

PUBLIC CONTRACTS REVIEW BOARD

Case 1831 – CfQ 020-2453/22 CPSU7140/22 – Quotation for the Supply of Custom Packs for Cataract Surgery

16th January 2023

The Board,

Having noted the letter of objection filed by Dr Robert Tufigno on behalf of GTG Advocates acting for and on behalf of Amas Co. Limited, (hereinafter referred to as the appellant) filed on the 14th November 2022;

Having also noted the letter of reply filed by Dr Leon Camilleri acting for Central Procurement and Supplies Unit (hereinafter referred to as the Contracting Authority) filed on the 24th November 2022;

Having heard and evaluated the testimony of the witness Mr Andrew Borg (Representative of Amas Co. Limited) as summoned by Dr Robert Tufigno acting for Amas Co. Limited;

Having heard and evaluated the testimony of the witness Dr Mario Vella (Member of the Evaluation Committee) as summoned by Dr Alexia Farrugia Zrinzo acting for Central Procurement and Supplies Unit;

Having taken cognisance and evaluated all the acts and documentation filed, as well as the submissions made by representatives of the parties;

Having noted and evaluated the minutes of the Board sitting of the 10th January 2023 hereunder-reproduced.

Minutes

Case 1831 – CfQ 020-2453-/22 – Call for Quotation for the Supply of Custom Packs for Cataract Surgery

The tender was issued on the 3rd October 2022 and the closing date was the 10th October 2022. The estimated value of the tender excluding VAT, was € 9,882.50.

On the 14th November 2022 Amas Co Ltd filed an appeal against the Central Procurement and Supplies Unit as the Contracting Authority objecting to their disqualification on the grounds that their offer was deemed to be not technically compliant.

A deposit of € 400 was paid.

There were five (5) bids.

On the 10th January 2023 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Mr Lawrence Ancilleri and Ms Stephanie Scicluna Laiviera as members convened a public hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – Amas Co Ltd

Dr Robert Tufigno	Legal Representative
Mr Andrew Borg	Representative

Contracting Authority – Central Procurement and Supplies Unit

Dr Alexia Farrugia Zrinzo	Legal Representative
Dr Leon Camilleri	Legal Representative
Ms Marika Cutajar	Representative
Dr Mario Vella	Evaluator
Mr Juan Zarb Cousin	Evaluator

Preferred Bidder – Prohealth Ltd

Mr Jason Busuttil	Representative
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Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties and invited submissions.

Dr Robert Tufigno Legal Representative for Amas Co Ltd requested the hearing of witness prior to making submissions.

Mr Andrew Borg (210567M) called as a witness by Appellant testified on oath that he is the Sales and Marketing Manager of Amas. His firm had been awarded similar tenders to this one with exactly the same specifications. He offered this time the same product as in previous bids and his firm’s products are the ones currently in use at the hospital. Witness stated that eye pads had been offered not eye patches as claimed. During the tendering process he had had verbal and email exchanges with a Ms Kraus asking if the eye pads offered can be exchanged for a different type which was preferred [Copy of the email to be provided to the Board]. Witness was also advised that the gowns could be supplied separately rather than in a pack.

In reply to a question from Dr Alexia Farrugia Zrinzo, Legal Representative for the CPSU, witness replied that there was a difference between original submission and final offer and that was due to a request received during the tender process from the Contracting Authority. He agreed that the eye pads supplied were different to the original.

Dr Mario Vella (409066M) called as a witness by the Authority testified on oath that he is an Ophthalmologist and Head of that Department at the Hospital and was one of the evaluators of the tender. He stated that in a short space of time around the issue of this tender four other tenders were issued but not proceeded with so samples were readily available for the current tender from the previous tender (5429/22). He was aware that certain changes were requested ‘along the way’. Things were certainly changed in the requested drapes. Ms Kraus was not part of the ophthalmic department. From Appellant’s submissions it was not clear if the bottle sizes requested were available as certain exclusions were mentioned; the drape packs technical data as supplied was not in agreement with the Excel sheet provided which was not an official document anyway; the cover featured in the table presented by the Appellant was not an official document from the manufacturer and the blue vision eye pad original submission indicated that it was a patch with has a specific use and was not the one

used in surgery. The blade size was not listed in the specifications of the bidder. The bid was eventually changed from the original after complaints. The Excel sheet which bidder provided had no authenticity regarding its origin and is a copy paste of the tender specifications and did not form part of the technical part of the tender.

Questioned by Dr Tufigno, witness said that the sample referred to in this tender was from a previous tender, not awarded, which had exactly the same specifications as this one and which was not up to scratch as the pouch had a different configuration. The details in the Excel sheet were not in the technical data and were an exact copy of the technical specifications without any supporting brochures or literature. In the declaration of conformity bidder had added an exclusion footnote.

This concluded the testimonies.

Dr Farrugia Zrinzo noted that no tender has to be considered with other tenders and objection should be related solely to the tender in question. Any documents referred to should have been presented to the Board at least three days before the hearing. The Board can only deal with the offer in this tender.

Dr Tufigno said that it struck him as strange that different methods of adjudicating were used on similar tenders. The claim that the literature provided was not on manufacturers' letter heads does not appear anywhere in the tender requirements and Appellant cannot be disqualified on that point. What the Authority is implying, if taken literally, is that the product cannot be marketed – however it is already in use and any exclusions included do not apply to the local market. The eye pads offered are not eye patches and are non-adhesive. There is enough information in the letter of objection for the PCRb to accept the Appellant's arguments.

Dr Farrugia Zrinzo said that the specifications have to be respected and treated separately from other tenders; this is normal procedure and in line with procurement process. According to the tender dossier (page 4 C ii) literature had to be provided as part of the bid. The Excel list and the manufacturers information supplied were different. Dr Vella in his testimony explained the difference in the products offered and how they failed to meet the specifications. A bid cannot be changed and the Evaluation Committee must follow the specifications. The bid was changed and this was confirmed in the testimony of Mr Borg.

Dr Tufigno noted that whilst the tender requested literature it did not say that it had to be submitted. Since there was no further submissions the Chairman thanked the parties and declared the hearing closed.

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 10th January 2023.

Having noted the objection filed by Amas Co. Limited (hereinafter referred to as the Appellant) on 14th November 2022, refers to the claims made by the same Appellant with regard to the tender of reference

CPSU 7140/22 – CfQ 020-2453/22 listed as case No. 1831 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Robert Tufigno

Appearing for the Contracting Authority: Dr Leon Camilleri & Dr Alexia J Farrugia Zrinzo

Whereby, the Appellant contends that:

- a) Preliminary - one has to point out that at no stage did the Contracting Authority seek any clarification from our clients. Moreover, no samples were asked for from our clients and our clients did not at any stage prove (sic) any samples. Hence any reference in the Reasoned Notice to samples cannot be understood as none were provided.
- b) First grievance - The first ground for refusal is: *“BSS although literature provided shows requested volume of bottle, however footnote says not all pack sizes may be marketed so not clear that volume requested is marketed”*. It is clear from the documentation provided that the volume of the bottle in question is 20ml. A photograph of this bottle has been provided and this is unequivocal. The Contracting Authority makes reference to the Declaration of Conformity and in particular to the "footnote" that not all pack sizes may be marketed. This is completely irrelevant as the fact that the bottle is being offered indicates that it is indeed marketed and in any case the scope of the Declaration of Conformity is that the offered product is compliant with Council Directive 93/42/EEC. In this case the product is both marketable and also compliant with the said Council Directive.
- c) Second grievance - The second ground for refusal is: *“Conflicting measurements between information given by bluevision medical products and last label provided by supplier labelled cataract pack code 24900001 22-058 Blue vision measurements show ophthalmic drape with one pouch and is what was supplied in sample and drape 100x150 not according to specs”*. As already mentioned above no samples were asked for and none were submitted. So the reference to samples cannot be understood. In any case what has been offered by our clients is according to the specifications required by the call for tender.
- d) Third grievance - Another ground for refusal is: *“Blue vision Trolley cover 100x 150 not according to specs”* This reason for refusal is unfounded. According to the tender document (see Section 3, 2.1.4) what was required was that the drape be "in the range of 150cm × 255cm". Our clients offered that each pack would include " Ophthalmic (sic) Drape with double LCP Incised ... SMMS....160x255cm 1pc". What has been offered by our clients is of the size of 160×255 cm. This certainly falls with the "range" requested by the call for tenders.
- e) Fourth grievance - Another ground for refusal is: *“Blue vision eyepad with adhesive not according to specs and eye patch with adhesive was provided with sample”* The specifications mentioned in the call (namely Section 3, 2.1.16) does not mentioned (sic) that the eyepad should be "with adhesive" or "without

adhesive". So the contracting authority cannot now require something that was not required in the call. What indeed has been offered is according to specifications. Moreover, no samples of any eye patch were provided by our clients. So any reference to such samples cannot be understood. In any case the offered product is according to specifications which does (sic) not make any reference to adhesive.

- f) Fifth grievance - Another ground for refusal is: "*Blue vision does not mention Microsharp blade short or full handle 15 degrees x 3mm and was not provided in sample*" The specification in Section 3. 2.1.6 describes the item as follows: "Micro sharp blade short or full handle 15° x 3mm". This means that the supplier would comply both if he offers a short handle as well as a full handle. No sample was required to be submitted and no sample was submitted. Hence, one cannot understand the reference to "sample"
- g) Sixth grievance - The last ground for refusal is: "*Blue vision includes gloves in pack which were not asked for in specs*". These gloves are included in the pack free of charge. They are indeed normally required to be used in such surgeries. It did not affect the pricing negatively, as indeed our clients financial bid was the lowest. Moreover, one has to keep in mind that the packs offered are already in use by the Contracting Authority to its satisfaction following an previously issued call for tenders which was adjudicated to our clients. One may also Appreciate that the call was for individual packs and not for packs in sets of seven as offered by the recommended awardee. This would mean that in the use of the product offered by Prohealth Ltd, one would be more prone to wastage. Hence, what was required by the Contracting Authority was individual packs.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 24th November 2022 and its verbal submission during the virtual hearing held on 10th January 2023, in that:

- a) Preliminary - CPSU agrees and concedes that a sample for this tender was not requested, however, the evaluators in this case had in hand the same set with the same code from an identical call for tenders issued during the same year bearing number CPSU5429/22. Having said that, and without prejudice to the same, the same reasons indicated in the reason for refusal are evident from the technical literature submitted by the objector. Moreover, a clarification would be essential in an instance where something in the offer is not clear. In the opinion of the evaluators in this case, the reasons for rejection were clear and a clarification was not required.
- b) On the First Ground of Refusal - The objector states that the fact that the product was offered these are marketed. It remains however that the literature provided clearly that not all packs sizes may be marketed. There was no indication that the 20ml bottle was actually marketed. The fact that the 20ml bottle was marketed was not indicated black on white.
- c) On the Second Ground of Refusal - The objector in this section conveniently does not go into the merits of the pouch and the drape size since as will be explained these are not in line with the specifications as published. As this Honourable board can note from the technical literature

supplied by the objector, the set offered provided an "Ophthalmic Drape 100×150cm, Single LCP". An "OPHTHALMIC DRAPE WITH DOUBLE LCP INCISED" was only mentioned in a table presented by objector, which could not be in any way considered as technical literature as it was not an official document of the manufacturer, not even on the objector's letterhead! In Section 3 of the tender document, specifications (2.1.4) clearly requires: *"Ophthalmic drape with double pouch and aperture. Size of drape must be in the range of 150cm x255cm with at least 60cm at the surgeon's end. The patient must be covered properly."* The literature of the pack as provided by supplier clearly indicated that the drape included one pouch and the drape was 100x150cm, which was nowhere within the range of 150cmx250cm. The information in the literature corresponded with the packs with the same code from the same supplier (the objector) which the evaluation committee had in hand. Thus it is amply clear that the drape was not within the published specifications and the evaluation committee was diligent and correct when rejecting the offer of the objector on the lack of compliance of the drape.

- d) On the Third Ground of Refusal - The table cover as indicated in the technical literature was that of 100x150. This corresponded exactly with the packs with the same code from the same supplier (the objector) which the evaluation committee had in hand. The size of 140X140CM only featured in the table presented by objector, which could not be in any way considered as technical literature as it was not an official document of the manufacturer.
- e) On the Fourth Ground of the Refusal - What was offered by the objector was an eye patch and not an eye pad. An eye pad is a soft medical dressing that can be applied over an eye to protect it and is not necessarily the same as an eye patch. In fact the eye patch which was included in the technical literature is clearly visible from the photo that the dressing part of the eye patch is not soft like an eye pad and does not offer the same protection when applied over an eye to protect it hence the reason for not (sic) compliance. As will be explained during the sitting an eye pad does not usually has adhesive.
- f) On the Fifth Ground of Refusal - Regarding the micro sharp blade in the technical literature provided, the manufacturer does not mention the micro sharp blade short or full handle 15 degrees 3mm. It was also not part of the pack the evaluators had in hand. The objector once again is referring to a table which does not have any authority and could not be considered by the evaluators for reasons already stated.
- g) General Submissions - The objector concedes that the packs offered are already in use by the contracting authority therefore this justifies and explains why reasons to samples were made. Secondly, the fact that a product was deemed as compliant in an evaluation procedure does not mean that the same will be found compliant in another. Each procurement process is determined on its respective merits and the evaluators are usually, as was in this case, different and therefore an award in a tender does not mean that the same pack will be deemed compliant in all subsequent procurement processes. In addition, submissions on the financial aspect at this stage

should not be done as the evaluation committee had not yet entered in the financial aspect of the objector's offer since it was disqualified (sic) on lack of technical compliance, a stage which precedes the financial stage of the evaluation.

This Board, after having examined the relevant documentation to this appeal and heard submissions made by all the interested parties including the testimony of the witnesses duly summoned, will now consider Appellant's grievances.

- a) Even though there are six (6) different grounds for rejection, this Board will initially deal with what it believes to be most relevant and in an order which is sequential to the evaluation process. It is normal praxis for evaluation committees, when starting their technical evaluation, to initiate such an exercise with a review of the technical literature submitted.
- b) This Board opines that most relevant to proceedings is how parts of the technical literature have been submitted by the Appellant.
 - i. Reference is made to the testimony under oath of Dr Mario Vella where he stated "*the drape packs technical data as supplied was not in agreement with the Excel sheet provided which was not an official document anyway*" and "*The details in the Excel sheet were not in the technical data and were an exact copy of the technical specifications without any supporting brochures or literature*".
 - ii. It is to be noted that the tender dossier in Section 1 paragraph 5 (C)(ii) states "*Literature as per Form marked 'Literature List' to be submitted with the Technical Offer at tendering stage. The scope of the literature is to **corroborate** a fully compliant technical offer*". (bold emphasis added)
 - iii. Moreover, the Literature List states "*Supporting documents and printed manufacturer's technical literature furnished by the tenderer may be in another language,.....*"
 - iv. When considering the above, this Board agrees with argumentation as brought forward by the Contracting Authority that an excel sheet prepared by the same bidding economic operator is not to be deemed as valid unless specifically requested. The aim and objective of Technical Literature is to corroborate the economic operator's bid. This is normally done through brochures, technical information sheets etc as prepared by suppliers of the bidding economic operators.

This point on its own is reason enough not to uphold this appeal in general.

- c) Another relevant point which this Board will delve into is the issue revolving around the Ophthalmic Drape. The supplier (3rd party) submitted brochure from Blue Vision Medical Products states "*1ea Ophthalmic Drape 100x150cm, Single LCP, incised fenestration*". On the other hand, the 'excel sheet' states "*Ophthalmic Drape with Double LCP Incised 160x255cm*". The tender specifications in page 16 Spec No. 2.1.4 were very clear that the Ophthalmic Drape was to be of a size of 150cm x 255cm and have a double pouch and aperture. Therefore, one can easily deduce

that the 3rd party brochure is not in line with technical specifications, whilst the excel sheet is. This Board opines that the Evaluation Committee correctly based its decision on the 3rd party corroborative evidence in hand and arrived at the correct final decision.

- d) At this point, even though this Board agrees with the Appellant on its sixth grievance, [this on the basis that if an economic operator within its offer included an additional item, which was not requested, free of charge, it should not be disqualified on such matters], it none-the-less cannot uphold this appeal based on points (b) and (c) above.

The Board,

Having evaluated all the above and based on the above considerations, concludes and decides:

- a) Does not uphold Appellant's Letter of Objection and contentions,
- b) Upholds the Contracting Authority's decision in the recommendation for the award of the tender to Prohealth Limited,
- c) Directs that the deposit paid by Appellant not to be reimbursed.

Mr Kenneth Swain
Chairman

Mr Lawrence Ancilleri
Member

Ms Stephanie Scicluna Laiviera
Member