

PUBLIC CONTRACTS REVIEW BOARD

Case No. 558

CT 2190/2013

Tender for the Supply, Delivery and distribution of Diapers to Scheme B beneficiaries

The tender was published on the 6th November 2012 with a closing date of the 18th December 2012. The estimated value of the Tender was €255,000 (including VAT).

Six (6) bidders submitted their offers.

Medic Sante filed an objection on the 19th April 2013 against a decision of the Director General (Contracts) to discard its offer and to recommend the award of the tender to Pharma Cos Ltd.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Richard A. Matrenza as members convened a hearing on Tuesday 2nd July 2013 to discuss the appeal.

Present:

Medic Sante

Dr Norval Desira	Legal Representative
Mr Keith Attard	Representative

Pharma Cos Ltd.

Mr Marcel Mifsud	Representative
Mr Edward Mifsud	Representative
Mr James Borg	Representative

Health Division

Mr Karl Farrugia	Representative
Mr Ray Mamo	Representative
Ms Stephanie Abela	Representative

Evaluation Board

Mr Albert Briffa	Chairman
Mr George Pavia	Member

Department of Contracts

Mr Nicholas Aquilina

The Chairman made a brief introduction and the appellant company's representative was invited to explain the motives of the firm's objection.

Dr Norval Desira, legal representative of the appellants, explained that their reasons for objection was as stated in the letter of Objection. Directive 2004/18/EU states that contracting authorities shall treat economic operators equally and non-discriminatorily. The principle is also found in the local Procurement Regulations regulation 4 (1). However, a clause in the tender document states that if the bidder does not prove that he supplied one hundred thousand (100,000) diapers within the last two years, he would not qualify. Had these diapers been used on the open market, this would be reasonable, but as these diapers are heavily subsidised by the government, it would not make any economic sense in importing them unless on being awarded this tender. For this reason, appellants contend that the relative clause 6.1.1 in the document is discriminatory, and this clause is incompatible with and goes against the principle of equal treatment of bidders, but is in fact creating a monopoly for those who had already managed to enter the market.

The Chairman asked how the figure of 100,000 was arrived at and the consumption per year.

Mr George Pavia, an evaluation board member explained that consumption last year was 100,000.

Mr Marcel Mifsud, the recommended bidder refuted the allegation made by appellants that there was a sort of monopoly in the market and that you needed to have obtained a similar tender to import these diapers. He explained that his firm normally supply around 300,000 diapers per year on the open market alone.

Mr Albert Briffa stated that the value of the tender is 1,000,000 euro for three years but explained that the government subsidises seven cents per diaper. The government runs two schemes, Scheme A where beneficiaries receive free diapers and scheme B, as in the present case where the government subsidises 7 cents per diaper. Thus although the value of the tender is one million euro, the cost to government is only as stated, 7 cents each diaper which amounts to €255,000.

Dr Norval Desira for the appellants contended that this confirms his arguments because as his clients would have to absorb this amount of 255,000 Euros itself to enter into the market. So his client never had an opportunity to enter the market since he was never on an equal footing with the preferred bidder. He contended further that performance was guaranteed by the performance bond and clause 6.1.1 was superfluous.

Mr Ray Mamo, Assistant Director explained that Diapers are distributed by the government to residents in the Homes for the Elderly and to other beneficiaries under Scheme B. The department had to have safeguard regarding the availability of these diapers at all times, because their users are the most vulnerable. This was the reason for the inclusion of the clause 6.1.1, to ensure that the chosen supplier would be able to have them in stock at all times. This particular tender was for use under Scheme B only. However the clause 6.1.1 referred to all kinds of diapers supplied locally and not only for those that were necessarily supplied under Scheme B or to the government. He contends that appellants should have asked for clarification regarding this point if they had any doubts. Appellants signed a tender form which included a tenderer's declaration form. This means that they agreed with all that was contained in the tender in its entirety.

Mr Nicholas Aquilina for the Director of Contracts said that any one of the bidders could have asked for clarification before submitting his offer. Since each bidder signed a declaration form accepting the tender conditions, appellants cannot now at this stage object after the adjudication, but should have filed a pre-contractual concern before the closing date of the tender.

This latter point was reiterated by Mr Marcel Mifsud, the preferred bidder.

Dr Norval Desira explained that this appeal was intended to create a precedent as otherwise the situation would remain the same and would continue to do so in any future similar tenders.

At this point, the hearing was brought to an end.

This Board,

Having noted the reasoned letter of objection filed by the appellant dated 19th April 2013;

Having noted the appellant's claims as follows:

- a) That contracting Authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way;**
- b) In that a mandatory quantity of 100000 diapers was imposed by the Contracting Party in the Tender document to have been supplied within the two years 2010, 2011, This in itself , created a monopoly as it limited the financial strength of bidders;**
- c) In that the sole award criterion will be the price and the appellant's offer was the cheapest yet compliant with the conditions of the tender document;**
- d) The applicant's bid to revoke the decision of the Director's General (Contracts) of the 19th April 2013;**

Having considered the Contracting Authority's submissions as follows:

- a) The "Quantity Clause" was based on the actual consumption of diapers per annum;**
- b) This clause was imposed in the Tender document to ensure uninterrupted supply. One has to take into consideration the vulnerable state of the users of such diapers;**
- c) The appellant could have asked for clarifications prior to submission of his offer;**

Reached the following conclusion:

- 1. The Public Contracts Review Board opines that the Appellant's claim that the "Quantity clause" created a monopoly and barred certain bidders from submitting an offer is not reasonable. In al fact that clause was stipulated in the tender document to:**
 - i. Ensure immediate supply as and when necessary;**
 - ii. Ensure uninterrupted supply.**

Dr. Anthony Cassar
Chairman

Dr. Charles Cassar
Member

Mr. Richard A. Matrenza
Member

25th July 2013