

## **PUBLIC CONTRACTS REVIEW BOARD**

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### **Case 1311 – CFT 021-324/18 – Tender for the Supply of Sodium Chloride 0.9% x 500ml IV Infusion**

The publication date of the call for tenders was the 23<sup>rd</sup> March 2018 whilst the closing date of the call for tenders was 12<sup>th</sup> April 2018. The estimated value of the tender (exclusive of VAT) was € 50,400.

On the 5<sup>th</sup> April 2019 ATG Co Ltd filed an appeal against the Central Procurement and Supplies Unit as the Contracting Authority objecting that the tender restricted competition. A deposit of € 400 was paid.

There were six (6) bidders.

On 16<sup>th</sup> May 2019 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Mr Lawrence Ancilleri and Mr Carmel Esposito as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

#### **Appellants – ATG Co Ltd**

Dr Franco Galea	Legal Representative
Dr Lucio Schiriha	Legal Representative
Mr Oliver Attard	Representative

#### **Recommended Bidder – Drugsales Ltd**

Dr Douglas Aquilina	Legal Representative
Ms Gulia Attard Montalto	Representative
Mr Andrew Attard Montalto	Representative
Dr Silvano Sforacchi Silvano	Representative

#### **Contracting Authority – Central Procurement and Supplies Unit (CPSU)**

Dr Marco Woods	Legal Representative
Ms Denise Dingli	Chairperson Evaluation Committee
Ms Deborah Magri	Secretary Evaluation Board
Dr Ian Ellul	Member Evaluation Board

Dr Anthony Cassar, Chairman of the Public Contracts Review Board, welcomed the parties and went on to state that the Board insists that the appeal follows the grievance set out in the letter of objection. The economic operator did not follow the rules laid down in the Public Procurement Regulations which terms such an appeal as a call for remedy before the closing date for competition and renders this appeal after award null and void.

Dr Franco Galea Legal Representative for ATG Co Ltd said that the point of the appeal was that the tender as drafted limited offers to infusion bags thus excluding potential tenderers, and limiting market spectrum. The CPSU are claiming that bags are more favoured by clinicians but this was not reason enough for not widening the tender to include both bags and bottles. It was within the law to appeal after the award despite that bidder had the option of appealing prior to making a bid.

The Chairman pointed out that in submitting an offer Appellants were binding themselves to accepting all the terms of the tender.

Dr Marco Woods Legal Representative for the CPSU said that the call for tenders had very clear technical specifications that bags were required. The reason for rejection was that Appellants had submitted a bid for bottles in lieu of bags. They had the option of asking for clarification which would have suspended the tender and given them time to ascertain the Authority's exact requirements. The terms of the tender were wide enough to allow competition.

Dr Woods entered a preliminary plea that since there were remedies available to challenge the terms of the tender prior to submission of the offer Appellants had accepted all the terms of the tender. Their appeal as drafted after the award of the tender limited them to follow their letter of objection and cannot include other points raised at this hearing.

Dr Galea said that Appellants' grievance had not changed – the tender limits competition and goes against the principles of public procurement.

The Chairman proposed a short recess to enable the Board to consider the preliminary plea raised. After the recess he said that the Board maintains that the basis of the appeal is erroneous but it is prepared to hear witnesses.

Dr David Gatt (316564M) called as a witness by the Contracting Authority testified on oath that he was a Consultant Anaesthetist. He stated that infusion bags are necessary in the intensive care unit and certain other acute treatment areas as they are easier and quicker to squeeze by hand or by a special purpose machine. Bottles are harder to squeeze and contain air which could present a risk to patients. The majority of hospitals abroad use bags in anaesthesia and intensive care units.

Dr Ian Ellul (296980M) called as a witness by the Appellant testified on oath that he was a member of the evaluation committee. Questioned by Dr Galea he stated that there were six offers on this tender four of which were not compliant.

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

**This Board,**

**having noted this objection filed by ATG Co. Ltd. (herein after referred to as the Appellants) on 5 April 2019, refers to the claims made by the same Appellants with regard to the tender of reference CRT 021-324/2018 listed as case no 1311 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 Franco Galea**

**Dr Lucio Sciriha**

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

**Whereby, the Appellants contend that:**

- a) **Appellants main grievance refers to the fact that, the way the tender was drafted, limited the number of offers which could compete and at the same instance, the tender requirements could have been widened further to include both bags and bottles, as containers of ‘sodium chloride’.**

**This Board also noted the Contracting Authority’s ‘Letter of Reply’ dated 10 April 2019 and its verbal submissions during the hearing held on 16 May 2019, in that:**

- a) The Authority insists that the tender requirements were very clear, and Appellants had all the remedies available to raise such concerns prior to the closing date for the call for competition. The Authority also maintains that the requirements and conditions, as laid out in the tender dossier, did not limit the scope of competition.**

**This same Board also noted the testimony of the witness namely, Dr David Gatt a Consultant Anaesthetist, duly summoned by Central Procurement and Supplies Unit.**

**On a preliminary note, this Board would respectfully refer to the ‘Letter of Objection’ dated 5 April 2019, wherein no specific reasons were stated why Appellants are objecting to the Contracting Authority’s decision in the award of the contract or as to why their offer should be reinstated in the evaluation process. In this regard, this Board also noted the preliminary plea raised by the Authority, in this respect.**

**This Board, after a brief recess, decided that, although it still maintains that the ‘Letter of Objection’ was not in accordance with the format and contents, as duly stipulated in the Public Procurement Regulations, opined to hear the testimony of the witness duly summoned by the Contracting Authority namely, Dr David Gatt.**

**To this effect, this Board, after having examined the relevant documentation to this appeal and hard submissions made by the parties concerned, including the testimony of the witness, opines that the issues which merit consideration are two-fold namely;**

- a) mode of stipulated conditions and requirements of the tender document  
and**
- b) whether such conditions limited the scope of competition.**

**1. Stipulated Requirements of Tender**

- a) This Board would, first and foremost acknowledge the fact that, the Contracting Authority has every legal right to impose the technical specifications and conditions which it deems necessary to achieve its objectives so that, technical specifications are not capriciously dictated but rather to ensure compliance to the tendered objectives and treat all**

**submitted offers on a level playing field. One has to assert the fact that, the Contracting Authority remains free to define the object of the contracts in any way, that meets the Public's needs, including technical specifications and award criteria promoting horizontal policies.**

**b) Such specifications so dictated in the tender document should:**

- be precise in the way they describe the requirements,**
- be easily understood by the prospective bidders,**
- have clearly defined, achievable and measurable objectives,**
- not mention any brand names or requirements which limit competition,**
- provide sufficient detailed information that allows tenderers to submit realistic offers.**

**In this particular case, the Contracting Authority requested that the specifications of the product be:**

*“Sodium chloride 0.9% solution for infusion x 500ml in bags. The bags should be made of a material which does not contain PVC, such as polypropylene or polyolefin plastic. The infusion bag offered must be compatible with the administrative sets available and presently in use with the Department”.*

**From the above stipulated description of the tendered product, the Authority made it clear, from the onset, that, what is being requested, in so far as containers are concerned, represents bags and not bottles. In this regard, this Board justifiably notes that, such an issue, which in turn formed the major factor of Appellants' submissions, was not even mentioned in their 'Letter of Objection'. In this regard, this Board acknowledges the fact that, Appellants can raise other inter-related issues in their objection, but in this particular case, this Board strongly opines that, there were no issues indicated in Appellants' 'Letter of Objection' except for a scant general comment that, the mode in which the specifications of the tender were drafted, limited competition.**

- c) Regretfully, this Board would point out that, Appellants are alleging such an issue now, during the hearing of this appeal, when same Appellants could have raised such concerns either through a clarification or through a call for remedy, prior to the closing date of the tender and in this respect, this Board notes that such remedies were not availed of by Appellants.**

**d) This Board would also refer to the fact that, through their submission of offer, Appellants had accepted to conform with the stipulated conditions and specifications of the tender document so that this Board, find such a concern inappropriate at this stage of the tendering process.**

**e) At the same instance, this Board would emphasize the fact that, the Evaluation Committee must always adhere to the principle of self-limitation, even if the offers so submitted, offer a more advantageous value and in this respect this Board would respectfully refer to a judgement by the Court of Appeal in the case ‘Transport Services for Disabled Persons Co-op Ltd vs Director General Contracts’, which states the following:**

*“Jibqa’ l-fatt pero’, li ghalkemm il-vetturi offruti kienu “the best value for money”, ma humiex konformi ma’ dak mitlub. Din il-Qorti, f’kazijiet simili, mhux l-ewwel darba li ikkonfermat il-principju li offerent, anke jekk joffri prodotti ahjar, ghandu jkun skwalifikat jekk il-prodott offrut ma jkunx skont kif indikat fis-sejha. Il-principju ta’ trasparenza jrid li l-kumitat ta’ evalwazzjoni jimxi mad-dettalji teknici kif imnizzla fid-dokumenti tas-sejha, u mhux jiddeciedi li jaghzel liema li jidhirlu li hi l-ahjar offerta”.*

**On a similar note, in a decision delivered by this Board in case no. 346 (CT/2174/2010; DH/1688/08 title: Tender for the Supply of a Full Field Direct Digital Mammography Unit and a Stereotactic Biopsy Unit) delivered on the 23 November 2011 it was held that:**

*“The Public Contracts Review Board feels that tender requirements are set by the Contracting Authorities and not by the Bidders and that, regardless of the fact as to whether a participating tenderer is in full agreement with the content or not, such tenderer has to abide by such terms and conditions. Furthermore, if a bidder is in doubt about the tender specifications or if one’s proposal represents a departure from what is required by the Contracting Authority, one should seek clarifications prior to submitting one’s offer.”*

**f) In this regard, this Board opines that the technical specifications were clear enough to enable prospective Bidders to submit their offers in accordance with the requirements as duly stipulated in the tender document. At the same instance, this Board justifiably noted that the Evaluation Committee acted in a just and fair manner by applying the principle of self-limitation and level playing field.**

## **2. Limitation of Scope of Competition**

- a) **With regard to Appellants' contention that the specifications were drafted in such a way that limited competition, this Board would, first and foremost, point out that such medical consumable is deployed on a regular basis at the Intensive Care Unit, at Mater Dei Hospital, so that, the stipulated technical specifications were formulated and based on the daily objective usage and experience gained from the Consultants and for medical reasons beneficial to the patient, to the effect that such specifications are well and truly justified.**
- b) **From the credible testimony of Dr Gatt, who, in actual fact, is the end user of such a medical consumable, this Board noted the advantages of having a flexible bag, as a container of 'sodium chloride' rather than a bottle container, as such consumable to the benefit and well-being of the patient.**
- c) **The fact that four of the Bidders offered containers in the form of bottles, does not justify the Appellants' claim that the use of bags, as stipulated in the tender, will limit competition as through the testimony of Dr Gatt, this Board was made aware that such container bags are used in various**

**hospitals, especially in the Intensive Care Unit divisions. In this regard, this Board also noted that there was more than one Bidder who offered bags as containers of ‘sodium chloride’.**

- d) Through the testimony of Dr Gatt, this Board is credibly convinced that the use of bags, as a container, provides easier application of this consumable such that the patient, receiving treatment will benefit.**

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

- i. Appellants’ ‘Letter of objection’ dated 5 April 2019, does not constitute a proper document fitting an appeal before this Board and is not in accordance with the Public Procurement Regulations.**
  
- ii. With regard to Appellants’ contention that the technical specifications limited competition, same Board notes that such a grievance should have been contested through the proper remedies available, which Appellants did not avail of. At the same instance, this Board establishes that the technical specifications, as duly dictated, do not limit competition.**

- iii. The technical specifications are truly justified and were formulated for sole benefit of the well-being of the patient.**
  
- iv. It was the duty and obligation of Appellants to conform to the conditions stipulated in the tender document and at the same instance, the fact that Appellants participated, through their offer, they had accepted to abide by such conditions.**

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

- i. Does not uphold Appellants' contentions,**
  
- ii. Upholds the Contracting Authority's decision in the award of tender,**
  
- iii. Directs that the deposit paid by Appellants; be forfeited.**

Dr Anthony Cassar  
Chairman

Mr Lawrence Ancilleri  
Member

Mr Carmel Esposito  
Member

*23 May 2019*