

PUBLIC CONTRACTS REVIEW BOARD

Case 1961 – CfT020-0267/22 (CPSU5439/2022) – Supplies - Tender for the Supply Disposable Sharp Containers – 11 Litres

9th February 2024

The Board,

Having noted the letter of objection filed Dr Clement Mifsud Bonnici and Dr Calvin Calleja on behalf of Ganado Advocates acting for and on behalf of Krypton Chemists Limited, (hereinafter referred to as the appellant) filed on the 29th August 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 5th September 2023;

Having also noted the letter of reply filed by Dr Matthew Paris on behalf of DalliParis Advocates acting for Pharma-Cos Limited (hereinafter referred to as the Interested Party) filed on the 7th September 2023;

Having heard and evaluated the testimony of the witness Ms Deborah Maria Xuereb (Advanced Practice Nurse at Mater Dei Hospital) as summoned by Dr Calvin Calleja acting for Krypton Chemists Limited;

Having heard and evaluated the testimony of the witness Mr Andrea Casasola (Representative of Keter Italia SPA) as summoned by Dr Calvin Calleja acting for Krypton Chemists Limited;

Having heard and evaluated the testimony of the witness Mr Patrick Ghigo (Member of the Evaluation Committee) as summoned by Dr Calvin Calleja acting for Krypton Chemists Limited;

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 6th February 2024 hereunder-reproduced.

Minutes

Case 1961 – CPSU 5439/2022 CfT 020-0267/22 – Supplies – Tender for the Supply of Disposable Sharp Container – 11 Litres

The tender was issued on the 1st March 2022 and the closing date was the 22nd March 2022

The estimated value of this tender, excluding VAT, was € 70,000.

On the 29th August 2023 Krypton Chemists Ltd filed an appeal against the Central Procurement and Supplies Unit objecting to their disqualification on the grounds that its offer was not technically compliant.

A deposit of € 560 was paid.

There were ten bids.

On the 6th February 2024 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a public hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – Krypton Chemists Ltd

Dr Clement Mifsud Bonnici	Legal Representative
Dr Calvin Calleja	Legal Representative
Mr Matthew Arrigo	Representative

Contracting Authority – Central Procurement and Supplies Unit

Dr Leon Camilleri	Legal Representative
Ms Marika Cutajar	Chairperson Evaluation Committee
Mr Patrick Ghigo	Evaluator

Preferred Bidder – Pharma-Cos Ltd

Dr Matthew Paris	Legal Representative
Mr John Soler	Representative

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

Dr Calvin Calleja Legal Representative for Krypton Chemists Ltd requested that witnesses be heard.

Ms Deborah Maria Xuereb (483877M) requested to testify on line by the Appellant stated on oath that she is an Advanced Practice Nurse at Mater Dei Hospital and has eighteen years' experience of carrying out sample testing. She was requested to test the sample containers and check them against the specifications by the adjudication committee. She tested one sample which failed the test and she stopped there. If a sample fails further samples are usually requested.

At this stage Dr Camilleri representing the Contracting Authority intervened to confirm that Ms Xuereb was a technical expert and had received samples from Krypton and Exporters Trading.

Dr Paris Legal Representative for Pharma-Cos Ltd objected to the line of questioning as they were not in keeping with the basis of the appeal.

Resuming her testimony, witness described how the bins were tested. The product was packed in a box containing more than one yellow buckets with red lids and some instructions. Witness confirmed that the tested bucket was model 12 Lit PBS. She also received some technical literature. It was the

witness who wrote the letter of rejection stating that on testing the lid could be removed and therefore the lid did not lock as specified.

Questioned by Dr Mifsud Bonnici, witness said that she could not recall if the lid was properly clicked in place when she assembled the product.

In reply to questions from Dr Camilleri witness stated that the lid was closed using normal pressure and that she has been using sharp containers since 1999.

Witness confirmed to Dr Paris that the concept behind the containers is that they are closed permanently to avoid re-use.

Mr Andrea Casasola (It PP YA8717125) called to testify by the Appellant stated on oath that he has worked for Keter Italia SPA for three years with responsibility for the European and Far East markets. He holds a Masters degree in International Management. Keter sells its products in 75 countries. Witness described the product and demonstrated how to assemble it and how to lock the outer and inner lids. [He physically demonstrated how once clicked in place the lids were locked permanently].

Questioned by Dr Camilleri witness said that he did not have a medical background but re-iterated that once clicked into place properly the lids cannot be opened by a normal person.

Mr Patrick Ghigo (300374M) called to testify by the Appellant stated on oath that he was the sole evaluator in this tender and that there was no technical expert on the evaluation committee. Ms Xuereb did not sign a declaration of impartiality. Although there were ten bids submitted samples were only requested from four of them. Of these only two were sent to the technical expert and both failed. No sample was requested from Pharma-Cos as they were the incumbents. The witness did not test the Krypton sample but relied on Ms Xuereb for her decision as she was the only one to carry out testing. {Witness was asked to physically assemble the test sample and was unable to unlock the lids}

Questioned by Dr Paris, witness said that the automated inner flap was there as a safety measure and that five units had been requested from Krypton for testing.

The Chairman said that he had allowed both the tested sample and a fresh sample to be physically tested in the presence of the Board and had noted that the result was the same on both samples.

Dr Paris asked that it be noted that the CPSU had asked for ten samples to be provided but had tested only one sample.

Dr Calleja said that this was on open, shut and locked case. It was clear that the sample provided showed that it was compliant. The relevant technical specifications were Article 2.1 and 2.2 and the ISO specification was to ensure that the conditions regarding permanent closure were met. Appellant had provided the same certification as the incumbent and one had to conclude that a possible error had occurred during the testing of the sample. Appellant was therefore requesting a re-evaluation of the bids by a different re-evaluation committee.

Dr Mifsud Bonnici added that it was obvious that the product cannot be opened once locked and the Appellant requests the withdrawal of the letter of rejection and that the bid be sent for re-evaluation.

Dr Camilleri stated that the allegations made by Krypton had not be proven and they had produced a witness with no medical background. The tender asked for seal and lock but the technical expert said that there was the possibility of leakages; this latter point had not been addressed by Appellant. The demonstrations seen were not so clear-cut bearing in mind that the product will be used in situations which do not allow risks - the balance of probability is in favour of the Contracting Authority.

Dr Paris said that it was claimed that the proof of lock and seal would be demonstrated but in fact the product shown on the video is not the product under consideration in this case and is best ignored since it has a totally different mechanism. Witness Ms Xuereb has vast experience in these products and concluded that it fails on two points. Proof has only been provided on lock but not on leaks. Appellant claims that ISO met but it has not been proven that Article 1.2 was also met – having one does not exempt having the other. If the terms were not acceptable an earlier remedy was available. Refereeing to *Cherubino vs Direttur tal Kuntratti* Dr Paris asked if the Board is entitled to disturb a technical decision. To reach that conclusion Appellant had to prove that there was an error in the evaluation. Only a technical person could have proved that and no proof was produced to contradict that witness. General Rule Governing Tenders 16.3 provides for the provision of samples to back an offer.

Dr Mifsud Bonnici said that the usual argument of the Contracting Authority is that they know what they want. Manifestation of proof of error was reached in the method the product was being assembled. Witness Mr Casasola indicated exactly how the product locks. The ISO specification is its proof that it is tested against leakages.

Dr Camilleri said that the ISO standard certificate is not accepted as indicating that all requirements met and no proof has been provided to contradict this.

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 6th February 2024.

Having noted the objection filed by Krypton Chemists Limited (hereinafter referred to as the Appellant) on 29th August 2023, refers to the claims made by the same Appellant with regard to the tender of reference CfT020-0267/22 (CPSU 5439/2022) listed as case No. 1961 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Clement Mifsud Bonnici & Dr Calvin Calleja

Appearing for the Contracting Authority: Dr Leon Camilleri

Appearing for the Preferred Bidder: Dr Matthew Paris

Whereby, the Appellant contends that:

- a) The Appellant submits that the product proposed in its bid complies with ISO 23907 and applicable laws and regulations, and therefore, the product's lid will seal and lock when permanently closed. This is clearly and unambiguously stated in the technical literature submitted by the Appellant in its bid.
- b) The Appellant further submits that the evaluation committee should have been able to achieve the seal and lock after use by following the product's instructions for use to the letter. This shall be proven during proceedings.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 5th September 2023 and its verbal submission during the hearing held on 6th February 2024, in that:

- a) CPSU submits that after sample testing it was found that the product offered was not effective for its purpose and did not seal and lock as requested. The fact that the product conforms with a particular ISO standard does not automatically mean that the product is compliant with the tender specifications. Sample testing serves to determine whether the product is adequate for the required purpose or not.
- b) As will be further explained and testified during the sitting, the product was tested by Ms. Deborah Maria Xuereb, Advanced Practice Nurse with vast experience who found the product not as effective as it should be in relation to the lock and seal. CPSU submits that sample testing has been long recognised by this Honourable Board as one of the most effective methods of evaluation.
- c) Moreover, CPSU submits that the fact that the product will be used by end users in hospitals and clinics, there is no better sample testing than by the users themselves.

This Board also noted the Preferred Bidder's Reasoned Letter of Reply filed on 7th September 2023 and its verbal submission during the hearing held on 6th February 2024, in that:

- a) Preliminary - By virtue of a letter dated 4 September 2023, CPSU had been requested to provide the information in relation to the brand, make and model number submitted by Krypton Chemists Limited. By the date of submission of this reply, the information requested has not been provided, and thereby PCR is hereby being requested to render an interlocutory decree, through which and on the basis of inter alia article 40 of the Public Procurement Regulations [PPR], CPSU is ordered to provide the requested information to the recommended bidder.
- b) Mandatory requirement -
Through section 3 of the tender document [Specifications], the contracting authority made it clear that: *"2.2 Includes a handle as well as a lid that seals and locks after use – Mandatory"*
Whilst the recommended bidder has no access or visibility to the bid of the appellant company, in accordance with article 39 of the PPR, all bidders are to be treated equally and in a transparent

manner - thus the samples [as produced by the tenderers] were all analysed and evaluated in accordance with the same technical specifications;

c) The appellant seems to suggest that the ISO certification should be deemed as sufficient to satisfy the requirement - this suggestion is erroneous because of the following:

i. Firstly - ISO certification provides documentary evidence that the product on offer is compliant with certain standards, however it is the sample analysis which provides the appropriate review and subsequent compliance with the tender requirements.

ii. Secondly - ISO certification provided was to ascertain compliance with provision 2.1 of Section 3 [Specifications], whilst the rejection was related to provision 2.2 Section 3 [Specifications].

iii. Thirdly - The discrepancy between the technical literature and the sample review has been a subject previously determined decisions of the PCRB, and sample analysis has been determined as an accepted method to certify compliance [or otherwise] with tender requirements.

d) Doctrine of self-limitation -

The doctrine of self-limitation is an important public procurement principle which has been referred to by this Honourable Board on various occasions, which seeks to ensure that tenderers are adjudged only on the basis of conditions stipulated within the tender document, this will ensure predictability and transparency.

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) With regards to the video evidence as produced by the Appellant, this Board concurs with the argumentation as brought forward by the Preferred Bidder. The product shown in the video is a different model to the one in subject matter of this appeal. Even though the locking mechanism is somewhat similar, they are not entirely identical. It is evident that the two products have different locking mechanisms and therefore this Board will be disregarding this videographic evidence as submitted.

b) This Board now makes reference to the testimony of Ms Deborah Maria Xuereb who, under oath, confirmed that she could not recall if the lid properly clicked in place when she assembled the product. Therefore, this creates doubt if the sample, provided to her, was handled correctly.

c) Following this, this Board makes reference to the testimony under oath of Mr Andrea Casasola who showcased how the lids (both outer and inner lids) are to be properly assembled with the clicking mechanism. Over here it is pertinent to state that the Board was able to ascertain that the locking mechanism is very easily achievable with no particular force required to be applied. In fact,

during the testimony under oath of Mr Patrick Ghigo, once the sample was also inspected by the Board to confirm that the lock and seal had been applied as shown by Mr Andrea Casasola, the member of the Evaluation Board was not able to re-open the lid! It is also crucial to note that to achieve this lock and seal objective, no particular knowledge and / or experience of medicinal products is required!

- d) With regards to the arguments brought forward by the Contracting Authority and Preferred Bidder on the 'leak' aspect, it is pertinent to note that no technical expertise is required to come to a conclusion that if the sample was not locked in properly, it would also be susceptible to leaking! Once it has been proven that the locking mechanism was not adhered to properly by the Evaluation Board, as per the clear and easy instructions provided, such arguments are to be deemed irrelevant.
- e) This Board also concludes that once the 'original' sample, as submitted during the tendering process and the sample of the product as provided during the hearing derived the same results, i.e. that once the product was CORRECTLY locked in, it could not be re-opened, this Board will also disregard any further arguments with regards to the sample of the product as presented during the hearing. The only material sample on which the decision is being based is the sample of the product as submitted during the tendering process, i.e. the 'original' sample.
- f) With regards to the reference made to Court of Appeal judgment with reference 426/2014/1 decided on the 6th February 2015, the Board fully agrees with such judgement (reference to paragraph 17) which states that "*Għal darba obra din il-qorti tosserva illi fuq materja ta' apprezzament tekniku bhala regola generali u **sakemm ma jintwerewx ragunijiet gravi u konvincenti** ma tiddisturbax apprezzament magħmul min board tekniku.*" (bold & underline emphasis added). In this specific case, it has been amply shown that the evaluation committee through its 'technical expert' did not follow the correct and easy procedure to lock and seal the product. This can only be said to be a manifest error of assessment.

Hence, this Board does uphold the Appellant's grievances.

The Board,

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

- a) To uphold the Appellant's concerns and grievances;
- b) To cancel the 'Notice of Award' letter dated 21st August 2023;
- c) To cancel the Letters of Rejection dated 21st August 2023 sent to Krypton Chemists Limited;
- d) To order the contracting authority to re-evaluate the bid received from Krypton Chemists Limited in the tender through a newly constituted Evaluation Committee composed of at least three members, apart from the Chairperson and Board Secretary, which were not involved in the original Evaluation Committee, whilst also taking into consideration this Board's findings;
- e) After taking all due consideration of the circumstances and outcome of this Letter of Objection, directs that the deposit be refunded to the Appellant.

Mr Kenneth Swain
Chairman

Dr Charles Cassar
Member

Mr Lawrence Ancilleri
Member