

Public Contracts Review Board

Case No. 602

GHPS/536/11

Tender for the Supply of Sterile Powder Free Surgical Gloves, Size 7.6

The tender was published on the 27th May 2011. The closing date was the 27th June 2011.

The estimated value of the Tender was €70,778.42 (Exclusive of VAT).

Four (4) bidders had submitted an offer.

On the 17th July 2013, Kemimport Limited filed an objection against decision of the contracting authority to award the tender to Messrs. Drugsales Limited as being the cheapest offer.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Richard A. Matrenza as members convened a hearing on Tuesday 1st October 2013 to discuss the appeal.

Present for the Hearing:

Kemimport Limited - Appellant

Mr Pierre Fava	Representative
Mr Reginald Fava	Representative
Dr Edward Debono	Legal Representative

Drugsales Limited - Preferred Bidder

Dr Andre Gera de Petri	Legal Representative
Mr Philip Moran	Representative
Ms Claudia Dimech	Representative

Central Procurement and Supplies Unit - Contracting Authority

Mr George Fenech	Chairman Evaluation Board
Ms Josette Camilleri	Senior Pharmacy Technician
Mr Noel Abela	Member Evaluation Board
Ms Connie Miceli	Representative

The Chairman made a brief introduction and invited the appellant's representative to make his submissions.

Dr Edward Debono on behalf of the appellant said that his client's objection is based on two claims. He explained that the tender was first awarded to his client. An appeal was subsequently made by today's preferred bidder, wherein it was alleged that the preferred bidder's offer was cheaper and that the gloves submitted by it were of the same quality that today's appellant was providing. The Public Contracts Review Board partially allowed the then appellant's claim. Drugsales were asked to provide more information regarding the product to be supplied. Notwithstanding this the Public Contracts Review Board re-awarded the tender to Kemimport. Dr Debono continued that by '*Board*' he meant the '*Evaluation Board*' and not the '*Public Contracts Review Board*'. In his opinion, Dr Debono continued, that whenever there is a review and this was rejected on appeal, the procedure had to stop. There was already a review in which the Public Contracts Review Board rejected Drugsales' appeal and the tender was awarded to Kemimport. However the Board re-opened the tender. Another complaint was made by Drugsales about the decision of the evaluation board and in this objection, Drugsales affirmed that the product supplied by it was the same, albeit with a different name. Here the second grievance arises. An appeal from an appeal is not permissible. However the Public Contracts Review Board asked Drugsales to produce another sample of what they should have produced in the first place. Drugsales thus produced these samples months or more than a year later. This was procedurally not correct. The Public Contracts Review Board could not consider the second appeal. Thus appellant's grievances are two. The first is that an appeal from another appeal is not permissible, according to the Civil Code; the second grievance is that at the stage of appeal, Drugsales were asked to produce samples.

Mr George Fenech, Chairperson of the Evaluation Board, on behalf of the Contracting Authority said that first he would like to correct what was stated by Dr Debono. He explained the sequence in this tender award. The tender was awarded and Drugsales, the present preferred bidder filed an appeal wherein it had submitted that it was the previous supplier, and that its bid was cheaper. Drugsales offer had been disqualified because the code numbers of their bid was different. Thus the evaluation board had reasoned that since the product had changed, it could not assess the bid using the existing samples from previous deliveries. The Public Contracts Review Board decided that Drugsales should be allowed to provide samples. Drugsales had written a letter to explain that the code numbers had been changed by the mother company, but this letter was received following the closing date of the tender. Following the Public Contracts Review Board decision, the evaluation board had consulted with the DCC who replied that this could not be done. Another complaint was filed, and during the hearing the Public Contracts Review Board said that its decision was final, and that the evaluation board had to abide and be guided by its decision. The DCC was consulted anew and gave its approval for the samples to be requested. The samples were produced and the evaluation board re-appraised Drugsales offer. The samples were found to be compliant. It was the procedure that required the evaluation board to clear the matter with the DCC. Mr Fenech insisted that once the code number had been changed, then the product offered had changed. After the evaluation board found the sample submitted by Drugsales to be compliant, the Public Contracts Review Board was consulted and this said that therefore the award had to be made to Drugsales.

Dr Andre Gera de Petri on behalf of the preferred bidder, Drugsales Limited stated that this is

the third time the case has been before this Board. When the tender was issued in 2011, appellant was the then current supplier, and therefore had no need to provide samples of the item requested. The tender form was filled correctly but the person compiling it made a typing error when entering the product code; instead of the last digits being 75, 70 were written. For this mistake Drugsales's bid was rejected, and Kemimport was declared the preferred bidder. Drugsales' offer had been €18,000 cheaper. Drugsales Limited filed an appeal before the Public Contracts Review Board. The Board in its decision stated that it was clear that the '70' instead of '75' was purely a typing error. The Board continued that since this was a minor mistake and could have been clarified. The Board's decision was to reintegrate Drugsales' bid into the evaluation process. Drugsales' offer resulted to be the cheapest offer. However in the meantime, the manufacturer had sold the firm to Medline and there was a re-branding of the product. This was not a change of product but only of the product's name, from Protexis to Progenity. The contracting authority was informed of this re-branding through a letter. However, the evaluation board considered this as a new product and rejected the offer once again. Another objection was filed with the Public Contracts Review Board and once again the Public Contracts Review Board decided in Drugsales' favour, since it was a case of rebranding. However the Public Contracts Review Board recommended that fresh samples be submitted. Drugsales complied and the samples were the same as the previous product.

Mr George Fenech contended that evaluation boards had to adjudicate on what was presented to them by the bidders. In the present case, the gloves in question are of great importance for the hospital authorities because they are used during surgical operations. Presently the hospital is obtaining these gloves outside the tender, at a much costlier price. For hospital staff, a change in number could have meant more than just a number, and any change could have serious repercussions on the patients.

The Chairman made it clear that the Board would not be deciding on the merits of the case that had already been decided by the same Board, differently composed. As stated by Dr Debono, to file an appeal on another appeal does not make sense.

Dr Debono on behalf of the appellant contended that the original mistake was not a typing error. Bidder should have taken more care to fill the tender. He re-iterated that Drugsales should not have been asked to produce samples; and that this was not a case of re-branding.

Dr Andre Gera de Petri for the preferred bidder stated that the first time his client acceded before the Board was because of the typing error, and the matter was decided and should be considered closed. The adjudication continued and the matter of re-branding arose. The Public Contracts Review Board was then asked to go into that second re-branding issue. The Public Contracts Review Board accepted the fact that it was just a re-branding exercise. Initially the present preferred bidder was the 'current supplier' and did not need to submit samples. Drugsales only submitted new samples because it was requested to do so in line with article 30 of the tender.

The hearing was here brought to a close.

This Board,

Having noted the Appellant's objection, in terms of the 'Reasoned Letter of Objection' dated 15th July 2013 and also through the Appellant's verbal submissions during the

hearing held on 1st October 2013, had objected to the decision taken by the pertinent Authority, in that:

- a) The Appellant's bid was administratively and technically compliant.
- b) It was incorrect on the PCRB part to consider the second appeal when in actual fact the same PCRB had originally awarded the tender to the present Appellant. To the effect that the second appeal resulted in an 'Appeal from another Appeal'. This is not permissible by law.
- c) The Appellant felt aggrieved due to the fact that at the stage of the appeal process the Present Preferred Bidder was asked by the Evaluation Board to produce samples.

Having considered the Contracting Authority's verbal submissions during the hearing held on 1st October 2013, in that:

- a) The Chairman of the Evaluation Board explained in great detail the sequence of events that led to the unnecessary delay in the award process of this tender.
- b) The only reason why the Present Preferred bidder's offer was discarded in the first instance was simply due to a 'change of code numbers' of the product.
- c) Following the decision taken by the PCRB on the 26th April 2013, the Present Preferred Bidder was reintegrated in the evaluation process. Samples submitted by the Present Preferred Bidder were found to be compliant.
- d) The present preferred Bidder's offer was Euros 18000 cheaper. In fact the same offer was the cheapest.

Reached the following conclusions:

1. This Board would like to clarify the decisions taken by PCRB on both appeals as follows:
 - i) The decision taken by the same Board on the 11th May 2012 was in favour of the then Appellant, namely, Drugsales Limited and the Public Contracts Review Board recommended the Appellant for reintegration in the evaluation process.
 - ii) The decision taken by the PCRB on 26th April 2013 was again in favour of the then Appellant, namely, Drugsales Limited.

In this regard, This Board opines that there was no 'Appeal on an Appeal' situation.

2. The Preferred Bidder's Offer was fully compliant and the cheapest.

- 3. This Board also notes that through the lengthy process of this particular tender, the Contracting Authority had to bear unnecessary costs due to the fact that same had to procure the same product through outside sources at a much more expensive rate. This Board feels that this is purely a waste of Public Funds.**

In view of the above, this Board upholds the decision taken by this same Board on 26th April 2013 and finds against the Appellant Company. Furthermore, this Board recommends that the deposit paid by the Appellant should not be reimbursed.

Dr. Anthony Cassar
Chairman

Dr. Charles Cassar
Member

Mr. Richard A. Matrenza
Member

7 December 2013