

PUBLIC CONTRACTS REVIEW BOARD

Case 1790 – CfT020-0140/22 CPSU 5283/22 – Supplies – Tender for the Supply of Non-Woven Swabs 10cm x 10cm

3rd October 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 Krypton Chemists Limited, (hereinafter referred to as the appellant) filed on the 28th June 2022;

Having also noted the letter of reply filed by Dr Alexia J Farrugia Zrinzo and Dr Leon Camilleri acting for Central Procurement and Supplies Unit (hereinafter referred to as the Contracting Authority) filed on the 8th July 2022;

Having heard and evaluated the testimony of the witness Ms Marika Cutajar (Chairperson of the Evaluation Committee) as summoned by Dr Clement Mifsud Bonnici acting for Krypton Chemists Limited;

Having heard and evaluated the testimony of the witness Mr Matthew Arrigo (Representative of Krypton Chemists Limited) as summoned by Dr Clement Mifsud Bonnici acting for Krypton Chemists Limited;

Having heard and evaluated the testimony of the witness Ms Marika Cutajar (Chairperson 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 27th September 2022 hereunder-reproduced.

Minutes

Case 1790 – CfT 020-0140/22 – Tender for the Supply of Non-Woven Swabs 10cm x 10cms

The tender was issued on the 4th February 2022 and the closing date was the 25th February 2022. The estimated value of the tender, excluding VAT, was € 133,404.57.

On the 28th June 2022 Krypton Chemists Ltd filed an appeal against the Central Procurement and Supplies Unit as the Contracting Authority objecting to the award of the tender due to a breach of the departmental call for tenders regulations.

A deposit of € 667.02 was paid.

There were twentytwo (22) bids.

On the 27th September 2022 the Public Contracts Review Board composed of Mr Kenneth Swain Chairman, Dr Charles Cassar and Ms Stephanie Scicluna Laiviera as members convened a public hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – Krypton Chemists Ltd

Dr Clement Mifsud Bonnici	Legal Representative
Dr Calvin Calleja	Legal Representative
Mr Matthew Arrigo	Representative

Contracting Authority – Central Procurement and Supplies Unit

Dr Alexia Farrugia Zrinzo	Legal Representative
Dr Leon Camilleri	Legal Representative
Ms Marika Cutajar	Chairperson Evaluation Committee
Ms Solange Vella	Secretary Evaluation committee

Preferred Bidder – Cherubino Ltd

Dr Matthew Paris	Legal Representative
Dr Francis Cherubino	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 Clement Mifsud Bonnici Legal Representative for Krypton Chemists Ltd requested that the testimony of witnesses be heard first.

Ms Marika Cutajar (468772M) called as a witness by the Appellant testified on oath that she was the Chairperson of the Evaluation Committee in which role she ensured that the evaluation was correctly carried out. She said that the estimated value of the tender was based on the quantity of swabs required multiplied by the price obtained in the last procurement cycle plus an addition for the likely increase in requirements.

Mr Matthew Arrigo (188094M) called as a witness by Appellant testified on oath that he is the Business Development Director at Krypton Chemists Ltd. He stated that when perusing the tender lists the procurement value indicated led him to conclude that their potential bid would be higher than the threshold value in the tender. Since voluminous documentation was specified in the tender involving extensive work he concluded that his firm was not interested in tendering. From looking at past cases the indication was that when the bids exceeded the tender value the call was cancelled – two past instances were quoted.

Ms Marika Cutajar was recalled as a witness by the Contracting Authority. Under oath she recalled how the cheapest compliant offer was selected and that the quantity of the product was adjusted to ensure that the threshold was not exceeded. This was to ensure that no bidder would be excluded. There were other occasions when quantities were adjusted to keep tenders within a threshold.

This concluded the testimonies.

Dr Mifsud Bonnici said that his appeal would follow the points raised in the appeal letter. Thresholds were important as they give limits to values as directed in the Directive. Once the threshold is exceeded then the Directive has to be followed. The procurement value has to be calculated anew in a new tender and not use the previous procurement cycle as the measure. A tender is not saved by playing about with the quantities. Publication of a tender is part of the process of transparency and equality and, referring to Recital 18 of the Directive, it has to be borne in mind, said Dr Mifsud Bonnici, that if a tender is open to EU countries other third countries are also allowed to participate.

The argument by the CPSU is that all they did was to reduce the quantity. This was not known at the time of the bidding and various of the offers made indicate that the estimated value was not a realistic one. Reference was made to Department of Contracts Circular 11/2021 where the point is made on calculating the estimated value. The tender should be clear from its inception but not by messing about with quantities. No documentary proof has been submitted that this has been done in previous cases. When it is the case that the estimated value is exceeded then the tender should be cancelled since once the value is set the Authority cannot accept an offer above that threshold.

Dr Leon Camilleri Legal Representative for the CPSU said the tender was open to all and hence the number of companies that made an offer and the argument re foreign participation is not valid. It was the decision of the Appellant not to bid when they were at liberty to do so. The word estimate by its very name implies what it is – it cannot be exact. There was here a small reduction in quantity and contracts do not bind the quantity and there are no regulations covering quantities, and the tender should proceed on that basis.

Dr Mifsud Bonnici said that the argument that an estimate was an estimate was naïve and care is required here. The Circular earlier referred to also refers to the law (paragraph 28) - an estimate is an obligation that has to follow the law.

Dr Alexia Farrugia Zrinzo Legal Representative for the CPSU said that the tender was based purely on an estimate and the difference in quantity was small and no one was prohibited from tendering.

There being no further submissions the Chairman thanked the parties and declared the hearing closed.

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 27th September 2022.

Having noted the objection filed by Krypton Chemists Limited (hereinafter referred to as the Appellant) on 28th June 2022, refers to the claims made by the same Appellant with regard to the tender of reference CfT020-0140/22 CPSU 5283/22 listed as case No. 1790 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 Alexia J Farrugia Zrinzo & Dr Leon Camilleri
Appearing for the Preferred Bidder: Dr Matthew Paris

Whereby, the Appellant contends that:

- a) Firstly, the Contracting Authority issued the Tender as a “departmental call for tenders” in accordance with Regulation 101 of the PPR which expressly provides that *“Where the estimated value exceeds ten thousand euro (€10,000), but does not exceed the threshold established under regulation 9(1a), the supplies, works or services may be procured after a departmental call for tenders.”*

Regulation 9(1) of the PPR reads as follows: *“9. (1) Without prejudice to the applicability of the other provisions of these regulations, the procurement process of public contracts: (a) the estimated value of which is less than one hundred forty thousand euro (€140,000), shall be issued, administered and determined by the contracting authorities on their own without the need to involve the Director; (b) the estimated value of which equals or exceeds the threshold of one hundred forty thousand euro (€140,000) shall be issued, administered and determined by the Director on behalf of the contracting authority; [...]”*

Therefore, and on this basis, the Contracting Authority could not use the procurement procedure of "departmental call for tenders" to award a public contract to a bidder who has submitted a financial offer in excess of the threshold established for such procedure. It does further appear that the Contracting Authority, in correspondence with the Appellant, has acknowledged the fact that the Recommended Bidder's financial offer exceeds the thresholds for a "departmental call for tenders".

- b) Secondly, and where the estimated value of a tender exceeds €140,000 provided for in Regulation 9(1) of the PPR and in Schedule 5 of the PPR, a procurement procedure is to comply with a number of formality and substantive requirements which are required *ad validitatem* and these requirements were not adhered to by the Tender as follows:
- a. The Tender was not issued, administered and determined by the Director of Contracts on behalf of the Contracting Authority (Regulation 9(1)(b) of the PPR).
 - b. The requisite notices in terms of Regulation 44 of the PPR were not published on the Official Journal of the European Union.
 - c. The Tender's time limits do not comply with Regulation 116(1) of the PPR.
- c) Thirdly, the Contracting Authority has unilaterally, and in breach of the principle of self-limitation, transparency and equal treatment, decided to vary the quantities of the Tender, at evaluation stage, such that the estimated financial value of the Tender is artificially reduced below the threshold for "departmental call for tenders". The Appellant submits that this is a text-book case of shifting of

the goal post ex post facto and after closing date of submission of bids and even after the evaluation of bids. As shall be submitted and proven during the proceedings, this has prejudiced the Appellant, and potentially other economic operators, who have elected not to participate in this Tender based on the manner in which it was originally issued.

The Contracting Authority did not, at least prior to the submission of bids, inform the market about its right or decision to vary the quantities of the Tender during evaluation of bids. The Tender, on the contrary, expressly provided that: "This tender is not divided into lots, and tenders must be for the whole of quantities indicated." In conclusion, and in view of the above, the Appellant submits that the only route available to the Contracting Authority at this stage is the cancellation of the Tender.

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

- a) The objector firstly quotes regulations 101 and 9(1) of the Public Procurement Regulations (PPR) which provide:

"101. Where the estimated value exceeds ten thousand euro (€10,000), but does not exceed the threshold established under regulation 9(1)(a), the supplies, works or services may be procured after a departmental call for tenders.

9.(1) Without prejudice to the applicability of the other provisions of these regulations, the procurement process of public contracts; (a) the estimated value of which is less than one hundred forty thousand euro (€140,000), shall be issued, administered and determined by the contracting authorities on their own without the need to involve the Director: (b) the estimated value of which equals or exceeds the threshold of one hundred forty thousand euro (€140,000) shall be issued, administered and determined by the Director on behalf of the contracting authority."

- b) The above quoted regulations clearly provide for an estimated value of the contract and do not constitute a strict rule on the value of the submissions, so much so that the tender document, as in most if not all procurement documents, clearly states in clause 1.1 of Section 1 that *"The purpose of this value shall be the guidance of prospective bidders when submitting their offer and is not to be considered as a binding capping price. Therefore, the published Estimated Procurement Value is not restrictive and final on the Contracting Authority. Economic Operators are free to submit financial offers above or below the Estimated Procurement Value."*
- c) It is well established that the contract value is only used as a guidance, and does not place any limit on the offers, so much so that 9 of the 10 economic operators who participated in the call, made an offer exceeding the estimated value.
- d) The tender document in fact did not in any part of its sections indicate that the offers should be capped by €140,000. Regulations 9.1 (a) of the PPR states that (...) the procurement process of public contracts; the estimated value of which is less than one hundred forty thousand euro (€140,000), shall be issued, administered and determined by the contracting authorities (...). The

estimated value of this tender was indeed €133,404.57 (less than €140,000) and thus in line with regulation 9.1 of the PPR, the Contracting Authority was well within its right to issue the call.

- e) The tender was issued as a departmental tender and remained a departmental tender therefore the requisites for calls, the estimated contract value of which exceeds the sum of €140,000, mentioned by the objector in his second part of the grievances, were and remain unapplicable. The principle of *ubi lex voluit dixit ubi noluit tacuit* (Where the law wills it speaks, where it does not, it is silent) is also, as in all other areas of law, a basic principle of Public Procurement Legislation and the law does not state that if a cheapest compliant offer exceeds the estimated contract value or the estimated contract value capped for departmental tenders, the tender should be cancelled. In fact the objector failed to quote any legal provision in this regard except for the definition of unacceptable tender which deals with a budget and not an estimated contract value.
- f) Thus, in simple and clear terms, the argument is that it is the estimated Contract Value which is capped by law up to €140,000 and not the actual contract value. CPSU nonetheless obtained approval from the Departmental Contracts Committee (DCC) to reduce the estimated quantities in order to keep within the €140,000 so as not to administer contracts which exceed the estimated threshold. This did not significantly alter the tender conditions since the quantities, as the tender value, are merely estimates. In fact, by way of example, since the contract values are estimated, the contracting authority is not obliged to purchase the total amount indicated in the estimated quantity of the tender. Moreover, minor changes are in actual fact permissible and regulation 52 of the PPR contemplates the possibility that parts of the procurement documents are changed. This regulation can be clearly interpreted *a contrario sensu* that unless there is a significant change, and in CPSU's humble view the small change in quantity does not constitute a significant change, no action shall be taken from (sic) the contracting authority. In fact regulation 52(3) provides that: “3) Contracting authorities shall extend the time limits for the receipt of tenders so that all economic operators concerned may be aware of all the information needed to produce tenders in the following cases: (.....) (b) where significant changes are made to the procurement documents.”
- g) In addition to the arguments above and in rebuttal to paragraph 25 of the objection, the clauses of the General Rules Governing Tenders quoted by the objector in the said paragraph, ie regulation 18, deal with a prerogative of the Contracting Authority which may cancel a tender. This clearly shows that it is not an obligation at law to cancel a tender if it exceeds the budget but a prerogative which the contracting authority chooses to exercise should there be the need. CPSU also submits that it is a well established practice and permissible by law and by the various published tenders that tenderers can exceed the estimated value of tenders in their submissions, and even the threshold of the average departmental contract value as is clear from the numerous submissions in this tender process, The Objector was in no way stopped or precluded from making an offer exceeding the estimated contract value or the departmental threshold.

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 consider Appellant's grievances as follows:

- a) This Board notes and appreciates the numerous bids received for this tender. However, it also notes that in their vast majority, these bids are all higher than the estimated procurement value. Only the bids of one (1) economic operator, who submitted two (2) offers were below the estimated procurement value. The other twenty-two (22) bids submitted by the other nine (9) economic operators were all above the estimated procurement value. Most of them, well above the estimated procurement value. This creates significant doubts on the procedure adopted to calculate the Estimated Procurement Value.
- b) The mechanism adopted to calculate the estimated procurement value should never be underestimated, as depending on the result / value obtained, different procedures are to be adopted. Circular 11/2021 is clear when it states *"The Estimated Value of a Procurement / Concession Procedure shall determine which regulations must invariably be adhered to. In fact, if such a value meets or exceeds the EU Financial Thresholds as set out in the relevant EU Directives¹, the process to be adopted is more definite and rigorous since it is open to a wider stream of Economic Operators through the publication of the Procurement / Concession Call on the Official Journal of the European Union (OJEU). Ultimately, these thresholds reflect the level at which the EU Legislator deemed that cross-border trade would be more prominent. Nonetheless, non-domestic Economic Operators are at liberty to submit bids for any calls below the EU Thresholds."*
- c) When considering, that it was not known at bidding stage that the Contracting Authority would be reducing the number of quantities procured in order to remain below the threshold, this put other economic operator, such as in this case the appellant, at a disadvantage.
- d) Whilst, in general, it is normally an accepted practice that not all quantities listed in a tender procedure are to be procured, such changes in quantities should not be altered at award and / or evaluation stage to place the value of the winning bid below or above certain thresholds.

Considering all of the above, this Board upholds appellant's grievances.

The Board,

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

- a) To cancel the tendering process as per regulation 90(3) of the Public Procurement Regulations,
- b) Directs that the deposit paid by Appellant to be reimbursed.

Mr Kenneth Swain
Chairman

Dr Charles Cassar
Member

Ms Stephanie Scicluna Laiviera
Member