

## **PUBLIC CONTRACTS REVIEW BOARD**

**Case No. 838**

**CT 3253/2014**

### **Tender for the Supply of Genetic Analyzer and PCR Equipment Laboratory.**

The tender was published on the 30<sup>th</sup> January 2015. The closing date was the 12<sup>th</sup> March 2015. The estimated value of tender is €88,500.00 (Exclusive of VAT).

Sixteen (16) offers from 6 bidders had been received for this tender.

On the 15<sup>th</sup> June 2015 Evolve Limited filed an objection against the decision of the Contracting Authority to reject their tender.

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 4<sup>th</sup> August 2015 to discuss the objection.

Present for the hearing were:

#### **Evolve Limited:**

Mr Alan Balghy	Representative
Mr Christopher Busuttil	Managing Director
Mr Mark Mizzi	Representative
Dr Steve Decesare	Legal Representative

#### **EJ Busuttil Limited:**

Mr Edwin Busuttil	Managing Director
Mr Aaron Grima	Sales Executive

#### **Water Services Corporation:**

Ms Diandra Caruana	Chairperson Evaluation Board
Mr Anthony Camilleri	Secretary Evaluation Board
Mr Trevor Giles Chircop Bray	Member Evaluation Board
Mr David Spiteri	Member Evaluation Board
Mr Matthew Vella	Member Evaluation Board
Ing. Mark Perez	Representative

#### **Department of Contracts:**

Dr Christopher Mizzi	Legal Representative
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Following a brief introduction by the Chairman, the Appellant's representative was invited to make his submissions.

Dr Steve Decesare on behalf of his client Evolve Limited submitted that:

- i) There exist two types of technology used in genetic analysis;
- ii) The Contracting Authority had chosen to limit the tender to just one type;
- iii) Capillaries are used only in the Sanger type of technology yet the Contracting Authority included it in the tender specifications as a mandatory requirement thus reducing competition;
- iv) European Union Directive 18/2004 said that "tenders based on equivalent arrangements must be considered by contracting authorities. To demonstrate equivalence, tenderers should be permitted to use any form of evidence. Contracting authorities must be able to provide a reason for any decision that equivalence does not exist in a given case.";
- v) Clarification had stated that "economic operators may offer equipment with different technology as long as the requirements specified in the Technical Specifications are achieved"; however since these were based on a specific technology, could not be reached by a different technology;
- vi) The Contracting Authority failed to evaluate Appellant's offer as directed in Article 29 of the EU Directive but instead chose to disqualify the offer as being technically non-compliant on the sole basis of not meeting the Sanger-specific standards.

Dr Christopher Mizzi for the Department of Contracts pointed out that the Appellant is not clear as to the reason for disqualification – at one point it is being declared that the latter's bid was disqualified for offering a different technology and at another point it is being claimed that the bid was disqualified for not satisfying the technical specifications. Bidders could not leave the tender submission so vague as to preclude evaluation.

Mr David Spiteri, ID No 465285M, for the Contracting Authority under oath said that before purchasing any equipment the contacting authority had to examine the scope of the equipment. In the present case the genetic analyzer would be used to further increase the authority's micro-biology technology. Studies were carried out of the limits reached by other counties and on the level the authority required to reach. The specifications were then worked out and set on these; they were not copied from any particular brand of technology. The market was also taken into consideration and it was the first time that the authority was acquiring a genetic analyzer. Replying to Mr Mark Perez he said that Appellant's offer offered a maximum read length of 2 times 300 bp that is 600 bp while the tender requested 850/900 bp. A lower rate meant that more errors could be made when using the analyzer. Replying to a question by the Chairman he said that the authority would have accepted a different technology provided that the technical specifications were attained. Replying to questions by Dr Decesare he confirmed that the specifications were related to Sanger technology but in his opinion the Next Generation Sequencing is more used in research and not for the use the Contracting Authority needed. The tender specifications were directed to

the Contracting Authority's needs. The Appellant had offered 600 bp which is not the requested 850/900 bp required by the authority. Sanger sequencing technology was not a trademark, Sanger was the person who created the reaction. Replying to a question by the Chairman he said that the evaluation board has to follow the tender specifications when evaluating offers. The Appellant's offer does not meet the tender requirements.

Mr Mark Perez on behalf of the Contracting Authority explained that the authority wanted a performance of 850/900 bp and if this was not offered it was not acceptable.

Dr Steve Decesare insisted that the Directive said that an equivalent technology should not be assessed according to the requested technology. Here he referred to other authorities that had issued similar tenders and a list of users making use of NGS technology and filed relevant documents as an example. The Directive forbids authorities from assessing equivalent technology using the standard specifications.

Mr David Spiteri replying to a direct question by the Chairman reiterated that the offer by Appellant did not meet the tender specifications. Genetic analyser first came to be used in the 1980s. In the late 2000s the Next Generation Sequencing started to be used for research and researchers encountered limitations. The Contracting Authority's needs were considered when setting specifications and thus 850/900 bp was requested. Had NGS achieved 850/900 bp it would have been acceptable. Appellant's offer was not evaluated since it has been declared that it only offered read length of 600 bp.

Mr Mark Perez insisted that the Appellant's offer suffered from two deficiencies: a) the capillaries and b) not reaching 850/900 bp. Since the NGS did not reach 850/900 it was not enough for the Contracting Authority.

Mr Christopher Busuttill for the Appellant claimed that the equipment would be used to analyse or read fragments and it did not matter whether these were read 850 or 600 at a time. The preferred bidder's offer reached 3000 with difficulty while the Appellant's product could read 15 million. Appellant's offer reached 3000 differently Appellant offered better technology at a cheaper price.

Dr Steve Decesare for the Appellant insisted that the Contracting Authority failed to evaluate the Appellant's equivalent bid and in doing so went against the Directive. This being a European Funded tender it would not pass because of this failure.

Dr Christopher Mizzi on behalf of the Department of Contracts stated that the measurements used in the tender are common for both technologies and thus the allegation made by Appellant that one technology was chosen over another does not hold. Bidders are obliged to submit all the necessary details for evaluation and the evaluation board could not assess on what was not submitted but could ask for clarifications. The bidder should give all the information required.

At this point the hearing was closed.

**This Board,**

**Having noted the Appellant's objection, in terms of the "Reasoned Letter of Objection" dated 15th June 2015 and also through the Appellant's verbal submissions during the Hearing held on the 4th August 2015, had objected to the decision taken by the pertinent Authority, in that:**

- a) The Appellant claims that the Technical Specifications dictated in the Tender Document were based on the "Sanger Type of Technology" which restricted the competition for other similar technologies, such as the Appellant submitted, namely "NGS Technology" which is cheaper and which would also meet the Technical Requirements of the Tender;**
  
- b) The Appellant maintains that the Contracting Authority went against the European Union Directive 18/2004 wherein equivalent technologies should be considered by the same. At the same instance, the Contracting Authority did not abide by Article 29 of the said EU Directive, by not considering further the Appellant's offer, from the Technical point of view.**

**Having considered the Contracting Authority's "Letter of Reply" dated 30<sup>th</sup> July 2015 and also through their verbal submissions made during the hearing held on the 4<sup>th</sup> August 2015 in that:**

- a) The Contracting Authority contends that it was made clear from Clarification Number 2 that it would accept different technologies provided that the Technical**

**Specifications would be in line with those dictated in the Tender Document;**

- b) The same Authority claims that the Technical Specifications were formulated on the specific requirements for which the equipment was to be applied, and not on the Technical Specifications of a particular brand, so that the Contracting Authority did not minimise competition of similar products on the market.**

**Reached the following conclusions:**

- 1. With regards to the Appellant's first contention, after having heard submissions from both the Appellant Company and the Contracting Authority, this Board justifiably would like to address this grievance under two main issues, namely the Technical Specifications dictated by the Contracting Authority and the alleged claim by the Appellant of the limitation of competitiveness**

**a) Technical Specifications of the Tender Document**

**This Board justifiably opines that "Sanger Sequence Technology" is not a "Trademark" or a "Brand name" but a technology invented by an individual named Sanger. At the same instance, this Board noted from the credible submissions made by the Contracting Authority, that the Technical Measurements dictated in the Tender are common for both the "Sanger" and "NGS" Technologies.**

**In this regard, this Board opines that it was not proven that the Technical**

Specifications had neither restricted nor favoured any of the bidders in particular. At the same time, this Board contends that a feature in the Technical Specifications, which clearly requests a reading of 850/900bp, was not reached by the Appellant's offer whilst the latter's bid offered 600bp.

During the submission, it was credibly proved that the Appellant's offer was not in conformity with the requested Technical Specifications. As credibly noted, the dictated readings did not conform to those stipulated in the Tender Document. This Board justifiably opines that the reason for rejecting the Appellant's bid was due to its "Technical Non Compliance" and not otherwise. In this regard, this Board does not uphold the Appellant's first grievance.

b) **Restriction of Competition**

This Board notes that the Technical Specifications were drawn up on "Generic Requirements" which the Contracting Authority felt that it had to dictate in the Tender Document, in accordance to its particular requirements. These requirements could be met by both the "Sanger" Technology and the "NGS Technology" so that, there was no limitation of competition in whatsoever manner. In this regard, this Board does not uphold the Appellant's argument that there was limitation of the scope of competition.

2. With regards to the Appellant's Second Grievance, this Board justifiably contends that the Contracting Authority, in its Clarification Note Number 2, did

**in fact clearly emphasize that the “same Authority would accept different technologies, provided that the Technical Specifications of the Technology would respect those as dictated in the Tender Document”. This is interpreted that “as long, as the Technical Specifications, as dictated in the Tender Document are met”**

**From credible submissions it was proved that the Appellant’s offer failed to meet the requested 850/900bp. At the same instance, this Board opines, that it was the responsibility and obligation of the Appellant to submit clear Technical data to substantiate that the new technology would meet the required specifications. It is evidently clear that the latter mandatory obligations were not submitted by the Appellant.**

**In this regard, this Board does not uphold the Appellant’s contention that the Contracting Authority went against Article 29 of the European Union’s Directive 12/2004 which emphasizes the fact that, “when a similar/alternative product or technology is submitted for evaluation, the prospective Tenderer has to justify that the product/service being offered is compliant with the Technical Specifications of the Tender Document.” In this regard, this Board does not uphold the Appellant’s second grievance.**

**At the same instance, this Board justifiably contends that the Contracting Authority, in this particular case, were correct in dictating the Technical Specifications in accordance with its scope and requirements and this Board is credibly satisfied that there was no such restriction of competition, in the**

**specifications dictated in the Tender Document were generic.**

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

Dr. Anthony Cassar  
Chairman

Dr. Charles Cassar  
Member

Mr. Lawrence Ancillieri  
Member

*17 August 2015*