

PUBLIC CONTRACTS REVIEW BOARD

Case No. 768

CT 3117/2014

Tender for the Supply, Delivery, Installation and Commissioning of a Measurement System capable of Performing Minority Carrier Lifetime and Light Beam Induced Current Measurements on Semiconductor Material for the Setting up of a Solar Laboratory at the University of Malta.

The tender was published on the 11th July 2014. The closing date was the 28th August 2014.

The estimated value of the Tender was €249,152.54 (Exclusive of VAT).

Three (3) tenderers had submitted an offer for this tender.

On the 5th December 2014 Evolve Limited filed a letter of objection against the decision of the contracting authority to award the tender to Freiberg Instruments GmbH.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a hearing on Tuesday the 6th January 2015 to discuss the objection.

Present for the hearing were:

Evolve Limited - Appellant

Mr Lawrence Zammit	Representative
Mr Karl Aquilina	Representative
Mr Christopher Busuttil	Representative
Mr Miklos Tallian	Representative

Freiberg Instruments GmbH - Preferred Bidder

Dr Kay Dormich	Representative
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University of Malta - Contracting Authority

Mr Tonio Mallia	Chairperson Evaluation Board
Mr Karm Saliba	Secretary Evaluation Board
Prof Tonio Sant	Member Evaluation Board
Prof Robert Ghirlando	Member Evaluation Board
Ing Charles Yousif	Member Evaluation Board
Dr Oriella Degiovanni	Legal Representative

Department of Contracts

Mr Kevin D'Ugo	Procurement Manager
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The Chairman opened the hearing by remarking that the letter of objection filed was in the name of Semilab when the bidder was Evolve Limited. He asked for an explanation since objections should only be submitted by bidders for the tender.

Mr Christopher Busuttill on behalf of the appellant explained that the objection was filed by Evolve. Semilab was just the supplier. The deposit was paid by Evolve.

Dr Oriella Degiovanni on behalf of the contracting authority said that the matter was raised as a plea in the contracting authority's letter of reply; the contracting authority contends that Semilab had no legal and juridical interest or standing in the case.

Appellant's representative was then invited to make his submissions on the objection.

Mr Christopher Busuttill for the appellant explained that the tender involve a niche market with very limited opportunities and competition. He stated that appellant believed that the decision to award the tender was misguided. The contracting authority had issued this tender for a tool with all accessories to enable it to conduct research on solar energy. The current trend is for more efficient solar energy production. This efficiency comes from the use of better materials.

Appellant had offered two bids; one with just the microwave based technology with optional SPV and the other was fully loaded, including SPV. Technically, since the tender requested SPV technology both appellant's offers were the same, and in fact treated as the same by the evaluators. The tender was however awarded to the preferred bidder.

It is public knowledge that the preferred bidder does not provide SPV technology but only microwave based technology. This was confirmed by the preferred bidder itself in its reply. The SPV forms 25% of the tender budget. The reply to the objection submitted by the preferred bidder admitted that it does not have SPV technology and that it had offered an alternative. The contracting authority seems to have accepted as truth the preferred bidder's contention that SPV was an old technology. This contention by the preferred bidder was completely false; yet the contracting authority concurred with this lie.

Dr Oriella Degiovanni on behalf of the contracting authority said that the specifications in the tender were the minimum requirements. The offer made by the preferred bidder was a technology of a much better quality and at a lower price to the contracting authority. The preferred bidder's offer surpassed the minimum requirements.

Professor Robert Ghirlando, Id.no. 358747M under oath stated that in his opinion the preferred bidder's offer was a technically superior offer. Replying to questions by Mr Miklos Tallian for the appellant, professor Ghirlando said that the tender called for SPV technology but the tender also explained that the contracting authority was interested in obtaining the best technology, and the preferred bidder offered a better technology. Replying to questions by Mr Christopher Busuttill he said that the contracting authority had never stated that appellant's offer was not technically compliant, but the evaluators reached the conclusion that the preferred bidder's offer was superior. What was offered by the preferred bidder could provide the same functions.

Mr Lawrence Zammit on behalf of the appellant explained that appellant had offered the

same technology as the preferred bidder, but since it was requested in the specifications, appellant also offered SPV. Half of appellant's offer was thus ignored. Also appellant offered contact-less probes as requested while the preferred bidder did not offer these contact-less probes.

Dr Kay Dornich on behalf of the preferred bidder said that it had developed tools with better sensitivity. Previously only SPV could give the same results. The preferred bidder's methods have an advantage over SPV, giving better results.

Miklos Tallian on behalf of the appellant said that according to the preferred bidder's publication, the same physical procedure limits its instrument capabilities. SPV does not have these limitations and is therefore better. Nowadays certain measurements are important and the Microwave technology has its limitations. It was for this reason that SPV was requested in the tender specifications. He contended that SPV technology was not antiquated and all silicon makers use the SPV systems.

Professor Tonio Sant ID no. 75477M, on behalf of the contracting authority explained that SPV technology was not set aside but the contracting authority was informed by the preferred bidder that MDP offered a better technology, with superior characteristics. MDP was better than SPV. Replying to Mr Christopher Busuttil, he explained that SPV was requested in the tender as a minimum requirement. MDP is definitely superior and the preferred bidder exceeded requirements.

Mr Tonio Mallia for the contracting authority remarked that appellant had submitted two bids, one with SPV and the other one not. The one without SPV was almost twice the cost of the preferred bidder's.

Mr Lawrence Zammit for the appellant reiterated that the tender specifications asked for various items including SPV and non-contact probes. Appellant had conformed and offered all these items; the preferred bidder did not offer all the items.

Mr Christopher Busuttil for the appellant insisted that the technical offer of the preferred bidder was inferior to the appellant's. Professor Ghirlando had failed to reply to the question how 47 microseconds was better than the ability to read higher.

At this point the hearing was brought to an end.

This Board,

Having noted the Appellant's objection, in terms of the 'Reasoned Letter of Objection' dated 4th December 2014 and also through Appellant's verbal submissions during the hearing held on 6th January 2015, had objected to the decision taken by the pertinent Authority, in that:

- a) This Board considered the Preliminary Plea Raised by the Contracting Authority, in that the 'Letter of Objection' was not in the name of appellant. However, since both the covering letter as well as the cheque have been issued by the appellant. This Board decided to hear the appeal.**

- b) Appellant contends that the technical specifications in the tender document called for an 'SPV Technology' and in this regard, Appellant claims that the Preferred Bidder's offer did not provide for such a technology.
- c) Appellant insists that the Contracting Authority conceded to the Preferred Bidder's declaration that the SPV technology was outdated, which Appellant is negating.

Having considered the Contracting Authority's 'Letter of Reply' dated 22nd December 2014 and also through the verbal submissions during the hearing held on 6th January 2015, in that:

- a) The Contracting Authority maintains that the inclusion of the SPV technology was a minimum requirement, as specified in the tender document. The Preferred Bidder's offer by far exceeded these requirements.
- b) The Preferred Bidder's offer, apart from being superior, was also the cheapest.

Reached the following conclusions:

1. This Board, after having heard credible submissions from technical expertise, is justifiably convinced that the Preferred Bidder's offer does exceed the SPV Technology and this same Board is also committed to accept the fact that the Evaluation Committee acted in a prudent and transparent manner in opting for a superior technology, yet at a cheaper price. In this regard, this Board does not uphold Appellant's first contention.
2. With regards to Appellant's second contention, this Board, after having evaluated the technical expertise submissions, is justifiably convinced that the Contracting Authority opted for its best interest in selecting the superior technology available within the financial framework of same.
3. This Board would also point out that the technical requirements as dictated in the tender document, with particular reference to Page 12 (description), it is clearly stated that, 'Item 1 - A lifetime measurement system having the following characteristics as a minimum specification. It is evidently clear that the Contracting Authority specified the minimum requirements and in this respect, the Evaluation Committee were diligent enough to opt for the most recent technology at the cheapest price.

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 Ancilleri
Member

15 January 2015