

PUBLIC CONTRACTS REVIEW BOARD

Case No. 430

CT/2184/2011; GPS 31032T11AD Tender for the Supply of Cochlear Implants

This call for tenders was published in the Government Gazette on the 20th September 2011. The closing date for this call with an estimated budget of € 1,350,000 (incl. VAT) was the 15th November 2011.

Two (2) tenderers submitted a total of three offers between them.

Trebee Ltd filed an objection on the 23rd April 2012 against the decision of Contracts Department to discard its offer as not the cheapest technically compliant offer and to recommend the award of tender to Charles de Giorgio Ltd.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr. Carmel Esposito and Mr Joseph Croker as members convened a public hearing on Wednesday, 4th July 2012 to discuss this objection.

Present for the hearing were:

Trebee Ltd

Prof Ian Refalo	Legal Representative
Mr Albert Buttigieg	Representative
Mr Riccardo Licari	Representative
Mr Jochen Nicolai	Expert

Charles de Giorgio Ltd

Mr Mark Bondin	Representative
Mr David Stellini	Representative
Mr Sebastian Foidi	Expert

Government Pharmaceutical Services

Mr Marlon Sultana	Representative
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Evaluation Board

Ms Connie Miceli	Chairperson
Mr Mario Said	Member/consultant
Dr Anthony Fenech	Member/consultant
Dr Elania Pace Balzan	Member/consultant
Ms Marthese Bonello	Secretary



After the Chairman's brief introduction, the appellant company's representatives were invited to explain the motives of the company's objection.

Prof Ian Refalo, legal representative of Trebee Ltd, the appellant company, made the following submissions:

- i. his client's contention was that the recommended tenderer was not technically compliant.
- ii. the tender technical specifications at page 37 provided, among other things, that:

'It should be compatible with a 3 tesla MRI with the magnet removed and 1.5tesla with the magnet in place. Please provide documentation to prove this. If removal of magnet is necessary safety and reduced risks should also be documented.'

- iii. the implant provided by the recommended tenderer was compatible only with a 1.5 tesla with the magnet in place and, therefore it did not meet this technical specification in full.

Mr Jochen Nicholai, representing the manufacturer of the product offered by the appellant company, confirmed that, whilst the appellant's product was fully compliant with tender specifications since it was compatible with both a 3 tesla MRI with the magnet removed and with a 1.5 tesla with the magnet in place, the product offered by the preferred bidder was compatible only with the 1.5 tesla with the magnet in place.


Mr Mario Said, consultant and member of the adjudicating board, submitted that:-

- a. the evaluation board did not interpret the technical specifications in a way that the implant had to be compatible with both the 3 tesla with the magnet removed and the 1.5 tesla with the magnet in place but that it had to be compatible with either one or the other;
- b. the evaluation board chose to be inclusive rather than exclusive in its interpretation because there were four manufacturers of these implants but only one, represented by the appellant company, produced implants compatible with both the 3 tesla removable magnet and the 1.5 tesla fixed magnet and had the evaluation board opted for this interpretation it would have excluded the other three manufacturers;

and

- c. had the evaluation board opted to be exclusive, it was most likely that the tender would have likewise ended up before the Public Contracts Review Board for requesting a product that only one supplier could provide, which effectively amounted to a direct order.

The Chairman Public Contracts Review Board remarked that the last sentence which read:



"If removal of magnet is necessary safety and reduced risks should also be documented"

seemed to imply that the drafter of the tender document had in mind either the 3 tesla removable magnet or the 1.5 tesla fixed magnet but not both options.

Prof Refalo argued that:-

- i. in his opinion, the proper interpretation of this technical specification was that the product had to be compatible with both a 3 tesla removable magnet and a 1.5 tesla fixed magnet because the term 'and' was a conjunction contrary to the term 'or' which was a disjunctive and so provided for an alternative;
- ii. his interpretation of the technical specification would have been different had the sentence read 'compatible with a 3 tesla if the magnet is removed and 1.5 tesla if the magnet is left in place';


and
- iii. since the product offered by the preferred bidder was compatible with the 1.5 tesla fixed magnet but not compatible with the 3 tesla removable magnet then that product was not fully compliant.

On his part, Mr Said expressed the following opinions:-

- a. this appeal revolved around the interpretation of the technical specification in question;
- b. clinically, the discussion was ongoing as to whether it was beneficial to have a removable magnet and, as a consequence, albeit it was too early to state if it was better to have a 3 tesla with removable magnet, yet it was a must that the product had to be at least compatible with a 1.5 tesla with fixed magnet;
- c. for all he knew, in five years time, one might have magnetic fields of 10 tesla but the problem was that, presently, the discussion was still ongoing as to the advantages of having 3 tesla with removable magnets;
- d. a 3 tesla could not be downscaled to, say, 1.5 tesla;
- e. once, presently, there was not enough evidence as to whether having removable magnets was a bonus, it was reasonable to opt for what was objectively available at the moment;

and
- f. it would be ideal to have an implant which could take any magnetic field but, unfortunately, that was not available yet.

At this point Prof Refalo submitted the following remarks:-



- i. whilst his client was not awarded the tender because it was more expensive than that of the recommended tenderer, yet Treebee Ltd's product was superior and it was technically compliant with both conditions which, perhaps, could explain the difference in the price from €618,750 to €740,520;
- ii. it could have been the case that whoever drafted the technical specifications had in mind the procurement of a product compatible with both conditions so as to make as wide use of it as possible and to look ahead;

and

- iii. without prejudice to his client's case, the Public Contracts Review Board should consider in its deliberations refunding the deposit to his client because it was clearly emerging that the appeal was not frivolous.

Mr Marlon Sultana, representing the contracting authority, informed those present that there were no previous calls for tenders to purchase this product but that a direct order had been placed for a product compatible with both the 3 tesla without magnet and 1.5 tesla with the magnet fixed.

Mr David Stellini, representing the recommended tenderer, submitted that:-

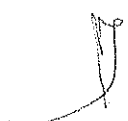
- a. he interpreted this technical specification in the same manner as the evaluation board, namely that it had to be compatible either with one or the other because if it was interpreted otherwise it would only apply to one manufacturer with the consequence that there would be no scope for the contracting authority to issue a tender as one might as well resort to a direct order;
- b. as far as he was aware, there were no previous tenders for the acquisition of this kind of product;

and

- c. there would be a price difference between a product compatible with the 3 tesla with removable magnet and a product compatible with the 1.5 tesla with fixed magnet.

The Chairman Public Contracts Review Board remarked that the Board had to consider, first and foremost, the technical specifications laid down in the tender document and to establish if the offers submitted were technically compliant or not according to the correct interpretation of the technical specification in question.

Mr Said stated that considering that this contract was to run for three years the evaluation board had also to take into account the element of price and opt for a cheaper product so long as it was technically compatible and presently available. He added that one could not rely on speculation as to what could take place in the next five or ten years when one hardly knew what developments might take place in the next two years.



Mr Sebastian Foidi, representing the manufacturer of the product offered by the preferred bidder, confirmed that there were four manufacturers of this kind of product but only one manufactured a product compatible with both 3 tesla with the magnet removed and 1.5tesla with the magnet in place. He added that there were many countries in Europe and elsewhere which were using a product compatible with the 1.5 tesla fixed magnet and one could not conclude that these countries were not operating according to good standards.

Mr Nicholai demonstrated to the Public Contracts Review Board the superior quality of the images produced by a 3 tesla with magnet removed against the images produced by a 1.5 tesla with a fixed magnet which, according to the appellant company's foreign principal's representative, justified the difference in the price.

Mr Said (i) whilst agreeing that a 3 tesla product provided better images, yet claimed that the removal of the magnet had its advantages and disadvantages, (ii) said that, given a choice, he would prefer having an implant that could withstand 3 tesla but if the contracting authority were to specify that the implant had to withstand 3 tesla then that would exclude all suppliers except for one and, in that case, one would end up before the Public Contracts Review Board just the same and (iii) concluded that this matter hinged on the interpretation of this particular technical specification on which the legal profession was better placed to decide upon.

Prof Refalo held that his client's interpretation of this particular technical specification was both legitimate and correct.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellants, in terms of their 'reasoned letter of objection' filed on the 14th May 2012 and also through their verbal submissions presented during the hearing held on the 4th July, 2012, had objected to the decision taken by the pertinent authorities;
- having noted all of the appellant company's representatives' claims and observations, particularly, the references made to the fact that (a) the appellant company's contention was that the recommended tenderer was not technically compliant, (b) whilst the appellant company's product was fully compliant with tender specifications since it was compatible with both a 3 tesla MRI with the magnet removed and with a 1.5 tesla with the magnet in place, the product offered by the preferred bidder was compatible only with the 1.5 tesla with the magnet in place, (c) the tender technical specifications at page 37 provided, *inter alia*, that (1) the product offered 'should be compatible with a 3 tesla MRI with the magnet removed and 1.5tesla with the magnet in place, (2) the product offered should be supported by documentary evidence and that (3) should removal of magnet be necessary safety and reduced risks should also be documented.', (d) the implant provided by the recommended tenderer was compatible only with a 1.5 tesla with the magnet in place and, as a result, it did not meet this technical specification in full, (e) the proper interpretation of this technical specification was that the product had to be compatible with both a 3 tesla removable magnet and a 1.5 tesla



fixed magnet because the term 'and' was a conjunction contrary to the term 'or' which was a disjunctive and so provided for an alternative, (f) his interpretation of the technical specification would have been different had the sentence read 'compatible with a 3 tesla if the magnet is removed and 1.5 tesla if the magnet is left in place', (g) since the product offered by the preferred bidder was compatible with the 1.5 tesla fixed magnet but not compatible with the 3 tesla removable magnet then that product was not fully compliant, (h) whilst the appellant company was not awarded the tender because it was more expensive than that of the recommended tenderer, yet Treebee Ltd's product was superior and it was technically compliant with both conditions which, perhaps, could explain the difference in the price from €618,750 to €740,520, (i) it could have been the case that whoever drafted the technical specifications had in mind the procurement of a product compatible with both conditions so as to make as wide use of it as possible and to look ahead and (j) without prejudice to the appellant company's case, the Public Contracts Review Board should consider in its deliberations refunding the deposit to his client because it was clearly emerging that the appeal was not frivolous;

- having considered the contracting authority's representatives' reference to the fact that (a) the evaluation board did not interpret the technical specifications in a way that the implant had to be compatible with both the 3 tesla with the magnet removed and the 1.5 tesla with the magnet in place but that it had to be compatible with either one or the other, (b) the evaluation board chose to be inclusive rather than exclusive in its interpretation because there were four manufacturers of these implants but only one, represented by the appellant company, produced implants compatible with both the 3 tesla removable magnet and the 1.5 tesla fixed magnet and had the evaluation board opted for this interpretation it would have excluded the other three manufacturers, (c) had the evaluation board opted to be exclusive, it was most likely that the tender would have likewise ended up before the Public Contracts Review Board for requesting a product that only one supplier could provide, which effectively amounted to a direct order, (d) this matter hinged on the interpretation of this particular technical specification on which the legal profession was better placed to decide upon, (e) clinically, the discussion was ongoing as to whether it was beneficial to have a removable magnet and, as a consequence, albeit it was too early to state if it was better to have a 3 tesla with removable magnet, yet it was a must that the product had to be at least compatible with a 1.5 tesla with fixed magnet, (f) for all one knew at the moment, in five years time, one might have magnetic fields of 10 tesla but the problem was that, presently, the discussion was still ongoing as to the advantages of having 3 tesla with removable magnets, (g) a 3 tesla could not be downscaled to, say, 1.5 tesla, (h) once, presently, there was not enough evidence as to whether having removable magnets was a bonus, it was reasonable to opt for what was objectively available at the moment, (i) it would be ideal to have an implant which could take any magnetic field but, unfortunately, that was not available yet, (j) considering that this contract was to run for three years the evaluation board had also to take into account the element of price and opt for a cheaper product so long as it was technically compatible and presently available being also fully cognizant of the fact that one could not rely on speculation as to what could take place in the next five or ten years when one hardly knew what developments might take place in the next two years, (k) whilst agreeing that a 3 tesla product provided better

images, yet claimed that the removal of the magnet had its advantages and disadvantages and (l) given a choice, professionally speaking, one would prefer having an implant that could withstand 3 tesla but if the contracting authority were to specify that the implant had to withstand 3 tesla then that would exclude all suppliers except for one and, in that case, one would end up before the Public Contracts Review Board just the same;

- having considered the recommended tenderer's representatives' reference to the fact that (a) the evaluation board was correct in interpreting the specification in the tender document as the product being offered having to be compatible either with one or the other because if it was interpreted otherwise it would only apply to one manufacturer with the consequence that there would be no scope for the contracting authority to issue a tender and that, in the circumstances, one might as well resort to a direct order, (b) as far as he was aware, there were no previous tenders for the acquisition of this kind of product, (c) there would be a price difference between a product compatible with the 3 tesla with removable magnet and a product compatible with the 1.5 tesla with fixed magnet, (d) there were four manufacturers of this kind of product but only one manufactured a product compatible with both 3 tesla with the magnet removed and 1.5 tesla with the magnet in place and (e) there were many countries in Europe and elsewhere which were using a product compatible with the 1.5 tesla fixed magnet and one could not conclude that these countries were not operating according to good standards,

reached the following conclusions, namely:

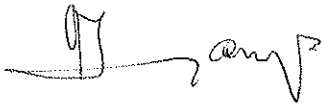
1. The Public Contracts Review Board agrees with the interpretation given to the specifications by the evaluation board wherein it was argued that the implant did not have to be compatible with both the 3 tesla with the magnet removed and the 1.5 tesla with the magnet in place but that it had to be compatible with either one or the other.
2. This Board, whilst appreciating the fact that the evaluation board chose to be inclusive rather than exclusive in its interpretation because although there were four manufacturers of these implants yet only one, represented by the appellant company, produced implants compatible with both the 3 tesla removable magnet and the 1.5 tesla fixed magnet and had the evaluation board opted for this interpretation it would have excluded the other three manufacturers, yet, predominantly, feels that such reasoning remained valid because, clinically, the discussion was ongoing as to whether it was beneficial to have a removable magnet and, as a consequence, albeit it was too early to state if it was better to have a 3 tesla with removable magnet, yet it was a must that the product had to be at least compatible with a 1.5 tesla with fixed magnet. Also, as argued by the chairman of the evaluation board, once, presently, there was not enough evidence as to whether having removable magnets was a bonus, it was reasonable for one to opt for what was objectively – from a cost/benefit perspective - available at the moment. Such interpretation tends to accentuate the real scope of the specifications. In this context this Board also accepts the logic behind the reasoning made by the evaluation board wherein, *inter alia*, it was argued that, considering that this contract was to run for three years the evaluation board had also to take into account the element of price and opt for a cheaper product so long



as it was technically compatible and presently available being also fully cognizant of the fact that one could not rely on speculation as to what could take place in the next five or ten years when one hardly knew what developments might take place in the next two years.


In view of the above, this Board finds against the appellant company.

However, having taken full cognizance of the fact that since there could have been a remote possibility that the specification, as stated, could have given rise to a potential misinterpretation of scope, the Public Contracts Review Board feels that the filing of the objection by the appellant company was not made in a frivolous manner and, as a result, it recommends that the deposit paid for the appeal to be lodged be reimbursed.



Alfred R Triganza
Chairman

11th July 2012



Carmel Esposito
Member



Joseph Croker
Member