

PUBLIC CONTRACTS REVIEW BOARD

Case 1056 – CT 2005/2016 – Supply of Incontinence and Cleaning Wipes

The Publication Date of the Call for Tenders was 19 July 2017 whilst the Closing Date for Call of Tenders was 13 September 2016. The Estimated Value of the Tender, (Exclusive of VAT) was € 1,001,922.

Six (6) Bidders have submitted Twenty Eight (28) offers for this Tender.

On 26 May 2017, Krypton Chemists Ltd filed an Objection against the decision of the Central Procurement and Supplies Unit to cancel Lot 1 of this Tender against a deposit of € 1,856.

On 22 June 2017, the Public Contracts Review Board composed by Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Richard A Matrenza as members convened a Public Hearing to discuss the Objection.

The Attendance for this Public Hearing was as follows:

Appellant – Krypton Chemists Ltd

Mr Matthew Arrigo	Representative
Dr Danica Caruana	Legal Representative
Dr Adrian Delia	Legal Representative

Contracting Authority – Central Procurement and Supplies Unit

Mr Tonio Briguglio	Chairperson, Evaluation Board
Mr Wayne Caruana	Secretary, Evaluation Board
Ms Maria Aquilina	Member, Evaluation Board
Dr Stefan Zrinzo Azzopardi	Legal Representative

Department of Contracts

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

Dr Adrian Delia, the Legal Representative for Krypton Chemists Ltd, opened by saying that the issue for the 2 Lots which they are Appealing for, namely Lot 1 and Lot 3 were not precise and invoked Clause 18.3 (a), the cancellation of the Tender for qualitative and financial reasons.

On the other hand, from the Reasoned Letter of Reply submitted by the Central Procurement and Supplies Unit and dated 22 June 2017 it seemed that the issues why the Appellants were disqualified were technical.

Dr Adrian Delia then proceeded to quote the Reason why his clients' offer for Lot 1 were rejected in the Letter of Rejection issued by the Department of Contracts on 18 May 2017 which said,

“Although the Technical Data sheet shows an absorbency level not less than 750 mls for the 40 x 60cm incontinence pads, the sample when tested, could only absorb not more than 400mls. On the other hand the Technical Data Sheet shows an absorbency level not less than 1,350mls for the 60 x 90cm incontinence pads but the sample when tested could only absorb not more than 600mls”

In this regard, the Appellants have brought in witnesses who can testify on the product, the sample and the Company Representation.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board asked whether this sample was the same sample which was given to the Central Procurement and Supplies Unit on submission of their offer.

Dr Adrian Delia, the Legal Representative for Krypton Chemists Ltd replied in the affirmative for Dr Cassar's question before proceeding to quote the Reason why his clients' offer for Lot 3 was rejected according to the Letter of Rejection issued by the Department of Contracts on 18 May 2017 namely,

“When samples were tested it was concluded that they did not include the double core as requested in the Technical Specifications”.

Dr Adrian Delia then argued that this was a factual case.

At this point, Ing John Bugeja, a Senior Manager within the Malta Competition & Consumer Affairs Authority, holding ID Card No 405462 M was summoned by Krypton Chemists Ltd to testify before the Public Contracts Review Board.

Following Ing Bugeja's testimony, Mr Christian Ferro, an Export Area Manager within Santex Co Ltd was also summoned by Krypton Chemists Ltd to testify before the Public Contracts Review Board.

At the end of Mr Ferro's testimony, Mr Matthew Arrigo, on behalf of Krypton Chemists Ltd submitted that one would know that they absorb the same because each item has its own product code which was an unambiguous reference to that absorbency.

At this point Ms Maria Aquilina, a Pressure Ulcer Prevention Co-Ordinator at Mater Dei Hospital, holding ID Card Number 70168 M was summoned the Central Procurement and Supplies Unit to testify under oath before the Public Contracts Review Board.

Following Ms Aquilina's testimony, a fourth witness, Mr Matthew Arrigo who works for Krypton Chemists Ltd and holding ID Card No 188094 M was summoned by the latter to testify under oath before the Public Contracts Review Board.

At the end of Mr Arrigo's testimony, Dr Matthew Paris, the Legal Representative for Phrama-Cos Ltd submitted that he was present with regards to the Objection for Lot 1. Dr Paris continued by referring to the testimony of Ing John Bugeja and the question which he asked him about whether he was accredited with the required ISO for which the witness had replied in the negative.

Pharma-Cos Ltd's Legal Representative referred then to Page 21 of the Tender Document which *inter alia* stated that,

"All products of offers submitted by Tenderers must be accompanied by an ISO-Accredited 11948-1 and a leakage (Rewetting test, laboratory certificates, submitted by the Malta National Laboratory.) Offers unaccompanied by the outlined certificates will be rejected."

Dr Matthew Paris continued by saying that the certificate provided by Krypton Chemists Ltd from the Malta Competition & Consumer Affairs Authority which was signed by Ing John Bugeja was not made by an accredited person and therefore here there was something missing.

With regards the testimony provided by Ms Maria Aquilina, Dr Matthew Paris said that the latter testified that sometimes the product submitted can cause problems to the patients. Previous decisions issued by both the Public Contracts Review Board and the Hon Court of Appeal said that no risks are to be taken when it comes to health related matters. Ms Aquilina had confirmed under oath that there is a risk.

Dr Adrian Delia, the Legal Representative for Krypton Chemists Ltd said that he was going to speak as a person who understood English and maybe logic. The documents submitted came from the Malta National Laboratory. Ing John Bugeja was an engineer within the Malta National Laboratory. The condition quoted by Dr Matthew Paris on Page 21 of the Tender Document requested a submission from the Malta National Laboratory. Certain conditions therefore were reached by the Appellants.

As a statement of fact the reason why the Central Procurement and Supplies Unit cancelled the Tender was that no offer satisfied them qualitatively and financially, continued Dr Delia. During the Public Hearing it was specified that the offer submitted by the Appellants did not include double core nappies. This was not an opinion but a visible fact.

There are standards in the industry and descriptions which showed otherwise, that the product submitted by Krypton Chemists was a double core one. This was the reason why the Tender was cancelled. Both products were technically compliant so therefore the cheapest product should have determined who was to be awarded the Tender. Dr Adrian Delia warned that if

the Tender was going to be decided according to the tastes of the End User, the system of Transparent Tendering was going to be crushed up.

With regards to Lot 1, the Appellant's Legal Representative continued to argue that the test had to be a clinical one made in a laboratory. Things had to be made with a standard method and meaning which had to be objectively made in the same way. The products submitted by his clients exceeded by far the minimum established by the Contracting Authority and were previously submitted to the latter without any issues. It was clear that there was an unqualified opinion on the matter.

Dr Stefan Zrinzo Azzopardi, the Legal Representative for the Central Procurement and Supplies Unit submitted that their witness' testimony was clear. His clients continued to sustain this testimony as the reason on why this Tender was cancelled.

At this stage, the Public Hearing was adjourned to Tuesday 4 July 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.

This Board,

Having noted this Objection filed by Krypton Chemists (herein after referred to as the Appellant) on 26 May 2017, refers to the Contentions made by the latter with regards to the award of Lot 1 in Tender of Reference CT 2005/2016 listed as Case No 1056 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

Whereby, the Appellant contends that:

- a) His product was in accordance with the Technical Specifications as dictated in the Tender. Moreover, Krypton Chemists Ltd contends that it had submitted all the necessary documentation together with the requested laboratory certificates confirming that with regards to absorbency, their product was by far superior to the standard required. In this regard, the Appellant insists that the reasons given by the Contracting Authority for cancelling the Tender were incorrect.**

This Board also noted the Contracting Authority's "*Letter of Reply*" dated 20 June 2017 and 22 June 2017 and its verbal submissions during the Public Hearing held on 22 June 2017, in that:

- a) The Central Procurement and Supplies Unit contend that upon testing the samples submitted by the Appellant, these did not contain equal absorption throughout and this may cause harm to parents. Moreover, the samples when tested clinically did not absorb the minimum volume of 600mls.**

This same Board also noted the Testimonies of the witness, namely:

- 1. Ing John Bugeja summoned by Krypton Chemists Ltd;**
- 2. Mr Christian Ferro summoned by Krypton Chemists Ltd;**
- 3. Ms Maria Aquilina summoned by the Central Procurement and Supplies Unit;**
- 4. Mr Matthew Arrigo summoned by Krypton Chemists Ltd**

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

- 1. This Board considers this Appeal to be of a Technical and Medical nature. Therefore, great emphasis is being placed on the testimonies of the Technical witnesses duly summoned by both Krypton Chemists Ltd and the Central Procurement and Supplies Unit.**

In this respect, this Board, after hearing lengthy submissions during the Public hearing, opines that this case can be considered under two

main issues, namely, the Appellant's Product Compliance and the validity of tests on samples.

a) **Krypton Chemists Ltd's Product Compliance**

This Board would like to respectfully refer to Page 6 of the Tender Document regarding the proof of Technical Capacity, Clause 3, wherein it is stated that:

“Submit Leakage (Rewetting Test), Laboratory Certificates, drawn up by the Malta National Laboratory for all products offered. This is to be submitted online as per Form “Rewetting Laboratory test Certificates” through the prescribed Tender Response Format and by using the Tender Preparation Tool provided.”

On the other hand, Page 21 of the Tender Document lists other conditions which must be respected one of which is that:

“All Product of offers submitted by Tenderers must be accompanied by an ISO-Accredited 11948-1 and a leakage (Rewetting test, laboratory certificates, submitted by the Malta National Laboratory. Offers unaccompanied by the outlined certificates will be rejected.”

From the credible submissions given by one of the Technical Witnesses, it is being established that Krypton Chemists Ltd's offer complied with the requisite to submit laboratory certificates from the Malta National Laboratory and other test certificates complying with ISO 11948-1 and therefore the Appellant's Offer was administratively compliant.

From the submissions made, it has been established that Krypton Chemists Ltd's sample was also tested clinically by the Central Procurement and Supplies Unit. Although, this Board has grave reservations as to the methodology applied for such tests, this Board has been informed that the Appellant's product failed to reach the absorbency level as that dictated in the Tender Document.

At this particular instance, this Board notes that there is a great discrepancy between the results shown on the tests' certificates provided by the Appellant and the results attained from the clinical tests carried out by the Contracting Authority.

This Board notes that on paper and from the submitted certificates, Krypton Chemists Ltd's product was technically compliant and in this respect, this Board refers to the tests carried out by the National Laboratory, wherein, yet again, the Appellant's Bid was confirmed as technically compliant.

In this regard, this Board considers that the key issue to this Appeal is the result of the tests carried out by the Central Procurement and Supplies Unit, which shall be considered as the next issue.

b) Validity of Tests on Samples

As has been established, the Key issue is the result of the tests, carried in house, by the Central Procurement and Supplies Unit. One has to accept the fact that test certificates confirming the results of tests carried out in a laboratory are requested so that the Contracting Authority is assured that the product being offered by a potential Bidder possesses the qualities and ingredients which the Technical Specifications in a Tender Document dictated.

On the other hand, this Board is justifiably satisfied that professional laboratory tests were carried out by the Malta National Laboratory and also takes into account the certificates issued by Santex SpA, a reputable manufacturer, on tests carried out using the methodology of standard ISO 11948-1. At this particular stage, tests certificates submitted by the Appellants confirm that the latter product is far from being technically Non-compliant.

The Central Procurement and Supplies Unit, quite properly, carried out clinical tests “*in house*” to verify the absorbency level of the Appellant’s product. In this respect, following submissions made by the Technical Witnesses, this Board observed that certain opinions were subjectively assumed.

At this stage, this Board cannot but mention the fact that tests should be carried out in an objective manner to arrive at a fair and just result. In this particular case, this Board, from submissions made, notes that the tests carried out on the Appellant’s product consisted of a manual exercise consisting of pouring water on the product and observe the volume the pad can absorb.

Although, this Board is not qualified to comment on the procedure of testing applied by the Central Procurement and Supplies Unit, this same Board notices that the discrepancy in results between those stated by the laboratories and those experienced by the Contracting Authority, is substantial enough to merit a just and final method of testing these products on a clinical basis.

In this regard, this Board is comforted by the fact that no harm will be inflicted on the patient if the Appellant's product is directly tested on the latter. This Board opines that, since there is this discrepancy in opinion, this test will provide the true and just result.

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

- i) The Tender for Lot 1 should not be cancelled;**
- ii) Krypton Chemists Ltd's offer be re-integrated in the Evaluation Process;**
- iii) A re-Evaluation Process is to be carried out by an Evaluation Board composed of different members, taking into account the**

**proposed method of testing “*in house*” the product supplied by
Krypton Chemists Ltd;**

iv) The deposit paid by the Appellant is to be refunded.

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Carmel Esposito
Member

4 July 2017