PUBLIC CONTRACTS REVIEW BOARD

Case 1519 – CFT020-0862/20 – Tender for the Supply of Automatic Filling Circuit/Double Transfer Set and High Pressure Connecting Lines (Lots 1 & 2)

The tender was published on the 7th August 2020 and the closing date of the tender was the 27th August 2020. The estimated value of the combined lots (exclusive of VAT) was € 71,490.

On the 30th October 2020 Suratek Ltd filed an application in terms of Regulation 270 of the Public Procurement Regulations requesting the Public Contracts Review Board to authorise them to withdraw their bids.

A deposit of € 800 was paid.

There were two (2) bidders.

On 2nd December 2020 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a public virtual hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellants – Suratek Ltd

Dr Clement Mifsud Bonnici	Legal Representative
Mr Kevin Galea	Representative

Contracting Authority – Central Procurement and Supplies Unit

Dr Marco Woods	Legal Representative
Ms Marika Cutajar	Chairperson Evaluation Committee
Ms Josette Camilleri	Representative

Preferred Bidder – Krypton Chemists Ltd

Mr Matthew Arrigo	Representative

Department of Contracts

Mr Nicholas Aquilina	Representative

Dr Anthony Cassar 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. He then invited submissions.

Dr Clement Mifsud Bonnici Legal Representative for Suratek Ltd said that this was an unorthodox case as the preferred bidders, who were awarded Lot 1, were requesting to withdraw their offer which withdrawal might give rise to alternative purchases at an unknown cost but despite this was being done with the patients' safety in mind. The point at issue revolved on the guarantees on patients' safety which could not be given by Appellants unless equipment required in both Lot 1 and 2 was supplied by the same manufacturer – using equipment from different manufacturers incurred the risk of cross contamination.

Dr Marco Woods Legal Representative for the Central Procurement and Supplies Unit said that the Contracting Authority was insisting that Appellants' request cannot be entertained and cannot accept the withdrawal of the offer. The Authority needs an explanation why this matter is being raised at this stage. Appellants were aware, as it was made very clear, that the tender was split into two lots but they still submitted their bids even though there was the possibility that they may not be awarded both lots.

The Chairman said that the Board wished to know if the evaluation committee had considered the need for the high usage of the alternative supply and was advised that the minutes of the committee did not indicate that it had been considered.

Dr Mifsud Bonnici said that Appellants had no issue with the technical specifications on both offers as all were correct. There was, however, the practical point of the guarantee requested on Lot 2 and it was up to the Board to decide on this matter.

Dr Woods stated that the specifications of the tender were known from the beginning and there was always the possibility that Appellants might not win both bids, so why are they know unwilling to give the requested guarantee? In any instance they had a remedy available prior to submitting their bid if they were unhappy with the specifications. The bid for Lot 2 was compatible and Appellants cannot refuse to give the guarantee now.

Dr Mifsud Bonnici pointed out that the guarantee offered was conditional and the Board could consider the broad picture of patients' safety.

Even with patients' safety in mind, said Dr Woods, one still cannot ignore the Public Procurement Regulations. Patients' safety aspect is taken care of in the specifications and Appellants cannot ignore the outcome.

Dr Mifsud Bonnici commented that it is not always possible to foresee the outcome of tenders.

Ms Erica Cesare (046870L) called as a witness by the Contracting Authority stated on oath that she was not involved and is not aware what took place in the tender process but was an end user of the equipment. She explained that the equipment consists of a transfer set and the connecting lines – the transfer set is changed every 24 hours with the connecting lines changed for every patient.

Questioned by Dr Mifsud Bonnici witness said that on a daily basis about 60 to 70 patients are attended to. In reply to Dr Woods witness stated that she has no experience of using equipment of different brands

as she has always used products of the same brand. She was of the view that if a combination of products of different brands were to be used a trial should be held first and further studies carried out.

Ms Marika Cutajar (467772M) called as a witness by the Contracting Authority testified on oath that she was the Chairperson of the Evaluation Committee. She confirmed that the tender was split into two lots and that different brands of equipment were in use up to 2011 but since then same brand equipment was in use.

Questioned later by Dr Mifsud Bonnici witness confirmed that till 2011 there were two different parts of this system in use, but they were not Novamed products, and she was not aware that prior to 2011 the lines had to be changed for every patient.

Mr Ulrich Andersen called as a witness by Appellants testified on oath that he was the owner of the firm Novamed and had a background in pharmaceuticals. He had invented the system under discussion and owned the rights. He gave a brief explanation of the system and its uses and could guarantee its safety 100%. He explained that with other systems there was the risk of cross contamination of patients which was prevented by the one way valve system in his equipment. The difficulty of using two different components is that if contamination occurred it would be difficult to identify the 'guilty party'. The Novamed system was marketed as a whole unit and he cannot accept liability for third parties' products used jointly with his system.

Dr Mifsud Bonnici said that after hearing the witnesses it was obvious that although different parts could be used the lines need to be changed after use by each patient to avoid the risk of cross contamination. The one way valve is the unique way of preventing that and witness had said that he cannot state if his equipment can be used with parts from other manufacturers. Witness Ms Cesare had even suggested that a trial period would be needed if different parts of equipment were used. The guarantee would not apply if equipment other than Novamed was used unless the tubes were changed after every patient - otherwise there was the risk of contamination – the principle of patients' safety was paramount and Dr Mifsud Bonnici referred to several PCRB cases (nos. 1028, 1057, 1065, 1136 and 1036) wherein the Board had stated that safety was the overriding principle.

Dr Mifsud Bonnici accepted that this was an exceptional case since in reality the guarantee offered applied only if the whole system was used. Witnesses had indicated that up to 2011 the tubes were changed after each use – thanks to Novamed that was no longer the case and Appellants cannot begin to consider the possibility of liability in case of contamination, more so in the current climate.

Dr Marco Woods said that the emphasis must be on the way Appellants had acted – despite the tender being split into lots witness had made it clear that they were only offering the complete product. Once again one must ask why they did not seek clarification. A call to alert the authorities of the damage likely to arise from splitting lots could have anticipated the issue of the tender. Appellants cannot now withdraw their offer without incurring any liability and the Authority maintains that the offer should stand as it is. No technical proof has been offered that there will be any problems in the use of split equipment – simply the word of a financially interested party was offered. The Authority will have to consider all aspects if the Board decides to order the cancellation of the tender.

Dr Mifsud Bonnici stated that the proposed arrangement was putting patients unnecessarily at risk. No proof has been provided that using different products is a safe procedure. Witness Ms Cesare who is an end user made it very clear that she could not make a decision about mixed products without a trial, and one had to put reliance on an independent process carried out by the University of Copenhagen. The preferred bidder in Lot 2 had also indicated that to simplify matters they confirm that if the tender is revoked they will not pursue the matter further.

Dr Woods re-iterated the point that a clarification would have resolved matters. There has been no proof brought before this Board that cross contamination would occur – merely an allegation. The evaluation committee had quite rightly used the principle of self limitation; on the other hand if the Contracting Authority had made an error it should not be overlooked.

Mr Matthew Arrigo representative of Krypton Chemists Ltd said that when he saw the letter of objection he realised the seriousness of the problem and as he did not want to get involved in this polemic he had written to the Board accordingly.

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

End of Minutes

Decision

This Board,

having noted this objection filed by Suratek Ltd (hereinafter referred to as the Appellants) on 30th October 2020, refers to the claims made by the same Appellants with regard to the tender of reference CFT 020-0862/20 listed as case No. 1519 in the records of the Public Contracts Review Board recommended for award by Central Procurement and Supplies Unit (hereinafter referred to as the Contracting Authority).

Appearing for the Appellants: **Dr Clement Mifsud Bonnici**

Appearing for the Contracting Authority: **Dr Marco Woods**

Appearing for the Department of Contracts: **Mr Nicholas Aquilina**

Appearing for the Preferred Bidder: **Mr Matthew Arrigo**

Whereby, the Appellants contend that:

a) **Appellants acknowledge that, they were awarded Lot no. 1 of the tender and the Authority is requesting a guarantee on the equipment being offered. In this regard, the manufacturers will only issue such guarantee if they supply the whole configuration of the equipment. In this regard, since, Appellants were only awarded part of the tendered equipment, such guarantee cannot be issued by the manufacturers and in this respect, Appellants are requesting the withdrawal of their offer.**
b) **Appellants also maintain that, for the benefit of the patients' safety, it is not recommended to procure components of the whole system from different manufacturers, as this might incur cross contamination within the system.**

This Board also noted the Contracting Authority's 'Letter of Reply' dated 9th November 2020 and its verbal submissions during the virtual hearing held on 2nd December 2020, in that,

a) **The Authority maintains that, it cannot accept the withdrawal of Appellants' offer for the following reasons:**
    i. **Appellants were aware of the possibility of being successful for only one lot of the tendered equipment.**

ii. **Appellants had other remedies to inform the Authority that the guarantee can only be issued on the whole configuration of equipment and in this respect, no such remedies were sought prior to the submission of their offer.**

This same Board also noted the testimony of the witnesses namely:

Ms Erica Cesare duly summoned by Central Procurement and Supplies Unit

Ms Marika Cutajar duly summoned by Central Procurement and Supplies Unit

Mr Ulrich Anderson duly summoned by Suratek ltd.

This Board after having examined the relevant documentation to this request and heard submissions made by all the interested parties, including the testimony of the witnesses duly summoned opines that, the issue that merits consideration is whether Appellants' request is justified.

1. **First and foremost, this Board would respectfully point out that, Appellants' main concern is the issue of guarantee (Performance) on the equipment. At the same instance, this Board was made aware that, such a guarantee applied only for Lot no. 2 which was awarded to another bidder.**
2. **From the submissions made during the hearing, this Board notes that both Lot no. 1 and Lot no. 2 form two separate components of the same equipment, so that, same Board is somewhat confused as to why, such a performance guarantee is requested for Lot no. 2, only. In this respect, this Board opines**

that, for the patients' safety and well-being, the guarantee should be mandatory for the full components of the equipment.

3. **From the testimony of Ms Erica Cesare (the end user of such equipment), this Board was informed that, in her opinion, combination of products of different brands should be used only after initial trials, so that, this Board is not comfortably assured that such a combination of parts of different brands will guarantee the safety of the patients.**
4. **From the testimony of Mr Ulrich Anderson (the manufacturer of Appellants' offer), it was shown to this Board how, by using different branded components in the system, contamination can be caused and it would be difficult to identify the 'Guilty Party', should such an issue arise. Mr Anderson also confirmed that their product was marketed as a whole unit and cannot accept liability for third party products used jointly with their system.**
5. **From the testimony of both Ms Erica Cesare and Mr Ulrich Anderson, this Board can safely deduce that, the tendered equipment is normally applied as a whole unit from the same brand.**
6. **This Board's priority is the patients' safety and well-being and from the testimony of Ms Erica Cesare, the end user has still to study trials of the equipment composed of parts of different brands and in this regard, this Board, does not deem such experimental use of the equipment advisable.**

In conclusion, this Board opines that:

a) **Appellants were aware of the possibility of not being awarded both lots and had other remedies which are not applicable prior to this stage.**

b) **From the testimony of both witnesses, it would be more advisable to procure the whole system from one brand, rather that go ahead with the award and proceed to an experimental stage of the system using different branded parts of the equipment.**

In view of the above, this Board,

i. **does not uphold the Contracting Authority's decision in the award of the tender,**

ii. **directs that the tender be cancelled,**

iii. **directs that any fresh issue of the tender, will take into consideration this Board's findings.**

iv. **in view of the fact that Appellants had remedies which were not availed of to clarify the issue of the guarantee prior to the submission of their offer, directs that an amount of €400 be refunded from Appellants' deposit.**

Dr Anthony Cassar	Dr Charles Cassar	Mr Lawrence Ancilleri
Chairman	Member	Member

9th December 2020