

## **PUBLIC CONTRACTS REVIEW BOARD**

### **Case 1396 – CFT 019-1054/18 – Tender for the Supply of Two Ultra-Violet Emitting Machines for Infectious Diseases Unit at Mater Dei Hospital**

The publication date of the tender was the 2<sup>nd</sup> October 2018 whilst the closing date was the 12<sup>th</sup> November 2018. The estimated value of the tender (exclusive of VAT) was € 118,644.07

On the 2<sup>nd</sup> October 2019 Evolve Ltd filed an appeal against Central Procurement and Supplies Unit as the Contracting Authority on the grounds that they had been disqualified on the basis that their offer was technically not compliant. A deposit of € 600 was paid.

There were four (4) bidders.

On 3<sup>rd</sup> December 2019 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Richard Matrenza as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

#### **Appellants – Evolve Ltd**

Dr Anthia Zammit	Legal Representative
Mr Chris Busuttill Delbridge	Representative
Mr Mark Zammit	Representative

#### **Recommended Bidder – Prohealth Ltd**

Dr Alessandro Lia	Legal Representative
Mr Mark Bondin	Representative
Ms May Schembri	Representative

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

Dr Marco Woods	Legal Representative
Eng Frankie Caruana	Chairperson Evaluation Committee
Mr Stephen Mercieca	Secretary Evaluation Committee
Ms Ruth Pace	Member Evaluation Committee
Mr Ian Attard	Member Evaluation Committee

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

Dr Marco Woods Legal Representative for Central Procurement and Supplies Unit requested permission to enter a preliminary objection to this appeal since Appellants had failed to make use of the remedy afforded by Section 262 of the Public Procurement Regulations but chose instead now to attack the requisites in the tender.

Dr Anthia Zammit Legal Representative for Evolve Ltd said that the remedies to appeal were available at every stage of the proceedings and Appellants were not precluded from objecting at any time.

The Chairman pointed out that if it was the intention of Appellants to challenge the technical specifications in the tender, then they should have made use of the remedies that were available to them at the pre-tendering stage.

Dr Zammit said that the point of their objection was not based on the technical specifications but on the way the tender had been evaluated. There was a breach of equal treatment because no test exists to measure the method of cleaning of the lamps and hence their efficiency. The award was made not only to the less efficient lamp but to the one that was most expensive.

Ms Ruth Pace (195675M) called as a witness by the Public Contracts Review Board testified on oath that she was a member of the evaluation committee. She stated that the committee's decision on the award was based on the bidders' offers as related to the tender specifications. In the case of Appellants' offer the process of disinfecting indicated a time of 41 minutes whereas the tender specified a time of not more than 10 minutes.

Questioned by Dr Lia Legal Representative for Prohealth Ltd witness stated the tender specifications were a measure to ensure that a room was free of bacteria in up to five minutes with 10 minutes being the upper limit.

The Chairman said that the evaluation committee was bound by the principle of self-limitation – both Appellant and Contracting Authority had to follow the tender documents.

Dr Woods re-iterated that the points raised or any ambiguity could easily have been dealt with through a pre-tender remedy and this appeal should not be upheld.

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

End of Minutes

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## **Decision**

**This Board,**

**having noted this objection filed by Evolve Ltd (herein after referred to as the Appellants) on 2 October 2019, refers to the claims made by the same Appellants with regard to the tender of reference CFT 019-1054/18 listed as case No. 1396 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 Anthia Zammit**

**Appearing for the Contracting Authority: Dr Marco Woods**

**Whereby, the Appellants contend that:**

- a) The tender specifications were ambiguous, and the evaluation process breached the principle of equal treatment as there exists no method of assessing the cleaning of the lamps and hence their efficiency. At the same instance Appellants contend that the tender was awarded to the less efficient product and the most expensive.**

**This Board also noted the Contracting Authority’s ‘Letter of Reply’ dated 10 October 2019 and its verbal submissions during the hearing held on 3 December 2019, in that:**

- a) The Authority insists that Appellants’ offer did not conform to clauses 2.1.2 of the technical specifications of the tender.**
  
- b) The Evaluation Committee carried out its evaluation process in accordance with the principles of transparency, equal treatment and self-limitation.**

**This same Board also noted the testimony of the witness namely:**

**Ms Ruth Pace Evaluator duly summoned by the Public Contracts Review Board.**

**On a preliminary note, submitted by the Contracting Authority that, Appellants’ cannot, at this particular stage, attack the technical specifications of the tender, this Board, not only upholds the Authority’s request but would also point out that, if Appellants deemed that the technical specifications were not appropriate ambiguous, they had all the remedies available to clarify with the Authority prior to their submission of offer. In this regard, this Board**

**opines that points raised regarding the technical specifications will not be considered or treated during the hearing.**

- 1. 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 only issue which this Board deems to be considered is the manner in which the evaluation process was carried out.**
  
- 2. With regard to Appellants' contention that the remedies to appeal were available at every stage of the tendering proceedings, this Board would respectfully point out that there are remedies which apply for concerns prior to the closing date of submissions and there are remedial objections for post award situations, so that such remedies can only be availed of, at particular stages of the tendering procedure and not at any time.**
  
- 3. This Board would also saliently point out that through Appellants' submission of offer, they had accepted the conditions and technical specifications of the tender document so that, any post submission contentions in this regard, are frivolous.**

**4. The Evaluation Committee were bound by the basic principles of self-limitation, transparency and equal treatment. In this regard, this Board opines that, after having examined the evaluation report, it is evidently clear that Appellants’ offer failed to conform with clauses 2.1.1 and 2.1.2.**

**Clause 2.1.1 states that:**

“

2.1.1	<i>a 5-log reduction of vegetative bacteria, including Staphylococcus aureus, Klebsiella pneumoniae and Acinetobacter baumannii (or surrogates from a distance of <math>\geq 3</math> meters in <math>\leq 5</math> minutes of operation</i>	N/A	Mandatory
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**Appellants’ submission in this regard indicated that the room will be free of bacteria within 10 minutes (and not 5 minutes as stated in the above-mentioned clause).**

**Clause 2.1.2 states that:**

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2.1.2	<i>a 4 log reduction of Clostridium difficile spores from a distance of <math>\geq 3</math> meters in <math>\leq 10</math> minutes of operation</i>	N/A	Mandatory
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**Appellants’ offered process of disinfecting indicated a time of 41 minutes, whilst the above-mentioned clause stipulated a time of 10 minutes.**

**5. This Board would point out that both the Appellants and the Evaluation Committee are bound to adhere to the principle of self-limitation in that,**

**Appellants are in duty bound to submit their offer in conformity with the stipulated conditions and specifications whilst the Evaluation Committee, in their deliberations, must ensure that the successful offer has satisfied all the terms and conditions as duly dictated in the tender dossier.**

**In conclusion, this Board opines, that:**

- a) Appellants' offer rejection was due to the failure of conformity with clauses 2.1.1 and 2.1.2 of the technical specifications, which was appropriately justified.**
  
- b) The Evaluation Committee carried out the evaluation process in a fair, just and transparent manner.**
  
- c) Appellants' had the remedy to clarify any alleged ambiguities or misunderstandings prior to the submission of their offer and such remedies were not availed of by same.**

**In view of the above, this Board,**

- i. upholds the Authority's preliminary pleas,**
- ii. upholds the Contracting Authority's decision in the award of the tender,**
- iii. does not uphold Appellants' contentions,**
- iv. directs that the deposit paid by Appellants should not be reimbursed.**

Dr Anthony Cassar  
Chairman

Dr Charles Cassar  
Member

Mr Richard A Matrenza  
Member

*17 December 2019*