

PUBLIC CONTRACTS REVIEW BOARD

Case 1249 –CFT 021-0384/18 –Tender for the Supply of Sterile Solutions for CRRT Machine on Pay-Per-Use Basis

The publication date of the call for tenders was the 13th April 2018 whilst the closing date of the call for tenders was 3rd May 2018. The estimated value of the tender (exclusive of VAT) was € 86,720.

On the 3rd December 2018 Drugsales Ltd filed an appeal against the Central Procurement and Supplies Unit as the Contracting Authority objecting to being disqualified on the grounds that their offer was technically not compliant and to the cancellation of the tender. A deposit of € 400 was paid.

There were two (2) bidders.

On 8th January 2019 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Mr Carmelo Esposito and Mr Lawrence Ancilleri as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellants: Drugsales Ltd

Dr Douglas Aquilina	Legal Representative
Ms Gulia Attard Montalto	Representative
Mr Stephen Farrugia	Representative
Mr Mark Vella	Representative

Contracting Authority – Central Procurement and Supplies Unit

Dr Marco Woods	Legal Representative
Ms Denise Dingli	Chairperson Evaluation Committee

Dr Anthony Cassar Chairman of the Public Contracts Review Board welcomed the parties and invited Appellants to make their submissions.

Dr Douglas Aquilina Legal Representative of Drugsales Ltd stated that this tender for the supply of Sterile Solutions for Renal Therapy was cancelled for two reasons – the inclusion of lactate in the product and the lack of a PVC line with leur lock connector. The tender specified particular ingredients which the solution had to contain but lactate was not excluded in these specifications. It was not contested that Appellants' product contained lactate but this was immaterial to the award of the tender. He quoted Case 857 of 2015 to support this contention that what was not excluded was immaterial to the evaluation.

Regarding the PVC line Appellant was offering a superior product which although it did not have a PVC line facilitated the mixing of the solution and was safer as it decreased the possibility of infection. The product offered had been in use for a number of years in local hospitals.

Dr Marco Woods Legal Representative of the CPSU said that the sample provided had been evaluated according to the technical specifications of the tender. The CPSU accepts that the tender specifications were outdated and accepts that the offer by the Appellant is now compliant – however the tender had to be evaluated on the terms specified at the time and since the offer was not compliant then, the tender had to be cancelled. Dr Woods went on to state that according to Dr Anastasi after evaluation of this tender the CPSU advised the DPA that the tender specifications were outdated and there was no technical reason for disqualifying Appellants. The DPA reviewed the specifications by updating them and decided to cancel the present tender. They in fact issued new specifications three days after the objection raised by Appellant.

Ms Gulia Attard Montalto Representative of Drugsales Ltd said that their offer was in line with the tender and the CPSU now accept that it was technically compliant.

The Chairman said that the Board wanted confirmation from a technical person that the tender was compliant, and since no such person was present he was adjourning the hearing to a day when a technical witness could attend.

The hearing was adjourned to Friday 11th January 2019 at 09.00hours.

SECOND HEARING

On the 11th January 2019 the Public Contracts Review Board consisting of Dr Anthony Cassar, Chairman, Mr Carmel Esposito and Mr Lawrence Ancilleri as members reconvened the public hearing.

The attendance for this public hearing was as follows:

Appellants: Drugsales Ltd

Dr Douglas Aquilina	Legal Representative
Ms Gulia Attard Montalto	Representative

Contracting Authority – Central Procurement and Supplies Unit

Dr Marco Woods	Legal Representative
Dr Alison Anastasi	Representative

The Chairman welcomed the parties and invited Dr Anastasi to give evidence.

Dr Alison Anastasi (398380M) called as a witness by the Board, testified on oath that she was the Head of Procurement at the CPSU. She stated that in previous tenders, products containing ingredients such as lactate and glucose had not been disqualified solely for that reason. In this particular tender lactate should likewise not have been a cause for disqualification. Witness

explained that the PVC line was a process to connect the sterile solution to a machine - the sterile bag offered in this tender is in use currently and is clinically compliant. The offer submitted by Appellant was technically fully compliant.

The Chairman thanked the witness and the parties in attendance and declared the hearing closed.

This Board,

having noted this Objection filed by Drugsales Limited, (hereinafter referred to as the Appellants), on 3 December 2018, referring to the contentions made by the same Appellants with regards to the cancellation of Tender of Reference CFT 021-0384/2018 listed as Case 1249 in the records of the Public Contracts Review Board and issued by the Central Procurement and Supplies Unit.

Appearing for the Appellants:

Dr Douglas Aquilina

Appearing for the Contracting Authority:

Dr Marco Woods

Whereby, the Appellants contend that:

- a) their offer was rejected for two alleged reasons namely, that their product contained lactate and that their offer lacked a PVC line with leur lock connector. In this regard, the Appellants maintain that the Tender Document did not exclude the inclusion of lactate and with regards to the PVC line, the Appellants insist that their product was superior and safer, to the benefit of the patient;**

This Board has also noted the Contracting Authority’s “*Letter of Reply*” dated 14 December 2019 and also their verbal submissions during the Public Hearings which were held on the 8th and 11th January 2019, in that:

- a) the Central Procurement and Supplies Unit had informed the Public Contracts Review Board that since the technical specifications were outdated, on the advice of the Directorate for Pharmaceutical Affairs, the Tender had to be cancelled and there were no technical reasons for disqualifying the Appellants’ offer.**

This same Board has also noted the testimony of the witness, namely Dr Alison Anastasi, who it had duly summoned.

This Board, after having examined the relevant documentation to this Appeal and heard submissions made by the parties concerned, including the testimony of the witness, opines that the issues that deserve consideration are twofold, namely:

- 1. The submissions made by Drugsales Limited;**
- 2. The relevant testimony of the witness.**

1. The submissions made by Druggales Limited

This Board would respectfully refer to Clause 1.1 of Section 4 – Technical Specifications, as follows:

“1.1 Product Specifications

Sterile Solution for Continuous Renal Replacement Therapy

A clear, sterile, apyrogenic solution for use as a substitution fluid drainage haemofiltration and a sterile dialysate for continuous haemodialysis. The bicarbonate solution should be supplied in a separate container in order to prevent precipitation in the actual bag and should be accompanied with a PCV line with luer lock connector, spike and clamp to facilitate mixing the two solutions. After mixing, the final solution should contain:

<i>Sodium</i>	<i>140mmol/l</i>
<i>Chloride</i>	<i>109-109.5mmol/l</i>
<i>Calcium</i>	<i>1.5-1.75mmol/l</i>
<i>Magnesium</i>	<i>0.5mmol/l</i>
<i>Bicarbonate</i>	<i>32-35mmol/l</i>

The solution should be potassium free.”

One of the reasons why the Appellants’ offer was considered to be technically non-compliant was due to the fact that their product contained lactate. This Board justifiably notes that the above mentioned clause states what the solution should include and what should not be included, excluding one ingredient, namely potassium. Drugsales Limited’s offer did not include potassium but apart from the inclusion of mandatory ingredients, it also included lactate which has been credibly established that such an ingredient is not detrimental to the recipient. At the same instance, this Board noted carefully the testimony of Dr Alison Anastasi, who is well qualified in the field of pharmaceuticals and who confirmed that such an inclusion does not render the Appellants’ offer technically non compliant. In this regard, this Board opines that the discarding of the latter due to the inclusion of lactate is not justified.

2. The Testimony of Dr Alison Anastasi

During the first Public Hearing for this Appeal, various technical matters were discussed and in this respect, this Board requested the

presence of a technical person to explain and clarify to this Board the technical statements made by the parties concerned.

During the second Public Hearing, Dr Alison Anastasi explained and confirmed in a vivid manner that the inclusion of lactate should not be a reason for the rejection of the Appellants' offer and also very affirmatively confirmed that the sterile bag offered by Drugsales Limited is in use and clinically compliant, so that their offer was fully technically compliant.

This Board is obliged to save offers whenever such circumstances are justified and in this particular case, there is no evidence to justify why the Tender should be cancelled.

In view of the above, this Board,

- i) does not uphold the Central Procurement and Supplies Unit's decision to cancel the Tender;**

- ii) upholds the contentions made by Drugsales Limited;**

- iii) directs the Central Procurement and Supplies Unit to re-integrate Appellant's offer and;**
- iv) instructs the Contracting Authority to re-evaluate all the submitted offers taking into consideration this Board's findings;**
- v) directs that the deposit paid by the Appellants to submit this objection is to be fully refunded.**

Dr Anthony Cassar
Chairman

Mr. Carmel Esposito
Member

Mr Lawrence Ancilleri
Member

15th January 2019