

PUBLIC CONTRACTS REVIEW BOARD

Case 1614 – CFT 019-1174/20 (CPSU3648/20) Tender for the Supply of Ready Made Feeds for Preterm and New-born Babies Lot 2

6th August 2021

The Board,

Having noted the letter of objection filed by Dr Clement Mifsud Bonnici and Dr Sylvann Aquilina Zahra on behalf of Ganado Advocates acting for and on behalf of Vivian Corporation Ltd, (hereinafter referred to as the appellant) filed on the 30th April 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 10th May 2021;

Having also noted the letter of reply filed by Dr Kevin Camilleri Xuereb on behalf of Caruana Camilleri Xuereb Advocates acting for and on behalf of Pemix Distributors Ltd (hereinafter referred to as the Preferred Bidder) filed on the 10th May 2021;

Having heard and evaluated the testimony of the witness Mr Hristov Hristo Ivanov (Coordinator within the CPSU) as summoned by Dr Clement Mifsud Bonnici acting for Vivian Corporation Ltd;

Having heard and evaluated the testimony of the witness Dr Mario Caruana (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 3rd August 2021 hereunder-reproduced.

Minutes

Case 1614 – CFT 019-1174/20. Tender for the Supply of Readymade Feeds for Preterm and Newborn Babies

The tender was published on the 30th October 2020 and the closing date was the 22nd March 2021. The value of the tender was as follows: Lot 1 – € 16,800, Lot 2 € 108,000.

On the 30th April 2021 Vivian Corporation Ltd filed an appeal against the Central Procurement and Supplies Unit as the Contracting Authority in terms of Article 270 of the Public Procurement Regulations with regard to Lot 2

A deposit of € 545 was paid.

There were four (4) bidders.

On 3rd August 2021 the Public Contracts Review Board (PCRB) composed of Mr Kenneth Swain as Chairman, Mr Lawrence Ancilleri 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 – Vivian Corporation Ltd

Dr Clement Mifsud Bonnici	Legal Representative
Dr Sylvann Aquilina Zahra	Legal Representative
Ms Denise Borg Manche	Representative

Contracting Authority – Central Procurement and Supplies Unit

Dr Marco Woods	Legal Representative
Mr Hristov Hristo Ivanov	Secretary Evaluation Committee
Dr Mario Caruana	Member Evaluation Committee

Preferred Bidder – Pemix Ltd

Dr Kevin Camilleri Xuereb	Legal Representative
Mr Joe Camilleri	Representative
Mr Keith Portelli	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.

Mr Harry Fenech Secretary of the Board asked the Board to note that he was a past client of Dr Kevin Camilleri Xuereb.

Dr Clement Mifsud Bonnici Legal Representative for Vivian Corporation Ltd said that the subject matter of this tender was a long drawn out story. The appeal concerns the possibility that the preferred bid is an abnormally low one which *per se* is not a reason for that bid to be excluded. However, should the Contracting Authority suspect that an offer is abnormally low they should seek an explanation. This is the case with the Pemix Offer and all the Appellant is asking is for the offer to be clarified.

Dr Marco Woods Legal Representative for the Central Procurement and Supplies Unit (CPSU) said that the Evaluation Committee did not feel there was a need for clarification.

Dr Kevin Camilleri Xuereb stated that Appellant seems to be changing the grounds for appeal – their original appeal was on three grounds – on which of those grounds is the appeal now?

Dr Mifsud Bonnici said that he is now relying on the first two grounds – that is requesting the Evaluation Committee to look again at the tender.

Mr Hristov Hristo Ivanov (690120L) called as a witness by Appellant testified on oath that his role in the CPSU was as a coordinator to provide the specifications and to publish the tender. He was also involved in assessing the financial estimates. He confirmed that the financial estimates in 2019 were the same as those in the present case and that the current buying prices were disregarded in respect of this present tender. He also said that he had no idea of the financial figures used for the direct orders issued since the 2019 tender.

Dr Woods objected to any reference to past tender cycles whilst Dr Camilleri Xuereb said he hoped that this was not going to turn into a fishing expedition. Dr Mifsud Bonnici said that he was only trying to establish the basis for the financial estimates.

Dr Mario Caruana (584776M) called as a witness by the Authority testified on oath that he was one of the members of the Evaluation Committee and their role was to oversee that the offered product met the tender requirements and had no involvement in the financial bids.

Dr Woods intervened to say that witness was only involved in the technical not the financial bid.

In reply to a question from Dr Camilleri Xuereb witness replied that the product offered met the tender requirements regarding quality.

Continuing with this testimony witness stated that no sample testing had taken place but the evaluators ensured that all the tender specifications were met. In reply to a question he stated that the evaluators have a clinical background and no analysis of the financial bids was made.

Dr Mifsud Bonnici said that in the case of abnormally low offers the Authority has obligations under the Public Procurement Regulations (PPRs) and on the evaluation process including the financial side – this is governed by Regulation 243 of the PPRs and the European directives. As regards what triggers that obligation the law states ‘when it appears’ which is clearly the case in this tender where only the technical, but not the financial side was assessed. *Ex admissis* no comparisons to current market rates were carried out and no assessments on the points covered in the appeal letter in paragraph 38 were carried out. There was no comparison of the bid price to the average offer price and no analysis of the various costs involved in the product reaching the market.

Appellants are not stating that the preferred bid is abnormally low but simply that an analysis of the financial side is necessary to allay all doubts. The market in question is a particular one with figures indicating that half the mothers giving birth cannot breast feed. There are two forms of feeds – powder and liquid with the latter being the current form in use. There is brand loyalty after a mother leaves hospital which is a vulnerable time aggravated by the policy that ‘breast is best’. There is therefore the inclination not to change from the brand used in hospital and since the feeding can follow up to the child’s age of three years there is a great incentive to win a tender in a ‘winner takes all’ situation.

In 2019 Pemix offer was of one cent per feed which offer was challenged and the tender cancelled. As an outcome the Office for Competition (MCCAA) is now carrying out a study of this market and has published an interim report. The restriction to open competition was challenged by Appellant but was denied by both the PCRB and the Court of Appeal. The preferred bidder knows full well the benefit of a winning tender and keeps offering low bids creating the suspicion that the offer is abnormally low and therefore Appellant is requesting a financial assessment to determine if the offer is justified.

In paragraph 39 of the appeal letter a full explanation is given why Appellant feels that the offer is abnormally low. The 2019 offer was accepted at sixty cents and now years later the offer is at 50% less – more serious is the fact that although it has been challenged since 2019 nothing has been done. This creates distortion of competition; a point that has not been addressed in the letter of reply. In the past Dr Anastasi, on behalf of the CPSU, claimed that evaluators are not bound to look into the issue of abnormally low prices in departmental tenders – this statement is wrong as the law has changed and it is now obligatory to check abnormally low tenders. The Court of Appeal in its decision states that it is necessary to follow the advice of the Office for Competition – the least that could have been done in this case would have been to scrutinize the award and it is in everyone’s interest that this is given serious consideration.

Dr Marco Woods stated that he does not agree that the financial evaluation was not carried out as this is a normal step in the evaluation process borne by the fact that prices of bids were published. The 2019 appeal was on an offer of one cent which speaks for itself and clarification was required at that stage – the fact that this was not done in the case of the present tender means that the offer was justified. On a point of procedure it is established that the one who alleges must provide proof – no proof has been offered that Pemix offer does not cover their costs. The Evaluation Committee did not feel there was a need to clarify the Pemix offer.

Dr Camilleri Xuereb said that this whole appeal is built on Appellant’s opinion that thirty cents is an abnormally low offer and is inviting the Board to override the evaluators’ decision. In paragraph 18 of the letter of reply the necessary two stages established under Regulation 243 are outlined. There is no obligation to clarify – clarification should be sought only if there is a suspicion of anything irregular. According to the CPSU they did not feel that there was the need for such a step. The first two requests made by Appellant contend that the decision to award the tender to Pemix was wrong but no proof was provided to substantiate this. The Board should accept that a price of thirty cents is not abnormally low. If the Board is to order an investigation it follows that it considers that the figure of thirty cents is low and they are contradicting the decision of the Evaluation Committee.

Dr Mifsud Bonnici in replying to the above points stated that all that Vivian Corporation has to prove is that *prima facie* the tender is abnormally low and the Board should not shy from requesting clarification by simply asking the Evaluation committee to carry out their work correctly. There is no need for Appellant to provide any proof as the figures speak for themselves. The Board should make reference to the Office for Competition report of the 28th April 2021. In his testimony Dr Mario Caruana confirmed that the financial evaluation was not carried out.

Dr Sylvann Aquilina Zahra Legal Representative for Vivian Corporation Ltd said that the role of the Office for Competition is to ensure that the market is not distorted. The sector enquiry carried out has prioritized the serious problem that a public authority is not regulating the market.

Dr Woods said that it is wrong to claim that no financial analysis was made. The MCCA Report was not presented as evidence by Appellant and it is not up to the Board to check it.

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 3rd August 2021.

Having noted the objection filed by Vivian Corporation Ltd (hereinafter referred to as the Appellant) on 30th April 2021, refers to the claims made by the same Appellant with regard to the tender of reference CFT 019-1174/20 (CPSU 3648/20) listed as case No. 1614 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Clement Mifsud Bonnici &

Dr Sylvann Aquilina Zahra

Appearing for the Contracting Authority: Dr Marco Woods

Appearing for the Preferred Bidder: Dr Kevin Camilleri Xuereb

Whereby, the Appellant contends that:

- a) The bid submitted by the Recommended Bidder for Lot 2 appears to be abnormally low, and therefore, the Evaluation Committee had an obligation at law to review the Recommended Bidder's financial offer and request clarifications and proceed to reject such a bid if the explanations provided are not satisfactory.
 - i. Public Procurement law imposes an obligation on contracting authorities to request explanations from a bidder whose financial bid appears to be abnormally low. This as per Regulation 243(1) of the PPR.
- b) Appellant contends that there is something fundamentally wrong in CPSU's procurement practices and its decision to only procure one brand of the product is incentivizing economic operators to submit abnormally low bids which would not allow them to recover these costs were it not for the sales that the successful bidder is able to capture from vulnerable mothers on the private market.
- c) The average of all of the bids submitted for the Tender in Lots 2 is €0.67 which makes the Successful Bidder's bid 55% cheaper than the average. The Successful Bidder's bid for this Tender was 50% cheaper than the estimated financial value for Lot 2 in this Tender and the Successful Bidder's bid for the same similar tender of 2015 was €0.60 per unit, 50% more expensive than its bid submitted for this Tender. Hence the bid submitted by the Successful Bidder is abnormally low and certainly will not in any legitimate scenario cover their costs.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 10th May 2021 and its verbal submission during the virtual hearing held on 3rd August 2021, in that:

- a) CPSU contends that the Appellant's allegation, that the offers of the preferred bidder are to be disqualified from this procurement cycle as they are too low as they will not cover the cost incurred by the eventual contractor, is unfounded. It must be noted that the price difference between the preferred bidder and that of the objectors is €0.19c, whilst the difference in price between the objectors and the third cheapest bidder is that of €0.20c. That said, the objectors still contend that the price difference of €0.19c from their offer to that of the preferred bidders renders the preferred bidder's offer to be deemed as abnormally low.
- b) The evaluation committee did not deem the price offered by the preferred bidder as being abnormally low. Had the evaluation committee deemed the offer to be suspicious and abnormally low and likely to cause a distortion of competition, they would undoubtedly have abided by the Regulations and requested the bidder to justify the quoted price.
- c) The objectors quote the European Commission Directive when defining abnormally low bids. That said, the objectors in claiming that the offer is abnormally low, did not provide any evidence in order to substantiate this claim / allegation.

This Board also noted the Preferred Bidder's Reasoned Letter of Reply filed on 10th May 2021 and its verbal submission during the virtual hearing held on 3rd August 2021, in that:

- a) The law grants solely to the Evaluation Committee the discretion to accept or to reject bids made by tenderers. As has been confirmed by the Court of Appeal, this Board may not appropriate itself of the discretion granted solely to the Evaluation Committee, which is the only body empowered by law to examine the offers made in light of the contents of the tender document. This Board's function is to examine whether, in light of the appeal lodged before it, there are grave reasons which militate against the decision of the Evaluation Committee. This Board may not make assumptions or conjectures, even if these may appear reasonable, but must adhere strictly to the principle of *in xta allegata et probata*.
- b) Seemingly abnormally low tenders may not be automatically excluded, and contracting authorities must always seek written justification from the tenderer/operator clarifying the reasons for the low price offer. Regulation 243(1) makes it manifestly clear that the contracting authority first and foremost must investigate its suspicions before reaching a conclusion on the nature of the bid. It must be stressed that the blanket rejection of all seemingly abnormally low tenders is not only not obligatory, but it is in actual fact prohibited.

- c) Appellant makes a number of allegations and speculations in its Letter of Objection regarding the reasons behind the offer made by the Preferred Bidder. Every one of these is unfounded. In fact, Appellant does not even attempt to justify any of the allegations made by it. It is incumbent on Appellant to prove the allegations made by it, because *incumbit probation ei qui dicit non ei qui negat*. Moreover, the profit or lack thereof to be made by Preferred Bidder is immaterial to this case

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 witnesses duly summoned, will consider Appellant's grievances as follows:

- a) The Board notes that the main point / grievance of this tender is whether the offer submitted by the Preferred Bidder 'appears' to be 'Abnormally Low' or not.
- b) In this regard, this Board has on numerous occasions given its opinion on what factors ought to be considered when an analysis of this sort is to be undertaken by the Evaluation Committee.

Estimated Procurement Value of Tender

- c) One main factor, as per Case 1140, is that the bid under evaluation is assessed against the estimated financial value of the procurement procedure.
- d) Mr Hristov Hristo Ivanov stated under oath that the estimated financial value in this tender dossier [reference CFT 019-1174/20 (CPSU 3648/20)] is the same as the tender issued in year 2019 and that the current buying prices were disregarded. The Board opines that a more meticulous approach ought to have been pursued bearing in mind the increases for inflation and especially shipping costs which in general experienced fluctuations due to the Covid-19 pandemic. This would have aided the Evaluation Committee to make a more informed decision should it have felt that a proposed bid **'appeared'** to be abnormally low.

Financial Evaluation

- e) Dr Mario Caruana stated under oath that none of the members of the Evaluation Committee analysed the financial bids as none of them are competent in this regard. The members all had a clinical background, and they mainly analysed the technical specifications against the product offered to ensure that it is a good product for the end-user.
- f) Reference is made to Dr Alison Anastasi's email (CPSU) to the legal representative of the Appellant where it was stated "..... for departmental threshold tender evaluators are not bound to look into the issue of abnormally low prices." The Board opines that this statement is factually wrong.

- g) One of the main arguments brought forward by the Contracting Authority in their Reasoned Letter of reply of 10th May 2021 was that *“the evaluation committee did not deem the price offered by the preferred bidder as being abnormally low. Had the evaluation committee deemed the offer to be suspicious and abnormally low and likely to cause a distortion of competition, they would undoubtedly have abided by the Regulations and requested the bidder to justify the quoted price.”*
- h) The Board opines that, after carefully analysing Dr Mario Caruana’s statement under oath and Dr Anastasi’s email, a thorough financial evaluation was not carried out. The Evaluation Committee did not seem to have the necessary understanding to assess whether the Preferred Bidder’s bid was abnormally low or not. After hearing this testimony, this Board is also dubious whether Regulation 243 of the Public Procurement Regulations was given any consideration or importance in their evaluation and hence final decision.

Hence, this Board upholds the Appellant’s grievance.

The Board,

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

- a) To uphold the Appellant’s concerns and grievances;
- b) To cancel the Letter of Acceptance dated 20th April 2021 sent to “Pemix Distributors Ltd”;
- c) To cancel all the Letters of Rejection dated 20th April 2021;
- d) To order the contracting authority to re-evaluate all the bids received in the tender through a newly constituted Evaluation Committee composed of members which were not involved in the original Evaluation Committee. Moreover, this newly appointed Evaluation Committee is to have within itself at least a member who has a thorough financial or economic background;
- e) after taking all due consideration of the circumstances and outcome of this Letter of Objection, directs that the deposit be refunded to the Appellant.

Mr Kenneth Swain
Chairman

Mr Lawrence Ancilleri
Member

Mr Richard Matrenza
Member