

PUBLIC CONTRACTS REVIEW BOARD

Case 1057 – 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 3 of this Tender against a deposit of € 2,316.

On 22 June 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 – Krypton Chemists

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.

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

Dr Adrian Delia, the Legal Representative for Krypton Chemists Ltd proceeded 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 absorbancy.

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 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.

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.

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 3 in Tender of Reference CT 2005/2016 listed as Case No 1057 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) **He feels aggrieved by the decision of the Contracting Authority in rejecting his offer due to the alleged reason that his product did not include the double core which is in fact a standard integral part of these incontinence items.**

In this regard, Krypton Chemists Ltd maintains that the Central Procurement and Supplies Unit's decision is incorrect as their product does in fact include the double core element.

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

- a) **The Central Procurement and Supplies Unit maintains that on testing the samples given by the Appellants, it was found out that these did not meet the requested Technical Specifications, hence being technically non compliant.**

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 Medical Nature and therefore great emphasis is being placed on the testimonies of the Technical Witnesses duly summoned by both the Appellant and the Contracting Authority.**

In this respect, this Board, after having heard lengthy submissions, opines that this case is to be considered under two main headings,

namely, Krypton Chemists Ltd's product compliancy and the validity of reasons given by the Contracting Authority for rejection of the Appellant's offer.

a) The Compliancy of Krypton Chemists Ltd's offer

This Board, after having examined the relative documentation and heard submissions would like to respectfully refer to the Technical Specifications of the Tender Document wherein, the Central Procurement and Supplies Unit requested the product to include the double core.

Credible Technical Testimony of one of the witnesses, confirmed that, in actual fact, Krypton Chemists Ltd's product included the double core, and it was also credibly established that all samples presented to the Evaluation Board included double core. At the same instance, this Board was given a "*hands on*" demonstration of Krypton Chemists Ltd's product, verifying the inclusion of a double core.

This Board also noted that the Technical witness duly summoned by the Contracting Authority, confirmed that she did not consider this

type of technology as having a double core. During the same testimony, the Witness also confirmed that she was not involved in the drafting of the Technical Specifications of the product. From the submissions and testimonies of Technical Witnesses, this Board is justifiably convinced that the Appellant's Product included the Double Core, so that the Appellant's product was in line with the Technical Specification as dictated in the Tender Document, hence Krypton Chemists Ltd's being Technically Compliant.

The fact that the Technical Witness was not aware of such technology of double core, as presented by the Appellant, does not mean that the latter's product can be classified as Technically Non compliant.

From the submissions, it transpired also that what the Technical Evaluator was expecting was not in line with the dictated terminology of a Double Core and in this regard, this Board finds this situation as a subjective circumstance.

One must appreciate that when a Tender Document is being drafted, great attention and emphasis must be given to the Technical Specifications of the requested product. At the same instance, this Board opines that ambiguous technical terms which could mean an

alternative should be avoided, but the most fair and transparent procedure is to describe in detail what is being requested and for what application the product is going to be utilised for.

In this particular case, the Double Core element was not specifically and elaborately described in the Technical Specifications and in this regard, enough credible evidence was presented to prove that Krypton Chemists Ltd's product was technically compliant.

b) Validity of Reasons for the Rejection of Krypton Chemists Ltd's offer

This Board would like to first and foremost establish the real reason why the Appellant's offer was rejected, based on the submissions of the Technical Witness summoned by the Central Procurement and Supplies Unit, who was also a member of the Evaluation Board.

The Actual Reason, as explicitly described, was that the double core of the nappy should be smooth all over so that no after effects on the skin of the patient would arise and cause discomfort thereafter. It also transpired that the Technical Witness confirmed that the Double

Core of the Appellant's products was lumpy enough to cause damage to the patient's skin.

In the "Letter of Rejection" dated 18 May 2017, the reason given for discarding the Appellant's Offer was:

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

This Board has been given clear evidence and demonstrations to prove that Krypton Chemists Ltd's product was a double core product but the Central Procurement and Supplies Unit expected other features in the product which could have been denoted in the Technical Specifications of the product.

In this regard, this Board upholds the fact that the incorrect justifications were stated by the Central Procurement and Supplies Unit for rejecting the Appellant's offer.

- 2. This Board, as it had done on many occasions when treating Appeals on Medical or Health Procurement, always takes the prime principle of patients' safety and comfort first and since during the submissions,**

this Board was made aware that the Appellant's product might cause skin damage and discomfort to the patient, this same Board recommends the following:

- i) The Tender for Lot 3 is to be cancelled. In this regard, it is being recommended that a more descriptive Technical Specifications are to be dictated to avoid misinterpretation and misunderstanding of what is being requested by the Contracting Authority;**

- ii) This Board upholds the fact that the offer submitted by Krypton Chemists was Technically Compliant. However, additional features, which should have been denoted in the original specification, were not present for the intended use of the product;**

- iii) This Board recommends that the deposit paid by Krypton Chemists Ltd is to be fully refunded.**

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Carmel Esposito
Member

4 July 2017