

PUBLIC CONTRACTS REVIEW BOARD

Case No. 865

CT 2108/2014

Tender for the Supply, Installation and Implementation of a Fully or Semi-Automated Liquid Based Cytology System, (on loan basis) at Mater Dei Hospital.

The Tender was published on the 20th April 2015. The closing date was the 5th May 2015. The estimated value of Tender is €370,000.00 (Exclusive of VAT).

Five (5) offers had been received for this Tender.

On the 24th September 2015 Technoline Limited filed an objection against the decision of the Contracting Authority to find their offer 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 29th October 2015 to discuss the objection.

Present for the hearing were:

Technoline Limited:

| | |
|------------------------|----------------------|
| Mr Ivan Vassallo | Representative |
| Mr Hilary Paul Agius | Representative |
| Mr Christopher Bonello | Representative |
| Dr Paul Gonzi | Legal Representative |

Evolve Limited:

| | |
|-------------------------|----------------|
| Mr Christopher Busuttil | Representative |
| Mr Adrian Balghy | Representative |

Mater Dei Hospital:

| | |
|---------------------|------------------------------|
| Mr Albert Briffa | Chairperson Evaluation Board |
| Ms Carmen Buttigieg | Secretary Evaluation Board |
| Mr Jesmond Farrugia | Member Evaluation Board |
| Ms Norah Abela | Member Evaluation Board |
| Mr Mario Taliana | Technical Expert |

Department of Contracts:

| | |
|----------------------|----------------------|
| Dr Christopher Mizzi | Legal Representative |
|----------------------|----------------------|

The Chairman made a brief introduction and asked the Appellant's representative to make his submissions.

Dr Paul Gonzi on behalf of the Appellant explained that his client's offer was rejected on two grounds: i) that *"this system does not have an in built staining capability as requested in the Tender specifications paragraph 2d."*; and ii) *"this system does have an automated computer guided imaging analyser system as requested in Tender specifications paragraph 2h"*. He submitted that the Tender's award criterion was the cheapest satisfying the conditions and he would only be basing submissions on these two reasons.

He contended that the Appellant did not agree with these reasons and because of this, he insists that his client's offer was the cheapest compliant bid and not as stated in the letter of reply at paragraph 5 wherein the Contracting Authority just gave the price for one year only.

With regards to the first rejection reason he submitted that: The Tender requirements did not include 'inbuilt' and therefore the Appellant's offer was compliant with the requirements since the latter offered a semi automatic system. Even the title of the Tender said that "or semi-automated" system would be acceptable. He also referred to clarification note 2 of the 29th April 2015 where two replies to queries had been given and no mention of inbuilt was made. The clarification stated that "all systems will be assessed separately by the adjudicating board" and that automated was preferable but did not exclude separate staining capability.

With regards to the second reason, although the Letter of Rejection said that the system offered by Appellant "does" have an automated image analyser, the Tender had asked for equipment that in future would be able to have additions. The wording was 'capability of integrating....' that is not having, as the Contracting Authority claimed in the Letter of Rejection, but having the capability of. The Appellant had offered equipment that had the capability of integrating with, and added to, other equipment. At this point Dr Gonzi filed a certificate from the manufacturers Novacyt that explained this capability of integration with other equipment.

Dr Christopher Mizzi on behalf of the Department of Contracts explained that the question of fully or semi-automated equipment related to all the equipment and not just in relation to staining. The process has to be examined. It is true that reply number 2 to the clarification stated that LBC slides can also be stained by separate automated staining machines, but continues that having a system with integrated slide staining was preferable. The wording in the second reason for disqualification was clearly a typing error.

Dr Paul Gonzi for the Appellant said that he was concerned about the Contracting Authority's interpretation of clarification 2. He said that the clarification explained that having an LBC system with integrated slide greatly reduces cost but Appellant's offer was cheaper, including reagents. The Tender did not exclude non integrated equipment.

Mr Mario Taliana, ID No. 207564 M under oath, stated that Appellant's offer Novocyte was good but used gravity for cell settlement and this made it more difficult to read the results since cells could be layered. It also needed a staining machine to stain the cells, and these have to be taken out and re-inserted into the staining machine. Shurepack on the other hand has an inbuilt staining capacity enabling immediate examination under the microscope. This feature was an advantage over the other machines since it also was more economical on

reagents. Separate staining machines use more chemicals or reagents and allowed each patient's slides to be processed immediately without risk of cross-contamination. The Appellant's equipment does not allow this. Replying to Dr Gonzi he explained that he understood "inbuilt", "integrated" and "incorporated" to mean the same. When the clarification was issued the word "integrated" had been added. The Contracting Authority wanted the staining to be done on the same equipment because semi-automated equipment required the intervention of the operators to finish the process. The wording of the Tender Document was done in such a way in order to open the Tender to more bidders; had the wording asked for fully automated this would have meant restriction in the number of bidders. In his opinion the equipment offered by the Appellant did not give good results as the other bidders'; it had features that were inferior. Cross contamination can occur when slides are stained in batches together and this could lead to misdiagnosis. The incidence of this was between 1 and 2 percent. The clarification had listed the advantages of having built in staining. Replying to questions by the Board he said that paragraph 2 d) of the Tender Technical Specifications at page 13 shows that the staining capability had to be incorporated where it stated that "also the automated staining of LBC slides" and in his opinion automated meant that the staining had to be incorporated. Replying to Dr Mizzi he continued that automated staining meant that the staining had to be integrated. Regarding the other point of rejection he said that the image analyser needed to be calibrated with the existing equipment. There were 2 analysers on the market and both of these do not recognize each other's images. He confirmed that the screening process has already started.

Mr Albert Briffa, Chairperson Evaluation Board, replying to questions by the Chairman whether consideration of the great difference in prices was taken, said that the Evaluation Board had to decide first on the technical compliance of the offer and if Appellant's bid failed in this it would not be evaluated financially.

Mr Ivan Vassallo on behalf of the Appellant asked the previous witness Mr Taliana whether the Recommended Bidder's equipment could give the HPV since he had information that the FDA had not approved it.

Dr Paul Gonzi on behalf of the Appellant referred to the clarification question number 2 that had been posed by Appellant. This had asked "Does the stainer need to be integrated into the LBC system or can it be a separate machine?" The reply given did not clarify matters; it should have made it clear that the Contracting Authority wanted an inbuilt machine.

The hearing was closed at this point.

This Board,

Having noted the Appellant's objection, in terms of the "Reasoned Letter of Objection" dated 24 September 2015 and also through their verbal submissions during the Public Hearing held on 29 October 2015, had

objected to the decision taken by the Pertinent Authority, in that:

- a) The Appellant Company maintains that the Tender conditions did not dictate an “*inbuilt system*” as being declared in the Letter of Rejection. In fact, the latter was compliant with the Technical conditions as dictated in the Tender Document. The Appellant also contends that through two clarification replies, no mention of “*inbuilt*” system was ever made;**

- b) The Appellant contests that although the “Letter of Rejection” requested an automated image analyser, the Tender asked for equipment that would in future, be able to have additional attachments. In other words, the Equipment to be offered would be able to integrate other ancillary equipment. In this regard, the Appellant maintains that a “*change of goal posts*”, was made by the Contracting Authority during the Evaluation Stage.**

At the same time, the Appellant maintains that the equipment which they were offering was capable of having the capabilities for future attachments to satisfy the Technical Conditions imposed by the Contracting Authority.

Having considered the Contracting Authority’s “Letter of Reply” dated 1 October 2015 and also through their submissions during the Public Hearing held on 29 October 2015, in that:

- a) The Contracting Authority contends that although Clarification No. 2 stated that the LBC slides can also be stained by the Equipment offered by the Appellant Company, they would prefer a system which had an integrated slide staining. In this respect, Clause 2d of the Tender Document specifically contains the description of the equipment so requested;**

- b) The Contracting Authority refers to Paragraph 2(h) of the Technical Specifications which clearly explains that *“The LBC System should have the capability of integrating with an automated computer guided imaging Analyser System, if further future development is envisaged.”***

In this regard, the Contracting Authority contends that a clear description of the equipment so requested was available to the Appellant for the latter to identify the type of equipment so requested.

Reached the following conclusions:

1. With regards to the Appellant's First Contention, this Board justifiably notes that the "*inbuilt system*", was not mentioned, however Paragraph 2D of the Tender Document states "*The LBC system also provide the Cytobrush (Cervic Brush Broom), detachable head collection devices, specimen vial containers, consumbales, chemicals and staining reagents needed to complete LBC slide preparation and also the automated staining of LBC slides. This will ensure reproducibility of the whole process together with standardised staining reaction and high quality*".

In this Regard, this Board opines that the above mentioned Paragraph described in detail what was required; however, the "*inbuilt system*" element was not mentioned or indicated.

- At the same instance, this Board refers to Paragraph 2h of the Tender Document wherein "*The LBC System should have the capability of integrating with an automated computer guided imaging analyser system, if further future development is envisaged.*"

In this regard, this Board opines that this particular paragraph

mentions the phrase “*should have the capability of integrating*”. This Board, after hearing the Technical submissions had enough evidence to credibly prove that the Appellant’s equipment was capable of integrating imaging system, but not “*inbuilt*”;

- This Board would also justifiably refer to Clarification No 2, where Technical and Medical terms were exchanged between the Contracting Authority and the Appellants. From evidence provided and submissions during the hearing, it emerged that the “*inbuilt*” element was not specifically clarified.

This Board notes that the word “*integrating*” was mentioned. It is the humble opinion of this Board that “*integrating a system*” can represent numerous configurations on equipment. This Board credibly opines that an “*inbuilt*” system does not necessarily hold the only solution for an equipment to be able to integrate further attachments.

In this regard, this Board opines that both the Technical Specifications and the contents of Clarification No 2 were not explicitly clear enough to allow for a level playing field to the

Appellant Company.

In view of these facts, this Board justifiably opines that there was no mention of an “*inbuilt system*” throughout the process of Evaluation and in this respect; this Board upholds the Appellant’s first grievance.

2. With regards to the Appellant’s second grievance, this Board, after having heard the submissions of both parties to this Appeal and after having examined the documentation and relevant correspondence with regards to clarifications, justifiably opines that:

- **Clarification Question 2 with particular reference to Question 1, states that a fully automated system would obviously lower the manual work involved but would increase the price. The reply given by the Evaluation Board, in this particular context, was that “*The most popular LBC systems available on the market are semi-automated systems, although a few fully automated LBC systems are gradually creeping into the market.*”**

In this regard, this Board credibly notes that the Contracting Authority concluded the reply of Question 1 by saying that “*It*

is not a matter of judging a semi-automated vs a fully automated system. All offered systems will be assessed separately”. Again, in this respect, this Board notes that no mention of an “inbuilt element” was mentioned;

- This Board also notes clarification in reply to Question 3 and in this regard, the Evaluation Board is confirming that *“Having two systems working alternatively will probably increase the lifetime of the equipment since the workload is divided between the two.”*

3. This Board credibly notes that the Technical Specifications were too subjective for any prospective bidders to have a *“Level Playing Field”*. This Board acknowledges the important fact that this is a health issue and it is not the competence of this Board to delve into such Technical and Medical matters, but is credibly concerned at the way with which the principles adopted by the Evaluation Committee effected the *“First Instance Remedy”* of the Appellant Company.

This Board opines that the Technical Specification, whilst not allowing for the suffocation of fair competition, should dictate clearly the requirements in the Tender Document. It is the opinion of this

Board that in such health issues, if a particular equipment performing a particular purpose, this should be stated clearly in the Technical Specifications of the Tender Document. In this regard, this Board finds many inconsistencies from the Technical Requirements as originally dictated in the Tender from those which were preferred by the Contracting Authority.

In view of the above, this Board finds in favour of the Appellant Company and recommends that:

- The Tender will be re-issued to reflect the exact requirements of the Contracting Authority and avoid any unnecessary of misinterpretations of the Medical or English interpretation;**
- The deposit paid by the Appellant Company is to be reimbursed.**

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Lawrence Ancillieri
Member

10 November 2015