

## **PUBLIC CONTRACTS REVIEW BOARD**

### **Case 1023 – CT 2242/2015 – Tender for the Supply of Non Ionic Contrast Medium for Cardioangiography Containing 350-370Mg Iodine per ml**

The Publication Date of the Call for Tenders was 11 December 2015 whilst the Closing Date for Call of Tenders was 21 January 2016. The Estimated Value of the Tender, (Exclusive of VAT) was € 1,134,300.00.

Three (3) Bidders have submitted six (6) offers for this Tender.

On 27 January 2017, Cherubino Ltd filed an Objection against the decision of the Central Procurement and Supplies Unit to award the Tender to Alfred Gera & Sons Ltd for the price of € 685,512 for Lot 2 (Exclusive of VAT) against a deposit of € 8,316.

On 9 February 2017, the Public Contracts Review Board composed by Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Carmel Esposito as members convened a Public Hearing to discuss the Objection.

The Attendance for this Public Hearing was as follows:

#### **Appellant – Cherubino Ltd**

Dr Francis Basile Cherubino	Representative
Dr Danica Caruana	Legal Representative
Dr Adrian Delia	Legal Representative

#### **Recommended Bidder – Alfred Gera & Sons Ltd**

Ms Anne Curmi	Representative
Ms Yanika Gatt	Representative

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

Mr Tonio Farrugia	Chairperson, Evaluation Board
Ms Danika Agius Decelis	Member, Evaluation Board
Mr Adrian Spiteri	Member, Evaluation Board
Ms Alison Anastasi	Representative
Ms Federica Spiteri Maempel	Representative
Mr Mark Zammit	Representative
Dr Stefan Zrinzo Azzopardi	Legal Representative

#### **Department of Contracts**

Ms Alicia Vella Lethridge	Procurement Manager
Dr Christopher Mizzi	Legal Representative

Following an introduction by The Public Contracts' Review Board Chairman, Dr Anthony Cassar, the Appellants were invited to make their submissions.

With regards to the Objections filed for Lot 1, Dr Adrian Delia, the Legal Representative for Cherubino Ltd submitted that he wanted to start by contesting the practice with which this Tender was working and with what the Contracting Authority required from the same.

Dr Delia was requesting the Public Contracts Review Board to revoke the Tender Cancellation and the adjudication of both Tenders together since there were grounds to do so. Therefore Cherubino Ltd was complaining about the cancellation of the Lot and the adjudication of the other.

Previously, the Contracting Authority has issued a similar Tender for the same things and the companies which submitted offers were Cherubino Ltd and Pharma-Cos Ltd who submitted for both 50ml and 100ml. Alfred Gera & Sons Ltd also submitted an offer but only for the 100ml. When the bids were combined the offer submitted by Pharma-Cos Ltd was cheaper than the one submitted by Cherubino Ltd while Alfred Gera & Sons Ltd was discarded since he offered only for one lot, hence Pharma-Cos Ltd being awarded the Tender.

The same three Bidders with the same conditions submitted offers for this same Tender, namely Pharma-Cos Ltd and Cherubino Ltd for the two lots and Alfred Gera & Sons for one lot only. Dr Delia was therefore suspecting that the brand which the latter was offering does not have 50ml since he did not bid for it.

The Contracting Authority wanted the same brands for the two lots and the combination of the two prices dictate the award. When one saw that Alfred Gera & Sons Ltd did not submit for both Tenders, the latter should have been discarded once again and due to the fact that Cherubino Ltd had the cheapest offer, therefore they had to be awarded the Tender continued, Dr Delia.

Cherubino Ltd's Legal Representative wondered what the Contracting Authority did when evaluating the offer supplied by Cherubino Ltd and Pharma-Cos Ltd when comparing their offers for both lots with Alfred Gera and Sons Ltd's offer which was for one lot only as this wouldn't work as therefore the Tender would have been awarded on separate lots rather than the Tender as a whole.

The Contracting Authority awarded the Tender to Alfred Gera & Sons Ltd since they had the cheapest bid in Lot 1 but on the other hand they did not submit offers for Lot 2. Dr Delia felt that his clients were prejudiced since a price was given when the Central Procurement and Supplies Unit advised that prices had to be given for both lots together and with the same brand.

Dr Adrian Delia continued by saying that there was no comparison like with like and that the Letter of Rejection dated 17 January 2017 *inter alia* stated that

*"Lot 1 was cancelled as per Article 18.3 (a) of the applicable General Rules Governing Tenders, no financially worthwhile Tender has been received."*

If one compared the prices for Lot 1, Cherubino Ltd offered € 23,800 while Pharma-Cos Ltd offered € 27,200 while for Lot 2, Cherubino Ltd offered € 1,151,280, Pharma-Cos Ltd €

1,159,200 while Alfred Gera and Sons offered € 685,512. Therefore, according to Dr Adrian Delia, the Contracting Authority cancelled the cheapest lot since there was nobody who was financially worthwhile when his clients had the cheaper offer while on the other hand they were adjudicating the Tender which was valued over a million Euros.

Dr Christopher Mizzi, the Legal Representative for the Department of Contracts submitted that the Lots are being awarded on a Lot by Lot basis. The Lots were segregated and were to be considered separately.

With regards to the financial issue, Dr Mizzi had the Chairperson of the Evaluation Board who he would like to call for witness and testify regarding the matter for Lot 1.

At this point, Mr Tonio Farrugia, the Senior Procurement Officer and also the Chairman of the Evaluation Board for this Tender, holding ID Card Number 297389 M was called to testify under oath before the Public Contracts Review Board.

Following Mr Farrugia's testimony, Dr Adrian Delia, the Legal Representative for Cherubino Ltd argued that it was crystal clear that it was for their own reasons, which were not dictated by the Witness why they wanted the 50ml and 100ml. It was also crystal clear that they wanted the same brand of vials, and this is a medical decision. It was also clear that whoever submitted one type of vial won't even be considered and it was also clear, which was an important thing for the Appellants' Objection to be a success that there was no reason why Lot 1 had to be cancelled.

In their Letter of Objection dated 26 January 2017, Dr Delia submitted that Article 18.3 could cancel only the Tender and not the Lot. The Contracting Authority on the other hand said that they were evaluating their Bids, Lot by Lot. Therefore Lot 1 could never be cancelled according to the Appellants as it was financially viable.

Dr Adrian Delia argued that if therefore both Lots were not cancelled, his clients were the only technically compliant and cheapest Bidder since Alfred Gera & Sons were not technically compliant and the other Bidder was more expensive and in fact the Central Procurement and Supplies Unit have eliminated them.

Therefore, the logic, the Regulations, the Law and the justice require that the cancelled Tender was cancelled wrongly and when the comparison was to be made, Cherubino Ltd was the cheapest, hence the Tender was to be awarded to the latter insisted the Appellants.

Dr Christopher Mizzi, the Legal Representative for the Department of Contracts countered that the exercise which Dr Delia decided to make with the witness at the end of the latter's testimony, wherein the Bid was compared with the estimate, does not fall under the consideration of Article 18.3 (a) of the General Rules Governing Tenders v 1.13 dated 26 August 2015.

When there is a Tender which exceeds the Estimate Value, there was another ground for cancellation, which was beyond the Financial Estimate for a Tender. In this case, the discussion was not about a cancellation because somebody has exceeded the Financial Estimate or was not within budget. In this case, the discussion was whether this was financially worthwhile or not, another ground, in the General Rules for Cancellation The question was whether the Bids were within budget or not.

Dr Adrian Delia, the Legal Representative for Cherubino Ltd intervened by saying that he has asked this question to the witness and he replied.

Dr Christopher Mizzi, the Legal Representative for the Department of Contracts agreed with the latter statement and added that the Public Contracts Review Board can consider the witness' testimony. The discussion was on another separate ground namely whether it was financially worthwhile or not. The comparisons, the estimates and the Bids were irrelevant at this stage. The witness had explained that the way which the Evaluation Board deemed the Tender to be financially not worthwhile when they had made a comparison of the Bids.

Dr Adrian Delia, the Legal Representative for Cherubino Ltd countered that it was Lot 1 which the Evaluation Board has deemed as not to be financially not worthwhile and challenged Dr Mizzi to explain to the Board in terms of the Public Procurement Regulations how come Lot 1 was not financially worthwhile.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board remarked that the latter has understood the Appellants' arguments.

Dr Christopher Mizzi, the Legal Representative for the Department of Contracts continued by saying that a decision was taken and that the Central Procurement and Supplies Unit have deemed Lot 1 not to be financially not worthwhile and there was certain background which supported this decision.

The Contracting Authority was going to defend the way with which the decision was taken. It was analysed by the General Contracts Committee and then the final decision was reached. When the prices were compared, it resulted that the 50ml vial, notwithstanding the fact that compared to the Tender in general, this was a trivial issue, as also said by Dr Delia, the comparison per vial did not make sense against the rate which was submitted the 100ml.

Dr Christopher Mizzi for the Department of Contracts argued that it does not make sense for the Central Procurement and Supplies Unit to buy the 50ml vials when compared to the price of the 100ml. This was not a medical question but it was a question of the rate which was submitted for the 50ml did not have any comparisons with the 100ml one as it was much more expensive. It was then that the Evaluation Board has decided that the prices submitted for Lot 1 were not financially worthwhile.

Dr Adrian Delia, the Legal Representative for Cherubino Ltd replied that therefore they should have cancelled both Lots not only one lot. If the Tender said that it was to consider a global sum for the two Lots, then the contract should have been cancelled in its entirety. Besides, to rub the salt in the wounds, the Evaluation Board has deemed the cheapest compliant Bid as not financially viable.

Dr Christopher Mizzi, the Legal Representative for the Department of Contracts referred to Article 3.1 of the Tender Document which said,

*“This Tender is divided into lots. Tenderers may submit a Tender for several lots (one or more lots).”*

Dr Mizzi referred also to Article 3.3 of the Tender Document which, *inter alia* said,

*“Contracts will be awarded lot by lot”*

At this stage, the Public Hearing was adjourned to Tuesday 21 February 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 Cherubino Ltd (herein after referred to as the Appellant) on 27 January 2017, refers to the Contentions made by the latter with regards to the award of Tender of Reference CT 2242/2015 listed as Case No 1023 in the records of the Public Contracts Review Board, awarded by the Central Procurement and Supplies Unit (herein after referred to as the Contracting Authority).**

**Appearing for the Appellant: Dr Danica Caruana**

**Dr Adrian Delia**

**Appearing for the Contracting Authority: Dr Christopher Mizzi**

**Dr Stefan Zrinzo Azzopardi**

**Whereby, the Appellant contends that:**

- a) The offers made for Lot 1 were discarded and the Tender was cancelled since the Contracting Authority alleged that, “*No financially worthwhile Tender has been received*” and in this regard, Cherubino Ltd contend that this reason is unfounded. Furthermore, the Appellant insists that since there were two fully compliant offers, the Evaluation of the same could have been carried out
- b) With regards to Lot 2, Cherubino Ltd contend that since Lot 1 was cancelled and the basis on which the cheapest offer was to be determined was on the overall combination of the cheapest offer in both Lot 1 and 2, then the establishment of the cheapest offer could not be determined and to this effect, Lot 2 should have also been cancelled.

This Board also noted the Contracting Authority’s “*Letter of Reply*” dated 6 February 2017 and its verbal submissions during the Public Hearing held on 9 February 2017, in that:

- a) With regards to Lot 1, the Contracting Authority insists that in Article 3.3 of Section 1 of the “*Instruction to Tenderers*”, which states that Contracts will be awarded on a Lot by Lot basis, the Evaluation

**Process had to be separately on each Lot and this entitled the right of the Evaluation Board to assess Lot 1 in its own right.**

**During the Evaluation of Lot 1, the Evaluation Board considered the offers submitted for this Lot to be non-financially worthwhile offers, and thus, the latter decided to cancel the Tender for this particular Lot.**

- b) With regards to Lot 2, the Central Procurement and Supplies Unit considered the offer made by Alfred Gera & Sons Ltd to be highly favourable and fully compliant and that the same offer could satisfy the supply requested as per Tender.**

**This same Board also noted the Testimonies of the witness namely, Mr Tonio Farrugia duly summoned by the Central Procurement and Supplies Unit.**

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

- 1. With regards to the Appellant's First Contention on Lot 1, this Board would like to credibly point out that apart from the Technical**

**aspect; the Evaluation Board had to assess the commercial viability of the product being offered as well.**

**After examining the relative documentation, this Board justifiably established the fact that when the Evaluation Board compared the quoted rate for the 50ml solution to the 100ml one, it transpired that the rates quoted by all the Bidders for Lot 1 did not make commercial sense to the effect that had the Evaluation Board awarded this lot to the cheapest Bidder, in the long run, the Contracting Authority would not have chosen the most advantageous offer.**

**In this regard, this Board would like to emphasise the importance of this issue during the Evaluation Stage and also the fact that the Evaluation Board had the opportunity of comparing the rates for the 50ml to the 100ml.**

**At the same instance, this Board could not find any credible evidence or proof that the Tender Document precluded the Evaluation Board from cancelling the Tender for Lot 1.**

One has to point out also the provision as laid out in Article 3.3 of Section 1 of the “*Instructions to Tenderers*” in that the award of this Tender was to be on a Lot by Lot basis, that is each Lot will be assessed separately. This provision also implies that if the award is to be made on a Lot by Lot basis, even the cancellation can be made on the same basis.

After considering all the facts and circumstances behind the reasons for the Evaluation Board to cancel the Tender for Lot 1, this same Board opines that the decision taken by the Evaluation Board was not only justified but also proper and diligent.

2. With regards to the Appellants’ Second Grievance, this Board would like to refer to Article 3.3 of the Tender Document wherein it is dictated that,

*“In such a case that the cheapest offer in each Lot is not of the same Brand, the Contracting Authority will choose the most favourable overall solution by choosing the cheapest overall combination from all the Lots with offers having the same Brand as per specifications in Section 4 etc”*

**It is hereby being understood that although the Contracts will be awarded Lot by Lot and the combination of the product must be from Lot 1 & Lot 2 provided that in case where the cheapest is not of the same Brand, the procedure to be adopted in so far as establishing the cheapest offer, the Contracting Authority will opt for a combination from the Lots of the same Board.**

**In this Regard, this Board interprets this important clause that the combination of the cheapest price will represent the cheapest from Lots 1 and 2 provided that they are of the same Brand. However, this Board also notes that Lot 1 was cancelled and therefore, the computation of the cheapest offer was not possible. On the other hand, the offer made by Alfred Gera & Sons was only for Lot 2.**

**Although the Tender provided that Bidders may bid for the separate Lots, the actual Tender required two Lots; Lot 1 (50ml vials) and Lot 2 (100ml vials).**

**The cancellation of Lot 1 automatically discarded the intended computation of the cheapest offer on “*an overall combination*” basis due to the Cancellation of Lot 1, a situation arose wherein the Recommended Bidder quoted for Lot 2 and there were no further**

**Bidders for Lot 1 as this was cancelled, hence the establishment of the cheapest offer was somewhat erratic.**

**This Board also points out that the awarding of Lot 2 only does not, in any way, satisfy the main objective of the Tender and in this regard, this Board does not confirm that Article 3.3 is triggered only if there were offers for both lots.**

**The issue is that the Tender requested two lots so that the cancellation of one Lot affected the Award Criteria with regards to the cheapest offer having the same Brand. This Board justifiably opines that under the circumstance and due to the fact that Lot 1 was cancelled, Lot 2 should have been also cancelled. In this regard, this Board upholds the Appellants' Second Grievance.**

**3. This Board, in arriving at its decision regarding the Appeal filed by Cherubino Ltd for Lot Number 2 took into consideration two basic facts as follows:**

**i) Although the Tender Document, as per Clause 3.1, allowed separate offers for each lot, the latter was comprised of a product**

consisting of two components, wherein each component listed under a separate lot.

In this regard, this Board respectfully points out that the Tender Requirements would not be complete with one Lot only, so that the cancellation of Lot 1 impaired the composition of the Tendered Product. If the Central Procurement and Supplies Unit intended to accept the award of one Lot only, as well, the latter should have denoted this eventual circumstance in the Tender Document.

ii) This Board noted the excessive length of time taken between the publication of the Tender and the date of the Award. In this regard, this Board justifiably feels that there was ample time for the Contracting Authority to regulate the procedural state of this Tender by adhering to article 8 of the “*General Rules Governing Tenders*”

**In view of the above, this Board recommends that:**

**a) The cancellation of Lot 1 of the Tender is justified;**

- b) The established fact that Lot 1 was justifiably cancelled, created an erratic interpretation as to how the cheapest offer was to be determined, in the event, that Alfred Gera & Sons Ltd quoted for Lot 2 only and in this regard, this Board recommends that the award of the latter should also be cancelled;**
- c) The whole Tender is to be cancelled and if re-issued, the exact and precise methodology of the assessment of the cheapest Bid is to be provided for, in the Tender Document;**
- d) The deposit paid by the Appellant is to be refunded.**

Dr Anthony Cassar  
Chairman

Dr Charles Cassar  
Member

Mr Carmel Esposito  
Member

*21 February 2017*