

PUBLIC CONTRACTS REVIEW BOARD

Case 1690 – CT2097 / 2021 - Supplies Tender to Procure and Implement a CCTV System including Environmentally Friendly Equipment and Client Workstations withing Government State Schools

11th March 2022

The Board,

Having noted the letter of objection filed by Dr Jean-Pie Gauci-Maistre and Dr Joseph Bugeja acting for and on behalf of Mediterranean Protection Solutions Limited, (hereinafter referred to as the appellant) filed on the 17th January 2022;

Having also noted the letter of reply filed by Dr Simon Cachia acting for the Ministry for Education (hereinafter referred to as the Contracting Authority) filed on the 27th January 2022;

Having also noted the letter of reply filed by Dr Ryan C. Pace acting for Alberta Fire & Security Equipment Limited (hereinafter referred to as the Preferred Bidder) filed on the 31st January 2022;

Having heard and evaluated the testimony of the witness Mr Stephen Vella (Chief Technical Officer at Computime – supplier of Appellant company) as summoned by Dr Joseph Bugeja acting for Mediterranean Protection Solutions Limited;

Having heard and evaluated the testimony of the witness Mr Bruce Bonnici (Director of Mediterranean Protection Solutions Limited) as summoned by Dr Joseph Bugeja acting for Mediterranean Protection Solutions Limited;

Having heard and evaluated the testimony of the witness Mr Akos Bernath (Representative of HP Aruba) as summoned by Dr Joseph Bugeja acting for Mediterranean Protection Solutions Limited;

Having heard and evaluated the testimony of the witness Mr Marcin Scieslicki (Representative of HP Aruba) as summoned by Dr Joseph Bugeja acting for Mediterranean Protection Solutions Limited;

Having heard and evaluated the testimony of the witness Mr Benjamin Abela (Member of the Evaluation Committee) as summoned by Dr Simon Cachia acting for the Contracting Authority;

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 8th March 2022 hereunder-reproduced;

Minutes

Case 1690 – CT2097/2021 – Supplies Tender to Procure and Implement a CCTV System including Environmentally friendly Equipment and Client Workstations within Government State Schools.

The tender was issued on the 2nd July 2021 and the closing date was the 31st August 2021. The value of the tender, excluding VAT, was € 597,450.

On the 17th January 2022 Mediterranean Protection Solutions Ltd (MPS) filed an appeal against the Ministry for Education and Sports as the Contracting Authority objecting to their disqualification on the grounds that their offer was not technically compliant.

A deposit of € 2,987 was paid.

There were five (5) bidders and seven (7) bids.

On the 8th March 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 – Mediterranean Protection Solutions Ltd

Dr Joseph Bugeja	Legal Representative
Dr Jean-Pie Gauci-Maistre	Representative

Contracting Authority – Ministry for Education and Sports

Dr Simon Cachia	Legal Representative
Mr Benjamin Abela	Member Evaluation Committee
Ms Jessica Apap	Representative
Mr Jeffrey Muscat	Representative
Mr Gordon Dimech	Representative

Preferred Bidder – Alberta Fire and Security Equipment Ltd

Dr Ryan Pace	Legal Representative
Mr Karim Cassar	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 invited submissions.

Dr Joseph Bugeja Legal Representative for Mediterranean Protection Solutions Ltd said that his client presented a compliant bid since it offered a superior product to what was requested. On the other hand the preferred bidder offered a product that according to a circular from the manufacturer, Ambra, was an end of the line product which was no longer produced for countries within the European Union. The product offered is superior in performance, consumption and environmentally. Not only was the product compliant but it was cheaper than that offered by the preferred bidder.

Dr Simon Cachia Legal Representative for the Ministry for Education and Sports said that the tender did not specify any particular product or brand – hence any reference to Ambra was misguided. It is clear that two requisites were not met by Appellant, namely the network switch and the MAC address table and thus the bid is not compliant.

Mr Stephen Vella (311374M) called as a witness by the Appellant testified on oath that he is the Chief Technical Officer at Computime who were partners with the tenderer. The tender specifications had a matrix table which had to be complied with. The Ambra switches requested in the tender were replaced by a new product and Computime recommended these products to the bidder. In May 2021 an end of sale notice was issued by Ambra; in August the new products were announced and in September the old products ceased to be supplied. Witness agreed that two particular products offered were not according to the specifications of the tender. The new product was superior to the previous one except in the case of the MAC table. The products specified in the tender are available but there would be a price difference.

Questioned by Dr Cachia witness agreed that the tender requested a dynamic ARP protection switch and a 16,000 entries MAC address table but was not aware of what bidder offered as he was not directly involved in the tender. Witness agreed that there was no MITA involvement in the tender.

In reply to a question from Dr Ryan Pace, Legal Representative for Alberta Fire and Security Equipment Ltd witness agreed that bidder had only communicated with Ambra to source the materials for this tender.

Mr Bruce Bonnici (325478M) called as a witness by Appellant testified on oath that he was a Director of MPS and was involved on the technical side. When sourcing the products for the tender he had contacted Ambra and was advised of the change of switches following the discontinuance of the previous ones which information was already in the public domain. It would have been impossible to undertake the contract if they offered the old switches. Appellant's bid was € 8000 cheaper than the competition.

Answering questions from Dr Cachia witness confirmed that only Computime was used to source the materials to submit the tender. He confirmed that the MAC product offered supports only 8,192 entries when the Authority requested 16,000 entries. He also confirmed that the tender required a dynamic network switch but bidder offered a static switch.

Questioned by Dr Pace witness agreed that there was no reference to the Ambra switch in the tender dossier or of any software and that MPS had submitted three bids on this tender. Witness stated that market research had been carried out before submitting the tender and discovered that the product stated in the tender did not exist but despite this had made no attempt to seek clarification from the Authority on this point.

Mr Akos Bernath (PP no 431677DE) called as a witness by Appellant testified on oath that he runs an HP Aruba Unit covering 90 countries. He confirmed that the switch referred to is no longer available but a replacement was available. He stated that the end of sale products do carry support if this is purchased.

Questioned by Dr Cachia witness said that he had no involvement in the tender process and that MPS did not approach Aruba.

Mr Marcin Scieslicki (ID no 78011301452) called as a witness by Appellant testified on oath that he is a Manager at Aruba. He stated that the Company has many authorised representatives in Malta. He confirmed that the old switch is no longer in production and the end of sale was in October 2021 but that support service can be purchased depending on circumstances.

In reply to questions from Dr Cachia witness stated that he was neither familiar nor involved in the tender – his role was advising representative on the best products. In theory their representatives or distributors could still sell the old product but the indications were that none were available in Europe.

At this stage Mr Bonnici asked to intervene to point out that in reply to a question put to him on the witness stand, the tender in page 21 states that the current management tool is Hewlett Packard Enterprise Intelligent Management Centre and therefore the product offered had to be able to interface with this requirement.

Mr Benjamin Abela (498070M) called as a witness by the Contracting Authority testified on oath that the tender specified a dynamic network switch and a MAC table with 16,000 entries capacity.

This was the end of the testimonies.

Dr Bugeja stated that the product requested in the tender did not exist anywhere and had been replaced by the product offered by Appellant which was much superior. According to Public Procurement Regulation 232 (d) bidder had to provide proof of the means of technical

ability. The preferred bidder had no supply chain as the product offered had been withdrawn. Offering the old product comes at extra costs on the contract at a later stage. The Appellant product is compliant and the tender implicitly refers to a particular product at a lower price and should lead to the award of the tender.

Dr Pace said that the Board is being asked to disqualify a party that met all the tender requirements. Appellant put in three offers but never asked for a remedy once the product was not available. These facts were known at least one month before the tender was issued which gave ample time for recourse to attack this point. Mr Vella in his testimony agreed that mistakes were made by offering the wrong product. There is no reference to Ambra in the tender. The Appellant submitted in his appeal certain requests to the Board in dealing with this tender – it is worrisome that Appellant is requesting the ignoring of PPRs. Appellant is also requesting cancellation of the tender when according to the PPRs cancellation is the last resort.

Dr Cachia said that the new product is irrelevant as the tender does not refer to Ambra. Appellant simply did not match the tender requirements and therefore the decision is correct. The claim was made that the award might lead to breaches of contract – should that happen there are remedies available.

There being no further submissions the Chairman thanked the parties and concluded the hearing

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 8th March 2022.

Having noted the objection filed by Mediterranean Protection Solutions Limited (hereinafter referred to as the Appellant) on 17th January 2022, refers to the claims made by the same Appellant with regards to the tender of reference CT2097 / 2021 as case No. 1690 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Jean-Pie Gauci-Maistre & Dr Joseph Bugeja

Appearing for the Contracting Authority: Dr Simon Cachia

Appearing for the Preferred Bidder: Dr Ryan C. Pace

Whereby, the Appellant contends that:

- a) By letter dated the 7th of January 2022 (the "Decision") the Department of Contracts informed the Appellant Company that the offer submitted by the Appellant Company was found to be technically non-compliant for the following reason:

"You were requested to clarify/rectify your position through a clarification/rectification dated 25.11.2021. Your company replied on time however the following shortcomings were noticed:

Reference to Literature List.

Item 6 - POE Network Switch - Dynamic ARP protection support - Given model supports only static ARP.

Item 6-POE Network Switch - MAC Address table size - 16,000 entries (Minimum) Given model supports only up to 8,192 entries."

- b) The specifications and conditions required by the tender are impossible to meet with the same specifications of the tender, as one would exceed the Estimated Procurement Value based on market research namely €597,450.00, because no such product is available on the market within this price range, and that the only product which would have fitted the Estimated Procurement Value is past end of sale period as evidenced by Aruba Networks Public End of Sale Announcement on the 31st May, 2021.
- c) The product offered by the preferred bidder, while it may meet the specifications of the tender, is past end of sale period as confirmed by the manufacturer's notice;
- d) Therefore the tender is being awarded to a preferred bidder whose product is no longer in production, which may lead to variations/modifications post award to the detriment and prejudice of the appellant company. Therefore, the following questions arise:
- i. Considering the fact that the product that meets the requested requirements had reached its end of sales date in 'October 31st 2021 or while supplies last', how will the preferred bidder have managed to acquire 100 units of the same product?
 - ii. If the Department of Contracts was aware prior to the award of the tender that the products subject of the tender were out of production, and even if one had to concede that a "particular" company can conveniently provide 100 units, why did the Department of Contracts proceed knowing that the product is no longer in production, unless there were other considerations unknown to the Appellant Company?
 - iii. That even if any of the applicant companies had sufficient stock to supply all 100 schools, they should not have, in good faith, put forward a product which is already past its end of sale period and for which replacements will be difficult to find, when the very 'scope' of the tender was 'to have the same structure of CCTV Cameras across the state schools being installed' (clause 3.1 of the Tender).

- iv. The product furnished by the Appellant Company meets the intended scope of the tender. Not only that, but as declared by the Appellant Company in its letter of clarification, the product offered by the Appellant Company is superior to the technically compliant product requested.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 27th January 2022 and its verbal submission during the virtual hearing held on 8th March 2022, in that:

- a) It is clear from the Tender document that one of the elements of the CCTV system is POE (Power Over Ethernet) Network Switches. Some documents show that these POE Network Switches have to have the following specifications;
 - a. Item 6 – POE Network Switch - Dynamic ARP protection support
 - b. Item 6 – POE Network Switch - Mac Address table size – 16,000 entries (Minimum)
- b) Appellant's bid included a POE Network Switch with Static ARP instead of a Dynamic ARP, hence it was correctly deemed technically non-compliant.
- c) Appellant's bid included a POE Network Switch with a MAC Address table size of maximum 8,192 entries rather than the minimum 16,000 as requested.
- d) The Tender document did not make any references to specific brands or specific suppliers. The "Aruba" supplier, mentioned by the Appellant, is nowhere to be found in the tender dossier. All prospective bidders were free to use any supplier they deemed fit.
- e) The Estimated Procurement Value mentioned in the Tender Dossier is there only to serve as guidance.

This Board also noted the Preferred Bidder's Reasoned Letter of Reply filed on 31st January 2022 and its verbal submission during the virtual hearing held on 8th March 2022, in that:

- a) The Appellant company never made any kind of request, during the process of this tender, over its presumed allegations that certain "*specifications and conditions are impossible to meet*". It never substantiated such arguments, except by referring to its own market research. Hence why was a call for remedy as per Regulation 262 of the PPR not invoked?
- b) It is incomprehensible to understand the arguments of the Appellant when firstly they state that "*specifications and conditions are impossible to meet*" and later in their objection letter they make a contradictory argument stating "*We confirm that the technical specifications of Aruba 6000 48G Class4 PoE 4SFP PoE+ R8N85A supersede the above specifications in which they provide better performance in general and compliance with the latest protocols and standards*".
- c) The tender dossier in no way or form expected that only "Aruba" may be used as a supplier and hence the arguments brought forward by the Appellant, basing their arguments on a document

relating to “Aruba” products, stating that these lines of products are no longer in production, is totally unfounded.

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. This Board opines that this analyses can be tackled in two main points, being:

- 1) the technical compliance, or non-technical compliance, of the Appellant’s bid and;
- 2) the argument raised by the Appellant company whereby it was alleged that *“The specifications and conditions required by the tender are impossible to meet with the same specifications of the tender”* and other grievances.

Point 1 –

- i. This Board will immediately stress the fact that the tender dossier was clear and unambiguous in its requirements, more specifically, when it required, in Section 3 “Specifications”, the POE Network Switch to have / include *“Dynamic ARP protection support”* and *“MAC Address table size – 16,000 entries (Minimum).”*
- ii. This Board notes that at no point in time where clarifications requested on these two specific requirements above.
- iii. It emerged, very clearly, from the testimony under oath of both Mr Stephen Vella and Mr Bruce Bonnici that the product offered by the Appellant company did not satisfy these two specific requirements mentioned above. In fact, the product offered by the Appellant was confirmed to offer a “Static ARP protection support” and support only 8,192 entries (re MAC Address table size), when the Authority requested a minimum of 16,000 entries.

In view of such clear requirements as requested in the Tender Dossier and evidence as per the testimonies in point “iii” above, this Board can only but agree with the Rejection Letter dated 7th January 2022 issued by the Department of Contracts to the Appellant, Mediterranean Protection Solutions Ltd.

Point 2 –

- i. The Appellant also alleges that *“The specifications and conditions required by the tender are impossible to meet with the same specifications of the tender”*.
- ii. During the course of the hearing, this Board was provided with a ‘timeline’ of events as to how the ‘initial’ product as was envisaged to be provided by the Appellant, in its bid, was to be discontinued. This ‘timeline’ was also confirmed from the testimonies under oath of Mr Akos Bernath and Mr Marcin Scieslicki.

- iii. However, this Board is incredulous as to why the Appellant is only raising this point now, in the appeal stage of this tender procedure. The notice issued by ‘HP Aruba’ (the supplier of the Appellant company, indirectly, through Computime) stating that this ‘product’ will no longer be sold, was issued even before the ‘Publication Date of the Call for Tenders’ of this particular procedure. Hence this was known to the Appellant even before they started preparing their prospective bid.
- iv. Therefore, this Board opines, that the Appellant should have either used Regulation 262 of the Public Procurement Regulations to seek remedy if it was of the opinion that the tender specifications and conditions were impossible to be met, or at the very least to make a clarification request to the Contracting Authority during the bidding process.
- v. The arguments brought forward by the Appellant company that the ‘revised’ product they offered is superior in many other aspects, such as energy efficiency and other matters, are deemed by this Board to be irrelevant if other minimum requirements as set out by the tender dossier are not adhered to (refer to point 1 above ‘Dynamic / Static ARP’ and ‘MAC Address table size issues’).
- vi. This Board also notes, that the tender dossier did not list any specific brand names and the name ‘Aruba’ does not feature at all in the tender dossier. The requirement of the tender dossier, referred to by the Appellant, whereby *“The Specified Ethernet switch must be fully managed through the existing centralized management tool. The currently management tool is Hewlett Packard Enterprise Intelligent Management Centre (iMC)”* does not entail that the POE as proposed by the Preferred Bidder to be technically non-compliant. No proof was brought forward in this regard.

Therefore, this Board does not uphold the grievances of the Appellant.

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 to Alberta Fire and Security Equipment Ltd,
- c) Directs that the deposit paid by Appellant not to be reimbursed.

Mr Kenneth Swain
Chairman

Mr Lawrence Ancilleri
Member

Dr Charles Cassar
Member