

PUBLIC CONTRACTS REVIEW BOARD

Case 1610 – RFP 021-6125/20 – Request for Participation (Negotiated) for Over-labelling Services of Medicinal Products

3rd August 2021

The Board,

Having noted the letter of objection filed by Dr Clement Mifsud Bonnici and Dr Calvin Calleja on behalf of Ganado Advocates acting for and on behalf of Consolidated Packaging Ltd, (hereinafter referred to as the appellant) filed on the 17th May 2021;

Having also noted the letter of reply filed by Dr Marco Woods acting for Central Procurement and Supplies Unit (hereinafter referred to as the Contracting Authority) filed on the 26th May 2021;

Having heard and evaluated the testimony of the witness Dr Richard Despott (member of the Evaluation Committee) as summoned by Dr Marco Woods acting for Central Procurement and Supplies Unit.

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

Having noted and evaluated the minutes of the Board sitting of the 27th July 2021 hereunder-reproduced;

Minutes

Case 1610 – RFP 021-6125/20. Request for Participation (Negotiated) for Over-Labeling Services of Medicinal Products

The RfP was published on the 11th December 2020 and the closing date was the 11th February 2021. The value of the RfP was not stated.

On the 17th May 2021 Consolidated Packaging Ltd filed an appeal against the Central Procurement and Supplies Unit as the Contracting Authority objecting to their disqualification on the grounds that the offer was not technically compliant.

A deposit of € 400 was paid.

There were five (5) bidders.

On 27th July 2021 the Public Contracts Review Board (PCRB) composed of Mr Kenneth Swain as Chairman, Dr Vincent Micallef and Mr Richard Matrenza as members convened a public virtual hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellant – Consolidated Packaging Ltd

Dr Antoine Cremona	Legal Representative
Dr Calvin Calleja	Legal Representative
Mr Jurgen Azzopardi	Representative
Mr Mario Sciberras	Representative

Contracting Authority – Central Procurement and Supplies Unit

Dr Marco Woods	Legal Representative
Dr Richard Despott	Member Evaluation Committee
Mr Hristov Hristo Ivanov	Representative

Preferred Bidders – Medical Logistics Ltd

Dr Karl Tanti	Legal Representative
Ms Samantha Cusens	Representative

- Inspectra Ltd

Mr Mark Camilleri	Representative
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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. The Chairman, in line with the Board’s policy, agreed to a request by Dr Calvin Calleja Legal Representative for Consolidated Packaging Ltd to exclude the fresh documents submitted on the 22nd July 2021 by the preferred bidders and also agreed to a request by Dr Marco Woods Representative for the Central Procurement and Supplies Unit to allow him to withdraw the last two paragraphs of point 2 of the submissions in the CPSU’s letter of reply dated 26th May 2021. He then asked Appellant’s representative to make his submissions.

Dr Antoine Cremona Legal Representative for Consolidated Packaging Ltd stated that there was a substantive and crucial point on the decision of the Contracting Authority which had not been touched upon in the appeal hearings on this Case. If one concedes the point that the award is not based solely on price but on two equal criteria then it follows that the Authority made the wrong assessment by declaring a bidder with good lead times to be non-compliant and they should not have been eliminated. Divulging how each bidder fared would remove the need for an appeal and enables them to know the ranking if one is compliant.

Dr Calvin Calleja Legal Representative for Consolidated Packaging Ltd said that according to Clause 5.1 in the tender the award would go to the cheapest offer with the minimum time lines – the time lines are there merely to give comfort to the Authority and are over and above the main criterion which is the price.

Dr Woods said that the information expected by Appellant is available only to the Board and other offers cannot be revealed. The role of the PCRB is to decide if the tenders were evaluated correctly and if the Appellant is still aggrieved after that decision there is always recourse to the Court of Appeal. There appears to be selective reading of the tender by Appellant – one is here dealing with medicinal products which include documents requiring translations for the benefit of users; speed is therefore

of the essence. The reason for Appellant's bid refusal is that the offer is less advantageous as a shorter lead time was offered by the winning bidder and correctly self limitation was applied by the evaluation committee.

Dr Cremona said that the Authority was defending the indefensible since the unit of measurement between the price and the lead times criteria was not defined making the tender a 'mess' as it did not define which aspect is the more important.

Dr Woods intervened to ask why Appellant did not resort to seek clarification or remedy before call if the tender is a 'mess' to which Dr Cremona replied that first of all CPSU had not replied to queries raised and secondly the remedy before a call is not there to improve the Authority's 'mess' in the tender.

Dr Richard Despott (38068M) called as a witness by the Contracting Authority testified on oath that he was one of the evaluators and confirmed that time lines were the reason why Appellant's offer was declined. No marks were awarded in assessing the bids. Witness confirmed that he had evaluated all bids but he did not make the final decision on the award.

Dr Karl Tanti Legal Representative for Medical Logistics Ltd said that he agreed with Dr Cremona that this was not a case of non-compliance, however this did not change the outcome of the tender decision and makes no difference whether results are published or otherwise. Medical Logistics were the winners as they offered the best lead times and the PCRb are limited on what they can decide on the outcome. Appellant claims that they cannot prepare a proper defence if the marking on the results is not known. This information is sensitive but does not alter outcome whilst if it is the case that the tender is 'messy' then there were remedies available prior to tendering. The Evaluation Committee carried out their work correctly and followed the criteria set and it is up to the Authority to take action if the contract is not fulfilled.

Dr Cremona stated that the Authority and the preferred bidder cannot agree on the correct interpretation of the terms of the tender. European jurisprudence says that the balance of a decision should always be in favour of the Appellant. The ruler by which a tender is measured gives certainty and is not totally subjective as in this case where no yardstick was laid down and there is no way of knowing if one's bid was submitted correctly.

Dr Woods said that the claim made by Appellant is due to the fact that they did not win the tender. Regulation 262 of the PPRs exists for it to be used if there are doubts about a tender; the available remedy was not used and the present appeal is simply because the bid did not succeed.

Dr Tanti noted that the RfP was not a tender but a negotiated procedure.

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 27th July 2021.

Having noted the objection filed by Consolidated Packaging Ltd (hereinafter referred to as the Appellant) on 17th May 2021, refers to the claims made by the same Appellant with regards to the tender of reference RFP 021-6125/20 listed as case No. 1610 in the records of the Public Contracts Review Board.

The Board is also noting that there was a ‘Reasoned Reply’ filed on 22nd July 2021 by Dr Karl Tanti acting for Medical Logistics Ltd with further submissions. In this respect the Board has received an application from Dr Antoine Cremona, Dr Calvin Calleja and Dr Clement Mifsud Bonnici on behalf of Ganado Advocates acting for Consolidated Packaging Ltd for this reply to be deemed inadmissible. The Board upholds Dr Antoine Cremona, Dr Calvin Calleja and Dr Clement Mifsud Bonnici’s application and invites all interested parties to follow the procedures as set out in the Regulations. All parties within the hearing will still have their opportunity to submit their verbal submissions hence no party should feel aggrieved to not having the opportunity to a fair hearing. Written submissions, after the Objection Letter filed by the Appellant and Reasoned Letters filed by the Contracting Authority and Preferred Bidder, will not be accepted if they are outside the statutory dates specified in the Regulations.

Appearing for the Appellant:	Dr Antoine Cremona & Dr Calvin Calleja
Appearing for the Contracting Authority:	Dr Marco Woods
Appearing for the Preferred Bidder (Medical Logistics Ltd):	Dr Karl Tanti
Appearing for the Preferred Bidder (Inspectra Ltd):	Mr Mark Camilleri

Whereby, the Appellant contends that:

- a) The Rejection Letter states that the Appellant’s proposal ‘was not technically compliant’. Reasons stated are the shorter lead times proposed by the preferred bidder and the fact that the Appellant did not submit any offer for the Second Set of Sub-Sections. Neither the short lead times nor the decision not to submit any offer for the above mentioned sub sections amounts to technical non-compliance.

- b) The Rejection Letter was not sufficiently clear to assess whether its offer was rightly rejected by CPSU. The letter should have contained at least some of the information requested by way of the letter dated 12 May 2021 in order to enable it to claim an effective and rapid remedy. In particular, confirmation that the Recommended Bidder's offer was not cheaper than that of the Appellant and an indication of the Recommended Bidder's lead times. The Appellant's rights have been breached as a result of the evident lacuna in the Rejection Letter. For this reason alone, the deposit paid upon filing of this objection should be refunded.
- c) As stated in Section 5.1 of the RfP, the sole criterion for the award of the contract for each subsection is the price. The operative part of the criterion is however made subject to the ability of the recommended bidder to 'ensure least delay in making the medicinal product available to users within the Government Healthcare Service'. The appellant's offers were rejected in part because the recommended bidder proposed shorter lead times. The appellant is deducing that its offer was cheaper than that of the recommended bidder. The Appellant submits that the lead times it proposed in its own offer were 'maximum' timelines based on a 'worst case scenario' basis. This in fulfilment of the requirement of ensuring least delay in delivery to the end user.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 26th May 2021 and its verbal submission during the virtual hearing held on 27th July 2021, in that:

- a) The sole award criterion clearly stated "*the Contract for each respective Works Order sheet will be awarded to the Economic Operator submitting the cheapest offer; **provided that the offer reflects the minimum timelines, which ensure least delay in making the medicinal product available to users within the Government Healthcare Service. In this regard, due consideration will also be given to those applicants who offer tangible advantages in terms of shorter timeframes and overall reduction of logistical delays.***"
- b) The RfP clearly outlined that the cheapest technically compliant offer will be chosen, provided that the offer reflects the minimum timelines.
- c) The offer as submitted by the preferred bidder did in fact provide the more advantageous Lead Times, and due to this their offer was chosen for the sub-types in question. As a result of this, it is irrelevant for the objector to request whether the offer of the preferred bidder was more expensive and such an argument cannot be used by the objectors in seeking to justify their offer.
- d) Referring to the rejection for requirements 1.1b, 2.1b and 3.1b, the objectors were not considered any further for the sole reason that they did not submit any offers with regard to these sub-types.

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

1. With regards to the Appellant's first grievance, reference is made to the 'Rejection Letter' issued by the CPSU to the Appellant company of 7th May 2021, whereby it states "*The main reasons why your procurement proposal was **non-compliant** are as follows:.....*" (bold, and underline emphasis added).
 - a. It is to be pointed out that the choice of wording used is certainly not the most diligent.
 - b. The Appellant offer was not 'non-compliant' per se but did not present the best offer as requested by CPSU. Other bidders proposed better lead times. Hence, the Appellant could have ranked 2nd, 3rd or in other positions for the different sub-sections.
 - c. It is being noted that nobody present at the hearing challenged this point.
 - d. However, this Board opines that should proper wording have been used by the Contracting Authority, this would not have changed the outcome of this RfP. The Recommended Bidders would still have been Medical Logistics Ltd and Inspecra Ltd (for the different sub-sections where they proposed the best offer in line with the sole award criteria).
 - e. This Board takes this opportunity to emphasise the importance of the responsibility being placed on Contracting Authorities to properly and diligently draft the Tender dossier, Award Letter, Rejection Letters, Clarification notes and all other documentation pertaining to a specific tender whatever they may be. The choice of wording in line with Public Procurement Regulations, manuals, notices issued and other jurisprudence material is crucial for this 'system' to be availed of in an efficient and equitable manner by all user of the 'system'. Contracting Authorities being the representatives of Government of Malta should be at the forefront of this!
2. With regards to the Appellant's second grievance, this Board notes the following:
 - a. The full and complete bids / tender offers of the Appellant and the Recommended Bidders are within the acts of the PCRB, whereby a thorough assessment can be done on whether the Evaluation Committee proceeded with its assignment in a diligent and professional manner while observing their rights, duties and obligations.
 - b. Reference is also made to the testimony under oath of Dr Richard Despott whereby he confirmed that the time lines were the reason why Appellant's offer was declined. This due to the fact that since we are referring to medicinal products, which include documents requiring translations for the benefit of users; speed is therefore of the essence.

- c. On the comment made by the witness being “*No marks were awarded in assessing the bids*”, when asked by Dr Antoine Cremona, this Board opines that where the award criterion is making reference to ‘multiple’ variables, i.e. ‘cheapest offer’ and also the ‘minimum timelines’, more specific ways and tools, e.g. with the use of scorecards, of how the assessment was carried out, would have aided in no small way with the transparency policy which is one of the pillars of public procurement.
 - d. Finally, this Board is of the opinion that the Evaluation Committee did however assess accordingly in line with the Tender dossier and the concept of ‘Self Limitation’ was adhered to in no uncertain terms.
3. With regards to the Appellant’s third and final grievance, this Board notes the following:
- a. Reference is made to Dr Antoine Cremona’s verbal submission that the unit of measurement between the price and the lead times criteria was not properly defined, making the tender a ‘mess’. This as it did not define which aspect is the more important.
 - b. This Board already made reference to this in note 2 (c) and (d) above.
 - c. However, the Board also notes that the Appellant company did not make use or seek clarification on the matter before presenting its bid. Moreover, other remedies are in place should the Appellant have felt that the tender dossier, and more specifically the award criterion, were drafted in an ambiguous manner or lacked transparency. Specific reference hereby is made to regulation 262(d) of SL 601.03. It is also humbly pointed out that when a tenderer submits its proposal, it is also accepting the general terms and conditions of the tender dossier.

Finally, when considering all the above, this Board upholds the Appellant’s grievance that its offer was compliant even though it did not offer the best lead times. **The Board,**

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

- a) Upholds the Contracting Authority’s decision in the recommendation for the award of the tender,
- b) Directs that the deposit paid by Appellant to be reimbursed.

Mr Kenneth Swain
Chairman

Dr Vincent Micallef
Member

Mr Richard Matrenza
Member