PUBLIC CONTRACTS APPEALS BOARD

Case No. 18

Contract: **CT 2278/03, Advertisement 214/03, GPS 68.335.TO3.BM Supply of IMMUNOASSAY KITS WITH EQUIPMENT ON LOAN**

The call for offers, with an estimated value of Lm 550,676 was published in the Government Gazette on the 18th July 2003 following a request received by the Director of Contracts from the Government Pharmaceutical Services.

The Adjudication Board went through offers received and decided against proceeding with opening the third envelope submitted by Messrs Cherubino Ltd as it considered it not according to Tender specifications.

Following formal publication of the Board's decision, Messrs Cherubino Ltd filed an objection with the Director of Contracts against the decision.

The Public Contracts Appeals Board composed of Mr Alfred Triganza (Chairman), Mr Anthony Pavia (Member) and Mr Maurice Caruana (Member) met on the 16th June 2004 to hear the appellant's objection in order to establish whether the Adjudication Board's decision was correct.

Dr Marcello Basile Cherubino and Mr Nigel Borg (Technical Officer) represented Messrs Cherubino Ltd (the appellant). Ms Anna Debattista (Director GPS), Ms Miriam Dowling (Chairperson Adjudicating Board), Dr Gerald Buhagiar (Consultant Bio-Chemical Department) and Ms Annalise Sciortino (Principal Medical Laboratory Scientist) represented the central health authorities.

In submitting his case before those present for the hearing, Dr Basile Cherubino commented on various points which were indicated to him when he enquired about the adjudication board's decision which lead to the discarding of their tender. The reasons given left much to be desired so much so that it became unavoidable for his Company to seek redress as granted by the law itself.

Messrs. Cherubino Ltd went through issues specifically raised by the Adjudication Board leading to their final decision to bring the process of scrutiny of the offer submitted by the said Company to a halt due to lack of compliance with tender specifications. Such issues related to (i) lack of space; (ii) CD ROM; (iii) condition of equipment; (iv) technical expert; (v) maintenance agreement; (vi) calibration and (vii) anti-TPO.

With regard to lack of space available to Messrs Cherubino (if the Company were to be awarded the tender) to accommodate all the seven instruments the appellant's representative stated that, in agreement with the end user, they intended to supply five instruments in the laboratory and to keep in their offices the back up instruments, which would be installed in the relevant laboratory on the same day, if and when requested.

Dr Basile Cherubino claimed that in the Board's report it was stated that the CD ROM was considered insufficient for the client's needs. However, the appellant drew the attention of those present by stating that no literature was requested by the Department, yet one has to consider that nowadays the CD ROM was the most modern tool providing all the required information about a system. He said that companies rarely submitted catalogues or literature any more since one could gain access to all systems' information on an interactive CD. However, if the Department felt that the CD ROM was insufficient for their requirement they could have asked for a hard copy or at least some kind of clarification. Furthermore, they were more than willing to send technical experts to explain how the system functioned. He said that '*Remisol 2000 Software*' was a Bechman Coulter system that provided patients' identification and corresponding traffic and particularly used to keep pertinent records of patients.

The Adjudication Board seemed to have been adversely affected by the fact that the tenderer stipulated that, once the contract was terminated, the equipment had to be returned in the same condition in which it would have been originally delivered.

Undoubtedly, Dr Basile Cherubino explained that any Company would have expected at least that at the end of the agreed term the equipment would be returned to the successful tenderer in good condition and not damaged or broken. He was of the opinion that this was a flimsy excuse to exclude them from the next phase.

In September 2003, Backman Coulter sent over to the island Mrs Monique Blom, who was the Product Manager specifically on this type of apparatus, to illustrate and explain how the system functioned. The appellant felt amazed how certain points were not raised at the time when all clarifications could have been made.

Furthermore, Dr Basile Cherubino was baffled by the issue concerning the alleged lack of commitment on his Company's behalf to agree to a maintenance contract covering 24 / 7 all the year round including weekends and public holidays. The appellant stated that this was in the tender document and as a consequence not a question of choice or a topic for further discussion.

Mr Nigel Borg (Technical Officer) said that the technical specifications concerning the issue of dilution, particularly clause 1, entitled "on-board dilutions" of Section B - *Analyser Specifications*, were not quite clear.

He explained that auto-dilution was done by equipment having a specific range which analysed the patient. If the patient were to fall within the specified range, the patient would be accepted but if, for some reason or another the patient would fall outside the range, auto-dilution would bring the patient within range. He said that in view of the fact that their product had a wider range, fewer dilutions were required. As a result this saved time and re-agent consumption. Also their system was cost effective. The actual dilution of samples only involved the typing of the patient identification and indicating the dilution factor on the instrument. The rest was carried out automatically on the Analyser.

He said that Bechman Coulter had another instrument which carried out full auto-dilutions for all parameters but, when technical experts from Bechman Coulter held a

meeting with the laboratory officers before the closing date of the tender, it resulted that its cost was beyond the department's budget.

When specifically asked by the Chairman to elaborate on the fact that in their write-up it was stated that *'the technical specifications were not quite clear in regard to dilution'*, Mr Borg replied that in the tender document only 'on-board dilution' was required. He declared that one of their analysers had fully automated on-board dilution but the other was not fully automated. Although human intervention was required, the level of such intervention was considered to be negligible. He contended that 'on-board' dilution was very vague.

In replying to a question asked by a member of this Board, regarding whether the Adjudication Board had sought any clarification relating to this particular issue, Dr Cherubino said that no clarification was requested because of the fact that their system was superior to other systems in so far as *auto-dilution, calibration* (six point instead of two point) and *stability* (28days against 14 days) were concerned. Mr Vella intervened by stating that the fact that the two-point calibration was extended, the resultant six-point calibration curve could only be regarded as an added advantage.

A Board member, drew the attention of those present by referring to Clause 3 of Section A, ***Test Kits*** where, according to him, it was clearly specified that *'If any pre-treatment procedures of patient samples are required, these should be performed automatically by the analyser*.' Dr Cherubino commented that this should not be taken in isolation but should be considered in conjunction with the calibration system.

With regard to the issue of calibration, Mr Borg stated that the two-point calibration was the minimum required. He said that in view of the fact that their system used six to seven point calibration, it was more advantageous than the two point calibration as the range used was wider and more points were used, it gave more accurate results, it was more stable, it needed less frequent dilutions to be performed, required fewer re-agents and, as a final consideration, less time was wasted.

The appellant's technical officer stated that Anti-TPO tests were above the limit requested by the laboratory, namely 1,500 tests per year as against 500 tests per year. It was intended that these kits would be offered on an alternative system as their principals (Beckman Coulter) had to introduce the kits on board the Analyser by the end of 2004. This meant that by the time the tender would have been awarded and the equipment and the kits delivered, all kits would be run on board the same system. Thus, the number of tests exceeding the limit would be reduced significantly.

Dr Gerald Buhagiar, Consultant at the Bio-Chemical Department at St. Luke's Hospital, said that the analysers were earmarked for installation and commissioning at Mater Dei Hospital but eventually it was issued for St Luke's Hospital as the migration to the former hospital did not materialise. He said that the tenderer offered seven separate instruments which were not according to specifications. In actual fact they issued the tender for the supply of three identically, fully automated immunoassay analysers. The lack of space was problematic to the Department in the context that the equipment required enough working space within which technologists could work. Furthermore, he insisted that it was indispensable for the equipment to be on site.

With regard to the tenderer's requirement to return the equipment in the same condition in which it was delivered, Dr Buhagiar stated that Cherubino Ltd did not indicate that they would accept ordinary wear and tear. He contended that, despite the fact that their employees handled equipment carefully the Department was not in a position to guarantee or be held responsible for any damages which might be caused due to circumstances beyond their control.

Dr Buhagiar said that paragraph 1 of Section B., entitled '***Analyser Specifications'*** of the tender document, which stated that *'High throughput, continuous random access analyser system, with full automation of all procedures, on-board dilutions and a throughput of …'*, was a proof that the specifications regarding auto-dilution were clear and specific. The Consultant contended that the Department wanted the auto-dilution to be fully automated in view of the fact that members of his Department had to deal with large numbers of patients' requests. During the hearing it was confirmed that all recommended suppliers who were short-listed offered auto-dilution.

Experience had thought Dr Buhagiar that a two-point calibration curve was easier to use, more stable and robust than the six-point calibration curve. Dr Buhagiar argued that the fact that Messrs Cherubino Ltd had found it necessary to include more props in between indicated lack of stability and robustness in the system. He was of the opinion that the fact that a 6 to 7 point calibration curve was used did not necessarily mean that you had extended the analytical range and consequently did not need to do auto-dilution. Immunoassay systems used calibration curves with limited working range to cater for the majority of patients. The two-point calibration curve was more cost effective.

Dr Buhagiar said that, despite the fact that Bechman Coulter was a reputable supplier it was very unlikely that Anti-TPO would be made available in December 2004, since from his experience in the working field, the time taken to validate the system would take longer than anticipated. Thus, if it were to be postponed once again, the service they offered would be negatively affected, more so in this day and age when demand for this service is on the increase. He declared that the system was urgently required.

Dr Buhagiar stated that the tender was issued for major and minor analysers which all had to run on board the same system. He said that Cherubino Ltd offered analysers which ran on two different systems. In fact it was declared that they could meet their requirement by December 2004.

When asked about the drawing up of the tender conditions and specifications, Dr Buhagiar stated that it was the result of a team's effort since they were drawn up after various meetings were held before tender was issued.

Ms Annalise Sciortino, Principal Medical Laboratory Scientist, said that they mentioned auto-dilution twice in the tender specifications because they wanted to be sure that the system was fully automated. She said that they wanted to do without a manual dilution to avoid human errors. Ms Sciortino said that Cherubino Ltd needed a 6 to 7 point calibration because they were afraid that what they were offering was unstable. She said that to date the Department had never resorted to the 6 to 7 point calibration because it was done only once by the parent company before the kit was issued and they only needed to do a re-adjustment of 2 points whenever they used a new kit. With regard to the present system, she said that if a test came outside the

range, the analyser would do it within the range automatically without any human intervention.

During the hearing the Department's officials stated that clarifications were only sought from the three tenderers who were short-listed**.** Cherubino Ltd were not asked to clarify the matter regarding (a) CD-ROM, (b) equipment on site and (c) condition of equipment in view of the fact that the (d) number of separate instruments, (e) the fact that the number of assays was in excess of 1500, (f) the immunoassay analysers, (g) auto-dilutions and (h) calibrations were not according to specifications. However it was stipulated that if such items met the scope of the tender, they would have communicated with Dr Cherubino to clarify the other issues.

The Board,

- having noted that appellant's tender was adjudicated as non-compliant with the technical specifications, and consequently, in terms of regulation 102 (2) of the Public Contracts Regulations, 2003 (Legal Notice 299 of 2003), was discarded unopened since it was not considered eligible to pass on to the next stage of the tender procedure (the consideration of the financial package – "Package Three");

- having perused the contents of the Technical Adjudication Board's "Final Recommendations" dated 28 April, 2004, in particular, that section of the report which evaluates appellant's bid;

- having re-examined the several reasons given by the Adjudication Board for not recommending appellant's tender for further evaluation, leading to the discarding of the tender

- having also examined appellant's verbal and written reasons (in terms of his letter dated 16th June, 2004) for contesting the decision taken to discard his tender

- having cross-examined and put appropriate questions to Dr. G. Buhagiar, the Member representing the Adjudication Board in his capacity of Consultant-in-Charge,

reached the following conclusions:-

1. The question of space inadequacy to house the seven Analyser instruments would not have arisen had the equipment been installed at the Mater Dei Hospital during June, 2004, as originally programmed at the time the tender was published. According to Dr Buhagiar, the decision to install the equipment at St Luke's Hospital until it would be feasible to transfer it to the Mater Dei Hospital, was taken later, when it was evident that the installation programme had to be postponed.

   The Board, therefore, does not agree that this particular condition constituted a valid reason for discarding the tender.

2. As regards the Test Kits Specifications, it is clear from the Tender Document that the Contracting Authority was very specific and demanding in this particular requirement, namely,

   '*If any pre-treatment procedures of patient samples are required, these should be performe*d automatically by the analyser'

   (*vide* condition 3 under "A. *Test Kits - Specifications*" on page 8 of the Tender Document. Other references emphasising this requirement also feature on page 9 of the said document.)

3. The arguments put forward by the appellant in the sense that

   - the auto-dilution requirements (specifications) were not clear;
   - fewer dilutions would be required on the systems offered because of their high linear ranges of most parameters;
   - the actual dilution of samples only involves typing the patient identification and indicating the dilution factor on the instrument (a 3-minute manual job);
   - the 6-7 point calibration (the system offered) was more accurate than the 2-point system (the system required) and had several intrinsic technical as well as economic advantages

   did not alter the fact that the Contracting Authority's "auto-dilution" and "automatic performance" expectations from the analyser, as clearly and repeatedly specified in the Tender Document, were not being satisfied, in terms of the equipment offered. As a matter of fact the Contracting Authority's representatives gave very good practical reasons regarding their insistence on having the specified equipment.

4. The board also noted that the apparatus being used at present at St Luke's Hospital already possesses the "auto-dilution" capability. It therefore feels that this particular requirement as specified in the Tender Document is an important one and does not allow for alternative interpretations.

5. As regards the "Anti-TPO" kit required in terms of clause 12 under "B. Analyser Specifications", appellant had offered a phased delivery programme in an attempt to meet the Client's requirements. However, the Board did not consider this issue as particularly crucial, especially when considered in conjunction with the more important matter concerning the "auto-dilution" requirements.

6. As regards the Laboratory Information System Component, it does not result from the Adjudication Board's report that appellant's tender was also being disqualified because (a) he had only submitted a Power-Point presentation on Compact Disc without any other literature and (b) in his statement *"the equipment ……has to be returned in the same condition in which it will be delivered …… once the contract is terminated"* he did not indicate whether he was prepared to at least make provision for ordinary wear and tear – an issue which was clarified during the hearing.

In conclusion, the Board has no alternative other than accepting the conclusion reached by the Contracts Committee that Messrs. Cherubino Ltd.'s tender was not according to the specifications concerning the Test Kit, especially insofar as the "auto-dilution" and "automatic performance" expectations are concerned. In consequence, the Board has decided to reject the complaint raised by the appellant and authorises the tender award procedure to continue.

Alfred R. Triganza	**Anthony Pavia**	**Maurice Caruana**
Chairman	Member	Member

Date: 13th July, 2004