

## **PUBLIC CONTRACTS REVIEW BOARD**

### **Case No. 840: FTS 111-15 – Tender for Environmentally Friendly Cleaning Services (First Clean) at Various Schools in Malta & Gozo.**

The Tender was published on the 26<sup>th</sup> May 2015. The closing date was the 16<sup>th</sup> June 2015. The estimated value of Tender is €78,337.00 (Exclusive of VAT).

Four (4) offers had been received for this Tender.

On the 27<sup>th</sup> July 2015 JF Services Limited filed an objection against the decision of the Contracting Authority to find their Tender administratively non-compliant.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a hearing on Monday 17<sup>th</sup> August 2015 to discuss the objection.

Present for the hearing were:

#### **JF Services Limited:**

Mr Peter Formosa  
Dr Matthew Paris

Representative  
Legal Representative

#### **Foundation for Tomorrow's Schools:**

Perit Joseph Zerafa Boffa  
Mr Ivan Zammit  
Mr Joseph Saetta

Chairperson Evaluation Board  
Secretary Evaluation Board  
Member Evaluation Board

There were no representatives from TF Services Limited.

Following a brief introduction by the Chairman, the Appellant's representative was invited to make his submissions.

Dr Matthew Paris on behalf of the Appellant stated that the latter's Tender had been disqualified because his client had not filed the Tender on the downloaded Tender document filled-in in ink but had re-typed the document and included typewritten submissions. He said that the Appellant's main grievance arises from the fact that the reason given to his client for rejection arose from the Contracting Authority's web site and was not based on anything contained in the Tender document. The second grievance is that the notice informing Appellant of the rejection had not been made according to law and the requisites of the Tender document itself. He made the following submissions:

1. That according to clause 30.2 of the Tender document, Administrative Compliance, the evaluation of bids had to be carried out by checking "*the compliance of Tenders with the instructions given in the Tender document, and in particular the documentation submitted in respect of clause 16.*" There was no reference to any web site and thus the Evaluation should be limited to the contents of the Tender document, and the reason given for disqualification was not acceptable.
2. Clause 1.1 of the Tender states that "*In submitting a Tender, the Tenderer accepts in full and in its entirety, the content of this Tender document, including subsequent clarifications issued by the Contracting Authority, whatever his own corresponding conditions may be, which he hereby waives.*" This clause in the Tender document again makes no reference to the Contracting Authority's web site. This is so because adjudication can only be made on what is contained in the Tender document.
3. The Tender to be downloaded in the present document were in PDF format that does not allow making typing additions. The Appellant had re-typed the downloaded document filling in the necessary information about his offer.

Dr Paris contended that the submitted document was identical to the downloaded document and had reproduced all wording. This was a clear case of substance over form and his client's bid should not have been rejected. He reiterated that a clarification on the matter had referred the questioner to clause 16 Instruction to Tenderers and that thus it was not envisaged that a rejection based on the re-typing of forms would be resorted to.

Mr Ivan Zammit on behalf of the Contracting Authority stated that all the information was given to the Appellant regarding the letter of rejection. A reference to a letter of intent had been published and the Appellant was directed to access it as this had all the necessary information. Appellant was able to file an objection so he must have received the details of the award. He agreed that the web site had instructions to Tenderers to download the Tender document. Downloaded documents had to be used. Article 1.1 of the Tender document says that "*a prospective bidder shall download and print the Tender document from the FTS website; under the heading 'Tenders' etc.*" Clause 15 states that (a) *the Tender must be submitted on the original downloaded document duly signed in blue ink.* Thus the Tender required bidders to submit the original downloaded document and not a re-typed one. The Contracting Authority needed to be sure that the submissions were as per the original and did not have to go through all the Tenders to see if any alterations had been made. Although the

Appellant had declared that he had submitted an identical copy, it can be seen that in his bid the Appellant wrote down “excluding VA” instead of “excluding VAT”. There were several instances of differences between the original and the submitted document. The Tender was secured and could not be copied; he could not understand how the Appellant managed to print the copies, since this was not an e-Tender. The Evaluation Board had not checked the Appellant’s bid word for word. He was no aware of any other discrepancies.

Dr Matthew Paris for the Appellant explained that the latter had re-typed the document because he did not want to fill in the data in blue ink. The downloaded document had been re-typed word for word to ensure legibility. It was a faithful copy without the Contracting Authority’s logo. He reiterated that this was a case of substance over form. The reason for exclusion was not in the Tender document.

Perit Joseph Zerafa Boffa for the Contracting Authority explained that the Contracting Authority could not be expected to vet Tenders word for word to see if any wording had been changed. It was clearly explained in Clause 1.1.

Dr Matthew Paris for the Appellant said that the rejection was not because of this clause, but because of the website. Furthermore the said clause did not state that non observance would lead to exclusion.

Mr Ivan Zammit reiterated that it was clear that the original downloaded be used for submission of bids. A clarification had changed the Bills of Quantity and the new BOQ was to be downloaded and used for submission.

Dr Paris concluded that there was no indication that bidders should consult the website and that the reason for rejection did not arise from the Tender document but from the website and thus was not valid. After all, the Appellant’s offer was a cheaper offer. He suggested that future Tenders should not be in PDF format.

At this point the hearing was closed.

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**This Board,**

**Having noted the Appellant’s objection in terms of the “Reasoned Letter of Objection” dated 27<sup>th</sup> July 2015 and also through the Appellant’s verbal submissions during the Public Hearing held on 17<sup>th</sup> August 2015, had objected to the decision taken by the pertinent Authority, in that:**

- a) **The Appellant contends that his offer was deemed “Administratively non-**

**compliant”, due to the fact that the latter had filed and submitted the Tender Document in a “Re-typed Form”, which included all submissions, but not the downloaded version of the Tender Document. In this regard, the Appellant Company contends that it has submitted all the information as requested in the Tender Document;**

- b) The Appellant also claims that the “Letter of Rejection” sent to the Appellant by the Contracting Authority was not in accordance to law, as no specific reasons were given;**
- c) The Appellant also maintains that since the “Downloaded Present Document” was in pdf format, the system did not allow making any typing additions, hence only written additions were possible.**

**Having considered the Contracting Authority’s submissions during the Public Hearing held on 17<sup>th</sup> August 2015, in that:**

- a) The Contracting Authority contends that the “Downloaded Documentation” had to be used, quoting at the same time, Article 1.1 of the Tender Document, with particular reference to Clause 15 which states that “The Tender must be submitted on the original downloaded document duly signed in blue ink.” In this regard, appellant failed to submit the “Original Downloaded Document”, but instead the latter submitted a re-typed version.**
- b) The Contracting Authority maintains that, in its “Letter of Rejection of Award”**

**to the Appellant, it did give specific reasons for its decision.**

**Reached the following conclusions:**

- 1. With regards to the Appellant's first contention, this Board justifiably opines that the Appellant submitted the requested information, as dictated in the Tender Document, but in a typed form, and this did not deter that the details contained therein could be identified and assessed by the Evaluation Committee. The fact that the latter had not checked the Appellant's details in the submitted form does not in any way justify the Evaluation Committee's decision to discard the Appellant's bid on the grounds of pure presentation form.**

**In this regard, it was the obligatory duty of the "Evaluation Committee" to confirm that although the Appellant's submission was not on the prescribed form, all the necessary information was in actual fact submitted by the Appellant to enable the same committee to proceed with the "Technical Evaluation" of the Appellant's bid.**

**In this regard, this Board justifiably opines that this is a clear case of "substance over form" and is credibly convinced that although the Contracting Authority confirmed that it did not check whether all details were submitted by the Appellant, it could not be proven that the latter failed to submit the necessary information as dictated in the Tender Document. In this regard, this Board upholds the Appellant's first grievance;**

- 2. With regards to the Appellant’s second contention, this Board, after reviewing and examining the reasons in the “Rejection Letter” sent to the Appellant, opines that a more specification explanatory reason could have been communicated to the Appellant and in this regard, this Board upholds the Appellant’s second grievance;**
  
- 3. With regards to the Appellant’s Third complaint, this Board justifiably advises the Contracting Authority to ensure that the “Principle of Proportionality” is maintained so that the Tendering Process is facilitated as much as possible to enable SMEs to avoid cumbersome procedures in submitting their offers.**

**In view of the above, this Board finds in favour of the Appellant Company and recommends that:**

- i) The Appellant’s offer be re-integrated in the Evaluation Process**
  
- ii) The deposit paid by the Appellant should be reimbursed**

Dr Anthony Cassar  
Chairman

Dr Charles Cassar  
Member

Mr Lawrence Ancillieri  
Member

*1 September 2015*