

## **PUBLIC CONTRACTS REVIEW BOARD**

**Case No. 793**

**CT 2122/2013**

### **Tender for the Manufacture of Custom Orthoses**

The tender was published on the 4<sup>th</sup> April 2014. The closing date for the call was on the 15<sup>th</sup> May 2014. The estimated value of tender is €1,581,000.00 (Exclusive of VAT).

Three (3) bidders had participated in this tender.

On the 26<sup>th</sup> January 2015 Chas A Blatchford and Sons Limited filed a letter of objection objecting to the award of the tender to Messrs. Otto Bock Health Care Plc for the amount of € 1,244,067.87 including VAT

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a hearing on Tuesday the 7th April 2015 to discuss the objection.

Present for the hearing were:

#### **Chas A Blatchford & Sons Ltd - Appellant**

Mr Oliver Attard	Representative
Mr Peter Iliff	Representative
Mr Hans Wolf	Representative
Dr Franco Galea	Legal Representative
Dr Michael Sciriha	Legal Representative

#### **Otto Bock Health Care Plc - Preferred Bidder**

Mr Colin Pendlebury	Representative
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#### **Central Procurement & Supplies Unit - Contracting Authority**

Ms Connie Miceli	Chairperson Evaluation Board
Ms Marthese Bonello	Secretary Evaluation Board
Dr Jesmond Attard	Representative
Ms Marika Cutajar	Representative
Ms Alicia Vella Lethridge	Representative
Dr Stefan Zrinzo Azzopardi	Legal Representative

#### **Department of Contracts**

Mr Antoine Galea	Procurement Manager
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The Chairman made a brief introduction wherein he said that in future all contracting authorities should reply to the letters of objection and ensure that the letters of rejection sent to the bidders are dated. He then asked the appellant's representative to make his submissions.

Dr Franco Galea on behalf of the appellant explained that the product subject of this tender had to be custom made. He said that the appellant's main objection is based on the fact that in page 2 of the tender documentation (Award Criteria), it was stated that: "the tender would be judged on the more commonly used items only that are Schedule numbers: (however, contractor must be able to deliver all listed items. Thus prices must be quoted for all items)." The Schedule of Prices covered around 366 items but the tender had to be adjudicated on 155 of these. The schedule of prices had columns showing the estimated consumption for each item, the figure being given by the contracting authority, and the bidder had to submit the unit price of each item. After submitting the tender, appellant was informed on the 15<sup>th</sup> May 2014 that its bid was the cheapest tender. On the 10<sup>th</sup> October 2014, however, through an email, appellant was informed that the estimated number of items requested had been increased by the contracting authority, and that the number of visits necessary by a consultant had to be more than double the original estimated figure. Five months after the closing date of the tender, the contracting authority had prepared a new schedule of costs reflecting the new estimated consumption and appellant's bid price for each item. This was sent to the appellant who had to confirm the mathematical workings already prepared by the contracting authority according to the new quantities. Appellant had to confirm this as otherwise its tender would have been disqualified. Following the submission of this confirmation, appellant had received an email stating that the order of cheapness had been retained.

Dr Franco Galea continued that however appellant received another email which stated that its offer was not the cheapest and that the tender was being awarded to another bidder. He contended that the email of the 10<sup>th</sup> October 2014 had changed the parameters in such a way as to be material change. This meant that this was now a new tender. Even the adjudicating criteria had been changed since the original criteria had been clear that "the tender will be judged on the more common used items only," and these were listed. The final award decision does was however not based only on the 155 items, but on all the 366 items. Dr Galea contended that when the contracting authority realized that its needs had been different from those in the original tender, it should have cancelled the tender and re-issued it. It is not permissible to change the evaluation criteria mid-way through the adjudication process. Finally Dr Galea claimed that previous decisions stating that companies could opt to be awarded tenders even though making a loss, do not hold in this case, since the patients' interests would be involved. When examining the prices offered, it could be seen that the difference in the submitted prices by the appellant and the preferred is so great as to raise doubts.

Dr Stefan Zrinzo Azzopardi on behalf of the contracting authority stated that the contracting authority had submitted a letter of reply wherein the basis for adjudication was explained. The tender document indicated that adjudication would be based on 155 items commonly in use, although the submission could be for 366 items. When the original tenders were opened and published, the price of the appellant represented 155 items while the price of the preferred bidder covered all the 366 items. The evaluation board made their comparisons on the "like with like" bases for 155 items. Appellant's offer was €32,620.95 while the preferred bidder's was €17,985.00. When comparing the unit price offered by appellant to that of the preferred bidder's for the 155 items it can be seen that the preferred bidder's offer was from

the outset the cheapest at €236,740. Therefore this explains that there was no change in the rules since the adjudication started on the 155 items and continued on these. The same criteria were used. When comparing the unit price it could be seen that the preferred bidder's was the cheapest. The contracting authority is bound to purchase from the cheapest compliant bidder and this holds also for the purchase of medical equipment. The contracting authority was satisfied that what was being offered by the preferred bidder was of the required quality and according to specifications.

Ms Connie Miceli on behalf of the contracting authority replying to a query by the Chairman stated that the evaluation board had examined the offers for technical compliance and examined the samples submitted, and both the appellant's and the preferred bidder's offers were fully compliant. There was a technical person on the evaluation board.

Dr Jesmond Attard on behalf of the contracting authority under oath, and replying to questions by the Chairman stated that the workmanship of both the appellant's and the preferred bidder's products were similar, the same, and fully compliant. Their products were personally well-known to him. In fact all the bidders were known to be able to provide one hundred percent service. He had examined the samples provided. The preferred bidder was the incumbent supplier but the products offered were all the same. He reiterated that he had assessed the quality of the products and did not involve himself with the prices offered. He was not a member of the evaluation board, but had drafted the tender. He was not involved in the change in the quantities, and had not suggested the change. He had based the tender requirements on a rough estimated number of items required, based on the past usage. The tender was for items that would be custom built and not for "off the shelf" items and up to last year had cost around €700,000 out of a total budget of €1.2 million for the whole department.

Ms Connie Miceli for the contracting authority explained that the number of each item was changed during the evaluation process after consultancy, and according to the number of patients. Appellant had quoted for 155 items and the preferred bidder for 366 items. The evaluation board had to compare like with like and made the necessary adjustment. She explained that if they based their estimates only on the unit prices, the total amount would be ridiculously low and the sum would not be enough to cover the whole period. The total allocation of money is pre-allotted by the Department of Contracts so the contracting authority had to adjust the number, to be able to use the allotted amount.

Dr Stefan Zrinzo Azzopardi said that the estimated annual consumption is an indicative amount. The 155 items on which adjudication was made shows that the price offered by the preferred bidder was far cheaper than that of the appellant.

Dr Franco Galea for the appellant insisted that according to the letter of reply shows clearly that the adjudication was based on the 366 items and not on just 155. He insisted that the matter does not just involve the increase of say 1 item from 5 to 20. There is a marked difference in the Schedule of Prices from those submitted originally by the bidders and those prepared by the contracting authority for example the number of visits required where the original was for 6 visits of 12 days, amounting to 72 days, the revised schedule shows this to be 120 days. There is a marked difference. If the contracting authority needed to ensure sufficient funds then the calculations should have been made before the issue of the tender and not after the closing date.

The Chairman asked the chairperson of the evaluation board Ms Connie Miceli whether this major increase in the number of visits had been taken into consideration.

Ms Connie Miceli replied that it had been taken into consideration, but all items had to be quoted at unit price.

Dr Stefan Zrinzo Azzopardi for the contracting authority said the schedule asked for the professional daily charge, that is a unit price per day. The unit price would be multiplied by the required number and therefore the rules were not changed.

Mr Peter Iliff under oath for the appellant said under oath that he has an orthotics background. He said that before submitting tenders, bidders evaluate the quantities required, and have an accounting model to determine the bid price. The quantities in the present tender were increased and had the appellant known this before a different quote would have been made. He explained that although the bids were for unit prices, appellant would have changed the bid had it been known that the quantities would be increased. This was because economy of scale would have permitted this in the extremely competitive market for orthoses. He said that this was possible even though the bid was for unit price and items would have to be manufactured for each specific patient. Replying to a question by Dr Jesmond Attard for the contracting authority, witness explained that certain discounts would have been offered and the unit prices adjusted according to the quantities involved, even though the items would be custom made for each patient.

Dr Franco Galea for the appellant reiterated that in this highly competitive market the unit price would have been different for a greater quantity of items.

Dr Jesmond Attard remarked that since consultants are paid a salary he could not understand how an increased number of visits would be offered at a cheaper price.

At this point the hearing was closed.

**This Board,**

**Having noted the appellant's objection, in terms of the "Reasoned Letter of Objection" dated 23<sup>rd</sup> January 2015 and also through the appellant's verbal submissions during the hearing held on 7<sup>th</sup> April 2015, had objected to the decision taken by the pertinent authority, in that:**

- a) **The appellant contends that during the evaluation process, he was informed through an e-mail dated 15<sup>th</sup> May 2014, that his offer was the cheapest. On the 10<sup>th</sup> October 2014, the appellant was informed that the estimated number of items requested by the contracting authority had been increased considerably. The appellant contends that it is highly irregular for the evaluation board to change its goal posts at that stage;**
- b) **The appellant maintains that since there was a different requirement from that dictated in the original tender document, the contracting authority should have cancelled the tender and issued a new one.**

**Having considered the contracting authority's "letter of reply" and verbal submissions**

during the hearing held on the 7<sup>th</sup> April 2015, in that:

- a) The contracting authority maintains that the “award criteria” was based on the cheapest price per unit. There were various items which had to be considered, but to be more practical and transparent; the contracting authority had to identify the most commonly used items. In this regard, the same authority identified 155 items out of the 366 items which were listed in the tender document and assessed each tender on the “unit price” quoted for these “commonly used items”. The comparison of the tendered quotes were based on these same number of items, for all the bidders, and the contracting authority contends that there was a fair and transparent evaluation of all bids;
- b) The contracting authority contends that during the evaluation process, it was established that the most commonly used products should be taken into consideration and in this regard, the evaluation committee took this factor into consideration;
- c) The contracting authority also strongly maintains that the tender dictated a “unit price” per day and the question of the number of visits by the consultants do not in any way effect the tendered total value.

Reached the following conclusions:

1. With regards to the appellant’s first contention, this Board, after having heard credible submissions from the contracting authority, opines that although the tender document dictated a “unit price” for 366 items, the evaluation policy adopted with regards to the “most commonly” used items does in fact make sense. At the same time, the Tender Document asked for a “unit price” and not a total amount for the whole items. This Board is justifiably convinced that the same basis for the evaluation process adopted was the same for all bidders i.e. comparing the unit price of the 155 items, (most commonly) used.

The “award criteria” adopted by the evaluation board was still the cheapest, as this was credibly confirmed, but on the 155 items. This board opines that it was not proven that there was a change of goal posts. The “award criteria” remained the same and the evaluation process was correctly carried out on the 155 items for all bidders. In this regard, this Board does not uphold the appellant’s first contention;

2. With regards to the appellant’s second contention, this Board is justifiably convinced that since the tender asked for a “unit price” for all items, the fact that the evaluation procedure was applied in a manner which would assess the “unit price” for the most commonly items for all the bidders, does not constitute an “irregularity” in the evaluation process. This Board justifiably opines that all bidders were on a level playing field and there was no change in the tender requirements. This Board credibly refers to Section 4 – Technical Specification Clause wherein it is clearly stated that: “Tender will be judged on the more commonly used items only, i.e.: Schedule Nos.: F101-F118, F201-F203, F312-F333. L101-136, L201-223, L301-310, L401-403, S108-S111, C101-C121, LG01-LG13. (However, contractor must be able to deliver all listed items. Thus, prices

must be quoted for all items.) In this regard, this Board does not uphold the appellant's second contention;

3. On a general note, this Board is justifiably satisfied that out of the 366 items requested in the Tender Document, it was prudent for the contracting authority to establish the "most commonly used items", as these items would form the bulk of the procurement. This Board is convinced that the identifications of the most commonly items used were chosen by the contracting authority based on past experience.

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

Dr. Anthony Cassar  
Chairman

Dr. Charles Cassar  
Member

Mr. Lawrence Ancillieri  
Member

*30 April 2015*