

PUBLIC CONTRACTS REVIEW BOARD

Case No. 877

CT 3082/2015

Tender for the Supply, Delivery, Installation and Commissioning of an H202 Low Temperature Pass Through Autoclave at Mater Dei Hospital.

The Tender was published on the 11th September 2015. The closing date was on the 6th October 2015. The estimated value of Tender is €210,000.00 (Inclusive of Vat).

Eight (8) offers had been submitted for this Tender.

On the 27th November 2015 Enviromed (Malta) filed an objection against the disqualification of their bid and the award of the Tender to Associated Equipment for the amount of €129,881.00 excluding Vat.

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 3rd December 2015 to discuss the objection.

Present for the hearing were:

Enviromed (Malta):

Mr Noel Delia	Director
Dr Matthew Paris	Legal Representative

Associated Equipment Limited:

Mr Raymond Teuma	Representative
Mr Keith Vassallo	Representative

Ministry for Energy and Health:

Mr Chris Attard Montalto	Chairperson Evaluation Board
Mr Marnol Sultana	Secretary Evaluation Board
Dr Stefan Zrinzo Azzopardi	Legal Representative

Department of Contracts:

Dr Christopher Mizzi	Legal Representative
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The Chairman made a brief introduction and invited the Appellant's representative to make his submissions.

Dr Matthew Paris on behalf of the Appellant explained that after submitting the Tender, his clients had received a request for clarification dated 9 November 2015 wherein the Appellant was asked to indicate with a "yes" or "no" whether the offer was according to the requested specifications since there had been some discrepancy in the submitted literature with the Tender. The Appellant had answered unequivocally that yes, the offer was according to what the Contracting Authority requested. However, the request for clarification also referred to the contents of the literature submitted.

The Appellant's bid was disqualified because *"7. Selection and Award Requirements, (C) Technical Specifications (ii) Tenderer's Technical Offer in response to specifications to be submitted online through the prescribed Tender Response Format and by using the Tender Preparation Tool provided including any drawings if applicable (Note 3). This shall include but not limited to: Compliance with specifications Form (Note 3). Note 3 states that: No rectification shall be allowed. Only clarifications on the submitted information may be requested."*

This meant that the Contracting Authority in spite of asking for clarifications is now claiming that this was not allowed since note 3 did not allow for rectification. However he contended that (C) Technical Specifications at page 6 of the Tender, item (i) said that *"Literature as per Form marked literature to be submitted online through the prescribed Tender response format and by using the Tender Preparation Tool provided (Note 2)."*

This note 2 is clearly explained further down to mean *"Tenderers will be requested to clarify or rectify any incorrect and/or incomplete documentation, and/or submit any missing documents within five working days from notification."* He contended that this was in fact done by the Appellant and therefore there was no valid rejection reason.

Dr Christopher Mizzi on behalf of the Department of Contracts said that the clarification request had been sent to the Appellant because there had been some discrepancy between the literatures which they have submitted and the latter's Tender submissions. In the Appellant's reply it was stated that the literature submitted was outdated. However no new literature had been submitted. The reply also stated the remarks "plus vacuum and aeration pulses in articles 3, 4 and 5 should be disregarded". This meant that Appellant's Technical Offer was in fact being rectified. This was the reason why emphasis on "note 3" was made in the Letter of Rejection because it meant that the Technical Offer could not be rectified.

Dr Matthew Paris objected to the production of the Chairperson of the Evaluation Board as witness since he had been present in the hall during the Hearing. The Chairman declared that the Board would like to hear him testify since the witness was part of the Evaluation Board.

Mr Chris Attard Montalto, ID No. 260567M, an engineer and chairperson of the Evaluation Board under oath testified that bidders had to fill in a form, the technical compliance form, wherein they had to put either a yes or a no to confirm that offer complied with the Tender requirements. The Contracting Authority had asked for sterilization cycle and sterilization time of several items. Appellant's offer although "yes" was declared, showed a difference between requirements and offer for three items. The literature submitted did not agree. It was discovered that Appellant had included "(plus vacuum and aeration pulses) in the Actual

Value of Parameter column in the form for items 3, 4 and 5. For item 3, the Contracting Authority had requested from 25 minutes to maximum 60 minutes; Appellant had declared yes but in the last column put down 30 minutes plus vacuum and aeration pulses. For item 4 the requirement was 25 minutes to 35 minutes while the Appellant also had declared yes but the time was 25 minutes plus vacuum and aeration pulses. For item 5 the parameters were 30 minutes to 40 minutes while Appellant had put down 30 minutes plus vacuum and aeration pulses. The Appellant did not give the total complete cycle of each item.

The Evaluation Board therefore consulted the Literature submitted with the Tender and discovered that for non lumen instruments the normal cycle was 50 minutes and the advanced cycle took 55 minutes. For the flexible instruments the cycle was 45 minutes. The Evaluation also found discrepancy between the Technical Literature and the Tender submission.

The parameters according to the submitted literature were not compliant with those requested in the Tender. For example for item 4 Appellant offered 55 minutes cycle while the requirement was between 25 and 35 minutes and in the last column this was indicated as 25 minutes (plus vacuum and aeration pulses). The discrepancies were the result of the vacuum and aeration pulses and it was for this reason that it was decided to ask for clarification. When replying to the clarification request Appellant said that the literature submitted by the Appellant originally should be disregarded as it was no longer valid.

This was interpreted by the Evaluation Board to mean that in fact the Appellant was changing the original offer. Replying to a question by Dr Zrinzo Azzopardi he said that if the value of the “vacuum and aeration pulses” were included with the Appellant’s offer, this would not be compliant. The cycles offered by the Appellant exceeded maximum parameters required. Item 4 required a maximum time cycle of 35 minutes, while the Appellant’s offer was 55 minutes.

Item 5 required a maximum of 40 minutes while the Appellant offered 45 minutes. This offer was thus not compliant with requirements and had to be rejected. Replying to Dr Matthew Paris, witness stated that the Letter of Rejection was not written by the Evaluation Board but the reason for rejection was that of technical non-compliance because of the cycle lengths.

Dr Matthew Paris for the Appellant said that witness had just said that the reason of disqualification was because of change in the original bid but now he stated that the reason was the cycle length. He claimed that there was confusion of the reason for rejection. He made reference to another case Lidocaine CT 2080/14 wherein confusion on the reason for rejection had been discussed. He insisted that Appellant’s offer was compliant but the literature submitted was not.

This should not have been a cause for disqualification although the Appellant admitted that there was discrepancy in the literature. This meant that rectification of literature should have been allowed because it was qualified by note number 2. He referred also to Tender KLM 2013/19 case 694 where this Board had decided that clarification could only be sought on what was already submitted. In the present case the literature had been submitted and could thus be rectified.

The reply to the Clarification had explained that the offer was compliant. He referred to the principle of proportionality and insisted that a slight error in the submitted documentation did

not warrant a rejection. Finally he referred to a recent decision by the Board regarding a change in bid. This Board had said that “with regards to the Appellant’s Second Contention, this Board opines that the procedure adopted by the Contracting Authority did not in any way affect the ranking of the bids.” That case referred to changes in the bids of two bidders, and was sanctioned. He contended that Appellant had offered all that was required and there was no change in the original bid.

Dr Christopher Mizzi for the Department of Contracts contended that what Appellant had stated in the reply to clarification – to disregard items 3, 4 and 5, in fact meant a change in the Technical Offer and not a change in the Technical Literature as the Appellant was contending.

The latter could have chosen to change the literature since this was allowed; but he chose not to change the literature by changed the offer instead. All the points raised and mentioned by witness today had been reported in the Letter of Rejection sent to the Appellant. He cited a decision taken by the European Court of Justice against Denmark wherein it was established that evaluators cannot continue adjudication of a Tender when it was found to be technically non-compliant since this would be prejudicial to other bidders. The Evaluation Board could not know that eventually the Appellant would state that the submitted literature was outdated.

Dr Matthew Paris said that his client was not allowed to change the literature according to the clarification letter.

At this point the hearing was closed.

This Board,

Having noted the Appellant’s objection, in terms of the “*Reasoned Letter of Objection*” dated 27th November 2015 and also through the Appellant’s verbal submissions during the Public Hearing held on 3 December 2015, had objected to the decision taken by the pertinent Authority, in that:

- a) The Appellant contends that upon receipt of a clarification sent by the Contracting Authority, the Appellant complied and also confirmed that his offer was Technically Compliant. The Appellant also maintains that this declaration, although it does not correlate**

with the “*Literature*” submitted, should not have been a justified reason why his offer should have been discarded;

- b) The Appellant maintains that rectification of the original Literature should have been allowed in accordance with Note 2 in Paragraph 7.1 of the Tender Document. In this regard, the Contracting Authority failed to avail itself of such a clause.

Having considered the Contracting Authority’s “*Letter of Reply*” dated 30 November 2015 and also the verbal submissions during the Public Hearing held on 3 December 2015, in that:

- a) The Contracting Authority contends that the Clarification sent to the Appellant Company was simply due to the fact that the Appellant submitted Literature which did not confirm the Technical Compliance as stated in the Tender Document. The Appellant confirmed through the supplier’s letter dated 10 November 2015, that the Literature submitted by the same was outdated.

In Accordance with Note 3 Paragraph 7 of the Tender Document, no rectification was allowed. In this regard, the Contracting Authority maintains that the Appellant’s offer was not Technically Compliant.

Reached the following conclusions:

- 1. With regards to the Appellant’s First Grievance, this Board, after having heard submissions from both the Appellant and the Contracting Authority, opines that the merits of this Appeal deal with the Principles of Technical Compliance and Rectification. In this regard, this Board would opine, as follows, on each of these principles:**

- i) Technical Compliance**

From the Technical submissions during this Appeal, it has been credibly proved that the Literature as submitted by the Appellant was not in conformity with the dictated Technical Specifications. This fact was confirmed by the Appellant Company.

This Board would like to raise the issue of the Technical Literature where it opines that when “*Literature*” is dictated to be submitted, the latter is to be regarded as forming a part of the Tender Document so that the “*Evaluation Committee*” would examine whether the product being offered by the bidder is Technically

Compliant.

This Board justifiably noted that the Clarification sent by the Contracting Authority to the Appellant was instigated by the fact that the Literature submitted by the Appellant did not agree with the Technical details as submitted in the Tender Document.

In this regard, this Board opines that since the “*Literature*” forms part of the Tender Document and it did not meet the Technical Specifications as dictated in the latter, the Appellant’s offer was not Technically Compliant.

ii) The Principle of Rectification

This Board would credibly note that the reply of “Tuttnauer – Israel”, the Manufacturer of the Appellant’s product, as per Letter dated 10 November 2015, clearly and explicitly requests a change of Technical Specifications, apart from the fact of admitting that the submitted Literature is outdated.

Since, as stated in the foregoing opinion, the Literature forms part of the Tender Document, this Board opines that it was prudent and

transparent that the Evaluation Board regarded the reply of the Appellant as a “*Rectification*” of the Technical Specifications.

This Board has in previous decisions opined that, Technical Specifications are not capriciously dictated; in that they are stipulated by the Beneficiary to ensure that the Contracting Authority will procure the product which compiles most with the Technical Specifications.

In this regard, this Board opines that, in this particular Appeal, there was a change in the “Technical Offer” and not in the original submitted Literature. This Board also opines that this amounted to a rectification and not a clarification. An allowed rectification could have affected the ranking of the bids. In this regard, this Board does not uphold the Appellant’s first Grievance.

- 2. With regards to the Appellant’s Second Contention, this Board, after having examined the conditions laid out in the Tender Document, justifiably considers that Note 3, in Paragraph 7.1 of the Tender Document does not allow in fact rectification.**

In this regard, this Board opines that the Appellant did make a

change in the Technical Specifications.

This Board also refers to the decision taken by the European Court of Justice against Denmark where it was clearly stated that “*The Contracting Authority cannot enter into negotiations on the basis of a Tender which did not comply with the Tender Conditions.*”

- 3. On a general note, this Board would like to register a plea made by the Appellant Company, in that, the Chairman of the Evaluation Committee should not have been present during the Public Hearing of this Appeal, since he was summoned as a witness during the same Hearing.**

In this regard, this Board opines that since the Technical Witness, (under oath), was the Head of the Evaluation Committee, this same Board opted to hear his Verbal Technical Submissions.

At the same instance, this Board opines that the submissions made by both the Appellants and the Contracting Authority, could not influence the Technical Witness at any stage.

In view of the above, this Board finds against the defendant 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

10 December 2015