

PUBLIC CONTRACTS REVIEW BOARD

Case No. 733

CT 2062/2012: Tender for the Supply of Human Growth Hormone Injections.

The tender was published on the 11th May 2012. The closing date was the 3rd July 2012. The estimated value of the Tender was €152,311.

Two (2) bidders had submitted bids for this tender.

On the 21st July 2014 Charles de Giorgio Ltd filed an objection against the proposed cancellation of the tender.

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 Thursday the 4th September 2014 to discuss the objection.

Present for the hearing were:

Charles De Giorgio Limited - Appellant

Mr Ivan Laferla	Chief Operations Officer
Dr Antoine Cremona	Legal Representative

Central Procurement & Supplies Unit - Contracting Authority

Ms Astrid Sammut	Chairperson Evaluation Board
Mr Mark Spiteri	Member Evaluation Board
Ms Sharon Zerafa	Member Evaluation Board
Ms Connie Miceli	Representative

Department of Contracts

Mr Antoine Galea	Procurement Manager
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Following a brief introduction by the Chairman, the appellant's representative was invited to make his submissions on the objection.

The Chairman remarked that the evaluation report shows that the evaluation board had recommended the award to appellant.

Ms Connie Miceli on behalf of the contracting authority explained that following the first appeal case, wherein it was seen that the evaluation board had not taken consideration of the dosages of the submitted hormones, the appellant's tender had been reintegrated. The evaluation process was carried out once again and it resulted that the best offer was appellant's and appellant was recommended for award. The day before the hearing, while preparing for the hearing, she discovered that the tender had been cancelled. The contracting authority had recommended the award to appellant but the Department of Contracts had decided to cancel the tender.

Mr Antoine Galea, ID No. 377187M on behalf of the Department of Contracts, under oath said that the evaluation committee had recommended the award of the tender. However the Director General noted that two extensions for this tender had been granted and decided to cancel the tender according to Clause 6.2 (c) of the Public Procurement Regulations. The Director General had consulted the Department Contracts Committee and agreement was reached to cancel the tender. Replying to questions by Dr Antoine Cremona, witness said that the consultation with the DCC was held on the 10th July 2014, and the DCC recommended cancellation on the basis of the above Clause. There were no problems on the quality of appellant's offer. There were no problems with the financial offer but this was over the budget. The estimated value was €152,311 while the recommendation was for the award amounting to € 247,861.25

Dr Antoine Cremona on behalf of appellant at this point remarked that this was not so. The appellant's offer for the single dose was €123,000. The offer for €247,861 was in relation to the double dose. The tender was issued on the 11th May 2012 and closed on the 3rd July 2012. The tender was first awarded in December 2013 but an objection had been raised. This objection was decided in favour of appellant on the 20th February 2014 and appellant had to be reintegrated and the evaluation board had to re-evaluate. In the meantime, the appellant had to keep the bid bond in validity. He contended that the Department of Contracts is under the false impression that it could withdraw the tender at any stage. This is not true. Clause 33.3 of the present tender gives the only 5 instances where the tender may be cancelled. These are where:

- i) The tender procedure has been unsuccessful. This does not apply since two bidders submitted bids;
- ii) The economic or technical parameters have been altered. Does not apply;
- iii) Exceptional circumstances or force majeure. Again does not apply;
- iv) All technically compliant tenders exceed the financial resources. Again does not apply;
- v) There have been irregularities in the procedure. This also does not apply.

Dr Cremona explained that during the first objection hearing it was clearly seen that the

appellant's offer of €247,000 referred to the double dose. The single dose would cost €123,500, and that is well within the budget. The tender should not have been cancelled because the bidders had no say in the adjudication process and it was this process that was lengthy enough to require two extensions. No one should be allowed to benefit from his own default.

Mr Antoine Galea on behalf of the Department of Contracts said that the first extension was given on the 21st November 2012 and the second extension had been given on the 5th August 2013.

Dr Antoine Cremona said that the first award and subsequent objection had been given after the second extension. He said that the law caters for the default position but otherwise the tender document governs the relation between the department and bidders. He contended that once appellant had submitted a tender offer, only the parameters of the tender document prevail. This means that only Clause 33.3 governs the proceedings and relations between the contracting authority, and not the general law. Since none of the instances envisaged in the specific article occurred, then the tender should not have been cancelled.

At this point the hearing was closed.

This Board,

Having noted the Appellant's objection, in terms of the 'Reasoned Letter of Objection' dated 21st July 2014 and also through Appellant's verbal submissions during the hearing held on 4th September 2014, had objected to the decision taken by the pertinent Authority, in that:

- a) Appellant contends that the Contracting Authority had cancelled the tender without giving any reason, following the previous objection (Case 657) wherein Appellant's bid had been reinstated;**
- b) Appellant contends that his offer was erroneously disqualified through the cancellation of the tender.**

Having considered the Contracting Authority's verbal submissions during the hearing held on 4th September 2014, in that:

- a) The Contracting Authority confirmed during the hearing, that same had in fact recommended Appellant's offer for award of the tender, but the Department of Contracts decided to cancel the tender on the strength of Clause 6.2(c) of the Public Procurement Regulations.**

Reached the following conclusions:

- 1. After hearing all the submissions made by both the Appellant Company and the Contracting Authority, this Board upholds the Appellant's contention that the Contracting Authority did not specify the reasons for the cancellation of the tender, but rather quoted Clause 6.2(c) of the Public Procurement Regulations, which, in this Board's opinion does not apply in this case. This Board also opines that Clause 33.3 of the tender document by far supersedes clause 6.2(c) of the Public Procurement Regulations. Clause 33.3 of the tender document clearly states that this tender can only be cancelled in the following instances:**

- i) If the tender procedure has been unsuccessful;**
- ii) If the economical or technical parameters have been altered;**
- iii) In exceptional circumstances or *force majeure*;**
- iv) When technically compliant Bids exceed their financial resources;**
- v) Any irregularities in the procedure.**

In this regard and after hearing credible submissions by the Appellant Company and the Contracting Authority, this Board opines that Appellant's bid did not fall under any of the above mentioned instances. In fact, the Contracting Authority, quite rightly, recommended Appellant's offer for award. This Board opines that the tender document could only be cancelled if in default of any of the circumstances mentioned in Clause 33.3 of the tender document. The law caters for the default position on the other hand the conditions laid out in the tender document governs the relation between the Contracting Authority and the Tenderer.

- 2. This Board also notes that, through the Memorandum dated 10th July 2014, sent by the Department of Contracts to the DCC, the former may have misguided the DCC when he made his recommendations, in that he stated that the Appellant's Bid was valued at € 247,861.25 whereas in fact the Appellant's Bid should have been stated at € 9.079 per mg, which reflects a global price of € 123,000 for a single dose, which, again is within the estimated value.**

In view of the above, this Board finds in favour of the Appellant Company and recommends that:

- i) The Tender should not be cancelled and the evaluation process should be continued;**
- ii) The deposit paid by Appellant Company should be reimbursed in full.**

Dr. Anthony Cassar
Chairman

Dr. Charles Cassar
Member

Mr. Richard A. Matrenza
Member

18 September 2014