

PUBLIC CONTRACTS REVIEW BOARD

Case No. 874

DH 3378/2013

Tender for the Supply of Body Racking System Trolleys.

The Tender was published on the 3rd July 2015. The closing date was on the 30th July 2015. The estimated value of Tender is €20,500.00 (Exclusive of Vat).

Three (3) Offers had been received for this Tender.

On the 30th October 2015 Europharma filed an objection against the decisions of the Contracting Authority to award the Tender to Technoline Limited.

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 the 19th November 2015 to discuss the objection.

Present for the hearing were:

Europharma:

Mr Michael Peresso	Representative
Mr Alex Fenech	Representative
Ms Miriam Gambin	Representative
Dr Antoine Cremona	Legal Representative

Technoline Limited:

Mr Charlot Scicluna	Representative
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Central Procurement and Supplies Unit:

Mr Wayne Caruana	Chairperson Evaluation Board
Mr Chris Attard Montalto	Member Evaluation Board
Mr Marnol Sultana	Representative
Dr Stefan Zrinzo Azzopardi	Legal Representative

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

Dr Antoine Cremona on behalf of the Appellant contended that formalities in the Tender process ensured transparency. One of these formalities was that the financial offer by bidders had to be final and it could not be changed later on, not even mathematically. The Evaluation Board had to accept financial offers as submitted and could only make changes involving arithmetical mistakes and correct these. In the present case the wording was not very clear – it required body racking structure and it was not clear whether these had to include the body trays or not. The Tender, at Clause 4.1, excluded bidders from submitting options; and for this reason the Appellant had submitted two offers one with trays and the other without.

The schedule of prices shows that the Recommended Bidder had offered a price of €39,000 while Appellant made a cheaper offer. However the Tender was awarded to the Recommended Bidder for €22,000 and this could only mean that the Evaluation Board had worked out the price of the Recommended Bidder for part of the offer. This could not be allowed since no variant solutions were to be accepted according to Clause 4.1.

Dr Stefan Zrinzo Azzopardi on behalf of the Contracting Authority said that the Letter of Reply had explained the method used in making adjudication of the Tender. There had been three offers, two of which were submitted by the Appellant. The first offer submitted by the latter was for €23,265 without body trays whilst the other one was €38,925 and included the body trays.

Technoline, the Recommended Bidders had made one offer but had split the price into two – one for the rack at €22,621 and the other for the body trays at €16,918. This had allowed the Evaluation Board to make comparison between the prices for racks without trays of all the offers since the prices of the Recommended Bidder were easily identifiable.

Dr Antoine Cremona for the Appellant claims that this should not have been done since the Tender Document specifically did not allow variant solutions. Apparently the wording of the latter caused problems to both bidders and the Appellant solved these by submitting two offers while the Recommended Bidder chose to offer a variant solution in one offer.

At this point the hearing was closed.

This Board,

Having noted the Appellant's Objections, in terms of the "*Reasoned Letter of Objection*" dated 30 October 2015 and also through the latter's verbal submissions during the Public Hearing held on 19 November 2015, had objected to the decision taken by the Pertinent Authority, in that:

- a) **The Appellant contends that one of the most fundamental formalities in a Financial Bid of a Tender is that the Price offered by a bidder cannot be amended, except for Arithmetical Errors.**

In this regard, the Appellant maintains that, due to the Tender Document's lack of clarity with respect to what was required, they had submitted two offers, one containing trays and another one without.

In this regard, the Evaluation Board had based its decision for the award of this Tender "*on part of the offer*". Therefore, in accordance with Clause 4.1 of the Tender Document, no variant solutions were to be accepted.

Having considered the Contracting Authority's "*Letter of Reply*" dated 13 November 2015 and also the verbal submissions during the Public Hearing held on 19 November 2015, in that:

- a) **The Contracting Authority contends that when the Evaluation Board compared "*like with like*" i.e "*Tier Body Trolley Fixed Racking*" without the body trays, the Recommended Bidder's offer, was both the cheapest and fully compliant. The Award Criteria was the Price.**

In this regard, the Contracting Authority maintains that it had acted in a fair and transparent manner.

Reached the following conclusions:

- 1. With regards to the Appellant's First Grievance, this Board after having heard submissions and examined the documentation submitted by the Appellant, justifiably opines that, as quite rightly quoted by the latter, the Tendered Price cannot be adjusted except for any clerical errors. However, this same Board did not find any evidence that the Appellant's Bid Price was, in some form altered.**

A distinction has to be credibly made between a quoted price and an evaluation of the same price "on a level playing field". This Board opines that the Evaluation Committee compared the offers submitted by both the Recommended Bidder and the Appellant on a "*like with like*" basis of "*Body Racking System Trolleys*" – without body trays. The resultant Evaluation was that the Recommended Bidder had the cheapest compliant offer.

In this regard, this Board does not uphold the Appellant's contention that there was a modification of "*Price*".

- 2. With regards to the Appellant's Second Contention that there was an allowance of variant solutions, this Board justifiably opines that since, during the Evaluation Stage, a comparison of bids was assessed on a "*Like with Like*" basis, the Evaluation Committee evaluated the bids on a "*Level Playing Field*" and the Board opines that there was no change of goal posts.**

Although, this Board, recommends that more "*clear requirements*" are dictated

in a Tender Document to avoid such unnecessary appeals and litigants, this same Board notes that both the Recommended Bidder and the Appellant Company submitted offers on “*Equal Footing*” ie. “*Supply of Body Racking system Trolleys*”. The trolleys were considered without body trays.

Since a “*Level Playing Field existed*”, the Evaluation Board decided to award the Tender to the cheapest compliant bidder. This Board credibly notes that the “*Award Criteria*” was the price and in this regard, this Board notes that “*Substance over form*” should prevail in Public Procurements and the fact that the Contracting Authority published a global price of € 39,000 relating to the Appellant’s Bid should not, in any way, discredit the manner through which the Evaluation Board arrived at the decision of award of this Tender.

This Board justifiably opines that, the Evaluation Committee acted in a just and transparent manner. In this regard, this Board does not uphold the Appellant’s contention.

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
Chairperson

Dr Charles Cassar
Member

Mr Lawrence Ancillieri
Member