

## **PUBLIC CONTRACTS REVIEW BOARD**

**Case No. 698**

**CT 2001/2014**

### **Tender for the Supply of Oxygen Concentrators.**

The tender was published on the 14<sup>th</sup> February 2014. The closing date was the 27<sup>th</sup> March 2014.

The estimated value of the Tender was €2,293,200.00

Six (6) offers have been received for this tender.

On the 7<sup>th</sup> April 2014 Cherubino Limited filed an objection under Regulation 83 of the Public Procurement Regulations objecting about the disqualification of their offer after the opening of the first package in this three package tender.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a hearing on Monday the 19<sup>th</sup> May 2014 to discuss the objection.

Present for the hearing were:

#### **Cherubino Limited - Appellant**

|                       |                      |
|-----------------------|----------------------|
| Dr David Cherubino    | Representative       |
| Dr Marcello Cherubino | Representative       |
| Dr Adrian Delia       | Legal Representative |
| Dr Matthew Paris      | Legal Representative |

#### **Sidroc Services Limited - Intersted Bidder**

|                      |                |
|----------------------|----------------|
| Ms Josephine Bonello | Representative |
|----------------------|----------------|

#### **Euopharma Limited - Interested Bidder**

|                    |                      |
|--------------------|----------------------|
| Mr Alex Peresso    | Representative       |
| Dr Antoine Cremona | Legal Representative |

#### **OK Medical - Interested Bidder**

|                     |                |
|---------------------|----------------|
| Mr Claude Sciberras | Representative |
|---------------------|----------------|

#### **Central Procurement & Supplies Unit - Contracting Authority**

|                   |                |
|-------------------|----------------|
| Ms Connie Miceli  | Representative |
| Ms Marika Cutajar | Representative |

## Department of Contracts

Mr Nicholas Aquilina

Representative

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

Dr Adrian Delia on behalf of Cherubino Limited, the appellant said that his client's tender was rejected after the opening of the first package in this three package tender procedure because of the failure to submit an original tender guarantee by the closing date and time of the tender as stipulated under clause 2 and sub-clause 8.1 of the Instructions to Tenderers. He explained that this tender being an e tender, appellant had uploaded a scan of the bid bond together with his tender submission. He said that Clause 2 listed the tender timeframes which contained the last date for the submission of tenders giving both time and date and also the last item which referred to the deadline for the submission of the original bid bond. He said that this latter item stated that "Deadline for submission of ORIGINAL bank guarantee (bid bond) – Refer to Clause 8.1 of the Instructions to Tenderers. A scanned copy will be submitted through the ePPs, accompanied by the submission of the original copy by the closing date and time of the tender at Department of Contracts, Notre Dame Ravelin, Floriana". This item shows the date as being the 27<sup>th</sup> March 2014 while the time is shown as [Time]. He pointed out that the original bid bond was submitted on the 27<sup>th</sup> March 2014 at 10.00 am as can be seen from the receipt filed with the letter of objection.

Dr Adrian Delia made reference to Clause 8.1 which read "*A scanned copy will be submitted through the ePPs, accompanied by the submission of the original copy by the closing date and time of the tender at the Department of Contracts, Notre dame Ravelin, Floriana. If the ORIGINAL Tender Guarantee (Bid bond) is not submitted by the date indicated in Clause 2 above, the respective bid will be automatically disqualified.*" This clause 2 does not show the time. Appellant submitted the original at 10.00am. Usually tenders close at 12.00am. Yet his client's tender was disqualified.

Ms Connie Miceli the Chairperson of the Evaluation Board on behalf of the contracting authority said that no action has as yet been taken about the evaluation of the tender because of the present objection. She explained that three package tenders are processed by the Department of Contracts and not by the contracting authority. When the first packages were opened the facts referred to by the appellant resulted. She could not elaborate further since the processing was done by the Department of Contracts. She insisted however that the deadline for the submission of tender was clearly shown as 9.30am. Immediately beneath this the tender shows that "*A scanned copy will be submitted through the ePPs, accompanied by the submission of the original copy by the closing date and time,*" It is true that the appellant's original was submitted late by only a few minutes, but it was still not submitted in time.

The Chairman remarked that the tender closing date was shown in the Government Gazette to be at 9.30am on the 27<sup>th</sup> March 2014.

He said that in the case in question there were two dates: - the closing date and time and the closing date of when the original bid bond had to be submitted and this does not state the time. He insisted that submissions through the ePPs had a closing date and time and his

client had submitted the tender on time through the ePPs. He pointed out that in certain tenders some documents could be submitted even five days after the closing date of the electronic submissions.

Ms Miceli for the contracting authority confirmed that certain tenders allow 5 days for the submission of documents after the same documents had been scanned and submitted through the electronic submission. But in three package procedures the original bid bond had to be submitted by the closing date. In the present case the tender was clear in stating that “deadlines for submissions of original bid bond... by the closing date and time.”

Dr Adrian Delia insisted that the terminology was different. One dealt with the submissions of the tenders and the other with the deadline for the submission of the original bid bond. So much so that the Department of Contracts had felt the need to issue a clarification about the deadlines for three package e tenders. Appellant’s tender had been submitted on time. For some reason the deadline for the submission of the original bank guarantee was different from the tender submission deadline. He contended that Regulations were meant to open the procurement process and not to hinder it. His client did not break any regulation. A scanned copy of the original bid bond had been uploaded with tender on time, and the contracting authority was aware that appellant had provided the bid bond.

Ms Miceli reiterated that 3 package tenders required the submission of the original bank guarantee even in e tenders.

Dr Antoine Cremona on behalf of Europharma said that his client’s only interest was to have a level playing field. However it is a mistake to state that there were two deadlines in this case, and does not agree that there was any anomaly in the tender document. He said that table at Clause 2 was clear in that “*Deadline for submission of ORIGINAL bank guarantee (bid bond) – Refer to Clause 8.1 of the Instructions to Tenderers. A scanned copy will be submitted through the ePPs, accompanied by the submission of the original copy by the closing date and time of the tender*” and the closing date was 27<sup>th</sup> March 2014. Finally he referred to Case Number 462 which dealt with a similar matter wherein the Public Contracts Review Board had decided that the original bid bond had to be submitted before the closing of the tender. It was at that point that the competition between bidders started and one could not rectify any mistake made through this objection.

Dr Adrian Delia insisted that Clause 8.1 referred to ‘the original “copy” ’of the bank guarantee, and this had been submitted on time through upload. Mandatory requirements entailing disqualification had to be clear. In this case disqualification because of non submission of the original bid bond could only be resorted to if the original was not submitted by the date and there is no mention of time.

Dr Antoine Cremona for Europharma Limited said that the decision he referred to earlier stated that “the PCRB found that the fact that the bid bond in question in its original format was submitted following the closing time of the tender went against the mandatory requirements of the tender document.

Dr Delia said that in that case a closing time had been specified but in the present case no closing time was specified.

At this point the hearing was closed.

**This Board,**

**Having noted the Appellant's objection, in terms of the 'Reasoned Letter of Objection' dated 2<sup>nd</sup> April 2014 and also through Appellant's verbal submissions during the hearing held on 19<sup>th</sup> May 2014, had objected to the decision taken by the pertinent Authority, in that:**

- a) Appellant claims that his offer was rejected by the Contracting Authority since the submission of his original bid bond was submitted after the closing time of the closing time of the tender, i.e. 9.30 am on the 27<sup>th</sup> March 2014.**
- b) In accordance with clause 2 of the 'Instructions to Tenderers', this schedule stipulated the time frames for the submissions of tender documents including the original bank guarantee document as was dictated in the same clause of the tender document. This same clause was in fault as it did not indicate the time by which the original bid bond had to be submitted as in the appropriate column, the tender document stated {Time} instead of the exact time.**
- c) Appellant also contends that a scanned copy was submitted through the ePPs system. So that the Contracting Authority were well aware that the Appellant had provided the Bid Bond as was required in the tender document, however, the original document was submitted at 10.00am on 27<sup>th</sup> March 2014.**
- d) Appellant claims that since there was no indication of the closing time for the submission of the original bid bond in Clause 2 of Section 1 of the 'Instructions to tenderers', the submission of the original bid bond at 10.00am on the closing date of the tender , was in conformity with the tender conditions and regulations.**

**Having considered the Contracting Authority's verbal submissions during the hearing held on 19<sup>th</sup> May 2014, in that:**

- a) The Contracting Authority reaffirmed that the closing time and date of the tender was at 9.30am on the 27<sup>th</sup> March 2014 and that the original bid bond was not included in the first package of his bid.**
- b) The Contracting Authority also pointed out that since this tender was a 'Three envelope package', the opening of the envelopes/package is carried out by the Department of Contracts and when this process was carried out it was found that Appellant's original bid bond was missing.**

**Reached the following conclusions:**

- 1. This Board opines that, after having examined the submissions made by both the Appellant Company and the Contracting Authority, the latter did fail to denote 'the time' of the deadline for the submission of the Original Bank Guarantee as**

should have been included in the ‘Date and Time’ matrix under clause 2 on page three of the ‘Instructions to tenderers’.

2. This Board notes that, although a ‘scanned copy’ of the original Bid Bond was submitted by Appellant through ePPS system, at the same time cannot establish a valid reason why the original Bid Bond was not submitted by the closing date of the Tender.
3. This Board also opines that, although there was an omission of the ‘Time’ for the submission of the Original Bid Bond, under Clause 2 (Timetable) on page three of the ‘Instructions to Tenderers’, the same document clearly stated under clause 8.1, that “A scanned copy will be submitted through the ePPS, ACCOMPANIED by the submission of the original copy BY THE CLOSING DATE OF THE TENDER”, i.e. by 9.30am on the 27<sup>th</sup> March 2014.

This Board opines that the word ‘accompanied by’ clearly means ‘together with’. In this regard, Appellant failed to abide by this mandatory requirement.

In view of the above, this Board finds against the Appellant Company, however, it recommends that the deposit paid by Appellant should be reimbursed.

Dr. Anthony Cassar  
Chairman

Dr. Charles Cassar  
Member

Mr. Lawrence Ancilleri  
Member

*11 June 2014*