

In the Public Contracts Review Board

3rd October 2023

Re: Objection - 100 - CT2021/2022 - Supplies Tender for the Purchase on a Pay per Use Basis, Qty 2 High Power Urological Laser Units for the Urological Surgical Department at MDH.

Reply of the **Central Procurement and Supplies Unit (CPSU)** on behalf of the Department of Health to the reasoned letter of objection lodged by **Cherubino Limited** (the Objector).

On the 4th of August 2022, a call for tenders was published for the Purchase on a Pay per Use Basis, Qty 2 High Power Urological Laser Units for the Urological Surgical Department at MDH.

By means of a letter dated 15th September 2023, bidders were informed that the call was being cancelled in accordance with article 18.3(b) of the General Rules Governing Tenders for the below reasons:

1. The EC recognizes the fact that the specifications presented in the Tender Dossier are to be updated to cover the advances in the technology for holmium and thulium lasers so that two more versatile machines can be procured which will be able to cater for all the requirements of the Urology Department.

2. The EC also noted that the present specifications present a fundamental flaw in the technical offer form for items A3.1.1 and B3.1.1. The wavelength bandwidth specified, covers both the holmium and thulium laser wavelengths such that there is no differentiation between the 2 bandwidths. For clarity: A holmium laser has a wavelength of 2100nm A thulium laser has a wavelength varying from 1940 - 2013nm. Specifications describe a wavelength ranging from 2000nm - 2100nm (2100 +/- 100 nm). This covers both lasers simultaneously and therefore, cannot be considered as a suitable specification. Specification needs to be amended so that the two lasers can be clearly differentiated, since a thulium laser can be offered instead of a holmium laser and be technically compliant and vice versa, i.e. a holmium laser can be offered instead of a thulium laser and this will still be technically compliant.

The Objector Cherubino Ltd, felt aggrieved with the decision of the contracting authority and filed an objection letter based on 5 Grievances. CPSU respectfully disagrees with the Objection and is filing the below submissions in reply, following the same order of the Objector's grievances.



Submissions

First Grievance – Preliminary

1. In relation to this First Grievance CPSU submits that it was never notified with such request for the disclosure of the evaluation committee, since this has been addressed to the Department of Contracts;
2. Without prejudice to the above, CPSU submits that such information has never been disclosed to bidders in the award notice/notice of cancellation/rejection letter and therefore the fact that as per usual procedure this information was not disclosed, does not in any way effect the validity of the rejection letter/notice of cancellation;
3. Moreover, if there is anything to object to, this is the decision to cancel and not the composition of the evaluation committee. The objector's knowledge of the composition of the evaluation committee prior to filing a letter of objection, could not in any way whatsoever change the objector's possible arguments;
4. Without prejudice to the above, as done in each and every objection, the members of the evaluation committee will be present for the hearing to explain their decision;

Second Grievance - Reason for Cancellation: Wrong

5. The Objector in its second grievance claims that the reasons for cancellation are wrong and contends that the technical parameters of the project have not been altered and thus, according to the objector, the contracting authority could not use article 18.3(b) of the General Rules, but stated that the contracting authority could have used article 18.3(d) to cancel the tender (where there is a discrepancy in the tender document);
6. The Objector also states that there have been no technological advancements;
7. CPSU disagrees with the Objector's position since there was indeed developments in the technology and the knowledge of professionals in the area worldwide,
8. As will be explained by the members of the evaluation committee and the persons involved in the drafting of the tender, technology and knowledge has now advanced in the sense that; Whereas in the tender specifications in option A, a holmium laser was requested to have anti retropulsion technology, working with stone basket technology to carry out lithotripsy while a thulium laser, was requested to cut and ablate tissue with moderate haemostasis in the bladder, prostatic resection, and ureter section of the patient, while in option B a hybrid machine was requested comprising of both lasers being available to carry out all the described functions, today, a thulium laser may be versatile enough to provide all the required services described. This effectively means that there is no need that both a holmium and a thulium laser are offered in both laser units;

9. It is for the above reason that the technical parameters of the tender has been changed and such change shall be reflected in a new tender document, which will due to the eventual change in specifications be open for more competition;

Third Grievance – Reasons for Cancellation: Not Justified

10. As submitted in the reply to the previous grievance, the reason for cancellation is in the humble opinion of the Contracting Authority, scientifically and legally justified as will be further explained in the hearing by the witnesses produced due to a advancements in technology and scientific knowledge in these lasers;

Fourth Grievance – Evaluation Committee: Ultra Vires

11. The Objector here claims that the Evaluation Committee went beyond its remit in this case as the role of the evaluation committee is merely to adjudicate with offers and their compliance with the specifications as published and is not their role in questioning specifications;
12. CPSU submits that ultimately the decision to cancel is not one of the evaluation committee, but of CPSU as a Contracting Authority;
13. The technical specifications were not in the present case drafted by members of the evaluation committee, and the attention was drawn by the drafters of the tender documents of these technological advancements/advancements in scientific knowledge. Moreover, the members of the Evaluation Committee are professionals in their area of practice and these technological advancements and advancements in scientific knowledge are inevitably noticed by them as well;
14. However, the decision to cancel is ultimately a decision of the Contracting Authority and the Director of Contracts. The right of the contracting authority to cancel the tender process is well established and defined by article 18 of the General Rules Governing Tenders – The Contracting Authority and the Central Governing Authority were therefore well within their right and their decision can never be considered ultra vires;

Fifth Grievance - Proportionality

15. CPSU respectfully submits that in its humble opinion, its decision was indeed proportional. The principle of proportionality can be interpreted to a certain extent as 'reasonableness'. CPSU submits that it was only reasonable that the call was cancelled since there were the above mentioned advancements;
16. What is unreasonable is that the Contracting Authority purchase 2 laser units on the published specifications when it is aware that the published specifications need to be updated. The decision of CPSU thus followed the principle of proportionality as well as all the other fundamental principles of public procurement;
17. This decision was naturally equal to all bidders who will be given the chance to compete in an eventual call with updated specifications;

Further Submissions

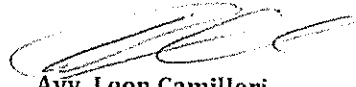
18. Without prejudice to the above submitted, should this Honourable Board, in an unlikely situation, have any doubt on the ground for cancellation, this Honourable Board should still order the cancellation of the tender in terms of regulation 90(3) of the PPR as was done in Case 1843 relating to CT 2095/2022.

19. This is being submitted since in the light of what will be explained by the witnesses produced by the contracting authority, in the light of the present circumstances the only reasonable way forward is the cancellation of the tender procedure;

CPSU is hereby reserving its right to present further evidence both written and orally to further its submissions.

In view of the above, the objection lodged by the objector ought to be rejected in full, whilst the decision of the Evaluation Board confirmed and the relevant deposit forfeited, otherwise cancel the tender in terms of regulation 90(3) of the PPR.

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