PUBLIC CONTRACTS REVIEW BOARD

Case No. 525

CPSU/CPU/2264/2012

Tender for the Supply of Supplements for Bacteriological Media Preparation

The call for tender was published in the Government Gazette of the 20th April 2012 with a closing date of the 21st May 2012. The estimated value of the tender was €19,234. The price of the recommended tender was € 18,789.

Al-Nibras for Science and Technology filed an objection on the 3rd December 2012 against the decision of the Ministry for Health, the Elderly and Community Care to disqualify its offer as technically non-compliant.

The Public Contracts Review Board composed of Mr Alfred Triganza (Chairman) and Mr Carmelo Esposito and Mr Paul Mifsud as members convened a meeting on Tuesday 26th March 2013 to discuss the appeal.

Present:

Al-Nibras for Science and Technology

Mr Sandro Ciliberti Representative

Technoline Ltd

Dr John Attard General Manager

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

Mr George Fenech Representative

Evaluation Board

Ms Connie Miceli Chairperson
Dr Paul Caruana Member

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

Mr Sandro Ciliberti, representing Al-Nibras for Science and Technology, the appellant company, made the following submissions:

i. by letter dated 26th November 2012 the appellant firm was informed that its offer was not successful since not all supplements submitted gave satisfactory results;

ii. by letter dated 28th November 2012 the appellant firm had requested the contracting authority to sustain the reason given for rejecting its tender by forwarding the results obtained from the scientific tests carried out, which request had been met;

iii. the results of the tests carried out by the contracting authority were referred to the manufacturer overseas and the latter provided the certificates of quality assurance indicating that the supplements from the same batch number had given satisfactory results;

and

iv. albeit the appellant firm had requested to be notified well beforehand of the date for the hearing so that arrangements could be made for the technical expert to be brought over from overseas, yet only three days notice had been given such that it was not possible for this expert to attend this hearing, adding that this case had been appointed for February but which appointment had been cancelled at short notice.

Dr Paul Caruana, a member of the evaluation board and consultant in charge of the bacteriological laboratory, explained that:-

a. the laboratory carried out tests on various bacteria and, every three years or so, the contracting authority procured products from various manufacturers to enable it to carry out these tests;

b. one had to appreciate that these tests were necessary to enable the consultant to establish the appropriate medical treatment required for the patient;

c. supplements, such as the ones under reference, were mixed with other products and, through these tests, certain bacteria would experience growth whereas other types would suppress the growth;

d. samples were requested from new suppliers whereas current or previous suppliers were exempted from producing samples in respect of supplements already tested by the contracting authority;

e. the purpose of testing the supplements provided by new suppliers was to verify that their performance was, at least, equivalent to or perhaps better

than that of the supplements currently used by the local health authorities, in technical terms, the concept of non-inferiority;

f. patients were checked for bacteria and then a stock of those bacteria was kept at the laboratory for testing purposes, namely in the laboratory parallel tests would be carried out on a known bacteria (supplement already in use) and on a test medium (new supplement provided by the bidder) to establish if the latter's performance equalled or exceeded that of the former, i.e. in terms of growth or reduction;

g. as evidenced in the report on the scientific tests carried out in the case of the six supplements provided by the appellant company, three supplements performed satisfactorily whereas the performance of three others was not acceptable, namely, Neisseriae, E.coli 0157 and Neomycin – whereas the first two were meant to increase the growth of the bacteria, Neomycin was meant to suppress the growth of bacteria;

h. in the case of Neisseriae, E.coli 0157 and Neomycin, when the appellant company's supplements were used in combination with other media (bacteria) in the laboratory, the expected growth/suppression did not materialise in all three tests carried out;

i. the tests of each of these supplements were not carried out once but three times for the sake of consistency;

and

j. indeed, he was providing a simplified version of what took place as the tests on these different supplements were quite complex to describe in layman's terms.

Mr Ciliberti explained that:-

a. the tender called for the supply of six supplements and the contracting authority has declared that in the case of three of them the tests were successful and in the case of the other three the tests were unacceptable;

b. these supplements were temperature and procedure sensitive, in other words one had to store these items at the required temperature and one had to conduct the tests according to established procedures, otherwise one would not obtain correct results;

c. whilst it had to be appreciated that all was being stated without casting any doubt on the professional competence of the personnel running the laboratory, yet it was also a fact that it was the responsibility of the bidder to deliver the supplements according to given conditions and whilst, in this case, they were delivered in an ice box at between 2 to 8 degrees, yet, from then onwards, it was the responsibility of the contracting authority to maintain those ideal conditions;

d. in the case of the three media which failed the test, the contracting authority, through Ms Julie Haider (Principal MLS at the Bacteriological Lab), requested the appellant company to provide a second batch of samples and the reason given was 'a procedural mistake';

e. the results obtained by the contracting authority were referred to the manufacturer, who in turn ran tests on the 'failed' supplements having the same batch numbers and produced positive results as per quality assurance certificates which were produced at the hearing but which the Public Contracts Review Board did not retain since its remit did not include the technical evaluation of the tender;

f. one had to question why the three successful supplements were not awarded to Al-Nibras for Science and Technology since the prices were cheaper;

and

g. the contracting authority failed to indicate in the tender document the organisms on which the supplements were expected to perform.

Ms Connie Miceli, chairperson of the evaluation board, explained that as per clause 3.1 (page 5), the tender was not divided into lots.

Dr Caruana remarked that:-

a. albeit he did have it in writing that the second batch of samples were requested with regard to the three 'failed' supplements, yet reason has it that it was so because it made no sense to ask for more samples with regard to the three samples in respect of which the tests were successful;

b. whilst it was correct to state that these supplements were temperature and procedure sensitive, yet, as far as the laboratory was concerned, he could vouch that such supplements were appropriately handled and stored but he could not vouch for what might have happened elsewhere;

and

c. the testing of such supplements in third party laboratories was not considered a solution because there existed the same operational risks besides the extra expenses involved.

The Chairman Public Contracts Review Board observed that:-

i. this case seemed to hinge on whether these samples were delivered by the bidder in good condition and on whether the contracting authority stored and handled the samples in a manner that preserved the good condition of the samples;

ii. this case concerned procedural issues rather than technical considerations and, as a result, technical/professional witnesses were not deemed necessary;

iii. it would have been better if the reasons for the request of additional samples had been made in writing but, on the other hand, it could well be the case that whereas, in the first instance, there could have been a procedural mistake, then, in the second instance there was no such procedural mistake and the samples still failed the test;

and

iv. with regard to the appellant company's claim of shortcomings or perceived shortcomings in the tender document, the bidder should have resorted to the pre-contractual remedy provided for in the regulations.

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 3rd December 2012 and also through its representatives verbal submissions presented during the hearing held on the 26th March 2013, had objected to the decision taken by the pertinent authorities;

- having noted all of the appellant's representative's claims and observations, particularly, the references made to the fact that (a) by letter dated 26th November 2012 the appellant firm was informed that its offer was not successful since not all supplements submitted gave satisfactory results, (b) by letter dated 28th November 2012 the appellant firm had requested the contracting authority to sustain the reason given for rejecting its tender by forwarding the results obtained from the scientific tests carried out, which request had been met, (c) the results of the tests carried out by the contracting authority were referred to the manufacturer overseas and the latter provided the certificates of quality assurance indicating that the supplements from the same batch number had given satisfactory results, (d) albeit the appellant firm had requested to be notified well beforehand of the date for the hearing so that arrangements could be made for the technical expert to be brought over from overseas, yet only three days notice had been given such that it was not possible for this expert to attend this hearing, adding that this case had been appointed for February but which appointment had been cancelled at short notice, (e) the tender called for the supply of six supplements and the contracting authority has declared that in the case of three of them the tests were successful and in the case of the other three the tests were unacceptable, (f) these supplements were temperature and procedure sensitive, in other words one had to store these items at the required temperature and one had to conduct the tests according to established procedures, otherwise one would not obtain correct results, (g) whilst it had to be appreciated that all was being stated without casting any doubt on the professional competence of the personnel running the laboratory, yet it was also a fact that it was the responsibility of the bidder to deliver the supplements according to given conditions and whilst, in this case, they were

delivered in an ice box at between 2 to 8 degrees, yet, from then onwards, it was the responsibility of the contracting authority to maintain those ideal conditions, (h) in the case of the three media which failed the test, the contracting authority, through Ms Julie Haider (Principal MLS at the Bacteriological Lab), requested the appellant company to provide a second batch of samples and the reason given was 'a procedural mistake', (i) the results obtained by the contracting authority were referred to the manufacturer, who in turn ran tests on the 'failed' supplements having the same batch numbers and produced positive results as per quality assurance certificates which were produced at the hearing but which the Public Contracts Review Board did not retain since its remit did not include the technical evaluation of the tender, (j) one had to question why the three successful supplements were not awarded to Al-Nibras for Science and Technology since the prices were cheaper and (k) the contracting authority failed to indicate in the tender document the organisms on which the supplements were expected to perform;

a. having considered the contracting authority's representative's reference to the fact that (a) the laboratory carried out tests on various bacteria and, every three years or so, the contracting authority procured products from various manufacturers to enable it to carry out these tests, (b) one had to appreciate that these tests were necessary to enable the consultant to establish the appropriate medical treatment required for the patient, (c) supplements, such as the ones under reference, were mixed with other products and, through these tests, certain bacteria would experience growth whereas other types would suppress the growth, (d) samples were requested from new suppliers whereas current or previous suppliers were exempted from producing samples in respect of supplements already tested by the contracting authority, (e) the purpose of testing the supplements provided by new suppliers was to verify that their performance was, at least, equivalent to or perhaps better than that of the supplements currently used by the local health authorities, in technical terms, the concept of non-inferiority, (f) patients were checked for bacteria and then a stock of those bacteria was kept at the laboratory for testing purposes, namely in the laboratory parallel tests would be carried out on a known bacteria (supplement already in use) and on a test medium (new supplement provided by the bidder) to establish if the latter's performance equalled or exceeded that of the former, i.e. in terms of growth or reduction, (g) as evidenced in the report on the scientific tests carried out in the case of the six supplements provided by the appellant company, three supplements performed satisfactorily whereas the performance of three others was not acceptable, namely, Neisseriae, E.coli 0157 and Neomycin – whereas the first two were meant to increase the growth of the bacteria, Neomycin was meant to suppress the growth of bacteria, (h) in the case of Neisseriae, E.coli 0157 and Neomycin, when the appellant company's supplements were used in combination with other media (bacteria) in the laboratory, the expected growth/suppression did not materialise in all three tests carried out, (i) the tests of each of these supplements were not carried out once but three times for the sake of consistency, (j) indeed, Dr Caruana was providing a simplified version of what took place as the tests on these different supplements were quite complex to describe in layman's terms, (k) Ms Connie Miceli, chairperson of the evaluation board, explained that as per clause 3.1 (page 5), the tender was not divided into lots, (l) albeit Dr Caruana did have it in writing that the second batch of samples were requested with regard to the three

'failed' supplements, yet reason has it that it was so because it made no sense to ask for more samples with regard to the three samples in respect of which the tests were successful, (m) whilst it was correct to state that these supplements were temperature and procedure sensitive, yet, as far as the laboratory was concerned, Dr Caruana could vouch that such supplements were appropriately handled and stored but he could not vouch for what might have happened elsewhere and (m) the testing of such supplements in third party laboratories was not considered a solution because there existed the same operational risks besides the extra expenses involved,

reached the following conclusions, namely:

1. The Public Contracts Review Board opines that whilst it is true that this case seemed to hinge on whether these samples were delivered by the bidder in good condition and on whether the contracting authority stored and handled the samples in a manner that preserved the good condition of the samples, yet it is also a fact that this case concerned procedural issues rather than technical considerations. This Board concludes that, whereas, in the first instance, there could have been a procedural mistake, in the second instance there was no such procedural mistake and the samples still failed the test.

2. This Board establishes that with regard to the appellant company's claim of shortcomings or perceived shortcomings in the tender document, the bidder should have resorted to the pre-contractual remedy provided for in the regulations.

In view of the above this Board finds against the appellant company and recommends that the appellant company should not be reimbursed with the deposit paid to lodge the appeal.

Alfred R Triganza	Carmelo Esposito	Paul Mifsud
Chairman	Member	Member

15 April 2013