

PUBLIC CONTRACTS REVIEW BOARD

Case 1618 – CFT 020-0058/21 CPSU 3878/20 – Call for Tender for the Supply of Diagnostic Catheters – Lot 1

20th August 2021

The Board,

Having noted the letter of objection filed by Dr Robert Galea acting for and on behalf of Procure Ltd, (hereinafter referred to as the appellant) filed on the 3rd June 2021;

Having also noted the letter of reply filed by Dr Marco Woods acting for the Central Procurement and Supplies Unit (hereinafter referred to as the Contracting Authority) filed on the 14th June 2021;

Having heard and evaluated the testimony of the witness Dr Kieran Chircop (Consultant Radiologist at Mater Dei Hospital) 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 10th August 2021 hereunder-reproduced.

Minutes

Case 1618 – CFT 020-0058/21. Call for Tender for the Supply of Diagnostic Catheters – Lot 1

The tender was published on the 15th January 2021 in two lots and the closing date was the 5th February 2021. The value of the tender on Lot 1 was € 125,000.

On the 3rd June 2021 Procure Ltd filed an appeal against the Central Procurement and Supplies Unit as the Contracting Authority in regard to Lot 1 on the grounds that their offer was deemed technically non-compliant.

A deposit of € 625 was paid.

There were four (4) bidders.

On 10th 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 – Procure Ltd

Dr Robert Galea
Mr Pierre Calleja

Legal Representative
Representative

Contracting Authority – Central Procurement and Supplies Unit (CPSU)

Dr Marco Woods
Ms Rita Zammit
Mr Marvin Grech
Ms Roberta Saliba

Legal Representative
Chairperson Evaluation Committee
Member Evaluation Committee
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 Robert Galea Legal Representative for Procure Ltd said that the appeal would follow the lines of the appeal letter which contented that the tender specifications had been fulfilled. He requested the Board's permission to call a witness.

Dr Woods Legal Representative for the Central Procurement and Supplies Unit intervened to say that the Contracting Authority had never stated that the specifications had been fulfilled.

Dr Kieran Chircop (438682M) called as a witness by Appellant testified on oath that he is a consultant radiologist and that he had tested the product which was the subject of this appeal. He had tested the product jointly with another colleague on two patients using the standard procedure. He provided feedback by compiling an independent report on the catheter characteristics. Since the product had met the technical specifications testing of a sample of the product followed for a final decision. It was not up to the testers to make the final decision - they merely supplied the feedback on the tests. During the testing of one of the samples witness said that the catheter had to be changed as it was unsatisfactory and was replaced by the product type currently in use. He agreed that the benchmark was the current product and the tester's experience of it and that his opinion was purely subjective based on his own experience.

Questioned by Dr Woods witness described the various types and sizes and properties of the product. He confirmed that the sample used created discomfort to the patient due to the maneuverability of the wire and had to be changed.

Dr Galea said that there was ambiguity in the refusal of Appellant's offer as also confirmed by witness. The product offered conforms to the tender requirements in the technical specifications. The offer was transparent as the product followed the tender guidelines and was 100% compliant. However the CPSU in their letter describe the product as being inferior. The assessment was carried out incorrectly as after the technical specifications another hurdle was created since the product was being compared to that in a previous tender. Article 6.1 in the tender stated that the sole criterion is the price and that the tender will be awarded on that basis – the sample requested is supplementary to the technical specifications and simply created a further barrier.

The Authority claims that the evaluation was within the remit but in fact the assessment was totally subjective and compared to a device currently in use. The reference made by the Authority to PCRB Case 1247 is not correct as in that case the device was causing discomfort. The fact that medical practitioners are familiar with the current product should not preclude new products from being introduced. Circular 11/2011 from the Director of Contracts acknowledges that decisions must be judicious and not arbitrary and the resistance to change is no reason to reject a product.

Dr Woods said that the consultant in his testimony confirmed that the feedback is based on the product performance not on experience – namely that over a period of seventeen years working in four countries he had used twelve products and hence had a wide experience of different brands.

In Case 1241 the Board recommended testing by the end users; in this case the testing had been done by two end users who both reached the same conclusion and hence the decision was not subjective. The product is used in delicate interventions and there is thus no time for experimenting. The Authority is entitled to ask for samples and to refuse an offer after testing those samples. The General Rules Governing Tenders (article 16.3) precisely allows this and corroborates the disqualification if the sample is not up to standard. The Authority has an obligation to ensure that the product is in the best interest of the patient and its decision was right.

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 10th August 2021.

Having noted the objection filed by Procure Ltd (hereinafter referred to as the Appellant) on 3rd June 2021, refers to the claims made by the same Appellant with regards to the tender of reference CfT 020-0058/21 – CPSU 3878/20 listed as case No. 1618 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Robert Galea

Appearing for the Contracting Authority: Dr Marco Woods

Whereby, the Appellant contends that:

- a) **About the ambiguity of the refusal –**
 - i. While samples were provided by the Appellant with respect to the lot in question, it does not result that the technical specifications required the allegedly lacking qualities in the devices requested by the call for tenders.
 - ii. How could the Contracting Authority reach such a conclusion when this was in no manner a determining criterion as laid down by the very same tender document?
 - iii. The Contracting Authority is obliged to provide clear reasons for any decisions taken. In this present case, not only is the motivation dubious in that it is clearly arbitrary and subjective, but there is doubt as to whether the relative lot was evaluated in terms of the applicable technical specifications.
 - iv. Whereas no claim was made by the Evaluation Committee that the offer as made was non-compliant, so much so, that upon a request for clarification following rejection, it was indicated that the rejection was based on ‘discretion’ rather than non-compliance with the technical specifications. Once that it is determined that the instructions have been complied with, the Evaluation Committee cannot, *sua sponte*, introduce ‘further criteria’ on the basis of which the tender is then adjudicated.
- b) **About the factual incorrectness of the refusal decision –**
 - i. The existence and availability of technical specifications is not an option but an *ad validitatem* requirement of a tender for a supply contract, and it is on the basis of such technical specifications that an offer is to be made and subsequently adjudicated and not on other extraneous and arbitrary factors.
 - ii. It is through the proper and rigorous establishment and implementation of technical specification that a tenderer may be encouraged, motivated and most importantly, guided to submit an offer, and similarly, it is through the proper application of the same specifications that the Contracting Authority is to determine which offer merits to be chosen.
- c) **About the fact that the introduction of adjudication criteria which were not included in the technical specifications renders the process arbitrary –**
 - i. Whereas so important are technical specifications that Regulation 53(6) of the Public Procurement Regulations states that “technical specifications shall afford equal access of economic operators to the procurement procedure and shall not have the effect of creating unjustified obstacles to the opening up of public procurement to competition”
 - ii. Since the technical specifications must have these qualities, it also follows that a tender shall not include criteria which are used for the evaluation of the bids put forward without these having formed part of the said specifications. However, this is specifically what has happened in the present case.

- d) **About the fact that the technical parameters of the tender had been fundamentally altered –**
- i. The way in which the Contracting Authority acted was such as to alter the technical parameters of the lot in question, and this after the offers were submitted.
- e) **About the obligation to exercise discretion in a just and proper manner –**
- i. The principles of natural justice dictate that if there is a discretion that is to be exercised, this must be exercised in an informed and just manner in order to lead to an equitable, just, logical and predictable outcome.
 - ii. It can never be successfully argued by the Contracting Authority that its discretion was properly exercised, since, as elucidated, the reasons proffered for the rejection of the offer are such that find no backing in the documentation provided, specifically the technical specifications.
- f) **About the fact that the Contracting Authority did not act according to procedure –**
- i. The PCRFB should consider whether the Contracting authority and / or the Evaluation Committee acted according to the rules and regulations governing this particular procedure.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 14th June 2021 and its verbal submission during the virtual hearing held on 10th August 2021, in that:

- a) The Evaluation Committee did not introduce any adjudication criteria which were not included in the technical specifications.
- b) Following the evaluation of the documentation and information submitted at tendering stage, the Contracting Authority is given the faculty of requesting samples of the offers submitted in order to ensure that the product in question being offered by the bidders, actually corroborates what is requested in the technical specifications as well as in the technical offer as submitted by the bidders.
- c) The authority is permitted to reject offers following the evaluation of samples submitted further to the information and documentation already submitted at tendering stage.
- d) Consequently, the Contracting Authority in carrying out the relevant evaluation of the offers received, acted well within its rights as well as abided by all the relevant rules and regulations in arriving to the conclusion that the product of the objectors was deemed not to be recommended for the department's use.

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 now consider Appellant's grievances.

The Board notes that:

- a) the main point of contention in this case has arisen after the product offered by the Appellant company was initially technically evaluated against the technical specifications in the tender dossier and later, a sample, 'tested' and 'utilised' by two (2) professionals in the medical field, namely Dr Kieran Chircop (also a witness to this case) & Dr Kenneth Saliba.
- b) The sample was tested for:
 - a. Tactile feedback
 - b. Pushability
 - c. Manoeuvrability
 - d. Directionality
 - e. Overall handling
- c) The two (2) professionals mentioned above concluded their testing by giving a satisfactory result in 'Pushability' but gave an unsatisfactory result in all the other 4 categories. This has been documented in a report provided to the Evaluation Committee.
- d) It is to be noted that samples can be an integral part of a tender procedure. In this specific case, Section 1 Paragraph 5(c)(iii) states "*Samples as per Form marked 'Sample List' may be requested during the adjudication stage to supplement the technical offer submitted. If requested,*" Hence this Board opines that the Contracting Authority was well within its rights to request a sample of the product offered.
- e) The General Rules Governing Tenders in section 16.3 clearly state "*wherever applicable, tenderers may be requested to submit samples so that the Evaluation Committee will corroborate the technical compliance of the offers received. Without prejudice to the possibility of requesting clarifications, where the samples do not corroborate the offer submitted, the tenderer shall be disqualified.*"
- f) This Board now refers to the testimony under oath of Dr Kieran Chircop whereby he unequivocally stated that he has seventeen years' experience in the field and has used twelve different brands of this 'product' throughout his medical career. In his testimony it transpired that when testing the sample, the product created discomfort to the patient due to the unsatisfactory manoeuvrability of the wire. In order to finalise the procedure, he decided to revert to the brand of product currently being used at the hospital.
- g) The Board also notes the ambiguity of the Rejection Letter dated 25th May 2021 sent to the Appellant company, whereby it stated "*Lot 1 – on trying out samples submitted, it transpired that the handling properties of these catheters are inferior and unsatisfactory and thus not recommended for department's use.*" This Board has always provided guidance that the tender in question should be evaluated under its own merits, hence the term 'inferior' is deemed ambiguous, as 'inferior' to what? This Board would again emphasise the importance of the responsibility put upon Contracting Authorities with

regards to the drafting of the 'Rejection Letters' as these serve an important role in Public Procurement so that the participants in a tender procedure would have enough clear information as to whether they should appeal a case or not.

Finally, this Board does not uphold the Appellant's main grievances but upholds the grievance relating to the ambiguity of the drafting of the Rejection Letter.

The 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 in the recommendation for the award of the tender,
- c) Directs that the deposit paid by Appellant be reimbursed due to the ambiguity of the drafting of the Rejection Letter dated 25th May 2021.

Mr Kenneth Swain
Chairman

Mr Lawrence Ancilleri
Member

Mr Richard Matrenza
Member