

PUBLIC CONTRACTS REVIEW BOARD

Case 1513– CT 2126/2020 – Tender for the Supply, Delivery, Installation, Testing, Training and Commissioning of Dental Equipment including the Purchase of Energy Efficient Computers & Monitors for the University of Malta, Gozo Dental Clinic.

Remedies before the Closing Date of a Call for Competition

The tender was published on the 22nd October 2020 and the closing date of the tender was the 24th November 2020. The estimated value of the tender (exclusive of VAT) was € 1,027,041.11

On the 12th November 2020 Suratek Ltd filed an appeal against the University of Malta as the Contracting Authority in terms of Regulation 262 of the Public Procurement Regulations

A deposit of € 5,135.21 was paid.

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

The attendance for this public hearing was as follows:

Appellants – Suratek Ltd

Dr Clement Mifsud Bonnici
Ms Annabelle Bartolo

Legal Representative
Representative

Contracting Authority – University of Malta

Mr Tonio Mallia

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 Clement Mifsud Bonnici Legal Representative for Suratek Ltd said that this was a hearing on case management and he expected the other party to explain the reason why they are recommending to the Board the cancellation of the tender and to clarify the points raised by Appellants in their appeal.

Mr Tonio Mallia Representative of the University of Malta said that the grievances raised were too generic in nature.

Dr Mifsud Bonnici said it appeared to Appellants as if this was a cut and paste exercise and their grievances were certainly not generic – as, for example, some of the requests in the technical literature called for patented products.

Mr Mallia stated that the Contracting Authority accepted to re-issue the tender to give the Appellants the benefit of the doubt. Appellants' representative had contacted the project leader on this tender prior to submission which was irregular and gave rise to the need to cancel the tender. The requirements of the tender were such that the equipment components had to 'speak' to each other and a clarification to this effect had been issued. The project leader had explained this to the Appellants and thus the process was irregular.

Dr Mifsud Bonnici said that he was not aware of this approach to the project leader – the Authority had not claimed that this created a conflict of interest and therefore did not create the need for a cancellation. There was no claim on the part of the Authority that there was a need for inter-comparability but merely a request that the equipment came from the same manufacturer. The Authority was requesting re-issue of the tender without addressing these grievances.

Mr Mallia in his reply said that a record of the contact with the project leader existed. The request was for the components to come from the same supplier not the same manufacturer with a request that the supplier had a European presence – this was as a direct result of hassle with previously obtained equipment. The reason for the cancellation was the contact referred to and the Authority does not agree with the issue raised by Appellants' that the literature was generic; in the majority of cases the specifications are obtained from literature available on the market.

Dr Mifsud Bonnici said that there was a point of principle here – Appellants need at least assurance that their grievances will be dealt with. The technical literature was a point of departure but the specification must be open to all and it was up to the Authority to try to avoid a cut and paste operation and to examine each point individually. The points quoted in the letter of appeal dealt with incorrect specifications; if these were dealt with Appellants, who are requesting a complete overhaul of the technical specifications so as to make them accessible to everybody, then would have no problem with agreeing to the cancellation of the tender.

Mr Mallia insisted that there is no doubt that contact had been made during the process of the tender. The Authority gave its assurance that market research had been carried out and certain items in the tender, for example, stools are manufactured by about 50 firms, so there was no need to limit the market requirements and since the specifications are generic Appellants should agree to the cancellation.

The Chairman pointed out that the Authority was not accepting the points of Appellants objections.

Dr Mifsud Bonnici referred to paragraph 19 on page 11 of the appeal letter which contained a list of compatible manufacturers which had been repeated '*in toto*' in the tender. The Authority seemed reluctant to give a commitment that the technical specifications will be overhauled and Appellants therefore wished to proceed with the appeal.

The Chairman again asked if the Authority was ready to consider the grievances of the Appellants in the re-issued tender.

Mr Mallia contended that it was not the role of the Public Contracts Review Board to decide the terms of future tenders. The Authority had agreed to the request for cancellation.

The Chairman said that the call for remedy cannot be ignored and the Board will have to deal with the call unless the Authority agrees to amend the technical specifications.

Dr Mifsud Bonnici again said that all Appellants were asking is that if the tender is to be re-issued the technical specifications should be looked at. This was not a selfish action but an attempt to open the tender to competition. The specifications at present are not acceptable and Appellants will have to request a full hearing of the Board to discuss the grievances and get specific answers.

Mr Mallia said that if the tender is re-issued there will be a full review and the specifications will be vetted again, pointing out that the existing ones have already been vetted by the Department of Contracts.

The Chairman noted that since the Authority is prepared to do a full review of the technical specifications the Board is in a position to reach a decision.

Dr Mifsud Bonnici welcomed this genuine review of the tender and said that the contact with the project leader should not be considered as no proof had been provided on this matter.

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

End of Minutes

Decision

This Board,

having noted this ‘Call for Remedy prior to Closing Date of a Call for Competition’ filed by Suratek Ltd (hereinafter referred to as the Appellants) on 12th November 2020, refers to the claims made by the same Appellants with regard to the tender of reference CT 2126/2020 listed as case No. 1513 in the records of the Public Contracts Review Board.

Appearing for the Appellants:

Dr Clement Mifsud Bonnici

Appearing for the Contracting Authority: Mr Tonio Mallia

Whereby, the Appellants contend that:

- a) **The technical specifications, as stipulated in the tender document, are highly restrictive and comprise of certain specific technical features which will distort open competition. In this regard, Appellants maintain that the Authority should carry out a full review of the technical specifications and amend where necessary. Such reviewed specifications will allow a fair and open participation among Bidders, in accordance with the Public Procurement Regulations**

This Board also noted the Contracting Authority's 'Letter of reply' dated 16th November 2020 and its verbal submissions during the virtual hearing held on 2nd December 2020, in that:

- a) **The Authority insists that, the technical specifications are formulated from literature available on the market so that such specifications are not distorting open competition. However, due to unforeseen circumstances, the tender is being recommended for cancellation whereby, prior to the issue of a fresh call, a full review of the technical specifications and conditions is normally carried out.**

This Board, after having examined the relevant documentation to this appeal and heard submissions made by the parties concerned opines that the issue which is being contested by Appellants refers to the technical specifications of the tender.

- 1. Appellants are claiming that the technical specifications, as denoted in the tender dossier, restrict open competition. On the other hand, the Authority is insisting that, these technical specifications are formulated from literature available on the market; however, the Authority is recommending the cancellation of the tender for ulterior reasons relating to conflict of interest.**
- 2. This Board was made aware by the Authority that, once the tender was cancelled, a full review will be carried out in the issuance of a fresh call.**
- 3. This Board will not enter into the treatment of technical merits of the tender since a full review will be carried out by the Authority prior to the publication of a new tender. However, it is the remit of this Board to remind the Authority that, in formulating the technical specifications, same Authority must ensure that, whatever specifications are deemed necessary by the Authority, they must:**
 - Be precise in the way they describe the Authority's requirements;**
 - Be easily understood by the prospective bidder;**
 - Have a clearly defined, achievable and measurable objectives;**

- **Not mention any brand names or requirements which limit competition or if brands are mentioned, include the term ‘or equivalent’;**
- **Provide sufficient detailed information that allows tenderers to submit realistic offers.**

4. After various submissions made by the involved parties, this Board established that, the Authority, in the full review of the tender, will also take into consideration Appellants’ grievances.

In view of the above, this Board:

- i. Upholds the Contracting Authority’s decision in the cancellation of the tender,**
- ii. directs that, in re-issuing a fresh call, the Authority takes into consideration Appellants’ grievances and this Board’s recommendations in the formulation of the technical specifications,**
- iii. directs that the deposit paid by Appellants be fully refunded.**

Dr Anthony Cassar
Chairman
7th December 2020

Dr Charles Cassar
Member

Mr Lawrence Ancilleri
Member