PUBLIC CONTRACTS REVIEW BOARD

Case 1202– CFT 020-6655/2017 – Tender for the Supply of Monofilament Polypropylene Sutures

The publication date of the call for tenders was the 1st September 2017 whilst the closing date of the call for tenders was the 20th September 2017. The estimated value of the tender (exclusive of VAT) was € 20,954.38.

On the 7th August 2018, ProCare Ltd filed an appeal against Central Procurement and Supplies Unit (Ministry of Health) as Contracting Authority against their exclusion on the grounds that their offer on three of the lots was technically not compliant. A deposit of € 400 was paid.

There were nine (9) bidders

On 28th August 2018 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman Mr Carmel Esposito and Mr Lawrence Ancilleri as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellant – ProCare Ltd

Dr Robert Galea	Legal Representative
Mr Pierre Calleja	Representative

Recommended Bidder – A.M.Mangion Ltd

Mr Ray Vella	Representative
Mr Manuel Spiteri	Representative
Mr Desmond Bell	Representative

Participating Bidder – Associated Equipment

Mr Charles Mifsud	Representative
Mr Keith Vassallo	Representative

Contracting Authority – Central Procurement and Supplies Unit (Health)

Dr Marco Woods	Legal Representative
Ms Rita Zammit	Chairperson Evaluation Board
Ms Marie-Etoile Craus	Member Evaluation Board
Mr Andrei Zahra	Representative

Dr Anthony Cassar, Chairman of the Public Contracts Review Board, welcomed the parties and asked them to make their submissions.

Dr Robert Galea, Legal Representative of ProCare Ltd, said that apart from the objections of his clients in being excluded on three lots (lots 1,5,&7) for which they had bid, there was also concern regarding the allegations made by the Contracting Authority that certain equipment had failed the tests with no proof being given either that testing had actually taken place or what failures had occurred.

Ms Marie-Etoile Craus (297970M) testified on oath that she was a Charge hand Nurse at Mater dei Hospital and was a member of the Evaluation Board. Witness stated that the procedure she usually followed was to pass samples received to nurses or surgeons who then submitted a report to her.

In the case of Lot 1 witness stated that out of five samples only two had been tested, one of which had been returned as faulty. No records were kept and she was unable to identify the person who carried out the test or how the suture was used. She had to rely on the observations made by nurses, and in this particular case she was not certain if both samples had been tested.

Dr Galea tabled an extensive list of SMI sutures supplied to the Health service in the past, and witness confirmed that she was aware that those products had proved successful.

When asked on Lot 5 why the Authority was claiming that there was no compatibility between what was offered and what was requested, witness stated that the samples provided, and the code number on the catalogue, both indicated, that they were ⅜ of a circle whereas what they required were sutures ½ of a circle.

Dr Galea pointed out to witness that his clients had a signed delivery note indicating that 5 by ½ circle sutures had been consigned to the CPSU. In reply witness said that samples were not individually checked when received and that in this tender no literature had been requested.

On Lot 7 Dr Galea pointed out to witness that his clients' offer was compliant as the CPSU had asked for a cutting needle and it was only after the samples had been supplied were different specifications requested. The 'slim blade' which the CPSU had asked for was a trade mark not a medical blade – this was contrary to Public Procurement Regulations (38.1) which states in clear and unambiguous terms that this is prohibited. Witness said she was unable to reply as she was not aware of what happened in this instance.

Dr Marco Woods, Legal representative of the CPSU, said that Appellant had not met specifications in the tender as a 'reverse cutting needle' and a 'curved cutting needle' were dissimilar products.

Dr Galea referred to Cases 1175, 1101 and 1148 decided by the PCRB which all sustained his arguments regarding use of trademarks and testing of medical samples. He deplored the CPSU's

attitude that it was difficult to keep track of samples and it was not acceptable on a serious matter like health products to say that the CPSU had many tests to carry out on too many samples.

The Chairman said that it was regrettable that no records were being kept of tests carried out and the Board had previous instances of this occurring.

Miss Rita Zammit said that it was impossible to check goods received, in the main the contents of deliveries to the CPSU at San Gwann were not known and not checked and they were simply passed on to the evaluators.

Dr Galea said that it was the responsibility of the CPSU to check the contents of deliveries and simply signing delivery notes was not in order.

The Chairman thanked both parties for their submissions and declared the hearing closed.

This Board,

having noted this Objection filed by ProCare Limited, (hereinafter referred to as the Appellants) on 7 August 2018, refers to the contentions made by the same Appellants with regards to the award of Tender of Reference CFT 020-655/2017, awarded by the Central Procurement and Supplies Unit and listed as Case 1202 in the records of the Public Contracts Review Board.

Appearing for the Appellants: Dr Robert Galea

Appearing for the Contracting Authority: Dr Marco Woods

Whereby the Appellants:

a) refer to Lots 1, 5 and 7 of the tender dossier and insist that their product was technically compliant so that the Contracting Authority's decision to reject their offer was incorrect;

b) raise their concern regarding the alleged claim that certain equipment being offered failed the tests. In this regard, the Appellants maintain that no proof of such occurrence was given by the Authority and no explanation, as to why their product failed the test, was provided.

This Board has also noted the Contracting Authority's "*Reasoned Letter of Reply*" dated 17 August 2018 and its verbal submissions during the Public Hearing held on 28 August 2018, in that:

a) The Central Procurement and Supplies Unit contend that, as per its "*Letter of Rejection*" dated 27 July 2018, the Appellants were provided with the necessary explanations and reasons as to why their products for Lots 1, 5, and 7 were rejected. At the same instance, the Contracting Authority maintains that its assessments on all the offers was based on clinical advice given by experts and consultants, the latter being the users of the product.

This same Board also noted the testimony of Ms Marie-Etoile Craus, Charge Hand Nurse at Mater Dei Hospital, duly summoned by the Public Contracts Review Board.

This Board has also taken note of the documents submitted by ProCare Limited which consisted of an extensive HST of SMI Sutures.

This Board, after having examined the relevant documentation to this Appeal and heard submissions made by the parties concerned, including the testimony of the technical witness opines that each grievance will be given its due consideration as follows:

1. **<u>Lot 1</u>**

   With regards to ProCare Limited's grievance, this Board would refer to the reason given by the Central Procurement and Supplies Unit for rejecting the Appellants' product, in that, when tested, their offered needle became straight after first insertion. At this stage of consideration, this Board is taking into account that such a test is carried out on actual patients, usually in the operating theatre, and it is quite appropriate and understandable that the applicator of the sutures would determine that such a needle is not performing the task for which it is intended and thus not technically compliant, upon straightening of the needle on first insertion.

Through the testimony of the technical witness, this Board was made aware that out of five samples supplied by the Appellants, only two were tested, one of which was found to be faulty and at the same instance, this Board was not presented with the result of test carried on the second sample. In this respect, this Board cannot determine whether the second sample was ever tested and, if so, the result thereof. At the same instance, this Board was made aware that no record of such a result is available by the Contracting Authority and the identity of clinician who applied such a test cannot be determined either. In this regard, this Board opines that two more samples are to be tested followed by a reasoned report of the findings. In arriving at this conclusion, this Board is firmly assuming that such tests will not cause harm or discomfort to the patient on which such trials of sutures are carried out.

2. **<u>Lot 5</u>**

With regards to Lot 5, ProCare Limited are maintaining that they offered the appropriate and technically compliant product. On the other hand, the Central Procurement and Supplies Unit is contending that the item offered by the Appellants represented a 3/8 circle and not one half circle needle, as duly dictated in the specifications. In this

particular case, the product had to be assessed by the applicator of this specific needle and this Board had to rely on the clinician performing the application. At the same instance, through clarification requests, it was established that the samples submitted by the Appellants were for sutures bearing code number 5351540 and not for sutures bearing code number 5351440 and in this respect, such samples do not fall within the specification of ½ circle reverse cutting. In fact, the sample submitted was for reverse cutting 3/8 circle.

Although the Appellants are insisting that they had delivered samples bearing code number 5351440, it is the actual practical testing of the product which rendered the results, as being technically non-compliant. This Board was also made aware, that upon delivery of samples, the latter were not checked as to contents and in this respect, this Board would point out that it is the duty of the Contracting Authority to check that the correct samples have been delivered for testing, prior to issuing a receipt for the delivery, yet, at the same time, this does not exempt the Appellants from ensuring that they have sent the correct samples.

With regards to the Appellants' claim that the Contracting Authority should have requested literature, this Board noted that, the Appellants,

in their submissions had included enough information to identify the product which they were offering. At the same instance, the Witness confirmed that the samples provided and the code number in the catalogue, both indicated that they were 3/8 of a circle and not ½ of a circle. In this regard, this Board does not uphold the Appellants' second contention.

3. <u>Lot No 7</u>

ProCare Limited are alleging that different technical specifications were requested after samples were submitted and that the "*Slim Blade*" which the Central Procurement and Supplies Unit had requested, represented a trade mark of a particular product.

This Board would respectfully refer to the specifications dictated in the Tender Dossier, as follows,

"***Monofilament polypropylene suture G3/0 on 20mm (+/- 1mm) curved cutting slim blade needle suture material blue of length 45mm (+/- 5cm) sterile and individually packed in double wrap*.**"**

First and foremost, this Board notes that the tender dossier requested a "*curved cutting slim blade needle*" *and not a "reverse cutting needle*", the latter type fulfils a different purpose from that of a "*reverse cutting needle*". In this regard, this Board opines that although the technical data did not indicate that a "*reverse cutting needle*" is not compliant, the requested product was a "*curved cutting needle*", which in the medical field has a different application from that offered by the appellants. In this regard, this Board opines that ProCare Limited's product for Lot 7 was not in accordance with the requirements as stipulated in the tender dossier.

With regards to the Appellants' claim that the word "*slim blade*" represents a trade mark, this Board was not presented with any justifiable evidence to prove such a claim and at the same instance, this Board notes a difference in the description so indicated in the tender dossier, in that a "*curved cutting slim blade needle*" does not in any way refer to a trademark under the name of "*slim blade*". In this regard, this Board does not uphold the Appellants' contention.

In view of the above, this Board,

i) **Upholds ProCare Limited's first contention relating to Lot 1, in that, a test on two samples of the Appellants' product is to be carried out and such tests are to be properly documented and if found to be compliant, re-integrated in the evaluation process;**

ii) **Does not uphold the Appellants' second contention regarding Lot 5;**

iii) **Does not uphold the Appellants' contentions relating to Lot 7;**

iv) **Upholds the Central Procurement and Supplies Unit's decision in the award of Lot 5 and Lot 7;**

v) **Recommends that the deposit paid by the Appellants should not be refunded.**

Dr Anthony Cassar	Mr Carmel Esposito	Mr Lawrence Ancilleri
Chairman	Member	Member

6th September 2018