

PUBLIC CONTRACTS REVIEW BOARD

Case No. 862

CT 2080/2014

Tender for the Supply of Lidocaine (Lignocaine) Hydrochloride 2 per cent Gel.

The Tender was published on the 19th September 2014. The closing date was the 30th October 2014. The Estimated Value of Tender is €136,080.00 (Exclusive of VAT).

Three (3) offers bidders had been received for this Tender.

On the 2nd September 2015 Cherubino Limited filed an objection against the decision of the Contracting Authority to award the Tender to Pharmachemic Trading Agency Company 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 20th October 2015 to discuss the objection.

Present for the hearing were:

Cherubino Limited:

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| Mr Francis Cherubino | Director |
| Mr Thomas Dimech | Representative |
| Dr Matthew Paris | Legal Representative |

Pharmachemic Trading Agency Company Limited:

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| Mr Adrian Farrugia | Director |
| Dr Julianne Portelli Demajo | Legal Representative |

Central Procurement and Supplies Unit:

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| Ms Alicia Vella Lethridge | Chairperson Evaluation Board |
| Dr Ian Ellul | Member Evaluation Board |

Department of Contracts:

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| Mr Kevin D'Ugo | Procurement Manager |
| Dr Christopher Mizzi | Legal Representative |

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

Dr Matthew Paris on behalf of the Appellant Company, Cherubino Limited, stated that, following the publication of the schedule where both they and the Recommended Bidder were shown to be the cheapest offers, the Appellants had received a letter informing them that their offer was not the cheapest and that the Tender was to be awarded to the Recommended Bidder for the amount of €112,995.00 including VAT. He said that the Tender Opening Schedule showed that this amount was different from the original offer. The Contracting Authority has made negotiations with bidders when this was not a negotiated procedure; the two identically cheapest bidders were asked to make another offer discounting their original bid. This action is not legal since the Tender did not allow changes in the original bid. The Tender Document explicitly states that the financial offer was qualified by note 3 which meant that on rectification of the offer could be made, and to offer a discount was rectification and not clarification. He asked to be shown the difference between revision and rectification as was being asserted by the Contracting Authority.

Dr Christopher Mizzi on behalf of the Department of Contracts explained that in the present Tender, the rectification or revision exercise was not done to change the order of the bids' ranking. It was carried out between two equally ranking bidders to choose one of them. The Contracting Authority had to resort to asking these two bidders to revise their offer. The other bidder, who had filed a higher amount, was not asked to revise the offer as otherwise the ranking would have been affected. The Contracting Authority had asked for direction from the Department of Contracts and had followed the advice given.

The Chairman asked for clarification due to the fact that the Tender showed two bidders offering the same price and that the Contracting Authority had subsequently asked these two bidders to revise their offer. It is evident that the Appellant had accepted this because he revised the bid.

Dr Christopher Mizzi referred to a Court of Appeal decision in a similar case. The Court had decided that the Contracting Authority could ask for a discount from the Recommended Bidder as long as the ranking was not altered.

Dr Matthew Paris for the Appellant insisted that although his client had participated and revised the original offer, the matter of the legality of the procedure remained in question. The procedure followed did not result from what the law stated. All the parties involved, including the Contracting Authority had participated in an illegality. He admitted that it was an unfortunate situation that was not provided for in the law; the law did not cater for a similar situation. His clients had been informed that unless another revised bid was made, the original offer would stand. The Appellant had no other recourse to counter this invented procedure and could not raise a pre-contractual concern. The situation has to be addressed for future similar instances. The case cited by the Department of Contracts referred to a discount asked from one bidder only and not like the present case.

Dr Christopher Mizzi for the Department of Contracts reiterated his reference to the Court of Appeal decision which justified discounted offers. The aim of the Contracting Authority was for the Tender to be successful. The two bidders were aware of what was happening, and were given the reason for asking them for a discount. This Board had to decide whether the procedure showed any inequality or bias against one of the bidders or not.

Ms Alicia Vella Lethridge ID No 40970M, the Chairperson of the Evaluation Board under oath, said that the procedure used was suggested by the Department of Contracts through an email. The Evaluation Board followed this advice and asked the two equal bidders to submit a discounted offer competitively. She did not ask the basis of this advice.

Dr Julianne Portelli Demajo on behalf of the Recommended Bidder contended that the Tender could not be cancelled since having two equal offers was not one of the reasons that could lead to cancellation, and Tenders could only be cancelled if one of those listed conditions arose. She contended that as soon as the Appellant had submitted the discounted offer the Appellant accepted the procedure and all the arguments being raised today should be dropped. It was certain that had Appellant won the Tender, this objection would not have been raised. The Appellant could and should have protested before submitting the new discounted offer.

Dr Matthew Paris for the Appellant reiterated that the situation was totally unregulated. The Department of Contracts had decided to illegally to accept changes in the offers. This was a serious matter and if accepted would have repercussions on future Tenders. Since the situation was not contemplated then it follows that it was a special circumstance and thus reason enough for the Tender to be cancelled.

Dr Christopher Mizzi on behalf of the Department of Contracts said that cancellation of Tenders was not recommended and required special circumstances. An adjudication mechanism for dealing with similar case had to be found and the Contracting Authority had given equal treatment to the two bidders who had Tendered the same amount.

The hearing was closed at this point.

This Board,

Having noted the Appellant's Objection, in terms of the "Reasoned Letter of Objection", dated 1 September 2015 and also through the Appellant's verbal submissions during the Public Hearing held on 20 October 2015, had objected to the decision taken by the Pertinent Authority, in that:

- a) The Appellant Company contends that the procedural method adopted by the Contracting Authority in asking for a revision of price of the original Tender was illegal, as this amounts to a rectification, which as per Note 3, could not be made;**

- b) **The Appellant maintains that although he participated in the revision of the original offer, the procedure adopted by the Contracting Authority was not provided for in the Public Procurement Regulations and as such should be considered illegal.**

At the same instance, the Appellant had no other option but to comply with the Contracting Authority's request to revise the price.

Having considered the Contracting Authority's "Letter of Reply" dated 11 September 2015 and also through verbal submissions during the Public Hearing held on 20 October 2015, in that:

- a) **The Contracting Authority maintains that the request for a revision of price was inevitable since the two Bidders who were the cheapest compliant quoted the same price. In this regard, the same Authority contends that it had acted appropriately by asking the same bidders to revise their price so that the Tender could be awarded to the cheapest one;**
- b) **The Contracting Authority also contends that the revision of the Financial Offer did not, in any way, affect the ranking of the bids.**

Reached the following conclusions:

1. **With regards to the Appellant's First Contention, this Board credibly notes that the latter abided by the request for a revision of price, and therefore, he accepted**

the Contracting Authority's request and the moment he submitted the revised financial offer, he had in fact accepted without objection or protest the conditions dictated in the request.

In this regard, this Board is somewhat concerned why the Appellant has submitted an objection in front of same. It is this Board's opinion that the Appellant had other remedies prior to submitting this revised offer. The latter could have filed his revised offer "under protest" so that this Board would be in a better situation to address this Appeal.

It is this Board's opinion that once that the Appellant has submitted his revised Financial Offer without any objection or protest, the latter had acceded to the Contracting Authority's request to continue the Evaluation Process and award the Tender to the cheapest offer.

At the same instance, this Board, after having examined the circumstances of the case, justifiably opines that the Evaluation Committee had two similar cheap and compliant bids that had to compete with each other for the award and the only transparent and fair adjudication process available was that, to ask the same two bidders for a revision of price.

It is the Board's opinion that, in this particular instance, there was no rectification to the conditions of the Tender Document. In this Board's opinion, there was only a request for a revision of price from the Bidders which had an identical financial offer. In this regard, this Board does not uphold the

Appellant's First Grievance.

2. **With regards to the Appellant's Second Contention, this Board opines that the procedure adopted by the Contracting Authority did not in any way effect the ranking of the bids. Although the Public Procurement Regulations do not cater for such circumstances, this Board opines that there were no illegal procedures adopted by the Evaluation Committee.**

The latter acted in a transparent and fair manner in requesting a revision of the financial offer from the two identical bids. In this regard, this Board does not uphold the Appellant's Second Contention.

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

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Lawrence Ancillieri
Member

27 October 2015