

## **PUBLIC CONTRACTS REVIEW BOARD**

### **Case 1423 – CFT 020-0498/19 – Tender for the Supply of 3.5ml Serum Tubes with Serum Separator and Clot Activator**

The tender was published on the 28<sup>th</sup> May 2019 and the closing date of the call for tenders was the 17<sup>th</sup> June 2019. The estimated value of the tender (exclusive of VAT) was € 89,964 for a two year supply.

On the 29<sup>th</sup> November 2019 Krypton Chemists Ltd filed an appeal against the Central Procurement and Supplies Unit as the Contracting Authority objecting to their disqualification on the grounds that their offer was not technically compliant. A deposit of € 470 was paid.

There were eight (8) bidders.

On 13<sup>th</sup> February 2020 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 – Krypton Chemists Ltd**

Dr Steve Decesare	Legal Representative
Mr Matthew Arrigo	Representative

#### **Recommended Bidder – Pharma-Cos Ltd**

Dr Matthew Paris	Legal Representative
Mr Claudio Martinelli	Representative
Mr Marcel Mifsud	Representative

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

Dr Marco Woods	Legal Representative
Ms Jacqueline Borg	Member Evaluation Committee
Mr Kevin Vella	Member Evaluation Committee

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

Dr Matthew Paris Legal Representative for Pharma-Cos Ltd sought permission to enter a preliminary plea. He stated that the reply by the Central Procurement and Supplies Unit (CPSU) to the letter of objection was filed outside of the set time limit. The Public Procurement Regulations (PPR) set a ten day limit for replies. The appeal was entered on the 29<sup>th</sup> November 2019, the objection was filed on the 9<sup>th</sup> December and the CPSU entered their reply on the 9<sup>th</sup> January 2020.

The Chairman stated that the CPSU had requested permission for an extension as they needed to consult experts before submitting their reply.

Dr Paris said that the law does not allow the PCRB such discretion and he requested the Board to ignore the CPSU's reply as it was prejudicial to the preferred bidder. He asked that it be recorded verbatim that:

“Dr Matthew Paris on behalf of Pharma-Cos Ltd hereby objects to the reasoned reply filed by the CPSU on 9<sup>th</sup> January 2020 on the fact that it was filed one month late and as a matter of fact is hereby requesting the Board to remove it from the file and not consider the contents therein.”

Dr Steve Decesare Legal Representative for Krypton Chemists pointed out that the PPR use the word ‘may’ not ‘must’ and therefore the time limit is not mandatory. In any case the CPSU, represented at this hearing, can make their request for re-evaluation in person.

Dr Marco Woods Legal Representative of the Central Procurement and Supplies Unit said that in their reply his clients were not objecting to the appeal but simply asking for a re-evaluation.

The Chairman said that the Board would have no objection to hearing the case without taking into consideration the CPSU reply.

Dr Paris stated that if the matter went to the Court of Appeal the preferred bidder would be a full party and this might have a bearing on costs. On December 2<sup>nd</sup>, through an e-mail he had requested a copy of the objection letter – there were follow-ups through e-mails (three in all) but his request was not answered and his clients were not given the requested information.

He asked therefore that it be recorded verbatim that:

“Dr Matthew Paris on behalf of Pharma-Cos Ltd raised an objection and notified the Board that notwithstanding that a formal request was made on the 2<sup>nd</sup> December 2019 and subsequent requests made on the 17<sup>th</sup> December 2019 and the 13<sup>th</sup> January 2020 no information whatsoever, in particular the rejection letter requested, has been forthcoming thus Pharma-Cos Ltd has suffered serious prejudice to its rights and to its ability to produce a proper argumentation before this Honourable Board.”

Dr Woods said that in the paragraph 1.2 of the reasoned letter of objection from Appellants the reason for rejection was clearly stated and was therefore known to the preferred bidder.

Dr Decesare referring to regulation 272 of the PPR said that the regulations did not deem it necessary that the letter of objection should be made available to the preferred bidder.

Dr Paris stated that the CPSU were claiming that they did not know why the copy of the letter of objection was not sent, but that in any case Appellants were not entitled to it. Appellants have to rely on that letter and the fact that he was being denied it restricted them in their submissions.

The Chairman said that the Board's view was that Appellants did not have the right to a copy of the objection letter.

Dr Decesare felt that there was no obligation to inform all parties of the contracting authority's decision. However if a precedent was going to be created then that should become the rule. What was not sure is that Pharma-Cos were entitled to what they were asking for. If the PCRB were revoking the process then there was the need for another hearing to produce witnesses.

Dr Woods asked that it be recorded verbatim that "After an internal meeting of the CPSU it was requesting revocation of the tender decision and re-evaluation".

The Chairman said that the request for re-evaluation must be considered and he proposed a short recess to enable the Board to discuss this point.

On resumption the Chairman said that the Board had looked at two points – the letter of reply from the Contracting Authority which will be ignored and the Contracting Authority's wish to have the tender re-evaluated. To ensure absolute transparency the Board will be calling another sitting to hear the testimony of the person who decided that the tender should be re-evaluated, and the reasons therefore.

It was agreed to have the next hearing on Monday 24<sup>th</sup> February 2020 at 09.30hrs.

End of Minutes

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## Second Hearing

On the 24<sup>th</sup> February 2020 the Public Contracts Review Board composed of Dr Anthony Cassar, Mr Lawrence Ancilleri and Mr Carmel Esposito as members convened a public hearing to resume proceedings as agreed at the first hearing.

The attendance for this hearing was as follows:

### **Appellant – Krypton Chemists Ltd**

Dr Steve Decesare	Legal Representative
Mr Matthew Arrigo	Representative

### **Recommended Bidder – Pharma-Cos Ltd**

Dr Matthew Paris	Legal Representative
Mr Claudio Martinelli	Representative
Mr Marcel Mifsud	Representative

### **Contracting Authorit - Central Procurement and Supplies Unit**

Dr Marco Woods	Legal Representative
Ms Rita Zammit	Chairperson Evaluation Committee
Ms Jacqueline Borg	Member Evaluation Committee
Mr Kevin Vella	Member Evaluation Committee
Dr Alison Anastasi	Representative

In welcoming the parties the Chairman of the Public Contracts Review Board reminded them that the sole object of this hearing was to hear the testimony of the person who decided that the tender should be re-evaluated.

Mr Kevin Vella (351780M) called as a witness by the Public Contracts Review Board testified on oath that he was an evaluator on the tender in question. He stated that re-evaluation was requested as only one certificate of harmonised standards out of twelve which were requested in the Declaration of Conformity had been submitted. The remaining certificates were requested twice but not submitted. After the evaluation process had been completed the evaluation committee had a meeting with the CPSU management where the decision was taken to have a fresh evaluation as more certificates were demanded by the evaluation committee than the tender requested.

Dr Decesare Legal Representative for Krypton Chemists Ltd said that the whole point of this appeal is that Krypton met the tender specifications by submitting requested standard on ISO 13485. The evaluation committee erroneously requested all twelve standards and Appellants are being excluded on this basis, which cannot be right.

Dr Matthew Paris Legal Representative for Pharma-Cos Ltd stated that he had requested the Board to allow a representative of the Director of Contracts to testify on this point. Mr Vella had just confirmed in his testimony that after the evaluation decision had been taken it was decided, at a subsequent meeting, to re-evaluate the tender. According to Article 15 of the Public Procurement Regulations only the Director of Contracts has the right to revise a tender (as for reference in Case

1364/2019) and consequently the CPSU took a decision which they had no right to do. What is being asked by the Authority is illegal as there is no evidence that the Director of Contracts got involved and there is no legislation to back this decision. The choice before the PCRB is cancellation of this procedure or ignoring this appeal. Any other decision is going to deprive his clients of the right of appeal on any subsequent decision.

The Chairman said that the Board agrees to allow the testimony of a witness from the Department of Contracts.

Both Dr Decesare and Dr Woods objected to the hearing of fresh witnesses.

Dr Franco Agius (496577) called as a witness by the Public Contracts Review Board testified on oath that he is an Assistant Director in the Department of Contracts. He stated that the value of the tender was under the departmental threshold and outside the terms of the Department's involvement. Witness was not aware if the Department had been consulted or had got involved – generally if under the threshold they were not involved and to his knowledge the Department did not have a file on this case.

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 Krypton Chemists Ltd (hereinafter referred to as the Appellants) on 29 November 2019, refers to the claims made by the same Appellants with regard to the tender of reference CFT 020-0498/2019 listed as case No. 1423 in the records of the Public Contracts Review Board awarded by Central Procurement and Supplies Unit (hereinafter referred to as the Contracting Authority).**

**Appearing for the Appellants: Dr Steve Decesare**

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

**Appearing for the Recommended bidder: Dr Matthew Paris**

**Whereby, the Appellants contend that:**

- a) **The technical specifications stipulated a valid declaration of conformity (DOC) of the product to include the relevant harmonised standards applied therein. The Authority is alleging that Appellants failed to submit 11 out of 12 certificates relating to the standards mentioned in the DOC. In this regard, Appellants maintain that they had not only met the minimum number of standards requested but also exceeded the same minimality so that their offer was unjustly discarded.**

**This Board also noted the Contracting Authority's verbal submissions during the hearing(s) held on 13 and 24 February 2020, in that:**

- a) **After an internal review of the award procedure of the tender, the Authority requests a revocation of the award and a fresh evaluation process.**

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

**Mr Kevin Vella evaluator duly summoned by the Public Contracts Review Board**

**Dr Franco Agius Department of Contracts duly summoned by Pharma-Cos Ltd**

**On the first Preliminary Plea, Pharma-Cos Ltd, the preferred bidder, stated that the Contracting Authority's 'Letter of Reply' dated 9 January 2020 was filed outside the stipulated time limit, so that the Board should not consider the contents therein. In this regard, although this Board notes that such a late reply was not capriciously made, upholds Pharma-Cos Ltd Preliminary Plea and disregards completely the Authority's 'Letter of Reply' dated 9 January 2020, however, same Board upholds the Authority's Plea to raise their request at the hearing for due consideration.**

**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, considered the Authority's verbal request for a re-evaluation process of this particular tender.**

- 1. With regard to Pharma-Cos Ltd.'s claim in that they were refused a copy of the Authority's 'Letter of Rejection' to Appellants, this Board would respectfully point out that the Authority is bound to inform each tenderer of the decisions reached concerning the award of the contract and in this respect, the Authority did inform the successful tenderer and the rejected bidders, however, same Authority is not bound to divulge further**

**information which might prejudice the legitimate commercial interests of a particular operator. In this particular case, the successful bidder had no legitimate interest to obtain additional information on Appellants' offer other than that so contained in the publication of the notice of award. At the same instance, this Board would respectfully point out that it is cognisant of the fact that Pharma-Cos Ltd, being the successful bidder was made well aware of the reasons for Appellants' offer rejection through Appellants' 'Letter of Objection' dated 29 November 2019 and in this regard, this Board does not find any justifiable reason to uphold Pharma-Cos Ltd.'s claim.**

**2. In this particular case, the Authority, upon receipt of Appellants' 'Letter of Objection' and upon conducting an internal review on the evaluation process, felt the need to request this Board to approve a re-evaluation process. From the testimony of the witness namely, Mr Kevin Vella, one of the Evaluators, the Evaluation Committee requested documentation regarding certification of harmonised standards which was not stipulated in the tender document and the non-submission of which represented the reason for Appellants' offer rejection. In this regard an extract from the testimony of Mr Vella will illustrate clearly the reason for the request of such a re-evaluation process.**

*“Chairman :* *Tista tghidilna r-raguni ghaliex tlabtu a re-evaluation?*

*Xhud :* *Bazikament tlabna xi certifikati fl-ewwel evaluation li ma kellniex dritt ghalihom. Ma konniex nafu at that time*

*Chairman :* *X’kienu dawn ic-certifikati?*

*Xhud :* *Declaration of conformity ghandha lista maghha ta’ sett ta’ dawk li jghidulhom harmonised standards, li dawn huma sett ta’ standards li ghandhom x’jaqsmu mal-manifattura tal-prodott. Dawn kienua attached mad-DOC u ahna tlabna kopja ta’ dawn ic-certifikati*

*Chairman :* *Fil-fatt bhala evaluation ghidtu hekk: ‘Declaration of conformity contains a list of 12 harmonised standards, for which only one certificate out of twelve have been attached. The remaining 11 certificates were requested twice’ u hemm id-dati ‘and supplier failed to provide the certificates . . . for complete evaluation. Since the evaluation of the offered product could not be completed due to the lack of certification, offer is not recommended.’ Xi nbidel minn dan?*

*Xhud :* *Bazikament, apparently dawn il-list of harmonised standards iridu jkunu attached magghom imma mhux bilfors they provide the certificates.*

*Avukat : Biex niccara, dawk it-tmax ma kinux rikjesti fit-tender, lanqas dawk l-istandards.”*

**3. It is being claimed by Pharma-Cos Ltd that such a revision of the Contracting Authority’s decision can only be approved and authorized by the Director of Contracts and in this particular case, there was no such approval. In this regard, this Board would refer to the testimony of Dr Franco Agius representative of the Department of Contracts who credibly confirmed that this was a departmental tender wherein such approval is not required, so that the Authority had the legitimate power to revise the award decision. In this respect an extract from the testimony of Dr Franco Agius from the Department of Contracts will amplify the procedure in such departmental tenders as follows:**

*“Avukat : Dr Agius, qed nirreferik ghal tender CPSU 153020D19JB bl- isem Tender for the Supply of 3.5 . . . . . Id-domanda tieghi hija, id-Dipartiment tal-Kuntratti gie kkonsultat dwar dan it-tender wara l-evalwazzjoni?*

*Xhud : Minix f’posizzjoni li nirrispondi d-domanda. Ma kontx infurmat fuq xiex ser ikolli nitla’ nixhed u ma stajtx naghmel dawn it-tip ta’ verifici.*

*Chairman : Jiena staqsejtek mistoqsija li jekk l-estimated value huwa 98,000, jaqa tahtkom?*

*Xhud : Le ma jaqax tahtna. Imma d-domanda hija, intom gejt u kkonsultati? Ma nistax jiena neskludi a priori jekk il-contracting authority b'xi mod jew iehor talbitx xi email jew xi gwida. I am not aware.*

*Avukat : Ma nistghu nistaqsuh xejn jigifieri”*

**From the testimony of Mr Kevin Vella, this Board was made aware, in a very clear manner, the sequence of events which led to the Authority’s request for a re-evaluation process in that, the Evaluation Committee requested additional certifications of harmonized standards which were not stipulated in the tender document and on the non-submission of which, Appellants’ offer was penalised. In this regard, this Board would emphasize the fact that, it is the duty and obligation of the Authority to revise or re-evaluate its decisions once it is aware that, there existed flaws in the decision of the Evaluation Committee. In conclusion, this Board opines that:**

- a) The Contracting Authority’s ‘Letter of Reply’ dated 9 January 2020 is being disregarded completely.**

- b) The Authority's verbal submission with regard to the request for a re-evaluation process is credibly justified.**
  
- c) The Authority had the right to reconsider its decision in the award of the tender. Moreover, it is its duty and obligation to rectify any irregularities arising during the evaluation process.**
  
- d) The preferred bidder was not deprived of any of his rights or interests in this appeal, through the non-receipt of a copy of the Authority's 'Letter of Rejection' addressed to Appellants.**
  
- e) Upholds the Contracting Authority's request for a re-evaluation process.**

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

- i. cancels the Contracting Authority's decision in the award of the tender,**
  
- ii. directs the Authority to carry out a re-evaluation process of all the technically compliant offers,**

**iii. directs that Appellants' offer be re-integrated in the re-evaluation process,**

**iv. directs that the deposit paid by Appellants be fully re-imbursed.**

Dr Anthony Cassar  
Chairman

Mr Lawrence Ancilleri  
Member

Mr Carmel Esposito  
Member

*5 March 2020*