

PUBLIC CONTRACTS REVIEW BOARD

Case 1222 – CFT 020-0459/18 – Supply of Calcium Alginate Dressings Size 10cm x 20cm

The publication date of the call for tenders was the 27th April 2018 whilst the closing date of the call for tenders was 17th May 2018. The estimated value of the tender (exclusive of VAT) was € 66,057.75.

On the 3rd September 2018, Krypton Chemists Ltd filed an appeal against the Central Procurement and Supplies Unit as Contracting Authority objecting to being disqualified on the grounds that their offer was technically non-compliant. A deposit of € 400 was paid.

There were seven (7) bidders.

On 18th October 2018 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Mr Carmel Esposito and Mr Lawrence Ancilleri as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellants – Krypton Chemists Ltd

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

Recommended Bidder – ConvaTec International Services GmbH

Mr Ian Pace	Representative
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Contracting Authority – Central Procurement and Supplies Unit

Dr Marco Woods	Legal Representative
Ms Marika Cutajar	Chairman Evaluation Committee
Mr Edmond Balzan	Member Evaluation Board
Ms Solange Vella	Representative

There was one member of the public.

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

Dr Steve Decesare, Legal Representative of Krypton Chemists Ltd requested permission to start proceedings by hearing witnesses.

Ms Marika Cutajar (469772M) testified on oath that she was the Chairperson of the Evaluation Committee, and had fulfilled this function for three years at the CPSU. Questioned if she was familiar with the principles of proportionality as detailed in Public Procurement Regulations 39.1 witness replied that the Committee followed the regulations in the tender dossier. In this case the evaluator checked the specifications in the documents submitted and they were passed on to her for verification. There were eight bids (actually seven) according to the witness and one evaluator. Appellants were excluded on the recommendation of this evaluator.

Mr Edmond Balzan (472665M) testified under oath that there were eight bids (seven) and they were originally classified by their financial value, then a check was made to ensure that the correct codes had been entered and the literature was checked against those codes. In this tender the Authority required size 10cm x 20 cm dressings but bidders' code showed the size as 10cm x 10cm. When questioned, witness could not answer whether he was aware of the proportionality principle regulating evaluation of tenders. He confirmed that the offer showed the correct description and size of dressings but the code number referred to pads size 10cm x 10cm. He agreed that this was an obvious error but stated that the Committee could not correct errors. Although the Committee proceeds on the product code rather than its name witness agreed that one should check all the details of an offer. According to the witness, once the Committee noticed the error in the code number they took no further action on that bid and declared the offer as non-compliant.

Questioned further, witness said that he had seen the financial bid form merely to check tender values but not details. The Evaluation Committee did not seek clarifications or rectifications of bids as they were precluded from doing so by Note 3 of the tender documents.

The Chairman noted that this case highlights the problem caused by having only one evaluator – a problem he had referred to before in other cases.

Dr Steve Decesare said his clients tender was not only compliant but cheaper than the winning bid by some 40%. Reference to the financial bid form would have indicated that the correct code was used and that the figure on the technical form was an obvious typing error. PPR 39 (1) covered equal treatment, transparency and proportionality in dealing with economic operators' documentation. He then referred to decisions of EJC and PCR B Cases to support his contentions:

- EJC – T195/08 – “may give rise to an obligation on part of Contracting Authority to seek a correction”
- EJC 599/10 and C 336/12 – “ does not preclude the correction or amplification of details where there are obvious errors”
- UK EWHC 886 – “if an obvious clerical error can be resolved quickly and easily [it] should be done”

- PCRB Case 1181 – “application of substance over form should prevail”
- PCRB Case 772 – “ a case where clarification should have been resorted to”
- Similarly Cases 910 and 956.

Section 16 in the evaluation of tender notes stated that only clarification on submitted information may be requested – in this case the information had been submitted and clarification should have been sought.

Dr Marco Woods, Legal Representative of the CPSU, said that the product requested was size 10cm x 20cm – the technical offer shows size 10cm x 10 cm without any ambiguity, as confirmed by witness that the Committee only follows code numbers. The financial offer was not considered since the technical offer was incorrect, therefore the CPSU acted correctly. Other bidders had been excluded and if Krypton’s objection is considered the other tenderers would be treated unequally.

The Chairman said that there was a need for evaluation committees to be knowledgeable on Public Procurement Regulations’ basic principles of equality, transparency and proportionality. The PCRB constantly emphasis how essential it is to use the principle of proportionality in evaluations and several decisions had been delivered on this matter. He then thanked both parties for their submissions and declared the hearing closed.

This Board,

having noted this Objection filed by Krypton Chemists Limited, (hereinafter also referred to as the Appellants) on 3 September 2018, refers to the contentions which were made by the same with regards to the award of Tender of Reference CFT 020-0459/2018 awarded by the Central Procurement and Supplies Unit, (hereinafter also referred to as the Contracting Authority) and listed as Case No 1222 in the records of the Public Contracts Review Board.

Appearing for the Appellants:

Dr Steve Decesare

Appearing for the Contracting Authority :

Dr Marco Woods

Whereby, the Appellants contend that:

- a) **Although their bid was substantially cheaper than that of the Recommended Bidder, their offer was rejected due to the simple reason that inadvertently, Krypton Chemists Limited denoted the incorrect code against the correct and compliant description of their product. At the same instance, the correct code of the product was clearly indicated in their financial offer submission. In this regard, the Appellants insist that the Evaluation Committee should have been aware that this was a genuine clerical error and in this respect, the same Committee should have asked for a clarification, in accordance with Section 16 of the Tender Document.**

This Board has also noted the Contracting Authority's "*Reasoned Letter of Reply*" dated 12 September 2018 and its verbal submissions during the Public Hearing which was held on 18 October 2018, in that:

- a) **The Central Procurement and Supplies Unit maintains that, in their technical offer, the Appellants' product code number denoted a size of 10cm x 10cm and although there was the correct description of the**

product, the corresponding code number was incorrect and does not represent the correct size of the product. At the same instance, since the Appellants' offer was deemed to be technically non compliant, the Evaluation Committee could not examine in detail, the former's financial offer.

This same Board has also noted the testimony of the two witnesses duly summoned by Krypton Chemists Limited, namely:

- 1. Ms Marika Cutajar**
- 2. Mr Edmond Balzan**

This Board, after having examined the relevant documentation to this Appeal and heard submissions made by all parties concerned, including the testimony of the witnesses duly summoned by Krypton Chemists Limited, opines that the issue that deserves due consideration is the rejection of the Appellants' offer due to the alleged incorrect code number of the product being offered.

- 1. The reason given by the Central Procurement and Supplies Unit for the discarding of Krypton Chemists Limited's offer was:**

“Offer 93842 was rejected since not according to specifications. In technical form, item on offer code Pad ALGI F1010 is size 10cm x 10cm while on specifications size of dressing is 10cm x 20cm.”

In the technical offer, under Section 11, the Appellants submitted the following information:

“Section II – To be completed for Medical Materials and Devices

<i>1. Product Descriptions (for each item being offered)</i>		
<u><i>Item No</i></u>	<u><i>Name of Product Including Brand</i></u>	<u><i>Code Number or Unambiguous Reference Number as Applicable</i></u>
<i>1</i>	<i>Pharma-Algi F Calcium Alginate Dressings Sz. 10cm x 20cm</i>	<i>Pad Algi F 1010</i>

From the above submissions, the details with regards to the product clearly denoted that the size of the dressing is 10cm x 20cm, however, the indicated code does not represent the same size, as in fact, it denotes a 10cmx10cm dressing.

On listing the offers, after submission, the Evaluation Committee were aware of the price quoted by the Appellants and although the former could not, at this stage, delve into the details of the Appellants' Financial Offer, the Evaluation Committee were conscious of Krypton Chemists Limited's favourable offered price.

- 2. The sole award criteria was the price and during the evaluation process, the Contracting Authority noted that the Appellants' offer was technically non-compliant as the product code referred to a different size specifications than that requested in the Tender Document.**

At this particular stage of consideration, this Board would like to point out that the Evaluation Board should have delved deeper to establish why the Appellants described the product correctly and yet, at the same time, denoted the incorrect corresponding product code. Every effort, without breaching any of the roles of the Public Procurement Regulations, should be made to save an advantageous Tender. In this particular case, an ambiguity had arisen and the Evaluation Committee should have sought clarifications on this issue, which was the sole reason

for Krypton Chemists Limited's offer rejection, at that stage of the tendering procedure. In doing so, the Evaluation Committee would have applied the principle of proportionality and at the same instance, the latter would not have rejected a Tender without exercising its power to seek clarification.

3. Proportionality

It is a general principle of the European Union Law, that member states are bound by the Principle of Proportionality. Moreover, the Procurement Directive specifically calls for the award of contracts in member states to comply with this principle.

In this particular case, the main objective of the Contracting Authority was that it procures the product at the most advantageous price, (after satisfying the Administrative and Technical compliancy tests.) The Evaluation Committee had to assess whether a clarification will constitute a "*recognised means*" of pursuing the identified objective and in this case, a clarification would have revealed that such an issue was due to a careless clerical error in the Product Code Number. At the

same instance, through such a clarification, the Evaluation Committee would have also confirmed that, the correct code number was also included in the Appellants' financial offer.

One of the basic requisites of the Principle of Proportionality is that the Contracting Authority should not adopt excessive measures and in this particular case, this Board opines that the Evaluation Committee opted to disqualify the Appellants' Bid due to an error in a products' code number while the same product was denoted by the latter with the correct specifications.

This Board would respectfully refer to a very important judgement, namely R (Hoole & Co) vs Legal Services Commission – UK which amplifies the duty of the Evaluation Committee to seek clarifications and under what circumstances, as follows:

“In my judgement, the critical factor which gives rise, or may give rise, to a duty to seek clarification is where the tender as it stands cannot be properly considered because it is ambiguous or incomplete or contains an obvious clerical error rendering suspect that part of the bid. If the

inability to proceed with a bid, which may be an advantageous addition to the competitive process, can be resolved easily and quickly it should be done, assuming there is no change to the bid or risk of that happening. If there is an obvious error or ambiguity or gap, clarifying it does not change the bid because, objectively the bid never positively said otherwise”

This Board is not, in any way, suppressing the principle of self-limitation which the Evaluation Committee has to adhere to, but rather to emphasize that, in specific cases such as this particular evaluation process, the application of the Principle of Proportionality will not alter or give an advantage to the particular Bidder but will allow the Contracting Authority to achieve its objectives in an even and equitable manner.

In view of the above, this Board:

- i) does not uphold the Central Procurement and Supplies Unit’s decision in the award of the Tender;**

- ii) upholds Krypton Chemists Limited’s grievances;**

- iii) instructs the Contracting Authority to re-integrate the Appellants' offer in the evaluation process whilst taking into consideration the application of the Principle of Proportionality;**

- iv) recommends that the deposit paid by the Appellants is to be fully refunded.**

Dr Anthony Cassar
Chairman
25th October 2018

Mr Carmel Esposito
Member

Mr Lawrence Ancilleri
Member