PUBLIC CONTRACTS REVIEW BOARD

Case 1580 – CT2326/2020 – Tender for the Supply of Safety Blood Collection Set & Holder 21G x ¾"

14th June 2021

The Board,

Having noted the letter of objection filed by Dr Matthew Paris on behalf of DalliParis Advocates acting for and on behalf of Cherubino Ltd, (hereinafter referred to as the appellant) filed on the 15th March 2021;

Having also noted the letter of reply filed by Dr Marco Woods on behalf of Central Procurement and Supplies Unit (hereinafter referred to as the Contracting Authority) filed on the 24th March 2021;

Having taken cognisance and evaluated all the acts and documentation filed, as well as the submissions made by the legal representatives of the parties;

Having heard and evaluated the testimony of the witness Mr Stephen Decelis who is a Senior Allied Health Practitioner and is an Evaluator on this tender;

Having heard and evaluated the testimony of the witness Ms Rita Zammit who is a Procurement Manager and is the Chairperson of Evaluation Committee on this tender;

Having heard and evaluated the testimony of the witness Mr George Grech who is a Senior Medical Laboratory Scientist and is an Evaluator on this tender;

Having noted and evaluated the minutes of the Board sitting of the 10th June 2021 hereunder-reproduced.

Minutes

Case 1580 – CT 2326/2020. Tender for the Supply of Safety Blood Collection Set & Holder 21G x ¾"

The tender was published on the 30th October 2020 and the closing date was the 1st December 2020. The value of the tender was € 1,374,450.

On the 15th March 2021 Cherubino 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 not technically compliant

A deposit of € 6,872 was paid.

There were ten (10) bidders and thirteen (13) bids.

On 10th June 2021 the Public Contracts Review Board (PCRB) composed of Mr Kenneth Swain as Chairman, Dr Charles Cassar and Mr Carmel Esposito as members convened a public virtual hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellant – Cherubino Ltd

Dr Matthew Paris	Legal Representative
Dr Francis Cherubino	Representative
Ms Janet Pace	Representative

Contracting Authority – Central Procurement and Supplies Unit

Dr Marco Woods	Legal Representative
Ms Rita Zammit	Chairperson Evaluation Committee
Mr Stephen Decelis	Representative
Ms Jacqueline Borg	Representative
Mr George Grech	Representative
Mr Edmond Balzan	Representative

Preferred Bidder – Europharma

Mr Alex Fenech	Representative
Mr Michael Peresso	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 asked Appellant's representative to make his submissions.

Dr Matthew Paris Legal Representative for Cherubino Ltd said that he intended to support Appellant's case by presenting a video feature and other documents but was unable to load the video on the PCRB site due to its size.

The Chairman said that the mentioned documents were not presented within the set PCRB policy - that is three days before the hearing and therefore will not be considered.

Dr Paris said that in that case he was objecting to the virtual hearing as it puts his clients at a disadvantage and him at some difficulty in presenting his case.

Dr Woods Legal Representative for the Central Procurement and Supplies Unit (CPSU) said that the Board should adhere to its policy and not consider late presented documents.

Dr Paris then requested that the following be recorded verbatim:

"Dr Matthew Paris in the name of Appellant Cherubino Ltd declares that on the preceding day 9th June 2021 he attempted to present a video confirming and ascertaining the reason why the rejection was not correct and which could lead to a different result. Due to the electronic system at PCRB not accepting the video he requests that the video is referred to the attention of the Board. Moreover in view of the fact that documents have been submitted and are in the hands of the PCRB he requests

that these documents are considered as valid and used as proof. This will not prejudice any party as the system will still refuse the submissions immaterial of when submitted and in that case the CPSU will still have the opportunity for any objections. It appears that the Board is not prepared to consider this submission and therefore Dr Paris is objecting to the electronic hearing as it is prejudicing his case and he reserves the right to present further evidence by Appellant Company as stated in his letter of appeal."

Dr Woods also requested a verbatim record of the following:

"Dr Marco Woods for the CPSU objects strongly and strenuously to the request by Dr Paris on behalf of Cherubino Ltd since the PCRB policy in regard to documentary proof states that they have to be presented at least three days before a hearing. Moreover Dr Woods declares that first of all he still has not received the documents submitted yesterday and in regard to the video not transmitted declares that Dr Paris could have presented it physically to the Board through a USB stick and thus he maintains the objection to the presentation of documents and video".

In a further submission Dr Paris stated that further prejudice was being created since Dr Woods was being allowed to call witnesses based on his claim that he has reserved the right but Appellant's submissions were not allowed although similarly the right had been reserved.

Dr Woods re-iterated that the PCRB's policy regarding to late submission of documents had been in effect since around 2019 and three days notice was required. As regard the witnesses the PCRB had been given the names of those attending the meeting since the 1st June.

Dr Paris said that in summary and for the record it should be stated that the Contracting Authority's point was being accepted but that of the Appellant was being rejected.

At this stage the Chairman said that the points raised have been considered and he now asked the parties to proceed with their submissions.

Dr Paris referred to the reason for Appellant's exclusion particularly on the point that the sample supplied did not have an audible click. This required click was in line with the tender technical specifications (page 17) and explains that this is on safety grounds. Page 6, item 2.1.1 of the technical offer confirms this point. It is totally incorrect to claim that the product does not give an audible click. The tender submissions required a declaration that all tender requisites have been met. All 50 samples submitted to the Authority at their request satisfy this requirement.

Dr Woods said that technical specifications are not subject to interpretation and must be complied with in full and the evaluators will confirm in their testimony that this was not the case.

Mr Stephen Decelis (8776M) called as a witness by the Appellant testified on oath that he is a Senior Health Practitioner at Mater Dei Hospital (MDH) and was one of the evaluators. He confirmed that the committee had requested and received 50 samples which failed to give a click when tested as a result of which they did not send the samples to the phlebotomists for further tests.

Ms Rita Zammit (276864M) called as a witness by the Appellant testified on oath that she is a Procurement Manager in the Health Department and was the Chairperson of the Evaluation Committee. In reply to questions she stated that she has no experience of testing medical devices, but confirmed that Appellant had met the administrative criteria set in the tender. The committee requested samples from bidders and Cherubino complied. She stated that she never saw the samples which went straight to the collection centre and then to the Hospital for testing and has no idea if the

samples had been evaluated - she merely relied on the evaluators decision and had no idea whether the product in question gave an audible click or not. Witness further stated that no records are kept to specify what tests were carried out or to verify any results – she simply followed what the evaluators said and had no idea of how many samples were tested or checked.

Questioned by Dr Woods witness stated that she saw her role as Chairperson as one to make sure that the evaluation process is carried out in order. The evaluation members stated that the product gave no audible click and she accepted their findings which she signed and passed on to the General Contracts Committee.

Mr George Grech (31859G) called as a witness by the Appellant testified on oath that he is a Senior Medical Laboratory Scientist and his evaluator role in the tender was to test samples and choose the best product offered. He confirmed the receipt of a number of samples from Cherubino Ltd. The first step was to ensure that the samples met the tender specifications following which the samples were sent to the end-users who are the experts in testing products. Cherubino's product was not sent for testing by the end-users as the first three samples out of 50 failed to meet the first requirement of an audible click. No testing records or reports were made and witness could not recall the date when the tests were carried out. He confirmed that he had no experience in the use or testing of this product.

In reply to a question from Dr Woods witness stated that once he carried out the first test on the samples after which there was no point in going any further except to disqualify the bidder.

Dr Paris said that he was disappointed at the poor quality of the evaluation process, more so since it dealt with medical equipment and reminded the Board to note that the Courts of Malta had time and again stressed the need to treat such evaluations seriously. Regrettably the Chairperson was not even aware of what she was signing whilst the evaluators were merely administrators with no medical expertise to enable them to judge if the product offered conformed with the tender. No proper testing was carried out despite the rigorous specification set out in para 1.1 on page 17 of the tender dossier which was clearly intended to be used by expert technical persons. The inability to hear the click could very well have been due to the inability of the tester to use the equipment properly. Reference was made to PCRB Cases 1148 and 1056 which dealt with identical cases of tests not carried out properly or not documented or verified. Despite the fact that Appellant's product had obtained ISO 13485 certification it had been refused without proper testing which was not acceptable methodology.

Dr Woods stressed that the Board was correct in not accepting late submissions. The comments passed by Dr Paris on the evaluators were not fair on Health Department employees. The role of the Chairperson was to ensure that the evaluation was carried out correctly whilst price offered has no bearing on the acceptability of a product. The evaluation was carried out correctly as the technical specifications were adhered to and this was confirmed and verified by the witnesses. The decision of the evaluation committee should stand.

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

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 10th June 2021.

Having noted the objection filed by Cherubino Ltd (hereinafter referred to as the Appellant) on 15th March 2021, refers to the claims made by the same Appellant with regards to the tender of reference CT 2326/2020 listed as case No. 1580 in the records of the Public Contracts Review Board.

The Board notes the preliminary objection of Dr Matthew Paris in that:

- On the preceding day of the hearing, i.e. 9th June 2021, he attempted to present a video that allegedly could ascertain the reason why the rejection was not correct and which could lead to a different result.
- The electronic system at PCRB did not accept the video.

The Board makes reference to its established policy, which is stated in all the emails sent to interested parties for hearings, whereby *"Please note that if any of the interested parties intend to present any additional documents these are to be circulated to* ***all*** *the parties concerned* ***at least three days before the date fixed for the hearing***. *For clarity purpose, additional documents do not include notes with legal submissions". (bold and underline emphasis added)*

Reference is made to Regulation 90 (2) of S.L. 601.03 Public Procurement Regulations, whereby *"It shall also have the power to determine the procedure for the hearing of all complaints lodged before it……"*

With regards to the electronic system not accepting the video;

i. The Board notes that it does receive on numerous occasions large electronic files from different interested parties, hence it is ambiguous to the comment of Dr Matthew Paris. The policy of *"at least three days before the date fixed for the hearing"* is there for specific reasons. In this case it could have aided the Appellant whereby he could have made logistical arrangements to provide **ALL** interested parties with a USB pen-drive with the video mentioned. It is also important to note this additional documentation needed to be circulated to *"ALL the parties concerned"*. The Appellant must be respectful to the Contracting Authority by providing it with necessary time (a minimum of 3 days) to review the additional documentation and to prepare itself for the hearing.
ii. The Board notes that due to the point above, it is irrelevant whether the electronic system at PCRB did accept or not the video, since the attempt was made late on the preceding day of the hearing.

Appearing for the Appellant: Dr Matthew Paris

Appearing for the Contracting Authority: Dr Marco Woods

Whereby, the Appellant contends that:

a) ***Offer technically compliant*** – Appellant confirmed through the technical literature that the product on offer adheres to all mandatory technical specifications, thus and thereby the claim within the rejection letter is factually incorrect.
b) ***Sample provided is technically compliant*** – Samples were requested and submitted on time. For an unknown reason, the contracting authority concluded that the sample provided "has no audible click", a claim which is being rejected forcefully.
c) ***Rectifications*** – The samples are within the tutelage of Note 3. The contracting authority had to request a clarification to address the matter. Its failure to address an alleged "inconsistent or contradictory information within the tender" falls shorts of the evaluation instructions issued by the European Union as well as the notes to evaluators issued by the Director of Contracts.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 24th March 2021 and its verbal submission during the virtual hearing held on 10th June 2021, in that:

a) ***Offer technically compliant*** – CPSU contend that it results that no objection was presented regarding TID 144948 but rather regarding TID144887. Consequently CPSU will not enter submissions relating the disqualification of TID 144948 as evidently the said disqualification was accepted by the objectors
b) ***Sample provided is technically compliant*** – the evaluation committee having reviewed all the information and documentation submitted by the objectors at tendering stage, opted as per their right to request samples of the said product to be submitted for further evaluation. Upon receipt of the samples and having carried out the evaluation thereof, it became evident that when triggering the in-vein activation system, no audible click was heard as is requested in the technical specifications of the tender.
c) ***Rectifications*** – On the contrary of that being claimed by the objectors, the evaluation committee were under no obligation to request a clarification once the offer submitted failed to satisfy the technical evaluation.

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:

i. The main point of contention here is whether the product being offered by Appellant company has an *'Audible Click'* or not? (Reference made to Tender Dossier page 17, point 10 of Technical Specifications paragraph 1.1)

ii. The Technical Specifications listed in page 17 of the Tender Dossier seem to have been drafted in a very well thought manner.

iii. The Evaluation Committee did request a sample from the Appellant, upon which a quantity of 50 samples have been provided.

iv. Some declarations made by members of the Evaluation Committee did create confusion. The Board does not comprehend how the product on offer was disqualified from proceeding in the tendering process when not all the members of the Evaluation Committee did even see the actual sample in hand. Let alone testing it.

v. 3 units out of 50 units (sample) were tested by members of the Evaluation Committee. This was stated under oath by Mr George Grech, however no record keeping of this testing was kept. Therefore, it could not be identified whether all or how many members where present whilst testing was being carried out.

vi. The Board also notes that none of the Evaluation Committee members are actual Phlebotomists or experts in the field of drawing blood from patients for medical purposes.

It is to be noted that the product tendered for is intended to be used at Mater Dei Hospital and its utilisation may be needed to be applied under pressure and stress. Due to the above points and after due consideration, the Board notes that the evaluation process could and should have been carried out in a more professional manner with all the diligence necessary . The Board upholds Appellant's grievances.

In conclustion this Board opines that;

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 Letter of Acceptance dated 5th March 2021 sent to "EuroPharma Ltd";
c) To cancel all the Letters of Rejection dated 5th March 2021;
d) To order the contracting authority to re-evaluate all the bids received in the tender through a newly composed Evaluation Committee composed of members which were not involved in the original Evaluation Committee. Moreover, this newly appointed Evaluation Committee is to have within itself at least 2 members who as their main profession and occupation, practice as Phlebotomists;

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	**Dr Charles Cassar**	**Mr Carmel Esposito**
Chairman	**Member**	**Member**