PUBLIC CONTRACTS REVIEW BOARD

Case 1346 – MPU MFCS 18117 – Tender for the Supply and Delivery of Twenty one (21) Semi-Automatic External Defibrillators for Agenzija Sapport

The publication date of the tender was the 4th March 2019 whilst the closing date was 25th March 2019. The estimated value of the tender (exclusive of VAT) was € 33,600.

On the 21st June 2019 ProCare Ltd filed an appeal against Agenzija Sapport as the Contracting Authority contesting the decision to disqualify them as their bid was not technically compliant. A deposit of € 400 was paid.

There were twelve (12) 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 – Technoline Ltd

Mr Bjorn Bartolo	Representative
Ms Damaris Lofaro	Representative

Contracting Authority – Agenzija Sapport

Dr Rita Mifsud	Legal Representative
Mr Giancarlo Farrugia	Chairperson Evaluation Committee
Ms Stephanie Etim Grech	Secretary Evaluation Committee
Ms Abigail Spiteri	Member Evaluation Committee
Mr Charles Pace	Member Evaluation Committee
Mr Keith Cauchi Vaughan	Member Evaluation Board

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 of ProCare Ltd sought permission to call a witness.

Mr Pierre Calleja (240072M) called as a witness by Appellants testified on oath that he was a Director of Appellant company. He stated that the defibrillators he was offering in the tender could be upgraded and he informed the Contracting Authority of this in an e-mail. The technical specifications also indicated that the equipment was upgradeable. In reply to a question by Dr Galea, witness stated that he was fully aware that he would be liable to damages if he failed to meet the terms of the tender if it were awarded to him.

Questioned by Dr Rita Mifsud Legal Representative of Agenzija Sapport witness said that the copy of the e-mail above referred to was not presently available. He confirmed that the Contracting Authority had requested clarification and his reply of 25th April 2019 had included a certificate from CU Medical Germany GmbH (submitted as Doc D in letter of objection) which however gave no indication that the product was upgradeable.

Dr Galea said that the rejection letter had stated that Appellants had failed to submit the necessary information as to whether the product could be updated but despite this Appellants representative had confirmed that he was aware of the risks if he did not adhere to the terms of the tender.

The Chairman said that the Board would require proof of Appellants' reply to the clarification request – otherwise it would reach its' own conclusions.

Dr Galea said that there were inconsistencies in the requirements of the technical specifications in that in the latter two of them (he referred to 2, 15 and 18) there was no request for documentation. Therefore the Contracting Authority was happy with this inconsistency or was arbitrary in its decisions. Appellants also had a second grievance as in the clarification note the words 'at no extra cost' had suddenly appeared. This was an additional specification and changed the parameters in violation of established principles. It was not equitable treatment and went against the concept of natural justice.

Dr Mifsud stated that there were two distinct criteria. The first was that the defibrillators had to meet the European Resuscitation Council Guidelines of 2015, and secondly that the units had to have the capability of being upgraded according to the latest guidelines of that body. The Contracting Authority requested clarification on this point – Appellant presented a certificate from the manufacturers but no document or confirmation that the units were upgradeable. On one hand the Appellants were claiming that it was impossible to obtain documents regarding the upgrading but was also claiming that the necessary document had been presented.

With regard to what was referred to as inconsistencies there was a difference between item 2 and items 15 and 18 in the specifications. Items 15 and 18 ask for assurances where the Appellants

certifications are sufficient to meet the terms of the Contracting Authority. Item 2 covered the product warranty where manufacturers' assurances were required.

With regard to the second grievance the Contracting Authority asked for confirmation that the product could be updated at no extra cost – they were not asking for anything extra.

Dr Galea said that to his thinking the request was that the upgrade should happen at no extra cost to the Contracting Authority – they were therefore passing on the cost to the Appellants.

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

This Board,

having noted this objection filed by ProCare Ltd (herein after referred to as the Appellants) on 21 June 2019, refers to the claims made by the same Appellants with regard to the tender of reference MPU MFCS 18117 listed as case no 1346 in the records of the Public Contracts Review Board, awarded by Agenzija Support (herein referred to as the Contracting Authority).

Appearing for the Appellants: Dr Robert Galea

Appearing for the Contracting Authority: Dr Rita Mifsud

Whereby, the Appellants contend that:

a) Their offer was rejected due to the alleged claim by the Authority that, from the submissions made, their offer product was not upgradable,

whilst, in actual fact, the information confirming such a requirement had been submitted.

b) **There were inconsistencies in the requirements of the technical specifications as stipulated in clauses 2, 15 and 18, wherein there was no request for documentation.**

This Board also noted the Contracting Authority's 'Letter of Reply' dated 2 July 2019 and its verbal submissions during the hearing held on 22 August 2019, in that:

a) **The Authority insists that Appellants failed to submit information confirming that their product was upgradable.**

b) **With regard to the claimed inconsistencies in the tender document, the Authority maintains that items 15 and 18 requested assurances and certifications were sufficient, whilst item 2 required manufacturer's assurance with regard to product warranty.**

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

Mr Pierre Calleja, Director of ProCare Ltd duly summoned by ProCare Ltd.

This Board, after having examined the relevant documentation to this appeal and heard submissions made by the parties concerned including g the testimony of the witness opines that, the issues that merit consideration are twofold namely, (a) Appellants' submissions and (b) inconsistences in the tender requirements.

1. **With regard to Appellants' first grievance, this Board would refer to the 'Specification Reference' in section 4, paragraph 2, which clearly states the following:**

   "The unit has the capability of being upgraded and updated according to the latest guidelines of the ERC as stipulated from time to time."

   From documentation made available to this Board, the above information was missing from Appellants' submission, so much so that, on the 17 April 2019, the Authority sent a notification to Appellants asking for further clarifications, as shown hereunder:

   "1. The Evaluation Committee would like to clarify the following:

   You are hereby being asked to clearly indicate where in you submitted Literature are the specifications as required in Section 4 of the Tender Document for the below:

Technical Specifications	
2.	*The unit has the capability of being upgraded and updated according Guidelines of the ERC as updated from time to time.*
10.	*Software programs are provided with the device to enable professional to analyse patient data stored in the unit.*
13.	*When the battery is low, the defibrillator depicts the capacity to engage a maximum of thirty (30) shocks or sixty (60) minutes of operating time and minimum of five (5) shocks*

In terms of Article 7 of the Instructions to Tenderers, you are hereby given the opportunity to confirm, clarify and rectify the above within five (5) working days of notifications, i.e. by ***noon of Thursday 25th April 2019.***

Through the above-mentioned clarification request, Appellants were given the opportunity to clarify/rectify their missing information.

2. **In their declaration, Appellants did declare that the unit is capable of being upgraded, however, quite appropriately, the Evaluation Committee had to verify that, such a declaration is correct, so that, the**

committee requested proof in the form of literature which would support such a capability and in this respect, this Board confirms that the Evaluation Board acted in a diligent and proper manner.

3. **This Board refers to the testimony of Mr Pierre Calleja, who when asked by this Board to produce evidence to prove that Appellant company provided the information requested as per clarification request dated 17 April 2019, Mr Calleja could not produce such evidence. In this respect, this Board could only identify a declaration by 'CU Medical Germany GmbH, stating that the 'i-Pad CU-SPI complies with the ERC/AHA 2015 guidelines' and there was no mention of the unit's capability of being upgraded from time to time.**

4. **With regard to Appellants' second contention, this Board opines that a clear distinction must be made between the requisite whereby the device must be compliant with the updated guidelines and the requisite whereby the same unit can be upgraded, if and when guidelines dictate so, and in this respect, this Board notes that, Appellants failed to understand this particular concept. Needless to mention that, Appellants had the remedies to clear any misunderstanding or interpretation on any**

particular clause in the tender document, prior to submitting their offer, however, this Board notes that such remedies were completely ignored by Appellants. In this regard, this Board does not find any justifiable cause to deem the technical specification as being inconsistent.

5. **With regard to Appellants' claim that, the wording 'At No Extra Cost' appeared suddenly and only in the clarification request, this Board noted that, Appellants' device had its default setting in accordance with the American Heart Association (AHA) and the Authority wanted to know if the device could be upgraded to the standards, as requested in the technical specifications of the tender i.e. (ERC Guidelines), obviously also to confirm that such upgrading will be at no extra costs. In this respect, this Board confirms that such a wording did not create any conflict with the technical specifications of the tender.**

In conclusion, this Board opines that:

a) **Appellants failed to submit proof that the device which they are offering can be upgraded,**
b) **There were no inconsistencies in the tender document, but rather misunderstanding on the part of Appellants, in their submission,**

c) Appellants had all the remedies available to clarify any misunderstanding or misinterpretation in their tender document but opted not to avail themselves of such remedies,

d) it was the duty and obligation of Appellants to submit the information so requested in the tender document and at the same instance, no justifiable evidence was presented to prove that the requested information with regard to the product's upgrading capable, was submitted.

In view of the above, this Board,

i) does not uphold Appellants' contentions,

ii) upholds the Contracting Authority's in the award of the tender,

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

Dr Anthony Cassar	Dr Charles Cassar	Mr Lawrence Ancilleri
Chairman	Member	Member

5 September 2019