PUBLIC CONTRACTS REVIEW BOARD

Case No. 888

CT 2188/2015

Tender for the Supply of Diagnostic Markers for Immunophenotyping with Equipment on Loan.

The Tender was published on the 27th October 2015. The closing date is on the 14th January 2016. The estimated value of Tender is €1,500,005.

On the 9th December 2015 Cherubino Limited filed a Pre-Contractual concern in terms of Regulation 85 of the Public Contracts Procurement Regulations claiming that the Tender is tailored to the strengths of a particular supplier.

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 7th January 2016 to discuss the objection.

Present for the hearing were:

Cherubino Limited:

Ms Janet Pace	Representative
Dr Francis Cherubino	Representative
Dr Matthew Paris	Legal Representative

Central Procurement and Supplies Unit:

Mr Tonio Farrugia	Representative
Mr Larkin Bonnici	Representative
Ms Carmen Buttigieg	Representative
Ms Patricia Brincat	Representative
Mr David J Camilleri	Representative
Dr Stefan Zrinzo Azzopardi	Legal Representative

Department of Contracts:

Ms Mary Anne Borg	Procurement Manager
Dr Christopher Mizzi	Legal Representative

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

Dr Matthew Paris on behalf of Messrs. Cherubino Limited the Appellants contended that this objection has been submitted because they are claiming that only one firm can reach the Technical Specifications: BD. His clients represent another firm BC. Dr. Paris was quoting from Section 4 – Technical Specifications of the Tender which contains six panels.

In Panel 1 and in the other panels he contended that only BD could supply the items listed in the panels under Fluorochrome and Clone columns.

Dr Paris contended that:

i) Although the Tender in the heading of Section 4 stated that *"it is to be understood that the Contracting Authority will accept equivalent standards. However, it will be the responsibility of the respective bidders to prove that the standards they quoted are equivalent to the standards requested by the Contracting Authority."*;

ii) Clause 1.3 in the same Section 4 later on insists that *"all kits/reagents must be certified by the Euroflow group and Euroflow approved alternative kits/reagents will also be accepted as part of the offer against documentary evidence."* This in fact means that bidders must only submit antibodies certified by Euroflow, products that are obtainable only from BD;

iii) Clause 5.2 said that *software must be provided. Supplier must also provide Infinicyt Software with a Basic + Advanced Standalone Licence"* it can be seen that this software can only be supplied by BD. Dr Paris filed a document to show that this is so;

iv) Clause 3.2 also clearly states that *'the detector bands* ***"should"*** *be as follows'* and then continues to state that the lasers and detector wavelengths must be compatible with dyes recommended by Euroflow. The colours and numbers contained there are exactly the same as those supplied by BD. Only BD can win the Tender as issued.

Dr Matthew Paris said that the product supplied by BD should only be **used for research purposes and is not licensed for any other use** and this was according to a document downloaded from the company website. He explained that there were 2 suppliers of the antibodies on the market, BD and BC. There were also other certifying consortia apart from Euroflow, like the GTIL and ELN; groups that are as good as Euroflow. ELN is also partly funded by the European Union.

He contends that the Contracting Authority should not be so restrictive in the Tender Specifications. The restriction here is that only Euroflow certification would be accepted and Euroflow is restrictive because it assigns more than 80% of the standard to BD. Bidders should be given the opportunity to submit offers and then the Contracting Authority should choose the best offer.

Dr Christopher Mizzi on behalf of the Department of Contracts said that Euroflow standard was chosen for this Tender because of the need to have standardization.

Ms Patricia Brincat, ID 10478M Medical Scientist, under oath said that her work consisted in making diagnoses of patients' samples for leukaemia. The samples are mixed with the antibodies as requested in this Tender to be analysed and identify certain proteins contained in the cells. The more information gathered from the cells the better the diagnoses.

The Contracting Authority tries to study what is being done in the rest of the world. A consortium, Euroflow, was formed to study and find out the most efficient antibodies enabling better diagnoses; this led to a standard being set for reagent mixing. Since the number of patients in Malta is relatively restricted, the Contracting Authority could not test the reagents and validate them itself so other laboratories had been consulted to find out the best validated protocol, and this turned out to be the Euroflow.

It was for this reason that Euroflow standard was chosen, because it was the only validated standard in Europe. Replying to questions by Dr Zrinzo Azzopardi, the witness said that although the Contracting Authority had consulted several laboratories, some using Euroflow and some not, it was discovered that only Euroflow could give validated protocol in Europe. These standards provided reliable diagnoses. The Contracting Authority could not validate protocols itself since the relatively small number of leukaemia patients who could be tested.

Replying to a question by the chairman she said that Euroflow was chosen because its protocol was validated in Europe, where Maltese patients had to be cured if needed. The Contracting Authority had examined the incidence of leukaemia cases in Malta before choosing Euroflow.

Replying to questions by Dr Matthew Paris witness said that the present equipment being used was supplied by BD. There is no single company who can supply all the items in the Tender. Some of the reagents are specifically produced for Euroflow. Three different companies can provide the five types of equipment. Infinicyt software is distributed by BD but not exclusively. She does not agree with Dr Paris that all the items in the panels are only available from BD. The alternative is to choose a product that is not validated. Only Euroflow has validated products, that is, products which had been tested on patients with or without leukaemia.

Dr Paris asked whether it was possible to state that supplier must supply compatible software instead of must supply Infinicyt software and then evaluate the offers accordingly? Witness explained that Euroflow wanted software that analysed the data and was building a database with patients who have leukaemia and those who have not. She said that Calusa software did not have a database. She was aware of ELN and CTIL as being Euroflow competitors.

Dr Matthew Paris on behalf of the Appellant insisted that although the Tender professed to accept alternatives, yet the imposition of Euroflow said the contrary. He suggested that the Contracting Authority widens the specifications allowing other bidders to offer their products and at the evaluation stage choose the best. As the Tender stood only BD could be awarded. He reiterated that after all, the BD product is indicated for research use only. The appellant's product supplied by BC is not so indicated.

Ms Janice Pace ID 477289M under oath, said that she was employed with the Appellant and was a BSc Graduate and that the document exhibited by Dr Matthew Paris about the BD product being indicated only for research was downloaded by her the day before.

Ms Patricia Brincat replying to the question made earlier by Dr Paris said that the specifications could be widened as long as the product was validated.

Dr Stefan Zrinzo Azzopardi on behalf of the Contracting Authority said that all the items in the panels have to be evaluated against a standard, and this standard has to be specified. Only Euroflow can provide this standard, which is essential for a small Island like Malta. The Contracting Authority had made a responsible choice in the best interest of the patients. It chose a reliable yardstick.

Dr Paris filed a document showing that ELN has 194 participants from 39 countries including the United Kingdom.

Ms Patricia Brincat, the witness, said that the Tender could be amended to include validated alternatives. Euroflow only validated panels not individual antibodies and these are for diagnostic uses.

Dr Francis Cherubino on behalf of the Appellant pointed out that Euroflow itself had recommended that the antibodies in question should only be used for research purposes.

Dr Matthew Paris made reference to three other previous cases heard and decided by this Board – Cases 697, 727 and 735 where the Board had suggested widening of specifications.

At this point the hearing was closed.

This Board,

Having noted the Appellant's "*Pre-Contractual Concern*" dated 9 December 2015 and also through their verbal submissions during the Public Hearing held on 7 January 2016, in that:

a) The Appellant Company contends that the way the Technical Specifications were drafted in the Tender Document, favoured one particular supplier, namely BD;

b) The Appellant also maintains that clause 1.3 in Section 4 state that

"*All Kits/Reagents must be certified by the Euroflow Group Etc.*" In this regard, the Appellant re-affirms that the certification is restricted to "*Euroflow Group*" or Euroflow approved alternatives. They are also contending that bidders must only submit antibodies certified by Euroflow and that these products are restricted to only one supplier, namely BD.

Having considered the Contracting Authority's "*Letter of Reply*" dated 4 January 2016 and also their verbal submissions during the Public Hearing held on 7 January 2016 in that:

a) **The Contracting Authority contends that "*Euroflow Group*" was chosen so that the best validated protocol would be achieved. They are also maintaining that "*Euroflow Group*" was the only European Consortium which in turn, would be beneficial for patients sent abroad to European Countries. Only "*Euroflow*" had validated products;**

b) **The Contracting Authority confirmed, (through witness under oath), that the specifications could be widened as long as the product offered could be validated.**

Reached the following conditions:

1. **This Board, after having analysed the verbal submissions made by both parties concerned, justifiably opines that the cardinal factor of the whole issue is that the product offered by the Prospective Bidder had to be validated.**

   At the same instance, this Board also credibly notes that the fact that the Contracting Authority chose "*Euroflow Group*" consortium did give an advantage to a particular product although the Tender did mention that alternative products can be accepted. This Board notes that the fact that "*Euroflow Group*" was chosen as the validating consortium, created an element of restricted competition.

   From submissions made during the Public Hearing, this Board also credibly notes that there are also other consortiums which can provide product validation and also operate in Europe. In this regard, the Technical Expert of the Evaluation Board confirmed, under oath, that the Technical Specifications of this particular Tender can be widened to include validated alternatives.

   This Board, had, on previous occasions discussed the merits of Fair

Competition and would like to contend that the Technical Specifications of a particular Tender cannot be formulated in a way which might favour a particular product or supplier, so that competition is not limited and allows for a wider choice of the procurement of the Tendered Product or service.

Although from submissions made, this Board credibly notes that "*Euroflow Group*" consortium was chosen for the benefit of the patient, this same Board recommends that:

i) The Technical Specifications be widened to allow for other validated alternatives;

ii) Due to the fact that the Tender in question concerns health issues, this Board recommends that the "*widening*" of the Technical Specifications should be performed by means of *"clarifications*" so that the Tendering Process can be carried out without any delay.

Dr Anthony Cassar
Chairperson

Dr Charles Cassar
Member

Mr Lawrence Ancilleri
Member

21 January 2015