

PUBLIC CONTRACTS REVIEW BOARD

Case 1431 – CFT 019-0478-19 – Tender for the Supply of Three Hundred (300) Stainless Steel Wire Shelves for the CSSD Department at Mater Dei Hospital

The tender was published on the 24th May 2019 and the closing date of the call for tenders was the 13th June 2019. The estimated value of the tender (exclusive of VAT) was € 16,949.16.

On the 5th February 2020 Drugsales Ltd filed an appeal against Central Procurement and Supplies Unit as the Contracting Authority objecting to their disqualification on the grounds of their bid being deemed to be technically non-compliant. A deposit of € 400 was paid.

There were five (5) bidders.

On 27th February 2020 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Richard Matrenza as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellants – Drugsales Ltd

Dr Douglas Aquilina	Legal Representative
Mr Paul Madiona	Representative
Mr Jason Busutil	Representative

Recommended Bidder – Medina Healthcare Ltd

Mr Andrew Cutugno	Representative
-------------------	----------------

Contracting Authority – Central Procurement and Supplies Unit

Dr Marco Woods	Legal Representative
Eng Frankie Caruana	Chairperson Evaluation Committee
Mr Stephen Mercieca	Secretary Evaluation Committee
Mr Stephen Demicoli	Member Evaluation Committee
Mr Joseph Testa	Member Evaluation Committee
Mr Noel Borg	Member Evaluation Committee

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

Dr Douglas Aquilina Legal Representative for Drugsales Ltd said that Appellants' offer had been refused as according to the evaluation committee the shelf offered in the technical data sheet was different in shape to that specified in specification 3.11 in the tender document.

A sample of a shelf was exhibited by Appellants.

Dr Aquilina said that from the sample displayed it was very obvious that all the tender specifications regarding handles, shape, weight, sharp edges had been met and there was no reason why the product should have been refused. The technical data sheet was merely indicative of the product Appellants could supply.

Dr Marco Woods Legal Representative for the Central Procurement and Supplies Unit stated that if one compared the illustration in 3.11 in the tender and the illustration in the technical data sheet (Doc 1 attached to the letter of objection from Drugsales Ltd) one could see that it was a totally different product. Reference was made to paragraph 2 of Appellants letter of 20th February 2020 from which it was to be noted that they accepted that they had failed to confirm that their offer complied with the mandatory tender requirements in specification 3.11. The sample displayed at this hearing was different to that shown in the technical data sheet.

Mr Noel Borg (26067M) called as a witness by the Public Contracts Review Board testified on oath that he was the technical evaluator of the tender and explained the purpose of the shelves specified in the tender. Witness explained that the shelves had to have three lateral rods to take certain weights; they had to be stepped down, with lateral rods not recessed and no sharp edges. The technical sheet on which the tender was evaluated showed a product different to what was specified and different to the sample displayed at this hearing.

Questioned by Dr Aquilina witness confirmed that in answering specifications 3.7 to 3.10 in the affirmative Appellants had confirmed that they were meeting the tender specifications, however they had failed to answer specification 3.11.

The Chairman pointed out that the technical data sheet submitted did not match the requirements of the tender. It was essential for the data to confirm the product that was to be delivered since the evaluation committee were bound by the principle of self limitation.

Dr Aquilina said that the illustration in the technical data sheet should be accepted for what it is – pure illustrative purposes. In the tender submissions Appellants had confirmed that they were meeting all the various specifications in 3.7 to 3.10.

Dr Woods said that the technical data sheet was there to put the mind of the evaluation committee at rest that the offer matches the requirements of the tender and the assurance that the product

shown is what is being delivered. As pointed out the committee are bound by the self limitation principle.

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 Drugsales Ltd (hereinafter referred to as the Appellants) on 5 February 2020, refers to the claims made by the same Appellants with regard to the tender of reference CFT 019-0478-19 listed as case No. 1431 in the records of the Public Contracts Review Board awarded by Central Procurement and Supplies Unit (hereinafter referred to as the Contracting Authority).

Appearing for the Appellants: Dr Douglas Aquilina

Appearing for the Contracting Authority: Dr Marco Woods

Whereby, the Appellants contend that:

- a) Their offer was rejected due to the alleged reason that their product did not meet the stipulated specifications as denoted in clause 3.11 of the technical specifications. In this regard, Appellants maintain that their product meets all the technical specifications as stipulated in the tender document. Furthermore, Appellants insist that the technical literature**

submitted was merely an indicative illustration of the product being offered.

This Board also noted the Contracting Authority's 'Letter of reply' dated 12 February 2020 and its verbal submissions during the hearing held on 27 February 2020, in that:

- a) The Authority contends that the technical data sheet submitted by Appellants illustrated a product which is totally different from that stipulated in clause 3.11 of the technical specifications and in this respect, Appellants failed to confirm that their product complied with the specific requirements, as stipulated in the tender document.**

This same Board also noted the testimony of the witnesses, namely:

Mr Noel Borg duly summoned by the Public Contracts Review Board

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 opines that the issue that merits consideration is the technical literature submitted by Appellants.

- 1. First and foremost, this Board would respectfully point out that, when technical literature is requested, such documentation must confirm and complement the technical offer of the bidder. Such documentation forms**

an integral part of the technical offer so that, one has to ensure that what is submitted does confirm visually and technically the product, in all respects, which the bidder is offering.

- 2. At the same instance, one must also consider the fact that technical specifications fall under note 3 of Notes to clause 7: of the tender document, which clearly stipulates that:**

“No rectification shall be allowed. Only clarifications on the submitted information may be requested.”

This very important article limits completely the powers of the Evaluation Committee from rectifying the already submitted information or technical literature.

- 3. One must also point out that, it is the duty and responsibility of the bidder to ensure that prior to the submission of his offer, the documentation, especially technical literature where requested, conforms to the technical offer of his product or service. At the same instance, this Board would respectfully point out that, if the bidder is not certain about any of the technical requisites, he has the remedies available to seek clarifications prior to the submission of his offer**

4. In this particular case, under clause 3.11, the tender document stipulated, via an illustration, how the shelving is to be supplied. At the same instance, this Board was made aware of the importance of such a design and the purposes for which such shelving is to be utilized. The technical data sheet (Technical Literature) submitted by Appellants illustrated a totally different design from that clearly stipulated in clause 3.11 of the technical specifications of the tender document and the fact that this Board was shown a sample of Appellants' product, does not confirm the same submitted design as that denoted in clause 3.11 of the technical specifications.

5. On the other hand, the Evaluation Committee had to abide by the principle of self-limitation, so that no further enquiries or clarifications could be requested. The fact that Appellants are claiming that the design, on the technical data sheet, serves as a mere indication of the product, is not sufficient to give comfort to the Authority that the technical literature conforms with the product being offered by Appellants.

In conclusion, this Board opines that:

- a) The technical literature submitted by Appellants does not complement the technical specifications as duly declared in their technical offer form.**

- b) In all respects, the technical literature must give comfort to the Authority that the offered product is on the market and can be delivered. In this particular case, such an assurance was not documented in the manufacturer's technical literature.**

- c) It is the responsibility of the bidder to submit the technical literature, when requested, and to conform with the full specifications as dictated in the technical offer.**

- d) If in doubt, the Appellants had the remedies to seek clarifications prior to the submission of their offer and in this particular case, this Board notes that such remedies were not availed of by Appellants.**

- e) The Evaluation Committee carried out the evaluation process in a just, fair and transparent manner.**

In view of the above, this Board,

- i. does not uphold the Appellants' contentions,**

- 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

Dr Charles Cassar
Member

Mr Richard A Matrenza
Member

5 March 2020