

PUBLIC CONTRACTS REVIEW BOARD

Case 1501 – CFQ009 – 2207-20 – Call for Quotations for the Supply of Qty One (1) Portable Pachymeter, as part of the Refurbishment at Gzira Health Centre

The tender was published on the 25th June 2020 and the closing date of the tender was the 8th July 2020. The estimated value of the tender (exclusive of VAT) was € 5,500.

On the 24th September Enviromed (Malta) 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 the cheapest compliant offer.

A deposit of € 400 was paid.

There were six (6) bids but four (4) bidders.

On 16th October 2020 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a public virtual hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellants – Enviromed (Malta)

Dr Matthew Paris	Legal Representative
Mr Noel Delia	Representative

Contracting Authority – Central Procurement and Supplies Unit

Dr Marco Woods	Legal Representative
Mr Stephen Mercieca	Chairperson Evaluation Committee

Recommended Bidder – Bioscint Engineering Ltd

Mr Carl Azzopardi	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 Matthew Paris Legal Representative for Enviromed (Malta) said that Appellants' first complaint was that the letter of disqualification sent to the firm was addressed to Enviromed Malta Ltd, an entity that does not exist and therefore that letter of rejection should be declared as void. Central Procurement and Supplies Unit (CPSU) treated this serious error as a 'mere' matter. Bearing in mind that letters were sent

by them – one to Enviromed Malta Ltd and one to AB Imports Ltd when neither entity has anything to do with Mr Noel Delia this is a very serious error and Appellants could have caused serious trouble by taking legal action at the later stage of contract signing. PCRБ should admonish CPSU on this point and bear this in mind regarding the deposit when the outcome of this appeal is decided.

Appellants' second complaint is that the technical specifications in the tender lead to only one supplier being in a position to meet the requirements, which in turn raises a third point as to how the preferred bidder's offer could be at such a low price. CPSU argues that the difference is only € 2825 but this represents 50% of the value of the tender. The price offered by the preferred bidder is lower than the price at which the product supplier sells this piece of equipment – quoted by them at € 4138 but offered in the tender at € 3466. Since the tender is for a single item there is no question of discounted bulk buying here. There is a probability that the offer price did not include the extra second probe in which case the offer fails as it is not delivering what was requested. It is obvious that the evaluation committee failed to follow the rule laid down in ECJ Case 599/10 to seek an analysis of the price offered.

Dr Marco Woods Legal Representative for the Central Procurement and Supplies Unit said that the difference in the name on the letter of rejection was a simple error – the letter showed the correct tender number which clearly refers to the right candidate. There is no point in Appellants trying to justify this point as an excuse for the Board not to hear this case.

On the point of a single supplier for this product Appellants should have sought a pre- contract remedy whilst with regard to the abnormally low price all bid prices have been published and it can be seen that the offer of the preferred bidder was not the cheapest. There is no substantial difference in price between the two offers and Appellants have not produced any documents backing their claims regarding prices. The Contracting Authority objects at these prices being bandied about and given consideration. There was also no indication that the models offered were the same.

Mr Noel Delia (165872M) called as a witness by the Appellants testified on making a declaration that he was a director of the Appellant trading company. He stated that this piece of equipment was first requested by the Health Authorities in 2015 – this product was unique in its features and the contract was awarded to him. Further tenders requested exactly the same product. In 2020 the manufacturers produced an enhanced product with better features. The price of the pachymeter plus carrying case and one probe is US\$ 2900. The manufacturers stated that they had not supplied the unit to anyone else in Malta but another company had asked for a quotation on the product. In this case the price quoted was US\$ 2800 probably for a refurbished unit. The tender specified two probes with the unit hence the final cost should have been \$ 2800 plus extra probe \$ 800 plus freight \$ 180 making a total of \$ 3860 equivalent to € 3590 at the then rate of exchange and without considering any profit margin.

Dr Woods requested the verification of the figures mentioned by Mr Delia which Dr Matthew supplied through copies of proforma invoice and e-mails (Docs 1).

Mr Stephen Mercieca (162469M) called as a witness by the Public Contracts Review Board testified on oath that he was the Chairperson of the Evaluation Committee. He stated that the Committee had noticed that there were two offers at lower prices, but they just accepted them and did not investigate any further; as far as the evaluators were concerned the cheaper offer was technically compliant.

Questioned by Dr Paris witness stated that the products offered by the preferred bidder and the Appellants were the same. At the evaluation stage the committee did not take into consideration any difference in prices.

Dr Paris said that on the first point he raised, the Board has enough information to establish that a mistake was made and that fact is agreed by both sides. On the second grievance the information regarding the difference in prices is also now known. The Appellants have a relationship with the supplier and has details of prices the products are offered at. The price at source is higher than the tendered price – that is a fact which has been proven and not been contested, and it is up to the PCRB to decide if the offer is abnormally low. The position is that Appellants' price is 50% higher than that of the preferred bidder, the products offered are identical and the evaluation committee saying that it ignored the difference in price at the time with no arguments being put forward contesting these points. Appellants offer is the only one compliant at the correct price. Mr Delia in his testimony confirmed that the price offered by his firm is the correct one and it is therefore clear that the preferred bidder offer is at a low figure. Department of Contracts Circular 12/2020 said that such similar cases should be investigated and further information sought. An abnormally low offer is irregular according to the Public Procurement Regulations.

Dr Woods emphasized that what Mr Delia had referred to was an estimate sent to the preferred bidder but no evidence had been produced that the product had been sold at that price. The exchange rate in July in fact gave a lower final price, and therefore it is not correct to state that the price offered is cheaper than the manufacturer's cost and there is no issue on what the percentage profit should be. The tender therefore was evaluated correctly and should stand.

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 Environmed (Malta) (hereinafter referred to as the Appellants) on 24th September 2020, refers to the claims made by the same

Appellants with regard to the tender of reference CFQ 009-2207-20 listed as case No. 1501 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 Matthew Paris

Appearing for the Contracting Authority: Dr Marco Woods

Appearing for the Preferred Bidder: Mr Carl Azzopardi

Whereby, the Appellants contend that:

- a) The Authority's 'Letter of Rejection' was incorrectly addressed to 'Environmed Malta Ltd', an entity which does not exist, so that the letter of rejection should be declared as void. At the same instance, Appellants point out that, they received correspondence pertaining to third parties with no connection at all to Appellants' offer.**
- b) Since, there is only one supplier for this product, Appellants are well aware of the cost of the product ex-works and when shipping costs are included, the price quoted by the preferred bidder is below cost, so that, the preferred bidders' offer is abnormally low and in this respect Appellants maintain that, the Evaluation Committee failed to investigate such an issue.**

This Board also noted the Contracting Authority’s ‘Letter of reply’ dated 5th October 2020 and its verbal submissions during the virtual hearing held on 16th October 2020, in that:

- a) With regard to Appellants’ first contention, the Authority admits that such occurrence was a genuine clerical error; however, the tender identification number was correct.**
- b) The Evaluation Committee did notice that two of the offers quoted a low price, however, one of these offers was technically compliant and, in this regard, the Evaluation Committee did not investigate further. At the same instance, the Authority maintains that Appellants did not produce any documentary evidence to back their claims.**

This same Board also notes the testimony of the witnesses namely:

Mr Noel Delia duly summoned by Environmed (Malta)

Mr Stephen Mercieca 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 two-fold namely:

- a) ‘Letter of Rejection’ and**

b) The Preferred Bidder' Offer

- 1. With regard to Appellants' first contention, this Board would point out that, the 'Letter of Rejection' sent by the Authority to Appellants, contained a grave error in that, it was addressed to an entity (whether it exists or not) which did not participate in the tender. It is a fact that, the tender identification number referred to Appellants' offer, and that the occurrence was a clerical error, however, such slipshod work should be avoided and the originators of such correspondence should be more careful and responsible.**
- 2. This Board was also made aware that, Appellants were in receipt of correspondence relating to other competing bidders in the same tender. In this respect, this Board would remind the Authority to apply more diligence in sending the appropriate correspondence to the correct addressee.**
- 3. With regard to Appellants' second grievance, this Board feels that, it would be opportune to remind Evaluation Committees, in general, what constitutes an abnormally low offer and what action needs to be taken by the Evaluation Committees, in such circumstances.**
- 4. In the current economic climate, there is often keen competition between economic operators that submit competitive, low-price bids in order to secure a tender. However, it may also be the case that low-priced tenders are "too good to be true" and will be very poor value for money or will not be delivered**

at all. It is in this context that the concept of “Abnormally Low-Tenders” arises.

5. The EU Directive and the Local Public Procurement Regulations contain provisions for dealing with tenders that are suspected of being abnormally low. These rules enable Contracting Authorities to avoid negative consequences of accepting a tender that appears extremely advantageous but in practice, is not viable. These rules are also aimed at supporting genuine competition between economic operators and reducing unfair advantages.
6. The first ‘Red Light’ which shows an extremely low offer is obviously the price variance from the rest of the competing offers. In this respect, the Evaluation Committee should first carry out a small exercise to establish that, the particular offer does indeed represent an unreasonably low offer and in practice the following steps should be considered through the following action:
 - An analysis of the price proposed by the bidder made in comparison with the objective of the particular procurement.
 - A comparison of the tendered price with the estimated value of the tender.
 - A comparison of the tendered price with the average price of the other competing offers.
7. Once the difference is identified, the Evaluation Committee is obliged to discuss such variance with the economic operator and investigate the cause of such a variance in price.

- 8. In this particular case, the preferred bidder' price was €3,466 as compared with competing prices ranging from €2,700 to €9,246 representing an average price of the competing bids of €6,582. From the very outset, the preferred bidders' price seems abnormally low, representing 53% of the average competing price.**
- 9. The Evaluation Committee had the obligation to summon the bidder with the lowest price and request explanations as to the breakdown of their offer. The explanation should promote assurances that, the bidders had understood what is being required and that they can, through the quoted price, execute the stipulated services to the full satisfaction of the Contracting Authority. The explanations given by the bidders must be sound and financially logical. In this regard, this Board notes that, the Evaluation Committee did not carry out this mandatory exercise but relied completely on the information submitted by the bidder. The Evaluation Committee should take into consideration, in adjudication, the preferred bidders' justification of his price factors such as misunderstanding or misinterpretation of the tendered service, underestimation of risks and non-compliance with social obligations. Such considerations would ensure that the successful offer will not lead to unfortunate circumstances which are detrimental to the tendered service and the Authority.**

In conclusion, this Board opines that:

- a) The preferred bidders' offer is abnormally low.**
- b) The Evaluation Committee failed to investigate and obtain valid reasons for the level of the quoted price of the preferred bidder.**

In view of the above, this Board,

- i. Does not uphold the Contracting Authority's decision in the recommendation of award**
- ii. Directs that the Evaluation Committee investigates the offer of the preferred bidder and obtains the necessary explanations, as duly described above**
- iii. Directs that, after having obtained the necessary explanations from the preferred bidder, a re-evaluation process be carried out on all the offers**
- iv. Directs that the deposit paid by appellants should be fully refunded.**

Dr Anthony Cassar
Chairman
21st October 2020

Dr Charles Cassar
Member

Mr Lawrence Ancilleri
Member