

## **PUBLIC CONTRACTS REVIEW BOARD**

**Case No. 878**

**CT 2249/2015**

### **Tender for the Supply of Oxygenators and Tubing Packs – Lot 1.**

The Tender was published on the 23<sup>rd</sup> January 2015. The closing date was on the 2<sup>nd</sup> June 2015. The estimated value of Lot 1 of Tender is €469,473.00 (Inclusive of Vat).

Six (6) offers had been submitted for this Tender.

On the 30<sup>th</sup> November 2015 A.T.G Co. Limited filed an objection against the disqualification of the company's Tender because of technical non-compliance.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a hearing on Thursday the 10<sup>th</sup> December 2015 to discuss the objection.

Present for the hearing were:

#### **ATG Co Limited:**

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| Mr Oliver Attard   | Director             |
| Dr Franco Galea    | Legal Representative |
| Dr Michael Sciriha | Legal Representative |

#### **Associated Equipment Limited:**

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| Mr Solomon El Khazmi | Representative |
| Mr Raymond Teuma     | Representative |

#### **Technoline Limited:**

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| Ms Damaris Lofaro | Representative |
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#### **Central Procurement and Supplies Unit:**

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| Ms Connie Miceli   | Chairperson Evaluation Board |
| Ms Renee Mifsud    | Secretary Evaluation Board   |
| Mr Carmel Grima    | Member Evaluation Board      |
| Mr Jeffrey Muscat  | Member Evaluation Board      |
| Ms Yvette Farrugia | Member Evaluation Board      |

#### **Department of Contracts:**

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

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

Dr Franco Galea on behalf of the Appellant Company explained that his client's offer had been rejected because of the late submission of the samples. He contended that the Tender contained a conflict between two clauses which rendered it null. Clause 3.3 stated that the "*most favourable overall solution*" must be chosen by the Contracting Authority while Clause 9.1 stated that the Tender would be awarded to "*each of the first two cheapest priced offers satisfying the administrative and technical criteria.*"

He contended that the matter could not be raised at the pre-contractual stage. This conflict has in fact been admitted by the Department of Contracts in the Letter of Reply and therefore the Tender should be declared null and cancelled. He said that his client's offer had been compliant with these criteria, whichever was chosen and that according to the Schedule of Offers; the Appellant's offer was the second cheapest bid while the Recommended Bidder ranked 4<sup>th</sup> or 5<sup>th</sup>.

Dr Franco Galea, while citing that his client's offer was administratively compliant, continued by arguing that the non submission of samples by the deadline was not a reason for disqualification according to the Tender Document. The samples for this Tender are not available from stock since these had to be sterilized and tested before being submitted. His client was asked to produce the samples on the 5<sup>th</sup> June 2015 within 5 days. On the 9<sup>th</sup> June 2015, the Appellant was informed by the manufacturer that the sample had been accidentally destroyed on its way back to the Appellant. The latter had immediately informed the Department of Contracts about the matter but received a reply from the Contracting Authority that the date of submission of samples was to stand. The samples had in fact later been delivered and accepted and he believed that the samples had been in fact assessed since his client had not been disqualified immediately after the deadline expired. In the interim period, the Contracting Authority had issued another stop-gap Tender for the oxygenators but this time allowed 10 working days for the production of samples. Even the wording in the second Tender was different.

Dr Christopher Mizzi on behalf of the Department of Contracts claimed that the Tender Document had allowed 18 weeks before the closing date. This was in order to allow for the preparation of the samples. The five day period was for the bidders to submit the samples and not for the manufacture of the samples. The other stop gap Tender was, because of urgency, for the supply of non-sterile equipment and 10 working days was considered enough. In the present Tender since it was for sterile equipment, 18 weeks interval was sufficient for the manufacture and preparation of the samples.

Dr Franco Agius on behalf of the Department of Contracts said that there was no contestation by the Appellant on the fact that the samples were submitted after the deadline had expired. The Appellant's sample had in fact been used in the evaluation of the second Tender at their request. The Tender had made it clear that late submission of samples would disqualify bidders.

Ms Connie Miceli on behalf of the Contracting Authority explained that the change in the second Tender from 5 to 10 days for the production of the samples was the result of a policy change.

Dr Christopher Mizzi for the Department of Contracts contended that:

- i) The Appellant had insisted in submitting the samples after the deadline;
- ii) The Appellant had asked that the samples be used for the assessment of the second Tender.

The award criteria were clearly explained in the Tender Document i.e. the award was to be given to the cheapest compliant bid. The other clause – the cheapest - was inserted because of the decision to split the award into 60% and 40%, to avoid problems when assigning these; it was a complementary clause to the award criteria. With regards to the Appellant's claim of being second cheapest he said that the latter's offer could not be evaluated for the financial offer because it had been stopped at the technical evaluation stage.

Dr Franco Galea on behalf of the Appellant whilst admitting that the 5 days allowed was for the delivery of the samples to the Contracting Authority, contended that the samples were not submitted in time through a *force majeure*. The sterilization process for another sample was two weeks and so the deadline could not be met. The Appellant's sample was used in evaluating the second Tender because this second Tender had stated that if a bidder had already submitted a sample then there was no need to resubmit.

He contended that his client could only be disqualified if samples were not submitted or in the quantities requested. In the present case, the Appellant had submitted the samples that were according to specifications and technically compliant, so much so that these were used for the second Tender and Appellant had been asked to produce an additional sample referring to document ATG 5.

Dr Franco Agius for the Department of Contracts, having seen document ATG 5 said that this was a receipt for additional samples that had not been requested. The Contracting Authority had not asked for submission of further samples.

Dr Franco Galea on behalf of Appellant reiterated that ATG 5 was necessary for evaluation of Appellant's Tender and not for the second Tender that had been issued on the 15<sup>th</sup> September 2015 while ATG 5 bore the date 17<sup>th</sup> July 2015. This meant that the Contracting Authority had intended to evaluate Appellant's offer. He asked the Contracting Authority for the dates when the relative samples had been tested in operations as part of the adjudication process.

Dr Christopher Mizzi for the Department of Contracts insisted that Appellant's samples had been tested during the evaluation of the second Tender. He contended that claiming force majeure was not sufficient reason for submitting the samples after the deadline. The Evaluation Board was correct in discarding Appellant's Tender.

Dr Franco Galea for the Appellant explained that it was not the Tender that was submitted late but the samples and the evaluators should have considered the implications of the decision taken; we are here dealing with public funds. He reiterated that disqualification was only applicable if the necessary quantities of samples were not supplied. The evaluation process took a certain length of time to finalize and evaluation of Appellant's sample later would not have disadvantaged any other bidder; it would not have been prejudicial to anyone. The concept of force majeure is recognized at law and is a basic right. He insisted on the production of the testing dates of the other bidders' samples, as this would show whether the

late submission had any effect in holding up the process.

Dr Franco Agius for the Department of Contracts objected to the production of the dates of the testing of the samples. The Tender Document was clear that late submission of samples will disqualify bidders. Page 25 9.B states clearly that “*Bidders who do not submit the requested samples in the quantities indicated will be disqualified*”. Deadlines had to be adhered to.

Dr Michael Sciriha for the Appellant insisted that the date of when the samples were tested is very important and should be given; but it is apparent that the Contracting Authority is reluctant to produce this date since it would show up the latter’s argument. He claimed that ‘*force majeure*’ is a recognized general principle of law. He also pointed out that the Tender Document stated that disqualification would only result when bidders failed to produce the necessary quantity of samples and not the late submission of samples.

Dr Christopher Mizzi for the Department of Contracts pointed out that the Evaluation Board does not test the samples itself but the samples are tested during actual operations by the medical staff. The records of these operations where samples were tested are kept at the operation theatre. The Department of Contracts is the regulator in such Tenders and has to ensure transparency and adherence to regulations; when deadlines were not kept, disqualification had to follow. In this case enough time was given to bidders to provide samples. The date of when the samples were tested was irrelevant, but the Department promised to produce within two days to the Public Contracts Review Board, this date.

At this point the hearing was closed.

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**This Board,**

**Having noted the Appellant’s Objection, in terms of the “*Reasoned Letter of Objection*” dated 30 November 2015 and also through the Appellant’s Verbal Submissions during the Public Hearing held on 10 December 2015, and had objected to the decision taken by the Pertinent Authority, in that:**

- a) In the first instance, the Appellant Company contends that the Contracting Authority had admitted that there were conflicting clauses in the Tender Document which did, in fact, handicapped the**

**Bidders' bid;**

- b) Appellant maintains that the main reason for discarding his offer was due to the fact that, he did not submit the requested samples in time as stipulated in the Tender Document. In this regard, the Appellant contends that this was due to a “*force majeure*” situation and the Appellant did inform the Contracting Authority of such an event.**

**Having considered the Contracting Authority's “*Letter of Reply*” dated 7 December 2015 and also through the verbal submissions by the latter, during the Public Hearing held on 10 December 2015, in that:**

- a) The Contracting Authority contends that any conflicting clauses, as mentioned by the Appellant Company, were clarified by means of the Clarification notes;**
- b) The Contracting Authority also maintains that enough time was given for the preparation and submission of samples. However, the Appellant submitted the samples one month later. In accordance with the mandatory conditions of the Tender Document, it was made vividly clear that “*Samples were to be submitted in time*”. In this regard, the Appellant Company did not meet this condition.**

**Reached the following conclusions:**

- 1. With regards to the Appellant's First Grievance, this Board, after having heard all submissions from the parties concerned and having examined all necessary documentation to arrive at a fair and just decision, credibly opines that there existed no conflicting clauses in the Tender Document, with regards to the Award Criteria.**

**The latter in the Tender Document clearly states that “*Bidders who do not submit the requested samples indicated below and not within 5 working days of being notified to do so, will be disqualified*”. This Board justifiably opines that ample time was given by the Contracting Authority, for bidders to submit samples.**

**This Board acknowledges the fact that the Tender Document is a contract between the Bidder and the Contracting Authority. In this respect, all the conditions laid out in the same must be strictly adhered to.**

**Mandatory Tender Conditions are not capriciously dictated, but are laid out to ensure that the Beneficiary, (the Contracting Authority), will procure the product/service, being tendered for, to its maximum**

**advantage.**

**In this regard, this Board credibly affirms that the requested samples were “*Part and Parcel*” of the Evaluation process and the non submission of samples by the Appellant Company did not allow the Evaluation Committee to assess the Technical Compliance of the Appellant’s product.**

- 2. With regards to the Appellant’s Second Grievance, this Board opines that the fact that there was an element of “*force majeure*” situation does not justify the late submission of samples by the Appellant Company. The Contracting Authority gave a time span of 18 weeks in order for all Bidders to ensure that the Samples are submitted.**

**At the same instance, this Board credibly notes that the Appellant Company had other remedies when the latter realised or was aware that due to unforeseen circumstances, they could not deliver the samples.**

**There was enough time for the Appellant to avail himself of a “*Pre-Contractual Concern*”. In this regard, the Appellant did not avail himself of such a remedy, but rather took the opportunity in his**

**objection to justify a late submission of samples. In this regard, this Board does not uphold the Appellant's Second Grievance.**

- 3. With regards to the Appellant's Request regarding the dates when the tests on samples were carried out, this Board, through the Contracting Authority's co-operation submitted the dates to the Appellant Company which referred to when their samples were tested.**

**However, this same Board does not see any connection between the non-submission of samples within the stipulated period and the dates when these tests were carried out. It must be noted that the latter were carried out on the Appellant's products for the Interim Second Tender and not for the Original Tender, (as these were not received).**

**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

*29 December 2015*