

PUBLIC CONTRACTS REVIEW BOARD

Case 1560 – CT 2320/2020 – Tender for the Supply of Enzyme Immuno Assay / Chemilumnescent Test Kits with Equipment on Loan

24th May 2021

The Board,

Having noted the letter of objection filed by Dr Robert Galea on behalf of ProCare Ltd (C71386), (hereinafter referred to as the appellant) on the 18th December 2020;

Having also noted the letter of reply filed by Dr Marco Woods on behalf of Central Procurement and Supplies Unit on the 21st December 2020;

Having taken cognisance and evaluated all the acts and documentation filed, as well as the submissions made by the legal representatives of the parties;

Having heard and evaluated the testimony of the witness Mr Robert Decelis who is an Allied Health Practitioner and is an Evaluator on this tender;

Having noted and evaluated the minutes of the Board sitting of the 8th April 2021 and 18th May 2021 hereunder-reproduced;

Minutes

Case 1560 – CT 2320/2020 – Tender for the Supply of Enzyme Immuno Assay/Chemilumnescent Test Kits with Equipment on Loan

Request for Remedy before Closing Date of Tender

The tender was published on the 12th November 2020 and the closing date was the 7th January 2021. The value of the tender was € 1,141,241 (excluding VAT).

On the 18th December 2020 Procure Ltd filed a request for remedy before the close of date of tender against the Central Procurement and Supplies Unit as the Contracting Authority objecting that the terms of the tender were restrictive to competition.

A deposit of € 5,706.21 was paid.

On 8th April 2021 the Public Contracts Review Board (PCRB) composed of Dr Ian Spiteri Bailey 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:

Appellant – Procure Ltd

Dr Robert Galea
Mr Pierre Calleja

Legal Representative
Representative

Contracting Authority – Central Procurement and Supplies Unit

Dr Marco Woods	Legal Representative
Mr Charles Borg	Representative
Mr Robert Decelis	Representative

Interested Party – Vivian Corporation

Mr Reuben Fava	Representative
Ms Denise Borg Manche	Representative

Dr Ian Spiteri Bailey 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 in line with Article 89 of the Public Procurement Regulations (LN 174.04). He then invited submissions.

Dr Robert Galea Legal Representative for Procare Ltd requested that the Contracting Authority should make their submissions first as this might affect appellant's claim.

Dr Marco Woods Legal Representative for the Central Procurement and Supplies Unit said that on behalf of his clients he would be asking the Board to agree to the cancellation of the tender due to a change in the required specifications. A witness will be asked to explain the reasons in full.

Mr Robert Decelis (337280M) called as a witness by the Contracting Authority testified on oath that he is an Allied Health Practitioner by profession and was responsible for preparing the tender. This tender was prepared in June 2020 when there was far less Covid pandemic testing. Since then many companies have been offering this service and the Authority felt that they might as well include testing for Covid in this tender – this will prevent the need to issue direct orders. The tender stipulated a throughput of 200 tests per hour and this cannot be changed at this stage. However a fresh tender could be issued reducing the throughput to 180 tests per hour. This will increase competition and include antibodies tests.

Dr Woods stated that cancellation of the tender was less complicated than changes to the technical specifications of the present tender. The Authority was entitled to specify exactly what it required to meet its needs.

In reply to a question by Dr Galea it was confirmed that the throughput range will be decreased from 200 to 180 tests per hour.

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

End of Minutes

SECOND HEARING

On the 18th May 2021 the Public Contracts Review Board (PCRB) composed of Mr Kenneth Swain as Chairman, Mr Lawrence Ancilleri and Mr Carmel Esposito as members convened a public virtual hearing to discuss this case further.

The attendance for this public hearing was as follows:

Appellant – Procure Ltd

Dr Robert Galea	Legal Representative
Mr Pierre Calleja	Representative

Contracting Authority – Central Procurement and Supplies Unit

Dr Marco Woods	Legal Representative
Mr Charles Borg	Chairperson Evaluation Board
Mr Robert Decelis	Member Evaluation Board

Interested Party – Vivian Corporation

Dr Clement Mifsud Bonnici	Legal Representative
Ms Daniela Galea	Representative
Mr Reuben Fava	Representative
Ms Denise Borg Manche	Representative

Mr Kenneth Swain 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 in line with Article 89 of the Public Procurement Regulations. He introduced himself and went on to explain that this second hearing was necessary due to a change of Chairman since the first hearing. He requested the parties to confirm the submissions made at the first hearing to enable the Board to come to a decision on this Case.

Dr Galea on behalf of the Appellant confirmed Appellant’s agreement emphasising that at the first hearing it was agreed that in the re-issued tender the throughput range will be decreased from 200 to 180 tests per hour and also requested that the deposit paid will be refunded.

Dr Woods on behalf of the Contracting Authority re-iterated that cancellation of the tender was the preferred option for the Authority and confirmed the proposed reduction in the throughput range.

Dr Mifsud Bonnici on behalf of the Vivian Corporation said that no previous submission had been made as the case was not discussed in detail since the Authority had proposed cancellation and re-issue of the tender – it was merely a decision taken by the CPSU.

Dr Woods pointed out that the cancellation was not only discussed but a witness had given reasons why it was necessary to cancel the tender.

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

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sittings of the 8th April 2021 and 18th May 2021.

Having noted the objection filed by ProCare Ltd (hereinafter referred to as the Appellant) on 18th December 2020, refers to the request for remedy before closing date of tender with regard to the tender of reference CT 2320/2020 listed as case No. 1560 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Robert Galea

Appearing for the Contracting Authority: Dr Marco Woods

Appearing for Interested Party: Mr Reuben Fava & Ms Denise Borg Manche

Dr Clement Mifsud Bonnici on the Second Hearing

Whereby, the Appellant contends that:

- a) The requirements as laid down in the tender inviting prospective bidders to make their offers namely, the requirement in the technical specifications requiring that *“All test kits must be adapted to run on a newly fully automated random access analyzer with a minimum throughput of 200 tests per hour and stat processing”*
- b) A similar tender issued by the same Contracting Authority, CT 2075/2015 *Tender for the Supply of Enzyme Immuno Assay/ Chemilumnescent Test Kits with Equipment on Loan* required a throughput of 80 tests per hour and stat processing
- c) The appellant feels aggrieved by this limitation (a), in that there is no objective reason therefore and thus it is discriminatory in nature and hinders fair and free competition.

This Board also noted the Contracting Authority’s Letter of Reply dated 21st December 2020 and its verbal submission during the virtual hearings held on 8th April 2021 and 18th May 2021, in that:

- a) The tender in question was published to cater specifically for the infectious diseases vis-à-vis patients being admitted to Mater Dei Hospital for treatment.
- b) Mater Dei needs to be adequately equipped with machinery / equipment which is capable of handling requests which come in spikes

- c) The hospital cannot find itself in a situation where the analyzer in question would be worked to its absolute limit in the eventuality that spiked requests are made
- d) Such allegation that the technical specification requiring that “*All test kits must be adapted to run on a newly fully automated random access analyzer with a minimum throughput of 200 test per hour and stat processing*”, is limiting competition is completely unfounded both in fact and at law
- e) Appellant’s reference to a Tender which was published five years ago is irrelevant and ought to be dismissed by the Board.
- f) The Contracting Authority wishes to cancel the tender and to re-issue a new one due to the reasons given by the witness Mr Robert Decelis, with a throughput of 180 tests per hour and stat processing and including Covid-19 antibodies test. This to ensure increased competition.

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 witness duly summoned, will consider Appellant’s grievances, as follows:

- The Board opines that CT 2075/2015 *Tender for the Supply of Enzyme Immuno Assay/Chemilumnescent Test Kits with Equipment on Loan* should have no bearing on future tenders issued by the Contracting Authority.

The Board,

Having evaluated all the above and based on the above considerations, concludes and decides:

- a) That the tender be cancelled. This to allow the Contracting Authority to re-issue a fresh tender with revised throughput amount and for the inclusion the further anti-bodies test as mentioned by the witness and
- b) In view of the above considerations, the Board furthermore orders that the deposit paid by the appellant upon filing of this letter of objection should be refunded.

Mr Kenneth Swain
Chairman

Mr Lawrence Ancilleri
Member

Mr Carmel Esposito
Member

24th May 2021