

PUBLIC CONTRACTS REVIEW BOARD

Case No. 976 – CT 2231/2014: Tender for the Supply of Thirty-Two (32) Operational Brand New Haemodialysis Machines on a Pay per Use Basis to Mater Dei Hospital.

The Tender was published on the 1st September 2015. The closing date was on the 24th November 2015. The Estimated Value of the Tender was €8,050,847.45 (Exclusive of VAT)

Seven (7) offers had been submitted for this Tender.

On the 8th August 2016 Associated Equipment Limited filed an Objection against the decision taken by the Contracting Authority to award the Tender to A.M. Mangion Limited.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Mr Richard A Matrenza and Mr Carmel Esposito as members convened a hearing on Tuesday 13th September 2016 to discuss the Objection.

Present for the hearing were:

Associated Equipment Limited:

Mr Charles Mifsud	Representative
Mr Michele Varsani	Representative
Dr Geoffrey Mifsud Farrugia	Legal Representative

A.M. Mangion Limited:

Mr Roberto Abdilla	Representative
Mr Jonathan Mangion	Representative
Dr Michele Susca	Representative
Mr Ray Vella	Representative
Mr Shuang Zhang	Representative
Dr Steve Decesare	Legal Representative

Central Procurement and Supplies Unit:

Mr Tonio Briguglio	Chairman Evaluation Board
Mr Marnol Sultana	Secretary Evaluation Board
Mr Paul Calleja	Member Evaluation Board
Dr Joseph Zarb Adami	Member Evaluation Board
Mr Karl Farrugia	Representative
Ms Rosina Attard	Representative
Mr Wayne Caruana	Representative
Dr Stefan Zrinzo Azzopardi	Legal Representative

Department of Contracts:

Dr Christopher Mizzi	Legal Representative
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Other Representatives:

Mr Douglas Aquilina	Drugsales Representative
Ms Giulia Attard Montalto	Drugsales Representative
Mr Jack Attard Montalto	Drugsales Representative
Mr Stephen Farrugia	Drugsales Representative
Mr Philip Moran	Drugsales Representative

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

Dr Geoffrey Mifsud Farrugia on behalf of Associated Equipment Ltd declared that his clients were not criticising any of the machines offered by the other bidders in this Tender. He believed that all were able to provide the service requested. The Letter of Objection should not be construed as meaning that some of the machines offered were not up to standard.

The Objection mainly dealt with the fact that the Evaluation of the machines was not done according to the requested specifications – mainly the Blood Volume control as specified in page 20 of the Tender, and the automatic sodium and Ultra filtration profiling mode as specified at page 21 of the Tender.

With regards the Blood Volume Control, the requirements for this stated that *“blood volume control monitor should be included to reduce undesired reduction in blood volume. This monitor will calculate the concentration of the extra corporal blood to reduce the chance of undesired reductions in Plasma volume which will lead to a BP drop. This control device shall automatically reduce the UF and slowly infuse replacement fluid should the case arise, that the blood becomes concentrated either due to slow refilling from the interstitial fluid or due to natural fluctuation in Dry Weight.”*

Therefore, this was a Tender requirement and was the subject of several clarifications. The Recommended Bidder in the Letter of Reply had admitted that this Blood Volume Control had not been offered. In the Letter of Reply paragraph 2.21 it is stated that *“the machine offered by our client achieves that objective, without the need for a BVM. This is the sole reason why a BVM was not offered by the Recommended Bidder”*, and tried to justify this by citing clarification 30 answer 4.

Dr Mifsud Farrugia contended that however the Recommended Bidder failed to mention clarification number 7, answer 3, the Contracting Authority had stated that *“the purpose of this monitor is to detect, as early as possible Intra-dialytic hypotension and thus controls the fluid loss from the blood by regulating the Ultrafiltration. This technology predicts IDH earlier than the blood pressure monitoring proposed above. This is the reason why BVM is requested. Therefore the technical specifications are to remain as published.”* This clarification is clearly understood and shows why the BVM was needed.

The main point in this issue is that the Tender did not request what the machine would achieve but demanded bio feed-back and BVM, two distinct requirements. A.M Mangion offered a bio feedback control system based on blood pressure measurements only. The Appellants offered a bio feedback system based on the measurement of plasma sodium concentration. Thus we have two different systems which were giving the same results. However, the Tender requested also the BVM, and the Recommended Bidder chose not to offer this although his supplier has similar equipment. The hospital is already uses BVM but this is through a standalone machine.

With regards the Automatic sodium and Ultra filtration profiling mode, the Tender Specifications dictate that *“the blood volume control should incorporate an automatic sodium and ultra filtration profiling mode.”* This enables the machine to automatically administer sodium whenever necessary. AM Mangion did not offer an automatic machine but one that prompts user to manually set the sodium profile for the first treatment of each patient.

If this step is skipped, the machine will operate on default settings and continue the treatment automatically. This is stated by the Recommended Bidder in the Letter of Reply. Once again what the Recommended Bidder offered was not what the Tender specifications requested, since the machine is not automatic but a setting by the user. Although the A.M Mangion insists that the offer was according to specifications, Associated Equipment Ltd insists that the Recommended Bidder's offer was not.

Dr Stefan Zrinzo Azzopardi on behalf of Central Procurement and Supplies Unit said that the scope of this Tender is for operational machines on pay per use basis. The equipment is not being purchased. Parameters were given in the Tender to enable the Contracting Authority to make a choice. The Appellant had raised three points on the Tender parameters but the Tender has to be taken holistically and not in diverse parts, and it can be seen from the clarifications that the Contracting Authority desired to widen the field as much as possible.

This Board has to see whether the Evaluation Board had assessed justly all the offers made by the bidders. The latter considered that the Recommended Bidder's specifications were compliant with requisites. All machines submitted in the offers had in fact all been tested and evaluation was not just made on documentation. When one considers the original specifications and the clarifications one had to see what was meant by automatic functioning.

The Contracting Authority is convinced that within the established parameters, the machines offered by the Recommended Bidder were within the Tender specifications.

Dr Christopher Mizzi on behalf of the Department of Contracts contended that when considering the Tender, output indicators have to be examined. The original specifications had been widened through clarifications. Different methodologies giving the same results were acceptable. Answer 3 of clarification 7 did not exclude the Recommended Bidder's offer.

The Contracting Authority wanted to make use of machines that gave the desired results and had widened the specifications through clarifications. All machines offered by all the bidders had been tested on patients and the evaluation process did not just rely on the submitted documentation for adjudication purposes.

Mr Paul Calleja ID No. 368361M, a member of the Evaluation Board and a nursing officer testified under oath that all the machines had been tested and the output performance of each was measured, based on the patients' reactions during treatment and after treatment. Records of the tests have been kept.

Mr Calleja explained the use of these machines. These remove water retained and toxins in kidney patients. During this removal the blood pressure of the patients could fall and the machines prevent this. Patients require different treatment and during each patient's first treatment, his individual parameters are identified. All the machines tested gave the desired results although different methodologies were used by different machines.

All the machines tested prevented blood pressure fall and some checked the blood pressure at intervals and others still kept records of the blood pressure. Other machines checked the blood density since thickened blood could lead to blood pressure loss. The patients on whom the machines were tested were informed of the testing being made. He reiterated that all the machines offered were compliant to specifications and therefore the ranking was made according to price.

Dr Steve Decesare on behalf of the Recommended Bidder A.M Mangion Ltd claimed that the Appellant had failed to quote the whole Letter of Reply especially where it stated that

equivalent offers were acceptable. Even the Public Procurement Regulations state that a Tender cannot be rejected if the bidder proves that the product is the equivalent of the requested item. In the present case the machine offered by his client performed all the services requested in the Tender. Even the Appellant states that all the machines gave ultimately the same result. This was also re-affirmed by the Contracting Authority itself.

Dr Geoffrey Mifsud Farrugia for Associated Equipment Ltd reiterated that the Objection regarded the question of the Technical Specifications. He insisted that clarifications are issued to clarify matters that are not clear, and not to give direction. The Tender specifications requested BVM and answer 3 of clarification number 7 confirmed this.

The Recommended Bidder is premising that the end result is what counts but Appellant insists that any machine not having BVM should not have even been tested because it was not compliant. Clarification 7.3 restricted the Tender and stated that BVM had to be an integral part of the machine.

Dr Stefan Zrinzo Azzopardi for the Contracting Authority said that the principle of a level playing field was followed by the Evaluation Board.

At this point the hearing was closed.

This Board,

Having noted the Appellant's Objection, in terms of the "*Reasoned Letter of Objection*" dated 8 August 2016 and also through their verbal submissions during the Public Hearing held on 13 September 2016 had objected to the decision taken by the Pertinent Authority, in that:

Associated Equipment Ltd maintains that the Evaluation of the machines was not carried out in accordance with the requested specifications as dictated in the Tender Document.

The specifications refer to "*The blood volume control*" and the "*Automatic sodium and ultra filtration profiling mode.*" In this regard, Associated Equipment Ltd contends that their machine

did include these two features whilst the Recommended Bidder's equipment being offered did not; hence the latter's cheaper rates.

Having considered the Contracting Authority's "*Letter of Reply*" dated 9 September 2016 and also their verbal submissions during the Public Hearing held on 13 September 2016, in that:

Central Procurement and Supplies Unit contend that the Technical Specifications as dictated in the Tender Document, gave a holistic requirement to enable the prospective bidders to submit their best offer.

At the same instance, through clarifications, the Contracting Authority confirmed, again through clarifications, that the equivalent machines rendering the desired output will be accepted. In this regard, AM Mangion Ltd's machinery, in accordance with its Technical Specifications does give the desired end result.

Reached the following conclusions:

This Board, after having examined the relative documentation and heard submissions from all the interested parties, opines

that the issue at stake, is not whether the machines offered by both the Appellant and the Recommended Bidder, were up to the required standard, but rather whether the Evaluation Board arrived at their conclusion by taking into account the requested Technical Specifications as dictated in the Tender Document.

At the same instance, this Board would like to credibly opine that clarifications do form part of the Tender Document and that all clarifications made are to be regarded as forming part of the Tender Document.

With regards to the Appellant's Grievance, this Board notes that the two main issues being contested by Associated Equipment Ltd is the absence of the "*Blood Volume Control*" and "*Automatic Sodium and Ultra Filtration Profiling Mode*" from the machinery being offered by AM Mangion Ltd, thus a cheaper rate being quoted by the latter.

- Blood Volume Control

The purpose of these machines was credibly explained and elaborated by the Technical Member of the Evaluation Board. This Board notes that both the machines of the Appellant and

the Recommended Bidder were tested “hands on” for the same duration and on the same number of patients so that there prevailed a Level Playing Field.

Both machines tested were in accordance to specifications and gave the desired output. This Board would like to refer to Reply 28 in Clarification 4 wherein it was clearly stated and confirmed that “*The Contracting Authority clarifies that as long as the machine offered gives kt/V readings, as requested, in published Technical Specifications, whether read in real time or calculated, this will be considered acceptable*”.

It has been credibly established that, equivalent equipment with different technology, will be accepted by Central Procurement and Supplies Unit, as long as the desired output results have been achieved, so that, in this particular case, both machines were fully compliant.

The Evaluation Board through its numerous clarifications expanded extensively on what is being required from the bidders. At the same time, again, through clarifications, the Evaluation Board dictated what will be considered as “*acceptable*”.

To be more certain of the Technical Compliancy of the machines, the latter were tested on a number of patients and the results derived proved that both the machines offered by Associated Equipment Ltd and AM Mangion Ltd gave the desired results.

The remaining award issue was then the price. In this regard, this Board opines that the machine offered by AM Mangion Ltd was fully compliant and compiled with the clarifications made by the Contracting Authority.

This Board credibly notes that the issue of the “*Blood Volume Control*” was also satisfied as the Recommended Bidder’s system fulfilled exactly the required functionability of the product.

In other words, the machine of AM Mangion Ltd, equipped with software & hardware would anticipate “*A drop in blood pressure*”, which the “*Blood Volume Control*” will actually do.

In this regard, this Board opines that the Evaluation Board acted in a transparent and fair manner in accepting an alternative machine, which when tested gave the required output results.

This Board would also add that the clarifications made amplified the original Technical Specifications in the Tender Document and the Recommended Bidder's equipment was fully compliant to anticipate "*A Drop in Blood Pressure*".

This Board would also refer to the reply for Clarification 7 Question 3 wherein in it was emphasised that "*The Contracting Authority clarifies that as long as the functional requirements are ascertained, then the proposed system will be considered acceptable by the Contracting Authority*". Such were the sequence of events which this Board justifiably upholds.

- **Automatic Sodium and Ultra-Filtration Profiling Mode**

Again, on this issue, this Board would point out that the principle of "*Equivalency*" should apply. Another feature of the machine was that it had "*Automatic Sodium and Ultra-Filtration profiling modes*".

The function of this feature is that when removing the water retained and toxins in kidney patients, from the Technical Evaluation, the machine offered by AM Mangion Ltd included automatic profiling mode for "*Ultra-Filtration Profile*" and it also included mode for "*Conductivity/Sodium Profile*" so that

the features for the application of the “*Functionability*” of the machine were contained therein.

Yet again, this Board opines that the machine satisfied the inclusion of this feature and in this regard, the Evaluation Board acted in a diligent, fair and transparent manner.

At the same instance, this Board justifiably opines that the Evaluation Board did in fact assess the offers on the functionability feature of each machine which was offered and tested on the same Level Playing Field.

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

Dr Anthony Cassar
Chairman

Mr Richard A Matrenza
Member

Mr Carmel Esposito
Member

22 September 2016