

PUBLIC CONTRACTS REVIEW BOARD

Case 1660 – CFT 020-0264/21 – CPSU 0584/21 – Supplies – Hydrocolloid Thin – Extra Thin Dressings

27th December 2021

The Board,

Having noted the letter of objection filed by Dr Robert Galea acting for and on behalf of ProCare Ltd, (hereinafter referred to as the appellant) filed on the 16th August 2021;

Having also noted the letter of reply filed by Dr Marco Woods acting for the Central Procurement and Supplies Unit (hereinafter referred to as the Contracting Authority) filed on the 25th August 2021;

Having heard and evaluated the testimony of the witness Ms Marika Cutajar (Chairperson of the Evaluation Committee) as summoned by Dr Robert Galea acting for ProCare Ltd;

Having heard and evaluated the testimony of the witness Mr Edmond Balzan (Member of the Evaluation Committee) as summoned by Dr Robert Galea acting for ProCare Ltd;

Having heard and evaluated the testimony of the witness Ms Miriam Wubbels (Technical Expert to the Evaluation Committee) as summoned by Dr Robert Galea acting for ProCare Ltd;

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 30th November 2021 hereunder-reproduced;

Minutes

Case 1660–CFT 020-0264/21. Tender for the Supply of Hydrocolloid Thin-Extra Thin Dressings

The tender was published on the 12th March 2021 and the closing date was the 21st April 2021. The value of the tender excluding VAT was € 105,920.

On the 16th August 2021 ProCare Ltd filed an appeal against the Central Procurement and Supplies Unit as the Contracting Authority objecting to their disqualification on the grounds that their bid was deemed to be technically not compliant.

A deposit of € 529.60 was paid.

There were nine (9) bidders.

On 30th November 2021 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Dr Charles Cassar and Dr Vincent Micallef as members convened a public virtual hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – ProCare Ltd

Dr Robert Galea Legal Representative

Contracting Authority – Central Procurement and Supplies Unit

Dr Leon Camilleri	Legal Representative
Ms Marika Cutajar	Chairperson Evaluation Committee
Ms Solange Vella	Member Evaluation Committee
Mr Edmond Balzan	Member Evaluation Committee
Ms Miriam Wubbels	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.

Dr Robert Galea Legal Representative for ProCare Ltd started his submissions by pointing out the ambiguity in the heading of the refusal letter but conceded that the contents of the letter were very clear as to what they referred to. However, there was a lack of transparency in the letter as to which lot the refusal referred to and there is some subjectivity in the decision as the product was one very simple to evaluate. Reference was made to Clarification Note 3 in which bidder asked for an indication of the use and thickness of the product. The same product is currently in use at Mater Dei Hospital in a quantity of some 88,000 units in a repeat order so the decision that it is not up to standard required is subjective. The Declaration of Conformity indicated that the product meets the tender requirements. Reference was made to past tender CT 2272 which offered the same product and one lot of which was accepted as technically compliant whilst a second lot only failed on price offered, which means it had also passed technical compliance.

Dr Leon Camilleri Legal Representative for the CPSU said that the Contracting Authority accepts that the heading of the letter is incorrect but all other details, including tender number, are correct and as such there is hardly a reason to meet the request to cancel the tender. The validity of the product was up to the clinicians to decide and past tenders could not be considered in the context of this appeal. Samples do not exclude the Declaration of Conformity since they are the only way of ensuring that the product is compliant for its specific use.

Ms Marika Cutajar (469772M) called as a witness by Appellant testified on oath that she was the Chairperson of the Evaluation Committee. She stated that she was not involved in evaluating which was of a technical nature. It was the technical people who had replied to the clarification note referred to. Samples were requested as the Committee was not aware that the product was currently in use at the Hospital. The use of the product is tested by the end-user according to the needs of the patients. The Declaration of Conformity is mandatory and serves to confirm that the product meets the required standards. According to the witness the way that the refusal letter is worded indicates that the product failed on both lots.

Questioned by Dr Camilleri witness confirmed that she was not involved in the testing of the product and that the end-user is a clinician.

Mr Edmond Balzan (311966M) called as a witness by Appellant testified on oath that he was one of the evaluators of the tender and had experience of medical devices. He stated that it was normal that in tenders for medical products samples are usually requested. The only difference between the two lots was the size of the dressings. Samples are sent for testing by the end-users who provide the Committee with the feedback on the tests and it is people with the necessary expertise who decide on the suitability of products. Witness was not aware of the dressings currently in use at the Hospital and this helped to maintain the independence of views.

Ms Miriam Wubbels (311966M) called as a witness by Appellant testified on oath that she is a Nurse at Mater Dei Hospital with 30 years experience and 10 years work in tissue healing. She explained that dressings need certain properties for different uses including Stoma which has particular needs. The samples provided by Appellant were used in different situations but problems were encountered with them in a short time with dressings coming off, curling at the edges and not being resistant to water. A whole box of samples was used in different scenarios. Currently product was in use in Hospital as in one particular size that brand was the only one available. There have been several complaints about the quality of the brand in use but usually staff held back from putting the complaint in writing. Based on her clinical experience witness had made sure that the samples had been used in correct situations.

In reply to questions from Dr Camilleri, witness stated that her experience included teaching nurses wound assessment and she was involved in medical procurement. Difference between the two products offered was the size area and the tests had been carried out over a range of scenarios on repeat patients – she was an eyewitness to the problems.

This was the end of the testimonies.

Dr Galea said that the letter of refusal creates doubts and should be annulled as there was lack of transparency. Testimonies indicate that there was lack of subjectivity in the use of the product. The Declaration confirms that the product meets the requirements and its use by a tester made the exercise subjective. Ms Wubbels' testimony showed a certain degree of contradiction regarding the use of the current product and she was the only complainant – there is therefore an element of subjectivity. In PCRB Case 1516 the CPSU had proposed a new evaluation since there was some doubts on the product. If a product is used incorrectly it obviously would fail and lack of conformity arises from the way a product is used. The same product is currently in use with no complaints.

Dr Camilleri stated that the heading of the letter did not create any problems as evidenced by the present appeal – in any case it does not alter the sense of the letter. All medical products use is subjective. Ms Wubbels had thirty years experience and had extensive practice in the use of dressings and had testified that it had been used in several scenarios indicating that the product had been well tested. Mr Balzan had indicated impartiality in evaluating. Patients are entitled to the best product available. If there was an error of judgement that happens once and does not mean it has been repeated. Past tenders cannot be considered as they could well refer to a different product or brand. Tests carried out indicate that the product failed.

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

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 30th November 2021.

Having noted the objection filed by ProCare Ltd (hereinafter referred to as the Appellant) on 16th August 2021, refers to the claims made by the same Appellant with regards to the tender of reference CFT 020-0264/2021 (CPSU 0584/21) as case No. 1660 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Robert Galea

Appearing for the Contracting Authority: Dr Leon Camilleri

Whereby, the Appellant contends that:

- a) *About the ambiguity of the refusal* - Whereas while the tender in question is one which relates to Hydrocolloid dressings, at the same time the refusal decision makes reference to a 'Tender for the supply of Bair Hugger Blankets and filters'. Such products never formed part of the subject matter of the offer submitted by the Objector and thus the decision is one of a vague and ambiguous nature, making reference to various calls for tender, thus not embracing the element of certainty that is required of a Contracting Authority in communicating a decision related to a competition. Whereas moreover, without prejudice, the manner in which the refusal is communicated is such as to not be clear as to whether the alleged lack of compliance with technical specifications applies to both the lots with respect to which an offer was made, or whether the first reason relates to the first lot and the second to the second lot. In the light of such lack of clarity and ambiguity, the Objector is at a state of disadvantage in exercising its right to object in an effective manner.
- b) *About the lack of clarity of the refusal* - Whereas the Objector's offer was rejected upon the grounds that devices put forward were such as not to meet the required technical specifications. It is not clear as to how this conclusion was reached by the Contracting Authority and as to which lots the alleged shortcomings apply. Whereas it must be noted that the technical specifications which the Contracting Authority claims not to be met by the Objector's offer are highly objectionable, in that they are clearly subjective and as results from Clarification No. 3, the same Contracting Authority is clearly wrong in stating that the 'indications for use are equivalent' when referring to extra thin and standard thickness dressings. Such element of subjectivity coupled with such lack of technical correctness amounts to a very unpredictable, subjective and volatile adjudication process. Whereas the Objectors submit that the offer as made by them complies with all technical criteria, so much

so that the Objectors have in the past supplied (and are in fact presently still supplying) the same devices to the same Contracting Authority which has utilised the same and made repeated orders thereof.

- c) About the factual incorrectness of the refusal decision - Reference is made to the intrinsic nature and function of technical specifications. Technical specifications are at the very centre of the public procurement process. Consequently, it is through the proper and rigorous establishment and implementation of technical specification that a tenderer may be motivated and guided to submit an offer, and similarly, it is through the proper application of the same specifications that the Contracting Authority is to determine which offer merits to be chosen. So important are technical specifications that Contracting Authorities resort to the use of International Standards in order to ascertain that the required qualities of a product are clearly met with. Whereas in line with this, the devices in question are covered by a Declaration of Conformity covering their use - duly submitted to the Contracting Authority - and thus, there is no doubt that they are in conformity with the relative objective and qualitative standards against which their performance is to be judged. The fact that they are accompanied by such Declaration of Conformity clearly indicates that the alleged failures are not inherent to the devices, but are related to the use to which they have been subjected.
- d) About the fact that the introduction of adjudication criteria which were highly subjective renders the process arbitrary - A tender shall not include criteria which are used for the evaluation of the bids put forward and which are highly subjective in nature, depending solely on the consideration and personal reference of the assessor.
- e) About the obligation to exercise discretion in a just and proper manner - The appellant humbly submits that the discretion was not exercised in an equitable manner as there is a clear inconsistency in the way in which the Evaluation Committee decided in relation to criteria as established and required on the Technical Specifications sheet. This is tantamount to a unilateral decision on the part of the Evaluation Committee, which elected to introduce further conditions only at the adjudication stage, rendering the same decision *ultra vires*.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 25th August 2021 and its verbal submission during the virtual hearing held on 30th November 2021, in that:

- a) CPSU submit that the reference in the rejection letter ought to have read CPSU 0584/21 - Hydrocolloid Thin - Extra Thin Dressings instead of 'Tender for the Supply of Bair Hugger Blankets and Filters'. That said, the remaining content in the said rejection letter is correct and applied to the offers submitted by the objector for the tender in caption, that being 'CPSU 0584/21 - Hydrocolloid Thin - Extra Thin Dressings'. It must be stated that the mere error of indicating the wrong Tender in the rejection letter, does not alter or change the reasons why

the objector's offers were rejected during the evaluation for the tender in caption. Therefore, the objectors can never request this Board to deem the rejection letter as null and invalid in an attempt to justify the missing properties found in their product on offer. During the evaluation of the offers, the issues relative to the products offered by the objectors remain the same, and consequently, the rejection letter can not be deemed null and invalid, even more so when the objectors themselves opted to appeal to the rejection as well as to the actual reasons for rejection, thereby acknowledging the said letter which in truth, formed the basis of the objection as can be seen from the objection in question.

- b) CPSU further submit that the technical specifications were clear and unambiguous, wherein they clearly indicated that the dressing must: i) Dressing should remain in place without edges lifting, loosening or rolling until planned change of dressing. ii) Absorbent and waterproof.
- c) CPSU submit that in evaluating the offers as submitted, the Evaluation Committee is duty bound to analyse and review all information and documentation as submitted at Tendering stage in order to ensure that the evaluation of the offers is carried out in the best interest of the patient, as well as in the best interests of Public Procurement.
- d) In evaluating the samples submitted by the objectors, the end users found that the product did not remain in place for longer than one hour. In fact, as evidenced in the reasons for rejection, within the hour the dressing was found to be lifting off the skin already. Furthermore, the sample was found to not provide a moist environment and would just come off when used in the shower, even though the technical specifications required the product to be absorbent and waterproof.
- e) On the contrary to that being alleged by the objectors, the samples of each bidder were tested in the same manner, that being on patients with wounds requiring such dressings. This was done in order to ensure that a level playing field was provided to all bidders, thereby eliminating any form of discrimination or inequality, whilst ensuring that the Contracting Authority acquires the product which would be in the best interest of the patient, and which would adhere to the technical specifications as published in the Tender Dossier.
- f) Furthermore, CPSU contend that the objectors are wrong in claiming that there was lack of clarity of the refusal and that the CPSU introduced adjudication criteria. The evaluation was carried out according to normal procedure and protocol, and each and every product on offer was tested equally in order to determine whether the products actually adhered to the technical specifications and that all properties required are present in the products.

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 on two major points. The first being the ambiguity and / or lack of clarity of the Rejection Letter dated 6th August 2021. The second being the 'actual' reasons provided for the rejection of the decision, hereby referred to as the 'merits' of the case.

- a) *Ambiguity and / or lack of clarity of the Rejection Letter dated 6th August 2021* – The Board notes and makes reference to the following:
- i. The 'title' / 'subject matter' as listed within the Rejection Letter states "*Re: Tender for the supply of Bair Hugger Blankets and filters*". This contrary to the tender under appeal, being "*Supplies – Hydrocolloid Thin – Extra Thin Dressings*".
 - ii. The CFT Reference number as listed within the Rejection Letter is correctly stated as "*020-0264/21 (CPSU0584/21)*".
 - iii. The reason/s for rejection as provided within the Rejection Letter are clearly referring to the product to be supplied for tender referenced as 020-0264/21 (CPSU0584/21). This as stated under oath by Ms Marika Cutajar during her testimony. This is also evidenced by the same Letter of Objection as filed on 16th August 2021 whereby they are rebutting these same reasons of rejection.
 - iv. That the Rejection Letter however also fails to directly specify that the reasons provided apply to both Lot 1 and Lot 2 of this tender.

Hence, this Board opines that even though the reasons for rejection were clearly drafted in reference to the tender under appeal, the Rejection Letter contained ambiguities when it did not correctly disclose the 'title' / 'subject matter' and did not make specific reference to different lots. Therefore, the only way that the Appellant could deal with these ambiguities was to file this appeal before this Board.

The Board upholds this grievance of Appellant where it makes reference to the correct disclosure of the 'title' / 'subject matter' of the Rejection Letter. However, this Board notes that the reference number and reasons for rejection provided were correct and therefore the Appellant had enough information to base its appeal. Hence, this Board does not uphold the part of the grievance whereby the Appellant is requesting this Board to declare this Rejection Letter as null and void.

- b) **Reason provided for the rejection** – The Board notes and makes reference to the following:
- i. The testimony under oath of Ms Miriam Wubbels whereby she stated “...*that dressings need certain properties for different uses including Stoma which has particular needs. The samples provided by Appellant were used in different situations but problems were encountered with them in a short time with dressings coming off, curling at the edges and not being resistant to water. A whole box of samples was used in different scenarios.*”
 - ii. General Rules Governing Tenders V4.1 article 16.3 which states “*Whenever applicable, tenderers may be requested to submit samples so that the Evaluation Committee will corroborate the technical compliance of the offers received. Without prejudice to the possibility of requesting clarifications, where the samples do not corroborate the offer submitted, the tenderer shall be disqualified.*”
 - iii. The facts that; 1) Ms Wubbels has 30 years experience in the field, including 10 years within tissue healing and 2) the samples were used in different scenarios, removes any possible subjectivity.

Therefore this Board does not uphold these grievances of the Appellant.

The Board,

Having evaluated all the above and based on the above considerations, concludes and decides:

- a) To uphold the Appellant’s concerns and grievance in relation to the ambiguity of the ‘title’ / ‘subject matter’ as listed within the Rejection Letter dated 6th August 2021;
- b) Does not uphold all other grievances brought forward by the Appellant in their Letter of Appeal filed on the 16th August 2021, including those in relation to the actual specific merits of the case;
- c) Upholds the Contracting Authority’s decision in the recommendation for the award of the tender;
- d) After taking all due consideration of the circumstances and outcome of this Letter of Objection, directs that the deposit will be refunded to the Appellant due to the ambiguity as found within the Rejection Letter dated 6th August 2021.

Mr Kenneth Swain
Chairman

Dr Charles Cassar
Member

Dr Vincent Micallef
Member