

PUBLIC CONTRACTS REVIEW BOARD

IMA-2020/Q002

Call for Quotations for the Supply and Delivery of Eco-Friendly Alcohol Sanitizing Liquid

Case 1538

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DATE: 18th March 2021

This Board,

Having noted the Notice of Objection filed by Dr Gianluca Cappitta on behalf of General Cleaners Co. Limited, (hereinafter referred to as the Appellant) and the contents of the correspondence received by the Board on the 2nd December 2020.

Having also noted the contents of the Contracting Authority's letter of reply received by the Board on the 10th December 2020 and filed by Martin Bowman, Chairperson of the Tender Evaluation Committee on behalf of Identity Malta;

Having taken cognisance and evaluated the witnesses produced, all the acts and documentation filed, as well as the submissions made by the representatives of the parties.

Having noted and evaluated the minutes of the Board sitting of the 26th February 2021 hereunder re-produced:

The tender was published on the 6th August 2020 and the closing date of the tender was the 17th September 2020. The estimated value of the tender (exclusive of VAT) was €9,500.

On the 1st December 2020 General Cleaners Co Ltd filed an appeal against Identity Malta as the Contracting Authority objecting to their disqualification on the grounds that their bid was not the cheapest compliant tender.

A deposit of €400 was paid.

There were fifteen (15) bidders and sixteen (16) bids.

On 26th February 2021 the Public Contracts Review Board composed of Dr Ian Spiteri Bailey 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 – General Cleaners Ltd

Dr Gianluca Cappitta
Mr Ramon Fenech

Legal Representative
Representative

Contracting Authority – Identity Malta

Dr Neil Harrison
Mr Martin Bowerman
Mr Pablo Cachia Belli

Legal Representative
Chairperson Evaluation Committee
Member Evaluation Committee

Recommended Bidder – Cosmoraj Ltd

Mr Danish Rehman

Representative

Dr Ian Spiteri Bailey 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 Gianluca Cappitta Legal Representative for General Cleaners Co Ltd said that his clients' appeal was in line with his letter of the 1st December 2020. At this stage Appellants reserved the right to make further submissions once an indication was given by the Contracting Authority on the grounds on which they were disqualified.

Dr Neil Harrison Legal Representative for Identity Malta stated that the reason for Appellants' exclusion was that there was divergence in the chemical makeup of the product requested in the tender and what was offered by Appellants.

The Chairman enquired why it was the Chairperson of the Evaluation Committee that signed the disqualification letter rather than the Authority.

Dr Harrison re-iterated that the chemical concentration of the product offered did not meet the World Health Organisation (WHO) recommendation, so the decision was based purely on price tendered.

The Chairman pointed out that looking at the disqualification letter of the 18th November it was clear that Appellants had not been properly notified of the reason for their exclusion. They were merely informed that the tender had been awarded to the cheapest bidder.

Dr Cappitta referred to Regulation 53 of the Manual of Procedure on tenders which states *inter alia* that an Authority should not reject a tender on a technical point if an equivalent product is offered – this does not mean that the offered product had to follow the dictated formula 100%. What Appellants had offered was near enough to the requested product and it met the tender requirements.

The Chairman said that the Board will not prejudice the parties at this stage by discussing the technical specifications but will make a preliminary decision on the appeal as submitted while leaving the right of the parties to make submissions on the technical aspects later. The present appeal deals solely with the claim that Appellant was not given the reason for disqualification and the technical issues will, if raised, be dealt with at another time. He then thanked the parties for their submissions and declared the hearing closed.

End of Minutes

Hereby resolves:

The Board considers, as results from the minutes of the sitting, that this decision is a preliminary decision in respect of the appellant's claim that it was notified of its rejection on the basis of price when its bid in terms of price was equivalent to that of the chosen bidder, however, as results in the letter of reply by Identity Malta of the 10th December 2020, the contracting authority claims that the appellant, as bidder, was technically non-compliant.

The Board has repeatedly decided and stated that it is of utmost importance that a rejected bidder is given **ALL** the reasons for such rejection. It is unacceptable that a bidder's right to appeal is prejudiced by the fact that the rejected bidder is not given **ALL** the reasons for such a rejection.

Furthermore, the Board would like to put on record, with a clear message to the contracting authority and the Chairman of the Evaluation Committee in this process,

that a contracted authority should not be represented in these proceeding by the Chairperson of the Evaluation Committee. It is the remit of the Evaluation Committee, as was in this case, to evaluate the bids and determine the one/s which should be chosen.

It is unacceptable that, as happened in this case, the Chairperson signs and files the letter of reply to the objection filed, as this goes diametrically against and defeats the whole scope of the Declaration of Impartiality and Confidentiality, to which the same Chairperson, as all other members, sign and attest to be “*independent of all parties*”. Although the same declaration refers to parties as “*all tenderers/applicants who are participating in the tender/call for proposals, whether individuals or members of a consortium, or any partner or subcontractor proposed by them*”, to the exclusion of the contracting authority, it remains unacceptable for the Chairperson of the Evaluation Board to represent the contracting authority before this Board, and this for two main reasons:

- a) because replying on behalf of the contracting authority falls outside the scope and remit of one’s position as chairperson or member of the evaluation board, and
- b) because in doing so, and hence replying to the objector, one is, before this board, directly or indirectly favouring the preferred bidder.

This is, in the Board’s view and understanding, is unacceptable and the Board hopes that this matter will not repeat itself.

The Board,

Having evaluated all the above cannot but resolve that the appellant is to be notified with ALL the reasons for his rejection by the contracting authority, and hence,

In view of the above, the Board concludes by this preliminary decision:

- a) To annul the Notice of Rejection issued to the appellant on the 18th November 2020,
- b) To order the contracting authority to re-issue, within one week from today, the notice of rejection to the appellant giving ALL the reasons for the rejection,

And puts off the appeal for continuation for the sitting of the 22 April 2021 at 9.00am provided that, the appellant shall have two weeks to make further written submissions following the notification of the new rejection letter and the contracting authority to reply further in writing if it deems necessary, within another two weeks from when it is notified with the appellant's further submissions.

The sitting of the 22 April 2021 will then be held so that either party is given the opportunity to briefly make any necessary verbal submissions they deem fit before the Board puts this appeal for a final decision on the merits.

Ian Spiteri Bailey
Chair

Lawrence Ancilleri
Member

Carmel Esposito
Member