

PUBLIC CONTRACTS REVIEW BOARD

Case No. 720

CPSU/CPU/3115/14: Tender for the Supply of Flowcytometry Markers

The tender was published on the 14th March 2014. The closing date was the 14th April 2014. The estimated value of the Tender was €67,800 (Exclusive of VAT)

Two (2) offers had been received for this tender.

On 18th June 2014 Messrs Cherubino filed an objection against the disqualification of their offer.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a hearing on Thursday the 17th July 2014 to discuss the objection.

Present for the hearing were:

Messrs Cherubino - Appellants

Dr Francis Cherubino	Representative
Dr Matthew Paris	Legal Representative

Evolve Limited - Preferred Bidder

Mr Chris Busuttil	Representative
Mr Aldo Ellul	Representative
Mr Mark Mizzi	Representative

Central Procurement and Supplies Unit - Contracting Authority

Ms Connie Miceli	Chairperson Evaluation Board
Ms Agnes Saunders	Member Evaluation Board
Ms Patricia Brincat	Member Evaluation Board
Dr David James Camilleri	Member Evaluation Board
Mr Joseph Xuereb	Representative
Ms Marika Cutajar	Representative

The Chairman made a brief introduction and invited the appellants' representative to make his submissions on the objection.

Dr Matthew Paris on behalf of the appellants Messrs Cherubino explained that the tender had requested a list of 48 specific items, made by a specific manufacturer. These items were listed in Section 4 – Tender Specifications. Appellants, his clients, had submitted and offered the same listed items in their tender. Yet, the contracting authority had disqualified their offer stating that *“these were not according to specifications as they are not the items requested.”*

Dr Paris referred to page 15 of the tender document where the 48 items are listed and where it was specified that the items had to be of a particular brand and a particular catalogue number. Appellants financial bid consisted in these same 48 items as listed. Their list of offered items was identical to the list in the tender document including the names of the items. This was an e tender. The appellants' technical submission, submitted through internet, said specifically confirmed that *“I confirm that the item being offered is as per specifications stated in section 4 of the tender document.”* The same technical submission of appellants stated also the name of product including brand and product code. Appellants offered the “BD” brand, and codes according to specifications. Appellants submitted products manufactured by BD, an American (US) company. Regarding the pack size, appellants again made it clear that these would be according to specifications. It is not understood therefore why the letter of rejection stated that the items submitted by appellants were not according to specifications as “they are not the items requested.

Ms Connie Miceli, the Chairperson of the evaluation board, on behalf of the contracting authority stated that bidders had to upload the technical literature showing the codes of the items being submitted. Appellants however had uploaded codes that do not tally with the specifications requested in the tender document. She had personally checked appellants' tender and found out that no items as uploaded by them corresponded to those requested in the tender Technical Specifications. This was not a technical matter but a matter of checking the facts. The rejection of appellants' bid was based on the fact that they had uploaded literature of items that did not correspond with the codes of the requested items.

Dr David James Camilleri on behalf of the contracting authority explained that in appellants' case, the uploaded catalogue numbers did not correspond to those requested by the technical specifications of the tender. Not one of the numbers uploaded by appellants corresponded.

Dr Matthew Paris for the appellants remarked that it has now resulted that the contracting authority has changed the reason of rejection. Originally the reason had been “items offered not according to specifications” and now the reason is being given that the submitted literature was not the requested literature. He referred to another decision handed down by the PCRB against the OHSA where the reason for rejection was changed during the hearing and justly, the PCRB had found against the contracting authority. In the present case, Dr Paris continued, that it now resulted that the case is about the submitted literature. He contended that literature is there to substantiate and confirm the product being offered. Bidders submit products and then submit literature to confirm that the product was offered was the requested one. He said that the catalogue of BD's, the product manufacturer, was more than 300 pages long and when appellants tried to upload it with their tender the system gave them a “proxy error” and would not accept it. A summary of the catalogue was then submitted. But this did not mean that the requested items would not be provided by appellants since and a declaration was signed that the bidder would provide the products

according to the requested specifications. This was declared more than once in the tender offer.

Dr David James Camilleri for the contracting authority said that not one item from the uploaded list submitted by appellants was in fact included in the list the authority gave in the required technical specifications. The submission had included different literature. There was inconsistency between the submitted literature and the requested specifications. Therefore the submission was deemed to be not according to specifications.

Dr Matthew Paris for the appellants stated that the Technical Specifications are specified in Section 4 at page 15 of the tender. Appellants' financial bid form clearly explained that what was being requested was in fact being offered. The appellants declared clearly this fact. Appellants could not alter the form 4 by including the catalogue numbers since forms may not be altered. Appellants filled in the form exactly as requested.

Ms Miceli for the contracting authority referred to appellants financial bid. The codes are not included into the bid. She explained that the financial bid form did not contain columns for inserting the catalogue codes and that is why it was mandatory to include the literature. The uploading of 300 pages was not acceptable. The 48 items' code numbers had to be included. Replying to a question by the Board, she said that the preferred bidder did not put down the codes in the financial bid form but he had submitted also a catalogue containing the codes.

Mr Joseph Xuereb for the contracting authority said that the financial bid form did not contain a column for setting down the catalogue codes but bidders were requested to upload the literature of the items being offered. This results from page 2 of 5 of the technical section where the request for the uploading of literature was contained. The literature uploaded by appellants under this requisite did not contain the codes, and the evaluators could not check the items.

Dr Matthew Paris said that it has resulted that there was no column in the financial bid that required inserting the code numbers. He reiterated that appellants' submission had included the name of product, brand, and code "as per specifications". This means that appellants were offering BD products, the BD catalogue number and description. There was no reason to conclude that appellants would be providing anything else. Now the contracting authority has changed the reason for rejection, limiting to the failure of submitting the correct literature.

Ms Connie Miceli for the contracting authority said that the submission of the literature was mandatory.

Dr David James Camilleri for the contracting authority said that the evaluation board had to adjudicate according to the submissions provided by the bidders. If a wrong catalogue was submitted the evaluation board could not assume that the item was the correct one.

At this point the hearing was closed.

This Board,

Having noted the Appellant's objection 'in terms of the 'Reasoned Letter of Objection' dated 18th June 2014 and also through Appellant's verbal submissions during the

hearing held on 17th July 2014, had objected to the decision taken by the pertinent Authority, in that:

- a) Appellant claims that his offer was unfairly discarded by the Contracting Authority, the latter citing the reason as “the requested list of 48 specific items were not in accordance with the specifications and were not the items so requested”. Appellant contends that he had offered and submitted the same listed items as those shown in the tender document;
- b) Appellant contends that the Contracting Authority stated another reason for discarding his bid which was not stated in the letter of refusal of offer dated 10th June 2014. This reason quoted by the Contracting Authority was that ‘the literature submitted by Appellant was not the requested one.’ In this regard, Appellant’s offer clearly dictated that what was being requested by the Contracting Authority, was in fact being offered by Appellant. Appellant claims that this declaration surely surpasses the requirement of the literature.

Having considered the Contracting Authority’s verbal submissions during the hearing held on 17th July 2014, in that:

- a) Tenderers had to upload the technical literature denoting the ‘Codes’ of the items being offered as stated in the tender document. Appellant had uploaded ‘Codes’ which do not correspond with the required specifications as dictated in the tender document;
- b) The tender document, with particular reference to pages 15 and 16, did not cater for a column to include the code of the specific item being offered. In this regard, the submission of the proper technical literature was of great importance for the Evaluation Board to identify and verify the items being offered as submitted in the tender document.

Reached the following conclusions:

1. This Board opines, that since the tender document , with particular reference to pages 15 and 16, did not provide for a space where the ‘Codes’ against each item could be inserted, the submission of the technical literature was of great importance for the Evaluation Board to assess and identify the items being offered by each tenderer. The Evaluation Board was in duty bound to check that the items as quoted by the tenderer on pages 15 and 16 of the tender document represented same in the ‘technical literature’. In this regard, the ‘Catalogue Codes’ submitted by Appellant did not tally at all with the items quoted by same in the technical specifications form under section 4 of the tender document. This Board upholds the fact that the Evaluation Board had to ensure that items offered by Appellant in section 4 of the tender referred to the same items as those shown in the ‘technical literature’ which had to be submitted. From the

information submitted by Appellant, this assessment could not be achieved as the ‘Codes’ submitted by same did not refer at all to the items being offered in the Appellant’s tender document. In this regard, the Contracting Authority was correct in stating that the items presented by the Appellant in his technical literature were not the same as those requested;

- 2. The Appellant’s declaration confirming that the items being offered are as per specifications dictated in section 4 of the tender document, does not in any way, provide an assurance that the items being offered by Appellant match with those as listed in technical literature, as requested. In this regard, this Board opines that the technical literature was a mandatory requirement and that a declaration by Appellant does not substitute the purpose of the technical literature;**
- 3. With regards to the Appellant’s claim that the Contracting Authority stated a second reason during the hearing of this Appeal and which was not mentioned in the ‘letter of refusal of offer’, this Board refers to the same letter dated 10th June 2014 and confirms that the reasons for refusal of Appellant’s offer, given by the Contracting Authority mentioned two factors, namely:
 - i) “Items offered are not in accordance with specifications” – This Board upholds the fact that the ‘Codes’ submitted by Appellant did not refer to the same items as offered by Appellant under section 4 of the tender document;**
 - ii) Items indicated in the technical literature (with regards to codes) do not refer to the items as stated in the tender document. In this regard, this Board opines that the ‘Catalogue Code numbers’ sent by Appellant did not refer to items as submitted by same under section 4 of the tender document. This Board upholds the Contracting Authority’s decision that information submitted by Appellant did not relate to the same items being offered by Appellant.****

In view of the above, this Board finds against the Appellant Company and recommends that the deposit paid by Appellant should not be reimbursed.

Dr. Anthony Cassar
Chairman

Dr. Charles Cassar
Member

Mr. Lawrence Ancillieri
Member

27 August 2014