

PUBLIC CONTRACTS REVIEW BOARD

Case No. 464

61.289.D.10.OT

Tender for the Supply of Cortex Screws 4.5mm

This call for tenders was published in the Government Gazette on the 11th March 2011. The closing date for this call with an estimated budget of € 71,218 was the 11th April 2011.

Five (5) tenderers submitted their offers.

Pharma-Cos Ltd filed an objection on the 26th June 2012 against the decision of the Central Procurement Supplies Unit of the Ministry for Health, the Elderly and Community Care to disqualify its tender as technically non compliant and to recommend the award of tender to Technoline Ltd..

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr Carmel Esposito and Mr Paul Mifsud as members convened a public hearing on Monday, 8th October 2012 to discuss this objection.

Present for the hearing were:

Pharma-Cos Ltd

Mr Stephen Attard	Representative
Mr Marcel K. Mifsud	Representative

Technoline Ltd

Mr Ivan Vassallo	Representative
Mr Felisia Sammut	Representative

Central Procurement Supplies Unit (CPSU) of the Ministry for Health, the Elderly and Community Care (MHEC)

Mr George Fenech	Representative
Mr Joseph Xuereb	Representative

Evaluation Board

Mr David Grech	Member
Ms Rita Zammit	Member



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

Mr Marcel Mifsud, representing Pharma-Cos Ltd, the appellant company, made the following submissions:

- i. by letter dated 21st June 2012 the contracting authority had informed his company that the offer was not successful since the price offered was higher than that awarded;
- ii. these screws were used to remedy cases of fractured bones;
- iii. Volume 3 'Technical Specifications', page 30 of the tender document, stated, among other things, that:-

Cortex Screws 4.5cm thread diameter, 3.0mm core diameter, with hexagonal socket 3.5mm width across flats, head diameter 0.8mm, made of stainless steel of type AISI316L, tolerances regarding chemical composition, impurity content, mechanical stress, shape and design, according to AO/ASIF specification;

- iv. what his firm was contesting was whether the products offered by the recommended tenderer satisfied this particular specification, namely if they were according to AO/ASIF specification;
 - v. the product he offered were implants trademarked Synthes® approved by the AO Foundation and supplied by Synthes GmbH – manufacturer and distributor of original instruments and implants of the Association for the Study of Internal Fixation (AO/ASIF);
- and
- vi. if the product offered by the recommended tenderer was according AO/ASIF specifications then the appellant company would withdraw the appeal but, as far as the company's representative was aware, there were no other local suppliers of such products which were according to AO/ASIF specifications as requested in the tender document.

Mr George Fenech, representing the contracting authority, explained that:-

- a. the tender specifications were those cited by the appellant company;
- b. the appellant company had exclusivity over AO/ASIF through its overseas supplier, Synthes;
- c. there were other suppliers of similar screws made of the same material;
- d. in 1958 a group of medical professionals had set up an association which pioneered a certain procedure of how to deal with bone fractures so as to prevent infections and, over the years, this association turned into a foundation



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which remained a prominent body for the certification and production of such items;

and

- e. the Department of Health was using two types of cortex screws, one type supplied by the appellant company and another supplied by the recommended tenderer, both of which were of an acceptable standard.

Mr David Grech, a member of the evaluation board, under oath, gave the following evidence:-

- i. the evaluation board recommended the tender submitted by Technoline Ltd because, besides quoting a cheaper price, it presented a product which was equivalent to AO/ASIF specifications as evidenced by the certificate to that effect presented by Technoline's supplier, Zimmer GmbH;
 - ii. albeit the Department of Health was using two types of cortex screws, one type supplied by the appellant company and another supplied by the recommended tenderer, both of which were of a good standard, yet, the parts of one were not compatible with the parts of the other and, as a consequence, only as far as the purchase of parts was concerned, one had to purchase the parts according to the specific product one intended to service;
- and
- iii. the contracting authority had issued other tenders with the same specifications but no objections had been raised

The Chairman Public Contracts Review Board remarked that a certificate of conformity should be issued by a competent third party and not by the same supplier as the latter was, practically, useless for evaluation purposes because it did not provide the required peace of mind.

Mr Ivan Vassallo, representing Technoline Ltd, the recommended tenderer, submitted the following explanations:-

- a. AO/ASIF was not a standard but a specification set by a group of surgeons;
- b. the AO Foundation started as an NGO but then, in 1959 or so, under the name of 'Synthes' started manufacturing products according to AO/ASIF specifications and, therefore, the Foundation would not approve any other competing products even if they were just as good as theirs because it had a vested interest in Synthes;
- c. his company's interpretation of the tender specifications was that the product had to be equivalent to AO/ASIF specifications and not as the appellant company's was implying, namely, that the product had to be 'Synthes', which was a trademark;

- d. if one would insist on Synthes then one could have well issued a direct order thereby excluding competition;
 - e. he presented a list of 'Zimmer' cortical screws with corresponding Synthes and Zimmer – the supplier of the recommended tenderer - reference numbers and stated that Synthes had not objected to that technical literature provided by Zimmer, which, he claimed, was one of the largest entities in this line of business and a Fortune 100 company;
- and
- f. over the past six years his firm had been awarded tenders issued by the same contracting authority with similar technical specifications.

The Chairman Public Contracts Review Board observed that the tender specification did not include the term 'or equivalent to' but required the items to be 'according to AO/ASIF specification'.

Mr Mifsud remarked that the AO Foundation was still engaged in research and development on fracture treatment and it derived its revenue from royalties of sales of Synthes trademark products. He added that if Zimmer would start paying royalties he was confident the AO Foundation Technical Commissions (AOTK) would certify that Zimmer's product also conformed with AO/ASIF. He argued that if the contracting authority did not require the product to be according to AO/ASIF specification then it should do away with that specification.

Mr Vassallo retorted that the way the appellant company's representative put it, then it was only a matter of money and not a matter of standards and quality. He insisted that the product his firm offered was according to published tender specifications.

Mr Fenech stated that:-

- i. it was not probable that the AO Foundation would grant anyone an AO/ASIF certificate unless one was a shareholder in that entity;
 - ii. many tender documents were in certain respects outdated and efforts were being made to review these documents;
 - iii. what had happened in this case was that the title of the tender had been amended to read 'Cortex Screws 4.5 mm' so as to avoid trademark names but the specifications in Volume 3 'Technical Specifications' were not, similarly, amended and so the reference to specification AO/ASIF persisted;
- and
- iv. the appellant company could be right in this case but what the contracting authority was interested in was not to finance an entity whose business was research and development but its main concern was to cure patients by purchasing good products at favourable prices.



Mr Stephen Attard, also representing Pharma-Cos Ltd, remarked that, as explained by Mr Grech, Mater Dei Hospital made use of two distinct systems and, as a result, there was nothing odd in one ordering parts for a specific system, be it 'Synthes' or 'Zimmer', since the parts of one system were not compatible with the other system.

At this point the hearing came to a close.

This Board,

- having noted that the appellants, in terms of their 'reasoned letter of objection' dated the 26th June 2012 and also through their verbal submissions presented during the hearing held on the 8th October 2012, had objected to the decision taken by the pertinent authorities;
- having noted all of the appellant company's representative's claims and observations, particularly, the references made to the fact that (a) by letter dated 21st June 2012 the contracting authority had informed the appellant company that the offer was not successful since the price offered was higher than that awarded, (b) these screws were used to remedy cases of fractured bones, (c) Volume 3 'Technical Specificaitons', page 30 of the tender document, stated, among other things, that "*Cortex Screws 4.5cm thread diameter, 3.0mm core diameter, with hexagonal socket 3.5mm width across flats, head diameter 0.8mm, made of stainless steel of type AISI316L, tolerances regarding chemical composition, impunity content, mechanical stress, shape and design, according to AO/ASIF specification*", (d) what the appellant company was contesting was whether the products offered by the recommended tenderer satisfied this particular specification, namely if they were according to AO/ASIF specification, (e) the product the company offered were implants trademarked Synthes® approved by the AO Foundation and supplied by Synthes GmbH – manufacturer and distributor of original instruments and implants of the Association for the Study of Internal Fixation (AO/ASIF), (f) if the product offered by the recommended tenderer was according AO/ASIF specifications then the appellant company would withdraw the appeal but, as far as the company's representative was aware, there were no other local suppliers of such products which were according to AO/ASIF specifications as requested in the tender document, (g) apart from the fact that the AO Foundation was still engaged in research and development on fracture treatment and it derived its revenue from royalties of sales of Synthes trademark products, it was also a fact that if Zimmer would start paying royalties one would be confident that the AO Foundation Technical Commissions (AOTK) would certify that Zimmer's product also conformed with AO/ASIF, (h) if the contracting authority did not require the product to be according to AO/ASIF specification then it should do away with that specification and (i) as explained by Mr Grech, Mater Dei Hospital made use of two distinct systems and, as a result, there was nothing odd in one ordering parts for a specific system, be it 'Synthes' or 'Zimmer', since the parts of one system were not compatible with the other system;
- having considered the contracting authority's representative's reference to the fact that (a) the tender specifications were those cited by the appellant company, (b) the appellant company had exclusivity over AO/ASIF through its overseas supplier, Synthes, (c) there were other suppliers of similar screws made of the

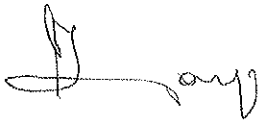
same material, (d) in 1958 a group of medical professionals had set up an association which pioneered a certain procedure of how to deal with bone fractures so as to prevent infections and, over the years, this association turned into a foundation which remained a prominent body for the certification and production of such items, (e) the Department of Health was using two types of cortex screws, one type supplied by the appellant company and another supplied by the recommended tenderer, both of which were of an acceptable standard, (f) the evaluation board recommended the tender submitted by Technoline Ltd because, besides quoting a cheaper price, it presented a product which was equivalent to AO/ASIF specifications as evidenced by the certificate to that effect presented by Technoline's supplier, Zimmer GmbH, (g) albeit the Department of Health was using two types of cortex screws, one type supplied by the appellant company and another supplied by the recommended tenderer, both of which were of a good standard, yet, the parts of one were not compatible with the parts of the other and, as a consequence, only as far as the purchase of parts was concerned, one had to purchase the parts according to the specific product one intended to service, (h) the contracting authority had issued other tenders with the same specifications but no objections had been raised, (i) it was not probable that the AO Foundation would grant anyone an AO/ASIF certificate unless one was a shareholder in that entity, (j) many tender documents were in certain respects outdated and efforts were being made to review these documents, (k) what had happened in this case was that the title of the tender had been amended to read 'Cortex Screws 4.5 mm' so as to avoid trademark names but the specifications in Volume 3 'Technical Specifications' were not, similarly, amended and so the reference to specification AO/ASIF persisted and (l) the appellant company could be right in this case but what the contracting authority was interested in was not to finance an entity whose business was research and development but its main concern was to cure patients by purchasing good products at favourable prices;

- having considered the recommended tenderer's representative's reference to the fact that (a) AO/ASIF was not a standard but a specification set by a group of surgeons, (b) the AO Foundation started as an NGO but then, in 1959 or so, under the name of 'Synthes' started manufacturing products according to AO/ASIF specifications and, therefore, the Foundation would not approve any other competing products even if they were just as good as theirs because it had a vested interest in Synthes, (c) the company's interpretation of the tender specifications was that the product had to be equivalent to AO/ASIF specifications and not as the appellant company's was implying, namely, that the product had to be 'Synthes', which was a trademark, (d) if one would insist on Synthes then one could have well issued a direct order thereby excluding competition, (e) the company presented a list of 'Zimmer' cortical screws with corresponding Synthes and Zimmer – the supplier of the recommended tenderer - reference numbers and stated that Synthes had not objected to that technical literature provided by Zimmer, which, the recommended tenderer claimed, was one of the largest entities in this line of business and a Fortune 100 company, (f) over the past six years, the company had been awarded tenders issued by the same contracting authority with similar technical specifications, (g) the way the appellant company's representative put it, then it was only a matter of money and not a matter of standards and quality and (h) the company's representative insisted that the product his firm offered was according to published tender specifications,

reached the following conclusions, namely:

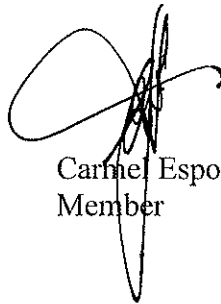
1. The Public Contracts Review Board opines that a certificate of conformity should be issued by a competent third party and not by the same supplier as the latter was, practically, useless for evaluation purposes because it did not provide the required peace of mind. Needless to say that this Board contends that the evaluation board should have dug deeper and ensured the attainment of such certificate from an independent entity.
2. The Public Contracts Review Board argues that the phrase "*according to AO/ASIF specification*" was not properly verifiable in view of the lack of adequate certification attained from the recommended tenderer.
3. This Board feels that if the contracting authority did not require the product to be according to AO/ASIF specification then it should have done away with that specification.

In view of the above, this Board recommends that (a) in view of the lack of adequate specifications, this tender be reissued without the phrase "*according to AO/ASIF specification*" and (b) the deposit paid by the same appellant company for the appeal to be lodged should be reimbursed.

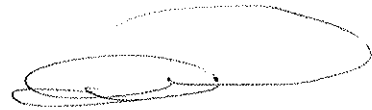


Alfred R Triganza
Chairman

26 October 2012



Carmel Esposito
Member



Paul Mifsud
Member