

Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties. He noted that since this was virtual hearing all the parties agreed to treat it as a normal hearing of the Board in line with Article 89 of the Public Procurement Regulations. After reviewing the progress in this case he invited further submissions.

Dr Capitta on behalf of the Appellant referred to the written submissions and briefly stated that the Public Procurement Regulations (PPR) stipulate that equivalent technical specifications of an offered product to those requested are acceptable – in this instance Appellant was offering a product which was not identical but equivalent to that requested in the tender. Regulation 232 of the PPR gives full details of the means of proof for technical equivalence including a list of European tests – this information is included in the dossier submitted by the Appellant, whose product is in fact not only equivalent but superior since the product is recognised as being up to pre-surgical standards. It fully meets the technical requirements of the tender and documents have been submitted to prove it. As an additional comment Dr Cappitta mentioned that the website of the preferred bidder advertising the offered product indicated that the hand rub did not meet the tender specifications.

Dr Neil Harrison Legal Representative for Identity Malta stated that the Contracting Authority does not judge tenders through websites but through document submissions. He said that the Authority needed a specific sanitizer with specific World Health Organisation standards which state an ethanol level of 80%. Appellant's product had an ethanol level lower than this and was also missing two further compounds requested. Subsection 9 of Regulation 53 specifies that the tender should have indicated equivalence at the tendering stage and not subsequently. Accepting a lower percentage of ethanol would have put other bidders at a disadvantage on price. The product offered is not equivalent and it has not been proven that it is so.

Dr Capitta said that the price difference is pure conjecture as the difference in ethanol percentage may not affect price since different products are constituted differently. The solutions in a product are guidelines not set in stone. PPRs are specific that an equivalent product cannot be excluded. Identity Malta were not after a specific formula but merely used the WHO formula and therefore equivalence should be considered without having the need to declare it once it has been shown in documents submitted.

Dr Harrison commented that it has already been stated at a previous hearing that the percentage of ethanol did make a difference in price, and Mr Ozair Mateen a representative of the preferred bidder confirmed this.

The Chairman thanked the parties for their submissions and declared the hearing closed.

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 25th May 2021.

Having noted the objection filed by General Cleaners Co Ltd (hereinafter referred to as the Appellant) on 7th April 2021, refers to the claims made by the same Appellant with regard to the tender of reference IMA-2020/Q002 listed as case No. 1538 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Gianluca Cappitta

Appearing for the Contracting Authority: Dr Neil Harrison

Whereby, the Appellant contends that:

- a) Bid was equivalent to tender requirements – This as per Regulation 53 (7) (b) of the Public Procurement Regulations (PPR). Also as per 53 (9) “*Where a contracting authority uses the option of referring to the technical specifications referred to in sub-regulation 7(b), it shall not reject a tender on the grounds that the works, supplies or services tendered for do not comply with the technical specifications to which it has referred, once the tenderer proves in its tender by any appropriate means, including the means of proof referred to in regulation 232, that the solutions proposed satisfy in an equivalent manner the requirements defined by the technical specifications.*” The appellant firmly submits that this principle laid down in the law has been overlooked or ignored at evaluation stage of its bid. The product offered by the appellant satisfies in an equivalent manner the requirements defined by the technical specifications. Finally, the Contracting Authority shall not reject the tender on the grounds that the works, supplies or services tendered for do not comply with the technical specifications to which it has referred when the solutions proposed satisfy in an equivalent manner the requirements defined by the technical specifications, as is clearly the situation in the appellant’s case.
- b) Possibility of misrepresentation by winning bidder – the appellant is cautiously submitting that the winning bidder might have misrepresented the technical specifications of its product. This is being stated because according to the decision communicated to the appellant by way of letter dated 22nd March, it is understood that the appellant’s bid was rejected on the basis that the ethanol percentage is less than 80% as required on the technical specifications. Conversely, the second formulation indicated on the CfQ is alcohol based and the concentration percentage required in this formula is indicated as 75%. The appellant brings to the attention of the Board that the winning bidder, i.e. Cosmoraj Limited publicly advertises its sanitizing products as containing a 70% concentrate of alcohol.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 20th April 2021 and its verbal submission during the virtual hearing held on 25th May 2021, in that:

- a) Bid was equivalent to tender requirements – The Contracting Authority totally differs with such a conclusion. This had to be proven during the bidding stage. As per Regulation 53(9) *“Where a contracting authority uses the option of referring to the technical specifications referred to in sub-regulation 7(b), it shall not reject a tender on the grounds that the works, supplies or services tendered for do not comply with the technical specifications to which it has referred, **once the tenderer proves in its tender by any appropriate means**, including the means of proof referred to in regulation 232, that the solutions proposed satisfy in an equivalent manner the requirements defined by the technical specifications.”* The objector was well aware that the product he is offering is not compliant with the technical specifications provided in the tender document, and if for the sake of the argument it was of an equivalent nature he should have submitted any proof during the bidding stage.
- b) Possibility of misrepresentation by winning bidder – The winning bidder, namely Cosmoraj Ltd has submitted a fully compliant tender, in that the composition and ingredients of the final composition of the product he is offering to Identity Malta Agency satisfy the requirements of the technical specifications provided in the tender document.

This Board, after having examined the relevant documentation to this appeal and heard submissions made by all the interested parties, will consider Appellant's grievances, as follows:

- a) With regards to the Appellant's first grievance, the Board makes reference to the Public Procurement Regulations article 53(9) which states *“Where a contracting authority uses the option of referring to the technical specifications referred to in sub-regulation 7(b), it shall not reject a tender on the grounds that the works, supplies or services tendered for do not comply with the technical specifications to which it has referred, **once the tenderer proves in its tender by any appropriate means**, including the means of proof referred to in regulation 232, that the solutions proposed satisfy in an equivalent manner the requirements defined by the technical specifications.”* It is to be noted that in this particular case the tenderer did present in its bid a data sheet of the product offered. This however did not meet the minimum requirements as set out in the tender document. The Board opines that the Appellant should have made a declaration in its original bid, and not at the objection stage, stating why in their opinion the product offered is of an equivalent nature. This Board does not uphold Appellant's first grievance.

- b) With regards to the Appellant's second grievance, the Board acknowledges the fact that this grievance was brought forward in a cautious manner and what was quoted were products offered in the publicly available information data within the preferred bidder's website. It is to be noted that the product offered by the preferred bidder is not the same as advertised on his website and it was a product which according to the preferred bidder's bid met all the minimum technical requirements as set out in the tender document. This Board does not uphold Appellant's second grievance.

In conclusion this Board opines that;

Having evaluated all the above and based on the above considerations, concludes and decides:

- a) Does not uphold Appellant's Letter of Objection and contentions,
- b) Upholds the Contracting Authority's decision in the recommendation for the award of the tender,.
- c) Directs that the deposit paid by Appellant should not be reimbursed.

Mr Kenneth Swain
Chairman

Mr Lawrence Ancilleri
Member

Mr Carmel Esposito
Member