

PUBLIC CONTRACTS REVIEW BOARD

Case No. 435

GHPST/2006/2012

Tender for the Supply of Chromogenic Culture Media

This call for tenders was published in the Government Gazette on the 13th January 2012. The closing date for this call with an estimated budget of € 40,415 was the 13th February 2012.

Four (4) tenderers submitted their offers.

Messrs Technoline Ltd filed an objection on the 14th May 2012 against the decision of the Ministry for Health, the Elderly and Community Care to disqualify its offer and to recommend the award of the tender to Drugsales Ltd.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr Joseph Croker and Mr Paul Mifsud as members convened a public hearing on Monday 23rd July, 2012 to discuss this objection.

Present for the hearing were:

Technoline Ltd

Mr Ivan Vassallo	Representative
Mr Christopher Rizzo	Representative

Drugsales Ltd

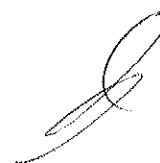
Mr Andrea Gera de Petri	Representative
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Central Procurement and Supplies Unit (CPSU) of the Ministry for Health, the Elderly and Community Care (MHEC)

Ms Stefanie Abela	Representative
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Evaluation Board

Ms Connie Miceli	Chairperson
Ms Julie Haider	Member
Ms Carmen Buttigieg	Secretary



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

Mr Ivan Vassallo, representing Technoline Ltd, the appellant company, explained that:

- i. by letter dated 8th May 2012 the contracting authority had informed his firm that its offer was not successful since the list of principal deliveries was not submitted;

and

- ii. clause 16.1 (c) of the tender document did not indicate that the evaluation criteria/technical specifications included the submission of the list of principal deliveries.

At that point the Chairman Public Contracts Review Board drew the attention of Mr Vassallo that clause 16.1 (b) 'Technical Capacity' dealt precisely with the 'List of Principal Deliveries for medical devices (Volume 1 Section 4, No. 4) and that Note 2 did not allow any rectification but only clarifications on the submitted information could be requested.

Mr Vassallo submitted that:-

- a. 'culture medium' was a liquid or substance containing nutrients in which microorganisms or tissues or bacteria were cultivated for scientific purposes and one could say that it formed a component of a medical device;
- b. page 23 of the tender document displayed the 'Documents/List of Samples in respect of the item being offered' and that the list of principal deliveries was not one of them;
- c. with regard to page 22 of the tender document which referred to the 'List of Principal Deliveries of Medical devices', his firm had signed that form and indicated N/A thereon, namely not applicable, because, in his opinion, the item 'chromogenic culture media' was a 'chemical' and not a 'medical device';
- d. his firm could not provide a list of principal deliveries of medical devices related to the item offered because, in actual fact, the item offered/requested, 'chromogenic culture media' was a chemical and not a medical device or, at most, it was a component of a medical device;

and

- e. his firm was well known to the local health authorities as it had been supplying them with medical items for the past 34 years.

Ms Connie Miceli, chairperson of the adjudicating board, remarked that it was a standard requirement in the issue of such tenders to ask for the list of principal



deliveries and that the items did not necessarily have to be identical to the ones being purchased because the purpose behind the submission of this list was to find out with whom the contracting authority was going to deal, its technical capacity.

Ms Carmen Buttigieg, secretary of the adjudicating board, informed that, following a meeting with a representative of the Malta Medicines Authority, it was explained that a medical device included the components of a medical device.

At this stage the Public Contracts Review Board went through the tender submission of the recommended tenderer and confirmed that it had submitted the list of principal deliveries of medical devices.

The Chairman Public Contracts Review Board remarked that:-

- i. the point of departure should be that the 'List of Principal Deliveries of Medical devices' was requested for a purpose and that it should therefore be filled in and submitted and, if what was being requested did not make much sense to the bidder then the bidder could have asked for a clarification;
 - ii. it was not the prerogative of the bidder to omit the submission of mandatory information;
- and
- iii. the contracting authority should provide all available information that would assist the bidder in drawing up one's tender submission such as the advice given by the Malta Medicines Authority with regard to what constituted a 'medical device'.


Ms Stephanie Abela, representing the contracting authority, informed those present that the relative template had since been amended in a way that bidders who, over the previous three year period, were regular suppliers to Ministry for Health, the Elderly and Community Care were no longer being required to submit the list of principal deliveries.

Dr Andrea Gera de Petri, representing Drugsales Ltd, remarked that one could find the distinction between a 'pharmaceutical' and a 'medical device' in the Medicines Act and VAT legislation. He added that anything that was not a pharmaceutical was a medical device.

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 23rd 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) by letter dated 8th May 2012 the contracting authority had informed the appellant company that its offer was not successful since the list of principal deliveries was not submitted, (b) clause 16.1 (c) of the tender document did not indicate that the evaluation criteria/technical specifications included the submission of the list of principal deliveries, (c) 'culture medium' was a liquid or substance containing nutrients in which microorganisms or tissues or bacteria were cultivated for scientific purposes and one could say that it formed a component of a medical device, (d) page 23 of the tender document displayed the 'Documents/List of Samples in respect of the item being offered' and that the list of principal deliveries was not one of them, (e) with regard to page 22 of the tender document which referred to the 'List of Principal Deliveries of Medical devices', the appellant company had signed that form and indicated "N/A" thereon, namely not applicable, because, in the firm's opinion, the item 'chromogenic culture media' was a 'chemical' and not a 'medical device' and (f) the appellant company could not provide a list of principal deliveries of medical devices related to the item offered because, in actual fact, the item offered/requested, 'chromogenic culture media' was a 'chemical' and not a 'medical' device or, at most, it was a component of a medical device and (g) the appellant company was well known to the local health authorities as it had been supplying them with medical items for the past 34 years;
- having considered the contracting authority's representatives' reference to the fact that (a) it was a standard requirement in the issue of such tenders to ask for the list of principal deliveries and that the items did not necessarily have to be identical to the ones being purchased because the purpose behind the submission of this list was to find out with whom the contracting authority was going to deal and its technical capacity, (b) following a meeting with a representative of the Malta Medicines Authority, it was explained that a 'medical device' included the components of a 'medical device' and (c) the relative template had since been amended in a way that bidders who, over the previous three year period, were regular suppliers to Ministry for Health, the Elderly and Community Care were no longer being required to submit the list of principal deliveries;
- having considered the recommended tenderer's representatives' reference to the fact that one could find the distinction between a 'pharmaceutical' and a 'medical device' in the Medicines Act and VAT legislation adding that anything that was not a pharmaceutical was a medical device,

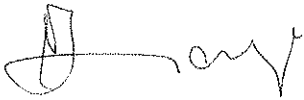
reached the following conclusions, namely:

1. The Public Contracts Review Board feels that the fact that clause 16.1 (b) 'Technical Capacity' dealt precisely with the 'List of Principal Deliveries for medical devices (Volume 1 Section 4, No. 4) and that Note 2 did not allow any rectification/s but only allowed clarification requests on the submitted information provided enough evidence against what the appellant company's had stated in its objection and which was duly filed.
2. This Board argues that the 'List of Principal Deliveries of Medical devices' was requested for a purpose and that it should have been filled in and submitted and if

what was being requested did not make much sense to the appellant company then the latter could have asked for a clarification.

3. This Board contends that it is not the prerogative of a participating tenderer to omit the submission of mandatory information.
4. For future reference the Public Contracts Review Board, whilst it feels that professional people should know precisely the definition of the term 'medical device', yet for further clarity's sake and with a view to avoid any possible misunderstandings, suggests that the contracting authority should perhaps provide all available information to participating tenderers as to what the term 'medical device' really means, at least within the context of the tender document.


In view of the above, this Board finds against the appellant company and recommends that the deposit paid by the appellant company for the appeal to be lodged should not be reimbursed.



Alfred R Triganza
Chairman



Joseph Croker
Member



Paul Mifsud
Member

31st July 2012