PUBLIC CONTRACTS REVIEW BOARD

Case 1332 – CFT 020-0448/19 – Tender for the Supply of Seldinger Chest Drain Kit

Remedy before Closing Date of a Call for Competition

The publication date of the call for tenders was the 10th May 2019 whilst the closing date was the 4th July 2019.

On the 29th May 2019 Prohealth Ltd sought a Remedy against Central Procurement and Supplies Unit as the Contracting Authority requesting an amendment in relation to the technical requirements of the tender that are deemed to be restrictive and discriminatory.

On 25th July 2019 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Mr Lawrence Ancilleri and Mr Richard Matrenza as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellants – Prohealth Ltd

Dr Alessandro Lia	Legal Representative
Mr Mark Bondin	Representative

Contracting Authority – Central Procurement and Supplies Unit

Dr Marco Woods	Legal Representative
Ms Marika Cutajar	Member of the Evaluation Committee
Mr Eman Gravino	Member of the Evaluation Committee

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

Dr Alessandro Lia Legal Representative of Prohealth Ltd sought leave to call a witness.

Mr Mark Bondin (352380M) called as a witness by Appellants stated on oath that he was a Unit Manager at Prohealth Ltd. After detailing the use of the product specified in the tender he said that it has been in use for a number of years and his firm had been awarded previous tenders. Appellant had offered the lowest price on a previous tender that had been cancelled at the evaluation stage. Prior to the cancellation of this tender a fresh one had been issued with a small change in the specifications – namely the needle had to be blunt and bent. This made Appellants' tender non-

compliant. The product they offered, which was widely used throughout Europe served exactly the same purpose as that specified. In reply to a question witness stated that there was only one supplier of blunt and bent needles.

Mr Walter Busuttil (610564M) called as a witness by the PCRB testified on oath that he was a Consultant Cardiothoracic Surgeon and Medical Director at Mater Dei Hospital. He described in detail the process undergone in the use of the product, and the advantage to the medical profession of using a blunt knife which posed less risk to the patient. Witness had 30 years experience of performing draining operations and he always sought to maximise aids to make life more comfortable for patients.

In reply to questions from Dr Lia witness said that he was not involved in the assessment process. In the past he has used both straight and sharp needles but was not aware of the maker of the kits used. All consultant surgeons prefer the blunt and bent type of knife as it reduces the risks to the patient.

Dr Lia said that for years the tenders specified straight needles, and it has never been an issue. Appellants' offer was the cheapest in the 2018 tender which was cancelled. The new tender introduced the specification of the blunt needle and his clients were requesting the removal of this clause which was impossible to achieve, save by the one single producer – this was discretionary and illegal.

Dr Marco Woods Legal Representative of CPSU said that this was a call for remedy and Appellants had not been given an indication that their bid was the chosen one; therefore the points raised were irrelevant. Besides, they had offered no proof that there was only one company supplying the product specified.

The Chairman said that the Board wishes to know if there are other firms in Europe supplying this product. It must be established beyond doubt that there was only one supplier. Both parties were granted one weeks' time to trace if there were other European manufacturers of the specified product. The result of their research was to be submitted by the 31st July 2019 for a hearing on the 1st August.

Second Hearing

On the 1st August the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman Mr Lawrence Ancilleri and Mr Richard Matrenza as members convened a second hearing to discuss the information submitted by both parties.

The attendance for this public hearing was as follows:

Appellants – Prohealth Ltd

Dr Alessandro Lia	Legal Representative
Mr Mark Bondin	Representative

Contracting Authority – Central Procurement and Supplies Unit

Dr Marco Woods	Legal Representative
Ms Marika Cutajar	Member of the Evaluation Committee

Both parties had earlier submitted the results of their research regarding suppliers of the product specified.

Mr Walter Busuttil (610564M) called as a witness by the Public Contracts Review Board testified on oath that he had examined the product sheets submitted. He explained that the Tuohy needle was directional and curved with variable sharpness. Blunt needles were better than sharp ones. The Tracoe product (Doc A) does not meet the specifications as it is not indicated that it is blunt. The Rocket Drainage kit (Doc B) offered Tuohy type needle which was described as neither blunt nor sharp. The Smiths Medical needle (Doc 1) had a Tuohy blunt needle which was better than a sharp one and was the only product that qualifies within the parameters of the tender. A thicker drain (14Fr rather than 12Fr) gives more efficiency but is more painful for the patient as it is thicker. On the Thal-Quick product (Doc 2) it was not certain that it had a Tuohy needle but in any case the wire guide and dilator were not compliant with the tender. Smiths Medical was the only ones who offered blunt needles. This is the choice that mitigates risk and the safest product.

Dr Lia said that he was practically certain that there were only three suppliers of this product. Traceo fails to meet several of the specifications, Rocket were compliant over all except for the blunt needle which left only one supplier that meets all the specifications. The specific requirement of the blunt needle should be removed as it is discriminatory.

Dr Woods said that the CPSU had the patients' safety in mind when drawing up tenders and they tried to minimise the risks of damage. It might well be the case that Appellants product would meet the specifications if the evaluation committee asked to see samples of the needles. If the 'blunt' specification was removed it might give rise to a further round of appeals as the sharp needles bids might be cheaper.

Dr Lia concluded by saying that Rocket Medical had indicated that the tender was tailor made to suit just one supplier.

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

This Board,

having noted this 'Call for Remedy Prior to the Closing Date of a Call for Competition' filed by Prohealth Limited (herein after referred to as the Appellants) with regard to the Tender of reference CFT 020-0448/2019 listed as case no 1332 in the records of the Public Contracts Review Board.

Appearing for the Appellants: Dr Alessandro Lia

Appearing for the Contracting Authority: Dr Marco Woods

Whereby, the Appellants contended that:

a) **Appellants' main concern refers to the fact that, whilst their product is compliant and has been used by the same Authority in previous procurement, the Authority, through a new tender, stipulated that the needle had to be blunt so that by doing so, same Authority restricted competition to only one supplier. In this regard, Appellants maintain that the new specifications are discretionary and illegal.**

This Board also noted the Contacting Authority's 'Letter of Reply' dated 10 June 2019 and its verbal submissions during the hearing held on the 25 July and 1 August 2019, in that:

a) **The Authority contends that the new specifications with regard to the style of needle were formulated after consultation with the end users. At the same instance, the Authority maintains that Appellants did not provide evidence to prove that such specifications will suit one supplier only.**

This same Board also noted the testimony of the witness namely,
Mr Walter Busuttil – Consultant Cardiothoracic Surgeon duly summoned by the Public Contracts Review Board.

This Board has also taken note of the documents submitted by:

Central Procurement and Supplies Unit, consisting of technical literature of products 'Tracoe' and 'Rocket',
ProHealth Limited, consisting of technical literature of products 'Smiths Med', 'Cook Medical', 'Rocket' and 'Tracoe'.

This Board convened the hearing on 25 July 2019 and after having established that Appellants' main concern refers to the fact that, the stipulated technical specifications will restrict competition to only one possible supplier, this Board requested both parties to this 'Call for Remedy', to provide evidence that more than one supplier for the tendered product is available on the market and in this respect, a second hearing was scheduled for 1 August 2019.

This Board after having examined the relevant documentation on this concern and heard submissions made by the parties concerned, including the testimony of the witness, during the hearings held on 25 July and 1 August 2019, opines that the issue that merits consideration is, whether the stipulated technical specifications with regard to the 'Blunt Needle', restrict competition or not.

1. **This Board has been made aware that previous tenders for the same product did not stipulate the restrictive specifications of a 'Blunt Needle', however, same Board also maintains that what matters, in this particular case, is the present tender's specifications so that, the Board does not intend to take previous procurements into consideration.**

2. **One must also mention the fact that the contracting Authority has the right to dictate specifications of a requirement which serves a particular purpose; however, in its invitation of procurement offers, it cannot stipulate a particular specification which restricts completely an open competition. In this particular case, Appellants' contention is that the specified technical specification of a 'Blunt Needle' reduces the supply to only one possible contender.**

3. **This Board had to rely substantially on the testimony of the technical witness namely, Mr Walter Busuttil who explained in a very clear manner, the purpose for the request of a 'Blunt Needle'. This Board also noted Mr Busuttil's confirmation that both 'Blunt' and 'Straight' needles are used, however, it was also pointed out that the 'Blunt' needle tends to contain a higher safety factor for the benefit of the patient.**

4. **This Board's remit, in this particular case, is to determine whether such particular technical specification is restricting competition, and, in this respect, one has to emphasize that the technical specifications should not be formulated in such a way so as to restrict competition and/or provide an advantage to any one particular bidder.**

5. **During the second hearing, both parties presented possible bidders for this particular product and from submissions made and the testimony of Mr Busuttil, it was concluded that, on paper, it results that there is only one definite supplier who can participate in this tender and who is compliant with supplying a 'Blunt Needle'. In this regard, this Board is justifiably convinced that such a stipulated requirement does in fact restrict competition.**

In conclusion, this Board opines that:

a) **The stipulated technical specification of a 'Blunt Needle' restricts competition and gives an advantage to only one possible bidder, so that, such a specification goes against the spirit of the Public Procurement Regulations.**

b) **It is not the remit of this Board, at this particular tendering stage to consider the element of safety to patient.**

In view of the above, this Board:

i) **Upholds Appellants' contention, in that the stipulated requirement of a 'Blunt Needle' restricts competition,**

ii) **directs that the Authority, through a clarification note, amends clause 1.1** *'kit must contain'* **from:**

- *Introducer needle must be blunt, tapered and diversional*

to

- *Introducer needle must be diversional*

iii) **directs that the Authority, through a clarification note, includes a requirement clause to the effect that 'Samples are to be submitted with the offers'.**

Dr Anthony Cassar Chairman	Mr Lawrence Ancilleri Member	Mr Richard A.Matrenza Member

13 August 2019