

## **PUBLIC CONTRACTS REVIEW BOARD**

### **Case 1465 – CFT 020-0064/20 – Tender for all the Supply of Dual Chamber Pacemaker with Leads (MRI conditional)**

The tender was published on the 24<sup>th</sup> January 2020 and the closing date of the tender was the 24<sup>th</sup> February 2020. The estimated value of the tender (exclusive of VAT) was € 81,000.

On the 1<sup>st</sup> June 2020 Technoline Ltd filed an appeal against Central Procurement and Supplies Unit as the Contracting Authority objecting to their disqualification on the grounds that their bid was technically non-compliant. A deposit of € 410 was paid.

There were two (2) bidders.

On 27<sup>th</sup> July 2020 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Carmel Esposito as members convened a public virtual hearing to discuss the objections.

The attendance for this public hearing was as follows:

#### **Appellants – Technoline Ltd**

Dr James Muscat Azzopardi	Legal Representative
Dr Maria Grech	Legal Representative
Ms Damaris Lofaro	Representative

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

Dr Marco Woods	Legal Representative
Ms Rita Zammit	Chairperson Evaluation Committee
Mr Samuel Bonnici	Member Evaluation Committee

#### **Preferred Bidder – V J Salomone Pharma Ltd**

Dr Arthur Galea Salomone	Legal Representative
Mr Christopher Treeby Ward	Representative

Dr Anthony Cassar Chairman of the Public Contracts Review Board welcomed the parties. He noted that since this was a virtual meeting all the parties had agreed to treat it as a normal hearing of the Board. He then invited submissions.

Dr James Muscat Azzopardi Legal Representative of Technoline Ltd following up on the appeal letter said that the file containing the technical offer could not be opened and it was up to the Contracting Authority to prove that it was not able to open the file, and that the file was not corrupted whilst it was in its hands. With regard to the Authority's claim that due to Note 3 it could not seek either a clarification or rectification the Appellants maintain that since the information was provided the Authority was under an obligation to seek clarification. Reference was made to PCRB case 1216 where it was held that a corrupt file could be replaced.

Dr Marco Woods Legal Representative for the Central Procurement and Supplies Unit (CPSU) said that the letter of rejection had not been contradicted – it was a fact that the file could not be opened. This was unusual but sometimes it did happen. The Authority requested the Department of Contracts which in turn requested the EPPS system developer to investigate the problem and they confirmed the fact that the file was corrupted. The evaluation committee had to follow the self limitation principle to be fair in their decision. No clarification was possible under Note 3, as if a new file had been asked for, it would be tantamount to a rectification. Appellants' offer was unacceptable as it was incomplete.

Mr Samuel Bonnici (47270M) called as a witness by the PCRB testified on oath that he was an evaluator of the tender offers. He stated that the technical offer file could not open even when the opening process was attempted on different computers. The assistance of the Department of Contracts was sought to try to resolve the problem. Two bids were submitted on this tender and there were no problems with the other bid.

In reply to a question from Dr Muscat Azzopardi witness stated that he did not enquire as at what stage was the file likely to have been corrupted, and confirmed that he was advised that the committee could not request a clarification or rectification.

Mr Christopher Agius (180772M) called as a witness by the PCRB testified on oath that he was an IT section manager at the Department of Contracts. He stated that he had received an e-mail from Mr Samuel Bonnici regarding a 'pdf' file that could not open. In turn he referred the case to European Dynamics who were the service provider of the EPP system in use. On the 6<sup>th</sup> March 2020 the developer informed him that after technical evaluation it had been established that the file was corrupted at source. All other files including those of the other bid had opened correctly and there were no reports that there was anything unusual on the system that day.

Dr Leonidas Bardis called as a witness by the PCRB testified on oath that he was the Managing Director of European Dynamics and he had a degree in computer sciences. He explained that when zipped documents were unzipped they would be in exactly the same original condition. His Company had never come across an instance that files are corrupted after zipping.

Dr Muscat Azzopardi pointed out to the witness that the file in question was not zipped and after the file had been rejected it opened perfectly correctly on Appellants' system.

In reply to further questions witness stated that a 'pdf' file cannot be changed by anybody – that is the very nature of such a file and it makes no difference if the file is in a zip or not. If a file is corrupted it cannot be opened correctly later.

Dr Muscat Azzopardi said that no definite proof had been provided as at what stage the file had become corrupted. The evaluation committee were in duty bound to choose the best bid and should therefore have asked for a clarification or rectification that was the only way the level playing field would have been observed.

The Chairman mentioned that from the evaluation committee's point of view this was a case of a missing document.

Dr Woods re-iterated that the Authority cannot ask for a clarification on a document which cannot be seen or read. The tender was clear on that point and it would have prejudiced other bidders if the Authority had not treated all bids on a level playing field principle. Whether the file was zipped or not is immaterial as the committee had done everything in their power to check if the file could be opened- this was the only file that would not open. The Public Procurement Regulations were there to be followed and Appellants had provided no proof that the file had opened correctly after rejection.

The Chairman thanked the parties for the submissions and declared the meeting closed.

End of Minutes

---

## **Decision**

**This Board,**

**having noted this objection filed by Technoline Limited (hereinafter referred to as the Appellants) on 1<sup>st</sup> June 2020, refers to the claims made by the same Appellants with regard to the tender of reference CFT 020-0064/20 listed as case No. 1465 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 James Muscat Azzopardi**

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

**Appearing for the preferred bidder: Dr Arthur Galea Salomone**

**Whereby, the Appellants contend that:**

- a) Their main complaint refers to the fact that, the Authority is alleging that, their technical offer could not be opened through the e-PPS, at the receiving end. In this regard, Appellants maintain that, apart from the fact that, they had indeed submitted their technical offer through the online system, the Authority did not present evidence that such documentation could not be opened at their end.**
- b) They also contend that, since the information was provided to the Authority, the latter should have sought a clarification to remedy the situation.**

**This Board also noted the Contracting Authority's 'Letter of reply' dated 4<sup>th</sup> June 2020 and its verbal submissions during the virtual hearing held on 27<sup>th</sup> July 2020, in that:**

- a) The Authority insists that, after several attempts, the Appellants allegedly submitted technical offer could not be opened, so that, Appellants' offer was deemed technically non-compliant.**
- b) With regard to Appellants' second grievance, the Authority maintains that the technical offer falls under note 3 wherein, any rectification and/or clarification is not allowed.**

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

**Mr Samuel Bugeja duly summoned by the Public Contracts Review Board**

**Mr Christopher Agius duly summoned by the Public Contracts Review Board**

**Dr Leonidas Bardis 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 witnesses duly summoned opines that, the issues that merit consideration are twofold namely:**

- 1. Appellants' submission of the technical offer and**
- 2. Request by the Authority for clarification.**

**1. Appellants' Technical Offer**

- 1.1. First and foremost, it must be acknowledged that, the technical offer forms the core of the tender document. It is through the technical offer that the Authority is aware of the quality of the product or service which the bidder is offering.**
- 1.2. In this particular case, the Authority maintains that, Appellants' technical offer could not be opened by the Evaluation Committee, whilst, on the other hand, Appellants are insisting that they have submitted such documentation, through the e-PPS in the usual manner.**
- 1.3. At the same instance, this Board notes that the Authority made various attempts to open the file but to no avail and as a last resort, an enquiry**

**was sent to the Server Provider, who confirmed that, the document which was submitted was corrupted at source.**

- 1.4. This Board had to rely on technical expertise and from the testimony of Dr Leonidas Bardis, (the Server Provider), it was established that, it makes no difference whether the file is ‘Zipped’ or ‘Unzipped’, such a file cannot be opened correctly later on.**
- 1.5. Dr Bardis also confirmed that, at the time of submission of Appellants’ technical offer, the e-PPS was in good working order, so much so, that, the other offer for this particular tender encountered no problem through its submission online via the same system.**
- 1.6. This Board would also point out that, Appellants in their submissions did not provide evidence that, the file was not corrupted from their end, i.e. not at source. At the same instance, this Board is justifiably satisfied that, the Evaluation Committee did all that was possible from their end to open such a file prior to considering Appellants’ offer as technically non-compliant.**
- 1.7. With regard to Appellants’ claim that, the file opened perfectly correctly on Appellants’ system and that no proof was provided by the Authority to determine at what stage the file was corrupted, this Board would respectfully point out that, same Board takes into consideration the following issues:**

- **Direct evidence from the Server Provider that, at the time of submission of Appellants' offer, the e-PPS was in good working order.**
- **Whether 'Zipped' or 'Unzipped', the file can never be opened correctly afterwards if corrupted.**
- **No proof was presented by Appellants' to justify their claim that the file could be opened correctly on their system.**

## **2. Clarification Request**

- 2.1. With regard to Appellants' second contention that, the Evaluation Committee should have sought clarification upon encountering difficulties in the opening of Appellants' technical offer, this Board would respectfully point out that, clarifications are requested to clarify submitted documentation and not to effect a rectification.**
- 2.2. In this particular case, the Authority could not open Appellants' technical offer, so that, in actual fact, there was technical documentation missing in their offer. One must also point out that, the technical offer fell under note 3, whereby no rectification or clarification is allowed.**
- 2.3. This Board would also respectfully note that, if the Evaluation Committee requested mandatory documentation which was not included on Appellants' original offer, a rectification of Appellants' offer would have been effected, which, apart from the fact, that such an**

**action on the part of the Evaluation Committee, is not permitted, same Committee would have breached the principles of equal treatment and self-limitation.**

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

- a) Taking into consideration the submissions made by the parties concerned and also the valid technical testimony of Dr Bardis, the Server Provider, it is evidently clear that, Appellants' technical offer was not received at the Authority's end.**
- b) The Authority did its utmost to open Appellants' technical offer and followed the correct procedure to establish the reason for the non-receipt of the technical offer, prior to deeming Appellants' offer technically non-compliant.**
- c) At the time of submission of Appellants' offer, the e-PPS was in good working order and the other competing offer was submitted without encountering any problems.**
- d) The only explanation which could be deduced from the technical witness is that, the file containing Appellants' technical offer was corrupted at source.**
- e) The circumstances of this particular case did not entail or permit any clarification from the Authority as, such an action, would have amounted to rectification which is not allowed.**

**f) Appellants did not provide evidence that, the document (Technical Offer) was not corrupted from their end.**

**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  
*5<sup>th</sup> August 2020*

Dr Charles Cassar  
Member

Mr Carmel Esposito  
Member