

## PUBLIC CONTRACTS REVIEW BOARD

Case No. 459

DH/4624/2009

**Tender for the Supply, Installation and Commissioning of a Laboratory  
Brightfield/Flourescence Microscope**

This call for tenders was published in the Government Gazette on the 23<sup>rd</sup> December 2011. The closing date for this call with an estimated budget of €25,000 was the 25<sup>th</sup> January 2012.

Six (6) tenderers submitted their offers.

Al-Nibras Science and Technology Ltd filed an objection on the 18<sup>th</sup> June 2012 against the decision of the Central Procurement and Supplies Unit (CPSU) of the Ministry for Health, the Elderly and Community Care to disqualify its offer as technically non-compliant.

The Public Contracts Review Board composed of Mr Alfred Triganza as Chairman, Mr Joseph Croker and Mr Carmel Esposito as members convened a public hearing on Tuesday, 25<sup>th</sup> September 2012 to discuss this objection.

Present for the hearing were:

### **Al-Nibras Science and Technology Ltd**

Mr Sandro Ciliberti	Director
Mr Noel Delia	Support Services

### **Evolve Ltd**

Mr Lawrence Zammit	Representative
Mr Christopher Busuttill	Representative
Mr Mark Mizzi	Representative

### **Central Procurement and Supplies Unit (CPSU) of the Ministry for Health, the Elderly and Community Care**

Dr Adrian Mallia	Legal Representative
Mr Marnol Sultana	Procurement Manager

### **Evaluation Board**

Ms Ruth Spiteri	Chairperson
Mr Jesmond Farrugia	Member
Dr Paul Caruana	Member
Mr Stephen Decelis	Member
Ms Eunice Briffa	Secretary



After the Chairman's brief introduction, the appellant company's representative was invited to explain the motives of the company's objection.

Mr Sandro Ciliberti, representing Al-Nibras Science and Technology Ltd, the appellant company, submitted that:-

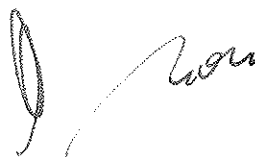
- i. by email dated 13<sup>th</sup> June 2012 the contracting authority informed him that his company's offer was technically non-compliant since only the 20X objective was quoted whereas Specification no. 3 requested the microscope to be fitted with the following objectives of semi-apochromatic quality 10X, 20X, 40X, 100X and any other objectives deemed necessary to satisfy the functional specifications;
  - ii. the microscope offered was of the type BA-410 Trinocular Sextuple which provided objectives 4X, 10X, 40X and 10-0X as standard features as per technical data provided in the original tender submission and, moreover, objective 20X was quoted additionally so as to comply fully with tender specifications;
- and
- iii. contrary to what the contracting authority was claiming his firm submitted a product with all the objectives requested in the tender document and, as a result, his company's was a compliant offer.

Mr Noel Delia, also on behalf of the appellant company and in charge of support services, corroborated what Mr Ciliberti had just stated and added that, if anything, their product had an additional objective, 4X, which was not requested in the tender document.

Dr Adrian Mallia, legal representative of the contracting authority, stated that, unfortunately, the letter of rejection did not include the more important reason for disqualification, namely that from the literature presented the appellant company's product was not fitted with objectives of semi-apochromatic quality as requested in clause 3 of the 'Technical Specifications' at page 32 of the tender document but it was fitted with Plan Achromatic objectives.

Mr Jesmond Farrugia, a member of the evaluation board, under oath, explained that the main differences between a semi-apochromatic lens and a plan achromatic lens were the construction of the lens and the number and quality of the lenses with the result that the user of a semi-apochromatic lens would not miss what one was looking for and that the images produced were of superior quality which also explained the difference in the price between the two products.

Mr Delia referred to a letter dated 18<sup>th</sup> June 2012 sent by Motic Europe, which manufactured the product Model BA-140 Trinocular Sextuple, wherein, amongst other things, it was stated that '*A plan (or planar) objective corrects better for color and spherical aberration than either the semi-plan or the achromatic objective. Plan objectives have a flat field about the center 95% of the image. They also often have*



*larger working distances. While plan objectives give you flatter fields than achromatic objectives, they also are the most expensive'.*

The Chairman Public Contracts Review Board noted that the reason for disqualification communicated to the appellant company had to do with the 20X objective and not with whether the quality of the objectives was plan achromatic or semi-apochromatic.

Dr Mallia remarked that:-

- a. while the contracting authority acknowledged that the letter of rejection was deficient it contended that, in the circumstances, the contracting authority should not be compelled to accept a product which, after all, was not technically compliant;
  - b. the letter submitted by the supplier of the product offered by the appellant company, should be taken for what it stood for and that the contracting authority was not in a position to cross examine the author of that letter;
- and
- c. on the other hand, the technical officer sitting on the evaluation board, who was not attached to any supplier competing in this procedure, had explained the advantages of using semi-apochromatic quality objectives.

Mr Christopher Busuttil, representing Evolve Ltd, the recommended tenderer, stated that:

- i. on checking the website of Motic Europe he discovered that this manufacturer produced lenses which were superior than those offered by the appellant company and which were equivalent to those offered by Evolve Ltd – in fact the latter offered a product which had both specifications, namely, plan and semi-apochromatic;
- and
- ii. his firm could have offered a much cheaper product but it would not have satisfied the tender specifications.

The Chairman Public Contracts Review Board drew the attention of those present that the role of the Public Contracts Review Board was not to replace the technical evaluation board but to ensure that the tendering process was carried out in a fair, regular and transparent manner.

Dr Mallia:-

- a. admitted that the letter of rejection may not have been clear enough for the appellant company – it may not have conveyed the main reason for rejection;

- b. stated that in spite of the letter by Motic Europe, it had not been established by independent experts that the appellant company's product was, in fact, superior to that requested in the tender;
  - c. pointed out that it was evident what the tender specifications provided for and that the appellant company's product did not match those specifications;
- and
- d. appealed to the Public Contracts Review Board that it would not be reasonable to compel the contracting authority to accept a technically non-compliant product.

Mr Ciliberti insisted that the reason for rejection communicated by the contracting authority concerned the 20X objective and that the issue of whether the objectives were plan achromatic or semi-apochromatic only cropped up at the hearing and that had they been made aware of it one would have brought over an expert from the manufacturer to tender his advice.

At this point the hearing was brought to a close.

This Board,

- having noted that the appellants, in terms of their 'reasoned letter of objection' dated the 18<sup>th</sup> June 2012 and also through their verbal submissions presented during the hearing held on the 25<sup>th</sup> September 2012, had objected to the decision taken by the pertinent authorities;
- having noted all of the appellant company's representative's claims and observations, particularly, the references made to the fact that (a) by email dated 13<sup>th</sup> June 2012 the contracting authority informed the appellant company that its offer was technically non-compliant since only the 20X objective was quoted whereas Specification no. 3 requested the microscope to be fitted with the objectives of semi-apochromatic quality 10X, 20X, 40X, 100X and any other objectives deemed necessary to satisfy the functional specifications, (b) the microscope offered was of the type BA-410 Trinocular Sextuple which provided objectives 4X, 10X, 40X and 10-0X as standard features as per technical data provided in the original tender submission and, moreover, objective 20X was quoted additionally so as to comply fully with tender specifications, (c) contrary to what the contracting authority was claiming the appellant company submitted a product with all the objectives requested in the tender document and, as a result, it's offer was a compliant offer, (d) added that, if anything, their product had an additional objective, 4X, which was not requested in the tender document, (e) in a letter dated 18<sup>th</sup> June 2012 sent by Motic Europe, which manufactured the product Model BA-140 Trinocular Sextuple, amongst other things, it was stated that '*A plan (or planar) objective corrects better for color and spherical aberration than either the semi-plan or the achromatic objective. Plan objectives have a flat field about the center 95% of the image. They also often have larger working distances. While plan objectives give you flatter fields than achromatic objectives, they also are the most expensive*' and (f) the reason for rejection

communicated by the contracting authority concerned the 20X objective and that the issue of whether the objectives were plan achromatic or semi-apochromatic only cropped up at the hearing and that had they been made aware of it one would have brought over an expert from the manufacturer to tender his advice;

- having considered the contracting authority's representatives' reference to the fact that (a) unfortunately, the letter of rejection did not include the more important reason for disqualification, namely that from the literature presented the appellant company's product was not fitted with objectives of semi-apochromatic quality as requested in clause 3 of the 'Technical Specifications' at page 32 of the tender document but it was fitted with Plan Achromatic objectives, (b) the main differences between a semi-apochromatic lens and a plan achromatic lens were the construction of the lens and the number and quality of the lenses with the result that the user of a semi-apochromatic lens would not miss what one was looking for and that the images produced were of superior quality which also explained the difference in the price between the two products, (c) while the contracting authority acknowledged that the letter of rejection was deficient it contended that, in the circumstances, the contracting authority should not be compelled to accept a product which, after all, was not technically compliant, (d) the letter submitted by the supplier of the product offered by the appellant company, should be taken for what it stood for and that the contracting authority was not in a position to cross examine the author of that letter, (e) on the other hand, the technical officer sitting on the evaluation board, who was not attached to any supplier competing in this procedure, had explained the advantages of using semi-apochromatic quality objectives, (f) one had to admit that the letter of rejection may not have been clear enough for the appellant company – it may not have conveyed the main reason for rejection, (g) in spite of the letter by Motic Europe, it had not been established by independent experts that the appellant company's product was, in fact, superior to that requested in the tender, (h) it was evident what the tender specifications provided for and that the appellant company's product did not match those specifications and (i) one had to appeal to the Public Contracts Review Board that it would not be reasonable to compel the contracting authority to accept a technically non-compliant product;
- having also considered the recommended tenderer's representatives' reference to the fact that (a) on checking the website of Motic Europe its representative discovered that this manufacturer produced lenses which were superior than those offered by the appellant company and which were equivalent to those offered by Evolve Ltd – in fact the latter offered a product which had both specifications, namely, plan and semi-apochromatic and (b) it could have offered a much cheaper product but it would not have satisfied the tender specifications,

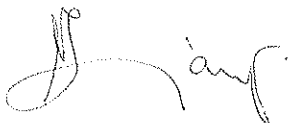
reached the following conclusions, namely:

1. The Public Contracts Review Board opines that the contracting authority had erroneously notified the appellant company as regards the real reason for its rejection from the tendering process noting that such rejection emanated from the inability of the appellant company to meet the quality of the objectives. As a matter of fact the reason for rejection communicated by the contracting authority concerned the 20X objective and that the issue of whether the

and that the issue of whether the objectives were plan achromatic or semi-apochromatic only cropped up at the hearing. Needless to say that this could have deprived the said tenderer from preparing oneself in an adequate manner for the hearing in view of the fact that had the appellant company been made aware of it one would have brought over an expert from the manufacturer to tender his/her advice.

2. The Public Contracts Review Board feels that, under the circumstances, one would have to give the benefit of the doubt to the appellant company as one would need to attain a more formal and arbitrary proof as to the difference between plan and semi-apochromatic.


In view of the above this Board finds in favour of the appellant company and recommends that the said company be not only reimbursed with the deposit paid for the appeal to be lodged but also that the company's bid be reintegrated in the evaluation process with the evaluation board clearly establishing whether the product offered by the appellant company was, indeed, not compliant to tender specifications.



Alfred R Triganza  
Chairman



Joseph Croker  
Member



Carmel Esposito  
Member

*2<sup>nd</sup> October 2012*