

PUBLIC CONTRACTS REVIEW BOARD

Case 2016 – Cft009-4326/23 (CPSU 1401/23) – Supplies - Tender for the Supply of Over Bed Tables

5th June 2024

The Board,

Having noted the letter of objection filed by Dr Robert Galea acting for and on behalf of ProCare Ltd, (hereinafter referred to as the appellant) filed on the 26th April 2024;

Having also noted the letter of reply filed by Dr Alexia J Farrugia Zrinzo and Dr Leon Camilleri acting for Central Procurement and Supplies Unit (hereinafter referred to as the Contracting Authority) filed on the 6th May 2024;

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 30th May 2024 hereunder-reproduced.

Minutes

Case 2016 – Cft 009/4326/23 (CPSU 1401/23) – Supplies – Tender for the Supply of Over Bed Tables

The tender was issued on the 24th October 2024 and the closing date was the 11th November 2024

The estimated value of this tender, excluding VAT, was € 15,400.

On the 26th April 2024 ProCare Ltd filed an appeal against the Central Procurement and Supplies Unit objecting to the decision to reject their tender as it was deemed to be technically not compliant.

A deposit of € 400 was paid.

There were eight bids.

On the 30th May 2024 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Dr Vincent Micallef 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 – ProCare Ltd

Dr Robert Galea	Legal Representative
Mr Clive Muscat	Representative
Mr Pierre Calleja	Representative

Contracting Authority – Central Procurement and Supplies Unit

Dr Leon Camilleri	Legal Representative
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Dr Alexia Farrugia Zrinzo	Legal Representative
Mr Hristov Hristo Ivanov	Chairperson Evaluation Committee
Ms Oriana Jo Magro	Secretary Evaluation Committee (Online)
Mr Charles Bugeja	Evaluator
Mr Anthony Cini	Evaluator
Mr Norbert Mifsud	Evaluator (Online)

Preferred Bidder – Europharma Ltd

Mr Johann Cini	Representative
Mr Alex Fenech	Representative

Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties and invited submissions.

Dr Robert Galea Legal Representative for ProCare Ltd outlined the two reasons why appellant's bid was rejected, namely tilt and total load of the table. The Technical Offer table submitted by the appellant clearly indicates that the requirements of specifications 2.2 and 2.6 have been met. The Contracting Authority, however, maintain that a 'YES' answer is not sufficient despite the fact that there is no indication in the tender that parameters had to be stated. If the literature provided was not satisfactory then this was a case where a rectification or clarification could have been sought since Note 2 obliges the Authority to request such correction. This was not done and had it been asked for appellant's bid would have been compliant.

Dr Leon Camilleri Legal Representative for the Central Procurement and Supplies Unit said that the appellant ignores the wording of the column in the Technical Offer where two distinct requirements are requested. Answering 'YES' is not tantamount to providing details of the specifications. Specification 2.2 required a table with a tilt of 30° but details were not provided. The Technical Offer is Note 3 which prohibits rectification. Nowhere are the two requisites indicated in the documents provided.

Dr Galea said that the tender does not indicate what details were required. It requested a tilt of 30° and this was met. Literature is Note 2 and the Authority is obliged to seek rectification. The Authority requested something that the tender did not ask for.

Dr Camilleri replied that if the appellant was not happy or confused with the tender formulation it had a remedy under Regulation 262 of the Public Procurement Regulations. The format of the tender is a table requesting details – merely replying 'YES' is not providing details. In answer to the tender requirement for a table with a 30° tilt, appellant simply said that the table tilts. The same applied to the table total load.

In a final comment Dr Galea said that appellant had followed the offer carefully and it appeared as if it was the Authority that was confused.

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 30th May 2024.

Having noted the objection filed by ProCare Ltd (hereinafter referred to as the Appellant) on 26th April 2024, refers to the claims made by the same Appellant with regard to the tender of reference CFT009-4326/23 (CPSU 1401/23) listed as case No. 2016 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Robert Galea

Appearing for the Contracting Authority: Dr Alexia J Farrugia Zrinzo & Dr Leon Camilleri

Whereby, the Appellant contends that:

a) ***1st grievance – about the factual incorrectness of the reasons given***

Whereas it is clear 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. So much is the case, that the manner in which the document was drawn up was such that it could be filled with a mere 'Yes or No'. In no section of the technical offer requirements is it indicated that the actual angle of tilt the table was capable of reaching was to be indicated - it was merely required that it be confirmed that the table was capable of tilting to at least 30 degrees, which requirement was duly addressed.

Whereas it is clear that in no manner did the request for offers require the bidder to indicate the maximum load that could be withstood by the table, but merely that it was capable of withstanding a total load of 25Kg or greater. So much is the case, that the manner in which the document was drawn up was such that it could be filled with a mere 'Yes or No'. The same reason stated above with respect to clause 2.2 applies to this point as well. Whereas simply put, this reason is indicating that the CPSU is alleging that the offer made included items which do not live up to the specifications required in the tender dossier, when this is clearly not the case, as will be expounded hereunder and on this basis, such allegation is being refuted by the Objector, and this on the following grounds.

b) ***2nd grievance - About the allegation that no rectifications are allowed***

Whereas, without prejudice to the above, the reason for rejection states "*Since technical documentation falls under Note 3, no rectifications are allowed*". Whereas this is a wrong interpretation of the tender dossier, not that any interpretation is at all necessary. Whereas in this regard reference is to be made to Page 5 of the tender dossier which reads as follows: "*(ii) Literature as per Form marked Literature List to be submitted with the Technical offer at tendering stage. The scope of the literature is to corroborate a fully*

compliant technical offer Note 2.” Whereas in turn, this refers to 'Note 2', which states as follows: “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” Whereas in this regard, therefore, without prejudice to the foregoing, if the Evaluation Committee deemed the literature as not being sufficient for the purposes of the offer, it should have requested a 'clarification / rectification' of the same in terms of the above. Note 2 actually imposes an obligation on the Contracting Authority to request such clarification as it specifically states "Tenderers will be requested to either clarify/rectify any incorrect and/or incomplete documentation" (added emphasis). In this regard it must be noted that the term 'will' imposes a positive obligation on the contracting authority to actually request such rectification if it deems it necessary - it is duty bound to do so in order to be deemed to be respecting the terms of the request for offers as laid down in the tender dossier. Whereas in view of this, the reason given is outright incorrect, and does not, in itself, respect the conditions on which it is supposed to have been based. It was the Contracting Authority that did not respect the terms of the tender, and not the Objector.

c) ***3rd grievance - About the fact that the Contracting Authority acted ultra vires***

Whereas, without prejudice to the foregoing, this grievance logically follows the last preceding grievance in that for the same reasons expounded above, it transpires that the tender document did not confer upon the Contracting Authority the right to reject offers that were indeed technically compliant, and consequently, in rejecting a technically compliant offer, the Contracting Authority went beyond the discretionary parameters established in the tender document. This is a flagrant breach of the principles of natural justice, and even on this basis, the objector humbly submits that the decision in question should be quashed.

d) ***4th grievance - About the fact that the Contracting Authority changed the evaluation criteria and technical specifications while deciding on the Objector's offer***

Whereas as can be seen from the rejection decision, the basis of the decision was that (1) the angle was not specified, that (2) the maximal loading was not specified and that (3) allegedly the literature regarding such matters could not be rectified. The Contracting Authority in this case opted to change the terms of the tender ex post facto since (1) the specific angles reached were never required, (2) the maximal loading was never requested and (3) the dossier clearly specifies that the Contracting Authority is to be (sic) request for a rectification of documentation if it deems this to be necessary. Whereas this can only mean one thing; that the adjudication criteria and even the specifications were being changed ex post facto by the Contracting Authority.

e) ***5th grievance - About the obligation to give reasons for decisions***

Whereas one of the very basic principles regulating the process where discretion is exercised and consequently a decision given - as is the present case - is the principle of natural justice calling for giving reasons for decisions. This principle of a fundamental nature in the proper exercise of a discretionary power would require that any decision is supported by a line of reasoning which

would indicate how that decision was actually reached. Whereas in this case, there is a manifest and unequivocal breach of this principle since the reasons are to serve as a logical explanation of the decision. Such reasons should follow a logical path, culminating in the decision itself. However, as indicated above, the reasons given are factually incorrect (as indicated in the grievances raised supra) and do not follow a logical course. In view of such failures, the reasons given for refusal fall short of the quality that reasons should have in order to truly qualify as reasons for the purposes of law.

f) ***6th grievance - About the obligation to exercise discretion in a just and proper manner***

Whereas furthermore, the principles of natural justice dictate that if there is a discretion that is to be exercised, this must be exercised in an informed and just manner in order to lead to an equitable, just, logical and predictable outcome. Justice must not only be done, but it must also be seen to be done, and the circumstances of the present case do not give much comfort to such a principle which is at the very basis of the rule of law. The existence of discretion brings along the duty to actually (i) exercise such discretion and (ii) to exercise it in a just and informed manner. In this case, the Objector humbly submits that (i) the approach taken in arriving at the decisions and (ii) the decisions themselves, clearly indicate that the discretion that had to be exercised by the Contracting Authority was not exercised in a proper manner, as the decisions do not follow in a logical manner the facts that were available to the Contracting Authority during the adjudication process and procedure was not followed. Consequently, the decisions are not intelligible and cannot be traced back logically to the facts upon which they were supposed to have been based.

g) ***7th grievance – About the fact that the Contracting Authority did not act according to procedure***

Whereas moreover the Objector humbly submits that in the event that the above grievances / submissions are not upheld, the Board should also consider whether the Contracting Authority and / or the Evaluation Panel acted according to the rules and regulations governing this particular procedure.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 6th May 2024 and its verbal submission during the hearing held on 30th May 2024, in that:

a) ***On the First Grievance -***

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. CPSU rebuts to (sic) this grievance since these requirements have not been substantiated by the objector in any way. 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.

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. 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. 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. 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 (sic) objector only states "see attached" when it is clear that the technical offer form is requesting a reference (document, page and paragraph). 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". A 'Yes' in a column which is requesting details on the offer's specification cannot be considered as a detail. Moreover this specification was also not supported by any technical documentation despite the objector states "see attached".

b) ***On the Second Grievance -***

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. 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.

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.*

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.

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;

c) ***On the Third Grievance -***

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. 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.

d) ***On the Fourth Grievance -***

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. CPSU did not change any criteria and it was the objector which did not follow the published criteria.

e) ***On the Fifth Grievance -***

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. 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.

f) ***On the sixth Grievance -***

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. 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.

g) ***On the seventh Grievance -***

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.

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

- a) The Board opines that the main bone of contention in this appeal revolves around whether the issues identified by the Evaluation Committee fell under the remit of 'Note 2' or 'Note 3'.
- b) The rejection letter sent to the appellant on 16th April 2024 lists two (2) specific criteria which in the opinion of the Evaluation Committee did not meet the minimum requirements as set out in the tender document.
- c) In both cases it was submitted that:
 - i. no specific details were provided in the technical offer
 - ii. same information was not available in the technical literature submitted to corroborate the technical offer
- d) Therefore, it is the opinion of this Board that the Evaluation Committee identified issues both relating to Note 3 [reference to (c)(i) above] and to Note 2 [reference to (c)(ii) above].
- e) This Board now refers to the Technical Offer form as submitted by the appellant whereby in the column "*Details on the Offer's specifications for the respective requisite*" it was the same appellant who provided information in detail to all criteria except for clause 2.6. A simple "*Yes*" was submitted in relation to this column for clause 2.6. This Board agrees with the Evaluation Committee that this is a Note 3 issue.
- f) Moreover, for the column "*Reference in the technical literature where this is being stated/shown*", the appellant submitted "*See attached docs*". The Board notes that the literature did not make reference to the total load that the bed table can withstand. This would have been a 'Note 2' matter. However, once the Evaluation Committee has duly identified non-compliance issues in the Technical Offer Form, which falls under the remit of 'Note 3', it would have been futile to request any rectifications for missing details in the technical literature.

Therefore, this Board does not uphold appellant's grievances.

The Board,

Having evaluated all the above and based on the above considerations, concludes and decides:

- 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.

Mr Kenneth Swain
Chairman

Mr Lawrence Ancilleri
Member

Dr Vincent Micallef
Member