

PUBLIC CONTRACTS REVIEW BOARD

Case 1126 – CFT 020-6974/2017 – Tender for the Supply of Through the Scope Multiband Ligation Kits

The Publication Date of the Call for Tenders was 15 December 2017 whilst the Closing Date for Call of Tenders was 8 January 2018. The Estimated Value of the Tender, (Exclusive of VAT) was € 28,579.20.

On 5 January 2018, Procure Limited filed a Call for Remedy Before the Closing Date of Competition against the Tender issued by the Central Procurement and Supplies Unit.

On 30 January 2018, the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Carmel Esposito as members convened a Public Hearing to discuss the Objection.

The Attendance for this Public Hearing was as follows:

Appellant – Procure Limited

Mr Pierre Calleja	Representative
Dr Robert Galea	Legal Representative

Contracting Authority – Central Procurement and Supplies Unit

Ms Marika Cutajar	Representative
Mr Eman Gravino	Representative
Dr Alexia Farrugia Zrinzo	Legal Representative
Dr Marco Woods	Legal Representative

In a brief introduction, the Chairman, Dr Anthony Cassar, welcomed the parties and asked Appellant's representative to make their submission.

Dr Robert Galea, the Legal Representative for ProCare Ltd. commenced by stating that he was flagging two elements in support of his clients' claim. The specifications in the tender were ambiguous and would therefore lead to uncertainty, and the tender as presently drawn up limited competition.

According to Dr Galea, under Subsidiary Legislation 174.04 Article 262 there were diverse grounds for appeals. He mentioned the following on which he would be relying – impossibility to perform the contract; discrimination; violation of legal points and clarifications unclear. He explained the purpose and structure of the apparatus in question, emphasising the point that the ligation kits had to be malleable and flexible to fit on the endoscope.

The Tender specified kits of a diameter of 9.5mm to 13mm – in their clarification the Contracting Authority states that the diameter was to be 13.2m, to fit existing endoscopes.

It was obvious, continued Dr Galea that a 13mm kit did not fit a 13.2mm endoscope, and he also queried why it was necessary to request such a wide range of sizes. In a further clarification, the Central Procurement and Supplies Unit were more specific and quoted figures of 12.8mm to 13.2mm. He contended that a 13.2mm endoscope was not suitable or ideal as it was very intrusive on the patient. The third clarification sought from Central Procurement and Supplies Unit did not shed any further light on the matter.

The clarification by the Central Procurement and Supplies Unit was inconsistent with the requirements of the Department of Health which utilizes two kit sizes – 8.2mm and 9.8mm. There was a further inconsistency in that Central Procurement and Supplies Unit stated that the 13.2mm endoscope was used only in emergencies when no alternatives were available.

Dr Galea stated that the Bidder opted for a better range product which fitted in with what was being used and was a market leader. This avoided the risk of the ligation becoming disconnected because it was not a proper fit and to the dislodgement of the band. He presented a report on the risks of incompatibility.

Finally, Dr Galea said that the way the tender was worded did not allow competition as there was only one provider of kits. He referred to a Case 1101 issued by the Public Contracts Review Board, where the latter had directed a cancellation of a tender precisely because it was limited to one supplier.

Dr Alexia Farrugia Zrinzo, on behalf of the Central Procurement and Supplies Unit asked to be allowed to produce a technical person to give evidence to assist in clarifying matters.

Mr Alan Azzopardi (559363 M) stated on oath that he was a Charge Nurse in the Endoscopy Unit at Mater Dei Hospital. Parameters on the range of sizes for the kits were set by the instruments in use and the range of diameters was set widely to open up competition. The apparatus in use was between 9.2mm and 9.8mm and there was no equipment with an 8.6mm diameter therefore there was no call for this size.

However, since these kits were made of rubber and therefore flexible they can be fitted on larger diameter equipment. In the opinion of Mr Azzopardi the clarification should have been clearer - not to limit competition specification should have stated '*kits between 9.8mm to 11 or 12mm*' – there was no need for 8.6mm kits as there was not the equipment in this size.

The Chairman concluded by pointing out that clarification was necessary to clear a misunderstanding and the Board will clarify it in its decision. He thanked the parties for their submissions and declared the hearing closed.

This Board,

Having noted this Call for Remedies Filed Before the Closing Date of Competition by Procure Limited (herein after referred to as the Appellant) on 5 January 2018, refers to the contentions made by the latter with regards to the award of Tender of Reference CFT 020-6974/2017 listed as Case No 1126 in the records of the Public Contracts Review Board, issued by the Central Procurement and Supplies Unit (herein after referred to as the Contracting Authority).

Appearing for the Appellant: Dr Robert Galea

Appearing for the Contracting Authority: Dr Alexia Farrugia Zrinzo

Whereby, the Appellant contends that:

a) The Technical Specifications with regards the diameters of kits to fit Endoscopes, does limit the scope of competition. In this regard, the Appellants' also insist that the replies to clarifications are inconsistent and ambiguous.

This Board also noted the Contracting Authority's "*Letter of Reply*" dated 19 January 2018 and its verbal submissions during the Public Hearing held on 30 January 2018, in that:

a) The Central Procurement and Supplies Unit insist that they have stipulated the diameters of the kits in accordance with the equipment available at Mater Dei Hospital.

This same Board also noted the testimonies of the witness namely, Mr Alan Azzopardi duly summoned by the Central Procurement and Supplies Unit.

This Board has also taken note of the documents submitted by Procure Limited which consisted of Endoscopy items.

This Board, after having examined the relevant documentation pertaining to this request and heard submissions made by the parties concerned, including the testimony of the witness, it was evidently clear that the

present apparatus in use for these kits, operates on diameters of kits between 8.2mm and 9.8mm and since these kits are flexible they can be fitted on larger diameter equipment.

From the testimony of the witness, it has been credibly established that the clarification should have been clearer and in this regard, this Board recommends that, through a Clarification Note, the Central Procurement and Supplies Unit should state that the kits should be within a diameter range which will fit the existing equipment.

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Carmel Esposito
Member

6 February 2018