

PUBLIC CONTRACTS APPEALS BOARD

Case No. 338

CT/2558/2009; Adv. No. 447/2009

Tender for the Supply of Non Woven Sterilisation Material 750mm x 750mm

This call for tenders was published in the Government Gazette on 4th December 2009. The closing date for this call with an estimated budget of € 193,849.49 was the 26th January 2010.

Five (5) tenderers submitted eight (8) offers.

Pharma-Cos Ltd filed an objection on the 30th June 2011 against the decision by the Contracts Department to award the tender to Medina Healthcare Ltd.

The Public Contracts Appeals Board composed of Mr Alfred Triganza as Chairman, Mr Carmel Esposito and Mr Joseph Croker as members convened a public hearing on Wednesday, 26th October 2011 to discuss this objection.

Present for the hearing were:

Pharma-Cos Ltd

Mr Marcel K. Mifsud	Director
Mr Stephen Attard	Representative
Mr Claudio Martinelli	Representative

Medina Healthcare Ltd - informed by no representative attended.

Government Health Procurement Services (GHPS) presently the Central Procurement and Supplies Unit (CPSU) – Ministry of Health, the Elderly and Community Care (MHEC)

Ing. Karl Farrugia	Chief Executive Officer
Ms Stephanie Abela	Manager

Evaluation Board:

Mr Mario Sant	Member
Mrs Alicia Vella Letheridge	Member

After the Chairman's brief introduction, the appellant company's representative was invited to explain the motives of his company's objection.

Mr Marcel Mifsud, Director Pharma-Cos Ltd, the appellant company, explained that the reasons for his company's objection to the decision communicated by the Contracts Department through letter dated 7th April 2011 that the tender had been awarded to Medina Healthcare Ltd, were the following:-

- i. the tender document stipulated that "*Tenderers are to note that the mandatory bid bond is to remain valid up to the 23rd July 2010*";
- ii. according to the 'Schedule of Tenders Received' published by the Department of Contracts a remark had been entered against Tenderer No. 3 'Medina Healthcare Ltd' which read '*Bid Bond not submitted*'; and
- iii. once Medina Healthcare Ltd had not submitted the mandatory bid bond then it should have been disqualified

Mr Karl Farrugia, representing the contracting authority, confirmed the statement made by the appellant company. Furthermore, Mr Farrugia added that the Department of Contracts had drawn the attention of the former Director Government Health Procurement Services but, apparently, the latter had failed to address this issue.

Ms Stephanie Abela, procurement manager at the Central Procurement and Supplies Unit, which replaced the Government Health Procurement Services, explained that albeit the 'Schedule of Tenders Received' indicated that Medina Healthcare Ltd had failed to submit the bid bond because what the recommended tenderer had, in fact, submitted was the performance guarantee, still the adjudicating board carried out the evaluation of the tenders and recommended that the tender be awarded to Medina Healthcare Ltd's offer, which recommendation was confirmed by the Department of Contracts.

Mr Mifsud explained that the bid bond, which amounted to €3,000, was intended to discourage the bidder from withdrawing one's bid during the tendering process, whereas the performance guarantee was requested upon tender award and, as a consequence, these were two separate and distinct requirements and by no means could one replace the other. Mr Mifsud stated that when he had drawn the attention of the Contracts Department about this erroneous decision he was informed that, while the Contracts Department acknowledged the mistake, still the remedy available to Pharma-Cos Ltd was to lodge an appeal with the Public Contracts Appeals Board.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellant's company, in terms of the reasoned letter of objection dated 5th July 2011 and through the verbal submissions made during the hearing held on the 26th October

2011, had objected against the decision by the Contracts Department to award the tender to Medina Healthcare Ltd;

- having noted the appellant firm's representatives' claims and observations regarding the fact that (a) the tender document stipulated that "*Tenderers are to note that the mandatory bid bond is to remain valid up to the 23rd July 2010*", (b) according to the 'Schedule of Tenders Received' published by the Department of Contracts a remark had been entered against Tenderer No. 3 'Medina Healthcare Ltd' which read '*Bid Bond not submitted*' and (c) once Medina Healthcare Ltd had not submitted the mandatory bid bond then it should have been disqualified;
- having considered the contracting authority's representative's (a) confirmation of the statement made by the appellant company with regards to the fact that according to the 'Schedule of Tenders Received' published by the Department of Contracts a remark had been entered against Tenderer No. 3 'Medina Healthcare Ltd' which read '*Bid Bond not submitted*', (b) reference to the fact that the Department of Contracts had drawn the attention of the former Director Government Health Procurement Services but, apparently, the latter had failed to address this issue, (c) reference to the fact that the bid bond, which amounted to €3,000, was intended to discourage the bidder from withdrawing one's bid during the tendering process, whereas the performance guarantee was requested upon tender award and, as a consequence, these were two separate and distinct requirements and by no means could one replace the other and (d) reference to the fact that when Mr Mifsud drew the attention of the Contracts Department about this erroneous decision, he was informed that, while the Contracts Department acknowledged the mistake, still the remedy available to Pharma-Cos Ltd was to lodge an appeal with the Public Contracts Appeals Board,

reached the following conclusions:

1. The Public Contracts Appeals Board acknowledges that one cannot overlook the reference made to the fact that the Department of Contracts had drawn the attention of the former Director, Government Health Procurement Services and that the latter had erroneously failed to address this issue.
2. The Public Contracts Appeals Board has taken full cognisance of the contracting authority's representative who referred to the fact that the bid bond, which amounted to €3,000, was intended to discourage the bidder from withdrawing one's bid during the tendering process, whereas the performance guarantee was requested upon tender award and, as a consequence, these were two separate and distinct requirements and, by no means, could one replace the other.
3. This Board cannot but adversely consider the Contracts Department's advice to Pharma-Cos Ltd to lodge an appeal with the Public Contracts Appeals Board despite acknowledging the mistake made by the contracting authority when, albeit the 'Schedule of Tenders Received' indicated that Medina Healthcare Ltd had failed to submit the bid bond because what the recommended tenderer had, in fact, submitted was the performance guarantee, yet the adjudicating board still carried out the evaluation of the tenders as well as recommending that the tender be awarded to Medina Healthcare Ltd's offer. The Public Contracts Appeals

Board feels that a considerable amount of time wasted by all parties concerned on this appeal procedure could have been easily avoided had both common sense and a certain degree of pragmatism prevailed.

In view of the above this Board finds in favour of the appellant company and recommends that, apart from the appellant company being reintegrated in the evaluation process, the deposit paid by the latter should be reimbursed.

Alfred R Triganza
Chairman

Carmel Esposito
Member

Joseph Croker
Member

14th November 2011