

## PUBLIC CONTRACTS APPEALS BOARD

### Case No. 217

#### DG/90/2009; DH/1196/2008

#### Tender for the Supply of Negative Pressure Therapy Unit

This call for tenders was published in the Government Gazette on 1 September 2009. The closing date for this call for offers was 14 October 2009. The estimated budget for this tender was € 52,800 for two years.

Three (3) tenderer had originally submitted their offers

Charles de Giorgio Ltd filed an objection on the 27 April 2010 against the intended award of the tender in caption to Cherubino Ltd claiming that the recommended tender was not compliant

The Public Contracts Appeals Board composed of Mr Alfred Triganza as Chairman and Mr. Edwin Muscat and Mr. Carmel J Esposito as members convened a public hearing on Wednesday, 11 August 2010 to discuss this objection.

Present for the hearing were:

#### Charles de Giorgio Ltd

Mr David Stellini	Managing Director
Mr John Mallia	Representative
Mr Mark Bondin	Representative

#### Cherubino Ltd

Dr Adrian Delia	Legal Representative
Dr John Gauci	Legal Representative
Mr David Cherubino	Representative
Dr Francis Cherubino	Representative
Mr Nigel Louis	Representative of Smith and Nephew

#### Contracting Authority

##### Health Division

Ms Phyllis Mercieca	Representative
Ms Rita Tirchet	Representative

##### Mater Dei Hospital

Eng. Karl Farrugia	Dir. Material Management & Logistics
Ms Stephanie Abela	Representative

##### Adjudicating Board

Ms Corinne Ward	Member
Ms Marylyn Desira	Member
Mr Marnol Sultana	Member

#### Department of Contracts

Mr Francis Attard	Director General (Contracts)
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After the Chairman's brief introduction, the appellant Company was invited to explain the motive/s of the objection.

Mr David Stellini, representing Charles de Giorgio Ltd, the appellants, explained that these units were costly items but very effective in the treatment of patients and, as a result, the Department of Health was at first resorting to the hire of these units and to the purchase of the dressings. He added that, since the demand for this rather new and innovative service was on the increase, the department decided to issue a call for tenders. Mr Stellini remarked that the tender was awarded on the basis of one global amount of €58,944 when in the tender document one was requested to quote for a list of 16 items and hence he had asked the Contracts Department for a breakdown of the price of the recommended offer, which information was not forthcoming.

Mr Stellini added that, on checking with his supplier in the United States, he was informed that there were certain specialised silver and heel dressings which the competing tenderer did not have in its range of products and therefore the recommended tender could not have been compliant. Mr Stellini claimed that his supplier was in the forefront in the development of this new technology.

Mr Stellini remarked that, in the light of the training given to hospital staff in the use of the items supplied by his firm, the tender specifications and conditions were issued to reflect the service and supplies that were already being provided to the department. He noted, however, that the specifications had been altered in subsequent departmental tenders such that the silver and heel dressings were being left out which, in his view, clearly demonstrated that the other suppliers were unable to provide them.

Mr Marnol Sultana, a member of the adjudicating board, confirmed that Mater Dei Hospital had been contracting this service by direct order from Charles de Giorgio Ltd and that, since this service was proving very beneficial to patients, the demand was on the increase such that it was considered opportune to procure this service through a public call for tenders. Mr Sultana explained that, until such time that this tender would be awarded, the department had to continue issuing departmental tenders and since this was a new and developing technology the tender specifications had to be modified from time to time to cater for developments.

Mr Sultana stated that three tenderers participated in this call for tenders and that the adjudicating board recommended the cheapest compliant tender.

Ms Corinne Ward, member of the adjudicating board, remarked that (i) one of the tenderers was not technically compliant and, as a result, was discarded, (ii) the appellant Company had already supplied this service to the department and (iii) the third bidder, Cherubino Ltd, was a new entity to them in the provision of this service and, as a consequence, the adjudicating board sought clarifications on the service and products offered and the answers they received were satisfactory from a practitioner's point of view and in line with what was being requested in the tender.

Mr Stellini drew a distinction between what was requested in the tender specifications and what was acceptable from a practitioner's point of view because it could be the case that although the end result would be similar, the offer submitted by the recommended tenderer was not up to specifications. Mr Stellini claimed that,

according to his supplier, items 5,6,7 and 10 that featured in the 'Schedule of Prices' were not available in the range offered by the recommended tenderer and he, therefore, wished to know what his competitor offered with regard to these specific items.

Ms Ward remarked that Cherubino Ltd had satisfied the adjudicating board that it could provide the foam silver dressing referred to in items 5 to 7. Ms Ward pointed out that they were provided with samples of the dressings and they were even given a demonstration as to how the proposed machine/unit functioned. Ms Ward explained that Mr Stellini was in a way correct to state that the recommended tenderer's range did not include the foam silver dressing as such but, on the other hand, Cherubino Ltd had foam dressing and silver dressing which, when put together, formed a foam silver dressing acceptable to the department.

Dr Adrian Delia, legal advisor of Cherubino Ltd, stated that, contrary to what the appellant Company claimed, his client was going to provide items 5 to 7 to the satisfaction of the adjudicating board. He added that these items were already being used in public hospitals (later on it was clarified that Cherubino Ltd started supplying this service to the department after the issue of this call for tenders). Dr Delia remarked that since the appellant Company was claiming that the recommended bid was not compliant then it was up to the appellants to prove their claim. Dr Delia referred to the four points raised by the appellant Company in its letter dated 28<sup>th</sup> April 2010 which were satisfactorily answered and explained by the adjudicating board as per emails sent to Mater Dei and the Department of Contracts on the 4<sup>th</sup> June 2010. Dr Delia stressed that the items offered by his client did not have to be identical to those offered by the appellants so long as they satisfied the requirements of the department, e.g. the appellants provided a foam silver dressing whereas his client provided two separate foam and silver items which when put together would provide one item in the form of a foam silver dressing.

When the Chairman PCAB requested the prices quoted by the two compliant tenderers, Ms Ward and Mr Sultana explained that the sum of the prices of the items contained in the schedule of prices was €541.24 in respect of Cherubino Ltd and €591.11 in respect of Charles de Giorgio Ltd. Dr Delia pointed out that this calculation was in line with the adjudication criteria of the tender document which stated:

*"The adjudication of the offers will be based on the cheapest compliant offer. The total cost of the schedule of prices will be taken into consideration in calculating the cost of each offer.*

*At this stage an exercise was undertaken on the addition of the respective list of items offered where it was noted that, although item 11 had been removed from the list by way of a clarification communicated to all tenderers, the cost of item 11 as added up in calculating the cost of the items offered by Charles de Giorgio Ltd and therefore the respective total schedule price should read €553.41 and not €591.11 even though that was still higher than the €541.24 quoted by Cherubino Ltd. It was also noted that in the list submitted by Cherubino Ltd items 10, 14 and 16 were not priced because they were included under others items since they represented part/s of a kit. Moreover,*

*in the case of Cherubino Ltd, besides the 16 items on the schedule at pages 1 and 2 of its submission one had to add also the 8 items at page 2 in respect of dressing items 5 to 7.”*

Dr Delia submitted that the appeal made no reference to prices and, hence, the question of price was beyond the purpose of the hearing although he acknowledged that the PCAB was free to seek information on any aspect of the tendering process.

Mr Stellini pointed out that the letter dated 21<sup>st</sup> April 2010 drawn up by the Contracts Department stated that the evaluation board recommended that the contract should be awarded to Cherubino Ltd for the amount of €58,944 and he complained that his request to the department to furnish him with a breakdown of this figure was not met and due to this lack of information he could not include the price issue in his appeal.

Ms Ward, under oath, stated that, although she was a practitioner, she did ask her colleagues on the adjudicating board to delve further into the pricing aspect of the offers because, for example, Cherubino Ltd offered many more items, e.g. the gauze dressing, than the appellant Company and, hence, it was at a disadvantage compared in that regard. Ms Ward remarked that, to do justice, the adjudicating board took into consideration two scenarios represented in Table 2.1 and Table 2.2 which reflected the therapy for one patient for 7 days (one using a small dressing and the other using a medium dressing) and from this like with like comparison the following costs emerged: €80.32 and €85.95 offered by Cherubino Ltd and €171.95 and €184.95 offered by Charles de Giorgio Ltd respectively. Ms Ward stressed that the main difference between the two offers resulted in the rental of the unit where Cherubino Ltd quoted €7.52 whereas Charles de Giorgio Ltd quoted €82.25.

To a query raised by Mr Stellini, Ms Ward confirmed that the prices of Cherubino Ltd for items 5, 6 and 7 were GBP 3.67, GBP 10.18 and GBP 93.63 respectively and that those same items were available and already being used in government hospitals.

Mr Stellini complained that had his Company been given the details of the prices he probably would not have lodged an appeal but, unfortunately, his requests for information were not met and instead he was advised by the Contracts Department to make an objection. Mr Stellini claimed that the prices should have been in the public domain so that one could check them out even for any errors such as the one discovered during the hearing where item 11, which had been deleted from the list, was added up in the pricing of his offer (*here one could observe that the appellant Company included item 11 when the item had been deleted*). He stated that he had the duty to inform his principals overseas as to the outcome of this tendering process. Although Mr Stellini considered the difference of almost GBP 90 between the small and the large dressing very much on the high side, Dr Delia confirmed the difference while adding that even the difference in the size from 5cm to 40cm was a considerable one.

Mr Francis Attard, Director General (Contracts), explained that it was standard practice that a tenderer would not be given access to the bid of the other tenderers and that was so for various reasons, among them, confidentiality. The Chairman PCAB added that one had also to avoid any fishing expeditions on the part of competing bidders.

Mr Stellini contended that, in his view, the recommended tender was not compliant with the published tender specifications and he, therefore, called for the cancellation of the tender and its re-issue with amended specifications.

Dr Delia remarked that the appeal was not lodged for the PCAB to consider the cancellation of the tender and, in any case, nothing emerged during the hearing that justified the cancellation of this tender.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellants, in terms of their ‘reasoned letter of objection’ dated 28 April 2010 and also through their verbal submissions presented during the public hearing held on 11 August 2010 had objected to the decision taken by the General Contracts Committee;
- having taken note of the appellants’ representatives (a) claim that on checking with the Company’s supplier in the United States, he was informed that there were certain specialised silver and heel dressings which the competing tenderer did not have in its range of products, claiming that, as a result, the recommended tender could not have been compliant, (b) claim that the specifications had been altered in subsequent departmental tenders such that the silver and heel dressings were being left out which, in his view, clearly demonstrated that the other suppliers were unable to provide them, (c) claim that, according to his supplier, items 5,6,7 and 10 that featured in the ‘Schedule of Prices’ were not available in the range offered by the recommended tenderer and (d) claim wherein he stated that had his Company been given the details of the prices he probably would not have lodged an appeal but, unfortunately, his requests for information were not met and instead he was advised by the Contracts Department to make an objection;
- having also taken note of Mater Dei’s representatives’ (a) statement relating to the fact that three tenderers participated in this call for tenders and that the adjudicating board recommended the cheapest compliant tender, (b) explanation that Mr Stellini was in a way correct to state that the recommended tenderer’s range did not include the foam silver dressing as such but, on the other hand, Cherubino Ltd had foam dressing and silver dressing which, when put together, formed a foam silver dressing acceptable to the department, (c) remark that Cherubino Ltd had satisfied the adjudicating board that it could provide the foam silver dressing referred to in items 5 to 7 and that, apart from being provided with samples of the dressings, they were even given a demonstration as to how the proposed machine/unit functioned and (d) emphasis on the fact that the main difference between the two offers resulted in the rental of the unit where Cherubino Ltd quoted €7.52 whereas Charles de Giorgio Ltd quoted €82.25;
- having also taken cognizance of Dr Delia’s (a) claim that, contrary to what the appellant Company had stated, his client was going to provide items 5 to 7 to

the satisfaction of the adjudicating board and that, as a matter of fact, these items were already being used in public hospitals as Cherubino Ltd had already started supplying this service to the department after the issue of this call for tenders through a direct order, (b) emphasis on the fact that the items offered by his client did not have to be identical to those offered by the appellants so long as they satisfied the requirements of the department, e.g. the appellants provided a foam silver dressing whereas his client provided two separate foam and silver items which when put together would provide one item in the form of a foam silver dressing and (c) argument that the appeal made no reference to prices and, hence, the question of price was beyond the purpose of the hearing,

reached the following conclusions, namely:

1. The PCAB opines that the claims made by the appellant Company – in respect of prices, quality, availability of pertinent sizes, etc. - were not adequately corroborated by supporting documentation. It seems evident that all claims were made based upon baseless declarations made by the appellants' suppliers.
2. The PCAB agrees with DG Contracts' statement wherein it was claimed that it is common practice for a tenderer not to be given access to the bid of the other tenderer/s and this for various reasons, among them, confidentiality. Furthermore, this Board feels that, in this particular instance, the appellant Company wanted to embark on a 'fishing expedition' in the absence of proper documentation in hand which could have perhaps assisted the said Company to formally corroborate claims made.
3. The PCAB also notes that it seemed evident that the appellant Company remained with the impression that, given that it had originally introduced this highly successful product / service in Malta, it felt that it had some kind of monopolistic stand on the quality standard and type of product/service available. Needless to say that this kind of reasoning is not acceptable, especially, in this day and age, where technology enables leading and smaller manufacturers to not only copy their competitors but, very often, ameliorate upon standards and pricing structures attained up at any given time.

As a consequence of (1) to (3) above this Board finds against the appellant Company.

In view of the above and in terms of the Public Contracts Regulations, 2005, this Board recommends that the deposit submitted by the said appellants should not be reimbursed.

Alfred R Triganza  
Chairman

Edwin Muscat  
Member

Carmel J Esposito  
Member

*18 August 2010*