

PUBLIC CONTRACTS REVIEW BOARD

Case 1511– CFQ026-2322/20 – Tender for the Supply of White Water Paint

The tender was published on the 17th September 2020 and the closing date of the tender was the 28th September 2020. The estimated value of the tender (exclusive of VAT) was € 5,500.

On the 28th October Berger Paints (Malta) 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 the cheapest technically compliant.

A deposit of € 400 was paid.

There were four (4) bidders.

On 16th November 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 – Berger Paints (Malta) Ltd

Dr Mark Refalo	Legal Representative
Mr Andrew Grech	Representative

Contracting Authority – Central Procurement and Supplies Unit

Dr Marco Woods	Legal Representative
Mr Hristo Ivanov Hristov	Chairperson Evaluation Committee
Mr Patrick Cuesta	Member Evaluation Committee

Recommended Bidder – Vella Falzon Building Supplies Ltd

Dr Thomas Bugeja	Legal Representative
Mr Alexis Vella Falzon	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 Marco Woods Legal Representative for Central Procurement and Supplies Unit as a preliminary plea stated that this tender was below the threshold limit for abnormally low tenders and the appeal should not be heard by the Board.

Dr Mark Refalo Legal Representative for Berger Paints (Malta) Ltd stated that Appellants would not be pursuing that point but the fact that no proper testing as required in the tender had been carried out and requested the testimony of a member of the evaluation committee.

Mr Patrick Cuesta (363964M) called as a witness by Appellants testified on oath that he was an evaluator on this tender. He said that as far as he knew the tender asked for normal paint to specifications laid down by Mater Dei Hospital staff. The evaluation committee did not go into details of specifications or whether the product met Class 2 classification as required in the tender; they merely relied on the confirmation of the supplier that the product met the requirements of ISO 11998.

Mr Noel Apap (189475M) called as a witness by Appellants stated on oath that he co-ordinated the evaluation and the paperwork. Appellants originally were thought to be not compliant, until they referred the evaluation committee to the data sheets submitted. The committee then asked for samples of the paint to make sure that it met their requirements. There was no requirement to check if the sample met the ISO standard as the suppliers made a declaration to this effect.

Questioned by Dr Refalo witness stated that the Authority required a paint that did not need a primer coat and the paint offered met this specification as the tests carried out proved.

Mr Andrew Grech (26874G) called as a witness by Appellants testified on oath that he is a Director of Berger Paints (Malta) Ltd. He explained that paint classified as Class 2 could withstand cleaning and wet scrubbing many times and needed testing to ISO standards. The raw materials required to produce it were expensive and the process lengthy – it was surprising therefore that having asked for samples on the 15th October the Authority published its recommendation on the 19th October which indicates that no proper testing had been undertaken as this usually takes around 15 days.

In reply to a question witness stated that the evaluation committee had simply asked for samples and gave no indication that they were testing the paint to see if it fulfilled ISO 11998 requirement.

Dr Refalo said that from the testimonies heard it was obvious that the evaluation committee had no inkling as to what Class 2 and ISO 11998 were – they simply went by what was stated on the forms and as a result they concluded that the high grade paint required was fulfilled by paint at an ordinary cheap price.

Dr Marco Woods Legal Representative for the Central Procurement and Supplies Unit said that the appeal seemed to hinge on price which could not be considered. As regards the testing of the paint samples the evaluator had confirmed that the smell, flaking and colour fulfilled the tender requirements, and they had observed the self limitation principles as all necessary declarations had been submitted. Once the Authority was satisfied at the outcome no further questioning was necessary.

Dr Thomas Bugeja Legal Representative for Vella Falzon Building Supplies Ltd said that it has not been proven that the product of the recommended bidder is technically not compliant.

Dr Woods said that the appeal was based on two grievances – the one on price has to be ignored and the Board's decision must be based on the second contention which dealt with the product.

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 Berger Paints (Malta) Ltd (hereinafter referred to as the Appellants) on 28th October 2020, refers to the claims made by the same Appellants with regard to ‘Call for Quotations’ (CFQ) of reference CFQ 026-2322/20 listed as case No. 1511 in the records of the Public Contracts Review Board recommended for award by the Central Procurement and Supplies Unit (hereinafter referred to as the Contracting Authority).

Appearing for the Appellants: Dr Mark Refalo

Appearing for the Contracting Authority: Dr Marco Woods

Appearing for the Preferred Bidder: Dr Thomas Bugeja

Whereby, the Appellants contend that:

- a) The Evaluation Committee should have applied the procedure for ‘Abnormally-Low Offers’ in respect of the offer submitted by the recommended bidder and should have investigated the price being quoted by same.**

- b) Although the Contracting Authority requested samples, not enough testing was carried out to ensure that the product being offered by the recommended bidder was technically compliant.**

This Board also noted the Contracting Authority's 'Letter of reply' dated 6th November 2020 and its verbal submissions during the virtual hearing held on 16th November 2020, in that:

- a) The Authority maintains that, in accordance with Legal Notice 196 of 2020, the provisions for abnormally low tenders do not apply in procurement below an estimated value of €10,000.**
- b) The Authority also insists that, the necessary tests with regard to the application, odour level, colour and flaking of the product, were carried out and the recommended bidders' offer was fully compliant.**

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

Mr Patrick Cuesta duly summoned by Berger Paints (Malta) Ltd

Mr Noel Apap duly summoned by Berger Paints (Malta) Ltd

Mr Andrew Grech duly summoned by Berger Paints (Malta) Ltd

This Board would refer to the Preliminary Plea raised by CPSU whereby same Authority is contesting Appellants' first grievance in that, the issue of 'Abnormally

Low Offers’ should not be considered by this Board since the estimated value of this particular procurement under appeal, has an estimated value of less than €10,000.

This Board, after having considered the Authority’s Plea, would respectfully refer to an extract from the Legal Notice 196 of 2020 which came into force on 15th May 2020 and which stipulates that:

“Thus the provisions of abnormally low tenders are now applicable to procurements with an estimated value exceeding €10,000 excluding VAT”

In this regard, this Board upholds the Contracting Authority’s Preliminary Plea and directs that Appellants’ first contention be disregarded.

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 issue that merits consideration is the application and testing of samples carried out by the Authority.

- 1. With regard to Appellants’ contention that the Authority did not carry out the appropriate testing on the product to establish the recommended bidders’ offer technical compliance, this Board would refer to the testimony of Mr Patrick Cuesta who confirmed that, the product offered by the preferred bidder met the requirements of ISO11998, according to the confirmation from the supplier of the product. In this respect, this Board notes that, compliance**

with the ISO standard and Class of paint was not actually tested by the Evaluation Committee, but they simply relied on the declaration submitted by the manufacturer.

- 2. Appellants maintain that, since the paint being requested was classified as ‘Class 2’, the testing of samples had to be carried out over a longer period than that allocated by the Evaluation Committee and in this respect, no proper testing of samples was carried out. Notwithstanding the fact that no evidence was presented to prove that the Preferred Bidders’ product is not technically compliant, this Board opines that the type of paint required to be classified as Class 2 was completely ignored by the Evaluation Committee during the testing period.**
- 3. This Board also notes that testing was in fact carried out on samples to ascertain compliance with regard to the application of the product on different surfaces, odour level, colour, flaking and coating coverage. However, this Board would refer to the technical specification stipulated in the tender document under 2.1. wherein it is stated that:**

“The paint shall be environmental friendly type and shall have a wet scrub resistance class 2 according to ISO 11998 (BS 3900-FIT) etc.”

In this respect, this Board would be comfortably assured of the compliance of the chosen product if the samples were tested to establish a wet scrub resistance to Class 2 standard. It must also be noted that, from the submissions

made by the evaluator, there was lack of knowledge of what constitutes a ‘Wet Scrub Resistance Class 2’.

In conclusion, this Board opines that:

- a) The technical specifications must not only be respected but mandatorily adhered to by the Evaluation Committee. When samples are requested by the Contracting Authority, such samples must be tested to ensure that they conform with the specifications contained in the tender document. In this regard, this Board noted lack of knowledge of what is being stipulated as Class 2, by the Evaluation Committee.**
- b) The tests carried out of samples do not convince this Board that, proper testing was carried out by the Evaluation Committee to establish that such samples complied with a ‘Wet scrub Resistance Class 2 as per ISO 11998’.**

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 requests a new set of samples of all the offers and carries out proper testing procedures to determine the full compliance with Class 2 of ISO 11998 and re-evaluate all the offers thereafter,**
- iii. Directs that the Evaluation Committee must be composed of at least two members,**

iv. Directs that the deposit paid by Appellants should be fully refunded.

Dr Anthony Cassar
Chairman
20th November 2020

Dr Charles Cassar
Member

Mr Lawrence Ancilleri
Member