

## **PUBLIC CONTRACTS REVIEW BOARD**

### **Case 1738 – CfT020-0098/22 (CPSU 1900/21) – Call for Tender for the Supply of Adult Digital Hearing Aids for Mild to Moderate Hearing Loss**

**13<sup>th</sup> June 2022**

The Board,

Having noted the letter of objection filed by Mr Christopher Busuttill Delridge acting for and on behalf of Evolve Limited, (hereinafter referred to as the appellant) filed on the 12<sup>th</sup> April 2022;

Having also noted the letter of reply filed by Dr Leon Camilleri acting for Central Procurement and Supplies Unit (hereinafter referred to as the Contracting Authority) filed on the 22<sup>nd</sup> April 2022;

Having heard and evaluated the testimony of the witness Ms Jacqueline Busuttill (Member of the Evaluation Committee) as summoned by Dr Leon Camilleri 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 31<sup>st</sup> May 2022 hereunder-reproduced.

#### **Minutes**

#### **Case 1738 – CfT 020-0098/22 – Tender for the Supply of Adult Hearing Aids for Mild to Moderate Hearing Loss**

The tender was issued on the 26<sup>th</sup> January 2022 and the closing date was the 15<sup>th</sup> February 2022. The value of the tender, excluding VAT, was € 45,000.

On the 12<sup>th</sup> April 2022 Evolve 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 to be not technically compliant.

A deposit of € 400 was paid.

There were three (3) bids.

On the 31<sup>st</sup> May 2022 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Mr Lawrence Ancilleri and Dr Vincent Micallef as members convened a public virtual hearing to consider the appeal.

The attendance for this public hearing was as follows:

#### **Appellant – Evolve Ltd**

Mr Christopher Busuttill Delridge Representative  
Mr John Montanaro Representative

**Contracting Authority – Central Procurement and Supplies Unit**

Dr Leon Camilleri Legal Representative  
Ms Jacqueline Busuttill Member Evaluation Committee  
Ms Marika Cutajar Member Evaluation Board

**Preferred Bidder – Prohealth Ltd**

Mr Mark Bondin 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.

Mr Christopher Busuttill Delridge Representative for Evolve Ltd stated that this appeal was on a procedural point in that the technical literature was different from the technical offer. As the technical literature comes within Note 2 there was the possibility of a clarification or rectification which the Contracting Authority did not avail itself of.

Dr Leon Camilleri Legal Representative for the Central Procurement and Supplies Unit said that the Authority maintains that the literature was not compliant and therefor it could not confirm if the product offered met the tender requirements. As the literature submitted was very clear that the maximum gains requested were exceeded there was no point, in line with self-limitation, in seeking clarification.

Ms Jacqueline Busuttill (482872M) called to testify by the Contracting Authority stated on oath that she has worked as an audiologist for 7 years and was a member of the Evaluation Committee. She confirmed that the tender specification were exceeded in regard to both the maximum gain and the maximum output in Appellant's offer.

Questioned by Mr Busuttill Delridge witness said that she is aware that hearing sensors are pre-programmed but are usually adjusted to meet patients' requirements.

Mr Busuttill Delridge said that sensors are programmed before release on the market and the Authority should have provided an opportunity for this to be cleared up and explained. However no opportunity was given and all Appellant was asking is for the tender to be re-evaluated.

Dr Camilleri said Appellant is claiming that use should have been made of Note 2 which however does not cover an instance where the wrong literature was submitted. In this case the product offered has different ranges to those required. The technical argument was not

raised in the appeal, and if this was a grievance a remedy should have been sought earlier. The hands of the Authority are bound and their decision should be confirmed.

There being no further submissions the Chairman declared the hearing closed.

End of Minutes

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**Hereby resolves:**

The Board refers to the minutes of the Board sitting of the 31<sup>st</sup> May 2022.

Having noted the objection filed by Evolve Limited (hereinafter referred to as the Appellant) on 12<sup>th</sup> April 2022, refers to the claims made by the same Appellant with regard to the tender of reference CFT 020-0098/22 (CPSU1900/21) listed as case No. 1738 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Mr Christopher Busuttill Delridge

Appearing for the Contracting Authority: Dr Leon Camilleri

Whereby, the Appellant contends that:

- a) The Appellant's objection is based on the fact that the Technical submission replied in the affirmative that the requested products fell within specification of the two mentioned criteria for disqualification and that the Evaluation Board took it upon themselves to discredit this undertaking of the better informed bidder, in this case the Appellant, Evolve Ltd.
- b) CPSU had at least three “choices” when dealing with the perceived shortfall in specifications:
  - i. The first and most commonly used choice, was to request a clarification why the Technical Reply (Note 3) was affirmative when the literature submitted was being (wrongly) perceived as being contradictory. Note 3 allows for this.
  - ii. The second was to request a sample of the same product being offered as was done in the same batch of tenders consisting of hearing aids too. This was not done.
  - iii. The third and most onerous choice was the disqualification of the Appellant's offer on the basis of the alleged technical non-compliance.
- c) CPSU went for the latter choice and this constitutes a breach of the duty to choose the cheapest offer fulfilling all specifications. The Appellant is now providing a declaration by the manufacturer to prove that its submitted product was technically compliant with the requested operational

specification of the tender in question. To be clear... these are Digital Hearing Aids and the Fitting Algorithm allows for these minimal response changes as should be clear to the technical people on the evaluation committee and as undertaken by the Appellant when they replied in the Affirmative in the Mandatory Technical Specifications.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 22<sup>nd</sup> April 2022 and its verbal submission during the virtual hearing held on 31<sup>st</sup> May 2022, in that:

- a) The objector states that the offered products were within the parameters of the technical requirements for maximum gain (70dB) and maximum output (130dB SPL). The objector had in its technical offer form indicated that the offered product falls within the established maximums of Gain and output established in the tender, however the technical literature submitted reflected otherwise. Whilst the technical offer form is filled in by the bidder, the technical literature which is issued by the manufacturer is used to assess if the submissions in the technical offer form are correct, which in this case were not. The objector, in a declaration letter attached to the objection, which does not form part of the tender submission, states that *"since Eartechnic hearing aids (Smart Group including Smart E SPn model) are digital, programmable hearing aids, they can be adjusted in fitting software..."* The above quoted therefore proves that since an adjustment is required to match the maximum requested in the tender, the actual maximum of the device is more than the maximum requested in the tender document;
- b) The tender document clearly requested the below:
  - i. Maximum Gain --- between 50dB - 70dB. (IEC 118-7/A1 OR ANSI S3.22-2003)
  - ii. Maximum Output --- between 90dB SPL - 130dB SPL. (IEC 118-7/A1 OR ANSI S3.22-2003)
- c) From the technical literature submitted, an extract of which is incorporated in the report attached to the objection letter, clearly indicated that the maximum output is dB SP 140/133 whilst the maximum Gain is dB 78/72. Since it was therefore evident that the product offered catered for maximum Gain and Output which exceeded the maximum requested in the tender, it was not a matter of clarification, since everything was clear for the evaluation committee, i.e. that the product was not compliant;
- d) If Objector had queries on the technical specifications as listed in the tender document, and in any way felt certain clauses were discriminatory, the objector should have made use of the procedure established under regulation 262 of the Public Procurement Regulations and seek a remedy before closing date of a call for competition;
- e) CPSU submit that what constitutes a fact is that the technical specifications were clear that maximums were being requested for gain and output and that the product offered by the objector stipulated a higher maximum;

- f) The evaluation committee is bound by the principle of self limitation and could only evaluate in accordance with what was provided to them, which in this case was clear and unambiguous;
- g) The declaration letter dated 4<sup>th</sup> April 2022 attached to the objection letter was obviously not filed with the technical literature submitted by the objector (even though had this been the case, the evaluation committee would have still arrived to the same conclusion), and what the evaluation committee had in hand was literature that demonstrated clearly that the product on offer exceeded the established maximum of Output and Gain therefore the evaluation committee could not have interpreted the offer in a different manner;

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 witness duly summoned, will now consider Appellant's grievances.

- a) The Board notes that there is a discrepancy in the Appellant's Technical Literature when compared to the Technical Offer Form submitted.
- b) From further analysis it transpires that the Technical Offer Form, which falls under the remit of Note 3, was correctly filled in by the economic operator, now Appellant.
- c) However, the technical literature has discrepancies in both the 'maximum gain' and the 'maximum output' of such devices and was therefore deemed non-compliant.
- d) It is to be noted that the adjudged non-compliant document was the Technical Literature, which falls under the remit of Note 2. This is also corroborated in the both the Letter of Objection filed by the Appellant and the Reasoned Letter of Reply as filed by the Contracting Authority.
- e) Therefore, this Board opines that the Evaluation Committee should have sought a clarification and / or a rectification from the Appellant since Note 2 allows for such procedure to be undertaken on Technical Literature.

Hence, this Board upholds the Appellant's grievance.

**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 4<sup>th</sup> April 2022 sent to "ProHealth Ltd";
- c) To cancel all the Letters of Rejection dated 4<sup>th</sup> April 2022;
- d) To order the contracting authority to re-evaluate the bids received in the tender procedure whilst also taking into consideration this Board's findings;
- e) 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 Vincent Micallef**  
Member