

PUBLIC CONTRACTS REVIEW BOARD

Case 1381 – MESDC 230/2019 – Service Tender for the provision of Services to Implement, Enhance and add New Modules to pre-developed Software Systems for the Wild Birds Regulation Unit

The publication date of the tender was the 26th June 2019 whilst the closing date was the 29th July 2019. The estimated value of the tender (exclusive of VAT) was € 245,000.

On the 10th October 2019 iPRO Solutions Ltd filed an appeal against the Ministry for the Environment, Sustainable Development and Climate Change as the Contracting Authority on the grounds that the preferred bidder was ineligible to be awarded the tender. A deposit of € 1,225 was paid.

There were six (6) bidders.

On 7th November 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 – iPRO Solutions Ltd

Dr Graziella Bezzina	Legal Representative
Mr Philip Pullicino	Representative

Contracting Authority – Ministry for the Environment, Sustainable Development and Climate Change on behalf of the Wild Birds Regulation Unit

Dr Victoria Scerri	Legal Representative
Mr Richard Lia	Chairperson Evaluation Board
Ms Elaine Caruana	Member Evaluation Board
Ms Jessica Fenech	Member Evaluation Board
Mr Justin Calleja	Member Evaluation Board
Ms Joanna Grioli	Representative
Ms Claire Petrila Vella	Representative

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

Dr Graziella Bezzina Legal Representative of iPRO Solutions Ltd said that the principal point that should be considered in this appeal is if the preferred bidder, Ideata Ltd, should be awarded the tender since they are registered in India and not eligible to compete. India has observer status only in the World Trade Organisation (WTO) Agreement on Government Procurement. If that is so, then there is no need for a re-tendering process and the award should go to the next compliant bidder.

Dr Victoria Scerri Legal Representative for the Ministry for the Environment, Sustainable Development and Climate Change, in her reply, referred to the official European Union Guidance Notes which do not exclude countries outside the WTO. The agreement is worded in a positive way in that countries are included unless they are specifically excluded. India does not form part of the Agreement on Government Procurement but it is not excluded. Foreign bidders are guaranteed access to the EU market and there are no restrictions if a bilateral agreement exists.

Dr Bezzina objected to the last minute submissions of documents contrary to the Board's instructions that these should be disseminated well in time to enable the other party to peruse them.

The Chairman said that the Board took notice of Dr Bezzina's comments. The Board now has to confirm if there is an agreement with India allowing procurement in Government tenders and decide accordingly. He then thanked the parties for their submissions and declared the hearing closed.

End of Minutes

Decision

This Board,

having noted this objection filed by iPro Solutions Ltd (herein after referred to as the Appellants) on 10 October 2019, refers to the claims made by the same Appellants with regard to the tender of reference MESDC 230/2019 listed as case No. 1381 in the records of the Public Contracts Review Board, awarded by Ministry for the Environment, Sustainable Development and Climate Change (herein after referred to as the Contracting Authority).

Appearing for the Appellants: Dr Graziella Bezzina

Appearing for the Contracting Authority: Dr Victoria Scerri

Whereby, the Appellants contend that:

- a) **Their main concern is that, the tender was awarded to an Indian bidder, registered in India and not eligible to compete. In this regard, the tender should be awarded to the next compliant bidder.**

This Board also noted the Contracting Authority's 'Letter or Reply' dated 11 October 2019 and its verbal submissions during the hearing held on 7 November 2019, in that:

- a) **The Authority maintains that the EU guidance notes do not exclude countries outside the World Trade Organisation (WTO) and non-EU bidder are allowed to participate unless they are specifically excluded.**

This Board, after having examined the relevant documentation to this appeal and heard submissions made by the parties concerned opines that the issue that merits consideration is the eligibility for participation of the preferred bidder.

- 1. On a preliminary note, Appellants object to the late submission of the Authority's 'Letter of Reply' and in this regard this Board upholds Appellants' contention and will adjudicate only on the merits presented during the hearing only.**
- 2. With regard to Appellants' contention in that, the preferred bidder should not have been awarded the tender, as he is prohibited to participate, this Board would respectfully refer to clause 2 of the General Rules Governing Tenders, wherein it is clearly stipulated that:**

“Participation in tendering is open on equal terms to all natural and legal persons of the member states of the European Union, the beneficiary country and any other country”

In this respect, this Board would point out that this is an open tender and the regulations for participation are clearly stated from the onset so that prospective bidders from India are not prohibited to participate.

- 3. The fact that India has an observer status in the WTO does not preclude bidders from that particular country to participate in Government**

Procurement Procedures of an EU member state unless, that particular country is prohibited to conduct trade with the beneficiary country for specific reasons.

- 4. This Board also notes that the preferred bidder is fully compliant and has the cheapest offer so that the evaluation process was carried out in a just and transparent manner.**

In conclusion, this Board opines that:

- a) This is an open tender and the General Rules Governing Tenders with particular reference to clause 2.1, allow the participation of bidders from any other country.**
- b) The EU regulations and directives do not prohibit participation from bidders from countries outside the EU.**
- c) No proof was presented as to why the preferred bidder, from India, should be disqualified for any wrongdoing on their part.**

d) It cannot find any justification to establish a reason as to why a bidder from India cannot participate in an open tender originating from an EU beneficiary country.

In view of the above, this Board,

- i. does not uphold Appellants' contention,**
- ii. upholds the Contracting Authority's decision in the award of the tender,**
- iii. directs that the deposit paid by Appellants should not be refunded.**

Dr Anthony Cassar
Chairman

Mr Lawrence Ancilleri
Member

Mr Carmel Esposito
Member

14 November 2019