

## **PUBLIC CONTRACTS REVIEW BOARD**

**Case No. 879**

**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 Pharma-Cos 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:

#### **Pharma-Cos Limited:**

Mr Marcel K Mifsud	Director
Mr Claudio Martinelli	Product Specialist
Dr Matthew Paris	Legal Representative

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

Mr Solomon El Khazmi	Representative
Mr Raymond Teuma	Representative

#### **Technoline Limited:**

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

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:**

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

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

Dr Matthew Paris on behalf of the Appellant said that the Contracting Authority rejected the Appellant's Tender as the latter was "*technically non compliant as follows: Items A, E and F were previously supplied according to specifications. Specifications of items B, C and D have been modified from previous Tender; hence are considered as new items and were subject to presentation of samples. On 08.06.15, samples were requested for items B, C and D. Samples were not submitted until deadline 12.06.15. Not according to published Tender conditions. Not acceptable.*" He wanted the Contracting Authority to present the mentioned letter of the 8<sup>th</sup> June 2015. (Dr Paris was then given a copy of the EPPS print out).

Mr Marcel Mifsud ID No. 446264M, on behalf of the Appellant, under oath said that on the 5<sup>th</sup> June the Appellant had received a request from the Contracting Authority to provide samples for items B, C, D, E and F. The latter had replied on the 8<sup>th</sup> June 2015 by means of a letter. The Appellant did not receive any communication on the 8<sup>th</sup> June 2015. Replying to Dr Franco Agius, witness insisted that only the letter dated the 5<sup>th</sup> June was received.

Dr Paris explained the sequence of events:

- a) on the 5<sup>th</sup> June, the Appellant received a request to provide samples;
- b) on the 8<sup>th</sup> June, it was Appellant who sent through the EPPS a letter referring to a previous clarification;
- c) On the 11<sup>th</sup> June, the Appellant received another notification through the EPPS wherein the submission of samples was requested;
- d) On the 12<sup>th</sup> June the deadline for the submission of samples expired.

Dr Matthew Paris stated that before going into the merits of the case, he was contesting the fact alleged in the Letter of Rejection i.e. that a request had been made to his clients on the 8<sup>th</sup> June 2015. This was simply not true.

Dr Franco Agius on behalf of the Department of Contracts explained that the Letter of Rejection erroneously misquoted the date of the request for samples from the 5<sup>th</sup> to the 8<sup>th</sup> June. This could be the result of the Evaluation Board not fully understanding how the EPPS works. The request for the submission of samples had been in fact transmitted to the Appellant.

Dr Matthew Paris for the Appellant produced copies of a print-out from the EPPS showing that the request for the submission of samples was received by Appellant on the 5<sup>th</sup> June. This means that the Letter of Rejection did not reflect what happened and hence the reason given for rejection of Appellant's offer was wrong. Furthermore the Letter of Rejection apart from giving the wrong date also referred to B, C and D only. He contended that this means that there was missing information.

Dr Christopher Mizzi for the Department of Contracts said that the request for samples was made on the 5<sup>th</sup> June, and was for all the items. However the Letter of Rejection had split the items because items A, E and F were already available, since Appellant was the previous supplier, and B, C and D which were not and had to be provided. Appellant had only to

produce these last 3 samples.

Dr Franco Agius explained that normally the Tender Document provides that the incumbent supplier be exempted from submitting samples, but in the present case, certain items had changed and thus even the incumbent supplier had to produce samples of these items.

Dr Matthew Paris for the Appellant insists that without going into the merits of the case, the contents of the Letter of Rejection were not true. It was not true that a letter had been sent by the Contracting Authority on the 8<sup>th</sup> June 2015. On this date the Appellant had informed the Contracting Authority that he was the incumbent and did not need to produce samples. The Appellant was disqualified for the wrong reasons.

Dr Franco Agius for the Department of Contracts said that the letter of the 5<sup>th</sup> June 2015, wherein the request for submission of samples was made, had also made it clear that even the Appellant as incumbent had to produce the samples. This pre-empted the Appellant's letter of the 8<sup>th</sup> June where he insisted he was the incumbent.

Dr Matthew Paris insisted that he was contesting the reason for exclusion of the Appellant's offer and nothing else at this preliminary stage. The reasons stated in the Letter of Rejection were not true. He referred to a recent decision by the Public Contracts Review Board in Case 853 where the reason for rejection was the wrongly stated. He contended that between the 5<sup>th</sup> June and the 8<sup>th</sup> June something had occurred that was not communicated to Appellant.

Dr Franco Agius for the Department of Contracts contended that the samples were requested on the 5<sup>th</sup> June and not on the 8<sup>th</sup> June and this was not contested. The samples were requested and not submitted thus the decision of the Evaluation Board was valid.

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 their verbal submissions during the Public Hearing held on 10 December 2015, had objected to the decision taken by the Pertinent Authority in that:**

- a) The Appellant Company contends that the Technical Reasons given by the Contracting Authority for discarding the Appellant's offer**

were incorrect. In this regard, the Appellant maintains that the request for the submission of samples was made by the Contracting Authority on the 11<sup>th</sup> June 2015 and not on the 8<sup>th</sup> June 2015.

At the same instance, in the Letter of Rejection, the Contracting Authority stated that the Appellant did not submit the samples as requested on the 8<sup>th</sup> June 2015.

The Appellant contends that the wrong reason was in fact stated by the Contracting Authority for discarding their offer.

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

- a) Although the wrong date was mentioned in the "*Letter of Rejection*", the Contracting Authority maintains that the request for samples of items B, C and D were communicated to the Appellant. The latter was also informed as to why these samples were mandatory requirements;
- b) The Contracting Authority maintains that although current suppliers are exempted to provide samples, if the product being offered

**dictates the same specifications as those being currently supplied, in this particular case, i.e. items B, C and D had modifications. In this regard, the Appellant did not provide samples of these said items.**

**Reached the following conclusions:**

- 1. This Board, after having heard the submissions during the Public Hearing and examined the relevant communications, justifiably notes that the Appellant was informed by the Contracting Authority on 5 June 2015 that he had to submit samples for items B, C, D, E and F.**

**Although the Appellant was the present supplier, there was a “variation” in the published drawings and specifications of these items, so that the Appellant was liable to present samples.**

**Although the Contracting Authority, in its “*Letter of Rejection*” dated 20 November 2015, quoted an incorrect reference, to a date relating to a “*Request for Samples*”, this “*slipshod*”, does not, in any way, create a credible basis for not submitting the samples as mandatorily requested by the Authority.**

**This Board opines that it has been credibly established that the Appellant was aware of his obligations, even though he was the**

**current supplier, as per communication dated 5 June 2015.**

**This Board also points out that “*substance over form*” should prevail in that the “*substance*” should be the “*submission of samples*” and form in this particular instance was an error in quoting an incorrect date of a particular request, i.e. the Contracting Authority, quoted a date of 8 June 2015 instead of 5 June 2015.**

**In this regard, this Board does not uphold the Appellant’s contention that the Appellant was informed of his obligations on the 11 June 2015, but this Board opines that the Appellant, through communication dated 5 June 2015 was well informed as to what samples had to be submitted and the reasons for the latter’s submissions.**

- 2. This Board would justifiably point out that had a request for an extension for the submission of samples been granted to the Appellant by the Contracting Authority, this action would have created unequal treatment among the suppliers.**

**In this regard, this Board credibly opines that the Appellant was fully aware of his obligations from the very start of the Tendering Procedure and did not avail himself of the remedies available, in**

**accordance with the Public Procurement Regulations.**

**In this regard, this Board does not uphold the Appellant's contentions and credibly confirms that the Evaluation Process was carried out in a just and transparent manner;**

- 3. With regards to the Appellant's submission that this Appeal is at a Preliminary stage, this Board credibly opines that the merit of the case concerning the incorrect date in the "*Letter of Rejection*" has been exhausted.**

**In view of the above, this Board finds against the Appellant Company and recommends that:**

- i) The deposit paid by the Appellant should not be reimbursed;**
- ii) The tendering process is to be continued.**

Dr Anthony Cassar  
Chairman

Dr Charles Cassar  
Member

Mr Lawrence Ancillieri  
Member

*22 December 2015*