

## **PUBLIC CONTRACTS REVIEW BOARD**

### **Case 1174 – CT2212/2017 – Tender for the Supply, Installation and Commissioning of two Ultrasound Machines including energy efficient IT equipment, complete with accessories and consumables and a five year service and maintenance agreement**

The publication date of the call for tenders was the 27<sup>th</sup> October 2017 whilst the closing date of the call for tenders was the 28<sup>th</sup> November 2017. The estimated value of the tender (exclusive of VAT) was € 151,742.86.

There were four (4) bidders.

Medsytec Engineering Ltd filed an appeal on 2<sup>nd</sup> May 2018 against the Contracting Authority's decision to award the contract to a bidder that was technically non-compliant. A deposit of € 677 was paid.

On 5<sup>th</sup> June 2018 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Mr Carmel Esposito and Mr Richard A Matrenza as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

#### **Appellant – Medsytec Engineering Ltd**

Dr Matthew Brincat	Legal Representative
Mr Andrew Cauchi	Legal Representative
Mr Daniel Camilleri	Representative
Mr Emanuel Abela	Representative

#### **Recommended Bidder – Associated Equipment Ltd**

Mr Charles Mifsud	Representative
Mr Sully Khazmi	Representative

#### **Contracting Authority – Central Procurement and Supplies Unit – Health**

Dr Marco Woods	Legal Representative
Ing Chris Attard Montalto	Chairperson Evaluation Board
Mr Stephen Mercieca	Secretary Evaluation Board
Ms Mona Lisa Camilleri	Member Evaluation Board
Mr Rosman Attard	Member Evaluation Board

The Chairman of the Public Contracts Review Board, Dr Anthony Cassar, invited Appellants to make their submission.

Dr Matthew Brincat, Legal Representative for Medsytec Engineering Ltd stated that his clients maintain that the winning bid was not technically compliant. The tender asked for probes for use at Mater Dei Hospital of up to 24 MHz capacity. These had a wider scope in imaging and probes with a lesser capacity obviously had limited imaging. He referred the Board to Case No 906 (CPSU 1024/2015) previously heard by them in 2016 on which they had given a decision precisely based on the technical compliance of probes.

The Chairman said that on technical matters the Board had to rely on the evidence of technical experts, and he invited any witnesses to give their evidence.

Ing Chris Attard Montalto (260567M) testified on oath that he was the Chairman of the Evaluation Committee. He confirmed that the tender requested probes of 24 MHz ( $\pm 10\%$ ) capacity. The preferred bidder had offered probes with a capacity of 18 MHz which with the right software could give a capacity equivalent to 24 Mhz. Applicant had submitted literature on probes which did not indicate 24Mhz capacity. The Evaluation Committee could only rely on the technical literature to ensure that the product offered conforms to the specifications. Witness also confirmed that the evaluation criteria had changed during the selection process.

The Chairman pointed out that the Evaluation committee could not change the evaluation criteria half way through a process. Whenever possible a tender should be saved. In this instance the criteria had been changed – therefore either a fresh tender had to be issued or a re-evaluation of the existing criteria was necessary.

Dr Brincat emphasised that his client had submitted a declaration of compliance by the manufacturer and the Board's decision should be that the preferred bidder's offer was non-complaint and his clients' bid should be deemed successful. He could not accept that a certificate from the manufacturer of the probes does not constitute part of the tender literature.

The Chairman thanked the parties for their submissions and declared the hearing closed.

**This Board,**

**Having noted this Objection filed by Medsytec Engineering Limited, (hereinafter referred to as the Appellants), on 2 May 2018, refers to the contentions made by the same Appellants with regards to the award of Tender of Reference CT 2212/2017 listed as Case No 1174 in the records of the Public Contracts Review Board, awarded by the Central Procurement and Supplies Unit, (hereinafter referred to as the Contracting Authority).**

**Appearing for the Appellants: Dr Matthew Brincat**

**Appearing for the Contracting Authority: Dr Marco Woods.**

**Whereby, the Appellants contend that:**

- a) The Preferred Bidder's offer is technically non-compliant. In this respect, the Appellants refer to the fact that probes of the equipment had to have up to 24 MHz capacity whilst the Preferred Bidder's offer could only reach an 18 MHz capacity;**

**b) Through the Declaration of Compliance issued by the manufacturer, their offer is technically compliant.**

**This Board has also noted the Contracting Authority's "*Letter of Reply*" dated 14 May 2018 and its verbal submissions held during the Public Hearing held on 5 June 2018, in that:**

**a) The Central Procurement and Supplies Unit insists that the Preferred Bidder's offer satisfied and complied with all the administrative and technical criteria, so that he was the cheapest fully compliant Bidder.**

**This same Board also noted the testimony of the witness, namely, Ing Chris Attard Montalto, Chairman of the Evaluation Committee, duly summoned by the Public Contracts Review Board.**

**The Board, after having examined the relevant documentation to this Appeal and heard submissions made by the parties concerned, including the testimony of the witness, opines that the issues which are to be considered are the following:**

**a) The procedure adopted by the Central Procurement and Supplies Unit  
in the Evaluation Process of this Tender;**

**b) Medsytec Engineering Limited's Offer;**

**c) Associated Equipment Limited's Compliance.**

**1. This Board would respectfully refer to Page 23 of the Tender Dossier,  
with special reference to Article 11.1.4 wherein it is dictated that:**

*“Wide-Band Linear array probe for High Definition Musculoskeletal  
Applications, Frequency Range 8 (+/- 10%) to 24 MHz (+/- 10%)”*

**From the Testimony of the Witness, namely Ing Chris Attard Montaldo,  
Chairman of the Evaluation Committee, this Board was made aware  
that, during the Evaluation process, it was decided that since there is  
only one manufacturer, who can supply this product having a frequency  
of 24 MHz and to avoid the cancellation of the Tender, the same  
Evaluation Committee accepted a much lower range of MHz capacity.**

**This Board would refer to an extract from the witness’s testimony, as follows:**

*“Nista’ ngħid xi haġa imma? Jekk ma jimpurtax, ghax jien hawnhekk imbagħad bhala Chairman kelli diffikulta’ kbira. Ghax hawn kumpanija wahda biss li tagħmel 24 MHz u li għamilna mbagħad biex ma nwaqqghux lil kulhadd, I enforced the rule biex nara l-operational equivalents to dak li qed joffri. Issa jien għaliya 18 MHz u bis-software li għandhom illum il-ġurnata mhux ser ituna l-istess riżultat li xtaqna operationally.”*

**At this stage of consideration and with regards to the Evaluation process, this Board is credibly convinced that there was a change in goal posts during the Evaluation Process.**

**In this regard, this Board would refer to the basic and fundamental principles which must be adhered to in drafting the technical specifications of a Tender, which should take into consideration the following:**

- **Be precise in the way they describe the requirements;**
- **Be easily understood by the prospective Bidders;**
- **Have clearly defined, achievable and measurable objectives;**
  
- **Not mention any brand names or requirements which limit competition or if brands are mentioned, include the term “*or equivalent*”;**
  
- **Provide sufficient detailed information that allows Bidders to submit realistic offers.**

**In this respect, this Board opines that, as duly confirmed by the witness, there was a change in the selection and award criteria during the Evaluation process which is not permitted. At the same instance, this Board would have expected that such a concern raised by the Chairman of the Evaluation Committee, should have been considered at the drafting stage of the Tender Dossier and not at Evaluation Stage.**

- 2. With regards to the Appellants’ First Contention, this Board was informed that the Recommended Bidder’s Offer provided for a wide-**

**band linear probe of a frequency range of 18, whilst the Technical Specifications under note 11.1.4 dictated a probe of a maximum range of 24 MHz. It is quite obvious that the Associated Equipment Limited's offer did not comply with such a specification. During the submissions and from the testimony of the witness, it was clearly established that the Evaluation Board changed the criteria and accepted a probe with a frequency range of 18 MHz as technically compliant. In this regard, the Evaluation Committee were in duty bound to observe the principle of self limitation so that the Evaluation Process should have been carried out in accordance with was actually requested in the Technical Specifications of the Tender Dossier. In this regard, this Board upholds the Appellants' First Contention.**

- 3. With regards to Medsytec Engineering Limited's Second Contention, as had been emphasized on numerous occasions by this same Board, the Technical Literature forms part of the Technical Offer, so that the Literature so submitted by the Appellants had to specifically denote the item with the same specifications as those quoted in the Technical Offer of the same. This Board has also noted that Medsytec Engineering Limited has submitted a declaration from the manufacturer of such**

probes dated 24 November 2017, wherein under Paragraph 4, it is confirming that such probes having the Technical Specifications as duly dictated in the Tender Document can be supplied.

In this respect, this Board notes that the Appellants had submitted a confirmation that what they offered in their technical offer form is available and can be supplied as duly declared. This Board also notes that, in this Particular Tender, the Technical Literature as stipulated on Page 7 Clause (c) (ii) is regulated by “*Notes to Clause 7*”, 2 B, so that the Literature so submitted shall be rectifiable only in respect of the missing information. In this respect, this Board has not been assured that such a rectification or clarification was requested with regards to any missing information in the Appellants’ Literature and Declaration.

This Board would also note that the Declaration accompanying the Technical Literature referred specifically to four types of wideband array probes, including all the Technical Specifications as those requested in the Tender Document. At the same instance, this Board credibly establishes that such a declaration formed part of the Technical Literature and in this regard, this Board was not presented with any

**justifiable evidence as to why such a declaration was not considered as forming part of the Technical Literature. In this respect, this Board opines that such declaration was proof enough that the Appellants' offer could provide the probes with the same specifications as those dictated in the Tender Dossier.**

**In view of the above, this Board,**

- i) Revokes the decision taken by the Central Procurement and Supplies Unit in the award of the Tender;**
- ii) Confirms that Associated Equipment Limited's offer is technically non-compliant;**
- iii) Upholds Medsytec Engineering Limited's grievances;**
- iv) Orders that the Appellants' offer is to be re-integrated in the evaluation process;**

**v) Recommends that the Evaluation Board will be composed of different members;**

**vi) Orders the new Evaluation Board to apply the Principle of Self Limitation in their adjudicating process;**

**viii) Recommends that the deposit paid by the Appellants is to be fully refunded.**

Dr Anthony Cassar  
Chairman

Mr Carmel Esposito  
Member

Mr Richard A Matrenza  
Member

*13<sup>th</sup> June 2018*