

IN THE PUBLIC CONTRACTS REVIEW BOARD

6th May 2024



Re: Objection 444- CFT009-4326/23 CPSU1401/23 Tender for the Supply of Over Bed Tables

Reply of the Central Procurement and Supplies Unit (CPSU) on behalf of the Department of Health to the reasoned application lodged by Procure Ltd (the objector).

On the 24th October 2023 a call for tenders for the for the Supply of Over Bed Tables was issued.

A number of bids were submitted and a recommendation was made in favour of the offer made by Europharma Ltd (Recommended bidder) being the cheapest priced offer satisfying the administrative and technical criteria;

The offers submitted by the Objector was rejected on the basis of technical compliance, with the reason being the below:

Clause no: 2.2 (table shall tilt at an angle of at least 30 degrees) – bidder did not specify table tilt in the filled in TO and this was also not provided in the technical documentation – Note 3. Re Specs no: 2.6 (the over bed table is to be able to withstands a total load of 25KG or greater) – although that the bidder answered with YES to this query in the submitted TO and referred to the provided documentation, the latter does not indicate carrying capacity of the proposed unit. Since technical documentations falls under note 3, no rectification is allowed.

The objector felt aggrieved with the decision of the evaluation committee and filed its objection based on 7 grievances.

CPSU humbly disagrees with the grievances raised and is hereby replying in the same order of the grievances raised.

Submissions

On the First Grievance – About the Factual incorrectness of the reason given

1. In its first grievance the objector states that the reasons given by the contracting Authority with reference to technical specifications 2.2 and 2.6 are factually incorrect;
2. CPSU rebuts to this grievance since these requirements have not been substantiated by the objector in any way;
3. Specifications 2.2 states that "The overbed surface shall also be required to tilt to an angle of at least 30°". The objector confirmed that its product meets this specifications by marking the column headed "Confirmation by Tenderer that Model offered complies with requirements (Yes/No)" by marking with a Yes. Despite this confirmation, in the column headed "Details on the offer's

specifications for the respective requisite" the objector only stated that "Table plate can be tilted. The table top is equipped with a prevent strip to prevent things from falling.". It is thus clear and evident that whilst the emphasis in the technical specification is on the 30° tilt, the objector did not make any reference whatsoever to the degree its product tilts despite this column requires the details on the offer's specifications for the respective requisite.

4. The objector states that in no manner did the request for offers require the bidder to indicate the specific angle of tilt but merely that it was capable of tilting to an angle of at least 30 degrees. This is all true as long as one is referring to the yes/no column entitled "Confirmation by Tenderer that Model offered complies with requirements (Yes/No)". The missing details were however in the column entitled "Details on the offer's specifications for the respective requisite". The only "detail" which the objector has given in relation to such requirement in this column was that "table plate can be tilted" which in our humble opinion is not a detail at all, as it is a repetition of the requirement to which you have already replied with a Yes. The detail would have certainly been, how much does the table tilt;
5. Moreover and without prejudice to the above, the prevent strip was not a requirement in the tender and any details given in this section in relation to this prevent strip, cannot be considered as details relative to section 2.2 of the technical specifications;
6. Moreover, the objector did not even substantiate this specification by any literature since the brochure presented as technical literature with the technical offer only stated that the table can be tilted but did not state the degree that this table can be tilted to;
7. The objector was well aware of this since in the last column of the technical offer form entitled "reference in the technical literature where this is being stated/shown" to objector only states "see attached" when it is clear that the technical offer form is requesting a reference (document, page and paragraph);
8. With reference to clause 2.6, the same argument applies. The objector replied with a Yes in both columns; "Confirmation by Tenderer that Model offered complies with requirements (Yes/No)" and "Details on the offer's specifications for the respective requisite";
9. A 'Yes' in a column which is requesting details on the offer's specification cannot be considered as a detail;
10. Moreover this specification was also not supported by any technical documentation despite the objector states "see attached";
11. For the above reasons and submissions, this first grievance ought to be rejected.

On the Second Grievance – About the allegation that no rectifications are allowed

12. In its second grievance the objector claims that if the evaluation committee was not satisfied with the information provided it could have requested a clarification or indeed a rectification;
13. CPSU strongly disagrees since it is amply clear and well established that no rectification can be allowed in relation to note 3 sections of the tender;
14. Section 3 Terms of Reference/Technical Specifications are clearly marked as note 3. The General Rules Governing Tenders in clause 16.3 provide that:

"No rectification shall be allowed in respect of the documentation as accompanied by Note 3 in Clause 5 of the Instructions to Tenderers. Only clarifications on the submitted information in respect of the latter may be requested. No clarifications shall be allowed where there is no doubt that the submitted technical offer does not comply to the requested specifications."

15. Moreover, at the end of page 11 of the tender dossier one can read in bold the below reproduced paragraph:

N.B. Complete technical documentation is to be submitted online through the prescribed Tender Response Format and by using the Tender Preparation Tool provided – failure to provide this will result to the outright rejection of the respective offer and no rectifications will be allowed – Note 3.

16. Without prejudice to the above and in the case that this Honourable Board had to agree with the objector that literature pertaining to the Technical Offer is subject to note 2 rules, the rejection still holds, because the evaluation committee did not only reject the offer on the basis of missing information from the technical literature, but also due to missing information in the section of technical offer form entitled "Details on the offer's specifications for the respective requisite", which is certainly not subject to note 2 rules;
17. In addition and without prejudice to the above, CPSU submits that in relation to the literature submitted, note 2 rules do not even apply since this is not a matter of incorrect, incomplete or missing documentation;
 - Incorrect would have been for example if a brochure relating to a different product has been submitted – In this case the literature submitted pertains to the product which is being offered thus it cannot be claimed that it is incorrect;
 - Incomplete documentation would have been if part of the documentation has been left out. In this case it is clear that the full brochure was submitted;
 - Missing is self explanatory – In this case the technical brochure was not missing as it was submitted for the scrutiny of the evaluation committee;

18. For the above reasons and submissions, this second grievance ought to be rejected in full;

On the Third Grievance - About the fact that the Contracting Authority acted Ultra Vires

19. In its third grievance the objector states that the tender document did not confer upon the contracting authority the right to reject technically compliant offers. This is factually incorrect as the contracting authority can reject technically compliant offers if there are cheaper technically compliant offers;
20. Subordinately, if what the objector meant was that the contracting authority cannot reject compliant offers on the basis of non-compliance, CPSU naturally agrees, however in this case, as already explained, compliance of the objector's product was not proven and thus CPSU acted within the parameters of the law when it rejected the offer and definitely did not act ultra vires;
21. For the above reasons and submissions, this third grievance ought to be rejected.

On the Fourth Grievance - About the fact that the contracting Authority changed the evaluation criteria and technical specifications while deciding on the Objector's offer

22. In its fourth grievance objector states that contracting Authority changed the evaluation criteria and technical specifications. CPSU rebuts this unfounded claim which was not substantiated;
23. The technical offer form clearly set out minimum technical specifications and requested from every bidder "Details on the offer's specifications for the respective requisite". This was not provided in clauses 2.2 and 2.6.
24. CPSU did not change any criteria and it was the objector which did not follow the published criteria;
25. For the above reasons and submissions, this fourth grievance ought to be rejected.

On the Fifth Grievance - About the obligation to give reasons for decisions

26. In its fifth grievance the objector submits that the contracting authority failed to give reasons for its decision;
27. CPSU respectfully submits that if the contracting authority failed to give reasons for its decision, a 7-page letter of appeal on substantive grievances would surely not be possible;
28. As this Honourable Board will surely note, the evaluation committee did give sufficient reasons for the rejection of the objector's offer as required by law and in line with all the principles of administrative and natural justice;

29. For the above reasons and submissions, this fifth grievance ought to be rejected;

On the sixth Grievance - About the obligation to exercise discretion in a just and proper manner

30. Had the rejection been on the basis of sample testing, debating the extent of the evaluation committee's discretion would have been much more understandable;

31. Whilst definitely acknowledging the fact that evaluation committees have an element of discretion in their evaluation process, this is limited especially in this case and similar cases, where the product was not proven to be compliant not due to some failure during the use but due to criteria which can be objectively ascertained, which however could not be ascertained from the information which was submitted by the objector;

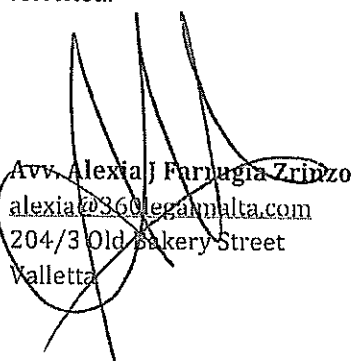
32. For the above reasons and submissions, this sixth grievance ought to be rejected;

On the seventh Grievance - About the fact that the Contracting Authority did not act according to procedure


33. As the objector fails to substantiate or at least explain this grievance, CPSU rebuts as unfounded in fact and at law and for this reasons, this seventh grievance ought to be rejected.

CPSU hereby reserves its right to present further evidence and submissions both written and orally to further substantiate their reply in relation to the said application throughout the hearings.

In view of the above, the objection lodged by the objector ought to be rejected in full, whilst the decision of the Evaluation Committee confirmed, and the relevant deposit forfeited.



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