

## **PUBLIC CONTRACTS REVIEW BOARD**

### **Case 1018 – CFT 019-10270/2016 – Supply of Activated Charcoal Dressings sz 10cmx10cm and 10cmx20cm**

The Publication Date of the Call for Tenders was 6 May 2016 whilst the Closing Date for Call of Tenders was 6 June 2016. The Estimated Value of the Tender, (Exclusive of VAT) was € 67,833.45.

Four (4) Bidders have submitted Seven (7) offers for this Tender.

On 20 January 2017, VJ Salomone Pharma filed an Objection against the decision of the Central Procurement and Supplies Unit to award the Tender to AM Mangion Ltd for the price of € 85,070.00 (Exclusive of VAT) against a deposit of € 400.

On 31 January 2017, the Public Contracts Review Board composed by Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a Public Hearing to discuss the Objection.

The Attendance for this Public Hearing was as follows:

#### **Appellant – VJ Salomone Pharma Ltd**

Ms Jackie Mangion	Representative
Ms Vanessa Said Salomone	Representative
Dr Veronica Galea Debono	Legal Representative

#### **Recommended Bidder – AM Mangion Ltd**

Mr Desmond Bell	Representative
Mr Ray Vella	Representative
	Legal Representative

#### **Contracting Authority – Central Procurement and Supplies Unit**

Ms Marika Cutajar	Chairperson, Evaluation Board
Mr Eman Gravino	Secretary, Evaluation Board
Mr Donald Attard	Member, Evaluation Board
Dr Stefan Zrinzo Azzopardi	Legal Representative

The Chairman of the Public Contracts Review Board, Dr Anthony Cassar opened the discussion by explaining that there was a reason why no postponements are granted to any requests to do so by parties concerned. The schedule of Hearings is prepared a week prior to the actual date of the Public Hearing and by accepting on request for deferment the Board would have to make other changes, hence the impossibility to accede to any similar requests.

Following this explanation, Dr Cassar invited the Appellants and their Legal Representative to submit their complaints before the Public Contracts Review Board.

Dr Veronica Galea Debono, the Legal Representative for VJ Salomone submitted that their Objection was a simple one based on three points. The first point concerned the price since her client's product costs half the price of the offer submitted by the Recommended Bidders.

The second point was that the product submitted by the Appellants was as requested by the Central Procurement and Supplies Unit. Dr Galea Debono continued by saying that her client's product was neither different nor inadaptable to the requests of the Tender Document. The only difference was that VJ Salomone Pharma's product was enhanced and had an added feature which would be needed and which effectively the product submitted by AM Mangion Ltd did not have and therefore they do not agree with the Reasoned Letter of Reply submitted by the Contracting Authority on 26 January 2017 which *inter alia* stated,

*"The product that was offered by the Appellant is a different product from the product that was requested in the Tender"*

This statement was not true. The Appellants therefore were asking whether the Contracting Authority understood their product and how it was to be used as it was feared that the latter did not recognize completely its proper usage. Dr Galea Debono continued by showing the Public Contracts Review Board a sample of the product and illustrated an added padding which was found on the top which was a very important part of the product since it absorbs both its smell and any infections.

VJ Salomone Pharma Ltd insisted that it was clear from what was offered and chosen that the product which they submitted may be directly applied to the whole surface and covered with a secondary dressing. They were offered what was requested in the Tender and this for half the price of the offer which was eventually recommended for award continued Dr Veronica Galea Debono.

Dr Stefan Zrinzo Azzopardi, the Legal Representative for the Central Procurement and Supplies Unit countered that the issue was whether the product submitted by the Appellants and the product requested were one whole product. Since this involved technical matters, the Contracting Authority had a Technical person who can testify under oath regarding the matter.

At this stage, Ms Miriam Wubbels, ID 311966, a Tissue Viability Nurse was summoned in front of the Public Contracts Review Board to testify under oath.

Following Ms Wubbels' testimony, Dr Veronica Galea Debono, the Legal Representative for VJ Salomone Pharma Ltd submitted that the points which came out clearly from the Witness' testimony regarding first and foremost the obvious issue regarding pricing wherein their product costed half as much as the one by the Recommended Bidders.

The witness raised a crucial point that she was afraid that the product would not be used in the appropriate manner and the Appellants were asking the Public Contracts Review Board not to be penalised for this matter.

There might be circumstances where their product would not be used due to the pad enhancement but it was a fact that AM Mangion Ltd's product was not viable for the situation when the product is not used according to Dr Galea Debono.

She added that the only charcoal product was not the right product for certain circumstances and the argument why the product submitted by the Recommended Bidder was chosen was a false one because although it was agreed that the padding could not always be used on the other hand the product offered by AM Mangion Ltd would need another product hence adding an extra cost.

The Appellants argued that their product provided all the requests which there were in the Tender Specifications. There was nothing in the Tender which say that the dressing must not have certain things. All specifications where there whether it was silver or charcoal and these were offered at half the recommended price.

VJ Salomone Pharma Ltd did not agree with the arguments issued by the Central Procurement and Supplies Unit in their Reasoned Letter of Reply dated 26 January 2017 wherein it was stated *inter alia* that,

*“the products are distinct and thus the Appellant failed to present the product that was requested by CPSU”.*

Dr Veronica Galea Debono, on behalf of VJ Salomone Pharma concluded by saying that her clients offered their product according to the specifications requested for half the price and it was enhanced with an item which could be needed during its usage.

Dr Stefan Zrinzo Azzopardi, on behalf of the Central Procurement and Supplies Unit countered that this was a Technical Evaluation since the product offered by the Appellants was disqualified since had his clients needed an extra absorbant layer, they would have asked for it in the Tender Document.

Once there was a product A which had something different than product B, one couldn't say that both products were one and the same and the fact that the product was an enhanced one distinguishes it.

The Contracting Authority noted that point 3 of the Letter of Objection submitted by the Appellants dated 20 January 2017 which *inter alia* said that,

*“Our principals can offer the alternative without the absorbing pad at the same price and conditions”*

Therefore, continued Dr Zrinzo Azzopardi, even the same manufacturer was distinguishing between a product with a pad and another one with no pad, hence one cannot come to this Public Hearing and argue that both products are one and the same. If this wasn't clear, the Appellants should have asked for a Clarification.

Dr Stefan Zrinzo Azzopardi concluded that the Technical person evidenced that it was true that the product was not doing any harm but in the optimal situation, the product requested must be adaptable to all situations. Once there was this distinction, one couldn't insist that the product offered was the one requested.

At this stage, the Public Hearing was adjourned to Tuesday 7 February 2017 at 09:00 wherein the Public Contracts Review Board will transmit the decision taken for this Objection verbally and then distribute a hard copy of the same to all parties concerned.

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**This Board,**

**Having noted this Objection filed by VJ Salomone Pharma (herein after referred to as the Appellant) on 20 January 2017, refers to the Contentions made by the latter with regards to the award of Tender of Reference CFT 019-10270/16 listed as Case No 1018 in the records of the Public Contracts Review Board, awarded by AM Mangion Ltd (herein after referred to as the Contracting Authority).**

**Appearing for the Appellant: Dr Veronica Galea Debono**

**Appearing for the Contracting Authority: Dr Stefan Zrinzo Azzopardi**

**Whereby, the Appellant contends that:**

- a) **The product submitted by VJ Salomone Pharma Ltd was as requested in the Tender Document and was fully compliant with the requisites as stipulated in the Technical Specifications of the same document. In fact, the Appellant maintains that his product has an added enhancement;**
  
- b) **Product maintains that apart from being technically compliant, his offer was by far the cheapest.**

**This Board also noted the Contracting Authority's "*Letter of Reply*" dated 26 January 2017 and its verbal submissions during the Public Hearing held on 31 January 2017, in that:**

- a) **The Central Procurement and Supplies Unit insists that the product submitted by the Appellant was not the one as requested and thus the Evaluation Board had no other option but to regard the same as being technically non-compliant, hence the price issue was not a determining factor.**

**This same Board also noted the Testimony of the witness namely, Ms Miriam Wubbels duly summoned by the Central Procurement and Supplies Unit.**

**This Board, after having treated the merits of this case, arrived at the following conclusions:**

- 1. This Board, after having examined the relative documentation and heard submissions by all parties concerned credibly established that the issue of this Appeal is to determine whether the product submitted by VJ Salomone Pharma conformed to the Technical Requirements as dictated in the Tender Document.**

**To treat this issue in a logical way, one has to examine the Tender Document and when doing so, one has also to point out the clarifications made on 9 May 2016 wherein it was clearly stated and confirmed by the Central Procurement and Supplies Unit that Bidders had to be guided as per specifications provided in the Tender Document. These specifications were drawn up in accordance with the actual requirements of the Contracting Authority.**

**The Technical Specifications specified the exact needs to be supplied. In this regard, this Board justifiably notes that the product that was requested consisted of “*Charcoal*” which must be impregnated with**

**metallic silver to further assist in reducing the Bio Burden of the wound.**

**The Tender Document did not specify that this product must also contain a pad for absorbency. At this particular stage, one has to deduce that the Contracting Authority was clear in its requirements by not including the supply of pads to the product and in doing so, it has also confirmed via Clarifications that one had to follow exactly what the Tender Document dictated.**

**In this regard, this Board confirms that the Tender Document clearly specified the Technical Composition of the product and that the latter was not to include a pad for absorbency.**

- 2. This Board also notes that from the testimony of the witness, reliable and credible reasons and expectations which were made as to why the Tender Document did not request the inclusion in the product of an absorbent pad.**

**This is a Technical Medical product which will be applied on patients with wounds, so that the well being of the patient is the prime concern of this Board. It has been credibly explained by the witness**

**that the medical reasons why such pads were not requested was simply due to the fact that the inclusion of absorbency pads in the product would not allow the treatment of wounds in cavities.**

**In this regard, this Board would like to justifiably confirm that VJ Salomone Pharma Ltd's product would limit its application and hence does not uphold the latter's First Contention, in that, their product is not the same as that requested in the Tender Document.**

- 3. With regards to the Appellant's Second Contention, this Board would like to respectfully point out that the issue of price is irrelevant in this particular case. One has to respect the justified usage and intended application of the particular product rather than weigh the cost to the Contracting Authority.**

**In this Board's opinion, there was enough evidence produced to demonstrate the fact that VJ Salomone Pharma Ltd's product, although it can be used, does not satisfy all the required applications.**

**It is being credibly established that the Appellant's product is not the same one as requested. This Board also notes the fact that even the manufacturer of VJ Salomone Pharma Ltd's product offered to**

**submit another product with the requested characteristic as that originally requested in the Technical Specifications.**

**One has to mention that the fact that the Appellant's product may contain an enhancement value, however the latter factor, in this instance is limiting the Application of the same product.**

**The main issue of the Appeal was whether VJ Salomone Pharma Ltd's product had all the necessary requirements to satisfy all the needs for its intended application. This Board, after having examined all the submissions made, credibly opines that the Appellant's product, although substantially cheaper does not meet all the criteria for its applications and in this regard, VJ Salomone Pharma Ltd's product is not the same as requested in the Tender Document.**

**This Board would also like to acknowledge the fact that although the Appellant's product is not the same as that requested, the latter can also be utilised for the Application but not in every circumstance.**

**In view of the above, this Board finds against VJ Salomone Pharma Ltd, however it recommends that the deposit paid by the latter should be refunded.**

Dr Anthony Cassar  
Chairman

Dr Charles Cassar  
Member

Mr Lawrence Ancilleri  
Member

*7 February 2017*