

## PUBLIC CONTRACTS REVIEW BOARD

Case No. 482

**GHPS/1052/11**

### **Tender for the Supply of Custom Packs for Cataract Surgery**

This call for tenders was published in the Government Gazette on the 23rd December 2011. The closing date for this call with an estimated budget of € 117,000 (excl. VAT) was the 23rd Jannar 2012.

Eight (8) tenderers submitted their offers.

Evolve Ltd filed an objection on the 29<sup>th</sup> August 2012 against the decisions of the Ministry for Health, the Elderly and Community Care that its bid was not successful and to recommend the award of the tender to Amas Ltd.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr Joseph Croker and Mr Paul Mifsud as members convened a public hearing on Thursday, 1st November 2012 to discuss this objection.

Present for the hearing were:

#### **Evolve Ltd**

Dr Peter Caruana Galizia	Legal Representative
Mr Chris Busuttil	Director
Mr Mark Mizzi	Manager, Medical Division

#### **Amas Ltd**

Dr Ivan Gatt	Legal Representative
Mr Andrew Borg	Representative
Mr Alessandro Psaila	Representative
Ms Yanika Cachia	Representative

#### **Ministry for Health, the Elderly and Community Care**

#### **Evaluation Board**

Mr George Fenech	Chairman
------------------	----------



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

Dr Peter Caruana Galizia, legal representative of Evolve Ltd, the appellant company, made the following submissions:

- i. the appellant company submitted two offers, one at the price of €135,700, which was considered too expensive, and the other of €94,400 or €37.76 per pack, which was the cheapest and the subject of this appeal;
- ii. by email/letter dated 22nd August 2012 the appellant company was informed that its offer was adjudicated to be technically non-compliant "*since the blades/keratome in the pack is not creating the ideal tunnel, users are unhappy with resultant tunnel which is not self healing. Not acceptable. Price offered is higher than that awarded*";
- iii. the appellant company had offered a product according to Volume 3 'Technical Specifications' item 2 'Item Description' (4) Slit knife 2.75mm or 2.20mm, namely it offered the 2.75mm;
- iv. whilst the product offered was provided by a German supplier yet the slit knives were manufactured by Unique Technologies Inc. in the USA, a world leader in the manufacture of microsurgical instruments, which also submitted a statement that it had not received any complaints similar to those raised by the contracting authority in this case;  
  
and
- v. called upon the contracting authority to explain further the reasons for the appellant company's exclusion.

Mr George Fenech, chairman of the evaluation board, explained that:

- a. the current contractor was Amas Ltd, the recommended tenderer;
- b. the bidder was asked to submit 12 sample packs and as part of the evaluation process these samples were handed out to the end users, namely the consultants/surgeons, to test them and to submit their comments;
- c. out of six consultants/surgeons, one made no comment while the other five made various comments but the general comment was that they did not recommend the appellant company's product;
- d. the evaluation board was composed of professionally qualified persons in ophthalmology including Mr Thomas Fenech, Chairman, Department of Ophthalmology;

and



- e. the second cheaper offer was that by VCC Ltd (Vivian Corporation) at €94,950, which was disqualified because the “*drapes are cumbersome such that one cannot safely drape with eyelashes cleared from operative field hence it is dangerous regarding sterility. Not acceptable*”.

*At this stage the Public Contracts Review Board went through and deciphered the handwritten comments/conclusions made by the ophthalmologists with regard to the appelland company’s product which read as follows:-*

- i. *I did not see any of Evolve’s packs – Dr J Janula;*
  - ii. *only reservation on keratome - needs some time to get used to – Mr Franco Mercieca;*
  - iii. *reservation on kertome (blade thick and not as sharp) – Mr Mario Vella;*
  - iv. *micro blade shaft too thick at blade – Dr John Grech Hardie;*
  - v. *Evolve, good - – Mr William Gualtieri;*
- and*
- vi. *Blade/keratome is not creating the ideal tunnel, unhappy resultant tunnel which is not self sealing. Otherwise pack is OK. Conclusion from all reports from all surgeons is that the pack from Amas is the ideal pack for all the surgeons. All other packs have some reservations and in view of the minimal price difference of €1,000 over the total price of €95,000 we should continue with present supplier and not take any risks – Mr Thomas Fenech, Chairman, Department of Ophthalmology.*

The Public Contracts Review Board remarked that:-

- a. the opinions expressed by the surgeons could be rather subjective and influenced by ‘resistance to change’, which was inherent to human nature;
  - b. it was evident that the appelland company provided a technically compliant product and it appeared that it’s offer was refused on the basis of the opinions expressed by the end users, the consultant ophthalmologists but there seemed to be no technical or scientific reasons which led to the non-compliance of the appelland company’s product;
  - c. no one was disputing the suitability of the product offered by the recommended tenderer;
- and*
- d. if one wanted to stick to the product presently in use locally because it gave very satisfactory results then the contracting authority should have resorted to a direct order.



Dr Ivan Gatt, legal representative of the recommended tenderer, insisted that the technical opinions expressed by the end users, the ophthalmologists, had to be considered from the technical point view and one should not diminish the importance of these opinions because, at the end of the day, the patients' interest was at stake. He added that the bottom line was that the consultants, the end users, were not happy with appellant company's product.

Mr Mark Mizzi, also representing the appellant company, declared that, according to the website of Unique Technologies Inc., the type of blade offered was one of the top seven best selling blades in 2011 and it was, therefore, odd how one came to the conclusion that the blade was the problem. Mr Mizzi observed that none of the consultants categorically stated that the product was non-compliant or outright unsuitable but the general remark was that they were 'unhappy'.

Mr Andrew Borg, also representing Amas Ltd, remarked that over the past three years the local Health Authorities carried out thousands of cataract operations in a drive to shorten the waiting list for cataract operations and, so far, no complaints had been received from consultants and patients on the packs furnished by Amas Ltd.

Dr Caruana Galizia concluded that:-

- i. no one was questioning the suitability of the product offered by the recommended tenderer;
  - ii. it was evident that the real reasons for refusal were more likely the power of incumbency and resistance to change;
- and
- iii. the facts were that the appellant company has submitted a compliant tender submission which was cheaper than the recommended offer and the tender should therefore be awarded to the appellant tenderer.

At this point the hearing came to a close.

This Board,

- having noted that the appellants, in terms of their 'reasoned letter of objection' dated the 29<sup>th</sup> August 2012 and also through their verbal submissions presented during the hearing held on the 1<sup>st</sup> November 2012, had objected to the decision taken by the pertinent authorities;
- having noted all of the appellant's representative's claims and observations, particularly, the references made to the fact that (a) the appellant company submitted two offers, one at the price of €135,700, which was considered too expensive, and the other of €94,400 or €37.76 per pack, which was the cheapest and the subject of this appeal, (b) by email/letter dated 22nd August 2012 the appellant company was informed that its offer was adjudicated to be technically non-compliant "*since the blades/keratome in the pack is not creating the ideal tunnel, users are unhappy with resultant tunnel which is not self healing. Not acceptable. Price offered is*




*higher than that awarded*", (c) the appellant company had offered a product according to Volume 3 'Technical Specifications' item 2 'Item Description' (4) Slit knife 2.75mm or 2.20mm, namely it offered the 2.75mm, (d) whilst the product offered was provided by a German supplier yet the slit knives were manufactured by Unique Technologies Inc. in the USA, a world leader in the manufacture of microsurgical instruments, which also submitted a statement that it had not received any complaints similar to those raised by the contracting authority in this case, (e) called upon the contracting authority to explain further the reasons for the appellant company's exclusion, (f) according to the website of Unique Technologies Inc., the type of blade offered was one of the top seven best selling blades in 2011 and it was, therefore, odd how one came to the conclusion that the blade was the problem, (g) none of the consultants categorically stated that the product was non-compliant or outright unsuitable but the general remark was that they were 'unhappy', (h) no one was questioning the suitability of the product offered by the recommended tenderer, (i) it was evident that the real reasons for refusal were more likely the power of incumbency and resistance to change and (j) the facts were that the appellant company has submitted a compliant tender submission which was cheaper than the recommended offer and the tender should therefore be awarded to the appellant tenderer;

- having considered the contracting authority's representative's reference to the fact that (a) the current contractor was Amas Ltd, the recommended tenderer, (b) the bidder was asked to submit 12 sample packs and as part of the evaluation process these samples were handed out to the end users, namely the consultants/surgeons, to test them and to submit their comments, (c) out of six consultants/surgeons, one made no comment while the other five made various comments but the general comment was that they did not recommend the appellant company's product, (d) the evaluation board was composed of professionally qualified persons in ophthalmology including Mr Thomas Fenech, Chairman, Department of Ophthalmology and (e) the second cheaper offer was that by VCC Ltd (Vivian Corporation) at €94,950, which was disqualified because the *"drapes are cumbersome such that one cannot safely drape with eyelashes cleared from operative field hence it is dangerous regarding sterility. Not acceptable"*;
- having also considered the recommended tenderer's representative's reference to the fact that (a) the technical opinions expressed by the end users, the ophthalmologists, had to be considered from the technical point of view and one should not diminish the importance of these opinions because, at the end of the day, the patients' interest was at stake, (b) the bottom line was that the consultants, the end users, were not happy with the appellant company's product and (c) over the past three years the local Health Authorities carried out thousands of cataract operations in a drive to shorten the waiting list for cataract operations and, so far, no complaints had been received from consultants and patients on the packs furnished by Amas Ltd,

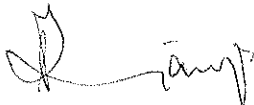
reached the following conclusions, namely:

1. The Public Contracts Review Board recognizes the fact that no one was disputing the suitability of the product offered by the recommended tenderer.



2. The Public Contracts Review Board has thoroughly deliberated on the comments made by professionals, including Dr J Janula (“*I did not see any of Evolve’s packs*”), Mr Franco Mercieca (“*only reservation on keratome - needs some time to get used to*”), Mr Mario Vella (“*reservation on kertome (blade thick and not as sharp)*”), Dr John Grech Hardie (“*micro blade shaft too thick at blade*”), Mr William Gualtieri (“*Evolve, good*”) and Mr Thomas Fenech, Chairman (“*Blade/keratome is not creating the ideal tunnel, unhappy resultant tunnel which is not self sealing. Otherwise pack is OK. Conclusion from all reports from all surgeons is that the pack from Amas is the ideal pack for all the surgeons. All other packs have some reservations and in view of the minimal price difference of €1,000 over the total price of €95,000 we should continue with present supplier and not take any risks*”). Undoubtedly, all these comments were found to be highly subjective and contradictory. Needless to say that this Board finds Mr Fenech’s conclusions to be, under normal circumstances, possibly, pragmatic. Nevertheless, in public procurement, pragmatism has to align itself with a just, transparent and equitable rendition of facts.
3. This Board feels that the final opinion expressed by the Evaluation Board, apart from not reflecting the individual comments formerly expressed, could be based on a high degree of subjectivity and influenced by ‘resistance to change’, which was inherent to human nature.
4. The Public Contracts Review Board opines that, in the circumstance, the appellant company could have provided a technically compliant product and, whilst it appeared that it’s offer could have been possibly refused on the basis of the collective opinion (not the subjective one) expressed by the end users, the consultant ophthalmologists, yet there seemed to be no technical or scientific reasons which led to the non-compliance of the appellant company’s product. It is a fact that the Public Contracts Review Board is not technical enough to reach a technical conclusion. However, in line with its remit, this Board feels strongly that the specifications were not clear enough to ensure an equal treatment of all possible bidders without any possibility of highly subjective interpretations of offers made.
5. This Board contends that if one wanted to stick to the product presently in use locally because it gave very satisfactory results then the contracting authority should have resorted to a direct order.

In view of the above this Board recommends that (a) this call should be cancelled and re-issued with clearer and fully transparent, equitable specifications and (b) the deposit paid by the same appellant company for the appeal to be lodged should be reimbursed.



Alfred R Triganza  
Chairman

Joseph Croker  
Member



Paul Mifsud  
Member

19 November 2012