PUBLIC CONTRACTS REVIEW BOARD

Case No. 725

DH 1069/2013

Tender for the Supply of Microspheres for the Delivery of Chemotherapy

The call was published on the 29th October 2013. The closing date was the 28th November 2013.

The estimated value of the tender was €96,000

Two (2) offers had been received for this tender.

On the 25th April 2014 ATG Co. Limited had filed an objection against the award of the tender to Associated Equipment Limited.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a hearing on Monday the 28th July 2014 to discuss the objection.

Present for the hearing were:

ATG Co Limited - Appellant

Mr Hans Wolf	Representative
Mr Oliver Attard	Representative
Dr Franco Galea	Legal Representative

Associated Equipment Limited - Preferred Bidder

Mr Charles Mifsud	Representative
Mr Ray Theuma	Representative

Central Procurement Supplies Unit - Contracting Authority

Mr Stephen Mercieca	Chairperson Evaluation Board
Dr Kenneth Saliba	Member Evaluation Board
Mr Marnol Sultana	Representative
Ms Cynthia Spiteri	Representative
Dr Adrian Mallia	Legal Representative

The Chairman made a brief introduction and invited appellant's representative to make his submissions.

Dr Franco Galea on behalf of the appellant said that the present tender's award criterion was the cheapest price. Admittedly, the preferred bidder's price was cheaper but the product offered by the preferred bidder was not according to the tender technical specifications. Section 4, the Technical Criteria of the tender document specifically asked for a product that has a stability period of between 7 to 14 days. The preferred bidder's product had a stability period of 24 hours. From the literature submitted with the letter of objection it can be seen, at page 5 of the literature relating to the preferred bidder's product, the HepaShere Microspheres have to be used within 24 hours after reconstitution. Appellant on the other hand had offered a product, DC Bead, which had a stability of 14 days when stored under refrigerated conditions. Thus the preferred bidder's product does not satisfy the technical criteria. There is a considerable difference in the price of the two products but since one of the products was not according to specifications it cannot be used for comparing like with like when it comes to financial offer.

Dr Adrian Mallia on behalf of the contracting authority explained that the technical expert could not be present for the hearing. The main motivating factor for the decision of the award of this tender was in fact the significant difference in the price of the two bids and the second was that even though the specifications were drafted in a certain way, the real needs of the contracting authority are not those as demanded in the specifications.

Dr Franco Galea on behalf of the appellant said that apparently the contracting authority was now stating that its needs were different and a different product was required. If the contracting authority had such a discrepancy between its real needs and the tender specifications it could have stopped the tender, re-drafted the specifications and re-issued the tender. This was after all a tender leading to a two year contract.

Dr Adrian Mallia for the contracting authority explained that the tender specifications had over-catered for the authority's needs. He explained what the microspheres are used for. These are impregnated with a chemical and then inserted into the patient's body as necessary. This allows the slow release of the chemical. Normally the loading with chemicals is done immediately before the microspheres are injected into the patient. Thus the period of stability for the microspheres of between 7 to 14 days does not arise from a clinical need. There is no contestation however that the said period was a tender requirement. The reasoning of the evaluation board had been that the preferred bidder's product still satisfied the needs of the contracting authority and was cheaper.

Dr Franco Galea for the appellant stated that his client was not contesting any clinical decisions but insisted that appellant had abided by the specifications, offering a product with greater stability, obviously at a greater cost. Appellant could have offered a cheaper product not in conformity with the specifications. The remedy afforded to the contracting authority, once the discrepancy between its needs and the tender specifications would have been to reissue the tender and not to proceed with the award to the cheaper, non-compliant bidder. He insisted that the action taken by the contracting authority failed to allow a level playing field to all bidders.

Dr Kenneth Saliba explained that the technical specifications were carried on from previous tender. They were a cut and paste scenario. He confirmed that the specifications were

according to the needs of the contracting authority. During chemotherapy the microspheres are injected directly into patients and when the procedure started to be used there had been only one product on the market. Now, three years later, there are other agents on the market and the question of the product's stability is now of a lesser importance. The dosage administered to each patient is always the same and is administered according to the patient's individual needs. The tender specifications had been drafted on past knowledge. Replying to questions by Dr Franco Galea he said that it was correct to say that nowadays the stability period of 14 days is no longer required but a stability of 24 hours would suffice. There are three products on the market that would satisfy the technical specifications with a stability of 24 hours. At the time of the award none of the bidders had stated their product's stability.

Mr Hans Wolf on behalf of the appellant said that with the tender, appellant had submitted "Instructions for Use" for the product offered. These clearly state at page 3 " *In order to minimise the risk of microbiological contamination DC Bead should be prepared under controlled aseptic conditions. As the preparation and loading conditions of DC Beads are outside the manufacturers' control, once the DC Bead vial has been pierced, the allocation of a shelf life longer than 4 hours if used at room temperature or 24 hours if stored in a refrigerator at 2 – 8 C is the responsibility of the user. DC Bead loaded with doxorubicin is physically and chemically stable for 14 days if stored in a refrigerator at 2 – 8 C and 7 days if mixed with non-ionic contrast media and stored in a refrigerator at 2 – 8 C.*"

Dr Kenneth Saliba explained that they use two types of agents for tumours according to the type of tumour. The two types of tumours require two types of chemotherapy.

Mr Hans Wolf said that according to data on the manufacturer of the HepaSheres website the instructions for use that was dated in 2012 the loading with Irinotecan is contra-indicated. New instructions for use have been updated in March 2014 and in the "Intention of use" it says that "HepaSpheres are intended for use in the ambulisation of blood vessels for therapeutic purposes for the following procedures" there is no indication anymore for loading with doxorubicin. This is because it was found that the beads are unstable when loaded with doxorubicin. The manufacturer does not take any responsibility if these are used with doxorubicin.

Dr Kenneth Saliba for the contracting authority said that the evaluation board had to adjudicate on what they had available. The question of stability does not really come into the matter since when mixed, the microspheres are always used within 8 hours. The preferred bidder's literature nowhere stated that they cannot be used after 24 hours and probably that was the reason why the evaluation board did not insist on that stability criterion.

Dr Franco Galea reiterated that the contracting authority was trying to save the unsolvable. If the contracting authority had changed the requirements due to a clinical decision it had a right to do so but not leaving the specifications unchanged. The specifications clearly specified a stability period of 14 days. The tender should have been stopped and re-issued with the new specifications.

Dr Kenneth Saliba replying to a question by the Chairman said that the appellant's product was compliant with the tender specifications.

Mr Hans Wolf for the appellant said that there were over 60 publications regarding the product offered by the appellant. Studies were conducted to test the product. There are less

than 100 patients in Europe who had tested the loaded product.

Dr Adrian Mallia for the contracting authority said that there is a clear difference between the needs of the contracting authority and the specifications as listed in the tender document. Perhaps a decision to cancel the tender would be appropriate.

At this point the hearing was closed.

This Board,

Having noted the Appellant's objection, in terms of the 'Reasoned Letter of Objection' dated 25th April 2014 and also through Appellant's verbal submissions during the hearing held on 28th July 2014, had objected to the decision taken by the pertinent Authority, in that:

a) **Appellant contends that although the Preferred Bidder's offer was cheaper, same offer was not in conformity with the technical specifications as stipulated in section 4, of the tender document.**

b) **Appellant contests that, during the Evaluation process, the Contracting Authority realised that its requirements were different from those dictated in the tender document. In this regard, the Evaluation Board, in its assessment, shifted the goal posts.**

c) **The Appellant Company insists that, no comparison, on the 'like with like' basis was conducted by the evaluation board, between the appellant's offer and that of the preferred bidder, with regards to the technical specifications as dictated in the tender document.**

d) **The Contracting Authority took into consideration the element of price only.**

Having considered the Contracting Authority's verbal submissions during the hearing held on 28th July 2014, in that:

a) **The Contracting Authority confirmed that the main motivating factor in awarding this tender was the difference in price.**

b) **The Contracting Authority admitted that the technical specifications as laid out in the tender document were based on previous tenders (Cut and Paste) and did not reflect the true requirements of the Contracting Authority's needs.**

Reached the following conclusions:

1. **This Board opines, that the technical specifications in a tender document are dictated by the Contracting Authority, so that prospective tenderers abide by them, as so stated in the same tender document. Through the submissions and**

admissions of the Contracting Authority, this Board notes, that during the Evaluation process, the Evaluation Board ignored the 'mandatory technical requirements' as stipulated by same in the tender document. In fact, great importance and impitus was given on the price difference, quoted by the Preferred Bidder. In this regard, this Board upholds the Appellant's claim that the Preferred Bidder's offer was not in conformity with the technical specifications as dictated in the tender document.

2. **The Evaluation Board, in arriving at its decision to award the tender to the Preferred Bidder, ignored the principle of comparing 'Like with Like' with regards to technical specifications of the bidders. Since there was a substantial variance in price, this Board contends that the Evaluation Committee should have examined more closely how the technical specifications compared or differed. In this regard, this Board opines that the Evaluation Board should have been more cautious in their decision and should not have based there decision of award on the merit of price only. The same Evaluation Committee should have also taken into account that the product being offered was in compliance with the technical specifications as dictated under section 4, of the tender document.**

3. **From credible submissions made by the Contracting Authority, same admitted that the technical specifications as stated in the tender document went far beyond the actual technical requirements. In this regard, this Board opines that the actual technical requirements were established during the evaluation stage and differed from those stipulated in the Section 4 of the tender document, hence a 'change of goalposts'. In this regard, this Board is of the opinion that the evaluation process was not transparent and fair.**

In view of the above, this Board finds in favour of the Appellant Company and recommends that:

a) **The tender is cancelled and be re-issued with the proper and actual technical requirements.**

b) **The deposit paid by Appellant be reimbursed.**

Dr. Anthony Cassar Chairman	Dr. Charles Cassar Member	Mr. Lawrence Ancilleri Member

2nd September 2014