances;
- b) To order the contracting authority to either:
  - i. cancel the tender dossier and re-issue in different lots as per point (d) above; or
  - ii. modify the existing tender and split into lots as per point (d) above
- c) after taking all due consideration of the circumstances and outcome of this Call for Remedies, directs that the deposit be refunded to the Appellant.

**Mr Kenneth Swain**  
Chairman

**Mr Lawrence Ancilleri**  
Member

**Dr Charles Cassar**  
Member