

PUBLIC CONTRACTS REVIEW BOARD

Case 1640 – CFT 009-0597/21 (CPSU 0799/21) Tender for the Supply of LV Switchgear Breakers and Accessories

26th October 2021

The Board,

Having noted the letter of objection filed by Mr Joseph Borg acting for and on behalf of AJ Electric, (hereinafter referred to as the appellant) filed on the 27th August 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 6th September 2021;

Having heard and evaluated the testimony of the witness Ms Karen Scicluna (Chairperson of the Evaluation Committee) as summoned by Dr Alexia Farrugia Zrinzo acting for the Contracting Authority.

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 19th October 2021 hereunder-reproduced;

Minutes

Case 1640–CFT 009-0597/21. Tender for the Supply of LV Switchgear Breakers and Accessories

The tender was published on the 1st July 2021 and the closing date was the 23rd July 2021. The value of the tender excluding VAT was € 25,000.

On the 27th August 2021 A J Electric filed an appeal against the Central Procurement and Supplies Unit as the Contracting Authority objecting to the cancellation of the tender.

A deposit of € 400 was paid.

There were four (4) bidders.

On 19th October 2021 the Public Contracts Review Board 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 – A J Electric

Notified of the hearing on the 4th October but not represented

Contracting Authority – Central Procurement and Supplies Unit

Dr Alexia Farrugia Zrinzo	Legal Representative
Ms Karen Scicluna	Chairperson Evaluation Committee
Ms Alison Gatt	Secretary Evaluation Committee
Eng Anthony N Magro	Member Evaluation Committee

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. Prior to inviting submissions he noted that Appellant had been contacted to enquire if they would be appearing, the Board had allowed time for this but regrettably they failed to attend although they had been given notification of the hearing well in advance.

Dr Alexia Farrugia Zrinzo Legal Representative for the Central Procurement and Supplies Unit said that the appeal was against the decision by the Contracting Authority to cancel the tender since all the offers exceeded the budgetary provision considerably.

Ms Karen Scicluna (392281M) called as a witness by the Contracting Authority testified on oath that she was the Chairperson of the Evaluation Committee. She stated that the tender was cancelled as all the offers by the economic operators had exceeded the estimated cost of the tender by more than 10%.

This concluded the testimony.

Dr Zrinzo confirmed that the cancellation was in line with the General Rules on Tenders and there were no feasible options.

The Chairman said that the Board will consider the letter of appeal in their deliberations and declared the hearing closed.

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 19th October 2021.

Having noted the objection filed by AJ Electric (hereinafter referred to as the Appellant) on 27th August 2021, refers to the claims made by the same Appellant with regards to the tender of reference CfT 009-0597/21 (CPSU 0799/21) as case No. 1640 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Not represented
Appearing for the Contracting Authority: Dr Alexia Farrugia Zrinzo

Whereby, the Appellant contends that:

- a) The Tender preamble states that after "*comprehensive research and appropriate financial analysis 'the estimate for this tender is set for €25,000*". The tender document also states that the price is not capped and that the estimate of €25,000 is for guidance purposes.
- b) Our understanding of the above was taken to mean that the implementation of a tender price cap of €25,000 + 10% would therefore not apply as clause 2 above clearly indicates.
- c) The specification list refers to part numbers from a particular named supplier in this case ABB. The specifications also accept that bidders are able to submit offers for technically equivalent products from a different supplier. ABB representatives participated in this tender at a price level about 75% higher than the budgetary price.
- d) The accuracy of Point (a) is therefore brought into doubt especially given the fact that the named parts supplier indicated are higher priced than ours.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 6th September 2021 and its verbal submission during the virtual hearing held on 19th October 2021, in that:

- a) CPSU submit that on page 3 - General Instructions, the Tender Dossier gave the right to the Contracting Authority to reject any bids over and above the said estimated value of €25,000. Whereas the said clause stipulates the following: "*Therefore, the published Estimated Procurement Value is not restrictive and final on the Contracting Authority. Economic Operators are free to submit financial offers above or below the Estimated Procurement Value. However, the Contracting Authority reserves the right to accept or reject Financial Offers exceeding the Estimated Procurement Value.*"
- b) CPSU submit that the bid of the objector did in fact exceed the estimated value by more than 10%. CPSU submit that although the right of the Contracting Authority's right to reject bids over and above the estimated value resulted clearly and unambiguously from the Tender Dossier, it is crystal clear that the objectors were unsure as to whether their bid can exceed the estimated value or not. Notwithstanding this, they opted to accept all the terms and conditions of the Tender Dossier and proceeded with submitted their offer with the sole intention of being awarded the Procurement Cycle.
- c) CPSU submit that the decision to cancel the call was taken following the conclusion of the Evaluation, whereby it resulted that all offers exceeded the estimated procurement value of the

Call. CPSU submit that this decision to cancel is in-line with the Tender Dossier, and furthermore is in accordance with the General Rules Governing Tenders as published by the Department of Contracts. In accordance with the said General Rules Governing Tenders, the Contracting Authority is given the said right to cancel by virtue of Article 18.3, which article stipulates the following: "*18.1 The Central Government Authority/Ministerial Procurement Unit/Contracting Authority reserves the right to accept or reject any tender and/or to cancel the whole tender procedure before and after the closing established for the submission of the tenders, including instances where the financial offer submitted exceeds the estimated value for the tender, and/or reject all tenders. The Central Government Authority/Ministerial Procurement Unit/Contracting Authority reserves the right to initiate a new invitation to tender. 18.3 Cancellation may occur where: a) the tender procedure has been unsuccessful, namely where no qualitatively or financially worthwhile tender has been received or there has been no response at all; b) the economic or technical parameters of the project have been fundamentally altered. c) exceptional circumstances or force majeure render normal performance of the project impossible. d) all technically compliant tenders exceed the financial resources available. e) there have been irregularities in the procedure, in particular where these have prevented fair competition. f) the only administratively and technically compliant offer is an unjustified abnormally low offer.*"

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:

- a) Reference is made to the Tender Dossier, Section 1 – Instructions to Tenderers, whereby in paragraph 1.3 it is stated "*The purpose of this value shall be the guidance of prospective bidders when submitting their offer and is not to be considered as a binding capping price. Therefore, the published Estimated Procurement Value is not restrictive and final on the Contracting Authority. Economic Operators are free to submit financial offers above or below the Estimated Procurement Value. **However, the Contracting Authority reserves the right to accept or reject Financial Offers exceeding the Estimated Procurement Value.***" (bold and underline emphasis added)
- b) Reference is also made to the General Rules Governing Tenders V4.1 whereby in article 18.3 (b) it is stated "*Cancellation may occur where the economic or technical parameters of the project have been fundamentally altered.*"
- c) This Board notes that the Financial Offer as presented by the Appellant exceeded the Estimate Procurement Value by approximately 36%. The Board opines that such a discrepancy would result in a fundamental economic alteration of the tender.

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

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 to cancel the tender process,
- c) Directs that the deposit paid by Appellant not to be reimbursed.

Mr Kenneth Swain
Chairman

Dr Charles Cassar
Member

Mr Lawrence Ancilleri
Member