

## PUBLIC CONTRACTS REVIEW BOARD

Case No. 455

**GHPS/62023D12OS; Adv. No. 2094/12**

**Tender for the Supply of Ostomy Items Sizes 38 – 100mm**

This call for tenders was published in the Government Gazette on the 24<sup>th</sup> February 2012. The closing date for this call with an estimated budget of € 119,445 was the 12th March 2012.

Three (3) tenderers submitted their offers.

A.T.G. Ltd filed an objection on the 28th June 2012 against the decisions of the Central Procurement and Supplies Unit (CPSU) - Ministry for Health, the Elderly and Community Care - to discard its offer as technically non-compliant and since offer did not include all items requested and to recommend the award of the tender to Convatec Ltd.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr Joseph Croker and Mr Carmel Esposito as members convened a public hearing on Friday, 17<sup>th</sup> September 2012 to discuss this objection.

Present for the hearing were:

### **A.T.G. Ltd**

Dr Franco Galea	Legal Representative
Mr Oliver Attared	Managing Director
Mr Aaron Grima	Representative
Ms Jo Sica	Representative

### **Convatec Ltd**

Mr Ian Pace	Representative
-------------	----------------

### **Central Procurement and Supplies Unit (CPSU) - Ministry for Health, the Elderly and Community Care**

Mr George Fenech	Representative
------------------	----------------

### **Evaluation Board**

Ms Connie Miceli	Chairperson
Mr Alex Attard	Member
Ms Palma Muscat	Member
Ms Jacklyn Sammut	Member
Ms Marthese Bonella	Secretary

After the Chairman's brief introduction, the appellant company's representative was invited to explain the motives of the company's objection. Meantime, no objection was raised to the appellant company's request to conduct the hearing in English in view of the fact that one of its witnesses was a UK national.

Dr Franco Galea, legal advisor of A.T.G. Ltd, the appellant company, explained that by letter dated 22<sup>nd</sup> June 2012 the contracting authority informed his client that its offer was not successful since not all the items offered conformed to specifications and because the offer did not include all the items requested.

Dr Galea submitted that:-

- a. his client had submitted a fully compliant tender submission;
  - b. the specifications with regard to Item 8 of the bill of quantities 'Fully flexible pre-cut convex skin barriers (Body wafers)' referred to a specific product and, therefore, in breach of procurement regulations since it restricted or eliminated competition;
- and
- c. he wished to call witnesses to take the stand to reinforce his arguments.

Ms Connie Miceli, chairperson of the evaluation board, under oath, gave the following evidence. She stated that

- i. three bids were received in response to this call for tenders, two from local companies and the other from a foreign company through its local representative;
  - ii. following the notice of rejection, the appellant company had asked for more information and, as a consequence, the contracting authority furnished all the shortcomings that the adjudication board had noted during the evaluation process;
  - iii. although the schedule of tenders received indicated that the appellant company's offer amounted to €89,046.80 and that the recommended offer amounted to €117,352.39, it was difficult to establish whether the appellant company's offer was in fact cheaper because it did not include all the items requested and so one would not be comparing both offers like-with-like;
- and
- iv. the recommended offer included all the items requested in the tender.

Ms Jackyln Sammut, member of the evaluation board and stoma care nurse, under oath, gave the following evidence:-

- a. the tender specifications were drawn up in such a way as to cover all the items used both in public hospitals and outside public hospitals;



- b. in drawing up the technical specifications the contracting authority consulted the literature of various suppliers, including Hollister of the UK which supplied the products offered by the appellant company;
  - c. the tender specifications, including those referring to item 8 of the bill of quantities, could be satisfied by different suppliers and not by a sole supplier;
- and
- d. she was not responsible for stock control and, as a result, could not reply to the appellant company's claim that the current contractor, who happened to be the recommended tenderer, had left certain ostomy items out of stock for months on end.

The Chairman Public Contracts Appeals Board pointed out that the contracting authority had the right to set the specifications according to its requirements provided that the technical specifications could be met by as many products/brands as possible and not by a particular product/brand.

Ms Jo Sica, under oath, after explaining that she had extensive experience in this kind of medical care in the UK, the USA and elsewhere, gave the following evidence:-

- i. after exhibiting several samples of ostomy items she explained that 'ostomy' referred to the surgically created opening in the body for the discharge of body wastes whereas a 'stoma' was the end of the ureter or bowel;
  - ii. she pointed out that the ring size was always larger than the cut size;
  - iii. with regard to item 1a ATG Ltd offered item 34500 and when one read the relative technical details of the manufacturer it transpired that Order No. 34500 had a ring (gasket) size 45mm which could be cut up into a skin barrier (body wafer) to fit a stoma the size varying from 13 up to 30mm;
  - iv. when her attention was drawn to the fact that item 1a referred to size 38mm  $\pm$ 3mm size variation, she confirmed that in that case one would require an item with a ring size 55mm because that could be cut up to fit a stoma size varying from 13 up to 40mm (e.g. Order No. 35500);
- and
- v. when Dr Galea referred her to the specifications of item 4a which read 'closed ostomy pouches of regular size 38mm  $\pm$ 3mm size variation' and in which case the contracting authority considered the item offered by the appellant company, having (flange/ring) size 45mm (Order No. 24420), as non-compliant, she confirmed that the item offered by the appellant company did not match specifications.

The Public Contracts Review Board noted that on going through the list of shortcomings drawn up by the evaluation board one would notice that there were

other instances where the items offered by the appellant company did not correspond to specifications, such as, item 5a which referred to 'drainable ostomy pouches of regular size 38mm  $\pm$ 3mm size variation pouch must be skin colour' whereas the item offered was of size 45mm (Order No. 24760).

Mr George Fenech, representing the contracting authority, remarked that:-

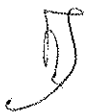
- a. the tender specifications were drawn up by the chairperson of surgery and, as was the practice, that person did not sit on the evaluation board so as to avoid conflict of interest and/or bias;
  - b. whenever items were out of stock the contracting authority always dealt with it in line with contractual obligations in force and/or according to its established procedures;
- and
- c. these items were used by patients with bowel problems such that they had to discharge body waste through a surgically created opening into pouches and the contracting authority did not want to add to their problems by supplying inadequate ostomy items.

*At one stage the Central Procurement and Supplies Unit (CPSU) - Ministry for Health, the Elderly and Community Care clarified for the benefit of the appellant company that there were two tendering procedures in course for the supply of these same ostomy items, a departmental tender which was the subject of this hearing was meant as a bridging contract until such time that the larger tender was adjudicated and awarded.*

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 the 28th June 2012 and also through their verbal submissions presented during the hearing held on the 17<sup>th</sup> September 2012, had objected to the decision taken by the pertinent authorities;
- having noted all of the appellant company's representative's claims and observations, particularly, the references made to the fact that (a) by letter dated 22<sup>nd</sup> June 2012 the contracting authority informed the appellant company that its offer was not successful since not all the items offered conformed to specifications and because the offer did not include all the items requested, (b) the appellant company had submitted a fully compliant tender submission, (c) the specifications with regard to Item 8 of the bill of quantities 'Fully flexible pre-cut convex skin barriers (Body wafers)' referred to a specific product and, therefore, in breach of procurement regulations since it restricted or eliminated competition, (d) after exhibiting several samples of ostomy items those present were informed that, whilst 'ostomy' referred to the surgically created opening in the body for the discharge of body wastes, a 'stoma' was the end of the ureter or bowel, (e) the



ring size was always larger than the cut size, (f) with regard to item 1a ATG Ltd offered item 34500 and when one read the relative technical details of the manufacturer it transpired that Order No. 34500 had a ring (gasket) size 45mm which could be cut up into a skin barrier (body wafer) to fit a stoma the size varying from 13 up to 30mm, (g) in the case of item 1a which referred to size 38mm  $\pm$ 3mm size variation one would require an item with a ring size 55mm because that could be cut up to fit a stoma size varying from 13 up to 40mm (e.g. Order No. 35500) and (h) in the case of item 4a which read 'closed ostomy pouches of regular size 38mm  $\pm$ 3mm size variation' the contracting authority considered the item offered by the appellant company, having (flange/ring) size 45mm (Order No. 24420), as non-compliant, in view of the fact that the item offered by the appellant company did not match specifications;

- having considered the contracting authority's representative's reference to the fact that (a) three bids were received in response to this call for tenders, two from local companies and the other from a foreign company through its local representative, (b) following the notice of rejection, the appellant company had asked for more information and, as a consequence, the contracting authority furnished all the shortcomings that the adjudication board had noted during the evaluation process, (c) although the schedule of tenders received indicated that the appellant company's offer amounted to €89,046.80 and that the recommended offer amounted to €117,352.39, it was difficult to establish whether the appellant company's offer was, in fact, cheaper because it did not include all the items requested and so one would not be comparing both offers like-with-like, (d) the recommended offer included all the items requested in the tender, (e) the tender specifications were drawn up in such a way as to cover all the items used both in public hospitals and outside public hospitals, (f) in drawing up the technical specifications the contracting authority consulted the literature of various suppliers, including *Hollister* of the UK which supplied the products offered by the appellant company, (g) the tender specifications, including those referring to item 8 of the bill of quantities, could be satisfied by different suppliers and not by a sole supplier, (h) the tender specifications were drawn up by the chairperson of surgery and, as was the practice, that person did not sit on the evaluation board so as to avoid conflict of interest and/or bias, (i) whenever items were out of stock the contracting authority always dealt with it in line with contractual obligations in force and/or according to its established procedures and (j) these items were used by patients with bowel problems such that they had to discharge body waste through a surgically created opening into pouches and the contracting authority did not want to add to their problems by supplying inadequate ostomy items;

reached the following conclusions, namely:

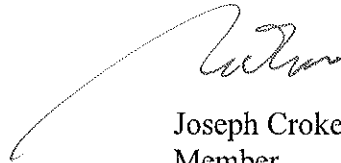
1. The Public Contracts Review Board noted that, on going through the list of shortcomings drawn up by the evaluation board, one would notice that there were other instances where the items offered by the appellant company did not correspond to specifications, such as, item 5a which referred to 'drainable ostomy pouches of regular size 38mm  $\pm$ 3mm size variation pouch must be skin colour' whereas the item offered was of size 45mm (Order No. 24760).

2. The Public Contracts Review Board took full cognisance of the clarification made during the hearing wherein those present were informed by the contracting authority's representative that there were two tendering procedures in course for the supply of these same ostomy items, a departmental tender, which was the subject of this hearing and which was meant as a bridging contract until such time that the larger tender was adjudicated and awarded.
3. This Board took note of the fact that the appellant company confused the details pertaining to one tendering procedure (the departmental tender) vis-a-vis the other tender. Needless to say that this rendered most of the arguments raised by the appellant company during the hearing as meaningless and irrelevant.

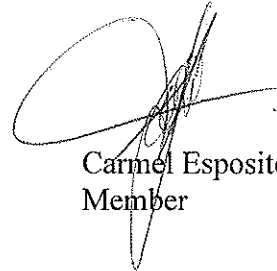
In view of the above, this Board finds against the appellant company and recommends that the deposit paid by the same appellant for the appeal to be lodged should not be reimbursed.



Alfred R Triganza  
Chairman



Joseph Croker  
Member



Carmel Esposito  
Member

28th September 2012