

PUBLIC CONTRACTS REVIEW BOARD

Case 1212 – CT 2118/2017 – Tender for the Supply, Delivery and Distribution of Diapers, Pads, Pull-Ups & Inco-Sheets for Senior Citizens and Persons with Disability

The publication date of the call for tenders was the 26th January 2018 whilst the closing date of the call for tenders was the 27th February 2018. The estimated value of the tender (exclusive of VAT) was € 4,173,657.29

On the 3rd August 2018, Krypton Chemists Ltd filed an appeal against the Active Ageing Community Care Department and the Director of Contracts as Contracting Authority on the grounds that their offer was technically not compliant due to invalid descriptive literature submitted. A deposit of € 21,395 was paid.

There were three (3) bidders.

On 25th September 2018 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellant – Krypton Chemists Ltd

Dr Steve Decesare	Legal Representative
Dr Katya Gatt	Legal Representative
Mr Matthew Arrigo	Representative

Recommended Bidder – Pharma-Cos Ltd

Dr Matthew Paris	Legal Representative
Mr Marcel Mifsud	Representative
Mr Edward Mifsud	Representative
Mr James Borg	Representative

Contracting Authority – Active Ageing and Community Care

Dr Claudio Zammit	Legal Representative
Ms Antoinette Zahra	Chairperson Evaluation Board
Ms Bernardette Barbara	Secretary Evaluation Board
Mr Alexander Vella	Member Evaluation Board
Ms Pauline Mamo	Member Evaluation Board
Ms Georgina Gauci	Member Evaluation Board

Department of Contracts

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

Dr Franco Agius, Legal Representative of the Director of Contracts requested permission to call his witness.

Ms Antoinette Zahra (592463M) stated on oath that she was the Chairperson of the Evaluation Board. On examining the technical literature submitted by Appellant, the Board had decided that it did not meet the specifications namely that it was not original literature as printed by the manufacturer. Since the product was to be used by vulnerable people there was the necessity to ensure that the quality was the best possible.

Witness said that it appeared to the Evaluation Board that the literature had been put together from various sources and that it was not consistent, with random extracts from various pages and with logos and pictures missing. Certain product sheets also carried a disclaimer. On checking the Products List with the internet it was also noted that there were some discrepancies in the absorption rates shown.

In reply to questions from Dr Decesare, Legal Representative of Krypton Chemists Ltd, witness re-iterated that what the Authority was after was original documents as printed by the manufacturer. Witness conceded that the one complete document she had tabled as not acceptable, in fact referred to two different suppliers with the products list referring to a firm which had no connection with the brochures of the Santex products. According to witness doubts had arisen in the Evaluation Board's mind as some of the literature seemed to be a 'cut and paste' exercise, and they could not trace certain information on the brochures supplied, and some documents did not have pictures and logos. There were also instances where certain details could not be found in the pictures of the brochures, but appeared in the technical literature. Since there was wording in the technical specifications that matched that in the tender requirements they had decided that it was not original manufacturers' text.

The Chairman pointed out that the Evaluation Board should not have assumed or suspected that the literature was not original but they should have consulted with the tenderer to establish the facts

Witness confirmed that no clarification was sought on this point, and they made their rejection without any further checks or proof regarding the origin of the documents provided.

Dr Decesare tabled a letter dated 4th September 2018 from the product manufacturer confirming that the literature supplied with the tender was originally printed by them. Dr Agius objected to this letter being considered as proof of provenance.

Dr Decesare went on to state that this tender for the supply of nappies covered two lots for a total value of around € 4 million. Out of three bids two were eliminated and the highest priced tender won. The disqualification letter sent to Appellant claims that the full descriptive literature

supplied was not ‘as originally printed by the manufacturer’. His clients were not told why the literature was considered as ‘not original’ but at today’s hearing it emerged that this was because there were no logos or pictures in the submitted documents. In their letter of reply the Authority stated that that in the data sheets submitted by the objecting bidder they noted the following discrepancies:

- In paragraph 7 – the collation is made up of scanned and not clearly identified literature
In paragraph 8 – the documentation does not meet the criteria stated
- In paragraph 9 – part of the documents submitted do not satisfy the criteria
- In paragraph 10 – objector did not seek clarification although they were the only bidder to claim that requirements were not sufficiently clear
- In paragraph 11 – had to be read in the context of technical standards.

In all the above, Dr Decesare stated, the Contracting Authority had to give reasons for their claims – they cannot make bland statements without backing them. There were no requests for clarifications or rectification and in the legal cases quoted in their letter of reply there were no exact parallels to this case. Furthermore we have the testimony of their witness who stated that in the opinion of the Evaluation Board they thought the documents were not originals without testing their conclusion. Similar data sheets had been accepted in past tenders. Public Procurement Regulations specifically state that full reasons for disqualification have to be given, confirmed by EJC Case 773/05 of 2018 wherein it was stated that knowledge or reasons why an offer was rejected cannot be justified.

Dr Agius said that contrary to Appellants’ claim the rejection letter is very clear – it affirms what the Evaluation Committee felt – namely that the documents were not original. A disclaimer appearing in the literature was not a minor matter (as has been claimed) and in the Case 400/2014 the Appeal Court had ruled that a disclaimer in bidders offer meant that the latter was not bound by the offer. This was not a case of missing documents but of the bidder not meeting the criteria of the tender which made it technically non-compliant. Appellant had not submitted any queries or asked for additional information.

Dr Claudio Zammit, Legal Representative of Active Ageing and Community Care, stated that the brochures presented by Appellant at this hearing, which were not contested, could have been made available at tender stage.

Dr Matthew Paris, Legal Representative of Pharma-Cos Ltd, stated that Appellant could have produced witnesses to prove that documents were original, but this possibility had not been availed of. No evidence that documents are original had been produced and therefore the doubt as to their origin still exists. Contrary to specifications of tender document, Page 11, Technical Specifications, point 2, certain submitted documents did not indicate absorption rate of nappies. The Preferred Bid met all these requirements and that is why they had been awarded the tender. The PCRB should confirm the decision of the Evaluation Committee in the award of the tender, and it was justified as it safeguarded public interest. He referred the Board to Court of Appeal Case 329/2017 in support of this claim.

Dr Decesare said that conversely that what had been stated it should have been the Contracting Authority which should have provided evidence that the documents provided were not original. The information regarding absorption capacity (even assuming Dr Paris' allegation is correct) appeared not only in the brochures but in 74 pages of technical information provided. The rejection letter states, that apart from the matter of the origin of the documents, they were satisfied with the rest of the bid. No effort had been made by the Authority to confirm that the documents were original, or indeed to seek further submissions by the bidder.

Dr Agius said that the testimony of the Chairperson of the Evaluation Committee was the proof that the Authority had produced, but the Appellant had not produced any contrary evidence. The Director of Contracts had proved through evidence their point similarly to Case AIG vs D of C.

The Chairman thanked both parties for their submissions and declared the hearing closed.

This Board,

having noted this Objection filed by Krypton Chemists Limited, (hereinafter referred to as the Appellants) on 3 August 2018, refers to the contentions made by the same Appellants with regards to the award of Tender of Reference CT 2118/2017 listed as Case No 1212 in the records of the Public Contracts Review Board, awarded by the Active Agent & Community Care, (hereinafter referred to as the Contracting Authority).

Appearing for the Appellants: Dr Steve Decesare

Appearing for the Contracting Authority: Dr Claudio Zammit

Appearing for the Department of Contracts: Dr Franco Agius.

Whereby:

- a) the Appellants' first contention refers to the reason given by the Contracting Authority wherein it was alleged that they did not submit**

the technical literature as “*originally printed by the manufacturer.*” In this regard, the Appellants maintain that they had submitted the technical literature as duly transmitted to them, by the manufacturer, so that the information represented what the original literature dictated;

b) the Appellants’ second contention refers to the fact that, in their opinion, there existed a lack of clarity with regards to the requirements of the technical literature, in the Tender Document;

c) the Appellants also maintain that, with regards to any doubts or suspicion regarding the submitted technical literature, the Contracting Authority had the obligation to seek clarifications on the documentation so submitted;

d) the Appellants contend that the Evaluation Committee should have applied the principle of proportionality regarding the technical literature so that, the appellants’ advantageous offer would not be discarded for such a minor error, if any;

- e) the Appellants' fifth contention is that the Contracting Authority did not give the reasons for the disqualification of their offer and in this regard the same Appellants are unaware of such reasons.

This Board has also noted the Contracting Authority's "*Letter of Reply*" dated 20 August 2018 and also its verbal submissions during the Public Hearing held on 25 September 2018, in that:

- a) The Active Ageing and Community Care maintains that the technical details submitted by the Appellants with regards to the Technical Literature were not in accordance with the "*Instructions to Tenderers*", Section 1, Clause 7 (c) (ii) of the Tender Document;
- b) The Contracting Authority also insists that the Tender Document specified in a very clear manner, what was requested, in so far, as the Technical Literature, is concerned. In this regard, the Authority maintains that the Appellants did not submit the manufacturer's originally printed document, showing all the technical specifications by the products being requested in the Tender Document;
- c) With regards to the Appellants' contention that the Contracting Authority, in case of doubt, should have asked for a clarification, the

Active Ageing and Community Care contends that, since documentation pertaining to the technical literature was not missing, the Evaluation Committee could not ask for rectification, as per Note 2B of the Tender Document;

d) The Contracting Authority also insists that, the Evaluation Committee could not apply the principle of proportionality, as the nature of the product, if not as specifically dictated in the Tender Dossier, could be deterrent to the well being of the patients;

e) The Authority also maintains that the “*Letter of Rejection*” did give the reasons for the disqualification of the Appellants’ offer and enough details were included to enable Krypton Chemists Limited to file this Appeal.

This same Board also noted the testimony of the witness, namely Ms Antoinette Zahra, duly summoned by Active Ageing and Community Care.

This Board, after having examined the relevant documentation to this Appeal and heard submissions made by the parties concerned, including the testimony of the witness duly summoned, will consider the Appellants’ contentions as follows:

1. Printed Material of Technical Literature Submitted

This Board would respectfully refer to Clause 7 (c) article (ii) wherein it is stipulated that:

“The literature shall be full descriptive technical literature as originally printed by the manufacturer and which technical literature must indicate absorption capacity of each product being offered.”

Through the above mentioned clause, this Board opines that, the Contracting Authority requested the official technical literature issued by the manufacturer, showing their products (sometimes with pictures) and the respective technical detail of each product which the Contracting Authority requested. In this regard, this Board acknowledges that the Authority expected a brochure with all the technical details to substantiate the products being offered by Krypton Chemists Limited. From submissions made, in this regard, the Evaluation Committee noted that Krypton Chemists Limited’s submissions consisted of various extracts, probably from various documentations, without denoting the source of such texts apart from the fact that there were missing specifications for some of the products.

An extract from the testimony of the witness, namely Ms Antoinette Zahra, would perhaps highlight the Evaluation Committee’s findings.

“Xhud: Dan meta rajna d-dokument li gie sottomess, l-ewwel nett ahna rajna li kif inhu miktub, jidher li huwa xi haġa li hija typed, li mehuda forsi minn diversi dokumenti ohra, ma nafx, affarijiet flimkien. Anke fonts differenti li jidhru li ntużaw. Barra minn hekk huma, meta qed ngħid huma skużawni jekk forsi qed nuża kliem

Avukat: Komplì, komplì

Xhud: Huma qalu li kien hemm bħala technical specs, huma użaw per eżempju page 1 u page 8. Issa meta qed naraw page 1, huwa l-istess litteralment copy and paste għal technical specifications li għamilna ahna.”

In this regard, this Board examined in detail the Appellants’ submissions and can confirm that the compilation of various extracts from the documentation of an unknown source, was indeed unprofessionally presented. At the same instance, this Board takes into

consideration the fact that such products are to be utilised by vulnerable people and patients.

When the technical literature is requested in a Tender Document, such documentation is not capriciously stipulated. In fact, it is the only tool through which the Evaluation Committee can check and examine that what is being offered, can be supplied and has the technical specifications as duly stipulated, so that the Technical Literature should show that it is what the manufacturer has available on the market for distribution and the technical specifications shown therein should be sufficient enough for the product to be identified and compared with what has been declared to be provided.

In this particular case, the Evaluation Committee noted certain peculiarities in the Appellants' submissions which, naturally, created suspicions as to whether such information, in its form and presentation, really reflected what the Appellants' had submitted in their technical offer. This Board was made aware that the Evaluation Committee carried out some checks via the Internet and the information obtained there from was by far more descriptive and illustrated than the submissions done by Krypton Chemists Limited.

In this respect, this Board would, again, refer to an extract from the testimony of Ms Antoinette Zahra relating to the findings upon checking via the Internet, as follows:

“Xhud: Li rriżulta l-ewwel nett dan fejn qed juri l-prodott kif inhu u iktar descriptive fejn ahna jista jghinna biex inti taghzel prodott li hu l-aħjar li tista’ jkollu s-service user. Barra minn hekk ukoll sibna a product list fejn din il-product list hemm anke l-assorbenza li hija l-istess test, l-ewwel nett hemm l-istess codes tal-prodotti u barra l-istess codes ukoll hemm kif isiru tests li huwa l-ISO 11948 fejn hemm xi diskrepanzi minnhom fejn tidhol assorbenza.”

In this regard, this Board confirms that the Appellants’ submissions with regards to the Technical Literature leaves much to be desired in the way it was presented, apart from the important fact that certain specifications were missing from the submissions, so that this Board confirms that the Appellants’ submissions were not complete and were presented in such a way that did not comply with Clause 7 c (ii) of the Tender Document.

2. Lack of Clarity in the Tender Document

In this regard, Krypton Chemists Limited contends that clause 7 c (ii) regarding technical literature was not clearly defined in the Tender Document. In this respect, this Board is somewhat surprised in that, the Appellants, if in doubt about the interpretation of clause 7 c (ii), had all the remedies available, prior to the submission of their offer. This Board notes that the Appellants did not avail themselves of such remedial actions and at the same instance, this same Board notes that the fact that Krypton Chemists Limited submitted their offer without prior request for clarification or remedy, confirms that they were comfortably aware of the requirements of clause 7 c (ii) of the Tender Document.

This Board also took into consideration the fact that the Appellants', being no newcomers in the field of tendering for medical products, are well aware of the expected contents and form of technical literature, when so requested. In this respect, this Board does not uphold Krypton Chemists Limited's Second Contention.

3. The Contracting Authority's Obligation to Seek Clarification

Regarding this issue, this Board would refer to the principle of self limitation, in that, the Evaluation Committee is bound, at law, to adhere strictly to the requirements as duly stipulated in the Tender Document at the same instance, it is an established and accepted fact that the same Committee can only adjudicate on the actual submissions of the Bidder.

In this particular case, the Evaluation Committee had to assess the technical literature which was submitted and after examining such documentation, the latter was found to be non compliant. The Appellants are contesting the fact that the Evaluation Committee should have asked for clarifications since their offer was cheaper. In this regard, this Board would respectfully refer to Note 2 B which states that,

“Tenderers will be requested to rectify/submit only missing documentation within five working days from notification.”

In this case, the documentation pertaining to the technical literature was not missing but did not include certain specifications and the requested presentation which represents the manufacturers’ original documentation in this regard, so that such submission was deemed to be technically non-compliant. Any clarification thereof would have

amounted to a rectification, as the additional information would have been forthcoming so as to enable Krypton Chemists' Limited's offer to be compliant. In this regard, this Board does not uphold the Appellants' Third Grievance.

4. Proportionality

In this regard, Krypton Chemists Limited maintains that the Evaluation Committee should have applied the principle of proportionality. In this particular case, the product being tendered for represented a medical/sanitary product which is intended to be used by vulnerable persons including persons with a disability, so that the Active Ageing and Community Care Department had the moral obligation to ensure that what is being offered is of the approved standard for the utilisation of the product. One of the requisites, whereby the Contracting Authority could be assured of the quality of the product was to compare the technical specifications of the manufacturers' publications with those as declared by the Appellants in their submitted technical offer, so that the provision and submission of the manufacturers' technical literature was of critical importance.

In this case, as previously stated, the Contracting Authority was presented with extracts of technical specifications taken from various documents which did not give the necessary comfort to the Evaluation Committee that such documentation was a true reflection of what a manufacturer of these products normally makes available on the market, apart from the fact that, some of the specifications contained in the Appellants' submissions did not meet the stated requirements.

In this regard, this Board opines that the Contracting Authority's insistence to ensure that the products being offered are fit for the intended application and do not present health hazards to the end users is of the highest priority. In this case, the application of the principle of proportionality would have suppressed such a priority and any clarification to the Appellants' offer would have created a rectification to their original submission. In this regard, this Board opines that, in such a situation, the principle of proportionality could not be applied.

5. The Reasons for Rejection of Krypton Chemists Limited's Offer

This Board would respectfully refer to the reasons given by the Active Ageing and Community Care Department, in its "*Letter of Rejection*" dated 7 August 2018, as follows:

“Thank you for participating in the above-mentioned tender procedure. However, I regret to inform you that the offer submitted by your company for Lot 1 and Lot 2 was found to be technically not compliant as follows:

As per section 1 instructions to tenderer number 7 (c) (ii), economic operator was requested to submit full descriptive technical literature as originally printed by the manufacturer. Literature uploaded by economic operator for the female disposable pads, male disposable pads, adult all in one diapers, pull up diapers and inco sheets are not considered to be original and printed by the manufacturer. Full descriptive technical literature as originally printed by the manufacturer was in fact submitted only for the children all in one diapers and children pull ups.”

In the opinion of this Board, sufficient information was submitted to the Appellants to enable same to identify the grounds on which their offer was discarded, with specific reference to the technical literature and even to those products which failed in this regard.

In view of the above, this Board

- i) does not uphold Krypton Chemists Limited’s grievances;**

ii) upholds the Active Ageing and Community Care's decision in the award of the Tender;

iii) recommends that the deposit paid by the Appellants should not be refunded

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Lawrence Ancilleri
Member

11th October 2018