

PUBLIC CONTRACTS REVIEW BOARD

Case 1522 – CFT019-1174/20 – Tender for the Supply of Ready-Made Feeds for Preterm and Newborn Babies (Lots 1 – Preterm and Lot 2 – Newborn Babies)

Remedies before the Closing Date of a Call for Competition

The tender was published on the 30th October 2020 and the closing date of the tender was the 20th November 2020. The estimated value of the tender (exclusive of VAT) for both lots was € 124,800.

On the 11th November 2020 Vivian Corporation Ltd filed an appeal against the Central Procurement and Supplies Unit as the Contracting Authority in terms of Regulation 262(1) of the Public Procurement Regulations

A deposit of € 624 was paid.

On 14th 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 – Vivian Corporation Ltd

Dr Clement Mifsud Bonnici	Legal Representative
Dr Sylvann Aquilina Zahra	Legal Representative
Ms Denise Borg Manche	Representative
Mr Christian Cachia	Representative

Contracting Authority – Central Procurement and Supplies Unit

Dr Marco Woods	Legal Representative
Dr Alison Anastasi	Representative
Mr Karl Farrugia	Representative
Mr Hristo Ivanov Hristov	Representative

Interested Party – Alfred Gera & Sons Ltd

Dr Adrian Mallia	Legal Representative
Mr Robert Magri	Representative

Interested Party – Cherubino Ltd

Mr David Cherubino
Mr Matthew Attard

Representative
Representative

Interested Party – Pemix Ltd

Mr Joe Camilleri
Mr Keith Portelli

Representative
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 Clement Mifsud Bonnici Legal Representative for Vivian Corporation Ltd by way of a preliminary note said that certain of the interested parties had not filed an appeal and therefore they were restricted solely to comments at the end of the hearing. He then stated that this was a follow-up on the 2019 tender where two participants had submitted abnormally low bids in the hope of consolidating and thus distorting the private market. This new model tender was meant to treat everyone equally by inviting offers and appearing to keep everyone involved. The claim by the Central Procurement and Supplies Unit (CPSU) that since Appellants competed in the 2019 tender they now cannot appeal on this case is mistaken as each tender is treated separately. However the 2019 tender is relevant to this case which to clarify matters is being appealed on Regulation 262 (e) which deals with breaches of law. The first point of the appeal is that the points made in the 2019 tender are taken into consideration.

Dr Marco Woods Legal Representative for the CPSU objected to the linking of this appeal to the 2019 tender as this was a completely new tender with different parameters and with no reference to abnormally low tenders – different basis tenders cannot be tied together. Further in the previous year's tender there had been no claim that the private market was affected.

Dr Mifsud Bonnici noted that there were many overlaps between the 2019 and the 2020 tenders – 2019 was the first time that offers of one cent were made. He then requested the Board to hear testimonies of witnesses.

Mr Yan Grima (345984M) called as a witness by Appellants testified on oath that he is a Pharmacist by profession and currently the Marketing Manager of Vivian Corporation Ltd who are the importers of SMA, a European baby food product. He explained that there was a liquid and a powder form of this product and the liquid ready to feed form was being currently sold to the Government for use in hospitals. Over the years various brands were in use by the Government – in 2014 the tender was for a single supplier and the following year this was extended to other brands on a three year period contract.

Witness stated that if a new born baby is started on a liquid form product the mother is likely to stick to that same product – in powder form - since there is no inclination to change products if a child is doing well on it. This has been confirmed by paediatricians. There are approximately 4000 births annually with

roughly 50% being breast fed and 50% bottle fed; although the latter figure is on the increase. 99.1% of the bottle fed babies are given the SMA product. Studies have shown that there is an increase in sales of that product when that sole product is offered to mothers of new born babies and a decline when there are other suppliers. The exposure to a particular brand in hospital tends to continued use afterwards. Appellants wish to have the mothers exposed to a wider choice of products to see the effect that would have on the private market.

In reply to questions witness stated that in the first six months babies are only given a liquid feed and therefore this is highly important in generating loyalty to a brand. The result is that it has a foreclosure effect on suppliers if there is no competition and only one supplier dominates the market. Further, witness confirmed that Appellants were awarded the 2014 tender whilst the 2016 tender was awarded in multiple lots: the figures quoted earlier in his testimony are taken from National Statistics Annual Report. Witness said that a mother's stay in hospital after childbirth was usually of two to three days duration and that the comments he made applied just as well to preterm births.

Mr Godwin Mangion (166262M) called as a witness by the Appellants testified on oath that he is the Director General of the Office for Competition (MCCAA). He referred to his letter dated 17 July 2019 to the CPSU wherein the Office expressed the view that having one sole supplier is distorting competition in the secondary market and creating barriers to entry of other suppliers of this product. He stated that there is evidence that mothers continued to use the same brand and it was difficult for other brands to enter the market. This was confirmed by studies carried out in Israel and Singapore while market studies in Malta from product suppliers tended to confirm similar results. The aim of the Office for Competition is to have an open market with multiple suppliers and the best way to achieve this is to have all products available in hospitals and let the mothers choose their brand. They have recently advised the CPSU to have an open procedure with a choice of brands.

Questioned by the Chairman as to how such a process would work witness said that parents would do their own research as to which brand they favour. As an example, mothers could be informed in pre-natal classes as to the different brands.

In reply to further questions by Dr Sylvann Aquilina Zahra, Legal Representative for Vivian Corporation Ltd, witness stated that he had requested the CPSU to advise him how they intended to offer a choice of brands to mothers but so far has had no response. Competition can only exist on the ability to select a brand otherwise there will exist the perception that the brand used by the hospital must be the best. The Office of Competition had carried out a sector enquiry in February 2020 covering a range of questions – in the case of Vivian Corporation sales had gone up when they won the tender but declined when the tender was lost.

Questioned by Dr Woods witness said that between 2013 and 2016 there had been no sector enquiries as the Office had not received any complaints. Turnover figures from suppliers were requested in regard of 2013 as prior to that there was no issue and they only became aware of the problem in 2019.

Dr Alison Anastasi (398380M) called as a witness by the CPSU testified on oath that she was the Head of Operations, Procurement at the CPSU. She confirmed that the MCCA had sent an enquiry after the present appeal, and the CPSU will reply once this appeal is settled. For the last three years the Medical Department management team have discussed how to implement a multi-supplier system but they are at a loss of finding a way to present alternative brands. The situation in Malta, where medicines are supplied free of charge, cannot be compared to Israel or Singapore and it is impossible to have all brands available, with consequential wastage problem – which would happen unless choice can be controlled. From past experience when multiple brands were available suppliers tended to push their brands. It is difficult to follow the MCCA recommendation as it is to establish criteria on choice.

Questioned by Dr Mifsud Bonnici witness stated that cases exist where there were several firms supplying products at a fixed price. When the CPSU had capped prices in the past there were appeals against their decision.

In reply to questions from Dr Aquilina Zahra witness said that a study should be carried out in Malta to make sure that it is 'like with like' with the studies mentioned in countries abroad. One must find out what happens to the private market when no branded products are used in hospitals.

Dr Mifsud Bonnici said that the matter here revolves on points on public procurement regulations and directives dealing with the free movement of goods and competition. These are statutory on a contracting authority. The tender does not exclude anybody but the policy of buying a single brand leads to an unfair advantage in the private market leading to the dropping off of economic operators and the lack of genuine competition over a few years unless action is taken now. The process has to be open to all within the regulations with the price fixed at a reasonable level and open to all. In Cases 1279 and 1361 the Board declared that regulations cannot be ignored and gave specific instructions to overcome obstacles. Procurement models must be looked at, as for example, a framework agreement that allows more than one economic operator in line with Regulations 173 (1) (a). A second route that could be followed is that of negotiated procedure and there are several instances of awards to more than one operator. The present system is harming the private market and a solution needs to be found.

Dr Woods stated that the cases quoted by Dr Mifsud Bonnici are different to the present one as they deal with closed competition, whereas this tender is fully open to competition and any one of seven companies can bid. The two letters of objection are both based on claims of lack of competition but the Board should judge if any economic operator is excluded – that will be the clear proof. The testimony of witness Mr Yan Grima is wrong in so far as he argued that the private market is affected whereas the tender is on liquid feeds. The tender follows Regulation 239 and is the most advantageous for the benefit of the patient. Witness did not indicate any concern for the private market when Appellants won the tender in 2016/2018. The MCCA only started their sector enquiry in 2019 following a complaint. The Board heard the testimony of Dr Anastasi who stated that there were no problems with the private market when the Authority purchased a foreign source product and hence the argument about brand loyalty raised by Appellants is not valid. Framework agreements, as suggested, refer to services not to supply of products.

Dr Adrian Mallia Legal Representative for Alfred Gera & Sons Ltd said that the Treaty on the Functioning of the European Union (TFEU) encourages open market competition with only one scope

whether it is the private sector or contracting authorities. In this case the Contracting Authority is looking at procurement in a vacuum and do not seem to be interested in the rest of the regulations. As a Government entity the Authority cannot behave as if they do not care and the limits imposed on them are in the very beginning of EU Directive 2014/24 outlining the cardinal freedoms. This Directive gives clear routes to the Authority that when dealing with procurement they have to follow all the aims of the Treaty in Articles 101 and 102 which are fundamental and cannot be ignored. If a practical problem exists in implementation this is not an excuse to ignore regulations since a Government entity should do its utmost to follow obligations.

Dr Woods said that the Authority was not arguing or claiming any excuse to ignore regulations – the tender is open to all; it was Appellants who were claiming that only one product will be bought. Other tenders issued on similar lines have evoked no complaints from the parties which won the tender.

Dr Aquilina Zahra said that the Board is considering an essential product and it is essential that there is a choice. There is evidence of brand loyalty and this leads to the possibility of foreclosure. The loss of economic operators will have detrimental effects as the Contracting Authority will be restricted in their choice.

Dr Mifsud Bonnici said that the Board had previously commented on how important the use of precontractual remedy was – it should now oblige the Authority to encourage competition and the said Authority cannot rid itself of its obligations by claiming practical problems. There is no defence in a clear case of market restriction. The testimony of the Director General of the MCCA is a considered one and one which cannot be ignored. In 2019 someone bid one cent which is unprecedented and confirms the fact that Government action affects the private market. The Board must look at this long term effect.

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

End of Minutes

Decision

This Board,

having noted this “Call for Remedy Prior to the Closing Date of Competition” filed by Vivian Corporation Ltd (hereinafter referred to as the Appellants) on 11th November 2020, refers to the claims made by the same Appellants with regard

to the tender of reference CFT 019-1174/20 listed as case No. 1522 in the records of the Public Contracts Review Board.

Appearing for the Appellants: Dr Clement Mifsud Bonnici

Dr Sylvan Aquilina Zahra

Appearing for the Contracting Authority: Dr Marco Woods

Appearing for Alfred Gera & Sons (Interested Party): Dr Adrian Mallia

Appearing for Cherubino Ltd (Interested Party): Mr David Cherubino

Appearing for Pemix Ltd (Interested Party): Mr Joe Camilleri

Mr Keith Portelli

Whereby, the Appellants contend that:

- a) Reference should be made by, PCRB, to the tender issued in 2019 so that, the Board would take into consideration certain issues relative to this appeal.**
- b) The fact that the tender is requesting only one brand of the product, does lead to an unfair advantage, in the private market, for the successful economic operator. In this regard, Appellants contend that, such an instance will eventually lead to the dropping off of competing bidders, that can participate in future and thus result in lack of genuine competition.**

- c) The tender document should be formulated so as to request the various brands of the product on the market so that, the consumer at the hospital will have a choice of their own.**

This Board noted the submission made by Alfred Gera and Sons Ltd, an interested party.

This Board also considered the Contracting Authority's 'Letter of reply' dated 17th November 2020 and its verbal submissions during the virtual hearing held on 14th December 2020, in that:

- a) The Authority maintains that, this is a completely new tender so that, it objects to any reference being made to the tender published in 2019.**
- b) With regard to Appellants' second grievance, the Authority insists that the tender document is not restrictive to open competition. In this regard, any of the available products on the market, can compete without any restrictive measures being imposed.**
- c) With regard to Appellants' third contention, the Authority claims that, it does not have the administrative structure and methodology necessary to make available all the brands available on the market to ensure genuine freedom of choice and eradication of waste of products.**

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

Mr Yan Grima duly summoned by Vivian Corporation Ltd

Mr Godwin Mangion duly summoned by Vivian Corporation Ltd

Dr Alison Anastasi duly summoned by Central Procurement and Supplies Unit

This Board, after having examined the relevant documentation to this ‘Call for Remedies’ and heard submissions made by all the interested parties, including the testimony of the witnesses duly summoned opines that, the issues that merit consideration are three-fold namely:

- 1. Reference to issues of tender 2019**
- 2. Tender requesting one brand of product**
- 3. Availability to all brands of the product in hospitals**

1. Reference to tender issued in 2019

- 1.1. With regard to Appellants’ first contention this Board would respectfully point out that, the issues raised in Appellants’ objection relate directly to this particular tender so that all considerations and treatment of appeal will be directly related to this tender without any reference to previous issues relating to any other tenders.**
- 1.2. This Board also respectfully points out that, it had dealt with the issues raised in the appeal pertaining to the tender issued in 2019 and the decision thereto does not, in any particular way whatsoever, relate to the issues being raised now, by the appellants. This appeal relates to a new tender**

having different parameters and is not to be considered as a continuation of the previous tender issued in 2019.

2. One brand of product

- 2.1. Appellants' second contention relates to the alleged fact that, since only one brand of the product will be successful for the supply to hospitals, same product will have an unfair advantage in the private open market and such a situation will enhance the possibility of the dropping off of economic operators which eventually will lead to a lack of genuine competition.**
- 2.2. The product being offered by the Authority consists of a 'Readymade feed' for preterm and new-born babies. From the submission made and testimony of Mr Yan Grima, pharmacist, employed with Appellants' company, it was established that, such a tendered product will be in liquid form and will usually be consumed at the hospitals for two or three days, under normal childbirth conditions. At the same instance, this Board was also made aware, by the same witness that, once discharged from hospital the feeds available for new-born babies are all in powder form.**
- 2.3. In this particular case, Appellants and the interested parties are claiming that, the tender document is requesting only one brand out of the products available on the open market and in this respect, it is limiting competition by giving an unfair advantage to the successful bidder on the private market for the same product.**

- 2.4. The arguments brought forward by the Appellants and the interested parties centred around the fact that, the tender is restricting the scope of open competition for the unsuccessful products on the private market and this Board will treat such an issue based on facts and submissions made during this hearing.**
- 2.5. This Board will also point out that the Authority has every right to stipulate certain technical specifications and conditions which it deems appropriate to achieve the desired results. The tender issued by the Authority is a normal call for the supply of a particular product used in hospitals on new born babies for a very short period of time. From the submissions of the witnesses, such a stay in hospital does not exceed three days, under normal conditions.**
- 2.6. The tender document itself, allows any bidder to participate without any restrictions and open competition is vividly present. Furthermore, the technical specifications and the conditions stipulated therein do not indicate any advantage to a particular product that is available on the market. However, Appellants' concern, in this respect, is the ripple effect of the unsuccessful products on the private market.**
- 2.7. In this regard, this Board opines that, the tender document does not, in any particular way, distort competition as it is open to all potential economic**

operations without any restrictions or advantages to any product that is available on the market.

3. Availability of choice of brands

- 3.1. Appellants are claiming that, since the Authority requested one brand of the product, the unsuccessful products will have a negative ripple effect on the private market so that an equitable solution would be for the Authority to allow the mothers to have a choice of the various brands available during their brief stay at the hospital.**
- 3.2. This Board cannot but commend such a proposal however; one must also weigh the balance between ideals and practicality. In this regard, this Board opines that, to implement such a choice of brands, the Authority must have the necessary administrative procedures in place, to ensure that there will be genuine freedom of choice thus suppressing abuses. It should also be pointed out that the introduction of choice of brands in hospitals will create additional administrative stress and pressure on medical staff that can be utilised on more professional duties. From the submissions made by the Authority it is not in an ideal situation to implement such a choice of brands for liquid feeds for new-borns.**
- 3.3. This Board also takes into consideration the fact that, under normal circumstances, the duration of stays in hospitals is two or three days, so**

that, once discharged from hospital, the mother can choose any other brand available on the market.

In conclusion, this Board opines that:

- a) The technical specifications and conditions as stipulated in the tender document do not breach any of the regulations contained in the Public Procurement Regulations.**
- b) The tender specifications do not restrict the scope of open competition nor do they favour any particular brand of the product available on the open market.**
- c) The duration of the stay in hospital is too short to dictate the brand, which is most suitable for the baby so that, the same brand used in hospital will not necessarily rubber stamp the same brand once released from hospital.**
- d) The Authority does not have the administrative mechanism to implement a choice of ‘Baby Feeds’ at the hospitals, at present, however, such a proposal should not be shelved but rather considered for future tenders once the hospital administration can administer such a choice.**

In view of the above, this Board,

- i. confirms that, the technical specifications and conditions, as stipulated in the tender dossier, do not restrict in any manner, open competition and they do not favour or give any advantage to any particular brand of the products available on the market,**

- ii. upholds the fact that, at present, the Authority does not possess the administrative set-up and monitoring methodology necessary to introduce a choice of brands of the product. Moreover, through such an introduction, the Authority must ensure that, once in operation, there will be a genuine freedom of choice without any abuses and in this regard, such an innovation will create undue additional burden on the hospital administration,**
- iii. does not uphold the fact that, reference should be considered by this Board, to the previous tender issued in 2019. This is a new tender and all the issues treated by this Board refer to the tender issued on 30th October 2020,**
- iv. directs the Authority to resume the tendering procedure,**
- v. directs that the new closing date of this tender will be the 18th January 2021,**
- vi. directs that an amount of €300 be refunded from the deposit paid by Appellants.**

Dr Anthony Cassar
Chairman
29th December 2020

Mr Lawrence Ancilleri
Member

Mr Carmel Esposito
Member