

PUBLIC CONTRACTS REVIEW BOARD

Case 1637 – CT 2032 / 2020 - Tender for the Supply Polymer I/A Tips for Irrigation / Aspiration Handpiece

11th October 2021

The Board,

Having noted the letter of objection filed by Dr Stefan Camilleri on behalf of Camilleri Cassar Advocates acting for and on behalf of Class Medical Ltd, (hereinafter referred to as the appellant) filed on the 19th July 2021;

Having also noted the letter of reply filed by Dr Marco Woods acting for the Central Procurement and Supplies Unit (hereinafter referred to as the Contracting Authority) filed on the 28th July 2021;

Having also noted the letter of reply filed by Dr Robert Galea acting for ProCare Ltd (hereinafter referred to as the Preferred Bidder) filed on the 2nd August 2021;

Having heard and evaluated the testimony of the witness Ms Rita Zammit (Chairperson of the Evaluation Committee) as summoned by Dr Alexia Farrugia Zrinzo acting for Central Procurement and Supplies Unit.

Having heard and evaluated the testimony of the witness Mr Benedict Vella Briffa (Consultant Ophthalmologist at Mater Dei Hospital and Member of the Evaluation Committee) as summoned by Dr Alexia Farrugia Zrinzo acting for Central Procurement and Supplies Unit.

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

Having noted and evaluated the minutes of the Board sitting of the 7th October 2021 hereunder-reproduced;

Minutes

Case 1637– CT2032/2020. Tender for the Supply Polymer I/A Tips for Irrigation/Aspiration Handpiece

The tender was published on the 26th February 2021 and the closing date was the 3rd March 2021. The value of the tender excluding VAT was € 114,600

On the 19th July 2021 Class Medical Ltd filed an appeal against the Central Procurement and Supplies Unit as the Contracting Authority objecting to their disqualification on the grounds that their bid was deemed not to be the cheapest.

A deposit of € 573 was paid.

There were two (2) bidders.

On 7th October 2021 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Dr Charles Cassar and Dr Vincent Micallef as members convened a public virtual hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellant – Class Medical Ltd

Dr Stefan Camilleri	Legal Representative
Dr Max Ebeyer	Legal Representative
Mr Hubert Montesin	Representative

Contracting Authority – Central Procurement and Supplies Unit

Dr Alexia Farrugia Zrinzo	Legal Representative
Ms Rita Zammit	Chairperson Evaluation Committee
Mr Benedict Vella Briffa	Member Evaluation Committee
Mr Juan Zarb Cousin	Member Evaluation Committee

Preferred Bidder – ProCare Ltd

Dr Robert Galea	Legal Representative
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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 invited submissions.

Dr Max Ebeyer Legal Representative for Class Medical Ltd started by detailing the properties of the product and its use and the grievances raised regarding the difference between polymer and silicone tips. Although in general terms silicone is a polymer it does not meet the scope of the tender since in healthcare the terms they have different properties. This is backed by extensive research documents where the two products are considered as different. The chemical structure is also different with polymer being smoother than silicone and therefore it is less abrasive in treating the eye. Reference was made to CJEU Case 413/17 which dealt with the need for proportionality in the interpretation of the tender objectives in public health matters.

Dr Ebeyer dealt with the chemical properties of polymer and silicone and their compatibility with their use in the present equipment. Manufacturers confirmed the suitability of the product offered and confirmed that it could be used with the Alcon infiniti system. This was not the case with the product offered by the preferred bidder.

Dr Alexia Farrugia Zrinzo Legal Representative for the Central Procurement and Supplies Unit said that the decision by the Contracting Authority was based on the bid not being the cheapest and not on the

product specification. Silicone is within the ambit of polymer and it was essential that the product offered had to tie in with the existing system.

Dr Robert Galea Legal Representative for ProCare Ltd said that there are two important points to note – the statement by Appellant that silicone is a polymer and that not all polymers are silicone. The tender asked for polymer without excluding silicone. The claim that the product was compatible is misleading as no proof was supplied that it has been approved. No clarification or remedy was sought from the Authority before bidding to find out if the product was acceptable nor was there any indication in the documents presented as to which device in use was described in the offer.

Ms Rita Zammit (276864M) called as a witness by the Contracting Authority testified on oath that she was the Chairperson of the Evaluation Committee and confirmed that the product specifications were as specified in Clause 1.1 namely polymer A/I tips for Irrigation/Aspiration

Questioned by Dr Stefan Camilleri Legal Representative for Class Medical Ltd, witness stated that she was a medical technician and was not involved in the tender documentation. Product decisions are taken by technical people knowledgeable on the product.

In reply to questions from Dr Galea witness confirmed that samples of the product had been requested and submitted to a technical person for evaluation and that the evaluators relied on the technical feedback for their decisions.

Mr Benedict Vella Briffa (454183M) called as a witness by the Contracting Authority testified on oath that he is a Consultant Ophthalmologist at Mater Dei Hospital and uses the product in question regularly. Witness stated that the product offered in the awarded bid met the specifications in Clause 1.1 of the tender and confirmed that tests had been carried out to ensure compatibility with existing equipment.

Questioned by Dr Camilleri on the products available on the market, witness stated that there were AI polymer tips and AI silicone tips and the distinction was between soft tips and hard tips. He was not involved in the drafting of the tender but was aware of and followed the specifications. Other consultants were made aware that samples were available for testing but witness did not receive any feedback. Before the issue of the tender witness used polymer AI tips – he had tested the product now offered and checked the brochure. The equipment manual only approves certain products with a practical analysis of the product but no analysis of machine competence.

Questioned by Dr Galea, Mr Vella Briffa said that the existing product was out of stock so an emergency request had been put in and further supplies of silicon AI tips obtained and no problems have been encountered.

End of testimonies.

Dr Camilleri said that the appeal was on the interpretation of the word polymer and its use in the medical market. If the tender had meant to include silicon it would have said so – it is a fact that the use of polymer is emphasised with the use in capital letter of 'P' in the word in the tender. The present equipment works efficiently only with its own products and this is confirmed by extensive research and there would be a serious risk of damage otherwise.

Dr Galea stated that the Appellant was the only one making a distinction between polymer and silicone. The only distinction the expert witness made was between soft or hard and therefore the tender requirements were met. The manufacturers report is faulty in that it disparaged all other products and no proof has been put forward that the product is incompatible with the existing equipment. In fact, the expert witness confirmed that the product in question is currently in use with no difficulties and with no danger to patients. The documents presented by Appellant are contradictory in that in Doc C (page 16) it states that the product is compatible with the Alcon system whereas in document E Alcon state that 'Use of non-approved accessories cannot be permitted'.

Dr Farrugia Zrinzo said that the role of the Evaluation Committee is to ensure that the tender specifications are respected and to decide which the cheapest compliant offer is. Expert witness said there was no distinction between polymer and silicone tips and confirmed that there was compatibility with existing equipment; hence the tender specifications were met. Appellant had not sought any remedies before submitting bid.

There being no further submissions the Chairman thanked the parties and declared the hearing closed.

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 7th October 2021.

Having noted the objection filed by Class Medical Ltd (hereinafter referred to as the Appellant) on 19th July 2021, refers to the claims made by the same Appellant with regards to the tender of reference CT 2032/2020 as case No. 1637 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Stefan Camilleri & Dr Max Ebejer

Appearing for the Contracting Authority: Dr Alexia Farrugia Zrinzo

Appearing for the Preferred Bidder: Dr Robert Galea

Whereby, the Appellant contends that:

- a) ***The I/A tips to be made of Polymer*** - The product offered by ProCare is manufactured by Micro Surgical Technology INC (MST). MST have no I/A tips manufactured out of Polymer, but only out of silicone which makes them non-complaint with the relative technical specifications. Consequently, once the technical specifications clearly state that I/A tips need to be made of polymer it should follow that the product offered by ProCare did not meet the technical specifications.

- b) **The I/A tips to be compatible with Alcon infinity machine** - Apart from the lack of conformity with the technical specification referring to material used to manufacture tips, the product offered by ProCare doesn't conform to the technical criteria in that it has not been validated for use with Alcon infinity machine. From research it should have transpired that the product offered by ProCare does not in effect satisfy the technical criteria and hence should have been discarded. In view of the fact that the second cheapest offer after that of ProCare was that of the Appellant, even since they were the only two companies who participated in the relative tender, it should follow that the tender should be awarded to Class in that the product offered by Class does in effect satisfy all the conditions including that of the technical criteria.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 28th July 2021 and its verbal submission during the virtual hearing held on 7th October 2021, in that:

- a) **The I/A tips to be made of Polymer** - CPSU contend that the objectors are wrong in claiming that the product of the preferred bidder is not compliant as it cannot be classified as a polymer. The Product of the preferred bidder is made from silicone. If one were to do basic research on silicone, it would transpire that silicone is classified as an inorganic synthetic polymer. The technical specifications do not specify that the product supplied needs to be specific type of polymer, but on the contrary, it merely dictates that the product needs to be Disposable Polymer Tip. Consequently, the product in question as offered by the preferred bidder satisfied the first technical specification due to the fact that the product is a polymer in nature.
- b) **The I/A tips to be compatible with Alcon infinity machine** - CPSU further contend that the objectors are wrong in claiming that the product offered by the preferred bidder is not compatible with the Alcon Infinity Machine. On the contrary, CPSU contend that if one were to review the MST Brochure as submitted by ProCare Ltd, on page 16, the Brochure clearly stipulates that the product is "compatible with any Phaco System". Furthermore, CPSU contend that samples of the preferred bidder's product were requested, received, and consequently tested with the Alcon Infinity Machine. When tested, it resulted that the product of the preferred bidder worked properly with the Alcon Infinity Machine without any issues. Consequently, since the product offered by the preferred bidders was found to be compatible with the Alcon Infinity Machine as requested in the technical specifications, the product satisfied the relevant technical specification.

This Board also noted the Preferred Bidder's Reasoned Letter of Reply filed on 2nd August 2021 and its verbal submission during the virtual hearing held on 7th October 2021, in that:

- a) **The I/A tips to be made of Polymer -** What the appellant fails to appreciate, is that the term 'Polymer' defines a large subset of materials, which encapsulates, inter alia, silicone. In other words, silicone is indeed classified as polymer, and thus, a device made of silicone is fully compliant with the relative criterion.
- b) **The I/A tips to be compatible with Alcon infinity machine -** The preferred bidder's offer was duly evaluated by the Evaluation committee, which duly considered all documentation submitted by the Respondent, including a confirmation that the device in question is compatible with a device as in the one with which the Contracting Authority intends to use the same device. Furthermore, this was also substantiated in fact, since the preferred bidder provided samples of the proposed devices, by means of which factual compatibility was indeed ensured by the Contracting Authority.

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 witnesses duly summoned, will consider Appellant's grievances, as follows:

- a) **The I/A tips to be made of Polymer –** Reference is made to the following:
 - i. It was not contested that a silicone is a polymer whilst not all polymers are silicone.
 - ii. Hence the issue at hand is whether a 'Silicone I/A tip' would meet the tender dossier specification as listed in paragraph 1.1. of Section 3 (page 17).
 - iii. The testimony under oath of Mr Benedict Vella Briffa (Consultant Ophthalmologist at Mater Dei Hospital and Member of the Evaluation Committee) whereby he stated that the distinction which surgeons make is not whether the I/A tip is 'polymer' or 'silicone' but the distinction to be made is whether the tip is soft or hard.
 - iv. It is therefore, inherent, that since 'Silicone' is a type of polymer, than Silicone I/A tips would fall within the parameters as issued under Section 3 of the Tender Dossier.

This Board does not uphold Appellant's first grievance.

b) **The I/A tips to be compatible with Alcon infinity machine** – Reference is made to the following:

- i. A 'Declaration Letter' issued by Alcon's Product Support Engineer, dated 6th August 2021, whereby it was stated "*The Infinity Operator's Manual (OM), catalog number 8065750594, contains a list of Alcon-approved, accessories. Use of non-approved accessories cannot be permitted.*"
- ii. The MST 'Technical Brochure', manufacturers of the product tendered for by the Preferred Bidder, whereby on page 16 states "*Allegro is compatible with any phaco system....*"
- iii. Due to the inconsistencies in the above points, this Board opines that the Evaluation Committee acted within its remits when it requested samples of the eventual Preferred Bidder to be submitted.
- iv. The testimony under oath of Mr Benedict Vella Briffa (Consultant Ophthalmologist at Mater Dei Hospital and Member of the Evaluation Committee) whereby he confirmed that tests had been carried out to ensure compatibility of the samples with the existing equipment. Upon further questioning by Dr Galea, the witness also confirmed that due to stock shortages, an emergency request had been put in and hence further utilisation of this product was done. No problems have been encountered.

Therefore, this Board opines that the Evaluation Committee acted well within its remit and technical expertise in order to ascertain the technical compliance of the bids it had under its responsibility to evaluate. Section 16.3 of the General Rules Governing Tenders is unequivocal when it states "*Wherever applicable, tenderers may be requested to submit samples so that the Evaluation Committee will **corroborate** the technical compliance of the offers received.*" (Bold & underline emphasis added)

This Board does not uphold Appellant's second grievance.

The Board,

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

- a) Does not uphold Appellant's Letter of Objection and contentions,
- b) Upholds the Contracting Authority's decision in the recommendation for the award of the tender,
- c) Directs that the deposit paid by Appellant not to be reimbursed.

Mr Kenneth Swain
Chairman

Dr Charles Cassar
Member

Dr Vincent Micallef
Member