

PUBLIC CONTRACTS REVIEW BOARD

Case 1467– CT 2300/2018 – Tender for the Supply of Cleaning Sanitizing Wipes 20 x 25 Cm

The tender was published on the 21st November 2018 and the closing date of the tender was the 10th January 2019. The estimated value of the tender (exclusive of VAT) was € 449,600.

On the 22nd June 2020 Prohealth Ltd filed an appeal against the Central Procurement and Supplies Unit as the Contracting Authority objecting to their disqualification on the grounds that their bid was technically non-compliant. A deposit of € 2248 was paid.

There were four (4) bidders.

On 31st July 2020 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a public virtual hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellant – Prohealth Ltd

Dr Alessandro Lia	Legal Representative
Mr Peter Apap	Representative
Mr Mark Bondin	Representative

Contracting Authority – Central Procurement and Supplies Unit

Dr Marco Woods	Legal Representative
Ms Rita Zammit	Chairperson Evaluation Committee
Mr Paul Pace	Member Evaluation Committee
Ms Solange Vella	Member Evaluation Committee
Mr Stephen Demicoli	Member Evaluation Committee

Preferred Bidder – Medina Health Care Ltd

Dr Matthew Cutajar	Legal Representative
Mr John Soler	Representative
Mr Andrew Cutugno	Representative

Department of Contracts

Mr Nicholas Aquilina	Representative
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Dr Anthony Cassar Chairman of the Public Contracts Review Board welcomed the parties. He noted that since this was a virtual meeting all the parties had agreed to treat it as a normal hearing of the Board. He then invited submissions.

Dr Alessandro Lia Legal Representative for Prohealth Ltd sought permission to examine witnesses.

Mr Paul Pace (126164M) called as a witness by the PCRБ testified on oath that he had 28 years experience as an Infection Control Nurse and he was an evaluator on this tender. Witness was referred to Doc A and B attached to the letter of reply from the Contracting Authority entitled Quantitative Suspension Tests which were part of the preferred bidders' offer. These certificates referred to the experimental conditions for the use of the wipes as 'clean'.

Dr Lia referred the witness to tender Clarification Note 1 dated 3rd January 2019 in which question 8 specified that the 30 second contact time had to be demonstrated in 'dirty' conditions. Witness stated that he was not aware of this clarification. He had merely examined Documents A and B referred to above which confirm what the Authority requested. Witness agreed that the technical specification of the tender and the clarification note are contradictory and he went on to explain the steps needed in the sanitising process.

The Chairman at this stage pointed out the inconsistency between the clarification note which requested testing under dirty conditions and the tender which specifies clean conditions and queried why the Authority had accepted as valid certificates showing tests carried out under clean conditions.

Witness redefined the interpretation of clean by stating that if the certificates stated 'clean' some medium would have been used before the wipes were used, as any surface needed prior cleaning before a wipe achieved a clean sanitised surface. Certificates, according to the witness should not have stated 'clean'.

Dr Matthew Cutajar Legal Representative of Medina Health Care Ltd said that clarification number 2 dated 5th April 2019 (tabled as Doc 1) specifically requested the preferred bidder to submit certificates that the wipes have been tested in the laboratory under dirty conditions.

Dr Lia said that Doc 1 just tabled appeared to indicate that the Authority had granted an extension for submission of a reply as a rectification which was not allowed under Note 3. Moreover it does not seem that this extension had been notified to any bidders except Medina Healthcare. He requested an adjournment of the hearing to enable the representative of the Director of Contracts who handled these changes to give the Board the reasons for these apparent shortcomings.

The Chairman said that he was concerned that it appeared as if not all documents were in the hands of the Board and he agreed to an adjournment.

End of First hearing

SECOND HEARING

On the 5th August 2020 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a public virtual second hearing to discuss the objections.

The attendance for this second hearing was as follows:

Appellant – Prohealth Ltd

Dr Alessandro Lia	Legal Representative
Mr Peter Apap	Representative
Mrs May Schembri	Representative

Contracting Authority – Central Procurement and Supplies Unit

Dr Marco Woods	Legal Representative
Ms Rita Zammit	Chairperson Evaluation Committee
Mr Paul Pace	Member Evaluation Committee
Ms Solange Vella	Member Evaluation Committee

Preferred Bidder – Medina Health Care Ltd

Dr Matthew Cutajar	Legal Representative
Mr John Soler	Representative
Mr Andrew Cutugno	Representative
Mr Gordon Zammit	Representative

Department of Contracts

Mr Nicholas Aquilina	Representative
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Dr Anthony Cassar Chairman of the Public Contracts Review Board reminded the parties that the purpose of this second hearing was to hear the testimony of a representative of the Department of Contracts and invited Dr Lia to proceed with his examination of the witness.

Mr Nicholas Aquilina (109067M) called as a witness by the PCRFB testified on oath that he is an Assistant Director in the Compliance Unit of the Department of Contracts, responsible for monitoring of tenders and complaints. He stated that after the closing date of the tender and during the adjudication process rectifications were sent on the EPPS to a particular bidder, Medina and replies received from them.

Questioned by Dr Woods Legal Representative for the CPSU witness stated that the rectification was sent to all bidders and Dr Woods requested the Board's permission to table a list of clarifications/rectifications sent to other bidders (tabled as Doc 2).

Mr Jason Grech (185071M) called as a witness by the PCRFB testified on oath that he is an IT specialist at the Department of Contracts. He confirmed that the closing date of the tender was the 10th January 2019 and 14 clarifications/rectifications were subsequently issued as follows:

- 2 to ATG Ltd
- 4 to Krypton Chemists Ltd
- 5 to Medina Healthcare Ltd
- 3 to Prohealth Ltd

Witness confirmed that on 5th April 2019 a request for rectification was sent to Medina, Krypton, Prohealth and ATG and on the 17th April 2019 Prohealth replied to the request by submitting what was referred to as a literature attachment. Original submission date was to be by the 12th April but this had been extended to 18th April.

Ms Rita Zammit (276864M) called as a witness by the PCRFB testified on oath that she is a Procurement Manager at the CPSU and on this occasion was Chairperson of the Evaluation Committee.

Questioned by Dr Lia witness confirmed that on 5th April 2019 the CPSU sent a request for rectification to Medina asking for certificates to be submitted that the wipes can be used without gloves and that they have been tested for 30 seconds under dirty conditions. She stated in reply that she did not see the fresh certificates submitted by Medina as the evaluation committee started the second evaluation from scratch ignoring what happened in the first evaluation. Witness said that she was fully aware that submissions under Note 3 were not subject to change, but as Chairperson she left matters in the hands of the evaluators to decide and relied on their decisions – she merely checked that everything was in order. None of the evaluators saw the rectification of 5th April.

Mr Paul Pace (126164M) recalled by the PCRFB to give further testimony stated under oath that he did not see the 5th April rectification as the second evaluation did not concern itself with what happened in the first evaluation.

Questioned by the Chairman witness confirmed that the second evaluation included offers with rectifications submitted to the first committee.

Dr Lia referred the witness to the Laboratory Certificate of 28th September 2019 and he replied that documents subsequent to that certificate were not seen by him.

Witness then again explained the process in the use of cleaning wipes and that surfaces had first to be cleaned before the wipes were used. In the light of this he felt that the use of 'clean' in the certificate was satisfactory and met the requirements of the tender.

Questioned further on this point by Dr Lia witness said that the wipes cannot be used on anything contaminated as the wipes are only meant for limited cleaning and sanitising. Witness agreed that tender demanded sanitising of surfaces but had been evaluated on the basis of first cleaning and then sanitising.

Ms Rita Zammit recalled to give further testimony was questioned by Dr Lia if clarification note No 1 dated 3rd January 2019 was part of the documents evaluated by the second committee. She stated that she could not confirm this but assumes that it had been passed on to the evaluators.

Mr Mark Bondin (352380M) called as a witness by the Appellants testified on oath that he is the Manager at Prohealth Ltd. He confirmed that his Company had received the rectification of the 5th April and had replied to it by resubmitting literature identical to that sent with the tender submission with no changes at all.

Dr Lia said that the tender closed on the 10th January 2019 and on the 5th April 2019 the CPSU sent a rectification which was not permissible. The rectification asked for fresh certification regarding the use of gloves and tests carried out under dirty conditions in terms of article 7.1 of the Instructions to Tenderers. In the actual tender instructions article 7.1 refers to the bid bond and hence the rectification is invalid. What Medina was asked to rectify – that is matters relating to gloves and dirty conditions, come totally under Note 3 of the technical specifications and is therefore also invalid. Furthermore clarification note no 1 of the 3rd January 2019 asked for ‘dirty conditions’ contrary to tender specifications which had asked for ‘clean condition’. This led to a situation where both the rectification and the original submissions by Medina were invalid, whereas Prohealth submitted the same documents in April as they had submitted in January. Medina realised that the first certificate was submitted in error and on the 15th April requested a new laboratory certificate confirming use on ‘dirty conditions’- in so doing rectifying something that could not be rectified. The January offer by Medina submitting a ‘clean’ certificate, followed by a submission on a clarification that conditions had to be ‘dirty’ was therefore not compliant.

There are other reasons for disqualifying Medina’s offer, stated Dr Lia. The packaging of the wipes offered by Medina clearly states that the wipes can cause skin irritation and advises use of gloves. Page 22 of the tender documents states that the wipes must be non-irritant but the packing recommends the use of gloves and this important point seems to have been overlooked by the evaluation committee. All these points seem to have been ignored and tried to be justified by claiming that clean is dirty and dirty is clean and by invalid rectifications.

Dr Woods said that the evaluation committee ignored the previous rectifications and the Appellant made no reference to clean or dirty condition on the use of the wipes or to the first evaluation in their letter of appeal.

The second evaluation as confirmed by witnesses ignored the first evaluation as if it never happened. Medina’s offer, as confirmed by witness Mr Pace took into consideration a process where a surface was

first cleaned and then use made of the wipes. This crucial point is important – the wipes cannot be used except after first cleaning a surface. Medina’s wipes were compliant with the tender requisites, and the point about the gloves is not in order as the gloves after tests proved to be dermatologically safe. Medina’s offered product had been certified as compliant and their offer was the cheapest within the criteria. The evaluation had been carried out correctly.

Dr Matthew Cutajar Legal Representative for Medina Healthcare Ltd said that the rectification issued had been made use of by all bidders and hence the level playing field had been maintained. One had to rely on the testimony of Mr Pace that Medina’s offer was clearly compliant as rectified. The evaluation committee had pushed the rectification aside in their deliberations and therefore the argument regarding its use falls and is not valid and there was no use in arguing on previous submissions as the rectification is valid. The Board should bear in mind that the rectification benefited all bidders across the board.

Dr Lia reminded the Board that rectifications cannot be used randomly and without considering all bidders. Note 3 is crucial to the tender and appears to have been ignored. The point raised by Dr Woods that certain points raised at this hearing were not in the original appeal was only due to Appellants becoming aware of them when the Contracting Authority themselves produced fresh documents at the hearing.

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

End of Minutes

Decision

This Board,

having noted this objection filed by Prohealth Ltd (hereinafter referred to as the Appellants) on 22nd June 2020, refers to the claims made by the same Appellants with regard to the tender of reference CT 2300/2018 listed as case No. 1467 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 Alessandro Lia

Appearing for the Contracting Authority:

Dr Marco Woods

Appearing for the Department of Contracts: Mr Nicholas Aquilina

Appearing for the Preferred Bidder: Dr Mathew Cutajar

Whereby, the Appellants contend that:

- a) The preferred bidders' offer was not compliant in the first evaluation process, as the laboratory certificate stated that, tests were carried out on the product under clean conditions, whilst the tender stipulated that, such testing certification should be carried out under dirty conditions.**
- b) Through a rectification which was not permissible as per Note 3 of the technical specifications the Evaluation Committee allowed the issue of another certificate for the preferred bidder's product.**

This Board also noted the Contracting Authority's 'Letter of reply' dated 1st July 2020 and its verbal submissions during the virtual hearing held on 31st July 2020, in that:

- a) The Authority contends that, during the second evaluation process, the new Evaluation Committee ignored the rectifications which were effected during the first adjudication process. In this regard, the Authority insists that, all the bidders were given the opportunity to rectify so that, a level playing field was maintained and the second evaluation process was carried out on all the offers as duly rectified.**

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

Mr Paul Pace, Evaluator duly summoned by the Public Contracts Review Board

Mr Nicholas Aquilina duly summoned by the Public Contracts Review Board

Mr Jason Grech duly summoned by the Public Contracts Review Board

Ms Rita Zammit duly summoned by the Public Contracts Review Board

Mr Mark Bondin duly summoned by Prohealth Ltd

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, during the virtual hearings held on 31st July 2020 and 5th August 2020, opines that, the issues that merit due consideration relate to;

- a) Rectifications effected**
- b) Compliance with the non-usage of Gloves,**
- c) Tests carried out on wipes**

1. Rectifications

1.1. In this regard, Appellants are claiming that, the Evaluation Committee requested fresh certification to establish whether it was necessary to use gloves with the preferred bidders' wipes and to carry out tests on the

wipes under dirty conditions, in regard to the preferred bidders' offer. Such a request constituted a rectification which, as per note 3, was not possible.

- 1.2. This Board would point out that, indeed such a request was made on the 5th April 2019 and the necessary appropriate certification was subsequently submitted by the tenderer within the prescribed period.
- 1.3. It would be pertinent and opportune to point out, at this particular stage of consideration, that, apart from the fact that such a rectification was requested on the 5th April 2019, other rectification requests were sent to all the other competing bidders in this tender so that, each of the bidders had the same opportunity to rectify their offer and by doing so, a level playing field was maintained.
- 1.4. This Board would also refer to this Board's decision dated 25th October 2019, on the same tender wherein, a newly composed Evaluation Committee was to be appointed to reevaluate all the offers. It must also be pointed out that, the new Evaluation Committee was presented with documentation after rectifications on all the offers were effected and the new Committee started the whole adjudication process afresh. It is on such documentation that the new Evaluation Committee conducted their evaluation process and this Board notes that the new Evaluation Committee did not effect any rectification to the offers.

2. Compliance of Non-Use of Gloves

2.1. Article 1.1 (2) of the technical specifications states that:

“wipes must be able to be applied using unprotected hands (without gloves)”

The above article stipulates that, the wipes must be able to be applied without the necessity for the user to wear gloves.

2.2. This Board would point out that, the tender document stipulates that:

“All claims must be supported by reports of analyses, using EN methods, undertaken in independent ISO accredited laboratories”

In this regard, the preferred bidder submitted the following report which confirmed that their product was not harmful to the skin and thus the preferred bidders’ wipes can be applied without the necessity to wear gloves viz:

“pal

Doc C

*Investors
In People*

*Appendix 7
1/7*

23rd August 2017

To Whom it May Concern:

Re: Medipal 3in1 Disinfectant Wipes – Test Report on Skin Irritation

A test is conducted to determine the human skin irritation potential of Medipal 3in1 Disinfectant Wipes by PCR Corp (Report No. PALPAT1M, dated 9th May 2017).

Based on the test results, we are pleased to confirm that Medipal 3in1 Disinfectant Wipes is proven to be safe for use and dermatologically tested.

Thank you for your attention.

Yours faithfully,

*Dr. Gracy Sailo-Lebeau
Technical & Product Development Manager”*

In this respect, the Evaluation Committee had to abide by the principle of self-limitation and in doing so, the preferred bidder’s product was confirmed by the appropriately accredited laboratory that, the application of the wipes without wearing gloves, will not cause any damage to the skin.

3. Tests Carried out on Wipes

3.1. This Board would refer to clarification note dated 3rd January 2019.

With special reference to question No. 8 and its relative reply, as follows:

“Question No. (8): Point three states that the contact time for EN13727 should be of 30 seconds, please clarify if these 30 seconds refer to dirty conditions please?”

Answer No. (8): Since the wipes are intended for use in clinical settings where soiling would be anticipated compliance with 30 second contact time, as determined by EN13727, listed in Section 4.1.1, would obviously need to be demonstrated in dirty conditions.”

The above clarification is misleading as there was no corresponding description of what is being implied by the word ‘Dirty’ and in the opinion of this Board, such a reply denoted the incorrect usage of the wipes being tendered for.

3.2. This Board specifically refers to the testimony of Mr Paul Pace, a senior nurse in the Infection Control Unit at Mater Dei, who very vividly explained the intended use of such wipes, as follows:

“Xhud :

Il-fatt li l-prodott qed joqtol il-mikrobi in 30 seconds, sinjal li mhux clean. Jigifieri dawn il-mikrobi jew qeghdin in a state of a liquid, jew qeghdin fuq it-trab. Jigifieri dawn iridu jkunu forma ta’ xi haga. Per ezempju sodiumoriginosa bilfors kien hemm liquid biex ittestjawh dan il-laboratorja privat. Jigifieri l-kelma clean qed tigi misinterpretata skorrettement. Staphylococcus jitrabba hafna fit-trab. Kieku ma kienux jittestjaw ghalih. Enterococcus is a bacteria which lives in fluid form. Mela meta saru dawn it-testijiet, il-kelma clean zgur ma kinitx ghax kieku ma jezistux dawn il-mikrobi u johorgu rapport li

jmutu fi zmien 30 sekonda. Dawn mikrobi qeghdin fuq mejda. Mela xi forma ta' medium dawn il-mikrobi bilfors kien hemm. Jigifieri li nghidu clean, qed naghmlu misinterpretation tal-kelma clean mentri mhijiex clean ghax biex ikollok sodiumoriginosa jrid ikollok l-ilma. Ma tikbirx mix-xejn din. Biex ikolloxk Staphylococcus irid ikollok it-trab. Biex ikollok Enterococcus ukoll irid ikollok l-ilma. Dawn huma affarijiet u qed nghidu ghax uzaw il-kelma clean, il-fatt li dawn gew ittestjati, clean ma kienx l-oggett. Meta tghid clean, ma jkun fih xejn. Mela la ghibt rizultat tal-mikrobi, xi mediums uzaw dan il-laboratorju. Mhumiex imgienen tal-laboratorju. Mela ma qaghdux juzaw il-kelma clean. La fih il-mikrobu huwa dirty. Inkella ma jkunx fih mikrobi. Ghax qed nuzaw kliem li naghtu x'nifhem gambetti lil dan ic-certifikat li johrog mil-laboratorji kollha, biex noqghodu nfittxu l-kelma clean u dirty meta dan qed jurina bic-car u tond li ttestjaw ruhhom ghall-bacteria u ghall-viruses li ahna tlabnieh fl-ispecifications. Mela ma noqghodx infittxu x'inhu clean u dirty ghax dawn clean, kieku vera kollox clean, ma kienx hemm dawn il-mikrobi

Chairman : *Ghaliex fic-certifikat jikkwalifika under clean conditions?*

Xhud : *Jiena min-naha tieghi l-kelma clean, ma tridx tigi nterpretata li clean tfisser il-kelma clean. Fl-infection control tfisser minghajr mikrobi. Dan zgur ma kienx il-kaz ghax l-ittestjar tal-mikrobi ghall-kelma clean ma tfissirx il-clean kif nafuha ahna s-soltu li ma fih xejn u clean. Issa jekk l-avukati ser jidhlu fuq il-kelma clean”*

- 3.3. From the credible and professional testimony of Mr Pace, this Board is convinced that, the tests to be carried out on the wipes which had to meet the specifications so dictated by the Authority, were to be performed, under dirty conditions.**
- 3.4. This Board was also made aware that, the intended use of the wipes was, first to clean the particular surface and then apply the wipes, so that, same wipes were not intended to clean but rather to sanitise from bacteria. In this regard, this Board notes that, the Authority should have specified more clearly what is denoted by the words ‘Clean’ and ‘Dirty’.**

In conclusion, this Board opines that:

- a) The rectification note dated 3rd January 2019 was effected by the Authority prior to the closing date of the tender, of 10th January 2019. Same rectification was not appealed. It must also be noted that rectifications request were sent to all competing bidders so that, a level playing field was maintained.**
- b) The new Evaluation Board, as duly instructed by this Board’s decision dated 25th October 2019, proceeded with their evaluation process well after the rectifications on all the offers were effected. At the same instance, the Evaluation Committee had to abide by the principle of self-limitation. In this regard, this Board after considering the technical testimony of Mr Paul Pace**

and the documentaion presented to the Evaluation Board, confirms that, the preferred bidders' offer was fully compliant and the cheapest.

- c) This Board also confirms that, the certificate supplied by 'Pal' a respectable laboratory, affirms the fact that, the successful wipes can be used without gloves, as they do not cause any harm to the skin.**

In view of the above, this Board,

- i. does not uphold Appellants' contentions**
- ii. upholds the Contracting Authority's decision in the award of the tender**
- iii. directs that the depost paid by Appellants should not be refunded.**

Dr Anthony Cutajar
Chairman
27th August 2020

Dr Charles Cassar
Member

Mr Lawrence Ancilleri
Member