

## **PUBLIC CONTRACTS REVIEW BOARD**

### **Case 1520 – CT 2396/2019 – Tender for the Supply of Sodium Hyaluronate Injection**

The tender was published on the 5<sup>th</sup> February 2020 and the closing date of the tender was the 10<sup>th</sup> March 2020. The estimated value of the tender (exclusive of VAT) was € 214,650.

On the 20<sup>th</sup> November 2020 Class Medical Ltd filed an appeal against the Central Procurement and Supplies Unit objecting to their disqualification on the grounds that their bid was not the cheapest offer satisfying the administrative and technical criteria.

A deposit of € 1,073 was paid.

There were three (3) bidders.

On 4<sup>th</sup> December 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 virtual hearing to discuss the objections.

The attendance for this public hearing was as follows:

#### **Appellants – Class Medical Ltd**

Dr Stefan Camilleri	Legal Representative
Ms Janica Cachia	Representative

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

Dr Marco Woods	Legal Representative
Mr Juan Zarb Cousin	Member Evaluation Committee

#### **Interested Party – Cherubino Ltd**

Dr Matthew Paris	Legal Representative
Dr Francis Cherubino	Representative
Dr David Cherubino	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 agreed to treat it as a normal hearing of the Board. He then invited submissions.

Dr Marco Woods Legal Representative of the Central Procurement and Supplies Unit confirmed that in line with the letter of reply after an internal investigation by the Contracting Authority it had been realised that a technical error occurred during the evaluation and it therefore was requesting the Board to meet their request to have the tender re-evaluated.

Dr Stefan Camilleri Legal Representative for Class Medical Ltd said that Appellants had no objection to a re-evaluation and would not wish to proceed with the appeal if the Board reached that decision.

Dr Matthew Paris Legal Representative of Cherubino Ltd queried the right of the Authority to carry out an internal investigation which went against Public Procurement Regulations and European Union jurisprudence. The Public Contracts Review Board was the only body authorised to review decisions. The Authority should have requested a cancellation of the tender not a re-evaluation.

Dr Woods stated that at the stage of preparing for this appeal it was realised that in the name of transparency and fair play a revision of the Authority's decision was necessary. The correct procedure was followed in asking the Board to sanction a re-evaluation.

Dr Camilleri said that agreeing to a cancellation would not be a good outcome as all bidders hands had now been divulged and prices known. It makes more sense to have the bids re-evaluated.

Dr Paris again asked under which regulation the investigation had been carried out. He quoted PCRB case 1424 which was identical and where cancellation was granted. The Board would be creating a new procedure outside the terms of existing regulations and jurisprudence.

Dr Woods said that the technical error occurred not in the evaluation but in the technical specifications and quoted PCRB case 1516 where in similar circumstances the Board accepted a re-evaluation.

The Chairman said the Board will study the submissions and decide thereon. He then 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 Class Medical Ltd (hereinafter referred to as the Appellants) on 20<sup>th</sup> November 2020, refers to the claims made by the same Appellants with regard to the tender of reference CT 2396/2019 listed as case No. 1520 in the records of the Public Contracts Review Board recommended**

**for award by Central Procurement and Supplies Unit (hereinafter referred to as the Contracting Authority).**

**Appearing for the Appellants: Dr Stefan Camilleri**

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

**Appearing for the Preferred Bidder: Dr Matthew Paris**

**Whereby, the Appellants contend that:**

- a) Their concern relates to the fact that, in terms of article 1.1 of the technical specifications, the average molecular weight of Sodium Hyaluronate was required to be 2.5 million Daltons. In this regard, the preferred bidder's offer did not satisfy this particular mandatory requirement, so that the Authority's decision in the award of the tender should be cancelled.**

**This Board also noted the Contracting Authority's 'Letter of reply' dated 27<sup>th</sup> November 2020 and its verbal submissions during the virtual hearing held on 4<sup>th</sup> December 2020, in that:**

- a) The Authority informed this Board, that during the examination of Appellants' 'Letter of Objection' and preparation of the 'letter of Reply', it was noticed that an error had occurred during the evaluation process and in this regard, it is in the best interest of good governance to carry out a re-evaluation process.**

**This Board, after having examined the relevant documentation to this appeal and heard submissions made by all the interested parties opines that, the issue that merits consideration is whether the Contracting Authority’s request to carry out a re-evaluation process, is justified.**

- 1. First and foremost, this Board acknowledges the fact that, once a ‘Letter of Objection’ is received by the Authority, same must formulate a ‘Letter of Reply’ and Appellants’ grievance examined in order for the Authority to reply thereto.**
- 2. In this particular case, on receipt of Appellants’ objection, the Authority noted that, in the evaluation process, a technical error occurred which might have affected the adjudicating process. In this regard, this Board was also made aware that, the procedural error did not relate to the formulation of the stipulated technical specifications.**
- 3. This Board takes into consideration that, the technical specifications of the medical product are formulated in a manner to ensure that the patient receives the best medication possible and must be strictly adhered to. At the same instance, if the Authority discovers a defect in its decision on the award of a tender, it is the responsibility of the Authority to point such a deficiency and ask for remedial action.**

- 4. It is also a fact that, all the information on all the offers is now divulged and this Board opines that, cancellation of the tender, at this particular stage, would not be beneficial to the bidders and to the evaluation process itself.**
- 5. In the circumstances, this Board opines that, a re-evaluation process of the present offers would be more equitable and transparent.**

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

- i. upholds the Contracting Authority's request to carry out a re-evaluation process on all the offers submitted,**
- ii. directs that a re-evaluation process be carried out on all the offers,**
- iii. directs that the Evaluation Committee be differently composed,**
- iv. directs that the deposit paid by Appellants be fully refunded.**

Dr Anthony Cassar  
Chairman  
*9<sup>th</sup> December 2020*

Mr Lawrence Ancilleri  
Member

Mr Carmel Esposito  
Member