PUBLIC CONTRACTS REVIEW BOARD

Case No. 738

CT 2076/2013

Tender for the Supply of Column Agglutination System with Equipment on Loan.

The tender was published on the 9th December 2013. The closing date was the 21st January 2014.

The estimated value of the Tender was €735,166. (Exclusive of VAT)

Three (3) bidders had submitted an offer for this tender.

On the 1st August 2014 Cherubino Limited filed an objection against the rejection of their offer and against the proposed award to EuroPharma Limited.

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 Thursday the 11th September 2014 to discuss the objection.

Present for the hearing were:

Cherubino Limited - Appellant

Dr Francis Basile Cherubino	Representative
Dr Marcello Cherubino	Representative
Ms Janet Pace	Representative
Mr Ferry Sprengers	Representative
Dr Danica Caruana	Legal Representative
Dr Adrian Delia	Legal Representative

Europharma Limited - Preferred Bidder

Mr Alex Fenech	Representative
Mr Derek Mifsud Speranza	Representative
Mr Michael Peresso	Representative
Mr Suso Puentes	Biorad Technical Expert
Dr Antoine Cremona	Legal Representative

Central Procurement and Supplies Unit - Contracting Authority

Ms Connie Miceli	Chairperson Evaluation Board
Ms Carmen Buttigieg	Secretary Evaluation Board
Mr Neville Debattista	Member Evaluation Board
Mr Jesmond Debono	Member Evaluation Board
Dr Stefan Laspina	Member Evaluation Board
Ms Marika Cutajar	Representative
Ms Alicia Vella-Lethridge	Representative

Department of Contracts

Mr Antoine Galea Procurement Manager

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

Dr Adrian Delia on behalf of the appellant explained that his client's offer had been rejected on 4 points:

i) Clause 2.1.2;
ii) non-submission of item 1.4
iii) non-submission of item 1.5 and
iv) because item 3.2 was not according to specifications.

Clause 2.1.2 of the tender document states that *"The system should be able to give priority to urgent requests preferably without disturbing or halting an already on-going process. It should be flexible enough to run a variety of different test profiles and samples at the same time"*. He contended that the product offered by appellant did this, conformed to the specifications. Literature regarding this product and the price were both given in the appellant's tender.

Regarding items 1.4 and 1.5, Dr Delia explained that these were test cards for conducting tests and contended that his client had also submitted both of these and included them in the financial offer form. He referred to the appellant's list showing the technical offer where these two items are featured. He also contended that appellant had provided item 3.2 the QC Kits for internal evaluation of kits and reagents. Thus Dr Delia affirmed that his client had submitted all the items appellant's tender had been disqualified for not providing, and had made financial offers for them. If the reason for rejection was that the items were not up to specifications then that is another matter.

Mr Neville Debattista, Id number 448972M, a Senior Health Practitioner at the Pathology Department, on behalf of the contracting authority, under oath stated about clause 2.1.2 that the contracting authority wanted the facility to give priority to urgent cases that were to be tested without stopping the analysis process of any other tests already being processed by the equipment. Appellant's equipment does not allow this to be made but keeps testing any ongoing processes until it finishes and then the urgent sample may be tested. The urgent test is not given priority.

Regarding items 1.4 and 1.5 he explained that the contracting authority wanted a column agglutination system. The system offered by Messrs. Cherubino was a different system called immunofixation, and this is different methodology from that requested. The main difference lies in the contents of the test tubes. The Agglutination gives a qualitative report while the immunofixation does not give such a qualitative report. It followed therefore that the requested items 1.4 and 1.5 were not provided because those provided referred to a different methodology. In fact the reason given by the evaluation board for disqualification had been "methodology not as requested". Somehow this was omitted in the disqualification letter, but the evaluation board had no say in this.

Regarding item 3.2, the contracting authority wanted a kit that would be used to make control tests of each batch of reagents to compare with known results. In this way each batch that passes control may be used for patients. The product offered by appellant, Pelicase 1 cannot be used in this way because its use is to assess staff proficiency. This is shown on the product packaging. This stated for example that the reactivity of the antigens may diminish during the product's shelf life and that Pelicase is to be used for education purposes only.

Replying to questions by Dr Adrian Delia, Mr Debattista explained that the evaluation board had been to Holland to view the system. During this visit they had specifically asked whether queue jumping for urgent cases could be made and the reply had been in the negative. The board were told that the urgent case would be processed immediately after the ongoing tests were completed. Furthermore the evaluation board had made several questions and had been informed by email that the machine could not perform two actions simultaneously.

Dr Adrian Delia insisted that queue jumping is allowed, but the tests are not done simultaneously. But the machine gives priority to urgent tests.

Mr Neville Debattista, continuing to reply to questions by appellant's representative stated that if it was shown and proven that the machine offered by appellant allowed priority then there would be no difficulty in accepting it. Although the machine specification literature stated that priority samples (no limitation) the reply given to the board by Mr Sprengers had been that it would not give priority. He confirmed that items 1.4 and 1.5 were in fact offered by appellant but these were not what were asked for by the contracting authority. They did perform the required tests but not according to the system requested. The system offered gave results for all the other items and these were deemed acceptable, but items 1.4 and 1.5 were not. Replying to questions by the Chairman, Mr Debattista stated that the system offered by appellant gave the same end result. As a whole the system was different from that requested in the tender. There were three bids from two bidders for this tender and the other bidder offered the present system already being used. Regarding clause 3.2 he said that appellant had offered a kit that was not up to specifications. The authority wanted a kit to test the other kits before these were used while that one offered by appellant (K1386) was intended to test the abilities and competence of the staff. This is stated on the product package itself.

Dr Antoine Cremona on behalf of the preferred bidder said that the most important question was what had the contracting authority wanted to acquire through this tender? What technology did it want? The tender was for the loan of a machine and the purchase of reagents etc. The contracting authority wanted a technology known as the column agglutination system, a system most used around the world. Appellant offered another system and items 1.4 and 1.5 offered by appellant could not be compliant because they refer to a different system. The column agglutination system for blood analysis works completely different from the system offered by appellant which works by affinity, a comparison with other tests.

Ms Connie Miceli the Chairperson Evaluation Board explained that when the evaluation report had been submitted to the Department of Contracts this had raised some queries that had been submitted to the experts. These confirmed that the contracting authority wanted a column agglutination technology while the appellant had submitted immunofixation technology which is not the requested system. They also remarked about the QC kit offered by appellant which is used to assess the skills of the person using it while the authority wanted kits for testing other kits before these are used for patients.

Mr Jesmond Debono Id. No. 471775M a member on the evaluation board, under oath said that there were two systems for testing, one is the column agglutination, and this was requested in the tender, and the column affinity system using a gel and does not use agglutination. The agglutination system uses anti human globulin reagent while the affinity system does not use the anti human globulin reagent. It uses other reagents. The two technologies are different. Answering a question by Dr Delia, witness explained that the evaluation board had to examine all offers and it was for this reason that appellant's offer was examined. He explained that the evaluators had asked Sanguin about the priority and had been informed by them that the urgent tests had to be done manually because the machine did not stop ongoing processes to make an urgent test. They replied by word of mouth. The contracting authority wanted queue jumping facility. Witness did not remember the exact words used. The evaluation board wanted to ensure that the anti human globulin reagent was included in the tests and therefore items 1.4 and 1.5 were not covered by appellant's offer. All the items in section 1 were not acceptable on the basis of the required methodology. The submitted system used 1 card for all tests. The evaluation board had nothing to do with the letter of rejection.

Ms Connie Miceli explained that the different methodology was mentioned in the evaluation report but this was not included by the Department of Contracts in the letter of rejection through an oversight.

Dr Antoine Cremona remarked that the proceedings during on site visits are not recorded through the keeping of minutes.

Mr Jesmond Debono replying to questions by Dr Antoine Cremona confirmed that the machine offered by appellant did not allow for simultaneous samples to be tested. Clause 2.1.2 was included to ensure priority for urgent tests. The second sentence in the clause referred to simultaneous testing. Replying to questions by Dr Delia witness stated that by 2.1.2 he understood that if say, 20 samples are being tested and an urgent test is needed, the process already going on could continue and the urgent test could be inserted in between. Each sample test involved a number of processes. During the on site visit he had not asked to see the urgent sample being tested. He was informed that the urgent test would be done manually.

Mr Ferry Sprengers employed by Sanguin, called by appellant under oath said he had read article 2.1.2 and can state that the system offered by appellant gives priority to urgent tests. In the event of an urgent sample to be tested this would be inserted with the other ongoing tests without disturbing these. The ongoing tests would be paused, the priority test carried out and then the other tests would continue. The urgent test jumped the queue and is given priority. He had been present during the on site visit but he was not sure he remembered having been asked about priority tests at the time. He confirmed that items 1.4(Antibody Identification Enzyme) and 1.5 (Antibody Identification [Coombs] + crossmatch) were offered by appellant. The item 1.5 offered was a universal card having columns representing reagents. Card 1.4 offered is the saline card with no reagents. The cards offered give the results shown in the columns. The cards should contain the anti human globulin. All the tests can be used using one single card. This uses a gel to which the patient's plasma cells are added. The product offered gives the same results as requested in items 1.4 and 1.5. These were offered and their price was listed in the financial bid, they complied with specifications and performed the required process.

Regarding section 3.2 he explained that the product offered by appellant, Pelicase 1, is according to specifications. This is a kit used to test other kits for control testing. The literature enclosed with the tender explained its use. Sanguin Foundation is the only instance in Netherlands allowed to collect and supply blood. Replying to questions by Dr Cremona he stated that he recalled the site visit but does not recall the questions about priority being made. He also confirmed that there is a priority system and the test which is ongoing continues and when it finishes, the priority test starts. He explained visually how the system processes an urgent sample while there are other ongoing tests. He confirmed that the system offered by appellant is in fact a column agglutination system.

Dr Adrian Delia said that the present objection deals with specific exclusion issues. He insisted that it has been proved that the system offered by appellant did in fact allow priority. The evaluation board had to see if the system provided what was requested. Regarding items 1.4 and 1.5 he reiterated that these were submitted but the evaluation board, being used to a system where different cards were used, did not accept a multipurpose card which performed just as well. The system offered by plaintiff obtained the same results that the tender required, and items 1.4 and 1.5 were offered and not as stated in the letter of rejection. Regarding section 3.2 he explained that the kit offered by appellant could be used to assess other kits. The evaluation board's decision has perforce to be overturned.

Dr Antoine Cremona for the preferred bidder stated that appellant had not managed to prove that the reasons of rejection were not correct. The main question boils down to the fact that appellant did not offer what the tender requested. The end users have confirmed that the technology offered by appellant was not the one requested. Priority of tests is dealt with in article 2.1.2 of the tender and this article contains two requirements – priority, and that the urgent priority test is done simultaneously with any ongoing test.

At this point the hearing was closed.

This Board,

Having noted the Appellant's objection, in terms of the 'Reasoned Letter of Objection' dated 1st August 2014 and also through Appellant's verbal submissions during the hearing held on 11th September 2014, had objected to the decision taken by the pertinent Authority, in that:

a) Appellant Company claims that the reasons given by the Contracting Authority were unfounded as follows:

- **i) The product offered by Appellant does in fact conform with the technical requirement as specified in Clause 2.1.2 of the tender document, as specified in the literature submitted by same;**

- **ii) Appellant was also in conformity with clause 1.4, as in actual fact, he did submit the requested information as dictated in tender document;**

- **iii) Again, Appellant contends that he did submit the information as per item 1.5 of the tender document, so that he conformed with the requirements of this clause as well;**

- **iv) Appellant claims that he was technically compliant, in accordance with clause 3.2 of the tender document.**

b) Appellant claims that if the Contracting Authority is now insisting that Appellant's offer was not technically compliant, then it is clear that the reasons

given by the Contracting Authority for refusal of Appellant's offer were unfounded and misleading.

Having considered the Contracting Authority's verbal submissions during the hearing held on 11th September 2014, in that:

a) **The Contracting Authority claimed that the Appellant's equipment being offered by same, did not allow for the facility to give priority to urgent cases without stopping the process of analysis of the other tests in line. This was a requirement as dictated in the tender document;**

b) **The system offered by Appellant applied a different methodology from that requested in the technical specifications of the tender document. The tendered called for a 'Column Agglutination System' whilst the Appellant's offer provided an 'Immunofixation' system;**

c) **The Contracting Authority requested a 'Kit' to control tests of each batch of reagents, to compare same with known results. Appellant's offer differed from this requirement.**

Reached the following conclusions:

1. **With regards to Appellant's contention that his offer was in full conformity with clause 2.1.2, i.e. that his offer was technically compliant, this Board, after having heard the expertise submissions, it was credible established that clause 2.1.2 requested a system whereby it would be possible to give priority to urgent requests without disturbing or halting the already ongoing process of the other tests. From the experts submission it was justified that Appellant's offered equipment could not meet this requirement. In this regard, this Board upholds the Evaluation Board's contention that Appellant's bid was technically non-compliant;**

2. **With regards to item 1.4 and 1.5, after having heard the experts' submissions, this Board is convinced that since the tender called for a 'Column Agglutination System' and Appellant's bid offered a different system defined as 'Immunofixation', Appellant offered a system which was not asked for and in this respect, this Board contends that the Evaluation Board's decision in this respect is correct;**

3. **This Board firmly affirms that 'medical technical specifications' must be strictly adhered to, especially in the Medical field where specifications are of the utmost importance. It has been clearly established, from Medical submissions that Appellant's offer failed to abide by the mandatory technical specifications stipulated in the tender document.**

In view of the above, this Board finds against the Appellant Company, however, due to the Contracting Authority's misleading reasons in the 'Letter of Refusal' sent to Appellant, this same Board recommends that the deposit paid by Appellant should be fully reimbursed.

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

15 October 2014