

PUBLIC CONTRACTS REVIEW BOARD

Case 1917 – CT2172/2022 – Supplies – Tender for the Supply of Gauze Swabs X-Ray Detectable – Lot 2

11th October 2023

The Board,

Having noted the letter of objection filed Dr Mark Attard Montalto, Dr Douglas Aquilina and Dr Samira Briffa on behalf of Attard Montalto & Aquilina Advocates acting for and on behalf of Drug Sales Limited, (hereinafter referred to as the appellant) filed on the 11th September 2023;

Having also noted the letter of reply filed by Dr Alexia J Farrugia Zrinzo and Dr Leon Camilleri acting for Central Procurement and Supplies Unit (hereinafter referred to as the Contracting Authority) filed on the 14th September 2023;

Having heard and evaluated the testimony of the witness Mr Edmond Balzan (Member of the Evaluation Committee) as summoned by Dr Douglas Aquilina acting for Drug Sales Limited;

Having heard and evaluated the testimony of the witness Ms Giulia Attard Montalto (Representative of Drug Sales Limited) as summoned by Dr Douglas Aquilina acting for Drug Sales Limited;

Having heard and evaluated the testimony of the witness Mr Edmond Balzan (Member of the Evaluation Committee) as summoned by Dr Leon Camilleri 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 3rd October 2023 hereunder-reproduced.

Minutes

Case 1917 – CT 2172/2022 – Supplies – Tender for the Supply of Gauze Swabs X-Ray Detectable

LOT 2 – 30cm x 30cm

The tender was issued on the 9th January 2023 and the closing date was the 9th February 2023. The estimated value of this Lot, excluding VAT, was € 68,289.38.

On the 11th September 2023 Drugsales 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 not technically compliant.

A deposit of € 400 was paid on this Lot.

On the 3rd October 2023 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Dr Vincent Micallef 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 – Drugsales Ltd

Dr Douglas Aquilina	Legal Representative
Mr Julian Tonna	Representative
Ms Giulia Attard Montalto	Representative
Mr James Borg	Representative
Mr Reuben Demanuele	Representative

Contracting Authority – Central Procurement and Supplies Unit (CPSU)

Dr Alexia Farrugia Zrinzo	Legal Representative
Dr Leon Camilleri	Legal Representative
Ms Marika Cutajar	Chairperson Evaluation Committee
Ms Maria Curmi	Evaluator
Mr Edmond Balzan	Evaluator

Preferred Bidder – Associated Equipment Ltd.

Mr Keith Vassallo	Representative
Ms Denise Galea	Representative

Department of Contracts

Dr Mark Anthony Debono	Legal Representative
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Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties and invited submissions, noting that since there are three identical appeals involving the same parties he is proposing to hear all three cases simultaneously. This was agreed to.

Dr Aquilina Legal Representative for Drugsales Ltd said the appeals on all three lots were the same but on different size swabs. The Contracting Authority had requested samples on the submission of which, Appellant had been disqualified as it is alleged that the labels were not on the outside of the packets as requested. This is denied by Appellant.

Dr Alexia Farrugia Zrinzo Legal Representative for the CPSU said that the Evaluation Committee had followed the requirements in the tender.

A member of the Evaluation Committee was requested to testify.

Mr Edmond Balzan (472665M) called to testify by the Appellant stated on oath that he was one of the evaluators. He exhibited specimen from the total samples submitted by the Appellant. He indicated packets with labels on the outside and others submitted by the Appellant which were double wrapped and therefore had the labels on the inside. Witness

agreed that samples were requested from the Appellant twice. Receipts were exhibited – A 17236 dated 4.7.23 for Lots 1 and 3 and A 18052 dated 13.3.23 for Lot 2. Witness said that the labels on the samples differed from a batch of samples produced at this hearing. It was necessary to have the labels on the outside of the packet as this avoided contamination of the contents.

In reply to questions from Dr Leon Camilleri Legal Representative for the CPSU witness confirmed that the samples displayed today had labels on the outside which did not match the samples submitted at evaluation stage which had inside labels.

Ms Giulia Attard Montalto (201382M) called to testify by the Appellant stated on oath that the samples submitted to the CPSU were correct and they were forwarded straight from the manufacturer which had been supplying this merchandise for a number of years. There must have been some confusion in correctly identifying the samples which were submitted in two boxes as only one was produced at this hearing.

Questioned by Dr Camilleri, witness could not say if the samples from the manufacturers were passed on unchecked.

Mr Edmond Balzan was recalled to testify by the Contracting Authority. He detailed the process at CPSU on receipt of samples and the procedure whereby the selection process was stopped once the first cheapest offer met the tender requirements. Witness confirmed that he opened the delivered samples himself.

In reply to questions from Dr Aquilina, witness said that there were offers from other bidders that were not acceptable and that not all samples were retained after examination.

This concluded the testimonies.

Dr Aquilina stated that the samples were submitted exactly as received from the manufacturer. There are doubts about the claim that the labelling this time was different from usual. On Lot 2 no proof had been provided that the product was incorrectly labelled and the benefit of the doubt must go to the bidder. The situation was a bit clearer on Lots 1 and 3.

Dr Camilleri said that an error on the part of the Appellant should not change the evaluation decision. If the labels on Lot 1 and Lot 3 were on the inside then it stands to reason that they should be disqualified. As regards Lot 2 witness confirmed that the samples displayed to the Board were same as submitted. The Evaluation process must follow the tender requirements.

Dr Aquilina asked that the difference in the timing of the requests for samples should be noted.

Mr Keith Vassallo representing Associated Equipment Ltd said that there was no guarantee on any future supplies of products from Appellant as labels seem to be both on the outside and the inside.

Dr Aquilina pointed out that his was a post award matter.

There being no further submissions the Chairman thanked the parties and declared the hearing closed.

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 3rd October 2023.

Having noted the objection filed by Drug Sales Limited (hereinafter referred to as the Appellant) on 11th September 2023, refers to the claims made by the same Appellant with regard to the tender of reference CT2172/2022 – Lot 2 listed as case No. 1917 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Douglas Aquilina

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

Whereby, the Appellant contends that:

a) It is factually incorrect that the peelable traceability labels of the appellant's products are on the inside (rather than the outside) of the packaging

- i. The appellant's bid was rejected on the basis that the peelable traceability labels of the products were on the inside of the packaging, rather than the outside.
- ii. This requirement is contained in "Section 3 - Specifications" of the tender document whereby there is the following specifications:- *"Each pack must include a three-part, peelable, traceability label for patients' notes, operating room register and hospital records"* (see Spec 2.10 of Lot 2) *"Peelable labels must be fixed to the outer packed (sic) of the swabs"* (see Spec 2.10.1 of Lot 2).
- iii. The tender requires that the swabs are to be packed in packs of five (see Spec 2.4 of Lot 2)
- iv. Therefore the tender requires that the swabs are packed in packs of five, and that each such pack has a three-part, peelable. traceability label fixed to the outside of each pack.
- v. Following the submission of tenders, the contracting authority had requested Drugsales Ltd to provide samples of the products, which samples were duly provided by Drugsales Ltd.
- vi. The contracting authority subsequently rejected the bids submitted by Drugsales Ltd alleging that in the samples submitted, the peelable traceability labels were fixed to the inside of each pack rather than the outside. This assertion is factually incorrect. The peelable traceability labels of the products supplied by Drugsales Ltd are affixed to the

outside of the packs, as required by the tender document, and this is how they are supplied directly from the manufacturer. Such labels are always affixed on the outside and have never been affixed to the inside. This is a worldwide industry standard.

- vii. Photographs of the packs offered to be supplied by Drugsales Ltd clearly show the peelable traceability labels affixed to the outside of the packs. Therefore the reason given by the contracting authority is factually unfounded, and the contracting authority should exhibit the samples to the Board, should it continue to claim otherwise as well as produce the medical professionals who utilized the said sample swabs.
- viii. Therefore the decision by the contracting authority to declare the offers submitted by Drugsales Ltd to be technically non-complaint and to reject the offers submitted by Drugsales Ltd, are unfounded.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 14th September 2023 and its verbal submission during the hearing held on 3rd October 2023, in that:

- a) CPSU respectfully submits that the evaluation committee's decision was legally, factually and technically correct for the below reasons, thus the conclusions of the evaluation committee should be confirmed and upheld.
- b) Amongst other specifications, the tender document at point 2.11.1 under Section 3 - Specifications - Technical Specifications (page 19), provided that the product is to have: *"Peelable labels must be fixed to the outer packed (sic) of the swabs"*
- c) The evaluation committee requested samples, and after the product was seen and inspected by the evaluation committee it was clearly evident that the product presented by the objector did not satisfy this specification which is marked as 'Mandatory'.
- d) As will be seen during the hearing of this objection, the peelable labels on the product as presented by the objector are found on the inside of the package rather than 'fixed to the outer packed (sic) of the swabs', hence not satisfying the specification at point 2.11.1 of the tender document.
- e) Thus, the evaluation committee was correct in finding the product as presented by the objector not according specifications, and rejected the bid as presented.

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) Relevant to this appeal is paragraph 16.3 of the General Rules Governing Tenders which states that *"Wherever applicable, tenderers may be requested to submit samples so that the Evaluation Committee will*

corroborate the technical compliance of the offers received. Without prejudice to the possibility of requesting clarifications, where the samples do not corroborate the offer submitted, the tenderer shall be disqualified.”

- b) Reference is now made to the testimony under oath of Mr Edmond Balzan who exhibited the actual samples as submitted by appellant during the tender evaluation process. He confirmed that the peelable labels, subject matter of this appeal, were not satisfying ‘Spec No 2.10.1’ of Section 3 – Specifications – 1.1 Product specifications as per the Tender Dossier since these were not placed on the outer packed (sic) of the swabs. Moreover, when examining the ‘samples’ as produced by the Appellant during the hearing vis-a-vis those submitted during the evaluation process, these differed with regards to the placement of the peelable label.
- c) It is this Board’s opinion that the sample that is to be used as reference for the proper evaluation of this tendering procedure, is that as submitted during the evaluation stage. This sample, on further examination and as exhibited by Mr Edmond Balzan, clearly did not satisfy Spec No 2.10.1. The fact that the receipt as issued by CPSU for the submission of the sample did not include the batch number of the product, this is deemed immaterial since the actual sample was produced during the hearing.
- d) In the interest of the principle of equal treatment and by following the concept of Self-Limitation, it is this Board’s opinion that the Evaluation Committee correctly deemed the offer of the Appellant as technically non-compliant. Any other decision would simply be giving an unfair competitive advantage to the appellant vis-à-vis the interests of other economic operators participating in this tendering process.
- e) With regards to the deposit, this Board does not agree with arguments brought forward by Dr Aquilina in that the appellant had to file an appeal to view the samples provided and confirm the placement of the ‘peelable labels’. This since it was the same appellant who delivered the samples and therefore such information was already available to the appellant.

Hence, this Board does not uphold the Appellant’s grievances.

The Board,

Having evaluated all the above and based on the above considerations, concludes and decides in reference to Lot 2:

- 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,
- c) Directs that the deposit paid by Appellant not to be reimbursed.

Mr Kenneth Swain
Chairman

Ms Stephanie Scicluna Laiviera
Member

Dr Vincent Micallef
Member