

PUBLIC CONTRACTS REVIEW BOARD

Case 1849 – SPD8/2022/107 – Supplies – Framework Contract for the Supply and Delivery of Laboratory Kits in Two (2) Lots – Lot 2

28th February 2023

The Board,

Having noted the letter of objection filed by Dr Cedric Mifsud and Dr Paul Radmilli on behalf of Mifsud & Mifsud Advocates acting for and on behalf of Pharmascint Ltd, (hereinafter referred to as the appellant) filed on the 2nd February 2023;

Having also noted the letter of reply filed by Dr Charlon Gouder acting for the Wasteserv Malta Ltd (hereinafter referred to as the Contracting Authority) filed on the 9th February 2023;

Having heard and evaluated the testimony of the witness Mr Helder Rocha (Chairperson of the Evaluation Committee) as summoned by Dr Paul Radmilli acting for Pharmascint Ltd;

Having heard and evaluated the testimony of the witness Ms Marie Ellen Mercieca (Representative of the Sectoral Procurement Directorate) as summoned by Dr Paul Radmilli acting for Pharmascint Ltd;

Having taken cognisance and evaluated all the acts and documentation filed, as well as the submissions made by representatives of the parties;

Having noted and evaluated the minutes of the Board sitting of the 23rd February 2023 hereunder-reproduced.

Minutes

Case 1849 – SPD8/2022/107 – Supplies - Framework Contract for the Supply and Delivery of Laboratory Kits In Two (2) Lots

LOT 2

The tender was issued on the 12th October 2022 and the closing date was the 17th November 2022. The estimated value of the tender excluding VAT, was € 70,746 for Lot 2.

On the 2nd February 2023 Pharmascint Ltd filed an appeal against Wasteserv Malta Ltd as the Contracting Authority objecting to their disqualification on the grounds that the Contracting Authority had deemed their bid on Lot 2 to be not technically compliant.

A deposit of € 562 was paid on Lot 2.

There were three (3) bids on this Lot.

On the 23rd February 2023 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a virtual public hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – Pharmascint Ltd

Dr Paul Radmilli	Legal Representative
Mr Mario Degiovanni	Representative
Mr Carl Azzopardi	Representative

Contracting Authority – Wasteserv Malta Ltd

Dr Charlon Gouder	Legal Representative
Mr Helder Rocha	Chairperson Evaluation Committee
Ms Salome Camilleri	Evaluator
Mr Clayton Farrugia	Evaluator
Ms Branica Xuereb	Representative

Preferred Bidder – Evolve Ltd

Mr Christopher Busuttil	Representative
Mr Nigel Farrugia	Representative

Department of Contracts

Dr Mark Anthony Debono	Legal Representative
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Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties and invited submissions.

Dr Paul Radmilli requested that witnesses be heard prior to submissions.

Mr Helder Rocha (0301244A) called as a witness by Appellant testified on oath that he was the Chairperson of the Evaluation Committee (TEC) and that a full evaluation had been carried out with a report produced at the end. Witness was requested to produce the full evaluation report so that Appellant would enjoy equality of arms.

Dr Charlon Gouder Legal Representative for the Contracting Authority objected to this as he stated that the decision of the TEC was clear and the case should be based thereon. He referred to PCRB Case 1168 which dealt with similar request.

The Chairman directed that the Board would have a short recess to consider Appellant's request.

After the recess the Chairman stated that the Board would refer to the request made by Appellant to have the full evaluation report made available to all parties concerned. This request is being made on the basis of paragraph 51 of the CJEU Case *Varec vs Etat Belgie* which was read out in full.

Therefore this Board is of the view that the supreme point is the maintaining of a balance between the parties. The information relevant to this appeal is to be found fully in the letter of rejection addressed to Pharmascint on the 23rd January 2023, and the Board feels that any additional information in the evaluation report is therefore irrelevant to the hearing before this Board.

The Board is also of the view that the information presently in the hands of the Appellant is sufficient to maintain the balance and the case can proceed to be heard on its merits without any need for the Appellant to have the full evaluation report.

The Board confirms that the full report is available to it.

Dr Radmilli said that he would proceed with questioning Mr Helder.

Mr Helder, continuing with his testimony, stated that the bidders were expected to supply information on every item requested in the tender with clear answers. The technical offer requested a 'yes' or 'no' answer to a series of questions. Appellant was not compliant on Lot 2 as it failed to answer Item 11 on the technical specifications which came under Note 3. The procurement procedure was clearly stated in the tender document. Item 11 was the only question that was unanswered in Appellant's submission. Referred to Lot 1, witness confirmed that item 17 in that lot had been completed by a 'yes' answer but pointed out that the two lots were separate with separate requirements. Clarification could not be sought under Note 3 since there was no answer and since no answer was submitted one could not seek clarification on nothing. The TEC, said the witness, does not have the luxury of assumptions. Clarifications sought in this evaluation on another bid covered a financial submission.

Ms Marie Ellen Mercieca (355396M) called as a witness by appellant as a representative of Special Procurement Directorate (SPD) 8, stated on oath that the Directorate was not involved in the tender except in vetting and ensuring that the tender followed regulations and the process thereof. Referred to the wording in Note 3, witness explained the difference between clarification and rectification and stated that no rectification was possible if no information had been submitted in the first place. Clarification was sought if some information had been submitted which was not very clear. Referred to the phrase in the tender stating 'Omitting to reply to one single requirement may seriously jeopardise the technical compliance of the submitted offer' witness said that only applies if values or technical literature were involved – this was not the case in this tender. Discretion in taking decisions was a matter for the TEC.

This concluded the testimonies.

Dr Radmilli stated that out of 37 questions one was left blank so 97% had been answered. In Lot 1 an identical question to number 11 had been replied to, so an answer to the unanswered question was available to the TEC and it is an extraordinary situation that TEC ignored this. This made no difference to the fact that the material in the two lots was going to be used in a different area. It would be reasonable to accept that the reply should have applied to both lots. Note 3 allows both clarification and rectification and the omission of an answer to a question demands a request for clarification especially when the answer was similar to the same question in Lot 1. The law demands a reasonable not a blind reaction to this problem. The TEC action is illegal on administrative grounds.

Dr Gouder said that the reply in the Authority's letter was comprehensive enough and covered the points raised in this appeal. If clarification had been sought it would have amounted to rectification and therefore was impossible to implement. In Court of Appeal Case *Micallef Builders vs Department of Contracts* (27.5.2016) it was held that if no rectification was possible then no clarification was possible. The TEC had to follow clear parameters and there was the risk of lack of transparency if the regulations were not followed. The tender requirements were very clear and the TEC was not there to interpret them but to follow them to ensure transparency and fairness. The two lots were independent of each other. In the *NQUAYMT* Case (22.6.22) the Court of Appeal stated that every bidder had to rigorously follow the tender requirements. It would be a dangerous precedent if the Appellant's request was to be agreed to by the Board.

There being no further submissions the Chairman thanked the parties and declared the hearing closed.

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 23rd February 2023.

Having noted the objection filed by Pharmascint Ltd (hereinafter referred to as the Appellant) on 2nd February 2023, refers to the claims made by the same Appellant with regard to the tender of reference SPD8/2022/107 listed as case No. 1849 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Paul Radmilli

Appearing for the Contracting Authority: Dr Charlon Gouder

Whereby, the Appellant contends that:

- a) Preliminary request – In accordance with the principles in Paragraph 51 of the Judgment of the Court (Third Chamber) in the names Varec vs Etat Belgie (C-450/2006) of the 14th February 2008 requesting the disclosure of the report of the Evaluation Committee and all documentation pertinent to the other bids submitted for this tender.
- b) Merits –
 - i. The information requested was in fact disclosed in the bid for Lot 1 -
The appellant tendered for Lot 1 and in the Tenderer's Technical Offer for Lot 1 as submitted by the appellant under Item No. 17 found on page 6, the same information and identical technical criterion as requested under Item No. 11 of Tenderer's Technical Offer for Lot 2 was marked as 'Yes'. The appellant was therefore in a unique situation where the unmarked Item No. 11 which lead to the adjudicating board to declare his bid as technically non-compliant was in fact manifestly and expressly indicated in the same tender document under the Lot 1 offer. Bearing this fact in mind it would be reasonable to expect that a well meaning and objective adjudicating board who would definitely realise that the omission was unintended would request a rectification of the missing information in Lot 2 once there was a discrepancy between the Technical information of the two lots.
 - ii. Having selected the appellant's bid for Lot 1 implies an acceptance of the technical criteria for Lot 2 -

As mentioned the appellant's bid for Lot 1 was recommended for award of this part of the tender being appealed. Once it was recommended for award, by default the Technical offer as indicated by the appellant was found to be technically compliant. As indicated under grievance 1 the technical criterion No. 17 found under the Technical offer for Lot 1 was in fact identical to the technical criterion No. 11 of Lot 2. Once the adjudicating board found the same bidder to be technically compliant for Lot 1, then in respect of the same criterion the same adjudicating board would be reasonably expected to find the bidder compliant under Lot 2. A *contrario sensu* once the adjudicating board found the non-compliance for Lot 2, as a minimum it would have been expected to request a clarification on Lot 1 in order to ensure that what was declared under the Technical offer for that Lot was in fact correct. It is contradictory to accept the Technical offer under one Lot and reject the same Technical offer under another lot. For the same technical criterion as submitted by the same bidder there cannot logically be compliance and non-compliance.

iii. No rectification was requested by the adjudicating board. -

Based on the aforementioned facts the adjudicating board was reasonably expected to request a rectification of the Technical offer for Lot 2, both in view of the right of the bidder as will be indicated hereunder to submit such a rectification as well as in order to ensure that that which was declared under Lot 1 and which was actually awarded is correct.

iv. The adjudicating board erroneously did not apply point 2 of the Notes to Clause 5 in the Tender Dossier which clearly applies to the circumstances of the Technical Offer of the appellant's bid. -

The document "Updated Tender Dossier" (attached and marked as Doc. 3) uploaded on 09/11/2022 under Section 5 contains the "Selection and Award Requirements". This Section found on pages 4 - 7 of the Updated Tender Dossier determines the manner in which this tender is to be awarded with respect to the Eligibility Criteria, the Exclusion (including Blacklisting) and Selection Criteria, the Specifications, and the Financial Offer. Under Section 5 one also finds the "Notes to Clause 5" found on page 7 of the Tender Dossier. Under point 2 of the Notes to Clause 5 one finds the following: "*2. Tenderers will be requested to either clarify/rectify any incorrect and/or incomplete documentation, and/or submit any missing documents within five (5) working days from notification.*" Based on the fact that the Tender Dossier does not provide a definition of the word "documentation" one is to give it a literal meaning which is that it encompasses generically all the documents as submitted in the bid for the award of the tender and therefore also includes the Technical Offer. Secondly, the adjudication board having declared the offer for the Lot 1 to be technically compliant, tacitly acknowledged that Item No. 11 of Tenderer's Technical Offer for Lot 2 was incorrect, both in terms of it not being in line with that declared under Lot 1 and in view that no selection was made by the tenderer, now the appellant. Such a situation as

described therefore falls within the parameters of point 2 of the Notes to Clause 5. In such a situation the Notes to Clause 5 are unambiguous in that they oblige the adjudicating board to request the tenderer to clarify or rectify such documentation as the operative phrase in this point 2 is 'will be'. The phrase 'will be' signifies that such request to clarify or rectify is in fact mandatory and not discretionary.

- v. Omitting to reply to a section of the Technical Offer does not result in an automatic non-compliance. The adjudicating board is afforded an element of discretion in determining whether such omission is deserving of non-compliance. -

The first page to the Tenderer's Technical Offer document states in red that: *"Omitting to reply to one single requirement may seriously jeopardise the technical compliance of the submitted offer."*

The operative word here is 'may' and therefore the adjudication board had the discretion to proceed to the reasonable procedure in such a circumstance which was to request a rectification from the tenderer and was not bound to proceed to declaring it non-technically compliant.

- vi. The decision to declare the Technical Offer for Lot 2 as being non-compliant constitutes an administrative act which is subject to judicial review in terms of Art. 469A (1) (b) (it) and Art. 469A (1) (b) (111) of CAP. 12 of the Laws of Malta. -

The decision to declare the Technical Offer for Lot 2 as being non-compliant constitutes an administrative act which is subject to judicial review on the basis that it lacked reasonableness in the circumstances of the case as well as on the fact that it failed to comply with point 2 of the Notes to Clause 5 of the Tender Dossier.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 9th February 2023 and its verbal submission during the hearing held on 23rd February 2023, in that:

- a) The first complaint of the appellant argues that the Board should have been able to reason out that an omission on its part was unintentional, simply because Item No.17 under the Tenderer's Technical Offer for Lot 1, which was marked as 'Yes', contains the same information and is identical to Item No.11 under the Tenderer's Technical Offer for Lot 2, which was left unmarked and was the reason behind the appellant's non-compliance. Clearly, the appellant's complaint is baseless. Neither the Contracting Authority nor the Board are in a position to assume when a declaration has been left unanswered and/or unclarified as, undoubtedly, this would result in lack of transparency. Section 3.1 of the tender document states that *"Tenderers may submit a tender for several lots"* and Section 3.3 of the tender document outlines that *"contracts will be awarded lot by lot, in accordance with the award criteria"*. Therefore, it was clear, each lot was to be considered independently from the other, and no similarity between the two lots should be interpreted as grounds to consider any correlation in a bidder's answers or lack thereof. In its decision, the Contracting Authority outlined: *"The bidder didn't answer to the question Y/N, that isn't rectifiable given that it is note 3."* In this

regard, the appellant chose to disregard the lack of rectifiability of the note in question and declared that the Board should *"request a rectification of the missing information in Lot 2 once there was a discrepancy between the Technical information of the two lots"* simply because its omission could be assumed to be unintentional. It is most evident that the lots were to be considered separately and rectifications should not be requested to bridge the gap between discrepancies.

- b) Under the second grievance, the appellant argues that *"once the adjudicating board found the same bidder to be technically compliant for Lot 1, then in respect of the same criterion the same adjudicating board would be reasonably expected to find the bidder compliant under Lot 2."* As indicated under the first ground, since the tender was divided into lots, and there was the possibility to apply for one or both lots, it could not be assumed that simply because one complies with the requirements under Lot 1, then that automatically transpires into a compliance with the same requirements under Lot 2, and vice-versa. The appellant complains that *"For the same technical criterion as submitted by the same bidder there cannot logically be compliance and non-compliance"*. However, he fails to recognise that each lot was considered separately and although both lots had similar technical criteria they were not completely identical and one was not to make up for the other when there was a slight discrepancy. Based on this argument being brought forward, the appellant's second grievance is fallacious and unfounded.
- c) The third and fourth complaints of the appellant hold that the adjudicating board was reasonably expected to request a rectification and this by reference to Note 2 under 'Notes to Clause 5' under Section 5 of the tender document. But in the box 'Notes to Clause 5' under Section 5 found on page 7, it is clearly indicated that each note is numbered with a separate number and such note number individually applies to various parts of the tender document, depending on the reference made throughout. The section dealing with the Tenderer's Technical Offer makes reference to Note 3 and Note 3 states: *"No rectifications shall be allowed. Only clarifications on the submitted information may be requested. Tenderers will be requested to clarify the submitted information within five (5) working days from notification."* Since the appellant failed to provide the information requested, no clarification could be requested, and rectification is explicitly prohibited. Hence, erroneously the appellant made reference to Note 2, when next to the Tenderer's Technical Offer there was an explicit reference to Note 3. If there was any doubt as to the applicability of such notes, when reading the three notes all together, evidently it is clear that they cannot be applied simultaneously as they contradict one another and, therefore, each note correlates only to the section whereby reference to it is made. The appellant further outlined that such rectification was also to be carried out *"in order to ensure that that which was declared under Lot 1 and which was actually awarded is correct"*. The same technical offer under Lot 1 is also subject to Note 3 and therefore, no rectification was possible. However, since the requested information under Lot 1 was indeed submitted, the Contracting Authority had the possibility of availing itself of asking for further clarification. Nevertheless, simply because the Contracting Authority refrained from requesting further clarification upon the criterion provided does not mean that it failed to meet its obligation, but rather that the criterion provided was clear

enough to meet the requisites of the tender and, thus, no clarification was needed. Furthermore, no bidder should be given the opportunity to amend his offer to reach the threshold which is required, and this was emphasised in the case, *Steelshape Ltd. V Direttur tal-Kuntratti et*, decided upon by the Court of Appeal (Superior Jurisdiction) on 7th August 2013. If the offer does not conform with what was requested then it is the bidder who should shoulder that responsibility and one should not expect the Evaluating Committee to guide him. The fact of the matter, considering the above, is that the evaluation committee did act proportionately and it was the Appellant that has failed to adhere to the tender instructions. Furthermore the Contracting Authority was right in its decision to uphold to the highest degree the principles of equal treatment, self-limitation and transparency in the public procurement process.

- d) In the fifth grievance, the appellant makes reference to the disclaimer, bold and marked in red on the first page of the Tenderer's Technical Offer which states: *"It is very important that bidders double check on whether they have replied to ALL the below listed technical requirements! Omitting to reply to one single requirement may seriously jeopardise the technical compliance of the submitted offer."* He argues that the use of the phrase *"may seriously jeopardise the technical compliance"* gives the adjudicating board the discretion to proceed to request a rectification from the bidders and was not bound to proceed to declare it as non-compliant. However, this disclaimer does not, in any way, give any discretion to the Contracting Authority to adopt the above-mentioned procedure. Even more so, when the Tenderer's Technical Offer is subject to the 'Note 3' provision, as aforementioned. Furthermore, instead of deliberating on a mere technicality as to what may or may not constitute jeopardy to a bidder's technical compliance, the appellant should have double checked his offer to ensure that the listed technical requirements are all replied to, as clearly outlined and requested in the Tenderer's Technical Offer.
- e) The sixth grievance that the appellant raised refers to Article 469A of the Code of Organisation and Civil Procedure, in which it has been argued that the Evaluation Committee's decision constitute an administrative act within the definition of Article 469A and is subject to judicial review on the ground of lack of reasonableness. The judicial review procedure outlined under Article 469A(1)b(ii) and (iii), as referenced by the appellant, refer to the lack of observance of the principles of natural justice and a public authority's abuse of power respectively, within which the courts of civil jurisdiction judicially review the points of law rather than delve onto the merits of the case. The appellant argues that the Evaluation Committee's decision lacked reasonableness but failed to provide a detailed analysis as to how such lack of reason took place, particularly when the Evaluation Committee has been shown to have correctly followed the procurement procedure in place. In order for the decision of the Evaluation Committee to fall within the scope of the grounds of review, as outlined in Article 469A of CAP. 12 of the Laws of Malta, the administrative act has to be in violation of the Constitution, or the act has to be ultra vires. The decision does not go against the Constitution and the Evaluation Committee did not abuse of its power, neither by using

its power for an improper purpose other than that which it intended for, nor by considering irrelevant matters or failing to consider relevant ones.

This Board, after having examined the relevant documentation to this appeal and heard submissions made by all the interested parties including the testimony of the witnesses duly summoned, will now consider Appellant's grievances.

- a) ***Preliminary plea*** – Reference is made to the minutes whereby this Board provided its views and decree during the same hearing. In this Board's opinion, the attainment of 'balance' is of critical importance during an appeal in the realm of public procurement. The very same paragraph referred to by the Appellant in the case Varec vs Etat Belgie is very clear when it states *"..... the adversarial principle **does not** mean that the parties are entitled to unlimited and absolute access to all of the information relating to the award procedure..... On the contrary, that right of access must be **balanced** against the right of other economic operators....."* (bold & underline emphasis added). In this specific case, the rejection letter issued to the Appellant was sufficient to reach equality of arms.
- b) Merits – The main points to be analysed are the following:
 - i. 1st and 2nd grievance – This Board opines that the two (2) separate and distinct lots, being the subject matter of the tender procedure, were to be evaluated independently of one another. In the Board's opinion, if the Evaluation Committee were to proceed as is being invited by the Appellant, this would have given rise to a clear case of breach of the principle of self-limitation which is imposed on Evaluation Committees.
 - ii. 3rd & 4th grievance – In relation to these two grievances, this Board agrees with argumentation brought forward by the Contracting Authority. Moreover, it is essential to point out that the Technical Offer Form is subject to 'Note 3'. Therefore, this Board, is quite incredulous as to why the Appellant is requesting *"..... the adjudicating board was reasonably expected to request a rectification of the Technical offer....."* when this is clearly not possible. Furthermore, a clarification (which is allowed under Note 3) would certainly not have resolved this issue of non-compliance. Reference is also made to the General Rules Governing Tender section 16.3 where it is stated *".....No clarifications shall be allowed where there is no doubt that the submitted technical offer does not comply to the requested specifications....."* Therefore, this Board opines that the Evaluation Committee correctly assessed and dealt with the situation at hand.
 - iii. 5th grievance – The Board opines that the Technical Offer Form, contrary to the argumentation brought forward by Appellant, leaves no room for interpretation when it states *"Tenderers that fail to complete, duly sign and upload the requested information will be deemed as non-compliant and will not be considered further for final adjudication."* Reference is made to Court of Appeal case NQuayMT vs Infrastructure Malta (35/22/1) whereby it was stated "L-

eccess fil-manjamina u fit-tfittix sabiex jigu salvati offerti akkost ta kollox mhux espressjoni ta proporzjonalita imma huwa sproporzjon kontra min kien "compliant" mil bidu nett. Din il-Qorti mhux l-ewwel darba li tirribadixxi li kull oblatur irid, sa mill-bidu nett mal-offerta tiegħu, isegwi rigorozament dak li trid is-sejba għall-offerti u m'għandux jippretendi li jigi mitlub "jiranga" l-offerta biex ikun kompatibbli ma dak mitlub."

- iv. 6th grievance – The Board opines that the grounds needed for such a grievance to be met are non-existent. It was shown, especially during the testimony under oath of Mr Helder Rocha, that the Evaluation Committee correctly analysed the situation at hand and rigorously observed the main fundamental principles governing the public procurement realm.

Hence, this Board does not uphold the Appellant's grievances in their entirety.

The Board,

Having evaluated all the above and based on the above considerations, concludes and decides in relation to Lot 2 of this tender procedure:

- a) Does not uphold Appellant's Letter of Objection and contentions,
- b) Upholds the Contracting Authority's decision in the recommendation for the award of the tender,
- c) Directs that the deposit paid by Appellant not to be reimbursed save for the amount erroneously paid in excess of the required deposit.

Mr Kenneth Swain
Chairman

Dr Charles Cassar
Member

Mr Lawrence Ancilleri
Member