

PUBLIC CONTRACTS REVIEW BOARD

Case No. 370

CT/2055/2011

Negotiated Procedure for the Supply of Incontinence Diapers and Pads for Senior Citizens and Persons with a Disability

This call closing date for this tender was the 26th April 2011.

The estimated value of this tender was €750,000.

Three (3) tenderers submitted their offers through a negotiated procedure.

Protex Ltd filed an objection on 31st October 2011 against the decision of the Department of Contracts to disqualify its offer on the basis of the latter bid being considered as non-compliant.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman and Mr Carmel Esposito and Mr Paul Mifsud as members convened a meeting on Friday, 20th January 2012 to discuss this objection.

Protex Ltd

Dr Jean Farrugia	Legal Representative
Mr Jonathan Guillaumier	Managing Director

Pharma-Cos Ltd

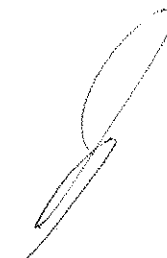
Mr James Borg	Representative
Mr Elton Mamo	Representative
Mr Edward Mifsud	Representative
Mr Claudio Martinelli	Representative

Ministry for Health, the Elderly and Community Care

Ms Stephanie Abela	Representative
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Evaluation Board

Mr Matthew Mangion	Chairman
Mr Marnol Sultana	Member
Mr George Pavia	Member
Ms Beatrice Vassallo	Member



After the Chairman's brief introduction, the appellant company's representative was invited to explain the motives of his company's objection.

Dr Jean Farrugia, legal advisor of Protex Ltd, the appellant company, made the following submissions:

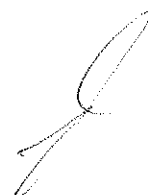
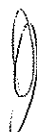
- by letter/email dated 19th October 2011 the Contracts Department had informed his client that the company's offer had been found to be non-compliant as follows:-
 - (i) distribution centre 2 - no waiting area was identified;
 - (ii) both distribution centers (1 and 2) - break between 12.30 and 13.30hrs.
 - (iii) leakage test of less than 0.09g and compliant to ISO 11948-1 - laboratory tests/certificates not submitted.

1) Distribution centre 2 - no waiting area was identified

Dr Farrugia made the following submissions:-

- i. clause 1.4.2 (page 56) stated that "*The centres offered by the successful tenderer/s must be well-lit and clean and have tiled floor. The distribution centre must offer a reception area with a number of seats available in the waiting area.*"
 - ii. the tender document requested two distribution centres and it appeared that there were no problems with regard to distribution centre 1 but the problem was attributed to distribution centre 2;
 - iii. his client had submitted the plans for both centres and in the event that the contracting authority encountered difficulty in understanding the tender submission then it could have sought a clarification or even visited the site as was done in previous similar calls for tenders;
 - iv. at tendering stage it was not possible to demonstrate that the centre was well lit and clean;
 - v. the tender document did not specify the number of seats that were to be provided in the waiting area and nor was the bidder asked to indicate the reception area;
- and
- vi. whilst the tender document did request the presentation of photographs, yet he argued that once the bidder would be awarded the tender would be bound to provide two distribution centres as per clause 1.4.2.

Mr Matthew Mangion, chairman of the adjudicating board, made the following remarks:-



- a. clause 1.4.4 (page 56) provided that “*Tenderers must give full details of these two centres at the tendering stage, including a plan, an elevation and four (4) photos (two internal and two external) of each proposed distribution centre;*”
 - b. from the photographs submitted by the appellant company with its tender submission it was quite clear that, with regard to distribution centre 1, there was a waiting area with a seating capacity but, on the other hand, it was clear from the photographs that distribution centre 2 did not have a waiting area with a seating capacity and neither did the appellant company make a written declaration that it had or would have such facilities;
 - c. that was a mandatory requirement as clearly indicated by the use of the term ‘must’ and the information given by the appellant company was quite clear that it left no room for any clarification;
 - d. clause 1.4.1 also requested that the premises had to be accessible to wheelchair users;
- and
- e. the contractor had to start supplying the diapers within 4 weeks from the date of the letter of acceptance.

Mr Jonathan Guillaumier, also representing the appellant company, conceded that distribution centre 1, which has already been used as a distribution centre and inspected by the Ministry for Health, the Elderly and Community Care, was larger than distribution centre 2. Nevertheless, he stressed that the contracting authority should have paid a visit to the site as was habitual when such tenders were issued.

The Chairman Public Contracts Review Board observed that photographs were requested for a specific purpose, namely to enable the contracting authority to visualise and to assess the facilities that were going to be made available to deliver the service along with any written declarations and undertakings provided by the bidder in the tender submission with regard to the provision of these facilities. He added that, prior to the closing date of the tender, bidders had the opportunity to clarify any grey areas concerning tender specifications.

The Public Contracts Review Board examined the photographs and the plans provided by the appellant company in its tender submission and it emerged quite clear that distribution centre 1 did provide for a waiting area with seating capacity and that it was tiled but, on the other hand, the photographs of distribution centre 2 did not demonstrate that this centre provided a waiting area with seating capacity and, apparently, no written submissions were made by the appellant company in this regard.



2) Both distribution centers (1 and 2) - break between 12.30 and 13.30hrs

Dr Farrugia submitted that:-

- i. clause 1.4.3 provided that *“The opening times of the distribution centres must be from Monday to Friday, from 10am to 4pm with no breaks in between. At least, one of the two centres offered must open on Saturday, from 10am to 12noon”*;
- ii. this was another provision which the tenderer would be bound to abide by once awarded the contract;
- iii. whilst his client presented in the company’s tender submission the present opening hours of the firm’s offices, which operated a break between 1230hrs and 1330 hrs., yet the tender document did not oblige the tenderer to submit the opening hours in the tender submission and, as a consequence, his client should not be excluded on information which the firm was not bound to provide at tendering stage;

and
- iv. clause 1.4.3 was to be enforced by the contracting authority during the execution of the contract and in the event that the contractor would default in that regard then the contractor could be warned and, if persisting, have the contract cancelled.

Mr Matthew Mangion, chairman of the adjudicating board, remarked that the tender specifications were quite clear with regard to the opening times of the distribution centres and the information submitted by the appellant company relating to the ‘incontinence service hours’ was quite clear, namely from 0830hrs to 1230hrs and from 1330hrs to 1530hrs Monday to Friday which clearly indicated that there would be a 1 hour break which contravened clause 1.4.3. He added that clause 1.4.3 was a mandatory requirement as clearly indicated by the use of the term ‘must’.

3) Leakage test of less than 0.09g and compliant to ISO 11948-1 - laboratory tests/certificates not submitted.

Dr Farrugia made the following submissions:-

- a. clause 2 of Vol. 3 ‘Technical Specifications’ (page 59) provided as follows:-

“All products of offers submitted by tenderers must be accompanied with:

- (i) the absorption test must be carried out by Malta National Laboratory and testing will be based on ISO 11948-1;*
- (ii) Leakage Rewetting Test must be carried out and Laboratory Test Report must be issued by the Malta National Laboratory.*



2.1 Any product test, with a result leak, of more than 0.09g, will not be considered and rejected outright at the tender opening stage.

2.2 Results obtained during testing on hip measurements of conventional all-in-one diapers, excluding pull-ups and other special designs, must have an overlap of 10 centimetres on each side."

- b. when his client had approached the Malta National Laboratory his representative was informed that the Malta National Laboratory was not ISO accredited and it therefore followed that it was not possible to submit with the tender submission the ISO-Accredited 11948-1 Certificate issued and accredited by the Malta National Laboratory as requested at 1.1 of Form 4.9 (page 36);

and

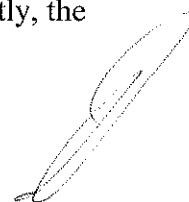
- c. contended that it was discriminatory to request this certificate only from the Malta National Laboratory and to exclude certificates issued by overseas ISO accredited laboratories.

Mr Guillaumier remarked that although the contracting authority also requested the *Leakage Rewetting Test*, yet no standard for this test was indicated even though ISO 11914-2 referred to this kind of test. Also, the contracting authority specified a rewet factor of 0.09g which applied to three of the four items requested in the tender but it did not apply with regard to the item 'Adult all-in-one diapers'.

Mr Joseph Bugeja, representing the Malta National Laboratory (presently the Malta Standards Authority), under oath, gave the following evidence:-

- i. the Malta National Laboratory had been carrying out the incontinence tests on behalf of the Ministry for Health, the Elderly and Community Care for a number of years and, in fact, the Malta National Laboratory was in a position to conduct the absorption test based on ISO 11948-1 as requested in clause 2 (page 59) (*emphasis added*);
 - ii. the Malta National Laboratory was not ISO accredited and, as a consequence, the Malta National Laboratory could not issue the ISO-Accredited 11948-1 Certificate mentioned at 1.1 of Form 4.9 'Literature/List of Samples';
- and
- iii. this absorption test was quite simple to carry out and, in this case, the difference between an ISO standard test and a test based on ISO standard was that the former used a stainless steel grid and in the latter a galvanised grid which produced a slightly different result was used.

Mr Mangion - after conceding that clause 2 page 65 mentioned in Form 4.9 was erroneous and should have read clause 2 at page 59 and that the clause numbering at page 59 was not correct and should have read at least 1 to 7 and, consequently, the



reference to clauses 2 to 8 in clause 1 was, likewise, incorrect - submitted the following remarks:-

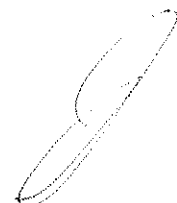
- a. clause 1 at page 59 stated that “*Failure to abide with the following clauses, 2 to 8 (both clauses included), will result in an automatic rejection of the tender offer*”;
 - b. clause 2 requested the Malta National Laboratory testing based on ISO 11948-1, which the appellant company did not submit;
 - c. regarding Annex C ‘Technical Compliance Grid’ of the evaluation report, clause 2.2 concerning the submission of the ISO 11914-1 Test, the space pertaining to the recommended tenderer (Pharma-Cos Ltd) was left blank because this was a negotiated procedure and during the meeting with tenderers instructions were issued to the effect that those tenderers who had submitted certificates in the original tender submission did not have to re-submit the certificates and Pharma-Cos Ltd was one which had submitted the ISO 11914-1 with its original tender submission;
- and
- d. the appellant company submitted no certificates, neither with the original tender submission nor with the negotiated procedure submission.

The Chairman Public Contracts Review Board noted that since all tenderers were requested the same kind of certificate from Malta National Laboratory there was no discrimination and, in any case, the appellant company could have raised this issue prior to the closing date of the tender and not participate and then raise the question at appeal stage. He noted that, similarly, no clarifications were sought by the appellant company prior to the closing date of the tender on (a) the ‘impossibility’ of Malta National Laboratory to issue ISO accredited certificates and (b) inapplicability of the re-wet test factor of 0.09g for adult all-in-one diapers.

The Chairman Public Contracts Review Board observed that, apparently, the drafter of the tender document did not distinguish between a Malta National Laboratory certificate based on ISO 11948-1 and ISO Accredited 11948-1 Certificate

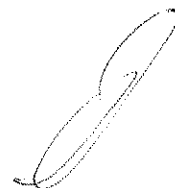
Mr Elton Mamo, representing Pharma-Cos Ltd, the recommended tenderer, remarked that the firm he represented had submitted the Malta National Laboratory test based on ISO 11914-1 in its original tender submission which, according to instructions issued at the negotiated procedure meeting, was to be considered still valid. He added that, at that same meeting, which he had attended, none of the participating tenderers, including his firm and the appellant company, raised the issue which was brought up at this hearing with regard to the technical discrepancy between the Malta National Laboratory test based on ISO 11914-1 (page 59) and the ISO Accredited 11948-1 Certificate issued and accredited by the Malta National Laboratory (page 36).

At this point the hearing was brought to a close.



This Board,

- having noted that the appellant company, in terms of the reasoned letter of objection dated 18th November 2011 and through the verbal submissions made during the hearing held on the Friday, 20th January 2012, had objected against the decision of the Department of Contracts to disqualify its offer on the basis of the latter bid being considered as non-compliant;
- having noted the appellant firm's representatives' claims and observations regarding the fact that (a) by letter/email dated 19th October 2011 the Contracts Department had informed the appellant company that its offer had been found to be non-compliant due to (i) distribution centre 2 - no waiting area was identified, (ii) both distribution centers (1 and 2) - break between 12.30 and 13.30hrs and (iii) leakage test of less than 0.09g and compliant to ISO 11948-1 - laboratory tests/certificates not submitted, (b) the tender document requested two distribution centres and it appeared that there were no problems with regard to distribution centre 1 but the problem was attributed to distribution centre 2, (c) the appellant company submitted the plans for both centres and in the event that the contracting authority encountered difficulty in understanding the tender submission then it could have sought a clarification or even visited the site as was done in previous similar calls for tenders, (d) at tendering stage it was not possible to demonstrate that the centre was well lit and clean, (e) the tender document did not specify the number of seats that were to be provided in the waiting area and nor was the bidder asked to indicate the reception area, (f) whilst the tender document did request the presentation of photographs, yet the appellant company argued that, once the bidder would be awarded the tender, would be bound to provide two distribution centres as per clause 1.4.2, (g) clause 1.4.3 was another provision which the tenderer would be bound to abide by once awarded the contract, (h) whilst the appellant company presented in the company's tender submission the present opening hours of the firm's offices, which operated a break between 1230hrs and 1330 hrs., yet the tender document did not oblige the tenderer to submit the opening hours in the tender submission and, as a consequence, it should not be excluded on information which the firm was not bound to provide at tendering stage, (i) clause 1.4.3 was to be enforced by the contracting authority during the execution of the contract and in the event that the contractor would default in that regard then the contractor could be warned and, if persisting, have the contract cancelled, (j) when the appellant company had approached the Malta National Laboratory his representative was informed that the Malta National Laboratory was not ISO accredited and it therefore followed that it was not possible to submit with the tender submission the ISO-Accredited 11948-1 Certificate issued and accredited by the Malta National Laboratory as requested at 1.1 of Form 4.9 (page 36), (k) it was discriminatory to request this certificate only from the Malta National Laboratory and to exclude certificates issued by overseas ISO accredited laboratories and (l) although the contracting authority also requested the *Leakage Rewetting Test*, yet no standard for this test was indicated even though ISO 11914-2 referred to this kind of test;



- having considered the contracting authority's representative's submissions, namely that (a) from the photographs submitted by the appellant company with its tender submission it was quite clear that, with regard to distribution centre 1, there was a waiting area with a seating capacity but, on the other hand, it was clear from the photographs that distribution centre 2 did not have a waiting area with a seating capacity and neither did the appellant company make a written declaration that it had or would have such facilities, (b) the submission of photos was a mandatory requirement as clearly indicated by the use of the term 'must' and the information given by the appellant company was quite clear that it left no room for any clarification, (c) clause 1.4.1 also requested that the premises had to be accessible to wheelchair users, (d) the tender specifications were quite clear with regard to the opening times of the distribution centres and the information submitted by the appellant company relating to the 'incontinence service hours' was quite clear, namely from 0830hrs to 1230hrs and from 1330hrs to 1530hrs Monday to Friday which clearly indicated that there would be a 1 hour break which contravened clause 1.4.3, (e) clause 1.4.3 was a mandatory requirement as clearly indicated by the use of the term 'must', (f) clause 2 page 65 mentioned in Form 4.9 was erroneous and should have read clause 2 at page 59 and that the clause numbering at page 59 was not correct and should have read at least 1 to 7 and, consequently, the reference to clauses 2 to 8 in clause 1 was, likewise, incorrect, (g) one had to take cognisance of the fact that clause 1 at page 59 stated that "*Failure to abide with the following clauses, 2 to 8 (both clauses included), will result in an automatic rejection of the tender offer*", (h) clause 2 requested the Malta National Laboratory testing based on ISO 11948-1, which the appellant company did not submit, (i) regarding Annex C 'Technical Compliance Grid' of the evaluation report, clause 2.2 concerning the submission of the ISO 11914-1 Test, the space pertaining to the recommended tenderer (Pharma-Cos Ltd) was left blank because this was a negotiated procedure and during the meeting with tenderers instructions were issued to the effect that those tenderers who had submitted certificates in the original tender submission did not have to re-submit the certificates and Pharma-Cos Ltd was one which had submitted the ISO 11914-1 with its original tender submission and (j) the appellant company submitted no certificates, neither with the original tender submission nor with the negotiated procedure submission;
- having also considered Malta National Laboratory's representative's submissions namely that (a) the Malta National Laboratory had been carrying out the incontinence tests on behalf of the Ministry for Health, the Elderly and Community Care for a number of years and, in fact, the Malta National Laboratory was in a position to conduct the absorption test based on ISO 11948-1 as requested in clause 2 (page 59), (b) the Malta National Laboratory was not ISO accredited and, as a consequence, the Malta National Laboratory could not issue the ISO-Accredited 11948-1 Certificate mentioned at 1.1 of Form 4.9 'Literature/List of Samples' and (c) this absorption test was quite simple to carry out and, in this case, the difference between an ISO standard test and a test based on ISO standard was that the former used a stainless steel grid and in the latter a galvanised grid which produced a slightly different result was used;

- having also considered the recommended tenderer's representative's submissions namely that (a) Pharma-Cos Ltd had submitted the Malta National Laboratory test based on ISO 11914-1 in its original tender submission which, according to instructions issued at the negotiated procedure meeting, was to be considered still valid and (b) at that same meeting, which he had attended, none of the participating tenderers, including his firm and the appellant company, raised the issue which was brought up at this hearing with regard to the technical discrepancy between the Malta National Laboratory test based on ISO 11914-1 (page 59) and the ISO Accredited 11948-1 Certificate issued and accredited by the Malta National Laboratory (page 36),

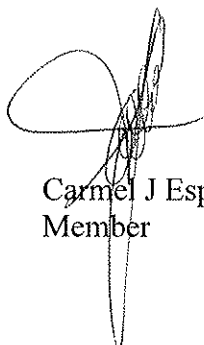
reached the following conclusions:

1. The Public Contracts Review Board opines that an examination of the photographs and the plans provided by the appellant company in its tender submission more than amply demonstrated that, whilst distribution centre 1 did provide for a waiting area which was tiled as well as having an adequate seating capacity, yet, on the other hand, the photographs of distribution centre 2 did not demonstrate that this centre provided a waiting area with seating capacity and no written submissions were made by the appellant company in this regard. This Board feels that such proof had to be somehow submitted and this is why it was mandatory for participating tenderers to do so as it is clear that evaluation committees have to have peace of mind brought about by the presence of corroborating documentation (including images, plans and so forth) when going through documentation. Undoubtedly, in this instance, this Board excludes the possibility of the evaluation committee seeking clarifications in regard as one either has a distribution centre which is already in place or not.
2. The Public Contracts Review Board feels that since all tenderers were requested the same kind of certificate from the Malta National Laboratory there was no discrimination and, in any case, the appellant company could have raised this issue prior to the closing date of the tender and not participate and then raise the question at appeal stage.
3. For the same reason this Board cannot accept the appellant company's objection with regard to their claim as to (a) the 'impossibility' of Malta National Laboratory to issue ISO accredited certificates and (b) inapplicability of the re-wet test factor of 0.09g for adult all-in-one diapers. Once again, this Board contends that the appellant company could have raised this issue prior to the closing date of the tender and not participate and then raise the question at appeal stage.

In view of the above this Board finds against the appellant company and recommends that the deposit paid by the latter should not be reimbursed.



Alfred R Triganza
Chairman



Carmel J Esposito
Member



Paul Mifsud
Member

6 February 2012