

PUBLIC CONTRACTS REVIEW BOARD

Case 1597 – RFP 004-6090/28 Request for Participation for the Provision of Third-Party Temperature Controlled Cold Storage Facility of Pharmaceuticals between 2^o C and 8^o C for the Central Procurement and Supplies Unit (MFH)

27th July 2021

The Board,

Having noted the letter of objection filed by Dr Kris Borg on behalf of Kris Borg & Associates acting for and on behalf of Unistores (Services) Ltd, (hereinafter referred to as the appellant) filed on the 13th April 2021;

Having also noted the letter of reply filed by Dr Marco Woods on behalf of Central Procurement and Supplies Unit (hereinafter referred to as the Contracting Authority) filed on the 22nd April 2021;

Having taken cognisance and evaluated all the acts and documentation filed, as well as the submissions made by the legal representatives of the parties;

Having noted and evaluated the minutes of the Board sitting of the 13th July 2021 hereunder-reproduced.

Minutes

Case 1597 – RFP 004-6090/28. Request for Participation for the Provision of Third-Party Temperature Controlled Cold Storage Facility of Pharmaceuticals between 2^o C and 8^o C for the Central Procurement and Supplies Unit (MFH)

The Request for Participation was published on the 29th September 2020 and the closing date was the 20th October 2020.

On the 13th April 2021 Unistores (Services) Ltd filed an appeal against the Central Procurement and Supplies Unit as the Contracting Authority objecting to their exclusion on the grounds that their offer was not technically compliant.

A deposit of € 400 was paid.

There were five (5) participants.

On 13th July 2021 the Public Contracts Review Board (PCRB) composed of Mr Kenneth Swain 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:

Appellant – Unistores (Services) Ltd

Dr Kris Borg

Legal Representative

Ms Andreina Fenech Farrugia

Representative

Contracting Authority – Central Procurement and Supplies Unit

Dr Marco Woods

Legal Representative

Mr Josef Borg

Chairperson Evaluation Committee

Ms Ruth Spiteri

Secretary Evaluation Committee

Ms Josette Sciberras

Member Evaluation Committee

Preferred Bidder – Pharma MT Ltd

Mr Patrick Nicholls

Representative

Mr Kenneth Swain 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 in line with Article 89 of the Public Procurement Regulations. He then asked Appellant's representative to make his submissions.

Dr Kris Borg Legal Representative for Unistores (Services) Ltd said that Appellant was originally requested to clarify if they had a GDP licence covering cold chain items. Subsequently in April 2021 his client was advised that no GDP/Wholesale Dealers Licence had been issued by the Medicines Authority; a reason which was totally different to what they had been asked to clarify originally. Appellant has held a licence since 1st July 2020 and there was no reason for the exclusion.

Dr Marco Woods Legal Representative for the CPSU said that there is no difference between a GDP Licence and a GDP/Wholesale Dealers Licence as they are issued as one. The point at issue was that the closing date for offers was the 20th October 2020 but the licence is dated 25th February 2021 – therefore at the time of the offer Appellant did not have a licence contrary to the tender requirements. Equal treatment demands that Appellant's offer could not be accepted as other prospective bidders in similar circumstances may have refrained from bidding.

Dr Borg said no evidence has been produced that anyone was excluded from bidding – the two licences are not the same as they are issued by different departments of Government. Although in October 2020 the licence may not have been effective by backdating the licence the department concerned was basically saying that the bidder was compliant on the closing date.

Dr Woods stated that the Public Procurement Regulations stipulate equal treatment and it is clear that if this offer is accepted it will be discriminatory against operators who did not have a licence at that date.

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

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 13th July 2021.

Having noted the objection filed by Unistores (Services) Ltd (hereinafter referred to as the Appellant) on 13th April 2021, refers to the claims made by the same Appellant with regards to the tender of reference RFQ 004-6090/28 listed as case No. 1597 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Kris Borg

Appearing for the Contracting Authority: Dr Marco Woods

Whereby, the Appellant contends that:

- a) RFP was published on the 29th September 2020 with the closing date set for the 20th October 2020.
- b) On the 16th November 2020 a request for Clarifications / Rectifications was received by Appellant. This was replied on the 24th November 2020.
- c) One of the points in request for Clarifications / Rectifications was for “GDP licence covering cold chain items for both sites”
- d) Reason for non-compliance (letter received 5th April 2021) was “No GDP / Wholesale Dealer Licence has been issued by Medicines Authority for the Storage of Medicinal Products including Cold Chain Medicinal Products by closing date of Call (20th October 2020)”. In the request for Clarifications / Rectifications, the appellant was asked to submit the GDP licence covering cold chain items for both sites. In the recent letter dated 5th April 2021, the wording has been changed to GDP / Wholesale Dealer License.
- e) The licence is valid for three years from date of initial inspection conducted on 01/07/2020, which is definitely before the closing date of Call (20th October 2020).

This Board also noted the Contracting Authority’s Reasoned Letter of Reply filed on 22nd April 2021 and its verbal submission during the virtual hearing held on 13th July 2021, in that:

- a) The technical specifications in the RFP were clear and included 6 points. Evidently, all were needed to be deemed technically compliant.
- b) A clarification / rectification request was sent to all bidders in order to attempt to save as many bids as possible by requesting all bidders to further submit the missing documentation which was requested in the first place.
- c) The reason for the wording and the inclusion of “No GDP / Wholesale Dealer Licence” since the said licences are issued as one. Thus if the objectors did not hold a valid GDP licence, then they cannot be in possession of a wholesale Dealer’s Licence.
- d) In view of the fact that no licence was in hand at the time when their bid was submitted, CPSU had no other alternative than deeming the bid as technically non-compliant.

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:

1. The main point of contention here refers to the Wholesale Dealer’s Licence issued in the name of Unistores (Services) Ltd. with Authorisation number WL 135. This as issued by the competent Licensing Authority, being the Office of the Superintendent of Public Health.
2. It is to be noted that the date of issue of this Licence is clearly stated as being 25th February 2021.
3. However, in section 10 of this Licence, entitled ‘Validity’, it is stated *“this licence is valid for three years from date of initial inspection conducted on 01/07/20.”*
4. Hence the Board notes that there is a ‘time lag’ of nearly eight (8) months between the date of inspection (being also the backdating of validity) and the date of actual issuance of the Licence.
5. It is to be noted that the closing date of the call for bids / submissions, was 20th October 2020.
6. Clarification / rectification requests were sent to the Appellant on the 16th November 2020. This was duly replied to within the requested timeframes, but till that date the Appellant did not have the licence mentioned in point 1 above in hand.
7. The Board notes that the Evaluation Committee, did comply with the spirit of good governance, transparency and proportionality whereby it tried to save as many bids as possible by utilising the tools at hand, being the request for clarifications and rectifications. However, much to the disappointment of this Board, the licence was not in the hands of the appellant company, even though nearly four (4) months had elapsed (being from the date of inspection, 1st July 2020, to the date of request for clarifications and rectifications).
8. The Board also notes that the licence took even further, till February 2021, to be issued.
9. The Board notes that the Evaluation Committee took all necessary steps in order to save the bid / submission, and its proceedings were all congruent to the equal treatment of bids received, with no discriminatory actions done against the Appellant. The concept of Self-Limitation was adhered to completely.

Hence, this Board does not uphold the Appellant's grievances.

In conclusion this Board;

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 issued on the 5th April 2021 by way of its letter for non-progression of the Appellant's bid;
- c) Directs that the deposit paid by Appellant not to be reimbursed.

Mr Kenneth Swain
Chairman

Dr Charles Cassar
Member

Mr Lawrence Ancilleri
Member