

PUBLIC CONTRACTS REVIEW BOARD

Case 1677 – RfQ 009-6055/21 CPSU 158/17 – Request for Quotations for the Supplies of Oxygen Concentrators on Loan for 12 Months including all consumables

31st January 2022

The Board,

Having noted the letter of objection filed by Dr Clement Mifsud Bonnici and Dr Calvin Calleja on behalf of Ganado Advocates acting for and on behalf of OK Medical Limited, (hereinafter referred to as the appellant) filed on the 24th November 2021;

Having also noted the letter of reply filed by Dr Leon Camilleri acting for the Central Procurement and Supplies Unit (hereinafter referred to as the Contracting Authority) filed on the 3rd December 2021;

Having heard and evaluated the testimony of the witness Mr Peter Pace (Board Secretary to the Evaluation Committee) as summoned by Dr Leon Camilleri acting for the Central Procurement and Supplies Unit;

Having heard and evaluated the testimony of the witness Ing Patrick Borg Cardona (Chairman of the Evaluation Committee) as summoned by Dr Leon Camilleri acting for the Central Procurement and Supplies Unit;

Having heard and evaluated the testimony of the witness Mr Ivan Debono (Member of the Evaluation Committee) as summoned by Dr Leon Camilleri acting for the 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 20th January 2022 hereunder-reproduced;

Minutes

Case 1677 – RfQ 009-6055/21 – Request for the Supplies of Oxygen Concentrators on Loan

The Request for Quotations was issued on the 10th August 2021 and the closing date was the 24th August extended to 7th September 2021.

The estimated value of the call, excluding VAT, was € 158,400.

On the 24th November 2021 OK Medical Ltd filed an appeal against the Central Procurement and Supplies Unit as the Contracting Authority objecting to the decision rejecting both offers one on grounds of not being the cheapest offer and the second because it was not compliant.

A deposit of € 792 was paid.

There were three (3) bidders.

On the 20th January 2022 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a public virtual hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – OK Medical Ltd

Dr Clement Mifsud Bonnici	Legal Representative
Dr Calvin Calleja	Legal Representative
Mr Andrew Meli	Representative

Contracting Authority – Central Procurement and Supplies Unit

Dr Leon Camilleri	Legal Representative
Dr Alexia Farrugia Zrinzo	Legal Representative
Engineer Patrick Borg Cardona	Chairperson Evaluation Committee
Mr Peter Pace	Secretary Evaluation Committee
Mr Ivan Debono	Member Evaluation Committee

Preferred Bidder – Sidroc Services

Mr George Bonello	Representative
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Participating Bidder – Cherubino Ltd

Dr Francis Cherubino	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 Clement Mifsud Bonnici Legal Representative for OK Medical Ltd stated that the point of this appeal was the non-compliance on two factors of the product offered by the preferred bidder. He requested confirmation from the Contracting Authority regarding the documents submitted with the bid on the sound level of the units offered. The manufacturers website indicated that the sound level was 58 decibels. The Authority was claiming that this was a negotiated procedure when the Request for Quotations (RfQ) states that it was issued under Regulation 103 which legislation referred to direct orders.

The procedure was of a competitive nature but very detailed in the general and technical specifications and included further clarifications – in substance this was a competitive tender with various bidders participating. The first rejection letter stated that Appellant was not technically compliant while the second introduced the price element. Eventually the correct details were provided. According to the Authority the 10 litre oxygen concentrators was not compliant on two aspects. On this point the CPSU is contradictory and naive as none of the bidders was complaint on the flow rate and so, in line with proportionality, the CPSU accepted all offers.

Dr Leon Camilleri Legal Representative for the CPSU said that on a procedural point he wished to confirm that his was a negotiated procedure without prior publication and therefore there was no need to proceed with such detailed transparency as the Authority had more flexibility under this procedure. As much as possible the Evaluation Committee (EC) still followed the general procurement principles.

The sound levels of the unit conforms with the tender requirements and as regard the flow rate all bids offered the same range. The whole point of the RfQ was to ensure that the service was not interrupted, so the cheapest compliant offer was accepted whilst following the correct steps.

Dr Mifsud Bonnici said that the Authority still has to explain the basis for this negotiated procedure and if it had been approved by the Director of Contracts (DoC). The tender states that the RfQ was issued under Regulation 103 of the PPRs and this point needs clarifying.

Mr Peter Pace (482868M) called as a witness by the Contracting Authority stated that he was the Secretary of the EC and that he had requested approval for the RfQ from the DoC. Under oath he testified that a tender issued in late 2020/early 2021 had to be cancelled and so this extension of the service was necessary. The DoC approved the negotiated procedure for twelve months as a stop gap until a new tender was awarded. There were issues in preparing the new tender since as a necessity of the Covid pandemic the Authority was overstocked with this type of equipment.

This RfQ was issued under regulation 153 (c) of the PPRs and was done in a transparent basis – eight previous suppliers of medical equipment were contacted with three or four indicating that they were willing to participate. A direct order could not be used in this case as the consideration was above the financial threshold. Witness confirmed that the Sidroc document in the tender was the same as that submitted to the PCRB and was clarified in regard to the decibel level.

The witness further stated that there were two types of concentrators offering different range of flows rates per minute (LpM) ranging from low to 5 and 2 to 10. The specifications for the smaller unit were considered too tight as everyone in the market was offering a minimum of 2 LpM. As the service needed not to be interrupted the technical people accepted that a flow

rate of 2 LpM was fine for the larger units. The ranges offered in the quotations from bidders were all from 2 LpM upwards and this was accepted.

In reply to questions from Dr Mifsud Bonnici witness said that the DoC had sanctioned the RfQ under regulation 153 (c) on the 10th August 2021. On the Sidroc offer clarification was sought to ascertain that the sound level was in conformity with the specifications since in the original submission no information was given on this point. Witness could not say whether clarifications and or rectifications were allowed in the RfQ document but confirmed that the only clarification/rectification sought in this tender was from Sidroc.

Engineer Patrick Borg Cardona (323669M) Chairperson of the Evaluation Committee called as a witness by the Contracting Authority confirmed on oath that the procurement process in this case was a negotiated procedure. He stated that the Sidroc offer did not indicate the sound level on the 10LpM model and since the tender allowed for clarifications, being less stringent than a normal tender, a clarification was sought. Regarding the flow levels a technical person indicated that the tender requirements were erroneous as they requested too low a flow rate and no offer was within the requested range; it was therefore clear that the problem was with the tender specifications not the compliance of the product offered.

Questioned by Dr Mifsud Bonnici witness said that the EC agreed that the technical specifications were erroneous. Further, he stated that he had not seen the clarifications referred to. He was not able to say if the present tender had the option to ask for clarifications but he assumed that it was the case as all tenders allowed it and had been confirmed by the Secretary of the EC in his testimony. Witness stated that he was not aware that request for quotations come under Note 3.

Mr Ivan Debono (75170M) called as a witness by the Contracting Authority testified on oath that he is a Chemist with 25 years' service in the Health Department. He stated that when he saw the specifications of the tender he advised that, in future, flow rates should better consider patients' state of health as the flow rates proposed where not suitable as they were too low for the purpose that they were normally required.

In reply to a question from Dr Mifsud Bonnici, witness said that the flow rates of the 10litre unit could certainly be improved.

This was the conclusion of the testimonies.

Dr Mifsud Bonnici stated that from what had been heard he was convinced that this was a negotiated procedure and one thus had to consider what flexibility that allowed. Regulation 150 *et sequitur* explains the procedure to be followed and the only allowance made is that prior publication is not necessary. When the Authority is dealing with not one but various economic operators it is still bound by the usual regulations of transparency, equal treatment and self-limitation and the general principles have to be upheld and not ignored.

Reference was made to a 2021 case in the UK High Court – Good Law Project Ltd vs Secretary of State for Health and Social Care (paras 332 to 350) where it was held that in a negotiated procedure the principles of equal treatment, transparency etc still apply even in procurement cases of extreme urgency. The Court acknowledged that if dealing with more than one person then procurement regulations apply. This decision is very apposite as British law here is a perfect photocopy of the EU Directive.

The CPSU position is contradictory, continued Dr Mifsud Bonnici, as in this Case they were picking and choosing which principles applied or were followed – proportionality applied but transparency and self-limitation were ignored. There is no option as to which principles to follow or to ignore. In the RfQ in three instances the flow rate was clearly specified and it follows that the Authority was bound by that; it also stated that the EC could not do what they claim to have done regarding the right to seek alternative options but only in one area but not in others. The Authority is barred by self-limitation from ignoring the technical specifications. Note 3 does not allow what witnesses under oath claim the Authority did and the offer as submitted was not compliant and should have been rejected. Instead the Authority, totally against the principle of self-limitation, issued a rectification to save the Sidroc offer thus changing the specifications half way through the evaluation process. CJEU Cases 331/04 and 532/06 emphasise that it is a cardinal principle that terms cannot be changed half way through a tender.

Dr Camilleri said there was no doubt that this was a negotiated procedure and this point has not been contested. The Authority could easily have just dealt with one economic operator, but despite the urgency of the matter still tried to follow the transparency rules to obtain the best price. The Authority did not have to follow all the detailed requirements of a tender whilst decisions in a British Court should not bind Maltese Courts. Where possible procurement principles were followed and everything was clearly explained. Since all bidders offered the same flow rates they were all treated equally. The EC did not request an amendment but requested literature which comes under Note 2.

Dr Mifsud Bonnici pointed out that the only reference in the technical specifications in the tender is Note 3 restricted and therefore no rectification was allowed. Two witnesses could not explain where the right arose for the Authority to request a rectification or clarification. It was only at this hearing did it become known that none of the bidders were compliant and the danger of accepting those bids is clear enough. Mr Debono himself testified that the specifications are unworkable.

Mr Camilleri re-iterated that the negotiations were undertaken on the basis of urgency and the Board should take this into consideration as well as the fact that the tender has a very short term to run.

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

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 20th January 2022.

Having noted the objection filed by OK Medical Limited (hereinafter referred to as the Appellant) on 24th November 2021, refers to the claims made by the same Appellant with regards to the tender of reference Ref 009-6055/21 CPSU 158/17 listed as case No. 1677 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Clement Mifsud Bonnici & Dr Calvin Calleja

Appearing for the Contracting Authority: Dr Leon Camilleri & Dr Alexia Farrugia Zrinzo

Whereby, the Appellant contends that:

- a) On 15 November 2021, the Appellant requested the disclosure of the brand or manufacturer of the oxygen concentrator offered by the Successful Bidder and the model of the oxygen concentrators offered in terms of the law. On 23 November 2021, CPSU acceded this request for disclosure and submitted that the Successful Bidder offered the following:

CAIRE Model: VISIONAIRE 5

CAIRE Model: NEW LIFE INTENSITY 10

The former was presumably offered as a type 1 oxygen concentrator, while the latter was presumably offered as a type 2 oxygen concentrator.

- b) Following market research made (s.i.by) the Appellant, it would appear that CAIRE New Life Intensity 10 does not comply with the technical specifications set in the RfQ and subsequent clarifications as follows:
 - i. The flow rate of this model appears to be 2-10 LPM +- 10% which in practice means that the lowest flow rate achieved by would be 1.8LPM which is above the minimum 0.5LPM requested by condition 2.3.2 of the RfQ-and as confirmed by the above-mentioned clarifications.
 - ii. The sound level of this model is 58dBA which in practice means that this exceeds the maximum sound level threshold of 50dBA (+- 5 dBA)) requested by condition 2.6 of the RfQ-and as confirmed by the above-mentioned clarifications.

- c) On this basis, it would appear that the model proposed by the Successful Bidder for the type 2 oxygen concentrator was not technically compliant with the Specifications/Terms of Reference of the RfQ and that these matters of non-compliance were overlooked, perhaps by way of an oversight, during the evaluation of bids.
- d) The Appellants submits that the evaluation of bids must be made in line with the PPR and more generally, with the constitutional principles of public procurement-specifically: equal treatment, transparency and self-limitation.
- e) That the RfQ was clear and unambiguous that the models offered by bidders had to comply with the Specifications/Terms of Reference of the RfQ, and in fact, one of the offers submitted by the Appellant was rejected on the basis that it was not technically compliant with such Specifications/Terms of Reference.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 3rd December 2021 and its verbal submission during the virtual hearing held on 20th January 2022, in that:

- a) Primarily CPSU submits that the procedure used in the case in question was a negotiated procedure without prior publication in terms of regulation 150 et seq of the Public Procurement Regulations. That the above effectively means that in such a situation, the contracting authority regulates its own procedure whilst respecting the general principles of public procurement legislation.
- b) With regard to the DBA levels, CPSU submit that from the documentation which it was provided by the recommended economic operator it results that the DBA levels of the New Life Intensity 10, the DBA levels are 55DBA, the maximum permissible DBA level according to the technical specifications circulated, but still in conformity with the specifications required.
- c) With regard to the LPM levels, CPSU submits, that it is true that the LPM level of the product offered by the recommended economic operator was 2LPM-10LPM, however all quotations submitted were offering a 2LPM-10LPM Oxygen concentrator for the type 2 requested.

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 now consider Appellant's grievances and the main issues of this case.

The Board opines that there are 3 main issues to this case:

1. Negotiated procedure without prior publication
2. dBA sound levels of Oxygen Concentrators
3. Flow rate of Type 2 Oxygen Concentrators

Negotiated procedure without prior publication

The Board refers to the approval as provided by the Department of Contracts on 10th August 2021 approving such a procedure under Regulation 153 (c) of the Public Procurement Regulations S.L.601.03 for a negotiated procedure for the supply of Oxygen Concentrators on Loan at the estimated cost of €158,400 excluding VAT for period of 12 months.

This Board is hence satisfied that there should be no doubt that this procedure is a Negotiated Procedure without prior publication.

dBA sound levels of Oxygen Concentrators

The Board refers to the technical literature as provided by the Recommended Bidder and notes that the dBA level of the New Life Intensity Oxygen Concentrator (Type 2 as requested by the RfQ) is indeed 55 dBA. Therefore, totally within technical specifications.

Hence this Board, does not uphold Appellant's grievance in this regard.

Flow rate of Type 2 Oxygen Concentrators

- a) This Board notes that this 'issue' is the most salient in this case. The RfQ Specifications / Terms of Reference, which are a Note 3 item, specifically state *"Type 2: Flow Rate ranging from **0.5 LPM +/- 0.5 LPM** and 10.0 LPM (+/- 0.5 LPM)"* (Bold & italics emphasis added)
- b) The Board refers to the testimony under oath of Mr Peter Pace whereby he stated: *"The ranges offered in the quotations from bidders were all from 2 Lpm upwards and this was accepted"*. (This for Type 2 Oxygen Concentrators)
- c) The Board refers to the testimony under oath of Ing Patrick Borg Cardona whereby he stated: *"Regarding the flow levels a technical person indicated that the tender requirements were erroneous as they requested too low a flow rate and no offer was within the requested range; it was therefore clear that the problem was with the tender specifications not the compliance of the product offered"*.
- d) The Board refers to the testimony under oath of Mr Ivan Debono whereby he stated: *"when I saw the specifications of the tender I advised that, in future, flow rates should better consider patients' state of health as the flow rates proposed were not suitable as they were too low for the purpose that they were normally required"*.
- e) At this point, this Board opines that there clearly exists an issue in the drafting of the RfQ, in that the minimum flow rates of the Type 2 Oxygen Concentrators was not 'well drafted'. This is evidenced by the testimony under oath of Ing Patrick Borg Cardona and Mr Ivan Debono. Moreover, the testimony under oath of Mr Peter Pace confirmed that in fact, due to this 'anomaly',

all offers for the Type 2 Oxygen Concentrators were as such non-compliant, therefore the evaluation committee took the decision that offers from 2Lpm upwards were acceptable.

- f) However, this Board is perplexed when in the reply to Clarification No. 10 which stated “*RE: Flow Rate Range. The flow rate range for the TYPE 2 product; i.e. between 0.5LPM +/- 0.5LMP and 10LPM is very wide. It is suggested that, should the patient require a low flow rate, it is advisable to opt for the TYPE 1 (ie 5LPM) instead of the TYPE 2 (ie 10 LPM) product. The patient’s medical needs will be met and at the same time it would be more cost-effective for the contracting party*”, the answer / reply of the Contracting Authority was for the attention of all interested Economic Operators was “*Specifications are correct, and are to remain as published*”.
- g) In the opinion of this Board, the Evaluation Committee therefore did not provide an equal level playing field for all prospective bidders, which the same Contracting Authority was obliged to contact, and more importantly did not observe the principle of Self Limitation.

Therefore, this Board upholds Appellant’s grievances in respect of the Flow Rate of Oxygen Concentrators Type 2.

For this overriding reason, due to the ‘anomaly’ in drafting of this RfQ, this Board feels that it is futile to send this procedure for re-evaluation, as all the offers are deemed to be technically non-compliant. The issue of the minimum flow rate of Type 2 Oxygen Concentrator would undoubtedly remain unresolved. This will not prejudice the Contracting Authority’s claim of the reason of extreme urgency since testimony was given that the Authority is overstocked with this equipment.

The Board,

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

- a) Upholds Appellant’s Letter of Objection and contentions in relation to the Flow Rate of Type 2 Oxygen Concentrators,
- b) To cancel the ‘Notice of Award’ letter dated 15th November 2021 sent to Sidroc Services Ltd;
- c) To cancel the Letters of Rejection dated 15th November 2021 sent to OK Medical Ltd;
- d) To order cancellation of the RfQ due to the ‘anomaly’ and incorrect technical specification (minimum flow rate for Type 2 Oxygen Concentrators) which as per testimonies heard, no supplier would be able to supply;

After taking all due consideration of the circumstances and outcome of this Letter of Objection, directs that the deposit be refunded to the Appellant.

Mr Kenneth Swain
Chairman

Mr Lawrence Ancilleri
Member

Dr Charles Cassar
Member