

## **PUBLIC CONTRACTS REVIEW BOARD**

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### **Case 1098 – CFT 021-6036/2017 – Tender for the Supply of Food Thickening Agent**

The Publication Date of the Call for Tenders was 20 January 2017 whilst the Closing Date for Call of Tenders was 16 February 2017. The Estimated Value of the Tender, (Exclusive of VAT) was € 112,050.

Six (6) Bidders have submitted Nine (9) Offers for this Tender.

On 11 October 2017, Associated Drug Company Limited filed an Objection against the decision of the Central Procurement and Supplies Unit to award the Tender to Alfred Gera & Sons Limited for the price of € 109,800 (Exclusive of VAT) against a deposit of € 565.

On 2 November 2017, the Public Contracts Review Board composed by Dr Anthony Cassar as Chairman, Mr Lawrence Ancilleri and Mr Carmel Esposito as members convened a Public Hearing to discuss the Objection.

The Attendance for this Public Hearing was as follows:

#### **Appellant – Associated Drug Company Limited**

Mr Nicholas Falzon	Representative
Ms Christina Meli Bugeja	Representative
Ms Kimberly Zammit	Representative

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

Mr Reuben Demanuele	Representative
Mr Etienne Seychell	Representative
Dr Clement Mifsud Bonnici	Legal Representative

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

Ms Joannah Bugeja	Secretary, Evaluation Board
Dr Ian Ellul	Member, Evaluation Board
Ms Sharon Vella	Member, Evaluation Board
Mr Mark Zammit	Member, Evaluation Board
Dr Stefan Zrinzo Azzopardi	Legal Representative

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

Mr Nicholas Falzon, representing Associated Drug Company Limited opened by saying that the Tender Document stipulated the amount of powder needed to get the Liquid to Stage 1 which was a consistency measurement. The Appellants pointed out that not all liquids are the same because the stage needed for water and the stage needed to make a soup were different.

Mr Falzon added that their offer stated that between 1 and 1.5 scoops are needed to get to stage 1. The Appellants proceeded to quote a document issued by Virgin Care, who was one of the main companies in the United Kingdom, which *inter alia* said,

*“Not everyone needs their fluids thickening to the same consistency. How thick the drink needs to be depends on the person’s swallowing difficulty.*

*It can also be difficult to prescribe the number of scoops of powder required, due to differences between fluids, e.g. hot and cold fluids thicken differently. Instead we describe the consistency we are trying to achieve.*

*Stage 1 Thick Fluid*

*Leaves a thin coat on the back of a spoon.*

*Has the consistency of “syrup” e.g. cough syrup or maple syrup*

*Should be drunk from a cup*

*Can be drunk through a straw but only if advised by a Speech and Language Therapist”*

Mr Nicholas Falzon continued by saying that Stage 1 was not a definite since some patients prefer a liquid solution whilst others prefer a solid solution. In this case, there is a range. Associated Drug Company Limited added that they have a study which compared four of their samples with those of the competition which shows that with regards to viscosity their product is stronger. Mr Farrugia added that if the offers were to be shown in an equivalent way, their product was 9.5% cheaper per scoop.

Dr Stefan Zrinzo Azzopardi, the Legal Representative for the Central Procurement and Supplies Unit said that the Evaluation Board made their considerations on the documents presented with their offer. What was presented with the latter and what was presented in the Appellant’s Letter of Objection dated 10 October 2017 were not the same and therefore he was summoning a member of the Evaluation Board to testify and explain the latter’s workings according to the Tender Document so that one can determine which company had the cheapest price.

At this point, Mr Mark Zammit, an Advanced Pharmacy Technician within the Central Procurement and Supplies Unit, who was also a member of the Evaluation Board for this Tender, 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, Mr Nicholas Farrugia, on behalf of Associated Drug Company Limited said that he agreed that the Tender was an ambiguous one. Stage 1 was a range and was not an exact number. The end result had to be a range. If one had to take the median, the chances were that the Appellant's Bid was the cheapest one. If you compare the 4.5 scoops of Associated Drug Company Limited's offer with the 4.5 scoops of Alfred Gera & Sons Limited's offer, the price would be 9.5 % cheaper anyway.

Dr Clement Mifsud Bonnici, the Legal Representative for Alfred Gera & Sons, the Recommended Bidders said that if the Appellant had any concerns with regard to Stage 1, he should have filed a Remedy before the Closing Date of Competition. He also disagreed with the Appellant's claims that it was an ambiguous Tender and that it was so clear that when they made their assessments in the Recommended Bidder's Reasoned Letter of Reply dated 30 October 2017, these tallied with the ones made by the Evaluation Board. Dr Mifsud Bonnici concluded that even when the prices were compared up to three decimal places, his client's price was cheaper.

At this stage, the Public Hearing was adjourned to Tuesday 21 November 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 Associated Drug Company Limited (herein after referred to as the Appellant) on 11 October 2017, refers to the Contentions made by the latter with regards to the award of Tender of Reference CFT 021-6036/2017 listed as Case No 1097 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: Mr Nicholas Falzon**

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

**Whereby, the Appellant contends that:**

- a) **His offer was the cheapest and was also sufficiently technically compliant to render the liquid to reach to Stage 1. In this regard, if the measuring yardstick is “per 100ml” of liquid, the Appellant’s product consisted of less weight, yet giving the desired results, so that overall, the Recommended Bidder’s offer is more expensive.**

**This Board also noted the Contracting Authority’s “*Letter of Reply*” dated 27 October 2017 and its verbal submissions during the Public Hearing held on 2 November 2017, in that:**

- a) **The Central Procurement and Supplies Unit insists that since the calculations carried out by the Evaluation board were based on the amount of scoops (weight), necessary to have a consistency in 100ml of liquid and the Appellant’s product, as per manufacturer’s instructions, required more scoops to obtain consistency in 100ml of liquid, Associated Drug Company Limited’s offer was more expensive than the offer of the Recommended Bidder.**

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

**This Board has also taken note of the documents submitted by Mr Mark Zammit which consisted of:**

- a) An Extract from the Tender Document; Section 4 Clause 1.1;**
- b) Calculations by the Evaluation Board regarding the prices of Alfred Gera & Sons Limited and Associated Drug Company Limited;**
- c) An Extract from the Offer Submitted by Associated Drug Company Limited;**
- d) An Extract from the Offer Submitted by Alfred Gera & Sons Limited.**

**This Board, after having examined the relative documentation, and heard submissions made by the parties concerned, including the testimony of the technical witness, opines that the issue of this particular Appeal is the procedure adopted by the Evaluation Board in arriving at their**

**adjudicated cheapest offer. In this regard, this Board would like to make the following considerations:**

- 1. With regards to Associated Drug Company Limited's Grievance, this Board justifiably notes that the Evaluation Board adopted, as a basis of assessing each offer, "*A unit of measurement per serving to be added to 100ml of Liquid to prepare syrup, in other words, to reach Stage 1 Level*". This unit of measurement was applied throughout on all offers so that there was consistency and a Level Playing Field in the adjudication of offers.**

**Through documentation and credible explanations given by the Technical Witness, this Board was made aware as to the mode of calculation of costs of both Associated Drug Company Limited's and Alfred Gera & Sons Limited's offer which are being scheduled hereunder:**

<b>Product on Offer</b>	<b>Agent</b>	<b>Cost per Tin</b>	<b>Cost per Gram</b>	<b>Scoop Size</b>	<b>Cost per Scoop</b>	<b>Scoops Required to Thicken 100ml Liquid to Syrup Stage 1 or Equivalent Consistency</b>	<b>Cost to Thicken 100 ml Liquid</b>
Nutlis	Associated Drug Company Limited	€ 2.95 per 300g	€ 0.00983	4g	€ 0.03933	2-3 Scoops to Thicken 200ml of Liquid. Median of 2.5 scoops to thicken 200ml. i.e. 1.25 scoops of 4g are needed to thicken 100ml of liquid i.e. 5g	€ 0.04916
Resource Energy	Alfred Gera & Sons Limited	€ 2.44 per 227g	€ 001057	4.5g	€ 0.04757	One scoop of 4.5g needed to thicken 100ml	€ 0.04757

**As can be deduced from the above information, all of which was, as submitted by the Bidders, this Board credibly notes that, although at face value, the Appellant's Offer seems cheaper, when one takes into consideration the number of scoops required to obtain a consistency in 100ml of Liquid, the Appellant's product entails more "scoop volume" of the thickening agent to achieve Stage 1 of the Process.**

**This Board credibly establishes that the methodology adopted by the Evaluation Board in determining the volume of thickening agent in 100ml of liquid, to achieve Stage 1, is consistent, correct and transparent. The above schedule clearly denotes that, on the principle of adjudication, as adopted by the Evaluation Board, the cost of the Appellant's offer, as expressed in the number of scoops required to meet the dictated requirements, the Appellant's offer is costlier, so that, it is quite apparent that although the latter offer was technically compliant, it was not the cheapest as appropriately denoted in the "*Letter of Rejection*" dated 3 October 2017, wherein the Central Procurement and Supplies Unit chose an offer which was technically compliant and which was cheaper by weight.**

**It is quite apparent that the Appellant was not fully aware of what was expected from his offer; - to supply a thickening agent to produce the**

**process of Stage 1, - as stipulated in the Tender Document. In this regard, this Board justifiably feels that if the Appellant had any concerns regarding the interpretation or misunderstanding of any particular Clause of the Tender Dossier, he had the opportunity to file a “*Remedy Before the Closing Date of Competition*”, through which any doubts or concerns could have been evened out. In this particular case, this Board notes that such a remedy was not availed of by the Appellant.**

**On a general note, this Board credibly notes that the Evaluation Board assessed the Appellant’s offer on the information supplied by the latter. At the same instance, it has been justifiably proven that the methodology and adjudication procedure adopted by the Evaluation Board was proper, fair and transparent and a “*Like With Like*” treatment was applied in the assessment of each offer.**

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

- (i) Confirms the Decision taken by the Central Procurement and Supplies Unit in the process of the Evaluation and award of the Tender;**

- (ii) Justifiably concludes that the offer submitted by Associated Drug Company Limited had an effective price which was higher than that of Alfred Gera & Sons Limited and therefore, in this respect, does not uphold the Appellant's Contentions;**
- (iii) Recommends that the deposit paid by the Appellant should not be reimbursed.**

Dr Anthony Cassar  
Chairman

Mr Lawrence Ancilleri  
Member

Mr Carmel Esposito  
Member

*21 November 2017*