

PUBLIC CONTRACTS REVIEW BOARD

Case 1218 – CFQ 019-10885/18 – Call for Quotes for the Supply of Human Milk Fortifier

Application for a Pre-Contractual Remedy

The publication date of the call for tenders was the 29th August 2018 whilst the closing date of the call for tenders was the 10th September 2018 (extended to 17th September 2018). The estimated value of the tender (exclusive of VAT) was € 4,000

On the 7th September 2018, Vivian Corporation Ltd (Vivian) filed an appeal against Central Procurement and Supplies Unit (Ministry of Health) as Contracting Authority on the grounds that if the tender were to continue there would be a breach of the principle of equal treatment.

On the 11th October 2018 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellant – Vivian Corporation Ltd

Dr Clement Mifsud Bonnici	Legal Representative
Dr Sylvann Aquilina Zahra	Legal Representative
Ms Denise Borg Manche	Representative
Ms Joanna Gatt	Representative
Mr Etienne Seychell	Representative

Contracting Authority – Central Procurement and Supplies Unit

Dr Marco Woods	Legal Representative
Dr Alison Anastasi	Representative
Mr Roger Vella	Representative

Dr Anthony Cassar, Chairman of the Public Contracts Review Board, welcomed the parties and invited submissions.

Dr Clement Mifsud Bonnici, Legal Representative for Vivian Corporation Ltd, said that this was an unusual case arising because of a discrepancy in the public procurement law regarding the level of value of tenders. He also mentioned, as a procedural point, that the reply from the CPSU was received very late. The value of the tender was not significant but there was a principle at stake – an offer had been submitted, awarded to his clients and cancelled after the price was

published. Twenty four hours later the tender was re-issued with wider specifications. This broke the general principle of equality as Vivian's price was known and therefore they were not on the same footing as their competitors. The Appellant, through their legal advisers, made written submissions to the Malta Competition and Consumer Affairs Authority (MCCAA) regarding the apparent manipulation of the market. The MCCAA contacted the CPSU who proceeded with the tender nonetheless.

Dr Marco Woods, Legal Representative for the CPSU, stated that the aim of public procurement was to have open competition. The specifications in the first tender were found to be different from those approved by the CPSU, which indicated restricted competition and therefore led to the cancellation of the tender and the issue of a new tender to open competition.

Dr Mifsud Bonnici wondered what was the process that had triggered the re-launch of the tender and why did Vivian have to suffer the consequences.

Dr Alison Anastasi, Representative of the CPSU, said that as a result of a cost-benefit analysis the CPSU has realised the need to amend the tender and there was a fast process to change the specifications.

Dr Mifsud Bonnici, explained the role of the MCCAA and asked to produce a witness.

Mr Godwin Mangion (166262M) stated under oath that he was the Director General of the MCCAA, and he had been contacted by lawyers on behalf of Vivian to examine the tender process in question. In an exchange of correspondence (tabled) with the CPSU witness advised them that the re-issue of the tender after the price had been revealed could lead to lack of competition and distortion of the market, and hence there would not be a level playing field. A meeting with the CPSU was planned for later in the month.

The Chairman asked if there was any possibility of finding a solution to this impasse, and suggested a short adjournment to enable the parties to explore the possibility of reaching an agreement.

After the adjournment Dr Mifsud Bonnici advised the Board that a solution had been agreed by both parties, verbalised as follows;

“The Letter of Acceptance CPSU 0601-2016 covering the Contract of Supply in force till the 16th November 2019 is to remain in force with an increase of the present supply volume by 4,000 sachets. Tender CFQ 19-10885/18 is to be cancelled and re-issued in 9 months from today with the revised specification and to cover a period of supply from 17th November 2019. Vivian Corporation Ltd will be reducing the price from the previous contract from € 1(one) per sachet of one gram to € .85 (85 cents) per sachet effective as of the next order”.

The Chairman thanked both parties for their co-operative attitude and declared the hearing closed.

This Board,

having noted this Call for Remedies filed by Vivian Corporation Limited, (hereinafter referred to as the Appellants), before the closing date of competition on 7 September 2018 refers to the contentions made by the same Appellants with regards to the Call for Quotations of reference CFQ 019-10885/18 issued by the Central Procurement and Supplies Unit listed as Case No 1218 in the records of the Public Contracts Review Board.

Appearing for the Appellants: Dr Clement Mifsud Bonnici

Appearing for the Contracting Authority: Dr Marco Woods

Whereby the Appellants contend that:

- a) their main objection is that they submitted an offer which was accepted and awarded by the Contracting Authority. Immediately after, the same offer was cancelled and replaced by a normal Tender. In this regard, the Appellants maintain that since their offered price was made public, they would not be on the same footing as their competitors in the participation of the Tender and in this respect, Vivian Corporation Limited request this Board that the Tender is to be cancelled and after a period of twelve months, another competitive Tender is to be issued.**

This Board has also noted the Contracting Authority’s “*Reasoned Letter of Reply*” dated 8 October 2018 and its verbal submissions during the Public Hearing held on 11 October 2018, in that:

- a) The Central Procurement and Supplies Unit states that since the specifications in the issued quotation were found to be different from those approved by the same and in fact, restricted competition, the Contracting Authority had no other option but to cancel the award on the call for quotations and issue a Tender with wider specifications so as not to limit the scope of competition.**

This same Board has also considered the testimony of Mr Godwin Mangion, Director General, Malta Competition and Consumer Affairs duly summoned by Vivian Corporation Limited.

This 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 although the amount involved in this Appeal is insignificant and is not within the remit of this Board, the issue worth of consideration is the principle of equal treatment in a tendering procedure.

It is an established fact that once the offered price of the Appellants is disclosed through an award of a quotation, any other competitors who are able to quote or submit an offer for the same product are at an advantage through the knowledge of the price of the successful candidate.

In this particular case, Vivian Corporation Limited were awarded a quotation and such an award was published; immediately after, the award was cancelled and a Tender was issued in place for the same product but with more generic specifications. It is a fact that any competing Bidder for the Tender will gain the benefit of knowing what indicative level of price is expected from the Authority, so that, at submission stage of the Tender, the Appellants' offer is more or less, anticipated by the other competing bidders, so that equal treatment for all Bidders would be breached and, at the same instance, the principle of Level Playing Field is totally infringed.

During the submissions, both parties expressed their interest to resolve the issue and after a brief discussion between them, this Board notes that an agreement has been reached to represent the following:

- i) Quote CFQ 019-10885/18 is to be cancelled and re-issued in nine (9) months from today with the revised specifications to cover the period of supply from 17 November 2019;**

ii) The Letter of Acceptance for Reference CPSU 0601/2016 is to remain in force up to 16 November 2019, with an increased supply volume of 4,000 sachets;

iii) The present supplier, (Vivian Corporation Limited), will reduce the price from € 1/1g sachet to € 0.85/sachet, effective from the next order.

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Lawrence Ancilleri
Member

23rd October 2018