

PUBLIC CONTRACTS REVIEW BOARD

Case 1928– TD/DO/2782/2023 (7230) – Monitoring of Submarine Cable between Malta and Sicily

10th November 2023

The call was issued on the 22nd May 2023 and the closing date was the 16th June 2023. The estimated value of this tender, excluding VAT, was € 125,000.

On the 1st September 2023 Medbiologix Company Ltd filed an appeal against Enemalta plc as the Contracting Authority on the grounds that the price of the recommended bidder was abnormally low.

A deposit of € 625 was paid.

There were five bids.

On the 24th October 2023 the Public Contracts Review Board composed of Dr Charles Cassar as Chairman, Mr Lawrence Ancilleri and Ms Stephanie Scicluna Laiviera as members convened a public hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – Medbiologix Company Ltd

Dr Norval Desira	Legal Representative
Mr Miguel Castagna	Representative (Online)

Contracting Authority – Enemalta plc

Dr Clement Mifsud Bonnici	Legal Representative
Dr Calvin Calleja	Legal Representative
Eng Ian Spiteri	Evaluator
Eng Ivan Bonello	Representative

Preferred Bidder – Ultramap Ltd.

Mr Andrew Desforges	Representative (Online)
Mr Martin Connelly	Representative (Online)

Dr Charles Cassar Deputy Chairman of the Public Contracts Review Board welcomed the parties and invited submissions.

Dr Norval Desira Legal Representative for Medbiologix Company Ltd referred to Section 2.4.13 of the tender which was mandatory and requested a dedicated 24/7 team. He stated that the word team means persons not software and dedicated means to be used solely for a particular aim and cannot be shared. The preferred bidder offer is also abnormally low and in line with EU Directive 2014/24 rejection has to be mandatory. Citing CJEU Cases C285/99 and C286/99 which support the obligation that the Contracting Authority has a duty to investigate suspect offers. The Appellant submitted three offers, two of which should not have been accepted. The budget for the tender was not realistic and the abnormally low tender is null and void.

Dr Calvin Calleja Legal Representative for Enemalta plc said that the interpretation of Section 2.4.13 must be read in full. The Authority did not intend this clause to be interpreted as a 24/7 team exclusively dedicated to the monitoring as referring solely to Enemalta. If the clause is read as interpreted by Appellant it would be in breach of European law as the offer would be below the minimum wage. The tender is not referring to one person but of a team doing the monitoring.

Dr Clement Mifsud Bonnici Legal Representative for Enemalta plc stated that the way the tender is structured leads to an efficient result and makes a difference between a valid offer and one that is abnormally low. The PCRB cannot state that a bid is abnormally low until the bidder has had a chance to explain the financial offer and the Authority has to request information first and then decide. The Court of Appeal has also confirmed that a bidder can make a loss on a bid if it so chooses and there is nothing wrong on an abnormally low bid. Bids cannot be rejected outright.

Mr Andrew Desforges Representative for Ultramap Ltd mentioned that the Company's business is to provide a 24/7 monitoring service and that it has 24, soon 27, persons based in the UK and the Philippines to provide the 24/7 service throughout the year. It has had its own well developed software system since 2009 and watches 53 cable systems around every part of the world. The monitoring team was formed in 2016 and is thus experienced.

Mr Miguel Castagna (60500L) called to testify by the Appellant stated on oath that he is a Director of Medbiologix Company and that his company had submitted three separate bids which he detailed and specified the difference in submissions. In terms of Section 2.4.13 one of the bids, value € 620,000 was fully compliant. A dedicated team, according to the witness, does not mean looking after 50/40/30 other cables, but giving your attention solely to that cable and the scope is exclusive to the Interconnector, especially Interconnector 1. In their submissions offer A has a human element in it; offer B does not have 24/7 team but a vessel can be contacted automatically dispensing with the risk of human error and with delays. This is a software, not team based system and the Company is the exclusive representatives of this system in Malta [A copy of the report on this system was tabled with the bid and also tabled at the hearing]. This bid was offered at € 245,000 for 5 years. Bid C offers support and equated to an offer of customer care but does not refer to a dedicated 24/7 team and is only € 18,000 higher than the preferred bid. It refers only to the service being offered during business hours [literature tabled]. The Evaluation Committee deemed all three offers to be compliant.

In reply to questions from Dr Calleja, witness explained that the system offered had the ability to alert the person in charge of the vessel. He agreed that the tender did not request direct messaging and that only their offer A is technically compliant as two offers required additional hardware.

Dr Mifsud Bonnici referred the witness to Section 2.4.13 and asked him why Appellant had submitted a bid without a dedicated team to which witness replied that it offered alternatives and left the option to the Authority . Of these options one was compliant and two were not. Witness agreed that the technical specifications were mandatory. Appellant did not feel that there was any need to seek any clarification on the technical aspect of the tender but the Authority should have written a clearer tender which became evident only in hindsight when the tender value became known. Witness agreed that the value of one of the bids submitted by Appellant was very near the tender value.

This concluded the testimony.

Dr Desira said that the tender list of specifications under Column 2 named compliance letters M, S or C and explained what each letter stood for. Both Enemalta and the Evaluation Committee performed a disservice when evaluating the tender. There were three offers by the Appellant one of which was an acceptable bid. Offer B which provides a means of monitoring and communicating with the vessel would have been acceptable had Section 2.4.13 had been marked with the letter M – this was an alternative offer declared not compliant. Alternately offer C was accepted as compliant when it was not. The method the evaluation was carried out must be ignored. Appellant is not disputing that the

preferred bidder does not have the ability or experience to meet the specifications but that they do not have a 24/7 dedicated service. Dedication is mandatory. The tender clearly asks for 24/7 dedicated team to look at one cable and does not need to use the word exclusively to indicate service has to be to a sole party. Once one agrees that the service has to be dedicated then the Financial offer of the preferred bidder equates to a rate of € 2.33 per hour which is abnormally low and cannot be denied.

Mr Desforges said that his Company was aware of the technology offered by Appellant in their bid B which technology it uses but not in isolation – it takes the view that human beings need to be involved through direct contact with the vessel. The monitoring team is involved on 24/7 basis.

Mr Martin Connelly Representative for Ultramap Ltd said that their web based software system was well established and dedicated. Their costs were based on experience and they have monitored areas around and well fully aware of the threats around Malta for along time and knew what they were likely to encounter.

Dr Calleja stated that dedicated does not mean exclusivity – dedication can be to several cases. Three bids were submitted by Appellant with the lowest bid at € 120,000 being in the region of the tender value – there were three offers submitted near this amount and they cannot all be abnormally low, as Appellant claims. The two higher offers were outside the mandatory terms of criteria 2.4.13. This was a new venture on the part of the Appellant which needed employees to be dedicated exclusively to it.

Dr Mifsud Bonnici stated that the Appellant Company was not credible in the way they structured their submissions. Why submit two bids on points that were mandatory when they knew in advance that they were not compliant with the technical specifications. This is a form of entrapment to make your case later. A reasonable bidder would have interpreted this matter as the Authority did. There is no need to have an exclusivity deal and both other bidders Ultramap and Gatehouse submitted bids very close to the bid by the Appellant. There was confusion in the interpretation of the tender by the Appellant which they claimed was because somehow the financial values were not correct. Mr Castagna in his testimony confirmed that the Company was a new entrant to the market and claimed that one cannot have economies of scale. This lack of experience showed in the leverage of costs which cannot all be loaded on one contract.

Dr Desira concluded by saying that what the other two bidders offered was not a dedicated but a shared service and the tender should not have used the word dedicated if all it wanted was monitoring on a shared basis.

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

End of Minutes

Decision

This Board, having noted this objection filed by Medbiologix Company Ltd (herein after referred to as the Appellant), on the 1st of September 2023. The objection refers to the claims made by the same appellant against Enemalta plc (herein after referred to as the Contracting Authority) regarding the tender listed as case No.1928 in the records of the Public Contracts Review Board.

The Board also noted the letter of reply by the Contracting Authority dated 11th September 2023, together with its verbal submissions during the hearing on the 24th October 2023, and the verbal

submissions made by the representatives of preferred bidder during the hearing, as well as the testimony of Mr Miguel Castagna on behalf of the Appellant.

Finally, the Board took into consideration the Minutes of the hearing of the Board on the 24th October 2023 appended above.

Whereby,

The Appellant contended that:

- A. The Preferred Bidder did not provide a 24/7 dedicated team but a shared team.
- B. The offer of the Preferred Bidder was abnormally low.

The above was counter argued by the Contracting Authority as follows.

- A. The Preferred Bidder interpreted a 24/7 team as being exclusively dedicated to the monitoring referred solely to Enemalta. The tender is referring to a team doing the monitoring. The system being offered is a web-based system to monitor through a secure 24/7 automatic identification system, thus , there is no need for any input by an employee but a need to 'monitor' for vessels.
- B. The Appellant's bid was close to that of the Preferred bidder, difference being euro 18000 higher, in an estimated procurement value of the Tender of euro 125,000 . The Tender was structured to lead an efficient result and makes a difference between a valid offer and one that is abnormally low.

After the Board considered the arguments and documentation from both parties, the testimonies of the witness and the preferred bidder's submissions, the Board opines that:

On the 'dedication' argument, the logical relationship here is having 'many' people monitoring 'many cables' with the aid of software on a 24/7 basis. The recommended bidder is providing monitoring service surveilled 24/7 by a team of personnel. This team of 24-27 people is monitoring several cables at any one point in time, circa 53 cables located around the world. Thus, the service is well dedicated and assures continuity. Along these lines, the financial bid was not calculated directly on man hours but took into consideration their experience on maintaining the type of cable in question while also taking note of the knowledge they hold on sea vessel activity, world wide. On the other hand, the Appellant has no direct experience in monitoring the particular type of cable in question.

The argument that the Preferred bidders bid is abnormally low is not sustainable, considering that the bid is relatively close to that of the Appellant (15% difference}. Also taking into consideration that due to the fact that the Preferred Bidder has vast experience and is well involved in the field, can achieve better economies of scale.

The Board concludes and decides that:

- a) Does not uphold the Appellant's Letter of objection.
- b) Upholds the Contracting Authority's decision.
- c) Directs that the deposit paid by the Appellant not to be reimbursed

Dr Charles Cassar

Chairperson

Mr Lawrence Ancilleri

Member

Ms Stephanie Scicluna Laiviera

Member