

## **PUBLIC CONTRACTS REVIEW BOARD**

### **Case 1480 – CFT001-0172/20 – Tender for the Supply of Orthopaedic Shoes for Health Workers**

The tender was published on the 21<sup>st</sup> February 2020 and the closing date of the tender was the 12<sup>th</sup> March 2020. The estimated value of the tender (exclusive of VAT) was € 138,900.

On the 26<sup>th</sup> June 2020 JD Trading Ltd filed an appeal against the Central Procurement and Supplies Unit as the Contracting Authority objecting to their disqualification on the grounds that their bid was not compliant.

A deposit of € 695 was paid.

There were five (5) bidders.

On 28<sup>th</sup> August 2020 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Mr Lawrence Ancilleri and Mr Richard Matrenza as members convened a public virtual hearing to discuss the objections.

The attendance for this public hearing was as follows:

#### **Appellants – JD Trading Ltd**

Dr Cedric Mifsud	Legal Representative
Mr John David Farrugia	Representative

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

Dr Marco Woods	Legal Representative
Mr Joseph Sant	Member Evaluation Committee

#### **Recommended Bidder – BTI Ltd**

Dr Peter Fenech	Legal Representative
Mr Ian Attard	Representative
Mr Matthew Farrugia	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 agreed to treat it as a normal hearing of the Board. He then invited submissions.

Dr Cedric Mifsud Legal Representative for JD Trading Ltd said that Appellants had been advised that their offer was not compliant since they had failed to submit manufacturers' literature and the requested certificate. Appellants maintain that they did present the manufacturers literature and the ISO Certificate although it bore a date different to the one requested in the tender. Bidder offered an ISO certificate dated earlier than the one required by the tender that specified the date as 2012. The Contracting Authority had in fact approached Appellants and requested a copy of the previous literature but had subsequently issued the tender asking for more recent literature. Appellants offer was € 18,000 cheaper than the recommended bid.

Dr Marco Woods Legal Representative for the Central Procurement and Supplies Unit said that page 11 of the tender clearly specifies that the Orthopaedic Shoes must comply with ISO Certificate 20347-2012 but Appellants had submitted literature referring to 2004. No rectification was allowed due to Note 3 restriction. Although certain certificates were submitted no certificate stipulating conformity with ISO 20347-2012 was submitted in the initial bid. Appellants could have requested clarification to find out if they could have submitted documents other than those requested but this was not availed of and their offer was therefore not complaint.

Dr Mifsud pointed out that Appellants were offering the same product with the same ISO number though for a different year.

Dr Woods said that the once the requested certificate was not the one submitted the bid was not compliant and the evaluation committee had to practise self limitation and apply the principle of a level playing field for all bidders.

Dr Peter Fenech Legal Representative for BTI Ltd said that the question of price did not come into the appeal since the disqualification was on wrong documentation. It had been made clear that the requested certificate was not submitted and the set parameters had not been followed. No rectification was permitted and hence the argument that the documents presented were equivalent to what was requested was futile.

Dr Mifsud again repeated that the manufacturers' literature and certificate had been submitted and Appellant should not have been excluded on these grounds if the only problem was the ISO number.

Dr Woods concluded by stating that it was wrong to claim that documents had been submitted since presenting documents that did not meet the specifications was equivalent to not presenting them at all.

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 JD Trading Ltd (hereinafter referred to as the Appellants) on 26<sup>th</sup> June 2020, refers to the claims made by the same Appellants with regard to the tender of reference CFT 001-0172/20 listed as case No. 1480 in the records of the Public Contracts Review Board recommended for award by Central Procurement and Supplies Unit (hereinafter referred to as the Contracting Authority).**

**Appearing for the Appellants: Dr Cedric Mifsud**

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

**Appearing for Recommended Bidder: Dr Peter Fenech**

**Whereby, the Appellants contend that:**

- a) Their main concern refers to the fact that, their offer was unfairly dismissed due to the alleged assumption that they did not submit the Manufacturers' literature and the ISO certificate. In this regard, Appellants maintain that all such documentation was, in fact submitted, except for the fact that the ISO certificate denoted a different version than that requested in the tender dossier.**
- b) In view of the fact that Appellants' offer is €18,000 cheaper the Evaluation Committee should have requested clarification and not discarded their offer.**

**This Board also noted the Contracting Authority’s ‘Letter of reply’ dated 6<sup>th</sup> July 2020 and its verbal submissions during the virtual hearing held on 28<sup>th</sup> August 2020, in that:**

- a) The Authority maintains that, the technical specifications clearly stipulate that, Appellants must submit certificate to show that their product is in conformity with ISO 20347-2012, with their original bid. In this respect, Appellants did not submit such a certificate of conformity with the dictated ISO reference.**
- b) The Authority also contends that since the literature requested falls under Note 3, no clarification or rectification is permitted.**

**This Board, after having examined the relevant documentation to this appeal and heard submissions made by the interested parties opines that, the issues that merit consideration are two-fold namely:**

- a. The requirement stipulated in the tender dossier and**
- b. The incidence of clarification.**

**1. With regard to Appellants’ first grievance, this Board would respectfully refer to item 1 and item 2 of section 3 (Specifications) as follows:**

***“Item 1: Black Orthopaedic shoes for Male Nurses***

***Orthopaedic Shoe must be:***

- *In compliance with ISO 20347-2012 (bidders are requested to submit this certificate with their initial bid)*

**Item 2: Black Orthopaedic Shoes for Female Nurses and Midwives**

*Orthopaedic Shoe must be:*

- *In compliance with ISO 20347-2012 (bidders are requested to submit this certificate with their initial bid)”*

- 2. The above mentioned clauses clearly state that, bidders must submit, with their original submission, certificate to show that their offer complies with ISO 20347-2012. Appellants, in their offer, submitted a certificate denoting ISO 9001-2015 which is different from what was requested so that, in actual fact, the Authority did not receive what was denoted in the tender dossier.**
- 3. This Board would point out, as it has on many occasions, that when the Authority requests literature and certificates of conformity, such a request is not capriciously made, since it is the obligation of the Authority to ensure that what is being offered conforms to the standards it so directed in the tender dossier.**
- 4. At the same instance, this Board would respectfully remind the interested parties that, whilst it is the obligation of the Evaluation Committee to abide by the principle of self-limitation, so is the duty of bidders to submit all the information duly stipulated in the tender document. In this particular case,**

**the Appellants' failed to submit the certificate which proves that their product conforms with the specific ISO 20347-2012.**

- 5. This Board would also point out that, Appellants had all the remedies through which they could have clarified the issue of the ISO reference or requested a 'Call for Remedy' prior to the submission of their offer. In this regard, this Board notes that Appellants did not avail themselves of the legal remedies, so that, this Board does not uphold Appellants' first grievance.**
- 6. With regard to Appellants' second contention in that, the Evaluation Committee should have sought clarifications, this Board would respectfully remind the Appellants that, the Evaluation Committee can only seek clarifications on submitted information and in this case, the proper ISO certificate was not included in Appellants' offer so that, any clarification sought would have amounted to a rectification. Technical literature falls under Note 3 whereby no clarifications and / or rectifications are allowed. In this regard, this Board does not uphold Appellants' second grievance.**

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

- a. Appellants failed to submit the certificate denoting that their product conforms with ISO 20347-2012, as duly stipulated in the tender dossier.**
- b. The Evaluation Committee could not ask for clarifications as technical literature fell under Note 3.**

- c. Appellants failed to avail themselves of the remedies, prior to the submission of their offer.**

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

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

Dr Anthony Cassar  
Chairman

Mr Lawrence Ancilleri  
Member

Mr Richard A Matrenza  
Member

*2<sup>nd</sup> September 2020*