

PUBLIC CONTRACTS REVIEW BOARD

Case 1832 – CfT020-1209/22 (CPSU7182/22) – Tender for the Supply of Lens Powers Ranging from +6.0D to +14.0D and +25.0D to +40.0D with the Highest Possible Range of Lenses in 0.5 steps for each category

23rd January 2023

The Board,

Having noted the call for remedies filed by Dr Alessandro Lia on behalf of Lia Aquilina Advocates acting for and on behalf of Prohealth Limited, (hereinafter referred to as the appellant) filed on the 21st October 2022;

Having also noted the letter of reply filed by Dr Leon Camilleri acting for the Central Procurement and Supplies Unit (hereinafter referred to as the Contracting Authority) filed on the 27th October 2022;

Having heard and evaluated the testimony of the witness Ms Marika Cutajar (Representative of the Central Procurement and Supplies Unit) as summoned by Dr Alessandro Lia acting for Prohealth Limited;

Having heard and evaluated the testimony of the witness Mr Juan Zarb Cousin (Representative of the Central Procurement and Supplies Unit) as summoned by Dr Alessandro Lia acting for Prohealth Limited;

Having heard and evaluated the testimony of the witness Dr Mario Vella (Representative of the Central Procurement and Supplies Unit) as summoned by Dr Alessandro Lia acting for Prohealth Limited;

Having heard and evaluated the testimony of the witness Mr Mark Bondin (Representative of Prohealth Limited) as summoned by Dr Alessandro Lia acting for Prohealth Limited;

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

Remedies before Closing Date of a Call for Competition

Case 1832 – CFT 020-1209/22 – Tender for the Supply of Lens Powers ranging from +6.0D to +14.0D and +25.0D to +40.0D with the highest possible range of lenses on 0.5 steps for each Category.

The tender was issued on the 7th October 2022 and the closing date was the 28th October 2022. The estimated value of the tender excluding VAT, was € 50,400.

On the 21st October 2022 Prohealth Ltd filed an appeal against the Central Procurement and Supplies Unit as the Contracting Authority in terms of Regulation 262 of the Public Procurement Regulations

A deposit of € 400 was paid.

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 – Prohealth Ltd

Dr Alessandro Lia	Legal Representative
Mr Mark Bondin	Representative
Mr Jason Busuttil	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

Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties and before inviting submissions noted that the Appeals on tender CFT 020-1215/22 and CFT 020-1214/22 and on this tender were similar and proposed to deal with the three appeals simultaneously. Both parties agreed.

Dr Alessandro Lia Legal Representative for the Appellant requested that witnesses be heard first.

Ms Marika Cutajar (469772M) called as a witness by the Appellant testified on oath that she is the Assistant Head of Procurement at CPSU and that she did not have any role in the tender process.

Mr Juan Zarb Cousin (201797M) called as a witness by the Appellant testified on oath that he is a Procurement Officer and that he had drafted the tender on specifications supplied by others. He was not involved in enquiring on the market requirements of the tender – what he did was mainly a copy and paste operation. . His role was to ensure that the procurement process was carried out correctly.

Dr Mario Vella (409066M) called to testify by Appellant stated on oath that he was the originator of the specifications in the tender although the decision on the specific requirements was a departmental one. An analysis was carried out as to what specifically fits most Maltese patients and availability on the market. As an example, Dr Vella quoted, that the need for a 13mm lens was based on the fact that it meets medical requirements as it gives better stability when inserted in the eye – seven companies offer this size. All decisions were based on clinical assessment but he was not aware of availabilities of sizes in Malta.

Mr Mark Bondin (352380M) called as a witness by Appellant testified on oath that he is a Nurse having served at Mater Dei Hospital and presently at S.V. de Paule Home. He stated that there is a problem with the specifications in the tender as what is requested can only be supplied by the current supplier of this product. It is not possible to prove that there are no other suppliers as from enquiries made several individual requests were met but none could meet all the requested combination of ranges.

Dr Mario Vella recalled to testify under oath by the Contracting Authority confirmed that he is an Ophthalmologist and as previously explained there are reasons for requesting 13mm lenses. UV availability is necessary in the local climate as this gets as near as possible to the natural eye condition.

Dr Lia intervened to point out that this appeal concerned a commercial matter and was not to be considered on medical grounds. Dr Alexia Farrugia Zrinzo Legal Representative for the Authority countered by saying that the witness needed to explain that the specifications were drafted on medical needs.

Proceeding with his testimony Dr Vella stated that the range of power from -5 to +30 is to cater for all patients – locally there is high incidence of myopia and the extreme ranges are very much required; hence the tender specifications. Having more than two batches of power runs the risk of having serious preventable incidents – the risk of inserting incorrect lenses or having wider ranges increases the risks. There have been episodes of lenses being inserted and having to be removed and replaced so one needs the best protection for clients with the least risk.

This concluded the testimonies.

Dr Lia said that according to the last witness dealing solely with the cumulative mix of all requirements it is clear in one way or another that nobody satisfies them. As explained by Mr Bondin, in his testimony, some specific items are tailor-made and have been provided for the last 20 years. The specifications are only met by Alcon and unless changed the situation will remain the same as the extremities cannot be met by any other supplier. No proof has been offered that any supplier can provide the range cumulatively and the Authority is fully aware that only Alcon can meet their specifications. The Alcon product is dated and is used to meet clinical requirements but there are other avenues open to the Authority. Competition is necessary and that needs a change of specifications.

Dr Farrugia Zrinzo stated that Appellant had options to prove that the specifications were issued incorrectly. The document referred to by Dr Vella details the reasons for the those specifications. Mr Bondin referred to matters discussed in the previous hearing – the Board had dealt by those by directing that the tender be re-issued by splitting. This appeal is a pure fishing expedition by trying to eliminate the specifications one by one. The previous appeal had been met but now we have a situation where Appellant has found other grounds to appeal on by objecting to the new ranges and specifications. This is an attempt to reduce the specifications in the tender but no proof was put forward why they should be reduced. The appeals should be refused.

The Chairman thanked the parties for their submissions 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 call for remedies filed by Prohealth Limited (hereinafter referred to as the Appellant) on 21st October 2022, refers to the claims made by the same Appellant with regard to the tender of reference CFT020-1209/22 – CPSU7182/22 listed as case No. 1832 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Alessandro Lia

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

Whereby, the Appellant contends that:

- a) The contracting authority ignored PRCB judgement 1719 and issued three (3) CFT's where there is still discrimination.
- b) The 'powers' requested in this procedure are +6.0D to +14.0D and +25.0D to +40.0D, which therefore means that it includes the extremities contemplated in decision 1719. These extremities / ranges, can only be provided by ALCON, the current incumbent supplier to Mater Dei Hospital.
- c) The UV filter covering wavelength up to 400nm is a characteristic which is only present in Alcon's products.
- d) Similar argumentation is brought for the 'diopter ranges'.
- e) It is evident that the Contracting Authority wants to continue making use of the current incumbent supplier with a 'first generation product' where lenses are produced 'spherical' and not 'aspherical'. This is an outdated technology. The 'spherical' lenses are made of acrylic material. The new lenses are also FDA approved.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 27th October 2022 and its verbal submission during the virtual hearing held on 10th January 2023, in that:

- a) It is being submitted that the claim that there is only one product on the market can satisfy the specifications as published is unfounded as the specifications as published since there are other manufacturers on the market that can offer similar or even higher specs than are being quoted, thus, the specifications as published do not limit competition
- b) The specifications as published are based on scientific knowledge of practitioners and are necessary for the procedures being undertaken in order to protect the patients at risk from adverse effects.

- c) The specifications as published also consider the particular conditions which are prevalent amongst the Maltese population more than in other countries and also consider practices widely used in Europe.
- d) The specifications are such that whilst allowing for competition, they do not expose the patients to unnecessary risks.
- e) Furthermore, it is being submitted that although the contracting authority has numerous public duties and legal obligations when procuring any object, it is also a client of prospective contractor and should have the discretion to procure the product which it needs, especially in cases where the products being procured are medicinal products and devices where the contracting authority's needs are based on clinical advice intended to safeguard the State Hospital's patients.
- f) Moreover it is being submitted that the decision of the PCRB 1719 for CT2087/2021 was followed and abided by as separate call for tenders were issued as ordered by the Board.

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 consider Appellant's grievances as follows:

- a) Reference is initially made to the testimony under oath of Mr Mark Bondin whereby he stated *"It is not possible to prove that there are no other suppliers as from enquiries made several individual requests were met but none could meet all the requested combination of ranges"*. This Board disagrees that 'it is not possible to prove...' as the impression given by the witness is that 'enquiries' were made and according to him most suppliers could meet a number of requirements of the tender dossier but not all (reference to page 18 Section 3 of the tender dossier). No proof, in relation to the above, written or otherwise, was presented to this Board. The appellant, by way of example, could have presented a sample of these requests / enquiries made to these 'other suppliers' or else present the views of an independent technical expert to corroborate such allegations.
- b) Reference is now made to a write up / report prepared by the Department of Ophthalmology and presented as proof by the Contracting Authority, which proves that there is more than one (1) company who produce 13mm sized intraocular lenses and that have a UV filter covering wavelength up to 400nm.

Therefore, this Board does not uphold the Appellant's grievance.

The Board,

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

- a) Does not uphold the Appellant's concerns and grievances;
- b) that the deposit is not to be refunded to the Appellant.

Mr Kenneth Swain
Chairman

Mr Lawrence Ancilleri
Member

Ms Stephanie Scicluna Laiviera
Member