

PUBLIC CONTRACTS REVIEW BOARD

Case 773

DH 3056/2014

Tender for The Supply and Delivery of Disposable Nappies for Adults.

The tender was published on the 5th September 2014 and the closing date was on the 29th September 2014.

The estimated value of the tender was €119,000 (Exclusive of VAT)

Three (3) bidders had submitted an offer for this tender.

On the 22nd December 2014 Krypton Chemists Limited filed an objection against the decision to reject their tender as being not according to specifications.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a hearing on the Thursday the 15th January 2015 to discuss the objection.

Present for the hearing were:

Krypton Chemists Limited - Appellant

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| Mr Christian Ferro | Representative |
| Ms Lorraine Arrigo | Representative |
| Ms Patricia Engerer | Representative |

Pharma-Cos Limited - Preferred Bidder

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| Mr Marcel K Mifsud | Representative |
| Mr Edward Mifsud | Representative |
| Mr James Borg | Representative |

Central Procurement and Supplies Unit - Contracting Authority

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| Ms Mary Gauci | Chairperson Evaluation Board |
| Mr John Privitelli | Secretary Evaluation Board |
| Ms Maria Aquilina | Member Evaluation Board |
| Ms Rita Zammit | Representative |

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

Mr Christian Ferro on behalf of the appellant stated that there must have been some misunderstanding when appellant's samples were tested because the rejection letter states that the waist bands of the samples were not elasticised and that they did not change colour when wet. He contended that all products supplied by appellant come with a built-in wetness indicator and it would be impossible for the manufacturer to forget to include this. At this point Mr Ferro opened a sample nappy and poured a bottle of water into it to show the reaction to the Board. It could be seen that after the sample was wet, the band of purple print going through the nappy's length, faded and smudged and could not be read anymore. The Board was also shown the elastic waist band in the sample being used. There were several ways in which these elastic bands could be fitted. Mr Christian Ferro continued and admitted that the large nappy samples were supplied without elastic but a letter was included with the samples that stated that since the samples had to be produced within a time-window of 5 days, the correct samples could not be sent in time and that the final product would incorporate the elastic waist band.

Ms Lorraine Arrigo for the appellant stated that appellant was the present supplier of nappies through a previous tender and had been supplying these for four years without receiving any complaints or encountering problems about the wetness indicator.

Ms Maria Gauci for the contracting authority explained that previous tenders were not relevant for the present one. She agreed that the samples had to be delivered within 5 days from notification, but insisted that bidders, including appellant could have asked for an extension if it was found impossible to produce the samples in the allotted time. The samples were tested by the evaluation board for wetness colour change both with water as well with urine and these samples did not change colour when wet; they only became smudged. They used the samples in the wards after 8 hours use. There were no samples with elastic back bands. The request was for two whole packets of each product delivered within 5 days.

Mr John Privitelli on behalf of the contracting authority explained that the samples provided by the appellant were not the same as the product that was being offered in the tender; and this fact was admitted by the appellant. The evaluation board members had not been informed that an explanation for this was included with the samples.

Mr Christian Ferro for the appellant said that it was not possible for the samples to produce no change when wet. The manufacturer produces more than 30 million diapers per month. The tender called for a visible change when wet and the samples did change this way. He continued that the samples were submitted for adjudication purposes only because appellant did not have enough time to produce the actual product for testing. The contracting authority could have asked for clarification.

Ms Lorraine Arrigo for the appellant said that some of the samples submitted had elastic waist bands but not all of them. The small sizes submitted had elastic. However this had been clearly explained in the document that accompanied the samples – that these were for adjudication purposes only and that all the nappies supplied would be fitted with elastic waist bands. This explanation was pasted on the box in which the samples were delivered; this also explained that size 12 was being submitted instead of size 14 for the same reason. She remarked that the preferred bidder's product was 72% more expensive. She added that the

nappy supplied by appellant was the same being actually used at present and had been issued with Malta Laboratory Certification.

Ms Mary Gauci for the contracting authority said that the evaluation board did not see any declaration which stated that the final product would be fitted with elastic bands. The current product being used was not fitted with elastic waist bands.

Ms Lorraine Arrigo for the appellant reiterated that appellant had been supplying 8 sizes of nappies and had never had any problems. She insisted that after all as the incumbent supplier, appellant did not need to submit any samples for testing. There was a clause in the tender that said so.

Mr Marcel Mifsud on behalf of the preferred bidder said that for this tender which opened on the 5th September and closed on the 29th September 2014, the samples had been demanded on the 3rd October 2014 from all bidders. All the bidders had enough time to submit the samples.

At this point the hearing was closed.

This Board,

Having noted the Appellant's objection in terms of the 'reasoned letter of objection dated 22nd December 2014, and also through Appellant's verbal submission during the hearing held on 15th January 2015, had objected to the decision taken by the pertinent Authority, in that:

- a) Appellant contends that the Contracting Authority must have misunderstood Appellant's offer. In that the manufacturer of the product knows well enough what the purpose of this product is. The fact is that the samples submitted were not the same as dictated in the tender document, due to the time allowed, by the Contracting Authority for such submission.**
- b) Appellant claims that although he has been the provider for such products for the last four years without any complaints from the Contracting Authority, Appellant maintains that it was not possible that this did not meet the desired requirements.**
- c) Appellant contends that accompanying the samples for adjudication, was a note explaining that all nappies will be fitted with elastic waist band, as required in the tender document. Appellant also contends that since he was the supplier of such products for the last four (4) years, he was not bound to submit samples.**

Having considered the Contracting Authority's submission during the hearing held on 15th January 2015, in that:

- a) The Contracting Authority maintained that all tenderers had to submit two whole packets of each product to be delivered within five (5) days. Appellant could have asked for an extension of time to allow same to submit the identical sample of product to be supplied.**

- b) **The Contracting Authority contends that the samples submitted by Appellants were not the same as the product being offered by same.**
- c) **The Evaluation Committee confirmed that it was not aware that an explanation was included with the samples so submitted by Appellant.**

Reached the following conclusions:

1. **This Board opines that the Evaluation Committee could only adjudicate on the tests carried out on the samples so submitted by the Appellant. From credible submissions made by the Contacting Authority, it was established, from the tests carried out on each sample, that Appellant's did not meet the expected level of efficiency. This Board would point out that this product had to ensure the least discomfort to the patient. In this regard, this Board upholds the Contracting Authority's contention that from the tests carried out it transpired that Appellant's offer did not reach the expected functional results.**
2. **The argument raised by Appellant Company in so far as the limited time allowed to submit samples same as the product being offered, is not credible to all, as this Board opines that the Appellant, knowing that it was not possible to provide samples of the product; had other remedies prior to the submission of the samples he could have requested for extension so that he will be in a position to submit the proper samples.**
3. **Appellant's contention that since he had been the supplier of such product for the last four (4) years, so that samples in this particular case should not be given all that weighing; this board noted from credible submissions that the product being tendered for had to include elastic waist bands so that, the actual sample was important to adjudicate the technical efficiency of the product. In this regard, this Board does not uphold Appellant's second contention.**
4. **With regards to Appellant's contention that an explanation was attached to the samples explaining that Appellant will provide 'the elastic waist band'; this Board noted from credible submission that this explanation was not available to the Evaluation Committee and in any case, since the product was different from that supplied by same Appellant over the last four (4) years, the Evaluation Committee had to rely on the tests on the samples so submitted by Appellant. In this regard, this Board does not uphold Appellant's third contention.**

In view of the above, this Board finds against the Appellant Company and recommends that the deposit paid by Appellant should not be reimbursed.

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Lawrence Ancilleri
Member

27 January 2015

