

PUBLIC CONTRACTS REVIEW BOARD

Case No. 946 – DH 4692/09: Tender for the Supply, Delivery, Installation, Commissioning and Maintaining of Dental CT Scanner Cone Beam Computed Tomography Imaging Unit.

The Tender was published on the 20th November 2015. The closing date was on the 17th December 2015. The estimated value of Tender is €80,000 (Exclusive of VAT).

Three bidders had submitted six (6) offers for this Tender.

On the 5th May 2016 Bart Enterprises Limited filed a Letter of Objection against the decision of the Contracting Authority to discard their offer 46410 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 the 16th June 2016 to discuss the Objection.

Present for the hearing were:

Bart Enterprises Limited:

Mr Etienne Barthet	Representative
Dr Franco Vassallo	Legal Representative

Suratek Limited:

Mr Kevin Galea	Representative
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Central Procurement and Supplies Unit:

Mr Tanio Scerri	Secretary Evaluation Board
Mr Mario Caruana	Member Evaluation Board
Dr Stefan Zrinzo Azzopardi	Legal Representative

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

Dr Franco Vassallo on behalf of Bart Enterprises Ltd said that his client's offer had been rejected because according to paragraph 4.2.1 of the Tender Document, "*the unit offered does not incorporate a motorized chair to allow the patient to be imaged in a sitting down position as requested by section 4 of the technical specifications*". Dr Franco Vassallo submitted that:

- a) It was probable, seeing that the file dates from 2009, that the specifications had been set down in 2009;
- b) There was advancement of technologies since then and therefore the specifications had been surpassed;
- c) Appellant had offered a better product that allowed wheelchair users to remain sitting in the wheelchair, thus in a "sitting down position" when being examined;
- d) Suratek Ltd's product has been discontinued.

The remedy would be either for the Contracting Authority to explain the reason why a motorized chair was demanded, since Appellant's bid was around €10,000 cheaper, or if it results that the specifications were surpassed to have the Tender re-issued with modern specifications.

Dr Stefan Zrinzo Azzopardi on behalf of the Contracting Authority submitted that the Appellant had made several offers for this Tender. The Objection being discussed is about his cheapest offer that had no motorized chair. The Appellant's other offer was compliant because it had a motorized chair but at a higher cost than that of the recommended bidder. The scope of this Tender had three elements:

- i) Imaging of the head for dentistry or ear nose and throat use;
- ii) Had to incorporate a motorized chair;
- iii) Had to enable patients to be in a sitting down position during examination.

The motorized chair was the key factor of Appellant's disqualification, since it did not provide this. Suratek Ltd's offer was the cheapest of all bidders who had offered a motorized chair as requested.

Dr Franco Vassallo said that one had to see if Bart Enterprises Ltd's option caused any discomfort to patients when in use.

Mr Mario Caruana, ID No. 110159M, a manager in the Technical Engineering Section and member of the Evaluation Board, under oath testified that Evaluation of the Tender had to be done according to the Tender specifications. Mr Caruana could not state why the specification called for a motorized chair.

The file regarding this Tender had been opened in 2009 but he could not state when the

specifications were fixed. The witness could not state if the product of the Recommended Bidder was “*off the line*” when the evaluation took place, but it was still on the market. The product chosen had to have a motorized chair.

Dr Stefan Zrinzo Azzopardi contended that speculation about the reasons why the specifications called for a motorized chair is irrelevant. The fact is that the specifications called for this product.

Dr Franco Vassallo for the Appellants pointed out that the Board had the right to order the cancellation of a Tender if it found out that the best price or deal were not being obtained. There was no medical reason for choosing a more expensive option and therefore the Tender should be cancelled and re-issued.

Dr Stefan Zrinzo Azzopardi contended that the Appellant had other remedies and should not have waited to raise the matter after the award.

The hearing was at this point adjourned to the 23rd June 2016 to hear as witness the clinical person who formulated the Tender specifications and who could reply to the question if the motorized chair was essential.

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 Thursday the 23rd June 2016 to continue hearing the Objection.

Present for the second hearing were:

Bart Enterprises Limited:

Mr Etienne Barthet	Representative
Dr Franco Vassallo	Legal Representative

Suratek Limited:

Ms Giselle Galea Gusman	Representative
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Central Procurement and Supplies Unit:

Mr Tonio Briguglio	Chairperson Evaluation Board
Mr Tanio Scerri	Secretary Evaluation Board
Dr Joseph Camilleri	Member Evaluation Board
Dr Alexander Cassar	Member Evaluation Board
Mr Mario Caruana	Member Evaluation Board
Dr Stefan Zrinzo Azzopardi	Legal Representative

The Chairman explained that this hearing had been necessary so that the Board would have more comfort of the need of a motorized chair.

On being asked by the Chairman whether a motorized chair was essential, Dr Alexander Cassar 192859M, a member of the Evaluation Board, under oath testified, that the Evaluation Board had to follow the Technical Specifications to the letter. It was clear from these that a motorized chair was needed. Even if the need for a motorized chair was a '*sine qua non*', the specifications required it.

He assumed that standardization required each machine to have the perfect positioning of the patient. It was essential that the machine had to incorporate a head locking position. There were several CT Scanners that do not have a motorized chair. Having such a chair was not essential but in this case the Tender specifications required it.

Dr Cassar could not state whether the chosen machine would require that a wheelchair person to be lifted from the wheelchair onto the motorized chair. The witness insisted that the Evaluation Board had to follow the specifications and that was not competent to state if the chosen equipment of the Recommended Bidder was the end of line or not.

The Tender specifications were set down in 2008 or 2009. He agreed with Dr Franco Vassallo that Tenders should ideally based on the latest technology but that would mean having to re-issue the Tender. He said that it was not necessary to have a motorized chair, but as an end user he had no exposure to such chairs.

Dr Stefan Zrinzo Azzopardi for the Contracting Authority pointed out that Bart Enterprises Ltd had in fact submitted two offers; one with a motorized chair and one without, with the latter being the cheapest. Based on the evidence brought, Dr Zrinzo Azzopardi felt that the decision of the Evaluation Board should be upheld.

Dr Franco Vassallo for the Appellant contended that:

- a) The Tender asked that the equipment should allow the patient to be “in a sitting position”;
- b) The Contracting Authority should choose the best deal;
- c) The chosen machine was antiquated and the expert testified that there was no special benefit obtained when a motorized chair;
- d) Bart Enterprises Ltd’s machine moves itself instead of moving the patient;
- e) Whether the preferred equipment was “end of line” could easily have been verified on the internet;
- f) The Appellant had offered an equivalent machine at €12,000 cheaper.

Finally Dr Vassallo suggested that the Tender should for these reasons be re-issued.

The hearing was at this point closed.

This Board,

In Accordance with the decision taken on 16 June 2016 and in agreement with all parties concerned, convened another hearing on 23 June 2016 to hear the submissions of a Technical witness in order for the Board to formulate a final decision on the merits of this Appeal.

The Technical witness, Dr Alexander Cassar, had duly stated under oath that although having a motorised chair included in the Tendered Equipment was not essential, the Tender Document stipulated that this had

to be included.

In this respect, the witness has declared that it was the duty and obligation of the Evaluation Board to evaluate the offers submitted on the basic principle of “*Following the Technical Specifications of the Tender Document itself*”.

With regards to the type of equipment required, Dr Alexander Cassar could not confirm whether the chosen equipment is still in production or outdated.

In view of the above, this Board reached the following conclusions:

- 1. This Board would like to credibly emphasize that the Second Hearing was held for the sheer comfort of this Board to assess whether the motorised chair was essential for the operation of the same. However, this same Board justifiably notes that it is not its jurisdiction to adjudicate or alter the Technical Specifications of a particular Tender.**

Although the latter was issued in 2009, and this Board acknowledges the fact that there were great leaps in improvements, especially in

medical equipment, such as this case, this Board will adhere to its jurisdiction, in that it will establish whether the Evaluation Process was carried out in a fair and transparent manner.

In this regard, this Board would like to treat the merits of this Appeal on two counts, namely the Tender Requirements and the Availability of the Equipment

- **Tender Requirements**

The issue of this Appeal and its second Hearing was to establish the necessity of the motorised chair. As stated in the opening Paragraph of these conclusions, this Board's jurisdiction is to determine whether the proposed procedures were adopted or not, by the Evaluation Board in their assignment.

This Board credibly established that the Technical Specifications dictated the inclusion of a motorised chair. On this aspect, this Board would opine that it is not its jurisdiction or the Bidder's competence to change the specifications of a Tender after the closing date and the Final Adjudication of the same.

This Board also notes that Bart Enterprises Ltd did in fact submit an offer which included a motorised chair, but was not successful at the Financial Stage. The fact that the Technical Specifications were drawn up in 2009 and that Technological Advancement has been made since then, does not, in any credible way, put the onus on this Board to request the Contracting Authority to change or alter the Specifications to accommodate a particular model of the Tendered Equipment to allow for a non-motorised chair to be included.

From the witness' submission, it was also established that although the operational usage of the Tendered Equipment does not necessarily require a motorised chair, the specifications of the Tender dictated such a system.

This Board justifiably emphasize that the mandatory conditions of a Tender must be strictly adhered to by both the Prospective Bidder and the Evaluation Board. The Technical Specifications are not capriciously dictated but are laid out to ensure that the Contracting Authority will obtain the product or services to render the desired results as desired by the Contracting Authority.

In this regard, this Board credibly upholds the mode of procedure

adopted by the Evaluation Board in their adjudication. The Tender Document dictated the inclusion of a motorised chair and it was on this inclusion that the latter had to act upon.

- **Availability of Equipment**

Bart Enterprises Ltd has raised the issue that since the Tender was published in 2009, Technology has advanced so much that the chosen equipment is now obsolete. This Board justifiably opines that apart from the fact that no concrete evidence was produced during the submissions to prove such an instance, it is the duty and obligation of the Contracting Authority to ensure that what was tendered for is supplied in accordance with the Technical Specifications as dictated in the Tender Document. When taking the above mentioned factors, this Board does not uphold the Appellant's Contentions.

In view of the above, this Board finds against Bart Enterprises Ltd and recommends that the deposit paid by the latter should not be refunded.

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Lawrence Ancilleri
Member

30 June 2016