

PUBLIC CONTRACTS REVIEW BOARD

Case 1343 – RfP 009-60030-19 – Request for Participation for the Supply, Installation, Testing and Commissioning of Canalisation, Cable Laying and Termination of same in Electrical Distribution Boards at Mater Dei Hospital and Sir Anthony Mamo Oncology Centre.

The publication date of the Request for Participation was the 7th May 2019 whilst the closing date was 27th May 2019 (extended to 30th May 2019). The estimated value of the works (exclusive of VAT) was € 600,000.

On the 29th July 2019 Raymond Vella & Co Ltd filed an appeal against the Central Procurement and Supplies Unit as the Contracting Authority contesting the decision to disqualify them as their bid was considered technically non-compliant. A deposit of € 3,000 was paid.

There were two (2) bidders.

On 20th August 2019 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Mr Lawrence Ancilleri and Mr Carmel Esposito as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellants – Raymond Vella & Co Ltd

Dr Matthew Paris	Legal Representative
Dr Michele Cardinale	Legal Representative
Dr Luke Dalli	Legal Representative
Mr Raymond Vella	Representative
Ms Stefania Grech	Representative
Eng Christopher Bilocca	Representative
Mr Sinclair Mallia	Representative

Recommended Bidder – Mekanika Ltd

Mr Sasha Antunovic	Representative
Ms Nathalie Falzon	Representative

Contracting Authority – Central Procurement and Supplies Unit

Dr Marco Woods	Legal Representative
Mr Peter Pace	Chairperson Evaluation Committee
Mr Noel Psaila	Member Evaluation Committee
Mr Samuel Bonanno	Representative

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

Dr Matthew Paris Legal Representative for Raymond Vella & Co Ltd (hereinafter referred to as RVC) said that there was ambiguity in this Request for Participation (hereinafter referred to as RfP), and this was a crucial point as it is the genesis of his clients' claim. The ambiguity arose as this appeared to be a tender rather than a RfP. The Public Procurement Regulations (PPR) make no reference to RfPs terminology. The law acknowledges various types of procurement like negotiated procedure or open procedure but the concept of a RfP is a creation of someone who is creating ambiguity through the nature of this procedure.

The Central Procurement and Supplies Unit (CPSU) claims that a Rfp equates to a negotiated procedure and are querying why this point is being raised at this stage when RVC could have used a precontractual remedy. Dr Paris explained that a precontractual remedy is used to ensure that no one is excluded from bidding through technical specifications that might favour one party over another or exclude a likely bidder. This is a preliminary plea and is being raised because of a clear failure by the CPSU to carry out its obligations as a contracting authority. Article 153 of the PPR details the obligatory steps to be taken in the case of a negotiated procedure in a public supply contract. There are preliminary steps to be followed in an open procedure and if there are no bidders or none that are suitable then a request has to be made to the Director of Contracts. In this instance the open procedure did not take place and hence there cannot be a negotiated procedure.

Paragraph 5 of the Request for Participation document states that the open tender as detailed in law will be initiated and the RfP process cancelled once there is more than one offer. This happens once the administrative, technical and financial offers are considered – since there was no submission of financial offers this cannot be an open tender. The process the CPSU is following is back to front since open tender procedure is going to follow the RfP – this is an obvious breach of the procurement regulations. In this case there is doubt whether there is a procurement platform approved by the Director of Contracts which allows one to follow the audit trail. Here there is a situation where all there is, is an information panel with matters being dealt with by email directly with the bidder without going through the legal process of publication in the Government Gazette or the ePPS. The only publication in this instance was in the negotiated procedure panel on the website of the Ministry for Health. (Tabled Negotiated Procedure print out from Ministry site - Doc 1). Communications and submissions on the RfP were only possible on the site 'negotiation.cpsu@gov.mt' which is indicative of what the CPSU had in mind.

This was never meant to be an open tender but a negotiated procedure process throughout and everything points that way – there is no single indication that this was an open tender process. A point that is of additional interest is that the rejection note sent to RVC states that any objection to the decision of the CPSU is to be accompanied by a deposit of € 720. This amount is tied to the figure for a negotiated procedure value which the CPSU is allowed to administer by law (€ 144,000). No proof has been submitted that the Director of Contracts allowed the CPSU to administer a higher figure.

Dr Marco Woods Legal Representative for the Central Procurement and Supplies Unit said that the Ministry website stated that this was a negotiated procedure. Applicants had a remedy under

Regulation 262 (e) and they could have submitted a reasoned application to have the RfP cancelled. Instead of attacking the ambiguity they submitted their offer accepting all the clauses in the Rfp. They only appealed once they were disqualified.

The Chairman at this stage stated that the Board wished to hear the testimony of person involved in the evaluation process.

Mr Peter Pace (48286M) called as a witness by the PCRБ testified on oath that he was the Chairperson of the Evaluation Committee. He stated that after very detailed evaluation of the technical submissions the committee sought certain clarifications, the replies to which were not considered sufficient – they therefore called a clarification meeting which both bidders attended. After this meeting one bidder was found to be compliant and one was non-compliant, so they started dealing with the compliant bidder.

Questioned by Dr Paris witness said that the technical offer of RVC was not accurate and the information supplied after clarification was still found to be insufficient. Subsequently a final offer was submitted by RVC offering further insufficient information and so they then proceeded with the remaining bidder in line with a negotiated procedure.

Dr Paris intervened to note that witness had stated on oath that it was a negotiated procedure when Article 5 of the Rfp states that in that situation an open tender should have been issued. The Contracting Authority was making arbitrary deadlines and decisions outside the terms of the RfP. All they were trying to do was to find a compromise by excluding his clients because of the actions of one of RVC's suppliers. Article 262 of the PPR does not oblige RVC to seek a remedy – it spoke of 'may' rather than 'should'. No explanation has been forthcoming regarding the point made earlier regarding the limit of € 144,000 imposed by law and why it has been exceeded. RVC only became aware of this very late as they did not have this information beforehand, and could not have appealed earlier.

Mr Peter Pace on oath asked the Board to take note that when earlier he had mentioned that the committee had proceeded with a negotiated procedure, he had meant to say that it was the Rfp as at that stage the committee was still assessing and testing the market for compliant economic operators.

Dr Paris asked to Board to record verbatim that 'he states that Mr Peter Pace made the declaration only after hearing the legal submissions and confirmed that no open tender has been held'.

Mr Noel Psaila (464070M) called as a witness by the PCRБ testified on oath that he was a member of the evaluation committee.

Witness stated that the Technical Evaluation Report was dated 12th July 2019 and the Rejection Letter with the price indication thereon was dated 18th July 2019. The Chairman asked whether the financial negotiations had taken place in a mere five days – in reality the equivalent of only three working days. Witness said that he was not aware if the negotiations took place between those dates.

Mr Peter Pace was recalled to testify further. In reply to a question he stated that the Department of Contracts in an e-mail had given the CPSU permission to issue the RfP up to a value of € 600,000.

The Chairman asked the witness why and how had it been possible to receive the financial offer on the 8th July, having been requested on the 5th July, when the Technical Report was not concluded till the 12th July 2019.

Mr Pace replied that he was advised who the compliant bidder was on the 4th July 2019.

Dr Paris stated that procedurally the CPSU had not made one simple move correctly. Article 153 which dealt with open procedure had not been followed as confirmed by the Chairperson of the evaluation committee. The law was breached by the Contracting Authority who was obliged by that same law to observe it. There was ambiguity all through the process and the Authority had moved from open to negotiated procedure to RfP. They had ignored Article 5 in their own document and while negotiating had asked for a price from another bidder. His clients had been illegally excluded and by law should have been given the right of appeal at that stage. The Authority had given reasons for their exclusion only on being asked.

Dr Paris said that this illegal procedure must not be allowed to proceed and cancellation of the tender and its re-issue was the only correct step – one would have expected the CPSU to do it of their own volition.

Dr Woods reiterated that Appellant had the right to seek a remedy. Under Article 262 they could have asked for cancellation of the tender if it was in violation of the law. The CPSU wanted more than one bidder hence the clarifications and meetings with Appellants, despite which their bid was still non-compliant. Instead of challenging the Rfp they decided to bid and appeal the decision – they had no basis for their appeal.

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

This Board,

Having noted this objection filed by Raymond Vella & Co Ltd (herein after referred to as the Appellants) on 29 July 2019, refers to the claims made by the same Appellants with regard to the ‘Request for Participation’ reference RFP 009-60030-19 listed as case no 1343 in the records of the Public Contracts

Review Board, awarded by Central Procurement and Supplies Unit (herein after referred to as the Contracting Authority).

Appearing for the Appellants: Dr Matthew Paris

Appearing for the Contracting Authority: Dr Marco Woods

Whereby, the Appellants contend that:

- a) There exists ambiguity in the ‘Request for Participation’ (RFP), in that, it appears that such a request was intended as a ‘Negotiated Procurement’, so that Regulation 153 of the Public Procurement Regulations should have been adhered to and in this regard, the Authority failed to abide by such a regulation governing ‘Negotiated Procedures’.**

This Board also noted the Contracting Authority’s ‘Letter of Reply’ dated 6 August 2019 and its verbal submissions during the hearing held on 20 August 2019, in that:

- a) The Authority maintains that, it has followed and abided by the requirements governing negotiated procedures and had all the necessary approvals from the Department of Contracts and at the same instance, the Authority insists that Appellants’ alleged grievances should not have been presented at this stage of the tendering process.**

This same Board also noted the testimony of the witnesses namely;

Mr Peter Pace, summoned by the Public Contracts Review Board

Mr Noel Psaila, summoned by the Public Contracts Review Board

This Board has also taken note of the document submitted by Raymond Vella & Co Ltd which consisted of document no 1 ‘Negotiated Procedure’ (print out from Ministry site).

This Board, after having examined the relevant documentation to this appeal and heard submissions made by the parties concerned, including the testimony of the witnesses duly summoned, opines that, the issues that merit consideration are two-fold namely:

- **Procedure adopted by the Contracting Authority**
- **Proper Remedial Process to address Appellants’ Grievances.**

Contracting Authority’s Procurement Procedure

1. **This Board would refer to paragraph no 5 of the RFP document, wherein the procedure to be adopted by the Authority in the ‘Eligibility and Award Process’ is clearly stated as follows:**

“The Contracting Authority will evaluate the technical offer/s submitted.

In case more than one submission is found to be technically compliant the

RFP process will be cancelled and a competitive process through an open tender will be initiated.

If only one submission is received or only one is found to be technically compliant, the Contracting Authority will enter into negotiations with the economic operator.”

The RFP was issued to test and assess the market for compliant economic operators and Clause 5 of the RFP clearly lays out the procedure to be followed in the eligibility and award criteria and at this particular stage of consideration, this Board will review whether such a stipulated procedure has been adhered to by the Authority.

- 2. This Board acknowledges and confirms the fact that the Public Procurement Regulations do not make any reference to the RFP’s terminology, however, it is to be appreciated that the RFP document itself sets out the conditions and circumstances with regard to eligibility and other criteria, without infringing any of the general rules governing Public Procurement. One must also point out that the RFP document, through clause 5 did stipulate the procedure to be adopted, so that, at**

submission stage, such conditions were acknowledged as being accepted, through the submission of Appellants' offers.

3. In this particular case, there were two offers submitted but only one of such offers was considered as technically compliant. It must also be mentioned that Appellants' deficiency in their offer was brought to the attention of Appellants' and the latter were also given opportunities to submit relevant literature and even after such events, Appellants' offer was found to be technically non-compliant in accordance with clause 5 of the RFP. Since there was only one compliant offer, the Authority entered into 'Negotiated Procedure' with Mekanika's compliant offer, as stipulated in clause 5.

4. Negotiated Procedures are allowable for the supply contracts provided where the required provisions can be supplied by a particular operator or where competition is absent for technical reasons, such as the case being considered. In this regard, this Board took onto consideration the approval given by the General Contracts Committee on 30 April 2019, for the processing of a negotiated procedure, as follows:

“Reference is made to your e-mail dated 26 April 2019 regarding the subject in caption.

The General Contracts Committee has discussed your request. Approval is hereby being given to conduct a negotiable procedure for the supply, delivery and insulation of electrical supply needed for the MRI machine at the estimated cost of circa €700,000 excl VAT. This procurement is being exempted from using the ePPS platform.

This approval has been granted in terms of Regulation 154 (c) of the Public Procurement Regulations LN 352/2016 under the following conditions:

- a) these supplies are absolutely necessary;*
- b) the most cost effective (value for money) basis was taken onto consideration when submitting your request;*
- c) funds are available;*
- d) the Contracting Authority is to revert for definite approval once the actual economic operator and costs are known.”*

After such approval was given by the GCC, the Evaluation Committee proceeded with the negotiated procedure with the only compliant economic operator, that is, Mekanika Ltd and in this regard this Board would also refer to the GCC’s approval to enter into negotiations, as shown hereunder.

“Negotiated Procedure with Mekanika Ltd for the Supply and Installation of Cables for New MRI at MDH and SAMOC.

Reference is made to previous correspondence regarding the subject in caption.

The General Contracts Committee has discussed your request. Approval is hereby being given to enter into a negotiated procedure with Mekanika Ltd for the supply and installation of Cables for the new MRI and [at ??] MDH and SAMOC for the estimated cost of €328,591.29.

This approval has been granted in terms of Regulations 153 (b) (ii) and 154 (b) (ii) of the Public Procurement Regulations LN352/2016 under the following conditions:

- a) these supplies/services are absolutely necessary;*
- b) the most cost effective (value for money) basis was taken into consideration when submitting your request;*
- c) funds are available.”*

In this regard, this Board opines that, the procedure adopted by the Evaluation Committee was within the parameters of the Public Procurement Regulations.

5. Remedial Process to Address Appellants’ Grievances

With regard to Appellants' claim that the RFP was ambiguous and that the RFP, in actual fact referred to a negotiated process, this Board would respectfully point out that the RFP document, had stated the procedure being adopted and had also stated that, the offer, at submission stage, should not include the price, as the RFP's objective is to identify whether such a procurement is compliantly available. The RFP document stated the condition under which a negotiated procedure will be conducted, so that, the whole procedure for the eligibility and award criteria was fully explained in the document itself.

6. This Board, after having heard the submissions made by Appellants, does not find any justifiable cause as to why Appellants did not avail themselves of the remedies available prior to the submission of their offer and assert that, through their submission, they have confirmed that they accept all the conditions so stipulated in the RFP document.

7. Although the evaluation process was carried out in accordance with the Public Procurement Regulations, this Board notes that the Authority, prior to negotiating a price with Mekanika Ltd, should have informed

Appellants, at that particular stage, to enable the latter to file any objection with regard to the technical aspect of their offer.

In conclusion, this Board opines that:

- a) The RFP document was not ambiguous and same explained in clear terms what procedure will be adopted by the Authority, in all eventualities,**

- b) The evaluation process was carried out after obtaining all the necessary approvals which are required for the treatment of a negotiated procedure,**

- c) The urgency of the procurement of the product, is truly justified, however, Appellants should have been given the necessary remedy to appeal on the technical merits of their offer, prior to the price negotiation process which was conducted by the Authority with the technically compliant bidder and in this regard, this Board opines that the Authority failed to avail such a remedy to Appellants.**

In view of the above, this Board,

- i) directs the Authority to cancel the award of the negotiated procedure,**

- ii) directs that Appellants be given the opportunity to file an appeal on the technical merit of their offer; such an appeal has to be filed within ten calendar days from the date of this Board's decision,**

- iii) in the event, that no such appeal is filed with the Public Contracts Review Board, within the stipulated period, the Authority is hereby being directed to proceed with the award procedure,**

- iv) directs that the deposit paid by Appellants should be fully refunded.**

Dr Anthony Cassar
Chairman

Mr Lawrence Ancilleri
Member

Mr Carmel Esposito
Member

5 September 2019