

PUBLIC CONTRACTS REVIEW BOARD

Case 1400 – CFT 020-0390/19 – Tender for the Supply of Readymade Preterm Formula and Readymade Formula Suitable for 0-6 Months

The publication date of the tender was the 23rd April 2019 whilst the closing date was the 15th May 2019. The estimated value of the tender (exclusive of VAT) was € 9030 (Lot 1) and € 41,250 (Lot 2).

On the 16th September 2019 Vivian Corporation Ltd filed an appeal against the Central Procurement and Supplies Unit as the Contracting Authority on the grounds that the accepted bids were evidently abnormally low. A deposit of € 400 was paid.

There were five (5) bidders.

On 10th December 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 – Vivian Corporation Ltd

Dr Clement Mifsud Bonnici	Legal Representative
Dr Sylvan Aquilina Zahra	Legal Representative
Ms Denise Borg Manche	Representative
Mr Etienne Seychell	Representative

Recommended Bidder – Pemix Ltd

Dr Kevin Camilleri Xuereb	Legal Representative
Mr Keith Portelli	Representative
Mr Joe Camilleri	Representative

Contracting Authority – Central Procurement and Supplies Unit

Dr Marco Woods	Legal Representative
Dr Alison Anastasi	Chairperson Evaluation Committee
Mr Hristo Ivanov Hristov	Secretary Evaluation Committee
Dr Mario Caruana	Member Evaluation Committee

Interested Party – Alfred Gera & Sons Ltd

Dr Adrian Mallia	Legal Representative
Mr Robert Magri	Representative
Ms Christine Spiteri Paris	Representative

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

Dr Kevin Camilleri Xuereb Legal Representative of Pemix Ltd wished to bring to the attention of the Board and the parties present that the Secretary of the Board, Mr Harry Fenech was a past client of his. The Chairman pointed out that the Secretary was not involved in the formulation of decisions and asked all parties if they were in agreement that he should proceed with recording the Minutes. All parties signified their assent.

Dr Clement Mifsud Bonnici Legal Representative of Vivian Corporation Ltd said that this tender dealt with a sensitive subject matter as the product in question is a substitute for breast milk. The appeal was not based on a matter of money or costs but on the distortion of the market. Certain offers are not acceptable and should not be accepted by the Contracting Authority. Abnormally low offers are problematic as generally they are too good to be true. The basic principles of whether an offer is too low are well known such as genuine competition, proportionality and ability to fulfil contract. Two preliminary pleas have been raised in this matter. The first plea as to whether a tender is abnormally low can be dealt with by considering the principle that it cannot be accepted unless detailed costings are asked for. In this case all the Contracting Authority did, was to ask bidders to confirm their price. The evaluation committee are bound to seek detailed explanations. The second plea is regarding the financial value limit of the tender. The limit is not restricted if there is cross border interest in the tender – which in this case there is. There are precedents on low value bids which the Public Contracts Review Board (PCRB) has dealt with previously. Two of the offers submitted are ridiculous – one cent and ten cents per bottle respectively.

Dr Marco Woods Legal Representative of the Central Procurement and Supplies Unit (CPSU) stated that the Public Procurement Regulations (PPR) are very clear when it comes to abnormally low tenders. Article 9 (1) (b) states that if the value of the tender is below € 144,000 (the threshold) then the appeal should not be heard. The Board itself must practise self limitation and must follow the PPR.

The Chairman intervened to point out that the issue being considered in this case is the principle of an abnormally low tender immaterial of the value of that tender.

Dr Adrian Mallia Legal Representative for Alfred Gera & Sons Ltd said that in this case it struck one instinctively that it does not make sense to ignore the outcome of the tender simply because it was under the threshold. Public Authorities Regulations dictate that a public authority has to

consider all relevant points in reaching a decision. If a ridiculously low price was to be not considered it would be a relevant failure in administrative duty.

Dr Camilleri Xuereb expressed the view that the Board should not consider matters in abstract. Any judicial board must seek to see a complete picture in a positive manner. This Board's competence was to ensure that the Contracting Authority operated its role correctly, and the price was not within the remit of the Board.

Mr Hristo Ivanov Hristov (356568M) called as a witness by the Public Contracts Review Board testified on oath that as secretary of the evaluation committee he was the tender co-ordinator – he gathered information and published the tender on the platform. He stated that he was aware that the value of the tender was around € 42,000 for the bigger lot and € 9,000 for the smaller one. The financial value on this tender was based on the prices offered on a previous tender, which had worked out at an average price of 60 eurocents per unit. In the case of the present tender the committee was certainly not expecting offers of one cent and ten cents per unit even though they were hoping for bids from more than one supplier as they wanted to open up the market.

Questioned by Dr Woods witness said that he was not aware how many bidders had put in offers in the previous tender as he was not involved in that one. He was, however, aware that Pemix Ltd was the previous suppliers of the product.

Dr Alison Anastasi (398380M) called as a witness by the Public Contracts Review Board testified on oath that she was the Chairperson of the evaluation committee. She stated that the other members of the evaluation committee were Mr Hristov, Ms Charmaine Psaila, Dr Ryan Farrugia and Dr Mario Caruana. Witness confirmed that she and the other evaluators were familiar with the concept of abnormally low tenders. Once the committee noticed the low prices offered in this tender they raised the issue with the Departmental Contracts Committee (DCC) which advised them to confirm the price offered with the lowest bidders. The committee was not advised to investigate any further. She was made aware that since 2016 supplies were obtained from Vivian Corporation at 50 to 60 eurocents per bottle depending on which courier service was used. Since there were some problems with supplies the CPSU had to resort to Pemix to fill the gap. The current suppliers of 0-6 month's feeds was Pemix but due to an issue that arose with them the CPSU had to resort to an accelerated procedure – currently this feed was being supplied on direct order basis.

Questioned by Dr Woods witness stated that she had referred the matter of the low prices to two individuals from the DCC and was advised that since the tender was below the threshold it should not be considered as an abnormally low tender. She was advised that the committee should confirm the bid price with the tenderers and not to delve any further. The wording of the question to be asked was approved by the DCC.

Witness, in reply to a question from Dr Mifsud Bonnici, said that the price of 60 eurocents mentioned earlier is for 0-6 month's feeds and there was an open call. Referred to Doc VCL 4

(tabled by Appellants in their letter of objection) witness confirmed that apart from the preferred bidder there were three other competitors listed.

Mr Godwin Mangion (166262M) called as a witness by the Public Contracts Review Board testified on oath that he is the Director General of the Office for Competition. His responsibilities included advising on points of competition and restrictions thereon. In this instance he was approached to give his views on the effect the winning tender would have on the secondary market on the long term use of the product. Of particular concern was the advantage winner would have through access to new parents who were likely to carry on using the product that was given in hospital. It was a worrying aspect if only one firm wins the tender as this eliminates competition in the secondary market.

Witness confirmed that he had met personnel from the CPSU and the Director of Contracts and gave them his views in writing (letter tabled as Doc 1) suggesting that there should be a choice of product offered to parents at Mater Dei Hospital where the majority of births occur. Witness identified procedures being followed in Israel and Singapore to handle the same problem. Closed market conditions do not make it viable for other suppliers to compete as the market share would be restricted – this could also lead to higher prices.

Referring witness to a trail of e-mails (tabled as Doc 2) Dr Woods pointed out that the CPSU were following the PPR in that remedies were available if a bidder objected to a decision.

In reply to a question from Dr Mifsud Bonnici witness stated that generally public authorities followed advice given by the Office for Competition.

Questioned by Dr Camilleri Xuereb witness said that the opinion he had given was that, not to distort competition, a tender should be awarded to more than one supplier. He had only had access to the tender documents and had not been involved in prices as that was outside his terms of reference.

Dr Alison Anastasi was recalled as a witness in her role as Head of Procurement at the CPSU. She confirmed that the current tender followed decisions taken on the previous one. Mr Godwin Mangion had requested a meeting with the CPSU regarding the distortion of the market. The CPSU had explained why multiple choice tenders were not possible. There is a notion that parents will not change formula feeds after a hospital stay but Mr Mangion's decision is that actually nothing could be done.

Dr Mifsud Bonnici said that the claim by the CPSU that the abnormally low tender principle did not apply in this case (as tender is below the threshold) is not sustainable. The fundamental doctrine is that general principles still apply for abnormally low tenders if there are cross border contracts open to all. There is a whole string of cases heard by the PCRFB even though in each case the value was below threshold – namely cases 487,422,1010,1033,1034 and 1292 where the overriding concept was value for money and competition. The Contracting Authority due to an incorrect decision by the DCC asked for confirmation of price when it should have asked for an explanation

and a breakdown of costs as directed by the Maltese Court and the European Court of Justice. What Appellants are requesting is that the tender is referred back to the evaluation committee with an order to ask for a breakdown of costs and consider the bids in line with the four established principles of what makes an abnormally low tender. Unlike Case 1350 where the Board said that there was no discrepancy as the prices tendered were very close – in this case the difference is vast as expressed by witness Mr Hristov who testified that the committee was surprised at such low prices. The Contracting Authority must check the low bids against the average of other tender prices as outlined in paragraph 23 of the letter of objection.

CPSU claim that the Board has no competence to go into the merits of the costs when it is yet obvious that costs of one eurocent are totally unrealistic. The Board should realise that there is a hidden agenda in a race to the bottom to corner the market through parents sticking to the product after leaving hospital. Pemix is in a dominant position as they are the beneficiaries of a direct order to supply Mater Dei Hospital with 0-6 months' feeds. This is a predatory bid and Appellants would ask the Board to use their power to cancel the tender in view of the winner takes all situation or go in a different direction by instructing the evaluation committee to ask for detailed clarification on prices.

Dr Woods re-iterated that the law does not allow the PCRFB to intervene when the tender value is under the threshold - just like any other party the Board is limited by the principle of self limitation. The PCRFB should not have become involved in past cases when the value was below the threshold and they should not get involved now. The CPSU does not see the relevance of the testimony of Mr Mangion – he was merely expressing an opinion on having multiple suppliers and not on the prices offered in the tender.

Dr Camilleri Xuereb referred the Board to the very detailed letter of reply which set out his clients' case in full and insisted that their defence is that the Board must not interpret the law. He referred to Court of Appeal cases *Klentex Ltd* (27.10.2015) (where it was upheld that a claim on low prices does not apply in the case of low value tenders), *Grange Security Ltd* (24.7.2015) (where it was deemed that it was not necessary for a bidder to make a profit since there could be other reasons not related to profit for the low offer) and *Dimbros vs Alfred Galea* (it was not the competence of the evaluation committee to delve into whether a profit or loss was made). The Board should not be inclined to put too much weight on the evidence of Mr Mangion merely because of his position.

Dr Mallia stated that no submissions had been made by the evaluation committee that they had made any attempt to explain that the offer was not an abnormally low one - it was therefore obvious and self-evident that it was, and there was no possibility that it was not so. Unless the Board deals with the principle of abnormally low offers in this case, then that will become the norm and the ruling will be ignored in future.

Dr Woods said that the CPSU did not need to offer any explanations as they were following the instructions of the Department of Contracts. Should the Board decide on considering an

abnormally low offer on a tender that is below the threshold value that would be tantamount to ignoring the law and to reducing it to the extent of being of no value.

Dr Mifsud Bonnici finally made the point that if the evaluation committee was convinced of the existing law they would not have felt the need to refer the matter to the Director of Contracts. He referred to ECJ case C147/06 (SECAP) paragraph 20 which deals with the general principles of the treaty regarding equal treatment and lack of discrimination in tenders. The Director General, Mr Mangion is obliged by law to get involved as he has special competence on competition and is a State official.

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

End of Minutes

Decision

This Board,

having noted this objection filed by Vivian Corporation Ltd (herein after referred to as the Appellants) on 16 September 2019, refers to the claims made by the same Appellants with regard to the tender of reference CFT 020-0390/19 listed as case No. 1400 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 Clement Mifsud Bonnici

Dr Sylvan Aquilina Zahra

Appearing for the Contracting Authority: Dr Marco Woods

Whereby, the Appellants contend that:

- a) The tendered price of the preferred bidder is an abnormally low offer which should have been investigated prior to the recommendation for award.**

- b) There were two ridiculously low offers which do not make financial sense and for which the Contracting Authority should have asked for the relative costings of both bids.**

This Board also noted the Contracting Authority's 'Letter of Reply' dated 24 September 2019 and its verbal submissions during the hearing held on 10 December 2019, in that:

- a) The Authority insists that, after consulting with the Departmental Contracts Committee (DCC), it was advised that since the tender value was below the threshold of €144,000, there was no need to investigate further the successful offers' low price but a confirmation from same of the price quoted would suffice.**

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

Mr Hristo Ivanov Hristov duly summoned by the Public Contracts Review Board

Dr Alison Anastasi duly summoned by the Public Contracts Review Board

Mr Godwin Mangion duly summoned by the Public Contracts Review Board.

This Board has also taken note of the documents submitted by Mr Godwin Mangion witness and Dr Marco Woods which consisted of:

Document No. 1 Correspondence between witness and Central Procurement and Supplies Unit.

Document No. 2 Trail of emails confirming that the CPSU were following the Public Procurement Regulations.

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

- a) Competence of this Board to treat the issue of abnormally-low offers, in this particular tender which had a value less than €144,000 and**

b) Action that needs to be taken in cases of abnormally-low tenders in such eventualities.

Competence of this Board

1. This Board would respectfully refer to clause 9 (1) B of the Public Procurement Regulations wherein it is stated that:

“Without prejudice to the applicability of the other provisions of these regulations, the procurement process of public contracts:

The estimate value of which equals or exceeds the threshold of one hundred forty-four thousand euro (€144000) shall be issued, administrated and determined by the director on behalf of the Contracting Authority.”

In this regard, this Board would also refer to article 243 (1) of the Public Procurement regulation as follows:

“Abnormally low Tenders and Variant Solutions

240. (1) Contracting authorities shall require economic operators to explain the price or costs proposed in the tender where tenders appear to be abnormally low in relation to the works, supplies or services when the estimated value of these falls under regulation 9(1)(b).”

- 2. The above-mentioned clause does not prohibit, in any particular manner, this Board from treating cases of abnormally low offers for tenders below the threshold of €144,000. Article 9 (1) (b) of the Public Procurement Regulations (PPR) does impose that issuance and administration of the tendering procedure is determined by the Director of Contracts on behalf of the Authority. However, one should also take into consideration the fact that, this Board is in duty bound to accept and treat objections or call for remedies on all public tenders exceeding the value of €5,000.**

- 3. At the same instance, this Board would respectfully point out that the Public Procurement Regulations apply to all procurement financed from Public Funds, so that, it will appear abusive if the necessary examination of abnormally low offers is not applied for tenders of an estimated value below €144,000.**

- 4. This Board is only concerned about the procedural process which had to be carried out by the Evaluation Committee in their deliberations of abnormal low offer and in this respect, same Board would affirm that, it will not delve into the merit of costs and prices offered by the respective bidders, so that this Board opines that it is within its remit to establish**

whether, the procedure adopted by the Evaluation Committee in its deliberations of the offers was in conformity with the PPR.

Procedural process relating to abnormally low offers

5. Before rejecting an apparently abnormally low tender, the Contracting Authority must request in writing details of the consistent elements of the tender which are considered relevant for the appraisal or verification of its apparent anomaly.
6. In view of the evidence supplied by the tender, upon consultation, the Authority will verify the details and reasons given by the tenderer, to justify his tendered price. At the same instance, it is the duty of the Authority to allow the bidder concerned to demonstrate in detail the financial consideration behind the abnormally quoted price.
7. In this particular case, there was an abnormally low tender for Lot No. 1 and another one for Lot No. 2. The very low price quoted in both lots are glaringly low when compared to the average quoted index and the Authority's estimate value, so that, in this eventuality, the

Evaluation Committee had to investigate further the reasons behind the negligible price quoted by the bidder.

- 8. From the credible testimony of Dr Alison Anastasi this Board noted that the Evaluation Committee was aware of such a glaring discrepancy and referred the matter to the DCC. An extract from the testimony of Dr Anastasi will explain the action taken by the Evaluation Committee, in this respect viz.**

“Lawyer : Previously you said that you had sought direction from the DCC. Could you elaborate further?”

Witness : Yes, obviously when you are a board, you need to follow the regulations and the legislation and the guidance issued by the Department of Contracts, the regulatory authority. When you have a threshold of 144K you go to the DCC not the GCC. The DCC has a representative from the Contracts Department and in fact besides the DCC, for this case we also queried two different persons from the DOC department who were Niki and Lorraine Mangion Duca. And we queried if abnormally low

situations and with regards to the detailed cases can be eventually considered for such tenders, even not considering the financial threshold as per legislation and they said that we should not be tackling abnormally low prices but we still felt as a board to go to the DCC.

Chairman : What did they say?

Witness : They said that since it is below 144K, we should not consider it as abnormally low. However the board since they saw the difference in price range, we decided to go to the DCC. I queried the DCC myself and I said how can I go in such cases? Can I clarify? And they just approved that I clarify if the price bid by the company, if there was a mistake or not

Lawyer : So the evaluation committee board, when it saw the difference in prices, you queried the DOC. Now the DOC had directed and instructed the contracting authority that since this is a tender which falls below the 144K

threshold, only a confirmation on the price could be sought and there you were instructed not to delve any further as to the reasons for the price, am I correct?

Witness : Yes and in fact the question querying the suppliers was approved by DCC.”

From the above testimony, this Board notes that the Department of Contracts relied substantially on the fact that, since the tender estimated value was below the threshold of €144,000, same advised the Evaluation Committee not to delve deeper to establish as to why the offers were of such a low level of value, when compared to previous supplies of the same product from the same economic operator, so that the DCC advised the Committee to confirm the low quoted price only. In this regard, this Board insists that, in this particular case and eventuality, further investigation and explanations were the tools to be implemented to ensure transparency in Public Procurement.

9. It should be pertinently pointed out that, abnormally low offers can arise at all levels of Public Procurement and the evaluation procedure, in all cases, should endorse all the basic principles of Public Procurement,

which is the only way that Good Governance of Public Funds is ensured. In this particular case, it is evidently clear that the Authority did not obtain the necessary documentation and explanations which are to be requested in instances of abnormally low offers. The requested verification of the abnormally low quotes does not constitute adherence to the EU Directives in such instances.

In conclusion, this Board opines that,

- a) Article 9 (1) (b) of the Public Procurement Regulations does not hinder this Board from treating instances of the procedure which should be adopted in the case of abnormally low offers.**
- b) This Board is empowered to treat objections and call for remedies on tenders of an estimated value exceeding €5,000.**
- c) This Board is concerned about the method adopted by the Evaluation Committee in the treatment of abnormally low prices.**
- d) There exist two abnormally low offers which should be investigated further, by obtaining the necessary explanations and documentation**

from the particular bidder, so as to ensure Good Governance in Public Procurement.

In view of the above,

- i. does not uphold the Contracting Authority's decision in the award of the tender,**
- ii. directs that a fresh evaluation process be carried out on all the compliant offers,**
- iii. directs that Appellants' offer be reintegrated in the evaluation process,**
- iv. directs that, in its deliberations, the Evaluation Committee will take into consideration this Board's findings,**
- v. directs that the deposit paid by Appellants be fully refunded.**

Dr Anthony Cassar
Chairman

Mr Lawrence Ancilleri
Member

Mr Carmel Esposito
Member

19 December 2019