

## **PUBLIC CONTRACTS REVIEW BOARD**

### **Case 1521 – RFP 027-6103/2020 – Request for Participation (Negotiated) for the Outsourcing of Swabbing Centres for Rapid Antigen Point of Care Testing**

The tender was published on the 27<sup>th</sup> October 2020 and the closing date of the tender was the 30<sup>th</sup> October 2020. The estimated value of the tender (exclusive of VAT) was not stated.

On the 16<sup>th</sup> November 2020 Healthcare First Ltd filed an appeal against the Central Procurement and Supplies Unit objecting to the cancellation of the tender after it had been awarded to them.

A deposit of € 400 was paid.

There were two (2) bidders.

On 10th December 2020 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Mr Lawrence Ancilleri 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 – Healthcare First Ltd**

Dr Clement Mifsud Bonnici	Legal Representative
Dr Ryan Buhagiar	Representative

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

Dr Marco Woods	Legal Representative
Dr Alison Anastasi	Representative
Mr Karl Farrugia	Representative
Ms Rita Turchett	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 Clement Mifsud Bonnici Legal Representative for Healthcare First Ltd said that the point of the appeal was that the tender, issued as a negotiated procedure, was amended, bids submitted, Appellants were advised that they were successful and within a matter of hours cancelled. Since then Appellants have been trying to find out from the Contracting Authority the facts leading to the revocation of the award but the latter failed to reply and have given no reason or details for the decision. The successful bidder has been treated badly and under the circumstances, at least, the deposit paid should be returned.

Dr Marco Woods Legal Representative for the Central Procurement and Supplies Unit said that the Authority had no objection to the return of the deposit. As regard the reason for the cancellation the Authority wished to produce a witness.

Dr Alison Anastasi (398380M) called as a witness by the Central Procurement and Supplies Unit testified on oath that she is the Head of Operations, Procurement at the CPSU and that she was not involved in the tender process. Any testimony given will be based on what had been related to her by others. Initially an internal clarification had been issued to update the terms of the tender but it transpired that the document was only partly uploaded and no standstill period had been indicated. As a result the evaluation was inconsistent and incorrect. The decision was taken to cancel the present tender and re-issue it in line with guidelines.

Questioned by Dr Mifsud Bonnici witness stated that she made enquiries as to what had gone wrong on receipt of the letter of appeal. The information was gathered from other sources and she was informed that the swabbing centres were changed from two in the Western and Northern Region to one only in the Northern Region. The normal practice when the terms of a tender are changed is to cancel the tender and re-issue.

Asked where the ambiguity was in this change, witness stated that there was a change of scope and specifications in deleting one Region as well as the financial bid form had not been uploaded. Witness said that she had not seen the bids but was aware of the financial offer of the two bids submitted. After the award of the offer to Appellants the evaluation committee realised that there was certain documents missing from the losing bidder's offer, and that these would change the outcome.

Witness confirmed that a negotiated process has no time limit and that the Appellants offer a swabbing service already. The changes in the terms affected the losing bidders as they did not supply full information through failing to submit the financial bid. They also lacked a licence to operate a hospital.

Dr Marco Woods said that the witness had testified that the parameters had been changed and that not all documents had been uploaded and this affected the outcome, which was reason enough to cancel the tender.

Dr Miriam Dalmas (368564M) called as a witness by the Public Contracts Review Board testified on oath that she was the Chairperson of the Evaluation Committee. She said that two bids had been received - one had a detailed breakdown of costs whilst the second one showed just a global sum (in a covering letter) with a big difference in the bid values submitted. The committee felt they had to disqualify the lower bid due to the lack of a breakdown of the financial figure and because the bidder did not state that they had a licence to operate a hospital: these were the only two reasons for their disqualification.

In reply to a question from Dr Woods witness stated that later it was realised that the reason why the bid form was not complete when submitted was due to the fact that the form had not been uploaded.

Dr Mifsud Bonnici expressed the view that there was no need to cancel the tender but it should be awarded to Appellants. The question lies in how the evaluation was managed and the tender can only be

cancelled if that offers the best solution – when various routes to a solution are available the least onerous one should be chosen. Reference was made to ECJ Case 195/08 backing this course of action.

The Chairperson of the Evaluation Committee confirmed that the other bidder had made the fatal mistake when they failed to state that they had a hospital licence; there was therefore no alternative except to exclude the bid. This holds true as a valid reason for exclusion even ignoring the question of the lack of the bid form. Appellants offer was much closer to the tender value whilst the other bid was abnormally low. The Board should declare that the award of the tender should stand.

Dr Woods said that the point regarding an abnormally low tender should not be considered as it was not part of the appeal. The Board should focus on the fact that the bids were made on different documents in this call: the process therefore was faulty from the start. The financial bid form was not uploaded which was reason enough for the tender to be cancelled as it gave a fundamental advantage to one party – there simply was no level playing field. The Board cannot but support the cancellation due to the shortcomings on the part of the Contracting Authority.

Dr Mifsud Bonnici said that the losing bidder submitted an erroneous bid and even the lack of a financial bid apart, could never qualify; moreover they lost all rights as they did not appear on the appeal. Adhering to Regulation 93 of the Public Procurement Regulations was the best course of action and the best solution in this case.

Dr Woods concluded by stating that the Appellant was requesting an RfP award that is faulty from the start and that had problems in its management. The call is faulty and therefore there is no level playing field.

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 Healthcare First Ltd (hereinafter referred to as the Appellants) on 16<sup>th</sup> November 2020, refers to the claims made by the same Appellants with regard to the ‘Request for Proposal’ (RFP) of reference RFP 027-6103/2020 listed as case No. 1512 in the records of the Public Contracts Review Board.**

**Appearing for the Appellants:**

**Dr Clement Mifsud Bonnici**

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

**Whereby, the Appellants claim that:**

- a) **Their first contention refers to the fact that, they were recommended for the award of the RFP and strangely enough, within a matter of hours, they were informed that the RFP was being cancelled. Appellants requested explanatory reasons for such an abrupt change of decision. However, the Authority failed to provide the information so that, Appellants had no other option but to file an urgent application to the Public Contracts Review Board to obtain the reasons behind such a decision.**
- b) **Appellants also maintain that, since their offer was the only compliant bid, the RFP should not be cancelled. At the same instance, the Authority should also take into consideration that the offers are now public and cancellation is not the appropriate action to be taken.**

**This Board also noted the Contracting Authority's 'Letter of reply' dated 25<sup>th</sup> November 2020 and its verbal submissions during the virtual hearing held on 10<sup>th</sup> December 2020, in that:**

- a) **The Authority contends that, through an internal investigation, it was noticed that the bidders did not compete on a level playing field, as the financial bid**

**form was not uploaded to one of the competing bids. In this regard, the Authority maintains that, the evaluation process was not carried out in accordance with the principles of equal treatment and level playing field, so that, the Authority had no other option but to cancel the tender.**

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

**Dr Alison Anastasi duly summoned by the Central Procurement and Supplies Unit**

**Dr Miriam Dalmas 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:**

- 1. Appellants' urgent application for information and**
- 2. Cancellation of the RFP**

- 1. Appellants' Urgent Application**

- 1.1. First and foremost, this Board cannot but emphasize that, upon recommendation of a cancellation of a tender, the Authority is obliged to give the specific reasons for such a cancellation. It must also be pointed out that the reasons to be given by the Contracting Authority must contain adequate detailed information to enable an aggrieved bidder to formulate his appeal and refer to the applicable provisions.**

**1.2. In this particular case, Appellants made requests for such explanations and up to the date of the hearing of this appeal, the Authority had failed to provide the necessary information to the Appellants. Although this Board noted that the Authority wished to submit the reasons being requested by Appellants, through a technical witness during this hearing, such an explanation, on the part of the Authority, should have been taken upon Appellants' request, without hesitation.**

**1.3. With regard to Appellants' urgent application, this Board upholds Appellants' grievance and confirms that it was the duty and obligation of the Authority to provide the specific and detailed reasons for the recommendation of the cancellation of the RFP.**

## **2. Cancellation of the RFP**

**2.1. With regard to Appellants' second grievance, this Board notes that, Appellants' offer was fully compliant, and the Evaluation Committee justified their adjudication thereto. At the same instance, it was also established that the other participating offer was not technically compliant as it did not produce confirmation that it had a licence to operate a hospital.**

**2.2. Apart from the non-submission of licence confirmation, the other bidder did not submit the financial bid form. However, from the submissions made during the hearing, this Board was made aware that, the**

**Authority failed to upload such documentation to the other bidder so that, there was no level playing field in the evaluation process.**

**2.3. This fact that one of the participants was not given the opportunity to submit the ‘Financial Bid Form’ does not render the evaluation process and the eventual recommendation for award valid. This Board notes that, the ‘Financial Bid Form’ contained the basic quantity of tests to be carried out on a daily basis. Although such quantities were estimated, they gave an insight and indication of the quantity of tests expected to be carried out over the period of 92 basic days; such information was not made available to the other competing bidder, so that, there was no level playing field in the evaluation process.**

**2.4. The fact that, Appellants’ offer was fully compliant whilst the competing bidder failed to submit the licence confirmation, does not justify the recommendations of the award. The other competing bidder did not have the means to be aware of the estimated number of tests which are envisaged to be performed whilst Appellants were provided with the information on which to base their offer. In this regard, this Board notes that the principles of equal treatment and level playing field were breached.**

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

- a) **The Authority was in duty bound to provide the specific reasons to Appellants in its notice of cancellation from the outset, and not during the hearing of this appeal.**
- b) **The fact that Appellants' offer was fully compliant whilst the bidder's offer was not, does not override the instance that, the very basic principles of Public Procurement were breached.**
- c) **The evaluation process was in breach of the principles of equal treatment and level playing field.**

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

- i. does not uphold Appellants' contentions,**
- ii. directs that the tender be cancelled,**
- iii. in view of Appellants' urgent application, which this Board deems justified, directs that the deposit paid by Appellants be fully refunded.**

Dr Anthony Cassar  
Chairman  
*21<sup>st</sup> December 2020*

Mr Lawrence Ancilleri  
Member

Mr Carmel Esposito  
Member