

PUBLIC CONTRACTS REVIEW BOARD

Case 1496 – CT 2117/2019. Tender for the Supply of Medical Oxygen to be refilled in Cylinders (Lots 1-3)

The tender was published on the 3rd July 2019 and the closing date of the tender was the 20th August 2019. The estimated value of the tender (exclusive of VAT) was € 597,000.

On the 28th August 2020 Multigas Ltd filed an appeal against Central Procurement and Supplies Unit as the Contracting Authority objecting to their disqualification on the grounds that their bid was not technically compliant and on the subsequent cancellation of the tender.

A deposit of € 3,355 was paid.

There was one (1) bidder.

On 30th September 2020 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Carmel Esposito as members convened a public virtual hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellants – Multigas Ltd

Dr Joseph Camilleri	Legal Representative
Eng Mark Asciaik	Representative
Mr Michael Mifsud	Representative
Mr Alistair Cachia	Representative
Mr John Catania	Representative

Contracting Authority – Central Procurement and Supplies Unit

Dr Marco Woods	Legal Representative
Eng Mark Anthony Bonnici	Member Evaluation Committee
Mr Peter Pace	Secretary Evaluation Board
Mr Mario Barbara	Representative

Department of Contracts

Mr Nicholas Aquilina	Representative
----------------------	----------------

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 agreed to treat it as a normal hearing of the Board. He then invited submissions.

Dr Joseph Camilleri Legal Representative for Multigas Ltd stated that this was the only bid submitted in this tender, and Appellants had been disqualified on three reasons – the first one being the claim by the Contracting Authority that the warranted engineer identity card number had been left out. On this point, on the basis of proportionality, the offer should not have been discarded as both the engineer’s name and warrant number had been submitted and this was sufficient to identify the individual.

Mr Mark Anthony Bonnici (274490M) called as a witness by the Central Procurement and Supplies Unit (CPSU) testified on oath that he was the technical evaluator in the tender adjudication. He stated that the Evaluation Committee was not permitted to request additional information. Dr Camilleri pointed out to witness that this was not a question of asking for additional information since the committee had enough information to identify the individual.

Dealing with the second reason for disqualification Dr Camilleri said that medical oxygen has certain standards reflected in the Summary of Product Characteristics (SPC). Appellants’ offer refers to same standards but the Authority maintains that this was not the standard the tender requested. The technical specifications of the product have not changed since 2005 and therefore the product is still the same and the SPC meets the specifications. References made by the Contracting Authority to the Medicines Authority indicate that the former checked on this point. Whatever year’s SPC was selected the product was still the same.

Mr Alistair Cachia (385173M) called as a witness by Appellants testified on oath that he has been the Quality Systems Manager of Multigas Ltd for 23 years. Oxygen is listed in the pharmacopeia as it is regarded as a medicine and the European Union established the basis of the oxygen analysis. The basis of the product listed under 2005 is still applicable to 2020 as confirmed in the pharmacopeia. This, said the witness, is exactly the product currently supplied to the CPSU on a daily basis, and certified accordingly.

Questioned by Dr Woods Legal Representative for Central Procurement and Supplies Unit, witness replied that he was the individual who submitted documents in the tendering process and was not aware that the SPC submitted in the tender only runs to eight pages as against the current SPC which runs to nine pages which meant that the document submitted is incomplete and fails as it falls under Note 3.

In an answer given later on this point witness stated that page 9 had not been sent in error.

Dr Camilleri pointed out that the reason given for the exclusion was not on a missing page but on the wrong reference year of the SPC.

Mr Mario Barbara (15964M) called as a witness by the Public Contracts Review Board testified on oath that he is a Senior Government Pharmacist and he wrote the technical specifications for the tender. In reply to a question he stated that page 9 usually shows a list of the product distributors. He confirmed that what the SPC presented was not the current version and was signed by a different person.

Questioned by Dr Camilleri witness said that he could not say if there was any difference between the 2005 and the 2020 versions of the SPC as the older version is not available to the Authority.

Dr Camilleri next dealt with the point regarding the Marketing Authorisation and the need to supply a copy of that authorisation. Reference was made to Legal Notice 458.34 which states that the market authorisation needs to be renewed after the first five years and then remains in force – renewal therefore is only required once. The Contracting Authority could easily have checked this point as the information is easily available. The document provided by Appellants shows the date as 2005 and the renewal date as 2012 which admittedly is not clear whether it was a renewal or a request to renew. The CPSU claims that two documents were presented whereas in fact 2012 was the date of renewal seven years after 2005.

Called to give further testimony Mr Alistair Cachia stated that the Company applied for marketing authorisation in 2005 and applied for renewal in 2010 which renewal was actually issued in 2012. In that interim period bids on other tenders had been successfully submitted indicating that the authorisation was still under review. The two documents confirming renewal were both dated 2012 and no further authorisation was necessary since the existing ones are still active. In line with current legislation no further renewals were necessary.

Engineer Mark Anthony Bonnici recalled to give further testimony stated, in reply to a question, that no clarification had been sought by the Evaluation Committee on this point.

Dr Camilleri in dealing with the three reasons for the disqualification said that the point regarding the lack of the identification number could have been easily established through the warrant number. It appeared that the second reason raised was not the lack of SPC but due to the missing page 9 – a point that had not been made in the rejection letter. The missing page 9 refers to distributors who are authorised to provide the product - information which was easily available in other parts of the submissions. It was confirmed at this hearing that the CPSU made no attempt to compare the standards of the product offered – clarification was possible to find out if there was any difference in the product. The CPSU did not exclude Appellants on the grounds of standards but due to a different SPC of the product, this despite the fact that the characteristics of the product are the same.

As regards the Marketing Authorisation there is no doubt that the CPSU were aware that the product is authorised; what it doubted was if the document was ‘still active’. It is clear that authorisation is still valid and again it was a case of a clarification being possible but not sought.

The difference in this tender is that the Appellant was excluded not because their product is not the right one but on procedural points – this is very relevant as otherwise the process will have to restart on a procedural point rather than on the product.

Dr Marco Woods said that the Authority did not agree to the references made to past tenders. The Evaluation Committee has to proceed on what is submitted in a particular tender – this procedure is important and regulated by the Public Procurement Regulations and each new offer must abide by the clauses in that tender. The ID card number was missing and no rectification was permitted; the Authority asked for the most recent standards in the SPC and it was clear, as also confirmed by witness, that the SPC had a page missing and the most recent one was only submitted at the appeal stage and could not be accepted. Immaterial of the contents of the missing page it was still a failure on the part of bidders. It would have been possible for the Evaluation Committee to request a clarification on the Marketing

Authorisation, however it cannot regularise irregularities and the Authority was correct in disqualifying Appellants and cancelling the tender.

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 Multigas Ltd (hereinafter referred to as the Appellants) on 28th August 2020, refers to the claims made by the same Appellants with regard to the cancellation of tender of reference CT 2117/2019 listed as case No. 1496 in the records of the Public Contracts Review Board.

Appearing for the Appellants: Dr Joseph Camilleri

Appearing for the Contracting Authority: Dr Marco Woods

Appearing for the Department of Contracts: Mr Nicholas Aquilina

Whereby, the Appellants contend that:

- a) Their concerns refer to the three reasons, given by the Authority, for the rejection of their offer namely non-submission of Identity card number of warranty engineer, standard of the medical oxygen and marketing authorisation certificate. In this regard, Appellants maintain that:**
 - i. In the case of the non-submission of the ID card number of the Engineer, the Evaluation Committee could easily confirm the identity of same through the warrant number.**

- ii. With regard to the standard of the medical oxygen, the product remained the same up to date of submission.**
- iii. The marketing authorisation did not require renewal and the Authority did not request clarification.**

This Board also noted the Contracting Authority's 'Letter of reply' dated 23rd September 2020 and its verbal submissions during the virtual hearing held on 30th September 2020, in that:

a) The Contracting Authority maintains that the reasons for Appellants' offer rejection were truly justified in that:

- i. With regard to the ID number of the warranty engineer, such information was missing.**
- ii. With regard to the standard of the medical oxygen, the Summary of Product Characteristic (SPC) was incomplete.**
- iii. The Marketing Authorisation Certificate (MAC) had expired and thus not valid.**

All the above requirements fell under note 3 where no rectification was allowable.

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

Mr Mark Anthony Bonnici duly summoned by Central Procurement and Supplies Unit

Mr Alistair Cachia duly summoned by Multigas Ltd

Mr Mario Barbara duly summoned by the Public Contracts Review Board

This Board, after having examined the relevant documentation to this appeal and heard submissions made by the parties concerned, including the testimony of the witnesses duly summoned opines that, it will treat Appellants' grievances as follows:

1. Non-Submission of ID Card Number of Engineer

1.1. This Board would respectfully refer to article 6, point number 4 (Technical Specification) which states the following:

“4. Prospective tenderers are required to make available to the Contracting Authority, at tendering stage; a declaration signed by the company's warranted engineer that the cylinders and valves which will be used in this contract will be within the scope and compliant to LN 331/2002 and any other Maltese and European regulations that may be applicable. The declaration shall include the full name; identity card number and engineering warrant number of the signatory.”

1.2. The above-mentioned clause clearly dictates what documentation, with regard to the warranty engineer, is to be submitted, at tendering stage. In this particular case, Appellants failed to submit the identity card number of the Engineer.

1.3. One has to acknowledge and appreciate that, the objective of the Authority to request the identity card number of the warranted

engineer, was to ensure and identify the Engineer himself. In this regard, this Board notes that, the identity of the Engineer could have been followed up from the warrant number, however, this fact does not justify the non-submission of what was clearly requested by the authority and such documentation could not be clarified by the Evaluation Committee since such information fell under note 3.

1.4. This Board does not dispute the fact that, the identity of the warranted engineer could have been extracted from the submitted warrant number however, the responsibility of the non-submission of such information should not be shifted on to the Evaluation Committee. In this respect, this Board would remind the Appellants that, whilst it is the duty and obligation of the Evaluation Committee to abide by the principle of self-limitation, even so it is the duty of appellants to ensure that, they submit all the information as duly stipulated in the tender dossier and in this regard, this Board does not uphold Appellants' first grievance.

2. SPC of the Medical Oxygen

2.1. Clause 7a of the technical specifications dictates the submission of a 'Summary of Product Characteristics' (SPC) approved by the Licensing Authority. Such documentation is justifiably stipulated so that, the Evaluation Committee will ensure that, the product is duly certified by

the competent Authority to possess all the requested characteristics which ensure safety and effectiveness, in its application to patients.

- 2.2. In this particular case, Appellants contend that, although 8 pages out of 9 of the SPC were submitted, the Authority was aware that, the product has not changed its characteristics since 2005 and the product is the same as is currently being supplied to the Authority.**
- 2.3. Although, this Board may accept Appellants contention in this regard, same Board cannot ignore the fact that, this tender has been issued as a separate Public Procurement from that of the previous supply of the product and in this respect, reference to previous or current supplies of the product do not justify the non-submission of the full documentation of the SPC, as duly justifiably dictated in the tender dossier. At the same instance, Appellants did not present any credible evidence to justify such omission.**
- 2.4. This Board would respectfully point out that its remit is to review the procedure adopted by the Evaluation Committee in its deliberations and to ensure that, the principles of the Public Procurement Regulations have been prudently adhered to and in this regard, the Evaluation Committee was presented with incomplete documentation of a mandatory requisite of the technical specifications of the product. The Evaluation Committee, quite appropriately, applied the principle of**

self-limitation and could not request clarifications on missing documentation.

2.5. One has to acknowledge the fact that, in this particular instance, the principle of proportionately does not correctly apply since the basic principle of self-limitation must not be suppressed and in this particular case, incomplete documentation was the main factor so that, no rectification was possible and in this regard, this Board does not uphold Appellants' second grievance.

3. Marketing Authorisation Certificate

3.1. This Board would, refer to clause 7b, wherein the Authority stipulated that bidders had to submit a copy of the Marketing Authorisation of the product. Again, this Board would confirm that such a document was necessary so that, the Authority would be comfortably assured that, the supplier of the product is properly authorised to provide same.

3.2. In this particular case, this Board was made aware of the procedure for obtaining such an authorisation and noted that, Appellants did submit the Marketing Authorisation Certificate (MAC) and from the testimony of Mr Alistair Cachia, this Board noted that the submitted documentation was valid. At this stage of consideration, this Board would respectfully point out that, although the wording of the (MAC) did not denote that the certificate submitted did not require renewal, if

in doubt, the Evaluation Committee could have requested a clarification prior to deeming such a certificate invalid. In this regard, from the testimony of Mr Cachia and from other submissions, made during the hearing, this Board upholds Appellants' contention in that, the certificate submitted by Appellants, did not require renewal and was thus valid.

In conclusion, this Board opines that:

- a) With regard to Appellants' first contention, this Board justifiably confirms that, although the identity of the engineer could have been determined, by the Evaluation Committee, through the submitted warrant number, it was the responsibility of Appellants to ensure that what has been requested is actually submitted and the principle of self-limitation applies both to the Evaluation Committee and the bidder.**
- b) With regard to Appellants' second grievance, this Board considers the importance of the 'Summary of Product Characteristic' to be of high mandatory relevance and noted that, the Evaluation Committee was not in a position to confirm the characteristics of the product with full certainty. At the same instance, this Board was not presented with justifiable evidence for such an omission on the part of Appellants.**

c) With regard to Appellants' third contention, this Board confirms that the 'Marketing Authorisation Certificate' submitted by Appellants did not require renewal and was a valid certificate.

In view of the above, this Board,

- i. does not uphold Appellants' first and second contentions,**
- ii. upholds Appellants' third contention,**
- iii. upholds the contracting Authority's decision to cancel the tender,**
- iv. directs that, in view of the above, an amount of €1000 be refunded from the deposit paid by Appellants.**

Dr Anthony Cassar
Chairman
7th October 2020

Dr Charles Cassar
Member

Mr Carmel Esposito
Member