

PUBLIC CONTRACTS REVIEW BOARD

Case No. 787

CT 2138/2013

Framework Agreement for the Supply of 11KV Three Core Cable.

The call was published on the 8th April 2014. The closing date for the call was on the 17th June 2014. The estimated value of tender was €4,112,512.50.

Four (4) offers had been received for tender.

On the 16th January 2015 Power Cables Malaysia Sdn Bhd filed a letter of objection against the award of the tender to TELE-FONIKA KABLE SA.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a hearing on Thursday the 26th February 2015 to discuss the objection.

Present for the hearing were:

Power Cables Malaysia Sdn Bhd - Appellant

Mr Roberto Ragonesi	Local Representative
Dr Franco Vassallo	Legal Representative

Tele-Fonika Kable SA - Preferred Bidder

Mr Patrick Spiteri Staines	Local Representative
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Enemalta Corporation - Contracting Authority

Mr Ivan Bonello	Chairperson Evaluation Board
Mr Bernard Farrugia	Member Evaluation Board
Mr Eric Montfort	Legal Officer
Dr Antoine Cremona	Legal Representative

Department of Contracts

Mr Antoine Galea	Procurement Manager
Dr Franco Agius	Legal Representative

Others:

Mr Joseph Mizzi	Interested Party
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The Chairman made a brief introduction and asked the appellant's representative to make his submissions.

Dr Franco Vassallo on behalf of the appellant submitted that it is clear that the bid bonds in this case have not been renewed. Bid bonds have to remain valid during the tendering procedure, even throughout the appeal period when objections had been raised. This point has been decided by this Board before and confirmed by the Court of Appeal. In the present case, the appellant has knowledge that the only bid bond that had been renewed was that of his client. When the appellant had queried the Department of Contracts, the latter had replied that the department had only asked for the renewal of the offers. When the appellant insisted further the Department replied that *"offers submitted are valid for 150 days from the opening of tender, and as such are valid up to the 17th November 2014."*, and no further explanation was provided. The department did not state that there was no need to extend the bid bond. He contended that if it results that the bid bond has in fact been extended; appellant should be reimbursed the deposit.

Dr Franco Vassallo continued by stating that the Department of Contracts in the reply to the objection had contended that the appellant should have been aware of the change in policy regarding the bid bond. Dr Vassallo contends that any policy change has to concur with the law. He contended that when a policy is changed the Department publishes circulars – Directorate Policy Development and Programme Implementation. This ensures transparency. He contended that in the present case the wording on the tender document was changed but this does not state that there was no need to extend bid bonds. The wording just states that bidders can ask for extension for the offer. He insisted that if the department wanted to remove the need for extending the bid bond then it would have included this in the wording.

The Chairman asked if the tender wording stated that if the tender was extended, the bid bond had also to be extended accordingly. He remarked that it was the tender document which should be directing the tender and in the present case there was nothing to the contrary.

Dr Franco Vassallo replied that there was not such declaration. He contended that this did not exclude the need for extending the bid bond. It was not clear that the bid bond did not need renewal. If it was not clear and there had been no change in policy, then the bid bond should have been renewed. Here he referred to the new "General Conditions of Contract" version 1.12 issued on the 11th February 2015 from where it can be seen that the conditions on the bid bond has been changed. This state: "In exceptional circumstances the Central Government Authority/Contracting Authority may request that the tenderers extend the validity of tenders, without extending the validity of the tender guarantee (Bid bond)...." He asked why the department felt the need to include this, if the question was clear before. The department following a query on the point by appellant did not explain that it was not necessary to renew the bid bond. He insisted that his client could not ask for clarification on the point because clarifications had to be made before the tender closed. His client had the Court of Appeals decision to follow that stated that bid bonds had to be extended.

Dr Franco Galea insists that there was no policy change because the directives of the law had not been followed. A policy changed should have been published. The simple change in the wording of a tender document does not amount to a policy change. Now the position has been made clear through the policy change published on the 11th February 2015. Extension of the validity of tenders should only be given in exceptional circumstances. Finally he said that the appellant has to know who in fact extended the bid bonds in this case and what

exceptional circumstances arose making the extension necessary.

Dr Antoine Cremona on behalf of the contracting authority first pointed out that the Court of Appeal decision referred to by appellant dealt with a different regime of bid bonds and has nothing to do with bid bonds required by the Department of Contracts. He pointed out that the Director of Contracts follows formal guidelines also incorporated into the tender document itself. In the present tender, clause 1.1 at page 4, “Instructions to tenderers” clearly specifies that the tender would be adjudicated based on the guidelines version 1.7 published on the 30th December 2013. The rules applied to all four bidders whose offers were adjudicated according to version 1.7 of the guidelines. There was a level playing field. The changes were induced by the claim of bidders themselves – having to extend bid bonds when tenders took long to be evaluated – bidders used to complain and thus the changes were made as per version 1.7. If appellant chose to renew the bid bond it was because clause 1.2 of the tender had been ignored since this specified that guidelines version 1.7 would be used.

Dr Cremona continued that the version 1.7 was further changed by version 1.12 to make it clearer to bidders. He pointed out that appellant’s offer was in fact the third cheapest. The contracting authority since version 1.7 had no right to ask for the bid bonds to be extended.

Dr Franco Vassallo for the appellant reiterated that the contracting authority should declare two facts:

1. Who had extended the bid bond?
2. What were the exceptional circumstances that led to the extension?

Dr Franco Agius on behalf of the Department of Contracts said that clause 1.1 of the tender was clear and unequivocal that the extension of the bid bond was not necessary. If appellant chose to extend the bid bond it was its own choice, since it was not requested to do so.

Dr Franco Vassallo for the appellant questioned why was the need felt to change version 1.7 with version 1.12 if this was so clear. Why did not the department reply to the query made by Ragonesi Company on behalf of the appellant? What were the exceptional circumstances? He claimed that there were no such circumstances and he could state this because Ragonesi and Company used to represent the preferred bidder in Malta but did not submit this tender on the preferred bidder’s behalf because it was convinced that the preferred bidder did not have the product demanded by the contracting authority.

Dr Antoine Cremona on behalf of the contracting authority stated that the exceptional circumstances involved did not form part of, and was not one of the grounds for the present objection.

The Chairman explained that in his opinion the objection dealt with four factors – the bid bond; the action of the Department of Contracts; misleading information given by the dame department and the calculation of the deposit.

Dr Antoine Cremona contended that it was the guidelines that were binding and not the processes that led to the formulating of the said guidelines. The Department of Contracts had replied to Ragonesi’s query stating that all offers were valid up to the 17th November 2014 and that requests for the extension of the validity of the offers would be sent in due time if the evaluation process had not yet been concluded. This was very clear. Regarding the deposit demanded for objection, this resulted from the Public Procurement Regulations and it could

be seen that it was set at 0.75% of the estimated value.

Dr Franco Agius for the Department of Contracts explained that at the adjudication stage the bidders could not ask for clarifications, but the contracting authority could ask clarifications.

Dr Franco Vassallo for the appellant said that it has been proved that the Department of Contracts did not abide with the policies and with the law. He said that he had shown that whenever a policy had to be changed, certain methods had to be followed. He filed a copy of a circular issued on the 6th January 2014 which shows the proper procedure that the department did not follow in the present case. He claimed that the tender never stated that there was no need to extend the bid bond; it was only the recent version that stated that there was no need. This was not clear in version 1.7 and contended that since this was so his client felt that it was necessary to renew the bid bond. He repeated the question to the contracting authority why it was felt that the version had to be changed if the original 1.7 was so clear.

Dr Antoine Cremona for the contracting authority said that clause 1.1 was clear in referring to version 1.7 and clause 8.2 of this version. The contracting authority did not break any rules but followed the clauses involved to the letter.

Dr Franco Vassallo said that the whole matter arose because the tender was not clear enough and the lack of a clear reply by the Department of Contracts. He therefore asked the Board that if the decision goes against appellant then the Board should recommend the reimbursement of the deposit.

Dr Franco Agius for the Director of Contracts said that the European Court had decided that if anything in the tender is not clear, then the decision should go in favour of the bidders. And thus the award should be confirmed even if it was found that the bidders should have renewed their bid bonds and did not. But this was a hypothetical case since the tender was clear.

At this point the hearing was closed.

This Board,

Having noted the Appellant's objection, in terms of the "Reasoned Letter of Objection" dated 15th January 2015 and also through the appellant's verbal submissions during the Hearing held on 26th February 2015 had objected to the decision taken by the Pertinent Authority, in that:

- a) The Appellant contends that if the closing date of the tender was extended so had to be the corresponding bid bond. In this particular case, the Appellant was not informed that the extension was only for the closing date of the tender and that the bid bond was not to be extended;**
- b) The Appellant also claims that if a change in policy was formulated by the Department of Contracts, this change should have been done through a Circular;**
- c) The Appellant claims that he was misled by the Contracting Authority whenever the Appellant requested clarifications from the same and that he was misled as to the amount of deposit he had to file with this objection.**

Having considered the Contracting Authority's "Letter of Reply" and verbal submissions during the Public Hearing held on the 26th February 2015, in that:

- a) The Contracting Authority contends that it is not correct for the Appellant to state that when there is an extension of the closing date of the Tender, the Extension of the Bid Bond should also follow. This Regulation has been changed and nowhere in the "Instructions to Tenderers", indicates that in exceptional circumstances when the Closing date of the Tender is extended, the Bid Bond should also be extended. The extension of Bid Bonds was a common practice of the past. The new policy caters for the extension of the closing date of the tender yet at the same time it does not establish that the Bid Bond should also cater this extension period;
- b) The Contracting Authority maintains that they did give the correct information to the Appellant upon requesting all bidders to extend the validity of their offers yet at the same time in their request for this extension, it did not ask for the extension of the Bid Bond as well;
- c) With regards to the Appellant's condition that the Contracting Authority advised the Appellant of the incorrect amount of deposit to be filed with his objection, the Contracting Authority maintains that since the Tender had a Three-Package Procedure as per Article 84 (1) of the Public Procurement Regulations, the deposit had to be 0.75% of the Estimated Value of the Tender and not 5% of the Appellant's offer.

Reached the Following Conclusions:

1. With regards to the Appellant's first contention, this Board justifiably opines that from the credible submissions made by the Contracting Authority, there is no validity in the Appellant's contention, in that the "Instructions to Tenderers" clearly and vividly dictated that "Under Exceptional Circumstances", the Contracting Authority can request an extension of the validity of the tender period. Nowhere was it stated or implied that the extension of the validity of the Tender should be accompanied by an extension of the Bid Bond. This Board notes that a couple of years ago, the Department of Contracts had changed policy with regards to the extension of Bid Bond, so that, quite rightly it does not increase the Financial Burden on Economic Operators, when such a situation arises. Apart from the fact that the appellant should have been aware of such a change of policy, the appellant had all the remedial actions to ask for specific clarifications with regards to the consequential extension of the Bid Bond as well. In this regard, this Board does not uphold the Appellant's first contention;
2. With regards to the Appellant's Second Contention, this Board opined that the Contracting Authority has a legal right to impose or change conditions in a Tender as long as the change is reflected either in the Tender Document or in the "Instructions to Tenderers". In this regard, this Board credibly notes that the change in policy instituted by the Department of Contracts, does not in any way, establish that whenever there is an extension of the validity period of a Tender, it should be accompanied by the same extension of the Bid Bond. The fact that the

“Instructions to Tenders” did not imply the necessary extension of the “Bid Bond” also is an acceptable document for the prospective tender to be guided on. In this regard, this Board does not uphold the Appellant’s Second Contention;

- 3. With regards to the Appellant’s Third Contention, this Board opines that from the documentation presented, and credible submissions made during this appeal, it justifiably contends that the Contracting Authority did in fact submit the correct information. First and Foremost, the Information submitted by the Contracting Authority to the appellant Company did state that the request was for the extension of the Tender. No mention was made for the extension of the Bid Bond, as well. With regards to the misleading amount of deposit, this Board quotes article 84 (1) of the Public Procurement Regulations wherein it is vividly clearly stated that the deposit to be filed with the Objection is to be of 0.75% of the Estimated Value of the Tender. This tender was a three package tender that had reached the final financial evaluation stage and therefore would be considered as falling under Regulation 84. This confirms that the deposit paid by the Appellant Company is correct. In this regard, this Board does not uphold the Appellant’s Third Contention**

In view of the above, this Board finds against the Appellant Company and recommends that the deposit paid by the Appellant should not be reimbursed

Dr. Anthony Cassar
Chairman

Dr. Charles Cassar
Member

Mr. Lawrence Ancillieri
Member

27 March 2015