

PUBLIC CONTRACTS REVIEW BOARD

Case No. 527

GHPST/536/11

Tender for the Supply of Sterile Powder Free Surgical Gloves, Size 7.5

The call for tender was published in the Government Gazette of the 27th May 2011 with a closing date of the 27th June 2011. The estimated value of the tender was €70,778.42. The price of the recommended tender was €64,289.52.

Drugsales Ltd filed an objection on the 11th December 2012 against the decision of the Ministry for Health, the Elderly and Community Care to disqualify its offer and to recommend award to Kemimport Ltd.

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:

Drugsales Ltd

Dr Andrea Gera de Petri	Director
Mr Philip Moran	Salesperson

Kemimport Ltd

Mr Reginald Fava	Representative
Mr Pierre Fava	Representative

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

Ms Connie Miceli	Representative CPSU
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Evaluation Board

Mr George Fenech	Chairman
Mr N Abeal	ICN/Member
Ms Josette Camilleri	Sen. Pharm. Tech./Secretary

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

The Chairman, Public Contracts Review Board, could not help noting that this tender was issued in May 2011 and, amazingly enough, two years after the evaluation process was still dragging on.

The contracting authority replied that, since then, the Central Procurement and Supplies Unit (CPSU) had undergone a rigorous re-structuring process.

Dr Andrea Gera de Petri, legal representative of Drugsales Ltd, the appellant company, made the following submissions:

- i. by letter dated 4th December 2012 the appellant firm was informed that its offer was not successful since the product changed from the one it had originally submitted and, as a result, the offer could not be considered further and that the award was recommended to Kemimport Ltd at a higher price;

and

- ii. on the 24th July 2012 the contracting authority asked if Drugsales Ltd would be supplying 'PROTEGRITY SMT MICRO' Sterile latex Powder-Free Surgical Gloves with Nitrile coating size 7.5 Code No 2D72NT75 and the reply submitted by the appellant firm on 26th November 2012 read that, albeit its principals had changed the brand name of this item to 'PROTEXIS' with a new product code 2D72NT75X, yet both the quality and the description remained the same - in short, the change only concerned a re-branding of the product.

Mr George Fenech, chairperson of the second evaluation board – the previous one was chaired by Ms Miriam Dowling - explained that:

- a. this tender had already been the subject of an objection before the Public Contracts Review Board (Case No. 402) because the same appellant company had submitted the product description, which was mandatory, but had failed to submitted the product code number, which was not mandatory;
- b. following the decision of the Public Contracts Review Board to reintegrate the offer made by Drugsales Ltd into the evaluation process, he, as chairperson of the newly appointed evaluation board, had asked, as per minute 58 in file, the Departmental Contracts Committee for guidance on the following two points, namely (a) in the course of the re-evaluation Drugsales Ltd informed that it had changed the product it was originally offering and, as a result, the evaluation board asked whether that was permissible and (b) if a product change was allowed, whether the evaluation board could ask for samples;

and

- c. the reply given by the Departmental Contracts Committee was that once there had been a change to the original offer submitted, this offer should no longer be considered.

The Chairman, Public Contracts Review Board, referred to the Board's decision dated 11th May 2012 on the first appeal and to the advice given by the Departmental Contracts Committee and remarked as follows:

- i. the Public Contracts Review Board had decided on the first appeal that it was in order for the contracting authority to seek a clarification from the bidder on the mandatory information already submitted and that the offer by Drugsales Ltd should be reintegrated in the evaluation process;
 - ii. it was not acceptable for the Departmental Contracts Committee to overturn the Public Contracts Review Board's decision to reintegrate Drugsales Ltd offer in the evaluation process;
 - iii. the Public Contracts Review Board was set up to scrutinise the work of the contracting authority/Departmental Contracts Committee and not the other way round because the decisions of the Public Contracts Review Board could only be contested before the Courts;
 - iv. moreover, the evaluation board was entitled to take all necessary action in order to carry out the decision taken by the Public Contracts Review Board, without the need of Departmental Contracts Committee approval;
 - v. if the evaluation board/contracting authority faced any difficulty in carrying out the decision of the Public Contracts Review Board then the former should communicate with and seek further advice from the Public Contracts Review Board;
 - vi. the contracting authority should carry out forthwith the decision taken by the Public Contracts Review Board in May 2012 and, in so doing, if necessary, it should ask for samples and for certification so as to ascertain that the product being offered was of the same quality and description as originally submitted, i.e. that the change was in fact only a question of re-branding;
- and
- vii. the contracting authority was being given three weeks time within which to obtain the information and to report back to the Public Contracts Review Board.

At this point the hearing was brought to a close.

Following the receipt of the requested feedback from the contracting authority which followed the expiry of the term allowed by this Board, which reported that, following re-analysis of the appellant company's bid, it transpired that "item offered according (*was*) to specs" this Board herewith concludes that:

- having noted that the appellant company, in terms of its ‘reasoned letter of objection’ dated the 10th 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 4th December 2012 the appellant firm was informed that its offer was not successful since the product changed from the one it had originally submitted and, as a result, the offer could not be considered further and that the award was recommended to Kemimport Ltd at a higher price and (b) on the 24th July 2012 the contracting authority asked if Drugsales Ltd would be supplying ‘PROTEGRITY SMT MICRO’ Sterile latex Powder-Free Surgical Gloves with Nitrile coating size 7.5 Code No 2D72NT75 and the reply submitted by the appellant firm on 26th November 2012 read that, albeit its principals had changed the brand name of this item to ‘PROTEXIS’ with a new product code 2D72NT75X, yet both the quality and the description remained the same - in short, the change only concerned a re-branding of the product;
- having considered the contracting authority’s representative’s reference to the fact that (a) this tender had already been the subject of an objection before the Public Contracts Review Board (Case No. 402) because the same appellant company had submitted the product description, which was mandatory, but had failed to submitted the product code number, which was not mandatory, (b) following the decision of the Public Contracts Review Board to reintegrate the offer made by Drugsales Ltd into the evaluation process, Mr Fenech, as chairperson of the newly appointed evaluation board, had asked, as per minute 58 in file, the Departmental Contracts Committee for guidance on the following two points, namely (1) in the course of the re-evaluation Drugsales Ltd informed that it had changed the product it was originally offering and, as a result, the evaluation board asked whether that was permissible and (2) if a product change was allowed, whether the evaluation board could ask for samples and (c) the reply given by the Departmental Contracts Committee was that once there had been a change to the original offer submitted, this offer should no longer be considered;
- having noted the findings as reported by the contracting authority following the time allowed by this Board for the contracting authority to re-assess the appellant company’s sample;

reached the following conclusions, namely:

1. The Public Contracts Review Board reaffirms its position wherein it maintains that it was not acceptable for the Departmental Contracts Committee to overturn its decision to reintegrate Drugsales Ltd offer in the evaluation process being fully cognizant of the fact that the Public Contracts Review Board was set up to scrutinise the work of the contracting authority/Departmental Contracts Committee and not the other way round because the decisions of the Public Contracts Review Board could only be contested before the Courts.

2. This Board, whilst reiterating that the evaluation board was entitled to take all necessary action in order to carry out the decision taken by the Public Contracts Review Board, without the need of Departmental Contracts Committee approval, this Board contends that if the evaluation board/contracting authority faced any difficulty in carrying out the decision of the Public Contracts Review Board then the former should have communicated with and sought further advice from the Public Contracts Review Board only and not from any other entity or department;
3. The Public Contracts Review Board opines that, in the light of the new conclusions reached by the evaluation board following further analysis conducted on the appellant company's sample as a result of the latter's reintegration in the evaluation process, this Board has no problem with concurring with such conclusions.

In view of the above this Board finds in favour of the appellant company and recommends that the appellant company be reimbursed with the deposit paid to lodge the appeal.

Alfred R Triganza
Chairman

Carmelo Esposito
Member

Paul Mifsud
Member

26 April 2013