PUBLIC CONTRACTS REVIEW BOARD

Case 1085 – CFT 020-6147/2017 – Supply of Pen Needles 8mm

The Publication Date of the Call for Tenders was 28 February 2017 whilst the Closing Date for Call of Tenders was 15 March 2017. The Estimated Value of the Tender, (Exclusive of VAT) was € 114,349.45.

Nine (9) Bidders have submitted offers for this Tender.

On 6 September 2017, EuroPharma Limited filed an Objection against the decision of the Central Procurement and Supplies Unit to award the Tender to Krypton Chemists Limited for the price of € 71,150.77 (Exclusive of VAT) against a deposit of € 571.50.

On 28 September 2017, the Public Contracts Review Board composed by Dr Anthony Cassar as Chairman, Mr Carmel Esposito and Mr Richard A Matrenza as members convened a Public Hearing to discuss the Objection.

The Attendance for this Public Hearing was as follows:

Appellant – EuroPharma Limited

Mr Michael Peresso	Representative
Mr Wendell Daniel Schembri	Representative
Dr Stefano Filletti	Legal Representative

Recommended Bidder – Krypton Chemists Limited

Mr Matthew Arrigo	Representative

Contracting Authority – Central Procurement and Supplies Unit

Mr Jonathan Pullicino	Secretary, Evaluation Board
Mr Donald Attard	Member, Evaluation Board
Mr Mark Zammit	Representative
Dr Alexia Farrugia Zrinzo	Legal Representative

Other Interested Parties

Ms Denise Borg Manche	Representative, Vivian Corporation Limited
Ms Marie Antoinette Ellul	Representative, Malta Competition and Consumer Affairs Authority

Following an introduction by The Public Contracts' Review Board Chairman, Dr Anthony Cassar, the Appellants were invited to make their submissions.

Dr Stefano Filletti, the Legal Representative for Europharma Limited opened by asking a representative for the Central Procurement and Supplies Unit to be summoned as a witness.

At this point, Mr Donald Attard, holding ID Card Number 304763 M, a Nursing Officer within the Central Procurement and Supplies Unit, who was also a member of the Evaluation Board for this Tender, was summoned by Europharma Limited to testify under oath before the Public Contracts Review Board.

Following Mr Attard's testimony, Dr Stefano Filletti, the Legal Representative of Europharma Limited said that he had brought a witness from the Appellant Company for cross-examination.

At this point, Mr Alex Fenech, a manager within Europharma Limited, holding ID Card Number 205576 M, was summoned by the same Appellant Company to testify under oath before the Public Contracts Review Board.

Following Mr Fenech's testimony, Dr Alexia Farrugia Zrinzo, the Legal Representative for the Central Procurement and Supplies Unit said that she also has brought a Witness from the Malta Competition and Consumer Affairs Authority for cross-examination.

At this point, Ing Michael Cassar, a Director in the Market Surveillance Department at the Malta Competition and Consumer Affairs Authority, holding ID Card Number 142564 M, was summoned by the Central Procurement and Supplies Unit to testify under oath before the Public Contracts Review Board.

Following Ing Cassar's testimony, Dr Stefano Filletti, the Legal Representative for Europharma Limited opened by saying that his clients were appealing because they disagree with what happened in the procedure. Dr Filletti then proceeded to quote part of the sentence between OK Ltd and the Director of Contracts, issued by the Hon Court of Appeal (Superior) on 18 July 2017 which *inter alia* stated,

"*Jibqa' l-fatt li l-prodotti taż-żewġ kumpaniji involuti joperaw b' mod differenti, u dan kif spjega uffiċjal tas-Soċjeta' Appellanti quddiem il-Bord, u fid-dawl ta' dawk is-sottomissjonijiet, il-Bord kellu jeżamina jekk, bħala fatt, l-offerta tal-offerent preferut kinitx jew le technically compliant, u mhux jistrieħ fuq x'qallu l-Kumitat evalwattiv*"

Dr Stefano Filletti continued by saying that the Public Contracts Review Board is an essential organ for the Public Procurement Regulations who had to see that the procedure for the award of the Tender was done correctly. The Contracting Authority has admitted that on submission of Tenders, the Appellants were compliant. The issues started to arise on whether the Appellants' Bid would have been compliant during the execution of the Contract.

Europharma Limited could not understand why the Central Procurement and Supplies Unit was still evaluating the offers on 7 August 2017 and why the latter did not ask the Appellants to submit the required documents. If this request was done, the problem encountered would have been solved easily.

Dr Stefano Filletti continued explaining that another issue came out during today's sitting since the Contracting Authority requested a clarification from the Appellants in June in which they had requested a document. Europharma Limited is saying that this was a Clarification to eventually submit the relative certificates but since at that moment an inspection was being

carried out, these certificates could only be passed to the Contracting Authority once this inspection was over.

The Central Procurement and Supplies Unit replied only in September when they issued the Letter of Rejection. This document was not requested in the Tender Document and the Contracting Authority should have included a proviso in the Tender Document saying that the Certificate had to expire at the end of the Contract.

Dr Stefano Filletti continued by saying that the Witnesses have testified on the fact that it was the TUV inspection and not the Declaration of Conformity which expired. The inspection was subject to an audit and the certificate was issued on time, on 7 August 2017, when the first one expired.

There was no time when a product submitted by Europharma Limited was not compliant and the relevant certificates could have been presented to the Central Procurement and Supplies Unit but the Evaluation Board did not grant any time to the Appellants to submit these documents.

Krypton Chemists' offer was € 6,000 more expensive than Europharma Limited. Dr Stefano Filletti, as a tax payer, was wondering why he had to pay more, when his clients had a product which was cheaper and compliant because of a failing system. His clients' offer was the cheaper one and the Appellants were hoping that the Public Contracts Review Board would understand these points and grant them the Tender, or at least, refund them the deposit paid with this Objection.

Dr Alexia Farrugia Zrinzo, the Legal Representative for the Central Procurement and Supplies Unit said that the Declaration of Conformity had to cover the product throughout the whole process from when it enters the market. The product submitted by Europharma Limited might be compliant since it was not covered all the time by the relevant certificates.

The Central Procurement and Supplies Unit had a problem for the period between 7 August 2017 and 21 September 2017 since although there was a CE number in the three certificates, this number was not the same for all certificates. Besides, the Contracting Authority felt that in that period, the product was not covered by a certificate.

Dr Alexia Farrugia Zrinzo felt that the Evaluation Board has acted in the correct way when evaluating the Tender. If one had to refer to the Clarification requested, the Contracting Authority requested a Declaration of Conformity which had to be submitted. The Appellants did not say in any time that their product was covered by a Declaration of Conformity. They only said that the Declaration was going to be provided at the end of the TUV inspection.

With reference to the document of the 14 June 2017, there was no confirmation to when the Declaration of Conformity was going to be presented with the dates requested by Law. With regards the Clarification requested, Europharma Limited only said that the necessary documents will be presented once the TUV audit was over and did not say that the product was going to be covered by the necessary documentation. Dr Alexia Farrugia Zrinzo concluded by saying that she felt that the Evaluation Board was right in making its judgements.

The Evaluation Board was not clear in its Evaluations; they didn't know what kind of timeline had and neither did they know whether the product was compliant or not since they had very limited information.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board said that this Board was going to recommend to the Director of Contracts to get an expert to check the system in order to give the Electronic Public Procurement System the chance for all parties concerned to have access to all faculties which a manual system gives.

At this stage, the Public Hearing was adjourned to Tuesday 24 October 2017 at 09:00 wherein the Public Contracts Review Board will transmit the decision taken for this Objection verbally and then distribute a hard copy of the same to all parties concerned.

This Board,

Having noted this Objection filed by EuroPharma Limited (herein after referred to as the Appellant) on 6 September 2017, refers to the Contentions made by the latter with regards to the award of Tender of Reference CFT 020-6147/17 listed as Case No 1085 in the records of the Public Contracts Review Board, awarded by the Central Procurement and Supplies Unit (herein after referred to as the Contracting Authority).

Appearing for the Appellant: Dr Stefano Filletti

Appearing for the Contracting Authority: Dr Alexia Farrugia Zrinzo

Whereby, the Appellant contends that:

a) The procedure adopted by the Evaluation Board in assessing his offer's compliance, in that, it was not correct and the alleged reasons for discarding his offer are unfounded. In this regard, Europharma Limited maintains that they have submitted all the

requested information, including a valid "*Certificate of Conformity*", as duly requested in the Tender Document.

This Board also noted the Contracting Authority's "*Letter of Reply*" dated 12 September 2017 and its verbal submissions during the Public Hearing held on 28 September 2017, in that:

a) In evaluating the Appellant's Offer, the Evaluation Board noted that the "*Certificate of Conformity*" which the latter submitted will expire by the time of the contract for award. After a request for clarification, the Appellant failed to submit an updated certificate.

This same Board also noted the Testimonies of the witness namely:

1. **Mr Donald Attard duly summoned by Europharma Limited;**

2. **Mr Alex Fenech duly summoned by Europharma Limited;**

3. **Ing Michael Cassar duly summoned by the Central Procurement and Supplies Unit**

This Board has also taken note of the documents submitted by Europharma Limited which consisted of:

a) Declaration of Conformity to Promisemed Medical Devices Inc dated 7 August 2017;

b) Re-Certification Audit by TUVRhineland dated 9 August 2017;

c) Declaration of Conformity to Promisemed Medical Devices Inc dated 21 September 2017

1. This Board, after having examined the relative documentation and heard submissions made by the parties concerned, including the testimonies of the Witnesses duly summoned by both parties to this appeal, opines that the main issue of this appeal is the alleged lack of conformity of Europharma Limited's "*Certificate of Conformity*".

First and foremost, this Board notes that the closing date of this Tender was 15 March 2017 whilst the date of award was 1 September 2017. This credibly establishes that the whole evaluation process lasted six months and in this respect, this Board was not presented with any justifiable reason for the rather lengthy duration of the Evaluation process.

From the relative documentation and submissions made, it was credibly confirmed that, at the time of submission of his offer, the Appellant

included a valid "*Certificate of Conformity*", and this Board was also informed by the Contracting Authority that the Appellants' Bid was fully compliant.

One has to note that the "*Certificate of Conformity*" duly submitted by Europharma Limited expired on 7 August 2017, while the Evaluation Process was still ongoing. It is understandable as to why the Evaluation Board requested a clarification as to the renewal of the "*Certificate of Conformity*, however, it does not uphold the latter's decision for not accepting the declaration submitted by TUV Rhineland, being the conformity's auditors.

This Board is fully aware that prior to the renewal of a "*Certificate of Conformity*", an audit is performed on the manufacturer to ensure that the necessary standards are being conformed with and this audit procedure takes its due duration. Even so, this Board justifiably refers to the Appellant's response to the requested clarification, which stated that:

"***Please be informed that the updated "Declaration of Conformity" will be provided by our supplier once TUV Rhineland's audit is over. Please refer to the enclosed document."***

On the other hand, the enclosed document consisted of a declaration from "*Promisemed Medical Devices Inc*" stating that,

"***We, Promisemed Medical Devices Inc, declare that CE Certificare and subsequently "Declaration of Conformity Certificate" updating is currently under process whereby we will have a schedule audit from TUV Rheinland in July 2017. We hereby commit to provide an updated Declaration of Conformity Certificate once the TUV Rhineland audit is over.***"

This Board opines that the above declaration clearly reveals that once the audit is finalised, the updated Certificate of Conformity will be available for submission to the Contracting Authority and in this regard, this confirmation should form an official and valid declaration from the Appellant that this certificate will be available in due course. On the other hand, this Board fails to understand why such a declaration was ignored by the Evaluation Board.

This Board also considered the testimony of one of the Technical Witnesses whereby the same Board was informed that, it was the TUV inspection which expired and not the "*Declaration of Conformity*". In actual fact, it was justifiably noted that the updated certificate was issued on 7 August 2017, at the time when the first certificate was expired, so as to prove the continuation of conformity.

In this regards, this Board upholds the fact that at the time of submission and the closing date of the Tender, Europharma Limited was fully compliant with the inclusion of a valid "*Certificate of Conformity*" and this same Board also affirms that the declaration by the manufacturer made in response to the Central Procurement and Supplies Unit's request for clarification should have sufficiently comforted the Evaluation Board in their deliberation of the Appellant's Bid.

At the same instance, this Board cannot but refer to the EU Directive on the "*European Single Procurement Document*" dated 5 January 2016, whereby the main objective of this Directive is to simplify, as much as possible, the process of qualification for tendering by permitting businesses to self-declare that they meet the necessary regulatory criteria or commercial capability requirements of the Public Authority concerned, without the need to submit proof unless subsequently selected as the appointed contractor. The supplier must state that they are able, upon request and without delay to provide the supporting documents necessary to prove compliance.

This important directive is highly applicable to this particular case, as the Appellant, not only did he submit a valid "*Certificate of Conformity*"

in the first place, but upon request, sent a proper and valid declaration that he will provide the necessary updated documentation. In this regard, this Board upholds the Appellant's Contentions.

In view of the above, this Board finds in favour of Europharma Limited and recommends that:

i) The award of the Tender to Krypton Chemists Limited is to be revoked;

ii) The Appellant's offer is to be reintegrated in the Evaluation Process;

iii) The deposit paid by the Appellant is to be fully refunded.

Dr Anthony Cassar Chairman	Mr Carmel Esposito Member	Mr Richard A Matrenza Member

24 October 2017