

PUBLIC CONTRACTS REVIEW BOARD

Case No. 496

DH/4620/2011

Tender for the Supply of Four Portable Patient Monitors - Mater Dei Hospital

This call for tenders was published in the Government Gazette on the 2nd March 2012. The closing date for this call with an estimated budget of € 25,000 was the 4th April 2012.

Three (3) tenderers submitted their offers.

Pharma-Cos Ltd filed an objection on the 2nd October 2012 against the decisions of the Ministry for Health, the Elderly and Community Care to disqualify its tender as technically non-compliant and to recommend the award of the tender to Triomed 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 Tuesday, 27th November 2012 to discuss this objection.

Pharma-Cos Ltd

Mr Marcel Mifsud	Director
Mr Stephen Attard	Representative
Mr John Cauchi	Representative

Triomed Ltd

Mr Alex Vella	Representative
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Central Procurement and Supplies Unit (CPSU) - Ministry for Health, the Elderly and Community Care (MHEC)

Dr Adrian Mallia	Legal Representative
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Evaluation Board

Mr Stephen Mercieca	Chairman
Mr Vincent Gatt	Member
Mr Jimmy Bartolo	Member
Ms Isabelle Amato	Secret



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

Mr Stephen Attard, representing Pharma-Cos Ltd, the appellant company, submitted that:-

- i. by letter/email dated 26th September 2012 the Central Procurement and Supplies Unit of the Ministry for Health, the Elderly and Community Care informed the appellant company that its offer was found to be technically non-compliant because the screen of the monitor offered was 10.4" instead of between 3.0" and 4.0" as requested;
 - ii. Volume 3 'Technical Specifications' provided, among other things, that "*The diagonal dimension of the monitor shall be between 3.0" and 4.0", with a max weight of 2.0 kg and up to 3 kg*";
 - iii. no clarification was sought from the contracting authority as to whether the tenderer could deviate from the tender technical specifications;
 - iv. the product offered met the contracting authority's request at page 32 which stated that "*The Monitor shall be fully user configurable and shall be flexible to create screens that are considered acceptable to the medical staff*";
- and
- v. his firm was offering a cheaper monitor with a screen larger than that offered by the recommended tenderer and, as a result, the offer should not have been disqualified.

The Chairman Public Contracts Review Board remarked that tenderers were requested and expected to offer a product according to the published technical specifications and they were not free to set their own technical specifications otherwise it would be pointless to publish the technical specifications. He added that price was one of the evaluation criteria and that aspect was considered after the offer would have been found administratively and technically compliant.

Dr Adrian Mallia, legal representative of the contracting authority, remarked that the tender title itself clearly requested 'portable patient monitors' and the size of the screen/monitor reflected the basic requirement that these had to be 'portable' monitors and not office monitors. He agreed that that one would view things better on a bigger screen but this particular (portable) monitor had to be moved about and hence the restriction on the screen size and consequently the overall size and weight.

Mr Marcel Mifsud, also representing the appellant company, remarked that the contracting authority had indicated that the monitor had to be acceptable to medical staff (page 32) and he questioned whether the contracting authority had, in fact, consulted the medical staff/end users as to the type of monitor required.

The Chairman Public Contracts Review Board stated that if the tenderer had any reservations with regard to the technical specifications or any other aspect of the

tender document, whilst the public procurement Regulations provided for the tenderer to seek a pre-contractual remedy prior to the closing date of the tender, yet, having participated in the tendering process meant that the tenderer had accepted all the tender conditions and specifications.

Dr Mallia remarked that whilst he was refraining from reacting to the appellant company's claim that the contracting authority failed to consult the end users because he deemed it irrelevant to the issue under consideration, yet he was making it clear that this did not mean that the appellant company's allegation was correct.

At this point the hearing came to a close.

This Board,

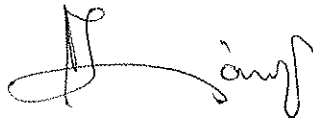
- having noted that the appellant company, in terms of its 'reasoned letter of objection' dated the 2nd October 2012 and also through its representatives verbal submissions presented during the hearing held on the 27th November 2012, had objected to the decision taken by the pertinent authorities;
- having noted all of the appellant company's representative's claims and observations, particularly, the references made to the fact that (a) by letter/email dated 26th September 2012 the Central Procurement and Supplies Unit of the Ministry for Health, the Elderly and Community Care informed the appellant company that its offer was found to be technically non-compliant because the screen of the monitor offered was 10.4" instead of between 3.0" and 4.0" as requested, (b) Volume 3 'Technical Specifications' provided, among other things, that "*The diagonal dimension of the monitor shall be between 3.0" and 4.0", with a max weight of 2.0 kg and up to 3 kg*", (c) no clarification was sought from the contracting authority as to whether the tenderer could deviate from the tender technical specifications, (d) the product offered met the contracting authority's request at page 32 which stated that "*The Monitor shall be fully user configurable and shall be flexible to create screens that are considered acceptable to the medical staff*", (e) the appellant company was offering a cheaper monitor with a screen larger than that offered by the recommended tenderer and, as a result, the offer should not have been disqualified and (f) the contracting authority had indicated that the monitor had to be acceptable to medical staff (page 32) and the appellant company questioned whether the contracting authority had, in fact, consulted the medical staff/end users as to the type of monitor required;
- having considered the contracting authority's representative's reference to the fact that (a) the tender title itself clearly requested 'portable patient monitors' and the size of the screen/monitor reflected the basic requirement that these had to be 'portable' monitors and not office monitors and (b) whilst in agreement with the logic behind the argument that one would view things better on a bigger screen, yet this particular (portable) monitor had to be moved about and hence the restriction on the screen size and consequently the overall size and weight,

reached the following conclusions, namely:



1. The Public Contracts Review Board opines that tenderers were requested and expected to offer a product according to the published technical specifications and they were not free to set their own technical specifications and that if this were to be the case it would have been pointless for the technical specifications to be published.
2. The Public Contracts Review Board establishes that lowest pricing policies are solely dependent upon an offer having been found to be both administratively and technically compliant.
3. The Public Contracts Review Board argues that whenever a tenderer has any reservations with regard to the technical specifications or any other aspect of the tender document, whilst the public procurement Regulations provide for a tenderer to seek a pre-contractual remedy prior to the closing date of the tender, yet, when one participates in the tendering process without seeking such pre-contractual remedy, such an action would imply that such tenderer would have accepted all the tender conditions and specifications.

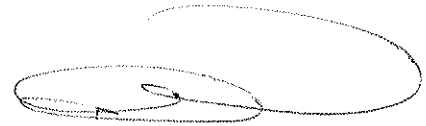
In view of the above this Board finds against the appellant company and recommends that the deposit paid by the same company for the appeal to be lodged should not be reimbursed.



Alfred R Triganza
Chairman



Joseph Croker
Member



Paul Mifsud
Member

4 December 2012