

PUBLIC CONTRACTS REVIEW BOARD

Case 1686 – CT2190/2019 – Tender for the Supply of Hydroalginate with Silver Dressings Size 5 x 5 cms and 10 x 10 cms – Lot 1 and Lot 2

4th March 2022

The Board,

Having noted the letter of objection filed by Dr Steve Decesare and Dr Katya G Gatt behalf of Camilleri Preziosi Advocates acting for and on behalf of A.M. Mangion Ltd, (hereinafter referred to as the appellant) filed on the 28th January 2022;

Having also noted the letter of reply filed by Dr Alexia J Farrugia Zrinzo and Dr Leon Camilleri acting for the Central Procurement and Supplies Unit (hereinafter referred to as the Contracting Authority) filed on the 7th February 2022;

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 3rd March 2022 hereunder-reproduced.

Minutes

Case 1686 – CT 2190/2019 – Tender for the Supply of Hydroalginate with Silver Dressings, Size 5x5cms and 10x10cms Lot 1 and Lot 2

The tender was issued on the 23rd January 2020 and the closing date was the 25th February 2020. The value of the tender, excluding VAT, was € 38,302 for Lot 1 and € 123,609.60 for Lot 2.

On the 28th January 2022 A.M.Mangion Ltd filed an appeal against the Central Procurement and Supplies Unit as the Contracting Authority objecting to their disqualification on the grounds that their tender was not compliant as their offer was deemed to be no longer valid.

A deposit of € 400 was paid on Lot 1 and € 618 on Lot 2.

There were five (5) bidders.

On the 3rd March 2022 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Ms Stephanie Scicluna Laiviera and Mr Richard Matrenza as members convened a public virtual hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – A.M.Mangion Ltd

Dr Steve Decesare

Legal Representative

Mr Ray Vella Representative

Contracting Authority – Central procurement and Supplies Unit

Dr Leon Camilleri Legal Representative
Ms Marika Cutajar Chairperson Evaluation Committee
Ms Josette Camilleri Member Evaluation Committee

Preferred bidder – Cherubino ltd

Dr Francis Cherubino Legal Representative

Department of Contracts

Dr Mark Anthony Debono Legal Representative
Mr Nicholas Aquilina 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 mentioned that the Contracting Authority had proposed that the tender be cancelled.

All parties agreed that the tender be cancelled as proposed by the CPSU.

The Chairman thanked the parties for their co-operation and declared the hearing closed.

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 3rd March 2022.

Having noted the objection filed by A.M. Mangion Ltd (hereinafter referred to as the Appellant) on 28th January 2022, refers to the claims made by the same Appellant with regard to the tender of reference CT2190/2019 listed as case No. 1686 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Steve Decesare

Appearing for the Contracting Authority: Dr Leon Camilleri

Whereby, the Appellant contends that:

- a) The Complainant's objection is based on the following three (3) grievances, in each case evidencing that the highly unusual award to the Recommended Bidder is in breach of the PPR:
 - i. firstly, the Contracting Authority cannot 're-open' the Tender Procedure and issue another award of the contract forming the subject-matter of the Tender Procedure over twenty-two (22) months from the deadline of submissions and circa a year from the conclusion of the contract with Medina Healthcare Ltd;
 - ii. secondly, the Contracting Authority cannot award the contract to the most expensive and least competitive offer received, simply because the other bidders could not maintain their previously extremely competitive price; and 3.1.3
 - iii. thirdly, the product offered by the Recommended Bidder is technically non-compliant,
- b) **First Grievance** - 're-opening' and awarding tender breaches PPR
 - i. The Tender Document refers to the General Rules Governing Tenders (the "GRGT") as applicable to the Tender Procedure. Section 8.1 of the GRGT states that "Tenders must remain valid for a period of 90 days after the deadline for submission of tenders indicated in the contract notice". Section 8.3 of the GRTG allows the extension of this time period in "exceptional circumstances" and for a maximum of two (2) further periods of four (4) weeks each.
 - ii. One cannot fail to mention that the DOC Letter itself - stating that the Complainant's offer is non-compliant for the reason that "Offer no longer valid" - is factually incorrect. The fact that the Complainant's offer is at present no longer valid does not mean that it is non-compliant with the Tender Procedure. The Complainant's offer was kept valid (at least) for as long as required by the Tender Document - as stated in section 6 of this Objection, this is a period of 90 days. The Complainant's failure to keep its offer valid for almost two years does not mean that it is non-compliant with the Tender Document and that the Contracting Authority can therefore proceed to award the Tender Procedure to the next cheapest compliant bidder - on the contrary, it is this decision of the Contracting Authority which is non-compliant with the requirements set out in the Tender Document.
- c) **Second Grievance** - Award to most expensive tenderer is incorrect
 - i. In any case, even if the award at such a late stage was possible, the award of the Tender Procedure to the most expensive tenderer - that is, the tenderer submitting the most expensive offers for both Lot 1 and Lot 2 - is wrong in fact and at law, and goes against the very

fundamental principles that procurement law seeks to protect, including competition and equal treatment of bidders with a view to obtaining the best value for taxpayer money.

- ii. The Tender Procedure was originally awarded to Medina Healthcare Ltd as the cheapest technically compliant tenderer in December 2020. The Complainant is not aware of what happened after that, but (as already stated) it was contacted by the Contracting Authority in December 2021 (a year later) to inquire whether the prices offered by it were still valid. When it said that it was not, the offer was awarded to the Recommended Bidder, whose prices were the highest (most expensive) offered. It is unclear whether, before contacting the Complainant, the Contracting Authority contacted Ian Pace Limited and Alfred Gera and Sons Ltd (assuming their offers were technically compliant), since their offers were cheaper than the Complainant's, with these too not agreeing to supply the products.
 - iii. The Complainant was no longer able to meet the prices it offered practically two years earlier. This is to be expected considering that product prices normally increase throughout the years, but especially so in recent months considering the price increase brought about by manufacturing disruptions caused by the COVID-19 pandemic, the EU-UK trade cooperation agreement enforced in January 2021, and the recent steep increases in freight costs.
 - iv. On the other hand, the Recommended Bidder, whose prices were already excessive – as explained above, offering prices which were higher than the Complainant's offer by over thirty per cent (30%) - is obviously in a better position to confirm its prices. The Recommended Bidder's prices were higher than the prices of the cheapest technically compliant tender of Medina Healthcare Ltd by over ninety-eight per cent (98%) for Lot 1 and over one hundred and forty-eight per cent (148%) for lot 2 respectively.
 - v. By awarding the Tender Procedure to the Recommended Bidder, the Contracting Authority is essentially awarding the highest-priced bidder in the Tender Procedure for the very reason that it offered the least competitive price! This goes against the very principle at the basis of procurement law which is the obtainment of best value for taxpayer money. Apart from that, this decision penalises the other bidders for having offered more competitive (cheaper) prices, which flies in the face of the principles of competition, fairness and equal treatment.
- d) **Third Grievance** - Recommended offer technically non-compliant
- i. Finally, and without prejudice to the above, even if the two (2) more than justifiable reasons for cancellation were not sufficient, the award of the Tender Procedure to the Recommended Bidder is also illegal considering that the product being offered by it is technically non-compliant.
 - ii. The Tender Document required the supply of an "anti-microbial dressing made of alcinatate, carboxyethylcellulose (CMS) and silver coated fibres". The product being offered by the Recommended Tenderer, as confirmed by the Department of Contracts, is the product Durafiber AG.

- iii. The product manufacturer's own website describes this product, on the official product information page , as "an absorbent, non-woven, silver containing antimicrobial dressing composed of cellulose ethyl sulphonate fibres". This confirms that Durafiber AG does not contain the alginate component required in the technical specifications and therefore does not satisfy the tender specifications for material composition.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 7th February 2022 and its verbal submission during the virtual hearing held on 3rd March 2022, in that:

- a) Both lots were initially recommended to bidder Medina Healthcare Limited, however prior to signing of the agreement, it resulted to CPSU that the product offered by Medina Healthcare Limited was not technically compliant and therefore the contract was not signed.
- b) The other compliant bidders were contacted by order, from the 2nd cheapest onwards, and all bidders refused to take the tender except for Cherubino Limited (recommended bidder). A letter in this regard was sent on the 18th of January 2022 and the present objection was filed.
- c) From further investigations it resulted that the product offered by the recommended bidder, is not technically compliant and therefore CPSU and DOC, without entering into the merits of the first 2 grievances of the objector, agree with the objector that this tender procedure is cancelled.
- d) CPSU and DOC do not object to the refund of the deposit.

This Board, after having examined the relevant documentation to this appeal and heard submissions made by all the interested parties, will consider Appellant's grievances as follows:

- a) That the bid by the recommended bidder is technically non-compliant.
- b) That the Contracting Authority is itself agreeing to the cancellation of this tender procedure.

Hence, this Board upholds the Appellant's grievances.

The Board,

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

- a) To uphold the Appellant's concerns and grievances;
- b) To cancel the Letter of Acceptance dated 18th January 2022 sent to "Cherubino Ltd";
- c) To cancel all the Letters of Rejection dated 18th January 2022;
- d) To order the cancellation of the tender procedure;
- e) After taking all due consideration of the circumstances and outcome of this Letter of Objection, directs that the deposits be refunded to the Appellant.

Mr Kenneth Swain
Chairman

Ms Stephanie Scicluna Laiviera
Member

Mr Richard Matrenza
Member