PUBLIC CONTRACTS REVIEW BOARD

Case 1509– CFT 020-1081/20 CPSU 2474/20. Tender for the Supply of Foldable Injectable Lenses

Pre-Contractual Remedy

The Call for Tenders was published on the 9th October 2020 and the closing date for submissions was the 30th October 2020. The estimated value of the Proposal (exclusive of VAT) was € 137,600.

On the 21st October 2020 AMAS Co Ltd filed a Precontractual-Remedy against Central Procurement and Supplies Unit as the Contracting Authority in terms of Regulation 262 et seq of the Public Procurement Regulations.

On 2nd November 2020 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, and Dr Charles Cassar as members convened a public virtual hearing to discuss the application.

The attendance for this public hearing was as follows:

Appellants – AMAS Co Ltd

Dr Robert Tufigno	Legal Representative
Mr Andrew Borg	Representative

Contracting Authority – Central Procurement and Supplies Unit

Dr Marco Woods	Legal Representative
Ms Rita Zammit	Representative
Dr Benedict Vella Briffa	Representative

Dr Anthony Cassar Chairman of the Public Contracts Review Board welcomed the parties. He noted that since this was a virtual meeting all the parties agreed to treat it as a normal hearing of the Board. He then invited submissions.

Dr Robert Tufigno Legal Representative for AMAS Co Ltd pointed out to the Board that the Contracting Authority had extended rather than suspended the tender process since the appeal was listed. The Board was advised by the Authority that it is the normal procedure to leave a tender open whilst an appeal is heard.

Ms Rita Zammit (276864M) called as a witness by Appellants testified on oath that the tender wording followed the existing format but that she was not involved at this stage.

Dr Benedict Vella Briffa (454183M) called as a witness by Appellants testified on oath that he was requested by the Contracting Authority to check and update the tender terms including the updating and

clearer description of the term 'centre of excellence'. The idea behind this was to ensure that the manufacturer of these lenses had a good track record in the use of these lenses. The figure of 3,000 units was chosen as this was the number used at Mater Dei Hospital each year.

In reply to questions witness agreed that the imposition of these conditions were not part of the technical specification of the tender but to make absolutely clear what the term meant. He also said that the terms were the same as those in a previous tender.

Dr Tufigno said that the conditions of tender specifications have to be tied to the Public Procurement Regulations (PPR) Regulation 53 which in itself is exhaustive. The additional specifications in this tender are outside those defined in the PPR and what the Authority was requesting in this instance is not included in Regulation 232. The tender asks for specific details from recognised centres when a list of users would have sufficed if what the Authority required was confirmation of the quality of the product. As drafted the specifications of the tender reduce competition and it is clear that the Authority had a supplier in mind, totally going against the spirit and text of the PPR. Further, S.L. 427/10 gives the terms for supply of this product and the Authority seems to be treating the European Union directives as superficial. He requested the setting aside of the paragraphs outlining the definition of centres of excellence in both Lot 1 and 2 since they were artificially narrowing competition.

Dr Marco Woods Legal Representative for the Central Procurement and Supplies Unit said that this tender was similar to the one published last year and the only difference was that it was additionally clarifying the term centre of excellence, precisely to try to reduce the areas for appeals. If these terms were to be removed the evaluation committee would have no basis to adjudicate the bids except on narrow terms and without the assurance that the selected product safeguarded patients' well being. The decision of the previous tender was not contested through an appeal and is therefore acceptable to Appellants and the matter is now therefore *'res judicata'*. The only reason for this call for remedy was that Appellants product does not meet the standards imposed by the Contracting Authority which in turn is at perfect liberty to set its own conditions, and which conditions conform to legal requirements.

Dr Tufigno said that this appeal is based on this tender and not on that of last year which was restricted as it could not request change of terms since it was already awarded when the appeal was made. Today the terms are being attacked before adjudication and it is only now that the Appellants can state that the Authority cannot impose whatever terms it wishes. If the conditions are illegal the PCRB is in a position to do something about it. All that this tender is doing is favouring the current supplier since the conditions are too restrictive and subjective and indeed tailor made. All the Authority had to do to establish excellence was to ask for a list ofconsumers.

Dr Woods stated that the term centre of excellence in the previous tender had been attacked but the PCRB had accepted the terms set by the Authority. Appellants could have gone to the Court of Appeal and had ample opportunity to contest the terms. The tender terms should be left as they are.

Dr Tufigno concluded by saying that this fresh appeal is in no way related to the previous tender, and Appellants were not contesting the quality of the product but the terms of competition.

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

End of Minutes

Decision

This Board,

having noted this 'Call for Remedies Prior to Closing Date of a Call for Competition' filed by AMAS Co Ltd (hereinafter referred to as the Appellants) on 21st October 2020, refers to the claims made by the same Appellants with regard to the tender of reference CFT 020-1081/ 20 listed as case No. 1509 in the records of the Public Contracts Review Board.

Appearing for the Appellants: Dr Robert Tufigno

Appearing for the Contracting Authority: Dr Marco Woods

Whereby, the Appellants contend that:

a) **Their main concern refers to the conditions, laid out in the tender dossier, relating to 'Centres of Excellence' and 'Minimum Annual Contract Operations'. In this regard, Appellants maintain that such conditions restrict drastically the scope of open competition and are in breach of the Public Procurement Regulations.**

This Board also noted the Contracting Authority's 'Letter of reply' dated 26th October 2020 and its verbal submissions during the virtual hearing held on 2nd November, in that:

a) **The Authority contends that, the conditions laid out in the tender document simply clarify what is meant by 'Centres of Excellence'. With regard to the annual number of 'Cataract Operations', the Authority insists that, such a condition represents the number of operations presently carried out at Mater Dei hospital and in this respect, the safety of the patient is being taken into consideration.**

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

Dr Benedict Vella Briffa, duly summoned by AMAS Co Ltd.

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 issues that merit consideration are two-fold namely, the conditions, as stipulated in the tender dossier pertaining to:

a) **Centres of Excellence and**
b) **Number of Annual Cataract Operations**

In this regard this Board will treat each of the above-mentioned grievances on their merits as follows:

1. **<u>Centres of Excellence</u>**

   1.1. Appellants' contention is that, the conditions as laid out in the tender document, restricts the participation of Bidders to such an extent that,

same are in breach of the Public Procurement Regulations. At the same instance, Appellants maintain that, if the Authority's objective behind such conditions is to ensure the quality of the product, the Authority should request a list of clients.

1.2. On the other hand, the Authority maintains that, the objectives behind the amplification of the definition of 'Centres of Excellence', is to avoid any misinterpretations or unnecessary appeals during the evaluation process of the tender. Furthermore, the Authority wants to be assured that the product being offered is applied in hospitals providing such facilities on a National level.

1.3. This Board, would respectfully refer to conditions complementing the technical specifications of the product, as follows:

"Tender must show that the product is already in use in recognised centres of excellence in EU countries. A centre of excellence is defined as fulfilling all of the following:

- *Must be a major tertiary referral hospital with academic affiliation, where a significant volume of clinical research is carried out.*
- *Must have a concentration of renowned expert ophthalmologists (including paediatric, corneal, glaucoma and vitreoretinal subspecialists) who manage a large population of patients including the most severe/rare cases.*

- *Must perform at least 3,000 cataract operations annually using the intraocular lens platform being offered by the tender."*

First and foremost, this Board would clarify, at the outset that the above clause represents a condition and is not to be treated as a technical specification. At this stage of consideration, this Board would point out that, the Contracting Authority has all the rights to impose certain conditions in a tender, as long as such conditions can be justified and do not favour any particular prospective bidder.

1.4. The reasons and objectives behind this condition is that, such a product must be proven that it has or is being applied in centres such as hospitals where a substantial number of cataract operations are performed, which this Board finds to be truly justified especially, when one takes into consideration the fact that, such a product is being applied at present at a level of 3,000 times annually. At this same instance, the Authority will justifiably be more assured that the product has been tested and is not detrimental, in any possible way, to the patient.

1.5. This Board had on a previous occasion pointed out that, it is the norm for such a product to be applied more in hospitals that in private clinics, apart from the fact that, hospitals in general, are affiliated to universities where research is on going in the particular medical field.

1.6. On this particular issue, this Board establishes that the conditions with regard to the identification of 'Centres of Excellence' are truly justified and proportional to the objectives of the Contracting Authority.

2. <u>Stipulated Minimum of 3,000 Annual Cataract Operations</u>

2.1. One of the conditions stipulated in the tender dossier is that, the product being offered must have been applied by a 'Centre', at least 3,000 times annually. The motive behind such a condition reflects the present approximate usage of such similar product, at Mater Dei Hospital.

2.2. It is to be favourably argued that, it is the obligation of the Contracting Authority to safeguard the safe application and reliability of the product and the only evidence that is attainable relating to the safety and reliability of the offered product is through the usage and application of same.

2.3. It must also be stated that, hospitals in general make us of the application of the tendered product, in larger amounts than private clinics do. One must appreciate the fact that, the condition stipulated, in this regard, reflects the proportionate usage at the Mater Dei, so that, it is quite prudent and diligent for the Authority to obtain a product which has been applied and tested successfully at other centres on a substantial level of application of such a product.

In conclusion, this Board opines that:

a) **Appellants' grievances relate to conditions stipulated in the tender dossier and not to the technical specifications of the product.**

b) **With regard to the condition of 'Centres of Excellence', this Board notes that such a product is to be applied at Mater Dei Hospital so that, proof of usage at other centres is proportionate and reflects the Authority' s application of the tendered product and in this respect, this Board upholds the Authority's stipulated condition.**

c) **With regard to the condition of proof of 'Number of cataract Operations' performed by the 'Centre', the Authority has to be assured that, the product being offered by the bidder is in use and is being applied at a level acceptable to the Authority's intended application.**

d) **The stipulated conditions ensure that, the product being offered by the prospective bidder is safe and has been applied successfully for the benefit of the well-being of the patient.**

e) **The stipulated conditions relating to 'Centres of Excellence' and 'Number of Cataract Operations Performed' are truly justified and necessary for the well being of the patient. At the same instance, this Board would also point out that, the Authority has the moral obligation to provide the best and most proven medical product available on the market.**

f) **The stipulated conditions do not breach regulations 53 and 232 of the Public Procurement Regulations.**

In view of the above, this Board,

i. **does not uphold Appellants' conditions,**

ii. **directs that the tendering process be resumed,**

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

Dr Anthony Cassar
Chairman
10th November 2020

Dr Charles Cassar
Member