

# **PUBLIC CONTRACTS REVIEW BOARD**

## **Case 1762 – CT2270/2021 – Tender for the Supply of Haemostatic Matrix**

**18<sup>th</sup> July 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 30<sup>th</sup> May 2022;

Having also noted the letter of reply filed by Dr Alexia J Farrugia Zrinzo and Dr Leon Camilleri acting for the Central Procurement and Supplies Unit (hereinafter referred to as the Contracting Authority) filed on the 9<sup>th</sup> June 2022;

Having heard and evaluated the testimony of the witness Mr Philip Mizzi (Member of the evaluation committee) as summoned by Dr Alessandro Lia acting for Prohealth Limited;

Having heard and evaluated the testimony of the witness Mr Joseph Borg (Orthopaedic Surgeon & end-user of the of the product) as summoned by Dr Alessandro Lia acting for Prohealth Limited;

Having heard and evaluated the testimony of witness Mr Philip Mizzi (Member of evaluation committee) as summoned by Dr Leon Camilleri acting for Central Procurement and Supplies Unit;

Having heard and evaluated the testimony of the witness Mr Joseph Borg (Orthopaedic Surgeon & end-user of the product) as summoned by Dr Leon Camilleri acting for Central Procurement and Supplies Unit;

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 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 12<sup>th</sup> July 2022 hereunder-reproduced.

### **Minutes**

#### **Case 1762 – CT 2270/2021 – Tender for the Supply of Haemostatic Matrix**

The tender was issued on the 30<sup>th</sup> September 2021 and the closing date was the 2<sup>nd</sup> November 2021. The value of the tender, excluding VAT, was € 152,384.

On the 30<sup>th</sup> May 2022 Prohealth 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 deemed to be not technically compliant.

A deposit of € 761 was paid.

There were two (2) bidders.

On the 12<sup>th</sup> July 2022 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Mr Lawrence Ancilleri and Mr Richard Matrenza as members convened a virtual public hearing to consider the appeal.

The attendance for this public hearing was as follows:

**Appellant – Prohealth Ltd**

Dr Alessandro Lia	Legal Representative
Mr Mark Bondin	Representative

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

Dr Leon Camilleri	Legal Representative
Dr Alexia Farrugia Zrinzo	Legal Representative
Ms Rita Zammit	Chairperson Evaluation Committee
Ms Solange Vella	Secretary Evaluation Committee
Mr Philip Mizzi	Evaluator
Mr Stanley Iles	Representative

**Preferred Bidder – Drugsales Ltd**

Dr Douglas Aquilina	Legal Representative
Mr Andrew Attard Montalto	Representative
Ms Rafaella de Santis	Representative
Mr Gerhard Moersdorf	Representative

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

Dr Alessandro Lia Legal Representative for Prohealth Ltd requested witnesses be heard prior to submissions.

Mr Philip Mizzi (347162M) called as a witness by Appellant testified on oath that he was the sole evaluator on this tender and confirmed the reason for disqualification of the bid. The decision, according to the witness was not his own but as instructed by an end-user of the product, Mr Joseph Borg, whose instructions he followed. The reason for the disqualification falls within the specification of the tender although it does not specify viscosity in the terms. Witness stated that he cannot define the element of viscosity. Appellant's literature stated that its product is suitable for any others and expressly mentioned spinal surgery.

Questioned by Dr Douglas Aquilina Legal Representative for Drugsales Ltd witness replied that it was within the terms of the tender to request samples which were only requested from Appellant. Two samples were requested and were tested by more than one surgeon who expressed various views on the use of the product.

Mr Joseph Borg (68465M) called as a witness by the Appellant testified on oath that he was one of the end-users of the product. He explained that one sample had to be used twice in the same operation. Witness requested a sample and after use noted that it was more viscous than the incumbent product which has been in use for a long period of time. He had no involvement in the tender and merely

tested the sample which used twice the amount of the product and was not sufficient for purpose. Viscosity, according to the witness, is decided by how the product handles.

In reply to questions from Dr Leon Camilleri, Legal Representative for the CPSU witness stated that he is an Orthopaedic Surgeon specialising in spinal surgery. He explained that if the product is too viscous 'it spreads all over the place other than where working' – this could create bleeding which interferes with the operation. It is important that bleeding and bruising is avoided. One use of the product was not sufficient and a second one had to be used as bleeding impedes the work. A representative of the company was present during the testing of the product to ascertain proper use.

Questioned by Dr Aquilina witness said that one packet was not sufficient to stop the bleeding. He was not involved or interested in the tender terms. In reply to a question from Dr Lia witness stated that Mark Bondin was the person who was present during the testing and he was pretty certain that he had used two packets. He could not recall if viscosity was mentioned.

Mr Mark Bondin (252380M) called as a witness by the Appellant testified on oath that he was present at the testing of the sample. The feedback was that the product is good and was told that he need not stay on any further. In his presence only one sample was used. Witness stated that there is no mention of viscosity in the tender terms. He had no idea how viscosity was calculated but is aware that there are numbers to define it. The product offered could be used for all types of surgery. The tender was failed on a matter that was not part of the specifications. Nothing untoward happened during the testing of the sample.

Questioned by Dr Camilleri witness said that had no idea of the viscosity measurement in their product as it was not asked for in the tender. He only had a slight sight of the product in use during testing.

Mr Philip Mizzi recalled as a witness by the Contracting Authority said that the main use of the product is in spinal surgery and is mainly used by Surgeon Mr Joseph Borg.

Mr Joseph Borg recalled to give testimony by the Contracting Authority said that he normally used only one dose but uses more in extreme cases. He confirmed that he had told someone that the product was good but that two doses had to be used. The representative of the supplier was there to explain how the product is used.

This concluded the testimonies.

Dr Lia said this was a case where the subjective element of one person was the reason for refusal of the bid. Mr Borg used phrases like 'my opinion' 'does not mean it does not work' and 'sometimes one sometimes five' to support this claim. The reason the evaluator gave was that he was directed to refuse the bid on a matter that was not in the tender. Viscosity is measurable but the CPSU did not require measurement – it simply asked for a product for spinal surgery but was offered one suitable for all operations. The evaluator relied on the order of one person and the only unfavourable comment heard was that the product was too liquid and the user needed two doses. The criteria of the tender is entirely satisfied as the tender does not limit how many doses of the product are needed. The decision to disqualify the bid is incorrect.

Dr Aquilina stated that samples are requested for a specific reason. There is no need for all elements to be stated in the tender document. The matrix is intended to control use to fulfil the tender. There would be extra costs if more than one packet had to be used every time. The product is not fulfilling its scope if it does not work the first time.

Dr Leon Camilleri said that every professional opinion is subjective but Mr Borg is a man of great experience and his opinion carries weight. The technical specifications indicated the use of the product and the evaluator relied on the experience of the surgeon. The testing of a product by the end-user proves the functionality of the product and the fact that two units had to be used proves that the product does not fulfil the function. Public Procurement Regulations seek the most advantageous offer – a product that has to be used twice is more expensive. The expert witness view is that the product does not work.

On a final point Dr Lia said that the Authority did not state the viscosity need and referred to PCRB Case 1579 which also dealt with the same principle of a single person’s opinion.

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 12<sup>th</sup> July 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 CT2270/2021 listed as case No. 1762 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Alessandro Lia

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

Appearing for the Preferred Bidder: Dr Douglas Aquilina

Whereby, the Appellant contends that:

- a) Reason provide for non-compliance was stated as *“Samples submitted with code number DCF – 17002: The product was tested by the main users and found it to be of very low viscosity as compared to other similar products on the market and is difficult to contain in situ. 2 packs had to be used during trail (sic) to complete purpose”*.
- b) Nowhere does the tender document refer to the viscosity of the product. If the Contracting Authority wanted specific requirements in relation to viscosity it should have listed them immediately in the tender dossier.

- c) General Rules Governing Tenders stated *“Wherever applicable, tenderers may be requested to submit samples so that the Evaluation Committee will corroborate the technical compliance of the offer received. Without prejudice to the possibility of requesting clarifications, where the samples do not corroborate the offer submitted, the tenderer shall be disqualified.”* It is therefore evident that the Evaluation Committee can test the samples only against the technical requirements of the tender dossier. The Evaluation committee went above its duties and went against the principle of self-limitation.

This Board also noted the Contracting Authority’s Reasoned Letter of Reply filed on 9<sup>th</sup> June 2022 and its verbal submission during the virtual hearing held on 12<sup>th</sup> July 2022, in that:

- a) The technical specifications clearly specified the purpose for which the required product was to be used, in clause 1.1 of Section 3 (Specifications) of the tender document, which provided that: *“A Haemostatic disposable matrix used to control spinal bleeding during spinal surgery, made up of a combination of thrombocin and collagen.”*
- b) The bidders were therefore aware of the use of the requested products and therefore had to offer products which were suitable for the indicated use.
- c) In evaluating the samples submitted by the objector, the end user found that the product had very low viscosity as compared to other similar products.
- d) The principle of equal treatment was strictly adhered to, the testing of all samples was to ensure a level playing field to all bidders, whilst ensuring that the Contracting Authority acquires the product which would be the most economically advantageous offer respecting all technical specifications in the best interest of the general public and the patient.

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 as follows in their entirety. Initially, this Board will refer to the testimony under oath of various witnesses and list down the main statements which again are deemed the most relevant. Finally, this Board will provide its conclusions on the matter and grievances of the Appellant.

Extracts from testimony under oath of Mr Philip Mizzi

- a) *“The decision, was not my own but as instructed by an end-user of the product, Mr Joseph Borg, whose instructions I followed.”*
- b) *“Appellant’s literature stated that its product is suitable for any others and expressly mentioned spinal surgery”*
- c) *“Two samples were requested and were tested by more than one surgeon who expressed various views on the use of the product”*

Extracts from testimony under oath of Mr Joseph Borg

- a) *“I was one of the end-users of the product. One sample had to be used twice in the same operation. I requested a sample and after use noted that it was more viscous than the incumbent product which has been in use for a long period of time.”*

Extracts from testimony under oath of Mr Mark Bondin

- a) *“In my presence only one sample was used.”*
- b) *“There is no mention of viscosity in the tender terms.”*
- c) *“I have no idea of the viscosity measurement in our product as it was not asked for in the tender.”*

Board conclusions

- a) This Board notes that it is an undisputed fact that the viscosity of the product was not mentioned in the tender dossier at all.
- b) This Board is also incredulous at how the sole evaluator (member of the evaluation committee) can declare under oath that the decision to declare the appellant’s bid as technically non-compliant was not his own! But that he followed instructions! Members of an evaluation committee can obviously ask for technical expertise of end users, but at the end of the day it is their responsibility of how they are to assess such offers of economic operators. Therefore, the way this was handled is certainly not how a proper evaluation of a procurement process, financed through public funds, should be held. Persons appointed to act as members of an evaluation committee should be well versed on how public procurement works and are also to know their respective rights and responsibilities.
- c) This Board as it has done in the past, also suggests to Contracting Authorities that there should be more than one evaluator on the evaluation committees. Moreover, such persons, or at least one of them, should be adept and knowledgeable on the product and / or service being acquired.
- d) Reference is also made to the testimony under oath of Mr Philip Mizzi who stated that other end-users provided positive feedback on the sample provided. Hence there are conflicting remarks on the Appellant’s products. When this Board correlates this part of the testimony with the testimony as per point (b) above, that the decision “was not his own”, this Board loses all possible trust and confidence on the workings on this current evaluation committee.

Hence, this Board upholds the Appellant’s grievances.

**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 cancel the 'Notice of Award' letter dated 24<sup>th</sup> May 2022;
- c) To cancel the Letters of Rejection dated 24<sup>th</sup> May 2022 including that sent to Prohealth Ltd;
- d) To order the contracting authority to re-evaluate the bid received from Prohealth Ltd in the tender through a newly constituted Evaluation Committee composed of members which were not involved in the original Evaluation Committee, whilst also taking into consideration this Board's findings. The new Evaluation Committee is to have more than one evaluator whilst at least one of them is to be an end-user of the product;
- e) after taking all due consideration of the circumstances and outcome of this Letter of Objection, directs that the deposit be refunded to the Appellant.

**Mr Kenneth Swain**  
Chairman

**Mr Lawrence Ancilleri**  
Member

**Mr Richard Matrenza**  
Member