

PUBLIC CONTRACTS REVIEW BOARD

Case 1345 – CFT 019-1090/18 – Tender for the Supply of One (1) Automated Tissue Processor for the Pathology Department at Mater Dei Hospital

The publication date of the tender was the 12th October 2018 whilst the closing date was 1st November 2018. The estimated value of the tender (exclusive of VAT) was € 63,559.33.

On the 1st July 2019 ProCare Ltd filed an appeal against the Ministry for Health, Central Procurement and Supplies Unit as the Contracting Authority contesting the decision to disqualify them as their financial bid was not acceptable. A deposit of € 400 was paid.

There were six (6) bidders.

On 22nd August 2019 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellants – ProCare Ltd

Dr Robert Galea	Legal Representative
Mr Pierre Calleja	Representative

Recommended Bidder – Cherubino Ltd

Dr Francis Cherubino	Representative
Ms Piera Assenzo	Representative

Contracting Authority – Central Procurement and Supplies Unit

Dr Marco Woods	Legal Representative
Mr Stephen Mercieca	Secretary Evaluation Committee
Ms Dionne Buttigieg	Member Evaluation Committee
Mr Jesmond Farrugia	Member Evaluation Committee

Dr Anthony Cassar, Chairman of the Public Contracts Review Board, welcomed the parties and invited them to make their submissions.

Dr Robert Galea Legal Representative for ProCare Ltd said that his clients' offer had been refused because they had failed to include the spare filters in the tender's financial bid. It is accepted that the technical specifications are paramount in a tender and yet the word 'filter' does not appear anywhere in the specification sheets – in other words the bid was refused for an omission that was not required. Public Procurement Regulations (PPR) 53 (1) lays down what is required in the specifications – if it is not laid down it is not required. In Case 1329 the Public Contracts Review Board laid down exactly the need to draft clear specifications while the standard guidelines for the evaluation of tenders issued by the Director of Contracts lays down the distinct stages an evaluation must follow. Following that procedure why fail a bid at the financial evaluation on something that had not been a requirement at the technical stage?

Dr Marco Woods Legal Representative of the Central Procurement and Supplies Unit referred to Page 15 item 2.11 of the tender document which states that the Processor had to be fully compliant with the latest European Union Health and Safety Regulations (which however it was established were not part to the tender dossier). Dr Woods maintained that even if the H & S Regulations did not mention the filters it must be taken as read that if a machine needed filters then they must be supplied. The Appellants' bid form had had the provision of filters deleted and that part was left blank (Doc 1 was tabled showing the BOQ original Financial Bid Form and the one submitted by Appellant). No clarification had been sought; the submissions were incomplete and had therefore been refused.

Dr Galea referring to PPR 187 (1) stated that a tender shall be considered admissible if it is in conformity with the technical specifications. What the Contracting Authority wants should be in the specifications and in this instance they had considered ProCare bid non-compliant on matters other than those requested. The evaluation committee had acted '*ultra vires*' – instead of following the technical specifications it had gone one step further by declaring default on the financial offer.

Ms Dorianne Buttigieg (179270M) called as a witness by the PCRFB testified on oath that she was a member of the evaluation committee. The filters were included under Clause 2.11 of the tender documents as part of the H&S requirements. Questioned by Dr Galea witness confirmed that there was no mention of the word 'filters' in the Specifications, nor indeed in Clause 2.11 of the tender.

Dr Francis Cherubino Representative of Cherubino Ltd stated that filters were essential otherwise the equipment would not be operational - it was, in fact, part and parcel of the equipment. The financial bid form was integral to the tender offer and by altering it Appellants had accepted that their bid could not be considered any further.

Dr Galea said that hypothetical arguments apart, the filters were not asked for. The tender is faulty as it includes a requisite item in the financial bid form which was not included in the technical part. Several cases decided by the PCRFB all confirm that the tender revolves around the technical specifications.

Dr Woods referred again to the H&S requirements which meant that the filters were obviously required. The financial bid form had been altered thus invalidating the Appellants offer.

The Chairman thanked the parties for their submissions and declared the hearing closed.

This Board,

Having noted this objection filed by ProCare Ltd (herein after referred to as the Appellants) on 1 July 2019, refers to the claims made by the same Appellants with regard to the tender of reference CFT 019-1090/18 listed as case no 1345 in the records of the Public Contracts Review Board, awarded by Central Procurement and Supplies Unit (herein after referred to as the Contracting Authority).

Appearing for the Appellants: Dr Robert Galea

Appearing for the Contracting Authority: Dr Marco Woods

Whereby, the Appellants contend that:

- a) Their offer was rejected due to the fact that, in their financial bid, they did not include the item ‘Spare Filters’. In this regard Appellants point out that, such requirement was not stipulated in the technical requirements of the tender dossier so that the inclusion of this technical item on the financial bid form is ‘Ultra Vires!’**

This Board also noted the Contracting Authority’s ‘Letter of Reply’ dated 10 July 2019 and its verbal submissions during the hearing held on 22 August 2019, in that:

- a) The Authority insists that the medical device itself had to be a complete machine which included filters and, in this respect, Appellants deleted the part where filters were indicated, so that their financial bid was incomplete, and the Evaluation Committee had no other option but to deem Appellants’ offer as being financial non-compliant.**

This same Board also noted the testimony of the witness namely;

Ms Dorianne Buttigieg, evaluator, duly summoned by the Public Contracts Review Board.

This Board, after having examined the relevant documentation to this appeal and heard submissions made by the parties concerned, including the testimony of the witness duly summoned, opines that the issue that merits consideration refers to the omission of the quote for ‘Filters’, in Appellants’ submitted financial bid form.

- 1. This Board would, first and foremost, point out that the financial bid form is an integral part of the tender dossier, so that, what was requested in the specific form, had to be submitted by Appellants.**

2. Appellants' are claiming that the requirement of the filters was not listed as an item, in the technical specifications of the tender document yet, shown, as a separate item, on the financial bid form. In this regard, this Board notes that Appellants, in their bid form, had deleted the item 'Filters' at their own discretion and without any justifiable cause. In this regard, this Board, regrettably notes that, by deleting a mandatory item in a tender dossier, Appellants are dictating what the technical specifications should be, which is totally unacceptable and goes against the basic principles of Public Procurement.

3. Needless to mention that, such an action on the part of the Appellants should be totally deplored and this Board, as it has on many occasions, would emphasize that, technical specifications are not capriciously stipulated but are formulated by the Authority to ensure transparency and equal treatment, which are two main pillars in Public Procurement. The technical specifications form the core of the tender document, so that, no such alterations or deletions by bidders are allowed. If Appellants had any objection to a particular clause in the tender document, there exist remedies for appellants to clarify any misunderstanding and/or

interpretation of what was being requested by the Authority, however, such remedies were not availed of by Appellants.

- 4. This Board would also point out that the Authority was requesting an ‘Automated Tissue Processor’, which had to be functional. Such medical device has ‘Filters’ incorporated in its mechanism and the Authority, in the financial bid form requested a price for a ‘Set of Filters’, which, in all respects, are treated as consumables that need to be changed at intervals depending on the use of the device. In this regard, this Board opines that the inclusion of ‘Set of Filters’, in the financial bid form is proper and justifiable and the fact that the item ‘Filters’ was not included in the technical specifications, does not justify Appellants’ deletion of same in the submitted financial bid form.**

In conclusion, this Board opines that:

- a) The tender document with special reference to the technical specifications depicts clearly and explicitly what the Authority was requesting,**

- b) the fact that Appellants' financial bid form was altered, automatically invalidated Appellants' offer,**

- c) there was no need to mention 'Filters' as a separate item in the technical specifications as these were part of the internal functional operation of the device,**

- d) the inclusion of 'Set of Filters' in the financial bid form was truly justified, as filters are consumables, need to be changed at intervals and the Authority wanted to be aware of the cost of such filters, for the necessary replacements, as and when required,**

- e) Appellants' had other remedies available to clear any misunderstanding on any particular clause in the tender dossier, prior to the submission of their offer and such remedies were not availed of by Appellants.**

In view of the above, this Board,

- i) upholds the Contracting Authority's decision in the award of the tender,**

ii) does not uphold Appellants' contentions,

iii) directs that the deposit paid by Appellants should not be refunded.

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Lawrence Ancilleri
Member

5 September 2019