

PUBLIC CONTRACTS REVIEW BOARD

Case 1784 – RfP 021-6125/20 – Request for Participation (Negotiated) for Supply of Over-labelling Services of Medicinal Products

The tender was issued on the 11th December 2020 and the closing date was the 11th February 2021. No estimate of value was provided for this tender.

On the 11th March 2022 Pharmadox Healthcare Ltd filed an appeal against the Central Procurement and Supplies Unit as the Contracting Authority objecting to its disqualification on the grounds that its bid was deemed not to be compliant.

A deposit of € 1,200 was paid.

There were five (5) bids.

On the 12th September 2022 the Public Contracts Review Board composed of Dr Charles Cassar as Chairman, Mr Lawrence Ancilleri and Ms Stephanie Scicluna Laiviera as members convened a public virtual hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – Pharmadox Healthcare Ltd

Dr Matthew Brincat	Legal Representative
Mr Keith Frendo	Representative

Contracting Authority – Central Procurement and Supplies Unit

Dr Alexia Farrugia Zrinzo	Legal Representative
Dr Leon Camilleri	Legal Representative
Mr Hristo Ivanov Hristov	Representative
Dr Alison Anastasi	Representative

Preferred Bidder – Medical Logistics Ltd

Dr Karl Tanti	Legal Representative
Ms Samantha Cusens	Representative
Mr Andrea Asensio	Representative

Dr Charles Cassar Deputy Chairman of the Public Contracts Review Board welcomed the parties and invited submissions.

Dr Matthew Brincat Legal Representative for Pharmadox Healthcare Ltd stated that one point was not dealt with by the Court of Appeal, namely, none of the bidders had authorisation of serialization and therefore it was a waste of time to impose this condition. Regarding the translations there was no mention that these had to be quoted and in fact a separate tender was eventually issued. The CPSU are obliged to

let the other parties know what the bidder offered. The Board was requested to order the tender to be re-issued with these points clarified.

Dr Karl Tanti Legal Representative for Medical Logistics Ltd said that in the case of Pharmadox the Court of Appeal decided that the information regarding prices and lead times should be provided to all bidders. The Evaluation Committee based their decisions on those factors and not on whether the tender was correctly and properly written. The Appellant provided no proof that the evaluation was not carried out correctly. Serialisation was only in regard to one particular lot and does not apply to the preferred bidder. The shortest time limit is not conducive to a bidder offering a range. Cancelling a tender is an exceptional remedy and the preferred bidder does not agree with this proposal. Reference was made to Court of Appeal Case 388/2018 where the Court explained how a tender should be adjudicated. All offers are now known except the preferred bidder's and therefore it is his client who is bound to be prejudiced and suffer.

Dr Leon Camilleri Legal Representative for the CPSU said that his clients agree with the proposal that the tender should be cancelled. The Appeal Court laid out three criteria but there is uncertainty about the weighting given to each one. It is much fairer to have one clear tender with clear indications of how it is to be judged. Regulation 90(3) of the PPR provided the Board with this remedy. The CPSU was only following the Court's decision in providing prices which are now out of date anyway due to the passage of time.

Dr Tanti pointed out that in the Spectra case the Court made it clear how the evaluation could be carried out.

Dr Brincat complained that his clients had not been given the prices referred to which Dr Camilleri replied that the CPSU had, following the Court directive, sent details with a fresh letter.

Mr Hristo Ivanov Hristov (690120L) called to testify by the Contracting Authority stated on oath that the entire financial bid forms had been sent to all appellants via e-mail.

Dr Brincat insisted that his client had not received these documents.

Dr Camilleri said that Appellant had given no indication that the CPSU had failed to send these documents following the Appeal Court's decision and he urged the Board to implement the cancellation of the tender.

The Chairman thanked the parties for their submissions and declared the hearing closed.

End of Minutes

Decision

This Board,

Refers to the Minutes of the Board's sitting of the 12th September 2022

Having noted this objection filed by Appellant – Pharmadox Ltd, (herein after referred to as appellant) on 11/ 03/ 2022, refers to the claims made by the same appellant regarding the Tender listed as case No.1784 in the records of the Public Contracts Review Board and the letter of reply by CPSU dated 24/03/2022 (herein after referred to as the contracting authority) and their verbal submissions during the hearing on 12 September 2022.

Also taking note of the letter submitted dated 28 /3/ 2022 by Medical Logistics Ltd (referred to as preferred bidder) and their verbal submissions during hearing on the 12 September 2022.

Whereby, the appellant mainly contends that:-

- A) The Court of Appeal did not deal with the point , that, none of the bidders had authorisation of serialization and therefore it was a waste of time to impose this condition
- B) And that there was no mention that translations had to be quoted .
- C) Requested the Board to order the tender to be re-issued.

Whereby, the Contracting Authority contended

- A) The Appeal Court laid out three criteria., however, there is uncertainty about the weighting given to each one. It is much fairer to have one clear tender with clear indications of how it is to be adjudicated.
- B) Regulation 90(3) of the PPR provided the Board with the remedy to cancel the tender.
- C) The CPSU was only following the Court's decision in providing prices which are now out of date.

In conclusion the Board after having heard the arguments and documentation from all parties namely the appellant, the contracting authority and preferred bidder concludes that:

Based on the Sentence of the Court of Appeal regarding the lack of equilibrium in the published tender

since the measuring criteria were not clear and specific therefore it follows that the adjudicating committee could not perform a proper adjudication

Hence it directs:

that a new Procurement Procedure be published by 20 October 2022,

wherein

the award criteria are clearly defined and adhered to through the determination of appropriate specifications and conditions.

The Procurement Procedure must determine clearly what specifications and respective parameters are required.

The Board therefore concludes and decides that:

- a) It partially upholds the Appellant's Letter of objection.
- b) The existing Tender is cancelled
- c) A new tender is issued by the date specified above.
- d) It directs that the deposit paid by the Appellant be reimbursed.

Dr Charles Cassar
Chairman

Mr Lawrence Ancilleri
Member

Ms Stephanie Scicluna Laiviera
Member