

## **PUBLIC CONTRACTS REVIEW BOARD**

### **Case 1362– CFT 020-0288/19 – Framework Tender for the supply of Injectable Lenses**

The publication date of the tender was the 27<sup>th</sup> March 2019 whilst the closing date was 9<sup>th</sup> April 2019. The estimated value of the tender (exclusive of VAT) was € 129,000 for a one year's supply.

On the 15<sup>th</sup> July 2019 AMAS Co Ltd filed an appeal against the Central Procurement and Supplies Unit as the Contracting Authority on the grounds that their bid was rejected as it was considered technically non-compliant. A deposit of € 650 was paid.

There were two (2) bidders.

On 8<sup>th</sup> October 2019 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr. Richard Matrenza as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

#### **Appellants – AMAS Co Ltd**

Dr Robert Tufigno	Legal Representative
Mr Andrew Borg	Representative

#### **Recommended Bidder – Class Medical**

Dr Robert Cassar	Legal Representative
Mr Cyril Gabaretta	Representative
Ms Janica Cachia	Representative

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

Dr Marco Woods	Legal Representative
Ms Rita Zammit	Chairperson Evaluation Committee
Mr Juan Zarb-Cousin	Secretary Evaluation Committee
Dr Benedict Vella Briffa	Member Evaluation Committee

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

Dr Robert Tufigno Legal Representative of AMAS Co Ltd sought permission to call witnesses.

Ms Rita Zammit (276864M) called as a witness by the Public Contracts Review Board testified on oath that she was the Chairperson of the Evaluation Committee. She confirmed that she had seen a letter dated 2 April 2019 from Rumex International Ltd (Rumex) in tender submissions. Asked what she understood by centre of excellence she said that in her view it was an organisation that made use of a product on a large scale; however she relied on the evaluators' decisions on this point.

Dr Benedict Vella Briffa (454183M) called as a witness by the PCRB testified on oath that he was a medical doctor and for two years a consultant Ophthalmologist and one of the evaluators. He could proffer no definition of a centre of excellence but in his view it was an organisation that was associated with a university in a large population centre and with research facilities which engaged a number of specialists. As an example he mentioned a National Health Service hospital in Sheffield where he worked for some time.

Questioned by Dr Woods Legal Representative for the Central Procurement and Supplies Unit witness stated that the Hydrophobic IOLs List submitted by the bidder (Doc 1) indicated that the power range of the lenses did not meet the tender specifications since the range of lenses required half sizes from 6 Dioptre upwards.

Questioned by Dr Tufigno witness stated that only the specification sheet had been considered and not the letter dated 2 April 2019, and they had not sought any clarification as there were other grounds for rejecting the bid. Asked why he considered the Centre for Sight in the UK (established for 20 years with over 800,000 procedures) and the Euro Eyes Laser Eye Center in Germany (established for 25 years and crowned as a world champion centre for implantation of trifocal lenses) (Doc 2) had been classed as not being centres of excellence witness replied that none of the centres listed in the Rumex list submitted in the tender had been researched.

Dr Robert Cassar Legal Representative for Class Medical stated that the Rumex declaration of 2 April 2019 referred to earlier was not technical literature and therefore should not be accepted. The excellence in centres had to be in specific areas i.e. in injectable lenses.

Dr Tufigno said that his clients' appeal was based on the rejection letter. The first contention is that the Contracting Authority states that the half sizes in lenses "seem available" and are basing their decision on impressions rather than reality. In the meantime they changed their version to "does not" instead of "seem". The documents submitted are not contradictory as the Authority claims but complementary, and if they had any doubt they should have sought clarification.

It was not logical to claim that a private clinic was not a centre of excellence without defining what such a centre is – it was prejudicial not to consider private clinics of excellent reputation as centres of excellence. The tender should have made it clear what the Authority was expecting. cursory research had shown that two of the refused centres are actually centres of excellence.

The Appellants' offer is € 27,000 cheaper and as price is the tender criterion it should be awarded to them.

Dr Marco Woods said that the evaluation committee had checked the technical specifications. The literature does not show the half size lenses, only the declaration does. This was contradictory. As regards the centres of excellence it was obvious that Rumex were only dealing with private clinics.

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

End of Minutes

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## **Decision**

**This Board,**

**having noted this objection filed by AMAS Ltd (herein referred to as the Appellants) on 15 July 2019, refers to the claims made by the same Appellants with regard to the tender of reference CFT 020-2088/19 listed as Case no 1326 in the records of the Public Contracts Review Board awarded by Central Procurement and Supplies Unit (herein after referred to as the Contracting Authority).**

**Appearing for the Appellants: Dr Robert Tufigno**

**Appearing for the Contracting Authority: Dr Marco Woods**

**Whereby, the Appellants contend that:**

- a) The Contracting Authority alleged that their offer did not conform to the technical specification relating to power range of the lenses. In this regard, Appellants refer to the declaration attached to the technical**

**literature which confirmed that their offer includes the power range of lenses as duly requested in the tender document.**

- b) With regard to the alleged claim that they did not refer to ‘Centres of Excellence’, Appellants maintain that the tender document did not specify whether such centres must be public entities. In this regard, Appellants insist that, the quoted centres in their offer are well established institutions and are regarded as centres of excellence.**

**This Board also noted the Contracting Authority’s ‘Letter of Reply’ dated 2 August 2019 and its verbal submissions during the hearing held on 8 October 2019, in that:**

- a) The Authority contends that the information contained in the technical literature duly submitted by appellants does not confirm that Appellants’ product meets the requested power range of lenses.**
- b) Appellants quoted ‘Centres of Excellence’ includes only private clinics and in this regard, the Authority noted there was no reference to public institutions such as hospitals/university hospitals.**

**This same Board also noted the testimony of the witnesses namely:**

**Ms Rita Zammit duly summoned by the Public Contracts Review Board**

**Dr Benedict Vella Briffa duly summoned by the Public Contracts Review Board**

**This Board has also taken note of the documents submitted by AMAS Ltd which consisted of:**

**Doc No 1 List of Hydrophobic IOLs**

**Doc No 2 details regarding Euro eyes Laser Eye Centre – Germany and Center for Sight in the UK**

**This Board, after having examined the relevant documentation to this appeal and heard submissions made by all the interested parties, including the testimony of the witnesses duly summoned, opines that, the issues that merit consideration are two-fold namely:**

- a) Power Range of Lenses in Appellants' offer**
- b) Centres of Excellence**

**Power Range of Lenses**

- 1. With regard to Appellants' first contention, this Board would respectfully refer to Clause 1.1 of section 4 (Technical Specifications) of the tender document with states that:**

*“1.1 Product specifications*

*Foldable Injectable lenses specifications:*

*Foldable/injectable Multi piece clear/single piece clear optic lenses hydrophobic acrylic implants with length of 13.00mm and a diameter of 6.0mm with full usable optic. Dioptre range of -5.0D to +40.0D including half sizes. The range of half dioptres must include the largest of possible range and must include from plus 6.0D to plus 30.0D”.*

- 2. In accordance with clause 7 (C) (ii) of the tender document, the technical literature had to be submitted with the technical offer at tendering stage. In this regard, this Board would emphasize the fact that, when technical literature is requested, such documentation is not capriciously stipulated, but such literature will serve as a confirmation that, what the economic operator declared to provide in the technical offer form, truly exists and can be provided by the bidder. At the same instance, the technical literature of any manufacturer is expected to be updated showing the full technical specifications of each product manufactured by same.**

- 3. The literature submitted in Appellants' offer does not indicate that the manufacturer can produce 'Half Dioptre Lenses' from +6.0D to +9.0D but through a declaration signed by a director of Rumex International Ltd (the manufacturer), same declared that they can produce the range, as duly stipulated in the tender document.**
- 4. Such a declaration is contradicting what Appellants had declared in their offer and what was indicated in the manufacturer's technical literature. In other words, Appellants' submissions confirmed that 'Half Dioptre Lenses' are only available from ranges +10.0D till +30.0D.**
- 5. As stated in paragraph 2 above, the manufacture's technical data sheet should present detailed technical specifications of product they manufacture and, in this regard, this Board opines that a declaration from the manufacturer should not change what has been declared in the technical literature. The tender documents' terms and conditions must be respected and adhered to at all times so that, if the technical literature is requested such literature must reaffirm what the bidder stated in his technical offer. In this particular case such a situation created an ambiguous and contradictory instance whereby, a simple declaration**

would add on specifications which are not officially included in the technical literature. In this regard, the Evaluation Committee had no other option but to adhere to the principle of ‘Self Limitation’ and to deem the scanty declaration as not forming part of the technical literature in Appellants’ submission.

### Centres of Excellence

6. With regards to Appellants’ second contention, this Board would respectfully refer to clause 1.1 of section 4 (Technical Specifications) which states that:

*“The Prospective supplier must keep a whole range of lenses with different dioptries at his end to be delivered on a monthly basis in quantities of 400 per delivery.*

*Tenderer must show that the product is already in use in recognized centres of excellence in EU Countries and must attach clinical data in per review literature comparing this product with already established products considered to be gold standard treatment.”*

7. The above quoted clause clearly denotes that the product had to be already applied in centres of excellence. Although there is no clear

**definition of what constitutes a ‘Centre of Excellence’, such a centre should include speciality areas, and should be well established, connected to the National Health Service of a particular country in the EU and in most cases connected or affiliated to universities.**

**8. Appellants’ offer mentioned private clinics only and it must be acknowledged that, such a product is intended for application at Mater Dei Hospital, where numerous interventions are carried out through the use of such a product, so that, hospitals in general, use the product much more than private clinics do in practice. At the same instance, the Authority cannot rely on the application of the product in private clinics only, without any reference in its usage, in state or national health institutions. In this regard, this Board opines that the Evaluation Committee, in its deliberation in this regard, acted prudently and diligently.**

**In conclusion, this Board opines that:**

**a) With regard to Appellants’ first contention, the declaration made by a Director of the manufacturer, does not replace or complement the**

**technical literature and specifications contained therein, as duly submitted in Appellants' offer.**

**b) Appellants' offer did not meet the tender requirements with regard to power range of lenses.**

**c) Centres of excellence should also represent public institutions such as University Hospitals, State Hospitals and not private clinics only.**

**d) The Evaluation Committee carried out its deliberations in a fair and transparent manner whilst applying the principle of self-limitation.**

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

**i) does not uphold Appellants' contention,**

**ii) upholds the Contracting Authority's decision in the award of the tender,**

**iii) directs that the deposit paid by Appellants should not be refunded.**

Dr Anthony Cassar  
Chairman

Dr Charles Cassar  
Member

Mr Richard A. Matrenza  
Member

*17 October 2019*