

PUBLIC CONTRACTS REVIEW BOARD

Case 1277 – MEDE/MPM/UOM/31-2018 – Supply, Delivery and Installation and Commissioning of an Energy Efficient UV-VIS-NIR Spectrophotometer System for the Faculty of Engineering – University of Malta (UM 2139)

The publication date of the call for tenders was the 26th October 2018 whilst the closing date of the call for tenders was 29th November 2018. The estimated value of the tender (exclusive of VAT) was € 122,881.36.

On the 6th February 2019 Labo-Pharm Ltd filed an appeal against the University of Malta as the Contracting Authority objecting that their bid was found to be not the cheapest compliant offer. A deposit of € 615 was paid.

There two (2) bidders and three bids.

On 7th March 2019 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Carmel Esposito as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellants – Labo-Pharm Ltd

Dr John L Gauci	Legal Representative
Mr Stephen Bonnici	Representative
Mr Jan Wuelfken	Representative

Preferred Bidder – Technoline Ltd

Mr Justice Godwin Muscat Azzopardi	Legal Representative
Mr Christopher Bonello	Representative

Contracting Authority – University of Malta

Dr Oriella De Giovanni	Legal Representative
Mr Tonio Mallia	Chairperson Evaluation Committee
Mr Glen Buttigieg	Secretary Evaluation Committee
Dr Eng Daniel Vella	Member Evaluation Committee
Dr Eng Paul Refalo	Member Evaluation Board
Dr Eng Stephen Abela	Member Evaluation Board
Mr Jurgen Carl Grixti	Representative

Dr Anthony Cassar Chairman of the Public Contracts Review Board welcomed the parties and invited them to make their submissions.

Dr John Gauci Legal Representative of Labo-Pharm Ltd started by saying that the offer by the recommended bidder of a spectrometer system for the University of Malta fails as it does not meet the specific requirements of the tender on six technical points; it should be disqualified and awarded to his clients.

The Chairman said that all too often the Board was being faced with cases where allegations were being made that the preferred bidder was not compliant. Before making such claims appellants must be certain of what the preferred bidder was offering.

Dr Gauci, continuing, said that in this case one is looking at a very restricted market. Appellants had checked the tender requirements for the specific model and after market research found that out of the compliant brands only their clients had participated.

Mr Jan Wuelfken called as a witness by Appellants testified on declaration that for 18 years he has been a product specialist. He went through a detailed list of component items in the requested product and which according to Appellants did not meet the tender requirements. In brief his testimony on the non-compliant items was as follows:

- His company was the only producer of 10 Abs equipment
- It was very difficult and highly technical to explain his company's superior reflection and transmission measurements
- Their production was unique when it came to angular control of sample rotation. No competitor offered such a product
- The angle control was only possible with their control equipment
- No other manufacturer can offer the flexibility of their free choice of angle on the incoming beam control.

Witness stated that he does not know what the successful bidder offered and did not know why it was claimed that the bidder was not compliant.

Mr Tonio Mallia, Director of Procurement of the University of Malta said that the product Appellants had offered does exactly the same function as the award – the only difference is that Appellants' who felt that he would have no competition, offered a product that costs € 55,000 more than the successful bid. At evaluation stage all the points raised as shortcomings in the preferred bid were thoroughly checked and found to be covered in the literature, as their technical witness will testify.

Engineer Dr Stephen Abela (269271) called as a witness by the Contracting Authority testified on oath that he wrote the tender specification and was an evaluator in this tender. He went through the contentious points and indicated what the preferred bidder had offered:

- The Abs offered had a range of -6 to +6 thus giving it a range of 12
- The operating modes offered reached the required standards through the accessories included
- Reflection and transmission measurements standards were reached through a major attachment supplied
- Two detectors do the same function as the competitors angle control equipment
- A manual filter instead of a variable one does the same function of the beam control

Witness said that, in summary, all points offered by the preferred bidder meet the specification in the tender.

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

This Board,

having noted this Objection filed by Labo-Pharm Limited (herein after also referred to as the Appellants) on 6 February 2019, refers to the claims made by the same Appellants with regard to the Tender of Reference MEDE/MPM/UOM/31/2018 listed as Case No 1277 in the records of the Public Contracts Review Board, awarded by the University of Malta (herein after also referred to as the Contracting Authority).

Appearing for the Appellants:

Dr John L Gauci

Appearing for the Contracting Authority: Dr Oriella de Giovanni

Mr Tonio Mallia

Whereby, the Appellants contend that:

a) the Preferred Bidder's offer does not meet the technical specifications.

In this respect, the Appellants are stating that this type of equipment has a very restrictive market and in fact, only the Appellant Company can supply the equipment with such specific requirements.

This Board has also noted the Contracting Authority's 'Letter of Reply' dated 4 February 2019 and its verbal submissions during the hearing held on 7 March 2019, in that:

a) the University of Malta insists that the product being offered by the Preferred Bidder provides all the functions as requested in the Tender Document and is cheaper than that being offered by the Appellants. In this respect, the Contracting Authority confirms that the alleged shortcomings mentioned by Labo-Pharm Limited, have been thoroughly checked and also verified through the technical literature of

the Preferred Bidders' offer and that the latter's offer conforms with the stipulated technical requirements.

This same Board also noted the testimony of the witness namely:

- 1. Mr Jan Wuelfken, who was duly summoned by Labo-Pharm Limited;**
- 2. Dr Eng Stephen Abela, who was duly summoned by the University of Malta.**

This Board, after having examined the relevant documentation to this Apepal and heard submissions made by the parties concerned, including the testimony of the witnesses duly summoned, opines that what merit sconsideration are the claims made by Labo-Pharm Limited.

- 1. The Appellants are claiming that the product which the Contracting Authority requested with the specific stipulated technical specifications can only be supplied from one Bidder and that is, Labo-Pharm Limited, so that any other offer should be deemed as technically non-compliant.**

At the same instance, the Appellants claim that the Preferred Bidder's offer failed in the following technical requirement:

“Item 1 ii. h. – Photometric range: 10 Abs or better.

Item iv. Operating Modes a. Must be capable of: ... ii. Measurement of absolute reflection and transmission, at user definable angles, for s-polarized and p-polarized light.

iii. Absolute reflection and transmission measurements, for s-polarized and p-polarized light must use a single baseline for any angle at a given polarization

v. Angular control of sample rotation (0-360 deg) and detector position (10 deg – 350 deg)

vi. Angular control provide capability for absolute specular reflectance measurement at positive angles of incidence and negative angle of incidence

vii. Control over incoming and detected beam geometry. Incoming beam controllable in vertical and horizontal angles.”

This Board refers to extracts of the testimony of the technical witness duly summoned by Labo-Pharm Limited and which testimony had the sole objective to identify the technical deficiencies of the Preferred Bidder’s offer, as follows:

“Lawyer: With regards to item 1 (II), photometric range, 10 absorbance or better, why are we saying that the recommended bidder does not meet that specification?”

Witness: For that I truly would need to know what is the instrument there aiming to be compliant.

Chairman: How do you know exactly what the preferred bidder offered?

Witness: I do not know that

Chairman: So how can you say that it is not compliant?

Witness: Because I know that the 10 absorbance is the value, it is a specific value, no other supplier has this value in their specification sheets. I know because I am doing this for 18 years and I know the possible competition in this market. So

there are 3 or 4 or 5 and none of them has 10 absorbance value in their specifications.

Chairman: But you have not seen the specifications of the preferred bidder's offer

Witness: No of course not."

With regards to the second alleged deficiency of the successful offer, an extract in this regard from the same technical witness would perhaps illustrate the basis on which the alleged claim was based upon, as follows:

"Lawyer: Second one is operating modes must be capable of measurement of absolute reflection and transmission at user definable angles for S-polarized and P-polarized light.

Lawyer: Your offer offers free choice. What about the competition? What does it offer in relation to this?

Witness: It would be very difficult and very technical to explain this point of measuring a base line only for a specific angle because this is only possible with a specific setup which we are using in this one where the detector is moving around. So very technical. I am fine to do that."

With regards to the third alleged deficiency, an extract from the testimony of the same witness, as follows:

“Lawyer: The next one is angular control of sample rotation from 0 to 360 degrees and the detector position 10 degrees to 350 degrees.

Witness: So this is for sure a unique possibility we have.

Chairman: You are saying a unique possibility which you have. I want to know why the Appellant’s offer does not meet this requirement. That is my duty here.

Witness: This is not existent or if somebody shows me in a brochure that it works but I know that this does not.”

With regards to the fourth alleged claim, the testimony of Mr Wuelfken continues as follows,

“Lawyer: Number 4 is angular control provide capability of absolute specular reflectance measurement provided positive angles of incidence at negative angle of incidence.

Witness: It is again something because we are moving around. We are cutting a circular, one is plus and one is minus and this is only possible when you are doing these type of setups. So it is question of how you set up the optics because you are setting it like this and we can define plus and minus angle, gives a higher accuracy for the measurement.”

With regard to the last alleged claim, an extract from the same testimony is as follows,

“Lawyer: And the last one is control over incoming and detecting beam geometry, incoming beam controlling vertical and horizontal angles.

Lawyer: Can you just briefly explain the importance of having free choice of angle like your system as compared to fixed angles which is provided by the competitor

Witness: The main point is to give you flexibility and not be thinking that only one angle of incidence is the right one and this typical example is for example if you think about the solar cell and the solar cell is measured at 0 degrees angle so the light is at 12 o'clock in Valletta hitting the surface. But what about 7

o'clock in the evening, the light is coming in a complete different angle. Maybe 80 degrees and a lot of people were interested in measuring solar cells are....”

- 2. This Board opines that, from the above quoted extracts from the testimony of Mr Jan Wuelfken, the latter explained what Labo-Pharm Limited’s product can achieve, yet he did not present proof or any evidence to justify any one of the alleged claims made by the Appellants. In this regard, this Board would respectfully point out that the claims made in the Appellants’ “*Letter of Objection*” were not justifiably substantiated by evidence of any shortcomings of the Preferred Bidder’s offer.**

- 3. At the same instance, this Board noted that all the deficiencies alleged by the Appellants were thoroughly checked and also confirmed in the technical literature of the manufacturer of the equipment, and that all the functions which were stipulated in the Tender, were present.**

- 4. This Board would also refer to the testimony of Dr Eng Stephen Abela, confirming that Technoline Limited’s offer was capable of performing all the functions, as stipulated in the Tender,**

“Chairman: Control over incoming beam geometry. Dik għidtieli. Jigifieri minn dawn il-punti kollha, skont intom bħala evaluators, rajtu li l-offerta tal-preferred bidder it meets such conditions?”

Xhud: Yes.”

From the above submissions and testimony of the technical witnesses, this Board does not find any justifiable need to appoint an expert. What Dr Eng Stephen Abela submitted under oath was credible enough to prove that, the University of Malta was not requesting the best equipment on the market but rather equipment which would conform with the technical requirements of the Tender. Also, the Appellant and the witness which the latter produced at no point pointed out specific issues in the Preferred Bidder’s offer which they alleged were technically non-compliant. In this respect, the successful offer was compliant and the cheapest.

In conclusion, this Board,

- a) after having heard submissions from the technical witnesses, does not find any justifiable reason to uphold the Appellants’ contentions;**

b) is comfortably convinced that the Contracting Authority, in its own interest, has selected a compliant equipment;

c) confirms that when making their technical submissions, the Appellants did not present any credible technical evidence to justify their alleged claims.

In view of the above, this Board,

i) does not uphold the contentions made by Labo-Pharm Limited;

ii) upholds the University of Malta's decision in the award of the Tender;

iii) directs that the deposit paid by the Appellants should not be refunded.

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Carmel Esposito
Member

20th March 2019