

PUBLIC CONTRACTS REVIEW BOARD

Case 1193 – CFT 019-0693/18 - Tender for the Supply of High Absorbance Adult Nappies

Remedies before the Closing Date of a Call for Competition

The publication date of the call for tenders was the 22nd June 2018 whilst the closing date of the call for tenders was the 9th July 2018. The estimated value of the tender (exclusive of VAT) was € 140,930.

On the 9th July 2018, Krypton Chemists Ltd filed a Call for Remedies before the Closing Date of the Competition against Central Procurement and Supplies Unit (Ministry for Health).(CPSU)

On 31st July 2018 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Mr Lawrence Ancilleri and Mr Richard A Matrenza as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellant – Krypton Chemists Ltd

Dr Ron Galea Cavallazzi	Legal Representative
Dr Katya A Gatt	Legal Representative
Mr Matthew Arrigo	Representative

Contracting Authority – Central Procurement and Supplies Unit

Dr Marco Woods	Legal Representative
Dr Alison Anastasi	Representative
Mr Hristo Hristov Ivanov	Representative

The Chairman of the Public Contracts Review Board, Dr Anthony Cassar, welcomed the parties and invited submissions.

Dr Ron Galea Cavallazzi, Legal Representative for Krypton Chemists Ltd stated that there were two reasons for this appeal – there were substantive deficiencies in the contract notice and tender documents, and secondly the short time limit to submit offers limited competition.

The Contracting Authority had used the accelerated process in this tender but there are certain limitations to conform to. Article 42 of the Public Procurement Regulations states the reasons why an accelerated process may be used whilst Article 116 requires substantiation for the urgency – this has not been substantiated by the CPSU. In their reply the CPSU had stated that the reason for the urgency was that stocks were low – that is no justification as shortage of stocks should have been anticipated. The Contracting Authority had set a time limit of 16 days (equivalent to nine working days) to submit offers – this time limit restricts competition, as certification was not available in Malta and it took three weeks to obtain the ABL certification from abroad. The Appellant tried to mitigate the situation by asking for an extension (which was refused); requested permission to submit the ABL certificate after the award of the tender (also refused); and requested permission to submit a Quality Assurance certification (to which they received no reply).

Dr Marco Woods, Legal Representative of the CPSU, said that the main reason for the urgency of the contract was that stocks had become depleted due to an outbreak of gastro-enteritis at the hospital. This high usage was not foreseen. In the similar acquisition process in 2015 an ABL certificate was supplied – it should therefore be readily available.

The Chairman said that one of the objectives of the ESPD was to speed up the procurement procedure by, for example, allowing certification on the award of a tender. The Contracting Authority must find a way not to limit competition whilst correctly requiring certification.

Dr Alison Anastasi mentioned that since 2015 the Authority has been having issues with the quality of certain nappies. Bidders knew of the tests being carried out and should have been aware that certificates will be demanded. The reason for the accelerated process was so that the CPSU would not have to go for a direct order.

Mr Matthew Arrigo mentioned that the Contracting Authority should do proper research before issuing tender since it was obvious that certification could not be obtained in such a short period of time.

The Chairman stated that the tendering process should continue through a clarification order extending the period to submit bids to the beginning of September with the ABL certificates to

be produced. In the meantime supplies of nappies to be made available not to let down or inconvenience patients.

He then thanked the parties for their submissions and declared the hearing closed.

This Board,

Having noted this Call for Remedies filed by Krypton Chemists Limited, (hereinafter referred to as the Appellants), before the Closing Date for Call for Competition on 9 July 2018 refers to the contentions made by the same Appellant with regards to the Tender of Reference CFT 019-0693/18 listed as Case No 1193 in the records of the Public Contracts Review Board, issued by the Central Procurement and Supplies Unit, (hereinafter referred to as the Contracting Authority).

Appearing for the Appellants: Dr Ron Galea Cavallazzi

Appearing for the Contracting Authority: Dr Marco Woods

Whereby, the Appellants contend that:

- a) **The first concern relates to the accelerated process adopted in this Tender. In this regard, although the Contracting Authority has valid reasons for applying such a short period for the Tendering process, the Public Procurement Regulations do in fact impose justification and at the same instance, such a short period for the submission of offers should not preclude prospective Bidders from participating;**

- b) **The Contracting Authority is requesting the submission of an ABL Certification from abroad and such a requirement takes time to attain, so that, there has to be an extension of time for the submission of offers to include such certification.**

This Board has also considered the Contracting Authority's "*Reasoned Letter of Reply*" dated 19 July 2018 and its verbal submissions during the Public Hearing held on 31 July 2018 in that:

- a) **The Central Procurement and Supplies Unit maintains that the short period given for the submission of offers was due to a sudden and unforeseen shortage of stocks caused by an unforeseen medical**

outbreak. At the same instance, the usage of this product is constant and the Contracting Authority wants to ensure immediate supply.

- b) From experience, the Contracting Authority contends that it is most important that the offers are accompanied with ABL Certification so as to avoid unnecessary testing and other complications of certain nappies.**

This Board, after having examined the relevant documentation to this concern and heard submissions made by the parties concerned opines that the issues worth of consideration are:

1) The Short Period for Tendering

2) The ABL Certification

1) The Short Period for Tendering

With regards to the Appellants' First Concern, this Board, after considering the submissions made by both parties, opines that the period, established by the Contracting Authority, for the Tendering

Process, was in actual fact, short; however there was a justifiable reason for the stipulation of such a period. In this regard, this Board was made aware that there arose an unexpected outbreak of gastro-enteritis at Mater Dei Hospital; hence the usage of these particular nappies was well beyond the norm. At the same instance, the Central Procurement and Supplies Unit had to have a stock level for the daily application of these products, and in order to avoid issuing a Direct Order, the Authority chose to issue a proper call for the supply of this product.

In this particular scenario, one has to be realistic enough to appreciate the Central Procurement and Supplies Unit's situation in this rare but possible circumstance, so that, on the one hand, an extraordinary demand for this product occurred, quite unexpectedly, and on the other hand, the availability for the daily usage must be present and in stock. At the same instance, the Contracting Authority, quite appropriately requested an ABL Certification and the latter documentation takes approximately three weeks to be provided; a week longer than the period allowed for the submission of offers.

This Board has always emphasized that the priority in this type of Procurement should always be the well-being of the patient and under whatever circumstance, the Contracting Authority must have available this product so that it can be administered on the patients. In this regard, this Board would also point out that the Contracting Authority had all the justifiable reasons to issue a direct order, however, it chose to go for the Tendering Procedure adopting a short time for tendering for a quicker procurement and security of supplies. In this respect, this Board opines that the time stipulated for the submission of offers was too short to cater for the requirements of the certification. This Board would point out that such a short period would definitely limit the scope of a wider participation by prospective Bidders.

2) ABL Certification

One of the Technical Specifications of the product dictated that an ABL Certification must accompany the offer. In this respect, this Board upholds the decision taken by the Contracting Authority to stipulate such a requirement so that:

- **It will ensure that the product being offered is in accordance with the Technical Specifications duly stipulated in the Tender Dossier;**
- **Such Certification will avoid the testing and trials procedure which takes time and sometimes creates unnecessary disputes and appeals on the results derived there from;**
- **Confirmation of the suitability of the product is ascertained from the very start of the Evaluation Procedure;**
- **Such certification will also confirm that the product being offered is suitable for the well-being of the patient.**

All the above-mentioned factors can be established and resolved through the attainment of the ABL Certification so that; the inclusion of this requirement is of the utmost importance. On the other hand, this Board was made aware that such certification can only be made available after the Closing Date of the Tender.

In view of the above, this Board:

- i) Upholds the fact that the period of submission of offers is too short to cater for all requirements and in this regard, this Board instructs the Central Procurement and Supplies Unit to extend the closing date of the Tender to the end of the first week of September 2018;**

- ii) Upholds the Contracting Authority's request for an ABL Certification of the product which is to be submitted with the offers;**

- iii) Upholds the Central Procurement and Supplies Unit's insistence to ensure that, under whatever circumstance, the latter must have available, in stock, such a product for the application of the well-being of the patient.**

Dr Anthony Cassar
Chairman

Mr Lawrence Ancilleri
Member

Mr Richard A Matrenza
Member

7th August 2018