

PUBLIC CONTRACTS REVIEW BOARD

Case No. 853

CPSU/CPU/ 3157/14

Tender for the Supply of Non-Woven Material 1000 x 1000mm.

The Tender was published on the 11th April 2014. The closing date was the 12th May 2014. The estimated value of Tender is €86,898 (Exclusive of VAT).

Seven (7) offers from five bidders had been received for this Tender.

On the 8th July 2015 Cherubino Limited filed an objection against the decision of the Contracting Authority to disqualify its Tender as being technically non-compliant.

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 24th September 2015 to discuss the objection.

Present for the hearing were:

Cherubino Limited:

Mr Thomas Dimech	Representative
Dr Matthew Paris	Legal Representative
Ms Martina Pace	Legal Trainee

Medina Healthcare Limited:

Mr John Soler	Managing Director
Mr Andrew Cutugno	Sales Director
Dr Steve Decesare	Legal Representative

Central Procurement and Supplies Unit:

Ms Connie Miceli	Chairperson Evaluation Board
Mr Joseph Testa	Member Evaluation Board
Ms Claudia Muscat	Representative
Ms Marika Cutajar	Representative
Ms Alicia Vella Lethridge	Representative

The Chairman pointed out that the Letter of Objection had not given any reasons for the objection and this was not regular. He then asked the Appellant's representative to make his submissions.

Dr Matthew Paris on behalf of the Appellant said that their bid was disqualified because "sample submitted for offer 13127 has 3 layers of microfibrils instead of 4." He contended that the sample submitted by the Appellant was in line with the requisites. In fact it exceeded the requirements and thus Appellant's Tender was the cheapest compliant.

Ms Connie Miceli, the Chairperson of the Evaluation Board, said that since the matter was of a technical nature, Mr Joseph Testa would be testifying on the matter.

Mr Joseph Testa, ID No 5007071M, a member of the Evaluation Board, under oath stated that the Tender's Technical Specifications asked for material having 4 layers, SMLS. The Appellant had offered a 3 layer microfiber SMS. Replying to Dr Paris, he stated that if a bidder offered more than requirements, he would not be at fault but if he offered less he would be. When asked for an explanation by Dr Paris, who insisted that the sample provided by the Appellant had 5 layers, Mr Testa said that the sample was not available at the hearing but when he had evaluated and tested the sample, he had also taken cognizance of the documentation supplied by the bidder.

If the Appellant had submitted a different sample from the product offered he could not say. The sample was processed by the autoclave process, passed and did not tear. From the test alone it could not be established whether the sample had five or less layer. He insisted that the Evaluation Board had to be made on both the documentation and the samples. He had not tested the number of layers in the sample because no there was apparatus to do this. It was the enclosed documentation that stated that the offered product had 3 layers.

Dr Mathew Paris for the Appellant said that the Letter of Rejection did not mention any documentation but just the samples.

Ms Connie Miceli for the Contracting Authority said that there was a discrepancy between the literature submitted by Appellant and the sample produced.

Mr Joseph Testa was shown the code of the items offered by the Appellant and he said that according to the literature the product had three layers. This should have agreed with the samples provided. Although the sample passed the test, it was not according to the Tender requirements.

Dr Matthew Paris for the Appellant insisted that Appellant had provided a 5 layer sample, while the Letter of Rejection stated that the sample had three layers. The submitted literature is not a matter that has to be raised.

Dr Steve Decesare on behalf of the Recommended Bidder said that according to Regulation 21 (3) all objections had to give detailed reasons for the objection. This was not done in this case and therefore the objection was null. Furthermore the bidders had to provide all information about the product being offered plus a sample. This sample however had to be of the same product that bidders had offered and had to be according to specifications. Evaluation could not be carried out on the samples alone but evaluators had to consider all

the documents submitted by the bidder.

Dr Matthew Paris reiterated that the Letter of Objection had made it clear what the objection was about.

The Chairman stated that the Board would appoint an expert to see whether the product offered by Appellant was according to Tender specifications.

At this point the hearing was closed.

Second Hearing:

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Lawrence Ancilleri as members re-convened a hearing on Tuesday 10th November 2015 to discuss the objection.

Present for the hearing were:

Cherubino Limited:

Mr Thomas Dimech	Representative
Dr Francis Cherubino	Representative
Dr Matthew Paris	Legal Representative
Ms Cinzia Azzopardi Alamango	Legal Representative

Medina Healthcare Limited:

Mr John Soler	Managing Director
Mr Andrew Cutugno	Sales Director
Dr Steve Decesare	Legal Representative

Central Procurement and Supplies Unit:

Ms Connie Miceli	Chairperson Evaluation Board
Mr Joseph Testa	Member Evaluation Board
Ms Claudia Muscat	Representative

The Chairman started by explaining that the Board could not appoint an expert because it had been informed that the samples submitted by the Appellant with the Tender had been destroyed and thus it could not be ascertained whether these were compliant with the Technical Specifications or not. In the circumstances the Board had to give its decision on the matter.

Ms Connie Miceli on behalf of the Contracting Authority explained that the sample submitted itself could not be examined to see how many layers it had since the sample came in sealed packaging. However she contended that the item specification code of the product that had been submitted by the Appellant, 4503008 referred to non-woven SMS 100% polypropylene (three layers) while the Tender had asked for SMS (four layers). Appellant could have submitted a sample that did not agree with the offer being made.

Dr Matthew Paris for the Appellant insisted that the only reason why his client's bid was rejected was that the sample was not good. The stated reason was not that the literature was not correct. However it resulted during the first hearing that the sample had in fact been tested and found to be compliant. He claimed that Appellant had submitted a five layer sample having SMMMS layers, and this was better than the requested specifications.

Mr Joseph Testa for the Contracting Authority said that when testing the samples he could not count the number of layers but had submitted the samples to the necessary testing and these had passed. He insisted that the literature that had been submitted with the Tender referred to three layers.

Ms Connie Miceli for the Contracting Authority reiterated that what counts was the specification code submitted by the Appellant for the product, and this referred to a three layer product. The Appellant should not have submitted samples that did not represent the actual offer. She admitted that the Letter of Rejection was erroneous.

Dr Francis Cherubino for the Appellant contended that five layers were better than four. He also said that the packaging of the sample had the details of the contents.

Dr Matthew Paris for the Appellant said that the Tender had a performance guarantee and this safeguarded the Contracting Authority against any abuse as alleged by the Contracting Authority, that of offering a different sample from the product offered.

Dr Steve Decesare on behalf of the Recommended Bidder said that the Letter of Rejection was defective because it just referred to the samples. He insisted that the Letter of Objection was not in order because it did not list any reasons. He said that it resulted that the product offered by Appellant was non-compliant. The performance guarantee covered the product being offered and not the sample.

The hearing was at this point closed.

This Board,

Having noted the Appellant's Objection, in terms of the "*Letter of Objection*" dated 8 July 2015 and also through the Appellant's verbal submissions during the Public Hearing held on 24 September 2015 and had objected to the decision taken by the Pertinent Authority, in that:

The Appellant contends that according to the "*Letter of Rejection*", the reason why their offer was discarded was due to the fact that the "*Sample*" submitted had three Layers of Microfibers instead of four.

In this regard, the Appellant insists that the sample submitted by them was in fact superior to the required specifications. The Appellant had provided a five Layer Sample.

Having considered the Contracting Authority's "*Letter of Reply*" dated 31 August 2015 and also through their verbal submissions during the Public Hearing held on 24 September 2015, in that:

The Contracting Authority maintains that the product offered by the Appellant was not technically compliant, as from the Literature submitted indicated that the product had three Layer and not five as

the Appellant was claiming.

During the verbal submissions, this Board justifiably notes that since the main issue of this Appeal centres around the Technical Specifications of the “*sample*” submitted by the Appellant, this Board wanted to appoint an expert to examine the technical quality of the same sample and report on the matter so that a definite technical result of the sample could be established. However, this Board was informed by the Contracting Authority that the actual sample to be examined by the appointed expert was destroyed.

This Board reached the following conclusions:

- 1. With regards to the Appellant’s Grievance, this Board credibly notes that according to the “*Letter of Rejection*”, the main reason why the Appellant’s bid was rejected was that the “*sample submitted was technically non-compliant*”.**

This Board also notes that during the submissions, although the Contracting Authority had to refer also to the Literature submitted by the Appellant, wherein the latter should agree with the sample submitted, this reasoning was not stated in the “*Letter of Rejection*”

to the Appellants.

In this regard, this Board re-affirms its opinion, in that, the main issue mentioned in the rejection of the Appellant's offer was the "sample". In this regard, this Board upholds the latter's contention.

- 2. This Board opines that, since the "Sample" which had to be examined by an appointed expert was destroyed, an exact and definite decision on the Technical Compliance of this sample cannot be determined and/or evaluated.**

In view of the above and in view that this Appeal entails Health issues and to avoid any unnecessary delay in the Procurement of this Product, this Board recommends that the Tender is to be re-issued as soon as possible.

This Board also recommends that the deposit paid by the Appellant Company is to be re-imbursed.

Dr Anthony Cassar
Chairperson

Dr Charles Cassar
Member

Mr Lawrence Ancillieri
Member

17 November 2015