PUBLIC CONTRACTS REVIEW BOARD

Case No. 715

CT 2100/2013

Tender for the Supply of Evacuated Tubes for Blood Collection.

The tender was published on the 15th November 2013. The closing date was the 21st January 2014. The estimated value of the Tender was €1,305,903.

Seven (7) bidders had submitted bids for this tender.

On the 5th June 2014 Reactilab Limited filed an objection against the disqualification of their tender.

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 the 24th June 2014 to discuss the objection.

Present for the hearing were:

Reactilab Limited - Appellant

Mr Stephen Debono	Representative
Dr Stefano Filletti	Legal Representative

Europharma Limited - Preferred Bidder

Mr Alex Fenech	Representative
Dr Antoine Cremona	Legal Representative

Central Procurement and Supplies Unit - Contracting Authority

Ms Connie Miceli	Chairperson Evaluation Board
Dr David James Camilleri	Member Evaluation Board
Ms Marika Cutajar	Representative
Ms Alicia Vella Letteridge	Representative

Department of Contracts:

Mr Nicholas Aquilina	Procurement Manager

The Chairman made a brief introduction and asked appellants' representative to make his submissions.

Dr Stefano Filletti on behalf of the appellants said that his clients tender had been discarded because *"since samples of tubes being offered drew more blood than the required volume marked on the bottle. Not according to published specifications. The sole award criterion for this tender was the cheapest priced tender satisfying the administrative and technical criteria."* Thus the tender should have been awarded to the cheapest tenderer who reached the specifications. The evaluation board interpreted the fact that the tubes drew more blood to mean that these were not compliant with the specifications. Appellants do not agree with this interpretation since the volume of blood drawn does not affect the resulting analysis of the blood. Appellants' offer had been the cheapest. The tender as originally issued allowed a margin of error of +/- 5% in the volume. However, clarification 2 explained that *"for item 1, the volume requested do not pose that big a problem should they be 0.5ml less,"* that is 10% less. In clarification number 3 it was stated that *"A tube will be acceptable as long as the size of it remains the same due to centrifugation."* The volume was not considered relevant. It has been decided several times both by this Board and by the Courts of Justice that clarifications had to be considered when assessing the tenders. The wording used in the clarifications indicated that volume was not considered an essential criterion; only the outside size of the tubes was essential.

Dr Filletti continued that there is no contestation that the tubes submitted by his clients were the correct size. The only complaint had been that the tubes drew more blood when the clarifications had affirmed that volume was not relevant if the size complied with specifications. Appellants' second grievance was that the contracting authority did not specify by how much the blood drawn by their samples exceeded the required volume. With the tube samples the appellants had submitted an ISO certificate showing a margin of error of +/-5%. The contracting authority also failed to state how the testing was done. He remarked that certain conditions, like the temperature, would affect the volume of such small amounts of blood. Another grievance was that the tender had set two criteria on the volume of blood – one was that tubes had to be ISO 6710, and the other that the tubes had to have a margin of error of +/-5%. This was not correct and was in conflict since ISO 6710 allowed a margin of error of +/-10%. As the contracting authority had requested compliance with ISO 6710, it could not at the same time insist on changing the error margin to +/-5%. This principle was confirmed several times by the Court of Justice. He claimed that the norm in the European Union is the threshold of +/-10%. Dr Filletti claimed that the preferred bidder offered ISO compliant products which means that his products have a margin of tolerance of +/-10% and not of +/-5%. Appellants on the other hand, in addition to being ISO compliant, had submitted a certificate from the manufacturer that the products offered do not exceed +/-5%. Finally he contended that the products offered by appellants were ISO compliant, were of the right size, and were accompanied by a certificate that certified a +/-5% margin of error. Therefore the contracting authority had no right to disqualify appellants' tender on the basis of the tubes drawing more blood since the contracting authority itself in the clarifications had indicated that the volume drawn was not relevant as long as the size was correct.

Dr David James Camilleri, consultant haematologist, on behalf of the contracting authority explained that whenever samples are to be tested there is a set procedure. Thirty tubes from each colour cap and from each supplier are tested by the phlebotomists who use them on patients and later submit an evaluation report. This report states how the diverse samples performed in use. The evaluation report on appellants' samples said that "samples fill up way past the filling line". This meant that when blood is drawn, the tube continues to draw blood after the line is reached. Some variations in volume are acceptable but in the case of samples

submitted by appellants, the report said that the tube had to be removed because it continued to draw blood. This entailed a certain health and safety risk because if blood continues to be drawn, the tube could blow the cap off and blood would run out. There were also some needles submitted by appellants that leaked blood, 5 out of 50 leaked. Replying to a question by Dr Stefano Filletti, Dr Camilleri explained that "way above the line" meant that the operator had to remove the tube because it continued to draw blood. It was the phlebotomist who conducted the tests and reported on the samples. The faulty needles were not mentioned as a reason for disqualification because it was deemed that the fact of the tubes drawing more blood was enough to warrant rejection.

Dr Antoine Cremona on behalf of the preferred bidder Europharma Limited submitted that the tender document had two criteria – one the drawing volume of the blood where the ISO standard 6710 established a margin of error of +/-10%. This margin was allowed because the volume could depend on various variables such as temperature and altitude and atmospheric pressure. Samples had to be compliant. The contracting authority did not change this tolerance and kept with the ISO standard. The court judgement quoted by appellant said that once a standard is published with the tender document the contracting authority had to abide with that standard and could not change it. The second criterion was as per clause 11 of the tender document at page 17 which states that "Supplier must confirm that the margin of error on the vacuum of the items offered is not more than 5%". This does not concern the drawing volume but the percentage of items that were faulty. This is not like the Unec case quoted by appellants in their letter of objection. The appellants understood these two criteria wrongly; the criteria do not conflict with each other. Of the sample tubes submitted, 5% only could be faulty or defective, while the tolerance of each of the sample tubes had to be +/-10%.

Dr David James Camilleri on behalf of the contracting authority submitted that clarification 3 referred to two specific kinds of tubes with rust coloured caps and green coloured caps that are used for some tests. However there are blue capped tubes used for coagulation studies. Blood is drawn into the blue cap tube and inserted into a machine for testing. These tubes are not mentioned in clarification number 3 and have to be as accurate as possible since the result would depend on the amount of blood drawn. A monthly report is drawn showing the non-conformities encountered. This report, lists the instances where coagulation studies are concerned where blood in excess was drawn. The present situation, with the present supplier is about 0.1%.

Dr Antoine Cremona for the preferred bidder stated that the appellants had raised 5 grievances in their letter of objection.

1. That they had the right to know the result of the tests and that the tests were therefore wrong. These two points are in conflict with one another.

2. The ISO 6710 submission. Here he cited case 711 decided recently by this Board.

3. Appellants misquoted clarifications. Clarification 2 answers: "Item 1 ideally the volume we requested Items 2 and 3 do not pose that big a problem should they be 0.5mls less Item 7 etc". The items are separate but the punctuation is missing. This is not as was alleged by appellants.

4. The two criteria about the tubes regarding the drawing volume which should be +/-10% and the percentage of defective tubes in a batch which should be 5%.

5. It is not true that a tolerance of 5% is better than a tolerance of 10%. Since there

was a minimum criterion and bidders past the threshold then the price would be the sole deciding factor. This was not a MEAT tender.

Dr Stefan Filletti said that with the letter of objection appellants had reproduced a copy of the clarifications and there is no question of missing punctuation marks. It is clear from the clarifications that 4ml and 6ml do not affect the result. The Technical Specifications Section 4 Item 6 at page 16 imposes an ISO standard 6710. Paragraph 11 at page 17 cited by the preferred bidder states that "Supplier must confirm that the margin of error on the vacuum of the items offered is not more than 5%"and this he contended is per bottle and the 5% refers to the volume of each tube. He contended that appellants' tender was discarded because the samples drew more blood and there is no mention of "way beyond the line" and not because items were defective. No proof of the defective tubes was given. This Board has to rely on what is documented. To be discarded appellants' offer had to be shown to exceed the 10% margin of error and no such proof was brought.

Dr David James Camilleri reiterated that clarification 2 referred to two kinds of tubes whilst in the case of coagulation test tubes, the blue top tubes, it was not acceptable that these draw more blood because would affect the result of the tests.

Dr Antoine Cremona reiterated that Clause 11 speaks on the tolerance of 5% of defective tubes and not on a margin of error of either plus or minus. The clause deals with the number of tubes and not on the volume.

At this point the hearing was closed.

This Board,

Having noted the Appellant's objection, in terms of the 'Reasoned Letter of Objection' dated 5th June 2014 and also through Appellant's verbal submissions during the hearing held on 24th June 2014, had objected to the decision taken by the pertinent Authority , in that:

a) **Appellant stated that his bid was discarded due to the fact that the samples provided by same, drew more unnecessary blood volume than was requested in the technical specifications of the tender document. Appellant contends that this criteria was not mentioned in the specifications of the tender document.**

b) **Appellant contends that he is in disagreement with the 'interpretation' of the Evaluation Board, in that the Contracting Authority, in its 'Letter of refusal' did not specify by how much, the Appellant's samples exceeded the requested volume.**

c) **Since the Contracting Authority had indicated that the volume of blood drawn was considered not to be relevant, as long as the size of the product was correct, the same Contracting Authority was not fair and just in deeming Appellant's bid as being 'non technically compliant'.**

Having considered the Contracting Authority's verbal submissions during the hearing held on 24th June 2014, in that:

a) **The Medical Expert of the Contracting Authority confirmed that the samples provided by the tenderers were actually tested on patients, in that the results achieved were actual and confirmed. So that, the decisions taken by the Evaluation Board were realistic.**

b) **The Evaluation Board tolerated the fact that some variances had to be accepted, however, if the level of tolerance is to the detriment of the patient then the situation is completely different.**

Reached the following Conclusions:

1. **This Board states that this particular appeal relates to a Medical issue and in this respect, this same Board had to rely on the Medical Expertise's submissions. At the same time, this Board, in delivering its decisions, had to take into account the comfort and well being of the patient at large.**

2. **This Board, in its jurisdiction, is to assess and evaluate whether the adjudication process was carried out by the Evaluation Board in a most transparent and just manner and in this regard, this Board confirms that:**

i) **The Product offered by the Appellant Company was medically proved to be inferior, and the submissions made by the medical experts were creditable, especially when this Board was, in a simple manner, given an explanation as to how and why the Appellant's offer was discarded.**

ii) **From the Medical Expert's submissions, this Board opines that, when dealing with such health issues, the product being offered by tenderers are actually tested on patients. Upon testing the Appellant's proposed product on the patients, it was confirmed that Appellant's product drew more blood than was needed and in fact this will cause discomfort to the patient. The Preferred Bidder's offer was the cheapest fully compliant bid.**

In view of the above, this Board finds against the Appellant Company, however, this same Board recommends that the deposit paid by Appellant be reimbursed.

Dr. Anthony Cassar	Dr. Charles Cassar	Mr. Richard A. Matrenza
Chairman	Member	Member

7 August 2014