

## **PUBLIC CONTRACTS REVIEW BOARD**

### **Case 1355 – CFT 019-0326/19 – Tender for the Provision of Portable Automated External, Defibrillators for Mater Dei Hospital**

The publication date of the tender was the 5<sup>th</sup> April 2019 whilst the closing date was 9<sup>th</sup> May 2019. The estimated value of the tender (exclusive of VAT) was € 63,000

On the 5<sup>th</sup> August 2019 ProCare Ltd filed an appeal against the Central Procurement and Supplies Unit as the Contracting Authority contesting the decision to disqualify their bid as it was not technically compliant. A deposit of € 400 was paid.

There were four (4) bidders and six (6) bids.

On 24<sup>th</sup> September 2019 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:

#### **Appellants – ProCare Ltd**

Dr Robert Galea	Legal Representative
Mr Pierre Calleja	Representative

#### **Preferred Bidder – Technoline Ltd**

Mr Nicky Sammut	Representative
Mr Bjorn Bartolo	Representative

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

Dr Marco Woods	Legal Representative
Mr Albert Incorvaja	Secretary Evaluation Board
Mr Samuel Bonnici	Member Evaluation Committee
Mr Jimmy Bartolo	Member Evaluation Committee
Ms Lisa Wright	Member Evaluation Committee
Ms Ruth Spiteri	Representative

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

Dr Robert Galea Legal Representative for ProCare Ltd expressed concern at the way the non-award of the offer was communicated to Appellants – instead of the normal letter of rejection they were only advised that the tender had not been awarded to them together with the reason

why. In past bids the actual word rejection was used (document tabled {Doc 1} to support this claim).

Dealing with the reason for the rejection Dr Galea stated that the tender for the defibrillators had a specific condition i.e. that it must switch between adult and paediatric patients use at the touch of a button. Appellants offered equipment which had a switch in lieu of a button to perform the same operation. In his view there is no difference between a switch and a button in the performance of the equipment.

Mr John Mary Bartolo (228464M) called as a witness by the Public Contracts Review Board testified on oath that he was one of the evaluators of the tender. One of the conditions of the tender was that the equipment must be able to be switched between patients at the touch of a button. Instead of a button the equipment offered by ProCare Ltd included a flap which had to be opened to gain access to a sliding switch. These defibrillators were used in life or death situations so the vital few seconds between pushing a button and sliding a switch mattered.

Dr Marco Woods Legal Representative for the Central Procurement and Supplies Unit said that the rejection letter stated the reason for disqualification and mentioned the tender winner which made it clear enough. Technical Offer Section 4 Item 2.6 made it very clear what the Contracting Authority wanted – Appellants had not submitted any clarification to find out if their product was compliant. The button operation was in the best interest of patients.

Dr Galea said that Appellants' product had an additional safety feature as the flap prevented accidental use, as could happen with a button operation.

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

End of Minutes

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## **Decision**

**This Board,**

**having noted this objection filed by ProCare Ltd (herein after referred to as the Appellants) on 5 August 2019, refers to the claims made by the same Appellants with regard to the tender of reference CFT 019-0326/19 listed as case no 1355 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 Robert Galea**

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

**Whereby, the Appellants contend that:**

- a) Instead of the normal ‘Letter of Rejection’, they were advised that the tender had not been awarded to them and such a change of format does create ambiguity in compiling the objection.**
  
- b) Their product satisfied the requirements of the technical specifications in that, the medical device had a switch in lieu of a button to perform the same intended operations. At the same instance, the offered equipment had an additional safety feature to prevent accidental misuse of same.**

**This Board also noted the Contracting Authority’s ‘Letter of Reply’ dated 22 August 2019 and its verbal submissions during the hearing held on 24 September 2019, in that:**

- a) The Authority insists that the letter informing Appellants that they were not awarded the tender constitutes a ‘Letter of Rejection’, and in**

**this respect, a valid reason for the rejection of their offer was also provided.**

- b) The tender document clearly stipulated that the equipment had to be regulated ‘At the Touch of a Button’ whilst Appellants’ product could only be operated through a switch.**

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

**Mr John Mary Bartolo duly summoned by the Public Contracts Review Board.**

**This Board has also taken note of the documents submitted by ProCare Ltd which consisted of:**

**Doc 1, sample of ‘Letter of Objection’ dated 27 July 2018.**

**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 duly summoned by this Board, opines that the issues that merit consideration are two-fold namely:**

- The Authority’s letter of rejection and**

- **The Appellants' equipment features.**

**1. With regard to Appellants' first contention, this Board would respectfully refer to an extract from the letter dated 25 July 2019, sent by the Authority to Appellants, as follows:**

*“Thank you for participating in the above-mentioned tender procedure. However we regret to inform you that the Evaluation Committee has recommended that this tender is awarded to Technoline Ltd at €68,213.97 excluding VAT.*

*Reasons for non-award of offer 112747 submitted:*

- ***The offered AED does not switch between Adult and Paediatric patients (and vice-versa) at a touch of a button as requested in the Tender Dossier, Section 4 Para 2.6.”***

**2. From the above communication, this Board opines that, it is evidently clear that although the word ‘Rejection’ is nowhere mentioned, it is being stated that Appellants have not been awarded the tender. It is also stating that the award has been given to Technoline Ltd and at the same instance Appellants are also being informed as to why their offer was not successful. Such information constitutes a letter of rejection as**

**the contents therein conform with the Public Procurement Regulations, in this regard.**

- 3. With regard to Appellants' second contention, this Board would refer to Section 4, Clause 2.6 of the tender document which stipulates that:**

*“2.6 The defibrillator shall be able to switch between adults and paediatric patients (and vice-versa) at the touch of a button.”*

**The above-mentioned clause stipulates clearly what the Authority was requesting so that, such a feature (touch of a button) of the equipment had a specific operational function which the Authority deems of great importance. In this regard, through the testimony of Mr John Mary Bartolo, this Board was informed that such an equipment is used in emergency cases and time is of the essence, so that, a touch of a button would facilitate the equipment's utilisation in such 'Life Saving' situations.**

- 4. This Board notes that although Appellants' offered equipment performs similar functions, its application to switch from adults to paediatric patients, can be slower due to the fact that it necessitates**

**more manual handling to switch from adults to paediatric patients and in such situations, every second counts.**

**5. This Board also considered Appellants' claim that, their equipment provided more safety features against unintentional mishandling of the equipment itself, during application. However, same Board would point out that the stipulated condition of a 'Push of a Button', is justified and has to be respected.**

**6. This Board would also point out that, it was the responsibility and obligation of Appellants to ensure or clarify whether their equipment's mode of switching from adults to paediatric patients, was compatible with the technical specifications. In this regard, this Board notes that Appellants had the remedies to clarify any specifications stipulated in the tender document, however, such remedies were not availed of by same.**

**In conclusion, this Board opines that,**

**a) With regards to Appellants' first contention, this Board confirms that the letter dated 25 July 2019, sent by the Authority constitutes a**

**‘Letter of Rejection’ and conforms with the Public Procurement Regulations, in its entirety.**

**b) Although Appellants’ equipment performs a similar function as that stipulated, it does not have the feature which the Authority requested and which is justifiably necessary during its application in such ‘Life and Death’ situations.**

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

- i. does not uphold Appellants contentions,**
- ii. directs that the deposit paid by Appellant should not be reimbursed.**

Dr Anthony Cassar  
Chairman

Dr Charles Cassar  
Member

Mr Lawrence Ancilleri  
Member

*8 October 2019*