

## **PUBLIC CONTRACTS REVIEW BOARD**

**Case No. 901**

**DH 2565/2013**

### **Tender for the Supply of Interfold Hand Towels.**

The Tender was published on the 3<sup>rd</sup> July 2015. The closing date was on the 30<sup>th</sup> July 2015. The estimated value of the Tender was €120,000.00 (Exclusive of VAT)

Four (4) bidders had submitted an offer for this Tender.

On the 5<sup>th</sup> January 2016 Krypton Chemists Limited filed an objection against the decision taken by the Contracting Authority to reject their Tender on grounds of it being not compliant.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Richard A. Matrenza as members convened a hearing on Thursday the 11<sup>th</sup> February 2016 to discuss the objection.

Present for the hearing were:

#### **Kyrpton Chemists Limited:**

Ms Lorraine Arrigo	Representative
Dr Julienne Portelli Demajo	Legal Representative

#### **KC Trading Limited:**

Mr Mark Micallef	Sales Executive
Mr Wilfred Privitera	Representative

#### **Central Procurement and Supplies Unit:**

Mr Wayne Caruana	Chairperson Evaluation Board
Mr Marnol Sultana	Secretary Evaluation Board
Mr Noel Abela	Member Evaluation Board
Dr Stefan Zrinzo Azzopardi	Legal Representative
Dr Alexia Farrugia Zrinzo	Legal Representative

The Chairman made a brief introduction and then invited the Appellants' representative to make her submissions.

Dr Julienne Portelli Demajo on behalf of the Appellants contended that the two principles that should guide the Technical Specifications were that they must have a functional purpose and that they should allow for equivalent values to be submitted. In the present Tender the specifications asked for a towel width of 220mm while Appellant had submitted towels having a width of 212mm but performing the same functions as otherwise required. She contended that the Appellants had been the present suppliers of the same towels and there have never been any complaints raised on their quality.

Dr Portelli Demajo quoted a decision from the European Court of Justice which dealt on the functionality when setting Tender specifications. She explained that the Court had decided that the Tender's Technical Specifications must be based on functionality and must accept equivalents. She reiterated that the Appellants were the present suppliers and that they have submitted towels costing around €30,000 less but providing the same service at the same time.

The Chairman remarked that the issue here is whether the product submitted by the Appellant provided the exact functional requirement.

Mr Noel Abela, ID No. 505166M, Financial Controller with the Contracting Authority and member on the Evaluation Board, under oath said that the Tender specifications regarding that the size of the towels were set down according to the dispensers already in use at the hospital. The previous Tender had no relevance for the present one.

The Appellant's product was disqualified because the towels do not fit into the available dispensers, that is, they are not wide enough and the dispensers cannot function properly. The Evaluation Board had tried using them with the dispensers but the towels came out six at a time from the dispensers. This would lead to a lot of waste towels.

Mr Wilfred Privitera on behalf of the Recommended Bidder contended that the issue here is not that the product offered by the Appellant gave the same service. The issue was that offered products have to be according to the requested specifications. The bidders have the responsibility to offer products according to specifications.

Ms Lorraine Arrigo on behalf of the Appellant reiterated that they had supplied the towels the previous two years and there have never been any complaints regarding the size or the material.

Dr Julienne Portelli Demajo on behalf of the Appellant said it was not proven that the towels provided by her clients were not good, in fact they were equivalent to the requested specifications.

At this point the hearing was closed.

**This Board,**

**Having noted the Appellant's Objection, in terms of the "*Reasoned Letter of Objection*" dated 5 January 2016, and also through their verbal submissions during the Public Hearing held on 11 February 2016, had objected to the decision taken by the Pertinent Authority, in that:**

- a) The Appellant Company contends that its product was the cheapest and fully compliant with the Technical Specifications as dictated in the Tender Document;**
- b) The Appellants also maintain that they were supplying the same quality of the product to the same Contracting Authority, without any complaints.**

**Having considered the Contracting Authority's "*Letter of Reply*" dated 19 January 2016 and also their verbal submissions during the Public Hearing held on 11 February 2016, in that:**

- a) The Contracting Authority contends that the width of the Tendered Product was dictated at the range of 220mm to 250mm. In this regard, the Appellant's product did fail this requirement as their**

**product had a width of 212mm, hence the bid was not in accordance with the Technical Specifications as stipulated in the Tender Document.**

**Reached the following conclusions:**

- 1. With regards to the Appellant's First Grievance, this Board, after having heard credible Technical Submissions, opines that the Appellant's offer quality was not the main factor why their bid was discarded. In fact it was credibly established that the reason why the Appellant's offer was rejected was due to the fact that the Technical Specifications of the Tender Document dictated a "*Towel Width*" of 220mm whilst the Appellants offered a towel with 212mm width.**

**The Technical Reasons submitted were that although the Appellant's offer was the cheapest, due to the fact that the width of the towel was less than that specified, in the long run, the Appellant's product would incur a lot of wastage which would cost the Contracting Authority more than that of the Recommended Bidder.**

**In this regard, this Board justifiably opines that the reasoning of the Evaluation Board, in that the Contracting Authority had to take into**

account the “*Economies of Scale*” was correct and proper.

This Board had on numerous occasions pointed out that the Technical Specifications in a Tender Document are not capriciously drawn up but the same are dictated to ensure that the Contracting Authority would cater for its requirements in the most advantageous manner. It is the duty of the prospective bidder to ensure that he abides by what is stipulated in the Tender Document.

The argument raised by the Appellant Company, in that their offer should qualify under the principles of “*Functional Purpose*” and “*Equivalency*” can perhaps be more defined. This Board opines that although the product offered by the Appellant had the same functional purpose, it does not fulfil the elimination of wastage, as it was credibly established.

The fact that “*lesser width of the towel would result in unnecessary waste of the same product*”, had been credibly proved. On the other hand, this Board justifiably opines that an “*Equivalent*” product should provide the same functions and benefits as those stated in the Tender Document.

**In this regard, this Board justifiably opines that it has been evidently proved that the Appellant's product would be more expensive in the long run. In this respect, this Board does not uphold the Appellant's First Grievance.**

- 2. With regards to the Appellant's Second Grievance, this Board opines that the fact that they had been the supplier without any complaints by the Contracting Authority, should not carry any weight with regards to this particular Tender.**

**This Board opines that the Contracting Authority had every right to impose a "Towel width" of 220mm with a very good reason and that in the long run, the Recommended Bidder's offer was more advantageous. In this regard, this Board does not uphold the Appellant's Second Grievance.**

**In view of the above, this Board finds against the Appellant Company and recommends that the deposit paid by the latter should not be reimbursed.**

Dr Anthony Cassar  
Chairman

Dr Charles Cassar  
Member

Mr Richard A Matrenza  
Member

*22 February 2016*