

## **PUBLIC CONTRACTS REVIEW BOARD**

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### **Case 1233 – CFQ 020-20340/18 –Tender for the Supply of16G Epidural Mini Pack Systems**

The publication date of the call for tenders was the 2<sup>nd</sup> August 2018 whilst the closing date of the call for tenders was 22<sup>nd</sup> August 2018. The estimated value of the tender (exclusive of VAT) was € 8,052.

On the 1st November 2018, Mr Russlan Cilia filed an appeal against the Central Procurement and Supplies Unit as Contracting Authority objecting to being disqualified on the grounds that his offer was not compliant. A deposit of € 400 was paid.

There were six (6) bidders.

On 20th November 2018 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Mr Carmel Esposito and Mr Lawrence Ancilleri as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

#### **Appellants – Mr Russlan Cilia**

Dr John L Gauci	Legal Representative
Mr Ernest Cilia	Representative

#### **Recommended Bidder – A M Mangion Ltd**

Mr Ray Vella	Representative
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#### **Contracting Authority – Central Procurement and Supplies Unit**

Dr Marco Woods	Legal Representative
Ms Marika Cutajar	Representative
Mr Joseph Xuereb	Representative
Mr Patrick Ghigo	Representative
Ms Bernice Gauci	Representative
Ms Josette Camilleri	Representative

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

Dr John L Gauci, Legal Representative for Mr Russlan Cilia stated that his client had been excluded because allegedly he had not submitted a Declaration of Conformity (DoC) with his offer. This appeal was limited solely to this allegation. Section 2 para 2.3 of the tender documents requested the submission of the valid DoC as part of the technical documentation.

Dr Gauci maintained that if this document was missing the Contracting Authority was obliged to request rectification since Para 4 (C) (ii) stated that in the case of the Literature List, any 'literature submitted shall be rectifiable only in respect of any missing information' which phrase was repeated in the notes to Clause 4 under 2B.

According to Dr Gauci the Literature list and technical specifications are interchangeable and therefore the Contracting Authority should have sought rectification of the missing DoC. All references in note 2B obliged the Contracting Authority to request the missing information.

Dr Marco Woods, Legal Representative of the CPSU said that at the evaluation stage no DoC was found in the documents submitted by Appellant and therefore he was disqualified. Appellant claims that the DoC could be uploaded as part of the literature. However para 2.3 of the technical specifications states that it has to be submitted on line – it was not so submitted with the offer and thus was not compliant. If there was any doubt on the part of the Appellant he could have asked for clarification. The DoC was requested in the technical offer not in the literature list.

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

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**This Board,**

**having noted this Objection filed by Mr Russlan Cilia, (hereinafter also referred to as the Appellant), on 1 November 2018, refers to the contentions made by the same Appellant with regards to the award of Tender of Reference CFQ 020-20340/18 listed as Case No 1233 in the records of the Public Contracts Review Board, awarded by the Central Procurement and Supplies Unit, (hereinafter also referred to as the Contracting Authority).**

**Appearing for the Appellant:**

**Dr John L Gauci**

**Appearing for the Contracting Authority:**

**Dr Marco Woods**

**Whereby, the Appellant contends that:**

- a) His offer was discarded due to the simple fact that he failed to submit the “*Declaration of Conformity*”. In this regard, the Appellant maintains that in accordance with Para 4 (c), the Contracting Authority had the obligation to request a rectification and thus obtain the missing document.

**This Board has also noted the Contracting Authority’s “*Letter of Reply*” dated 8 November 2018 and its verbal submissions during the Public Hearing held on 20 November 2018, in that:**

- a) The Central Procurement and Supplies Unit insists that Para 4 (c) (ii) refers to the literature whilst the Appellant failed to submit the “*Declaration of Conformity*” which formed an integral part of the technical specifications, so that the Evaluation Committee had no other option but to deem Mr Russlan Cilia’s offer as technically non-compliant.

**This Board, after having examined the relevant documentation to this Appeal and heard submissions made by the interested parties opines that the issue**

which deserves due consideration is the non submission of the *“Declaration of Conformity”*.

First and foremost, this Board would point out that there is a difference between requested literature and mandatory technical documentation. The literature, when requested by the Contracting Authority, should support and confirm that what the Bidder has offered can be actually supplied and at the same instance, asserts that the declared technical specifications are in conformity with those being delivered. On the other hand, a mandatory technical document, in this particular case, the *“Declaration of Conformity”* forms an integral part of the technical specifications. It is also to be noted, that in so far as technical specifications are concerned, no clarifications shall be allowed and only clarifications on the submitted documentation may be requested.

The Appellant’s contention is that, in accordance with clause 4 (c) (ii), the Central Procurement and Supplies Unit had the obligation to request the missing documentation. In this regard, this Board would refer to paragraph

4 (c) (ii), which states:

*“Literature as per form marked, “Literature List” is to be submitted with the technical offer at tendering stage”*

**This particular section under clause 4 (c) specifically segregates the literature from the technical offer. At the same instance, it is an established fact that, the Declaration of Conformity formed an integral part of the technical specifications, the latter of which cannot be rectified after the submission date of the offer.**

**Mr Russlan Cilia also maintain that in accordance with Note 2B, the Central Procurement and Supplies Unit was obliged to request the missing documentation. In this regard, this Board would refer to “Notes to Clause 4” as follows:**

***“Notes to Clause 4:***

***1. Not applicable for quotations.***

***2. a) Tenderers will be requested to either clarify/rectify any incorrect and/or incomplete documentation, and/or submit any missing documents within five (5) working days from notification.***

***b) Tenderers will be requested to rectify/submit only missing documents within five (5) working days from notification. No changes to the information provided in the Literature submitted will be allowed.***

*Literature submitted shall be rectifiable only in respect of any missing information.*

*All rectifications are free of charge.*

*3. No rectification shall be allowed. Only clarifications on the submitted information may be requested.”*

**Paragraph 2 (b) does not refer to the mandatory technical specifications which are missing in the original submissions of Mr Cilia’s offer, as the missing document, the Declaration of Conformity, formed part of the technical specifications, the latter of which, fall under note 3, where no rectification is allowed.**

**This Board would respectfully point out that the “*Literature*” and the technical specifications are not to be considered as interchangeable. The Central Procurement and Supplies Unit may or may not ask for technical literature so that one should not apply Clause 2 (b) for missing technical specifications. The Declaration of Conformity is an important document which certifies that the product has been tested in accordance with the standards and/or directives which relate to the particular product so that conformity is a mandatory technical condition, when so requested in a Tender**

**Document, in this particular case, the product represented a medical procurement.**

**Last but not least, this Board would also refer to paragraph 2.3, “*Medical Material & (?)Devices*”, under which this product is classified, as follows:**

**“2.3 *Medical materials & devices***

***The following technical documentation is to be submitted online through the prescribed Tender Response Format and by using the Tender Preparation Tool provided:***

- i) Detailed product technical document/datasheet for product being offered.***
- ii) A valid Declaration of Conformity for product being offered and references to the relevant harmonized standards used, (applicable if product falls under the medical device directive).”***

**From the above mentioned clause, it is evidently clear that the “*Declaration of Conformity*” of the product had to be submitted online via the original offer. On the other hand, this Board opines that, if the Appellant was in doubt, in any particular way, of the documentation to be submitted, he had all the remedies to seek clarifications prior to the closing date of the Tender and this Board notes that such remedies were not availed of by the Appellant.**

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

**i) upholds the Central Procurement and Supplies Unit's decision in the award of the Tender;**

**ii) does not uphold the contentions made by Mr Russlan Cilia;**

**iii) recommends that the deposit paid by the Appellant should not be refunded.**

Dr Anthony Cassar  
Chairman

Mr Carmel Esposito  
Member

Mr Lawrence Ancilleri  
Member

*4<sup>th</sup> December 2018*