

PUBLIC CONTRACTS REVIEW BOARD

Case 1084 – CFT 021-6313/2017 – Tender for the Supply of Maintenance PN Paediatric

The Publication Date of the Call for Tenders was 28 April 2017 whilst the Closing Date for Call of Tenders was 18 May 2017. The Estimated Value of the Tender, (Exclusive of VAT) was € 134,221.

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

On 30 August 2017, Drugsales Limited filed an Objection against the decision of the Central Procurement and Supplies Unit finding their offer to be technically non-compliant and subsequently against the award of the Tender to VJ Salomone Pharma Limited for the price of € 110,850 (Exclusive of VAT). This against a deposit of € 671.

On 26 September 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 – Drugsales Limited

Mr Andrew Attard Montalto	Representative
Ms Giulia Attard Montalto	Representative
Dr Douglas Aquilina	Legal Representative

Recommended Bidder – VJ Salomone Pharma Limited

Ms Jackie Mangion	Representative
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Contracting Authority – Central Procurement and Supplies Unit

Ms Denise Dingli	Chairperson, Evaluation Board
Mr Stephen Martin	Member, Evaluation Board
Ms Sharon Vella	Member, Evaluation Board
Dr Stefan Zrinzo Azzopardi	Legal Representative

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

Dr Douglas Aquilina, the Legal Representative for Drugsales Limited, the Appellants, opened by saying that they had a preliminary Objection on why their Bid was rejected but he noted that these reasons were not given in the Reasoned Letter of Reply issued by the Central Procurement and Supplies Unit on 6 September 2017. The Objection was about the amount of required calcium which measured between 10 mmol and 12 mmol.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board pointed out that this Board expects that the reasons why bids were being rejected, were to be submitted outright in the Letter of Rejection, and this will avoid frivolous appeals in the future.

Dr Stefan Zrinzo Azzopardi, the Legal Representative for the Central Procurement and Supplies Unit said that he drew the attention regarding the matter although there were cases where Bidders asked for further information and that the Contracting Authority had to send this additional information to support its arguments.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board, said that it was important that Contracting Authorities send reasons to the unsuccessful bidders.

Dr Douglas Aquilina, the Legal Representative for Drugsales Limited said that his clients' supplied a product which was equivalent to the requirements in the tender document and that there was no valid reason for discarding it.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board asked whether there were any witnesses present for which Dr Stefan Zrinzo Azzopardi, the Legal Representative for the Central Procurement and Supplies Unit replied that he brought one witness whilst the Appellants brought another witness.

Dr Douglas Aquilina, the Legal Representative for Drugsales Limited explained that the discussion was about a product which is used on pre natal patients. The product is a mix of medicinal ingredients which are given to prenatal patients. One of the requirements in the Tender Document was that the calcium should be between 10 and 12 mmols.

Dr Aquilina continued by saying that in their offer, the Appellants have indicated 12.08 mmols of calcium. The difference between 12.08 mmols submitted and the 12 mmols requested was negligent and thus there was no reason why the Central Procurement and Supplies Unit had to lose € 16,000 since one of the Award Criteria was the price.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board said that he wanted to hear about the technical reasons why Drugsales Limited's offer was discarded.

Dr Stefan Zrinzo Azzopardi, the Legal Representative for the Central Procurement and Supplies Unit said that at this stage in the Tender Document it was specified a range of requirements and the measurements had to be made on what was published. The mathematics was showing that the Appellant's offer went out of range. The Central Procurement and Supplies Unit have brought a witness who could testify regarding the matter.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board said that this Board would like to see what the difference between 12 mmol and 12.08 mmol was. The Public Contracts Review Board could not and will not raise any doubts regarding the conditions of the Tender Document.

At this point, Mr Mark Zammit, an Advanced Pharmacy Practitioner within the Central Procurement and Supplies Unit, holding ID Card Number 425874 M was summoned by the Contracting Authority to testify under oath before the Public Contracts Review Board.

Following Mr Zammit's testimony, Dr Douglas Aquilina, the Legal Representative for Drugsales Limited said that he had also brought a technical person whom he wanted to cross examine regarding the matter in discussion.

At this point, Ms Rosalyn Prior, a Registered Pharmacy Technician with Baxter Healthcare UK, holding Driver Licence Card Number FB60263607, was summoned by Drugsales Limited to testify under oath with the Public Contracts Review Board.

Following Ms Prior's testimony, Dr Douglas Aquilina, the Legal Representative for Drugsales Limited said that when one was talking about the Technical Specifications of a Tender, one was supposed to talk about things which are functional and how much can these be used for the required needs. There are different ingredients required for this product but calcium is the least important one. The ranges discussed do not endanger the babies' lives.

Dr Anthony Cassar, the Chairman of the Public Contracts' Review Board said that this Board wanted to be reassured that there was no difference between 12 and 12.08 mini mols despite the fact that the discussion regarded products for prenatal.

Dr Stefan Zrinzo Azzopardi, the Legal Representative for the Central Procurement and Supplies Unit added that the Public Contracts Review Board can bring whoever it chooses for testimony but he wanted to add a legal submission.

Ms Giulia Attard Montalto, on behalf of Drugsales Limited said that there was a specified range in the Tender. When they have sent their request to Baxter, who makes a similar unit for many hospitals in Europe, they were given the formulation of 12.08 mmols. The Appellants have also asked whether there was a clinical significance between 12 and 12.08 mmols for which the reply was in the negative. Following a request in writing, Baxter have confirmed the latter statement and supported it with their research.

Ms Attard Montalto continued by saying that the Guidelines advise 1.5 mmols or else between 1.3 and 3 mmols. Drugsales Limited has decided to appeal since they felt that they were within both specifications and clinical guidelines. As a supplier, the Appellants do not want to give a product which can hurt the babies but they had to appeal since there was no reason why their product was not compliant.

Dr Stefan Zrinzo Azzopardi, the Legal Representative for the Central Procurement and Supplies Unit said that the Tender Document presented a range on each part which makes this type of product. The testimony of Ms Prior showed that even in the United Kingdom, the figure given is a straight one without a range. If this was given, this Tender would have surely faced a Pre-Contractual Concern.

The role of the Public Contracts Review Board was to revise the work of the Evaluation Board and check whether the latter has abided by the Public Procurement Regulations and the Tender Document requirements. The Evaluation Board had to compare what the Bidders presented in their Technical Offers with the ranges which there were in the Technical Specifications. If there were three Bidders who exceeded 12 mmols, they were all deemed to be technically non-compliant.

Dr Zrinzo Azzopardi pointed out that no guidelines were mentioned but there were other people who instructed the Central Procurement and Supplies Unit to buy for them products based on their specifications.

Dr Douglas Aquilina, the Legal Representative for Drugsales Limited said that the Contracting Authority has to justify why they requested items to be between 10 and 12 mmols.

Dr Stefan Zrinzo Azzopardi, the Legal Representative for the Central Procurements and Supplies Unit replied that this had to be done at an appropriate time earlier, before the evaluation process.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board, pointed out that this Board cannot go against the Tender Document at this stage. This Appeal could have been made earlier in remedies before closing date of call for competition, then the discussion would have been a different one. This Board had to see only that the procedure was executed correctly.

Ms Giulia Attard Montalto, on behalf of Drugsales Limited said that their Bid was an equivalent one.

Mr Carmel Esposito, a member of the Public Contracts Review Board, suggested that if the Appellants had any doubts, they should have sought a clarification from the Contracting Authority.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board added that this Board is currently receiving a lot of Remedies before Closing Date of a Call for Competition which is helping out to avoid other further issues.

Ms Giulia Attard Montalto, on behalf of Drugsales Limited said that they felt no need to file a Remedy before Closing Date of a Call for Competition. The Appellants were only saying that there was no significant clinical difference between 12 and 12.08.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board said that this Board cannot change the conditions of the Tender at this stage since the Evaluation Process has been already made because they would go against a Level Playing Field of principles.

Dr Douglas Aquilina, the Legal Representative for Drugsales Limited said that legally this argument is not sustainable. There was no need for his clients to file a Remedy before Closing Date of a Call for Competition. If there was a clinician in the Evaluation Board, these would have been evaluated in mmols. The product submitted by the Appellants was the same one and there was no clinical reason why it had to be discarded by the Central

Procurement and Supplies Unit who had to show why 12.08 mmols was clinically relevant since they brought proofs which showed the exact opposite. The Appellants felt that with their exclusion from the Tender, the Contracting Authority was limiting competition.

Dr Stefan Zrinzo Azzopardi, the Legal Representative for the Central Procurement and Supplies Unit said that he strongly objected Dr Aquilina's claim that the Contracting Authority had to evaluate bids according to the tender requirements. Points like these had to be raised only through a Remedy before Closing Date of a Call for Competition. The Public Contracts Review Board had to only see whether the Evaluation Board evaluated the Bids in accordance with the Tender Document.

At this stage, the Public Hearing was adjourned to Tuesday 10 October 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 Drugsales Limited (herein after referred to as the Appellant) on 30 August 2017, refers to the Contentions made by the latter with regards to the award of Tender of Reference CFT 021-6313/17 listed as Case No 1084 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 Douglas Aquilina

Appearing for the Contracting Authority: Dr Stefan Zrinzo Azzopardi

Whereby, the Appellant contends that:

- a) **The Contracting Authority, in their “*Letter of Rejection*” dated 21 August 2017, did not specify the reasons why his offer was discarded, on technical grounds. In this regard, Drugsales Limited had to appeal to the Public Contracts Review Board to establish or rather be made aware why his offer was rejected and to contest such a decision.**

This Board also noted the Contracting Authority’s “*Letter of Reply*” dated 6 September 2017 and its verbal submissions during the Public Hearing held on 26 September 2017, in that:

- a) **The Central Procurement and Supplies Unit insists that the Evaluation Board had acted in an appropriate way and in accordance with the Public Procurement Regulations, in discarding the Appellant’s offer due to the fact that the latter’s product exceeded the dictated range of calcium content, in that his product had a range of calcium content of 10-12.08 mmol whilst the dictated range in the Tender Document was 10-12 mmol.**

The Contracting Authority also maintains that had the Appellant asked for more details on why his offer was deemed to be non

compliant, the Central Procurement and Supplies Unit would have given the required information.

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

- 1. Mr Mark Zammit summoned by the Central Procurement and Supplies Unit;**
- 2. Ms Rosalyn Prior summoned by Drugsales Limited.**

This Board has also taken note of the documents submitted by Ms Rosalyn Prior which consisted of

- 1. E-Mail dated 19 September 2017 from Mr Craig Madden to Ms Rosalyn Prior.**

This Board, after having examined the relative documentation and heard submissions from all parties concerned, including the Technical Witnesses, duly summoned by both parties to this Appeal, concede to the fact that, since no specific details regarding the rejection of Drugsales Limited's offer were given in the "*Letter of Rejection*" issued by the Central Procurement and Supplies Unit on 21 August 2017 and during the submissions, relevant

issues were brought up by Appellant to prove his Offer's compliancy, this Board justifiably feels that such issues should also be considered.

This Board, as had on so many occasions, would point out that the "*Letter of Rejection*" issued by the Central Procurement and Supplies Unit on 21 August 2017, did not specify, in whatsoever manner, the exact Technical deficiencies of the Appellant's offer and in this regard, this Board would like to register its disappointment for the lack of action being taken by Contracting Authorities in heeding the rulings handed down by this Board on similar circumstances.

This Board would like to justifiably insist that all "*Letters of Rejection*" should and must contain the explicit reasons for discarding an offer and it should also be pointed out that it is the Contracting Authority's duty and obligation to abide by this principle. Non adherence to this principle is resulting in the Appellant's opportunity to Appeal to be made aware of such reasons for rejection, which should not be the case as this Board's remit is to review the Evaluation procedure and not to reveal the reasons on which the Appellant should have objected.

Needless to state that, under these circumstances, Drugsales Limited's Objection is very generic due to the unawareness of the specific Technical

deficiencies of his offer so that this Board will have to consider the Technical aspect of his offer.

In this regard, this Board does not accept the Central Procurement and Supplies Unit's contention that:

“Had the Appellant asked for more information regarding the reasons for his offer's rejection, the Authority would have complied.”

This Board would justifiably insist that the “*Letter of Rejection*” should indicate the specific reason for discarding an offer, so that the Bidder will be in position to file his Appeal objectively and directly referring to the alleged deficiencies of his offer.

With regards to the alleged non-Technically compliance of Drugsales Limited's offer, this Board feels that, although such an issue could not be contested by the Appellant, the consideration of the same is justified.

Drugsales Limited's Contention, in this regard, is that the calcium content of his product has a range of 10-12.08 mmols, whilst the Tender Document dictated a range of 10-12 mmols. This Board notes that, at the very onset, Drugsales Limited's product range exceeds the stipulated one by 0.08,

however this Board wanted to establish whether such a small variance would make all that difference. In this regard, this Board placed great importance on the testimonies of the Technical Witnesses duly summoned by both parties.

In this respect, the first Technical Witness duly summoned by the Central Procurement and Supplies Unit, explained in great detail the nature and application of the product and emphasis was placed on the importance of the dosage prescribed on these type of patients who are premature babies, in that, they represent vulnerable and highly sensitive patients.

It was also vividly explained that since the nutrition is applied on such patients, a small variation of dosage may affect the health and well being of the patient. This Board was also credibly informed and assured that the dictated range of calcium content was established by Consultants in the Paediatric field and consideration was taken so that the established range would cater for the requirements of this product.

The Second Technical Witness duly summoned by Drugsales Limited, very competently explained that various dosages are applied in accordance to the weight of the premature infant and also stated that, in her opinion and according to various guidelines, the difference of 0.08 mmols should not

produce a negative effect on the patient. At the same instance, the witness confirmed that the dictated range of 10-12 mmols of calcium content can be applicable in accordance with the needs of the actual size of the premature baby.

After having heard the above mentioned testimonies, this Board would also like to consider two issues which are relevant to this Appeal, as follows:

i) Dictated Range

From the submissions made, this Board justifiably notes that the dictated range of 10-12 mmols of calcium content of the product is in accordance with normal medical practice and is applicable in accordance with the needs of the premature babies, depending on the weight of the patient.

In this particular regard, this Board credibly established, from the testimony of the Second Technical Witness, that the Appellant was aware of such range prior to the submission of his offer and this Board also opines that Drugsales Limited was also cognisant of the fact that the range of calcium content of his product exceeded the stipulated one.

In this regard, this Board opines that the Evaluation Board acted in a just and fair manner in their adjudication with regards to the Appellant's product as being non technically compliant.

ii) Remedies

As stated on numerous occasions, the remit of this Board is to review the Evaluation Process carried out on this particular Tender and to ensure that it has been carried out in a fair, just and transparent manner. In this particular case, this Board does not find any tangible facts which prove otherwise.

On the other hand, the Appellant could have solved the issue by requesting clarifications prior to the submission of his offer. The Appellant could have also filed a concern prior to the closing date of the Tender.

Such remedies have been provided for, in the Public Procurement Regulations, for the benefit of the Bidder, through which any misunderstanding or misinterpretation of a condition in the Tender

Document can be clarified. In this regard, this Board notes that such remedies were not availed of.

In view of the above, this Board finds against Drugsales Limited and concludes that:

- 1. This same Board does not uphold the Appellant's contention that his product was in accordance with the Technical Specifications as stipulated in the Tender Document;**
- 2. Confirms the decision taken by the Evaluation Board**
- 3. In view of the fact that the Central Procurement and Supplies Unit failed to submit specific reasons for the rejection of the Appellant's offer, this Board recommends that the deposit paid by Drugsales Limited is to be fully refunded.**

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Carmel Esposito
Member

10 October 2017