

PUBLIC CONTRACTS REVIEW BOARD

Case No. 870

CT 3084/2015

Tender for the Supply, Installation and Commissioning of a Modern Cardiac Capable Wide Detector CT Scanner at Mater Dei Hospital.

The Tender was published on the 18th September 2015. The closing date for the call was on the 17th November 2015. The estimated value of Tender is €750,000.00 (Exclusive of Vat).

On the 27th October 2015 Charles de Giorgio Limited filed a pre-contractual concern in terms of Regulation 85 of LN 296 of 2010.

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 10th November 2015 to discuss the objection.

Present for the hearing were:

Charles De Giorgio Limited:

Mr David Stellini	Representative
Mr Adriano Spiteri	Representative
Mr Joriss Dmitrideus	Representative
Dr Julianne Portelli Demajo	Legal Representative
Dr Antoine Cremona	Legal Representative

Central Procurement and Supplies Unit:

Mr Marnol Sultana	Representative
Mr Chris Attard Montaldo	Representative
Mr Kevin Cortis	Representative
Dr Kim Zarb	Representative
Dr Stefan Zrinzo Azzopardi	Legal Representative

Department of Contracts:

Ms Stephanie Farrugia	Procurement Manager
Dr Christopher Mizzi	Legal Representative

The Chairman after making a brief introduction invited the Appellant's representative to make his submissions.

Dr Antoine Cremona on behalf of the Appellant explained that the issue why the latter wanted to raise an objection was about the proposed award and selection criteria of the Tender. He explained that contrary to what the Contracting Authority claimed in the Letter of Reply, the Government does not have a free hand to 'dictate' in all requirements when it comes to Tender requirements, but is bound by regulations more than private entities.

The Government is bound both by Local Law and by the European Law. Regulation 46.1(b) of the Public Procurement Regulations states that "***Technical Specifications shall afford equal access for Tenderers and not have the effect of creating unjustified obstacles to the opening of public procurement to competition.***"

This means that the Contracting Authority is not free to select any selection criteria requirements but has to establish functional requirements of what has to be supplied by the bidders. These requirements have to be functional and not specific. In the present case there were four manufacturers of the equipment in question and the Appellant's supplier, Siemens, have 40% of the market in Europe.

Dr Cremona was not saying that Appellant's equipment was better than the others but that the Tender Technical Requirements as proposed in fact erected a barrier to the Appellant. These Technical Specifications were too detailed while Article 42.4 of the Directive states that "***that unless specified by the subject matter of the contract, Technical Specifications shall not refer to a specific make or source, to a particular process, to trade marks, patterns or types..... such reference must only be resorted to in exceptional cases and shall be accompanied by the words 'or equivalent.'***"

Dr Cremona continued that in the present Tender it is evident that the Technical Specifications would only be satisfied by one particular brand, although the Letter of Reply declared that they were based on two brands. He said that studies had explained that there were two schools of thought about the matter of the scanner, one preferring a wide diameter scan while the other school preferred having two narrower diameter scans with more speed.

He insisted that the Appellant's equipment would give the same results as the wider diameter ones and had the same functional parameters as the latter but was excluded by the Tender specifications. This was not allowed and he cited Case 278/14 by the European Court of Justice and Case 737/14 decided by the Public Contract Review Board where the decisions affirmed that such specifications should not be set. He explained that the Appellant wanted the Technical Specifications of the Tender to be amended in order to be compliant with the Law.

Dr Christopher Mizzi on behalf of the Department of Contracts did not admit that the Technical Specifications had to be functional. Technical Specifications are laid down by the Contracting Authority's experts involved and are meant to enable the Contracting Authority to make the right selection.

The Evaluation Boards would not be able to adjudicate without the right specifications. He said that in the present case there had been no 'cut and paste' scenario and the Appellant's supplier was free to participate. He referred to a recent case decided by this Board in the

navigation buoys case. He insisted that certain details had to be given and that the equipment was needed for a specific reason.

Dr Kelvin Cortis, ID No 541483M, a radiologist, under oath on behalf of the Contracting Authority, testified that the Contracting Authority wanted a heart scanner that had a scanning diameter wider than the size of the heart which was about 14 cms. Thus it wanted a model that had a diameter of 160 cms capable of scanning the heart between heartbeats. Two companies have models of this kind. The Appellant's supplier has a scanner with a smaller diameter, although has introduced a wider model. Scanners having smaller diameter may cause artefacts because of overlap between scans, (Here the witness showed the Board two heart images), Dr Cortis continued to explain that the heart arteries are about 2-3 mm thick.

Thanks to this scanner, it would no longer be necessary to make intrusive interventions and angiograms, to have heart images. Siemens have two sizes of diameters in the scanners they produce but the Appellant was offering only the smallest of these. The technology was not available 5 years ago.

The witness explained that the article mentioned by the Appellant's representative was not the result of a CT scan but computer generated – a simulation study on 140mm scanners. He agreed that the scanner intended to be offered by the Appellant was used in Europe and he was not stating that it was not good. He said that the Contracting Authority just wanted a better technology. In a study made by others it resulted that a wider angle of scan does not increase noise and that a 16 cm detector did not cause blurring at the sides of the image.

Regarding the exhibited analysis he said that only Siemens produce scanners with dual x-ray sources. He did not agree with this study because in the wider diameter there was no need for patient movement. It was obvious that smaller width scanners would have to be faster, but could cause artefacts. He explained to the Board that scans had to be made to produce an image in less time than a heartbeat. The equipment produced by Siemens takes less but then there would be the problem of movement. The process takes less than 0.06 of a second. When using the wider scanner the advantage would be that there is no movement of the table on which the patient rests.

Mr Adriano Spiteri, ID No.278981 M under oath, explained that he was a technician with the Appellant. He explained that the Appellant cannot submit an offer for this Tender with the present specifications. Manufacturers of the scanners had chosen two different methods of solution. Siemens had chosen smaller diameter scans but running at a faster rate. Several countries around the world use this technology. He pointed out also that page 15 of the Tender Document stated "***that it was imperative that the new scanner is able to centre of the heart at the isocentre of the CT scanner***". This means that the table should be able to move sideways and such is supplied only by Toshiba.

Dr Kelvin Cortis explained that the isocentre means that the heart has to be centred.

Dr Antoine Cremona insisted that this clause meant that the table had to be moveable sideways. He contended that the Contracting Authority's witness had admitted that the Appellant's offer was not defective. The Appellant is being excluded from bidding in this tender despite the fact that the Public Procurement Regulations state that any Tender has to be open to all interested bidders.

The selection criteria should either be the cheapest offer or the most economically advantageous offer. Dr Cremona continued by saying that the Department of Contracts is taking the wrong decisions. In the present case MEAT should have been used in order to allow the Contracting Authority to adjudicate without rejecting bids *ab initio*.

Dr Christopher Mizzi for the Department of Contracts explained that adjudication is first made on the administrative criteria then on the technical and finally on the financial.

Dr Antoine Cremona contended that the specifications had to be modified in order to open the Tender to more prospective bidders.

Dr Stefan Zrinzo Azzopardi for the Contracting Authority insisted that adjudicators should decide on the end result of all the offers.

At this point the hearing was closed.

This Board,

Having noted the “*Pre-Contractual Concern*” in terms of the “*Reasoned Letter*” dated 27 October 2015 and also through the Appellant’s verbal submissions during the Public Hearing held on 10 November 2015, had raised a Pre-Contractual Concern in that:

- a) The Appellant contends that the Government is in duty bound by Local Law to ensure that the Technical Specifications should give afford equal opportunity for prospective Tenderers and not creating obstacles for a wider range of competition.**

In this regard, the Appellant maintains that in this particular instance, the Contracting Authority dictated specific Technical

Specifications which limited the submission of offers from only two suppliers;

- b) The Appellant also contends that the fact that the Tender Document dictated “*a scanning diameter*” of 160cm did limit the scope of offers and also barred the other bidders who could supply equivalent equipment having the same functional capabilities.**

Having considered the Contracting Authority’s “*Letter of Reply*” dated 3 November 2015 and also through submissions made during the Public Hearing held on 10 November 2015, in that:

- a) The Contracting Authority maintains that the Technical Specifications in the Tender Document were drawn up in accordance with the actual requirements of the same Contracting Authority and these were stipulated, after having Expert Advice.**

In this regard, the Contracting Authority contends that it had all the rights to dictate the Specifications so required.

Reached the following conclusions:

1. With Regards to the Appellant’s First Grievance, this Board, after having heard lengthy and Technical submissions made by both the Appellant and the Contracting Authority, would justifiably treat this issue under three separate considerations:

i) Technical Specifications

This Board acknowledges and assert Local and European Law regarding the composition of the Technical Specifications in a Tender Document. This Board, as had in previous cases, opined that the Technical Specifications should be dictated in such a manner so as not to limit the Scope of Competition or create an advantage to a Particular Brand or Product.

In this instance, this Board credibly notes that the fact that the Contracting Authority dictated that they required a “*scanning model*” that had a diameter of 160 cm did limit the possible offers for suppliers.

It is not the jurisdiction of this Board to delve into the Technical Advantages of this “*Specific Specification*” but rather to adjudicate whether such inclusion of a specific dimension in a

Technical Specification created suffocation of “*Competitive Bidding*”.

In this regard, this Board opines that, at this stage of a “*Pre-Contractual Concern*”, the specific requirement of a “*scanning model that had a diameter of 160cm*” did in fact narrow the prospective bids to two in number.

If on the other hand, the Contracting Authority, dictated “*or equivalent equipment that would have the same functional result*”, then the situation would have allowed more than two competitors to be able to bid for this Tender. In this regard, this Board upholds the Appellant’s concern.

ii) Dictation of Technical Specifications

This Board would emphasize that the Contracting Authority is empowered to dictate, establish or approve the Tender Conditions and Specifications. However, at the same instance, the Contracting Authority must ensure that these conditions and specifications do not give undue advantage or disadvantage to any particular Tenderer.

In this regard, this Board opines that the specific Technical Specification of a “*scanning model that had a diameter of 160cm*” did in fact limit time market for such a supply as there was no provision for equivalent functional equipment in the same specifications.

iii) Health Issue

This Board acknowledges the importance of the functional results of this equipment and would justifiably not oppose either the requirements of such equipment or the functional capabilities of equivalent equipment.

This Board would opine that such Technical assessments should be carried out by the medical experts in the field to ensure that the patient is treated in the most effective manner.

In view of the above, this Board opines that the Contracting Authority should allow for a provision in the Technical Specifications to permit equivalent and alternative equipment which would give the same functional result.

This Board, taking note of the fact that this is an urgent health issue and the Procurement is EU Funded, strongly recommends that such an amendment to the Technical Specifications is to be made through a “Clarification”, so as not to cause undue delay in the Tendering Process.

Dr Anthony Cassar
Chairperson

Dr Charles Cassar
Member

Mr Lawrence Ancillieri
Member

13 November 2015