

PUBLIC CONTRACTS REVIEW BOARD

Case No. 857

CT 2230/2014

Framework Contract for the Supply of Sterile Solutions for Continuous Renal Replacement Therapy.

The Tender was published on the 13th January 2015. The closing date was the 10th March 2015. The estimated value of Tender is €199,278.28 (Exclusive of VAT).

Two (2) offers had been received for this Tender.

On the 7th September 2015 Associated Equipment Limited filed an objection against the decision of the Contracting Authority to award the Tender to Pharma-Cos Limited.

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 13th October 2015 to discuss the objection.

Present for the hearing were:

Associated Equipment Limited:

Mr Charles Mifsud	Director
Mr Sully El Khazmi	Representative

Pharma-Cos Limited:

Mr James Borg	Representative
Mr Claudio Martinelli	Representative

Central Procurement & Supplies Unit:

Ms Marika Cutajar	Chairperson Evaluation Board
Ms Corinne Bowman	Member Evaluation Board
Ms Audrey Dimech	Member Evaluation Board
Ms Sharon Vella	Member Evaluation Board
Mr Mark Zammit	Representative

Department of Contracts:

Dr Christopher Mizzi	Legal Representative
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The Chairman, following a brief introduction, invited the Appellant's representative to make his submissions on the Letter of Objection.

Mr Sully El Khazmi on behalf of the Appellant explained that their objection was based on the glucose content of the requested solutions. The Tender had laid out what the solutions had to contain and should not contain. He said that the solutions required were to be potassium free. Glucose content was not mentioned in these specifications. He said that the Recommended Bidder had offered solutions that did not contain any glucose and the Appellant contended that this product was thus not according to specifications.

The Chairman asked whether glucose level was part of the Tender specifications.

Mr Sully El Khazmi said that the Tender did not mention anything about glucose levels.

Dr Christopher Mizzi on behalf of the Department of Contracts explained that the Tender had listed the ingredients that the offered solutions had to contain together with the parameters for each ingredient. One ingredient was listed as not having to be present. Glucose was not on this list and this was because glucose level was considered irrelevant. Previously the Contracting Authority used to ask for the glucose level but this was not made in the present Tender since the glucose level was now considered irrelevant and so was not included in the specifications. Bidders were free to offer solution either with glucose or without. The Recommended Bidder's product was according to specifications.

Mr Sully El Khazmi for the Appellant insisted that since glucose levels were not mentioned in the specifications and the Recommended Bidder offered a product not containing glucose then the product was not according to specifications. The specifications should have made it clear that glucose was not required. The Appellant was basing the objection on previous Tenders.

Dr Christopher Mizzi on behalf of the Department of Contracts said that there had been no clarification requests on the levels of glucose. Anyone who was in doubt could have asked for clarification on the matter.

Mr Charles Mifsud for the Appellant contended that glucose levels of the solutions were relevant because of possible repercussions on the patients and that since glucose was not on the list, the Recommended Bidder could not offer a product that did not contain glucose. Appellant could have made a lower offer for a product without glucose.

Mr Mark Zammit, ID No. 425874M, on behalf of the Contracting Authority under oath testified that the specifications had been reviewed in the beginning of 2014 in complete consultation with the end users in the ITU. Since it was deemed that there was no need for the solutions to contain glucose - the glucose level was immaterial – it was removed from the Tender specifications. This opened the competition amongst bidders resulting in better prices. The patients using the product were monitored continuously and the product was classified as a medicine and regulated by the medicine authorities and the European Union. It was most important that the product offered would be potassium free.

At this point the hearing was closed.

This Board,

Having noted the Appellant Company's objection, in terms of the "Reasoned Letter of Objection" dated 7 September 2015 and also through the Appellant's verbal submissions during the Public Hearing of 13 October 2015 had objected to the decision taken by the Pertinent Authority, in that:

- a) The Appellant Company contends that the Tender's Technical Specifications did not include the "Glucose" element. In this regard, the Appellant maintains that since no reference was made in the Tender Document and that the bid submitted by the Recommended Bidder contained no glucose, the latter's offer was not technically compliant;**

- b) The Appellant Company also maintains that the glucose element should have been mentioned in the Tender Document.**

Having considered the Contracting Authority's "Letter of Reply" dated 30 September 2015 and also the verbal submissions during the Public Hearing held on 13 October 2015, in that:

- a) The Contracting Authority maintains that the non-inclusion of the glucose element was due to the fact that it was considered irrelevant therefore; there was no mandatory condition that glucose had to be included. Bidders were free to offer their product with or without glucose. In this regard, both offers submitted by the Appellant and the Recommended Bidder were technically compliant;**

- b) **The Contracting Authority contends that the Appellant Company should have asked for a clarification if they had any doubts about the non-inclusion of glucose.**

Reached the following conclusions:

1. **With regards to the Appellant's First Grievance, this Board, after having heard credible submissions by the Evaluation Committee is justifiably convinced that the inclusion of glucose in the list of Technical Specifications was not necessary and in fact irrelevant to the nature of the solution which was being tendered.**

It has been credibly established that the end users of this solution were going to be the ITU Department where all patients are closely monitored, so that the concern raised by the Appellants regarding repercussions on the patients, does not in any way jeopardise the condition of the end users.

It was also justifiably established that the Tender Specifications were drawn up after consultations with the end users of the ITU, who are all specially trained and experienced as to what solution is required by the Contracting Authority. In this regard, this Board does not uphold the Appellant's First Grievance.

2. **With regards to the Appellant's Second Contention, this Board justifiably opines that, the Contracting Authority acted in the proper manner for the non-inclusion of glucose in the Technical Specifications so that more opportunities were offered**

for prospective bidders. This was done after credible submissions from the Contracting Authority that the glucose element was irrelevant to the solution and that the non-inclusion of glucose did not, in any way endanger the condition or monitoring of the patient;

- 3. This Board also notes that the Appellants should have asked for a clarification during the bidding stage if they had any doubts about the non-inclusion of glucose in the Tender's Technical Specifications.**

At the same instance, this Board is justifiably convinced that both offers submitted by the Preferred Bidder and the Appellant were administratively and technically compliant and the Evaluation Committee, quite correctly, awarded the Tender to the cheapest bid.

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**

19 October 2015