

PUBLIC CONTRACTS REVIEW BOARD

Case 1750 – SPD2/2021/107 – Tender for the Supply of Motorcyclists’ Lifesaving Inflatable Vests to the Malta Police Force

27th June 2022

The Board,

Having noted the letter of objection filed by Dr Herman Mula acting for and on behalf of Bikers Zone, (hereinafter referred to as the appellant) filed on the 16th May 2022;

Having also noted the letter of reply filed by the Evaluation Committee acting for the Malta Police Force (hereinafter referred to as the Contracting Authority) filed on the 23rd May 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 23rd June 2022 hereunder-reproduced.

Minutes

Case 1750 – SPD2/2021/107 – Tender for the Supply of Motorcyclists’ Lifesaving Inflatable Vests to the Malta Police Force

The tender was issued on the 15th February 2022 and the closing date was the 8th March 2022. The value of the tender, excluding VAT, was € 33,900.

On the 16th May 2022 Bikers Zone filed an appeal against the Malta Police Force as the Contracting Authority objecting to their disqualification on the grounds that their offer was not the cheapest bid.

A deposit of € 400 was paid.

There were five (5) bids.

On the 23rd June 2022 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Mr Lawrence Ancilleri and Ms Stephanie Scicluna Laiviera as members convened a public virtual hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – Bikers Zone

Dr Herman Mula
Mrs Moira Schembri

Legal Representative
Representative

Contracting Authority – The Malta Police Force

Supt Raymond Cassar

Chairperson Evaluation Committee

Insp. Nicholas Vella
Insp. Nathan Bugeja
PS Andy Bellia

Member Evaluation Committee
Member Evaluation Committee
Member Evaluation Committee

Preferred Bidder – AMD Innovations Malta

Mr Darren Borg

Representative

Department of Contracts

Dr Mark Anthony Debono

Legal Representative

Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties and invited submissions.

Dr Herman Mula Legal Representative for Bikers Zone said that while Appellant accepted that they would not be pursuing their request regarding the submission of samples by the preferred bidder which was confidential information, however they still felt that no proper decision could have been reached by the Evaluators without requesting samples to check if the requisites of the tender had been attained.

Supt Raymond Cassar Representative of the Malta Police Force stated that the Evaluation Committee did not request samples as the Force was currently making use of equipment from both bidders. The technical data and specifications were sufficient to identify the better equipment offered without the use of samples – both bidders' equipment passed the test with the only difference being the financial bid. Samples were not a must as all bidders reached the required level with the recommended product being better in small details.

Dr Mula re-iterated that since the financial offers were close samples should have been requested.

Since there were no further submissions the Chairman declared the hearing closed.

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 23rd June 2022.

Having noted the objection filed by Dr Herman Mula on behalf of Bikers Zone (hereinafter referred to as the Appellant) on 16th May 2022, refers to the claims made by the same Appellant with regard to the tender of SPD2/2021/107 listed as case No. 1750 in the records of the Public Contracts Review Board.

Appearing for the Appellant:

Dr Herman Mula

Appearing for the Contracting Authority:

Supt. Raymond Cassar

Whereby, the Appellant contends that:

- a) Whereas, section three (3) is introduced with the following note: *“Note: Where in this tender document a standard is quoted, it is to be understood that the Contracting Authority will accept equivalent standards. However, it will be the responsibility of the respective bidders to prove that the standards they quoted are equivalent to the standards requested by the Contracting Authority.”*
- b) Whereas regulation 53 (1) of Subsidiary Legislation 601.03 states the following *“53. (1) The technical specifications shall be set out in the procurement documents and these shall lay down the characteristics required of a works, service or supply.”*
- c) Whereas in addition, section "5 C" namely "Selection and Award Requirements - Specifications - Samples" the following is dictated: *“Samples as per Form marked Samples List' may be requested during the adjudication stage to supplement the technical offer submitted. If requested, the Samples must be submitted within 10 working days of being notified to do so. (Note 3) If Samples are not submitted within the specified timeframe offer will not be considered further.”*
- d) Whereas with regards to the mandatory specifications quoted above, the Objector has prepared a sample of an inflatable vest proposed by the same Objector and notwithstanding this, the Contracting Authority has not requested the Objector to submit the same sample.
- e) Whereas the Objector is informed that the Contracting Authority (The Malta Police) has requested to the winning bidder a sample as per section 5C of the request for Tender, and the Objector is further informed that the sample submitted by the winning third-party bidder does not fulfil at least one of the technical specifications quoted above.
- f) Whereas in view of the fact that section 3 of the request for tender clearly puts the burden on the bidder to prove that the standards quoted reach the standards requested by the Contracting Authority and also considering the obligation laid down in the Public Procurement Regulation (S.L. 601.03) imposing terms upon the technical specifications, the fact mentioned in the last preceding paragraph nullifies the submission of the winning bidder automatically, placing in pole position the Objector's bid.
- g) Whereas in view of this, the Objector is willing to provide to the Contracting Authority (i.e. the Police) the sample prepared by the same Objector.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 23rd May 2022 and its verbal submission during the virtual hearing held on 23rd June 2022, in that:

- a) Means of proof of compliance - In order for the Evaluation Committee to properly carry out the evaluation of offers and issue its report according to the same, the submission of samples in terms of Section 5(c) of the Tender Document can be an appropriate means for tenderer to demonstrate that the supply of motorcyclists lifesaving vests genuinely comply with what is being sought to be procured by the Contracting Authority. Technical offers are to be substantiated by evidence, inter

alia, on the basis of technical literature and samples. The extent and composition of this evidence is governed by rule 16.3 of the General Rules Governing Tenders v4.4, whereby it is stated that: *“Literature may also be requested with the technical offer so that the Evaluation Committee will corroborate the technical compliance of the offers...”* This interpretation equally applies in terms of the tender document with respect to sample submission: Samples as per Form marked "Samples List" may be requested during the adjudication stage to supplement the technical offer. Nonetheless, as will be proven by the Contracting Authority during the eventual hearing of the objection, since the provision of samples was not mandatory for the tender offer to be evaluated and that the submission of literature sufficed, the Contracting Authority hereby submits that it has acted diligently and has not committed any shortcoming in its evaluation process.

- b) Inequality and discrimination - In its objection, the objector submits that the request for a sample by the Contracting Authority had not been addressed to it and that it had only been the recommended tenderer which was given this opportunity. This submission therefore is alleging that there had been an element of inequality and discrimination in treatment by the Contracting Authority in its regard. The Contracting Authority strongly contests such submissions and states that it has acted fairly and equally in utmost compliance with the public procurement principles under regulation 38 et seq of the Public Procurement Regulations, 2016. The burden of proof is incumbent on the objector to prove that the Contracting Authority had requested sample submission and that such request had only been required by the recommended bidder. Furthermore, in terms of rule 14 of the General Rules Governing Tenders, since the evaluation process is one governed by secrecy, the Contracting Authority hereby submits that the objector must duly substantiate its source of the submission and whether the information it has obtained the information (sic) respecting the duty of secrecy.
- c) Sample and technical non-compliance of tender offer - Furthermore, the objector asserts that the sample which had been provided by the recommended tenderer AMD Innovations Malta is not technically compliant in accordance with the tender document specifications and should therefore not have been recommended for award. Since, as explained above, the Evaluation Committee has limited the evaluation process to the submission of tender offers with the literature submitted in support thereto and since it had not requested the objector nor the recommended tenderer to submit a sample, the Contracting Authority is not in a position to provide its decision on anything that had not formed part of the evaluation process by the same Committee.

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) Reference is made to the General Rules Governing Tenders v4.4 whereby in paragraph 16.3 it is stated *“Wherever applicable, tenderers **may** be requested to submit samples so that the Evaluation Committee will*

corroborate the technical compliance of the offers received. Without prejudice to the possibility of requesting clarifications, where the samples do not corroborate the offer submitted, the tenderer shall be disqualified.” (bold emphasis added).

- b) Therefore, this Board notes that the request for a sample to be provided, is at the discretion of the Evaluation Committee. The objective of such a request, if made, would be to corroborate the technical compliance as per the tender dossier requirements.
- c) Another way by which technical compliance can be corroborated is through the collation and submission of technical literature. This as stated in the General Rules Governing Tenders v4.4 paragraph 16.3 whereby “*Literature may also be requested with the technical offer so that the Evaluation Committee will corroborate the technical compliance of the offers.*”
- d) Therefore, there are different ways and avenues that the Evaluation Committee can adopt to ascertain Technical Compliance.
- e) This Board agrees with the argumentation of the Contracting Authority that in this specific instance, technical compliance could have been tested, ascertained and eventually corroborated by analysing the Technical Offer as against the literature that was provided.

Hence, this Board does not uphold the Appellant’s 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

Mr Lawrence Ancilleri
Member

Ms Stephanie Scicluna Laiviera
Member