

PUBLIC CONTRACTS REVIEW BOARD

Case 1810 – SPD1/2022/110 – Tender for the Supply, Delivery, Installation and Commissioning (including Training) of an Environmental Chamber for the University of Malta.

16th November, 2022

The tender was issued on the 24th June 2022 and the closing date was the 15th July 2022. The estimated value of the tender excluding VAT, was € 48,305.08.

On the 21st October 2022 Labo Pharm Ltd filed an appeal against the University of Malta as the Contracting Authority objecting to their disqualification on the grounds that their offer was deemed to be not technically compliant.

A deposit of € 400 was paid.

There were five (5) bids.

On the 8th November 2022 the Public Contracts Review Board composed of Dr Charles Cassar as Chairman, Mr Lawrence Ancilleri and Mr Richard Matrenza as members convened a public virtual hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – Labo Pharm Ltd

Dr John L Gauci	Legal Representative
Mr Stephen Debono	Representative

Contracting Authority – University of Malta

Dr Carlos Bugeja	Legal Representative
Prof Eng Maurice Apap	Member Evaluation committee
Mr Yoram Ohayon	Secretary Evaluation Committee

Preferred Bidder – Tektrako Lab Solutions

Mr Colbert Balzan	Representative
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Director of Contracts

Dr Mark Anthony Debono	Legal Representative
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Dr Charles Cassar Deputy Chairman of the Public Contracts Review Board welcomed the parties and invited submissions.

Dr John Gauci Legal Representative for Labo Pharm Ltd requested the hearing of witnesses.

Mr Stephen Debono (47373M) called as a witness by Appellant testified on oath that he was the Managing Director of Labo Pharm Ltd. He explained that the grounds for his Company's exclusion was on Item 13 of the tender dossier and particularly on the voltage rating of the equipment offered. In the Technical Questionnaire Appellant had replied 'yes' that 380 Volts was compatible with 400 volts. He further explained that in 3-phase supply any voltage between 380v and 440v was accepted as equivalent to 400v. The Tender Evaluation Committee state this this is not compliant as $380V \pm 10\%$ is not what was required. Witness claimed that his offer fits between the tolerance and the lower figure of 342v is beneficial to the Authority, as it does not shut down on electricity tripping and they were offering a stabilizer to cancel any spikes in current voltage.

Questioned by Dr Carlos Bugeja Legal Representative for the University of Malta witness said that it was not necessary to reach 440v as a stabilizer had been offered. Without stabilizer a 380v instrument can go down to 342v and up to 418v.

Prof Engineer Maurice Apap (514674M) called to testify by the Authority stated on oath that he was one of the Evaluators. He said that precision was necessary in the voltage ranges and these requirements are standard. The reason why a specific range was requested is that Enemalta issued a guidance on network code which states the voltage range. The tender was based on Enemalta voltage indicators. The lower voltage offered by Appellant was no problem but it was not the case across $400v \pm 10\%$ as Enemalta does not guarantee that the voltage might not exceed 418v. The tender submission contained a condition and it is not a mere question of one small fault out of 21 requirements. The bid could not be rectified as this would have changed the offer and it was therefore non-compliant.

In reply to questions from Dr Gauci witness stated that there were no problems, apart from the voltage, on the equipment offered by appellant. The minimum voltage was reached but the stabilizer was not requested in the tender.

Questioned by Dr Bugeja the witness said that the stabilizer was first mentioned in the letter of objection – there was no prior mention. If the stabilizer works correctly in excess of 418V it should have been stated. It was not included in the technical literature.

This concluded the testimonies.

Dr Gauci said that what Appellant offer met the minimum requirements, but one had to look at form over substance here. Bidder met all specifications with a small doubt over the maximum voltage. If the reply was not clear or defective a clarification was obligatory. The offer met the requirements, and it was simply the reply to the questionnaire that was being questioned. If there was doubt why not clarify? The model offered met the requirements and substance must prevail over form. The case merits an appeal to the Courts to clarify this point. The appeal should be met.

Dr Bugeja stated that the claim that the stabilizer resolved the matter are not correct and witness Prof Apap did not state so. The faulty reply, as confirmed by witness is not a matter of substance over form. There is a clear reply in the tender that the voltage maximum cannot be met and the idea of a stabilizer only cropped up at the appeal stage. The reply was not unqualified and hence it was defective. The technical offer is not meant to be an opinion but a binary 'yes' or 'no' – once qualified it becomes a 'no' and there was nothing the Evaluation Committee could do in that situation. This was not a case of clarification as the answer by the bidder was equivalent to a 'no'.

The Chairman thanked the parties for their submissions and declared the hearing closed.

End of Minutes

This Board,

Having noted and evaluated all the documentation filed as well as the submissions made including the Minutes of the Board sitting of the 8th November 2022 hereabove reproduced.

Having noted this objection filed by the Appellant – Labo Pharm Ltd., (herein after referred to as the appellant) on 21/10/2022, refers to the claims made by the same appellant regarding the Tender listed as case No.1810 in the records of the Public Contracts Review Board

Whereby, the appellant mainly contends that:-

- A) The offer supplied was fully compliant with the specifications requested in tender.
- B) In this case substance should prevail over form as the appellant met the minimum requirements.

Whereby, the University of Malta referred to as the Contracting Authority in their letter of reply dated 31/10/22 and their submissions contended that

- A) Appellant's response only confirmed correct functionality of the equipment within the three-phase voltage supply range between 342V and 418V and therefore failed to confirm correct functionality of the

equipment across the $400 \pm 10\%$ range as required by the technical questionnaire.

- B) The technical offer replies are not meant to be an opinion but a binary 'yes' or 'no' therefore it is not a matter of substance over form as the qualified reply would have changed the offer.

The Board, having heard the arguments and considered the documentation from all parties namely the appellant, the Contracting Authority and witnesses noted that:

Item 13 in the technical offer clearly states that a yes or no answer is specifically required. The appellant's answer to this item was a qualified yes and not a specific yes as required in the questionnaire. The bid could not be rectified as this would have changed the offer. The lower voltage offered by Appellant was not an issue, but this was not the case across $400v \pm 10\%$ range.

Appellant's grievance is therefore not upheld.

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

Mr Richard A Matrenza

Mr Lawrence Ancilleri

Chairman

Member

Member