

# **PUBLIC CONTRACTS REVIEW BOARD**

## **Case 1573 – CT 2254/2020 – Tender for the Supply of 0.9 Percent Sodium Chloride x 50ml IV Infusion.**

**8<sup>th</sup> July 2021**

The Board,

Having noted the letter of objection filed by Mr Matthew Gatt and Ms Samantha Cusens acting for and on behalf of Medical Logistics Ltd, (hereinafter referred to as the appellant) filed on the 15<sup>th</sup> March 2021;

Having also noted the letter of reply filed by Dr Marco Woods acting for and on behalf of Central Procurement and Supplies Unit filed on the 24<sup>th</sup> March 2021;

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 noted and evaluated the minutes of the Board sittings of the 1<sup>st</sup> June 2021 and 6<sup>th</sup> July 2021 hereunder reproduced.

### **Minutes**

#### **Case 1573– CT 2254/2020. Tender for the Supply of 0.9% Sodium Chloride x 50ML IV Infusion**

The tender was published on the 6<sup>th</sup> January 2021 and the closing date was the 16<sup>th</sup> February 2021. The value of the tender was € 637,080.

On the 15<sup>th</sup> March 2021 Medical Logistics Ltd filed an appeal against the Central Procurement and Supplies Unit as the Contracting Authority objecting to their disqualification on the grounds that their offer was not technically compliant.

A deposit of € 3,365 was paid.

There were four (4) bidders.

On 1<sup>st</sup> June 2021 the Public Contracts Review Board (PCRB) composed of Mr Kenneth Swain as Chairman, Dr Charles Cassar and Mr Richard Matrenza as members convened a public virtual hearing to discuss the objections.

The attendance for this public hearing was as follows:

#### **Appellant – Medical Logistics Ltd**

Dr Karl Tanti  
Mr Matthew Gatt

Legal Representative  
Representative

## **Contracting Authority – Central Procurement and Supplies Unit (CPSU)**

Dr Marco Woods	Legal Representative
Dr Alison Anastasi	Representative
Ms Denise Dingli	Representative
Ms Deborah Magri	Representative

## **Preferred Bidder – Drugsales Ltd**

Dr Douglas Aquilina	Legal Representative
Ms Giulia Attard Montalto	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 then asked Appellant's representative to make his submissions.

Dr Marco Woods Legal Representative for CPSU said that there are doubts arising out of the process followed in the evaluation of the product. To avoid problems he was requesting the Board to authorise a re-evaluation of the tender by a different committee.

Dr Douglas Aquilina Legal Representative for Drugsales Ltd said that this request was highly irregular as it has not been notified to them.

Dr Karl Tanti Legal Representative for Medical Logistics Ltd said that a member of the evaluation committee had sent an email to the manufacturers of the product offered by his clients seeking information regarding the conformity of the product.

Dr Woods said that he had nothing further to add to his previous statement whilst Dr Aquilina stated that no one has the right to change the Product Specification Number.

The Chairman requested a recess to enable the Board to consider this fresh development of which they were not aware.

After the recess the Chairman said that the Board wished to see a copy of the email merely to have proof of its existence. He deprecated the action which this individual had taken and said that under the circumstances the Board had no alternative except to defer the case.

Dr Tanti said the admission by the CPSU puts the contents of their letter of reply in doubt but he reserves his right to deal with the merits of the case later.

Dr Aquilina said that it was necessary to follow the trend of further correspondence if there was any.

Dr Woods assured the Board that the CPSU were investigating the reasons for this episode.

The Chairman thanked the parties for their participation and declared the meeting deferred.

End of Minutes

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## **SECOND HEARING**

On 6<sup>th</sup> July 2021 the Public Contracts Review Board (PCRB) composed of Mr Kenneth Swain as Chairman, Dr Charles Cassar and Mr Richard Matrenza as members convened a public virtual hearing to discuss this case further.

The attendance for this public hearing was as follows:

### **Appellant – Medical Logistics Ltd**

Dr Karl Tanti	Legal Representative
Mr Matthew Gatt	Representative
Ms Samantha Cusens	Representative

### **Contracting Authority – Central Procurement and Supplies Unit (CPSU)**

Dr Marco Woods	Legal Representative
Ms Denise Dingli	Representative
Ms Deborah Magri	Representative
Ms Kathryn Galea	Representative

### **Preferred Bidder – Drugsales Ltd**

Dr Douglas Aquilina	Legal Representative
Ms Giulia Attard Montalto	Representative
Mr Ivan Corbetta	Representative
Mr Davide Pio	Representative

### **Department of Contracts**

Mr Nicholas Aquilina	Representative
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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 then noted that this hearing has been called to hear submissions regarding the email sent by a member of the evaluation committee to the manufacturers of the product offered by one of the bidders.

Dr Karl Tanti stated that the PCRB requested written submissions with regard to the e-mail. The point to be made is that the sending of this document was unprecedented and highly irregular. Both Appellant and the Contracting Authority are in agreement that this tender should be re-evaluated. There may be a number of arguments to be put at a later stage but prior to reaching that step there should be only one way forward.

Dr Marco Woods said that on the part of the Authority there were no further submissions to be made. The position of the Authority has not changed and re-evaluation is in the best interest of the procurement process.

Dr Douglas Aquilina on behalf of the preferred bidder said that re-evaluation at this stage should not be an issue for consideration. The individual views of evaluators do not matter in deciding a tender

award but what matters is the overall decision. The procedure was carried out correctly and a decision taken and the later e-mail should not affect the decision reached.

Dr Woods said that the main issue is that the action taken by an individual was highly irregular and a 'first'. It would be prudent to re-evaluate.

Dr Aquilina pointed out that the e-mail incident occurred after the evaluation had been completed and there was no prior communication.

Dr Tanti said that none of the parties concerned was aware of the incident except in the last hours before the hearing and no one was privy to any information. The procurement process demands transparency and it is in the best interest of all concerned to have a re-evaluation since in any case all remedies against future decisions will still be available.

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

End of Minutes

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**Hereby resolves:**

The Board refers to the minutes of the Board sittings of the 1<sup>st</sup> June 2021 and 6<sup>th</sup> July 2021.

Having noted the objection filed by Medical Logistics Ltd (hereinafter referred to as the Appellant) on 15<sup>th</sup> March 2021, refers to the claims made by the same Appellant with regard to the tender of reference CT 2254/2020 listed as case No. 1573 in the records of the Public Contracts Review Board.

Appearing for the Appellant:	Dr Karl Tanti
Appearing for the Contracting Authority:	Dr Marco Woods
Appearing for the Preferred Bidder:	Dr Douglas Aquilina

The Board notes that:

1. An email communication was sent by a member of the evaluation committee, Dr Kathryn Galea, directly to the supplier of the Appellant company, on Friday 28<sup>th</sup> May, being 3 days prior to the first hearing of this case.
2. This only became known to all involved parties at the initial stages of the first hearing of PCRB Case 1573, by a declaration made by the legal representative of the Contracting Authority.
3. After the deferral of the first hearing, Dr Kathryn Galea submitted her written statement to the Board on 10<sup>th</sup> June 2021, whereby she confirmed that:
  - a. *“..... was for the sole purpose to have further evidence to support my evaluation for the PCRB which was to take place on Tuesday 1<sup>st</sup> June against Medical Logistics Ltd.”*
  - b. *“I still stand with my evaluation decision and at no point I had any doubts. My sole purpose for the communication with Fresenius Kabi Italy as to get an image and further evidence what the product on offer by Medical Logistics Ltd. as PE vials is not as per published technical specifications.”*
4. Dr Karl Tanti’s (acting for and on behalf of the Appellant company) reply followed on the 18<sup>th</sup> June 2021 whereby it was stated:
  - a. *“it must be said that this situation is, quite possibly, unprecedented. A member of the Evaluating Committee, which had earlier declared my client’s product as non-compliant, sought clarifications on the same product on the eve of the hearing in which she was summoned to testify.”*
  - b. *“As the Chairman of the Board so rightly pointed out at the hearing, this practice is extremely unprofessional and unethical. The Evaluation Committee, or any of its members, should not be engaging in any correspondence with any of the interested parties in a tender which is still under review.”*
  - c. *“It is unfortunate that the Evaluation Committee chooses to obtain additional information on the product after being declared as non-compliant and through this means of communication rather than requesting a sample or, at least, a clarification, from the bidders directly during the evaluation process.”*

After having noted all the above, the Board feels obliged to make it clear that this type of behaviour is certainly not acceptable and is totally unprofessional and unethical. The members of the Evaluation Committees should be aware of the rights and **obligations** when evaluating a prospective tender award. It must be said that this tender is being financed through public funds, hence total transparency is a must and is a concept that must not be taken lightly. Unquestionable impartiality must be shown both in fact and in appearance. This is a foundation principle for both ethics and independence.

**In conclusion this Board;**

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

- a) To cancel the Letter of Acceptance dated 5<sup>th</sup> March 2021 sent to “Drugsales Ltd”;
- b) To cancel the Letters of Rejection dated 5<sup>th</sup> March 2021;
- c) To order the contracting authority to re-evaluate all the bids received in the tender through a newly composed Evaluation Committee composed of members which were not involved in the original Evaluation Committee. Moreover, this newly appointed Evaluation Committee is to disregard the emails / communications sent by Dr Katryn Galea to the supplier of the Appellant company;
- d) Directs that the deposit paid by Appellant should be reimbursed.

**Mr Kenneth Swain**  
Chairman

**Dr Charles Cassar**  
Member

**Mr Richard Matrenza**  
Member