

PUBLIC CONTRACTS REVIEW BOARD

Case No. 846

CT 2064/2015

Tender for the Supply, Delivery, Installation and Commissioning of Permanent Navigational Buoys.

The Tender was published on the 5th June 2015. The closing date for the call was on the 16th July 2015. The estimated value of Tender is €308,000.00 (Exclusive of Vat).

On the 2nd July 2015 L & A Camilleri Limited filed a pre-contractual concern in terms of Regulation 85 of LN 296 of 2010 requesting that the Tender be split into two lots – supply and installation.

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 27th August 2015 to discuss the objection.

Present for the hearing were:

L&A Camilleri Limited:

Mr Ludwig Camilleri	Representative
Dr Veronique Dalli	Legal Representative

Transport Malta, Ports & Yachting Directorate:

Mr Konrad Muscat	Representative
Mr Ray Stafrace	Representative
Dr Joe Camilleri	Legal Representative

Department of Contracts:

Dr Christopher Mizzi	Legal Representative
Ms Susan Camilleri	Representative

The Chairman after making a brief introduction invited the Appellant's representative to make her submissions.

Dr Christopher Mizzi for the Department of Contracts filed a correction note for the Letter of Reply.

Dr Veronique Dalli on behalf of the Appellant said that the present Tender was for the delivery, installation and commissioning of buoys and the Appellant was demanding that the Tender be split into lots. The installation of the buoys requires specialized licensed boats and there were a limited number of such boats that can be used to install and commission buoys. The situation resulted in there being no level playing field between bidders since not every importer was necessarily an owner of such boats. Although the Contracting Authority had the right as to fix its priorities, there was no reason why the Tender could not be split into two lots allowing bids to be made for the supply and bids for the installation of the buoys. The reason given by the Contracting Authority in the Letter of Reply does not hold. She insisted that there would be no problems to the Contracting Authority if the Tender was split into lots.

Mr Ludwig Camilleri on behalf of the Appellant explained that the new trend for contracting authorities was for splitting large Tenders into smaller lots and thus ensuring that more bidders are attracted.

Dr Joe Camilleri on behalf of the Contracting Authority clarified that the Letter of Reply was in fact filed by the Department of Contracts and not by the Contracting Authority. He explained that contracting authorities had a certain amount of leeway and there were no set rules when Tenders should be divided into lots or not. He contended that the decision of the Contracting Authority not to split the Tender into lots was reasonable; there were technical reasons justifying this decision.

1. The purchase and the installation of the buoys were related and not independent. Obtaining one without the other was useless and it made more sense that whoever provided the buoys would also be required to lay them;
2. The question of the warranty – if anything went wrong it was easier to control matters if the supplier of the buoys was also the installer. The latter could not refer to the former if anything went wrong and vice-versa;
3. Storage: The Contracting Authority did not have sufficient storage for the buoys once these were delivered until installation;
4. Having to deal with one entity for both supply and installation was better. This would ensure a better pricing offers if the supplier and installer were the same. There were different methods of installing the buoys and if the supplier and the installer were different there could be conflicts that were difficult to resolve.

Finally Dr Camilleri stated that it was not the intention of the Contracting Authority to exclude certain bidders since there were several other opportunities for bidders to participate in this Tender, like sub-contracting or forming consortia.

Dr Veronique Dalli on behalf of the Appellant declared that two months ago another Tender for the supply and delivery of a buoy and there had been no problems. In the present Tender

only the value had increased but the principle should have remained the same. She insisted that sub-contracting the installation of the buoys had its own problems. It was the Contracting Authority who had changed the praxis for the supply and installation in the present Tender.

Mr Ludwig Camilleri for the Appellant reiterated that the Contracting Authority had several times in the past issued Tenders for the supply of buoys only.

Mr Konrad Muscat for the Contracting Authority explained that there was a great difference between installing one buoy and installing 14 buoys all around Malta. He envisaged difficulties if the Tender was split into lots. If a buoy was damaged during the installation through incorrect installation it would be very difficult to ascertain the responsibility for the damage.

Dr Veronique Dalli on behalf of the Appellant insisted that storage of the buoys did not pose any problem to the Contracting Authority since the supplier would keep them until required. She was to file a note of references indicating previous Tenders for the supply of buoys.

At this point the hearing was closed.

This Board,

Having noted the Appellant's "Pre-Contractual Concern" filed on 2nd July 2015 and also through the latter's verbal submissions during the Public Hearing held on 27th August 2015, had objected to the mode and formulation of the tendered services being requested by the Contracting Authority, in that:

- a) The Tender Document dictated that only bidders having licensed workboats can participate. This condition does in fact limit the scope of competition. In this regard, the Appellant maintains that the tendered services should be split in lots, i.e. Supply and Delivery of Permanent Navigational Buoys and Installation of the same, to the effect that the Tender would give bidders an equal opportunity and a level playing field;**

- b) The Appellant maintains that other similar tenders were issued in the past for**

the supply of buoys only. The Contracting Authority had changed the praxis for this Tender.

Having considered the Contracting Authority's verbal submissions during the Public Hearing held on 27th August 2015 and also the Letter of Reply by the Director General (Contracts) dated 25th August 2015, in that:

- a) The Contracting Authority contends that the purchase and installation of the buoys were related and not independent so that splitting the Tender into lots might create problems for the proper and efficient execution of the tendered supply/service;**
- b) The Contracting Authority also pointed out that there was not enough storage for the buoys to be housed during the span of time between delivery and installation of the same;**
- c) Since there were different methods of installing the buoys, a sole prospective bidder for both the supply and installation of buoys would be more beneficial for the proper execution of the Tendered supply/service.**

Reached the following conclusions:

- 1. With regards to the Appellant's first grievance, this Board, first of all maintains that the Contracting Authority can dictate requirements in a tender, as long as these conditions are attainable and to the best of interest of the latter. In this**

respect, this Board justifiably asserts that the scope of the condition that “Only bidders having licensed work boats can participate”, was to ensure better pricing offers, and at the same time avoid possible unnecessary conflicts between supplier and installer of the buoys. In this regard, this Board contends that the condition imposed in the Tender is justified.

This Board also contends that the Tender Conditions allowed enough leeway (45%) for prospective bidders, who did not possess the necessary licensed work boats to subcontract, or form a consortium. This Board justifiably opines that the condition laid out in the Tender document did not in any credible way, limit the scope of competition and level playing field to potential bidders. In this regard, this Board does not uphold the Appellant’s First Grievance.

- 2. With regards to the Appellant’s Second Grievance, this Board opines that, the fact that previous tenders were issued for the supply/delivery of buoys only, does not, in any credible way; dictate the conditions imposed in the present Tender. The Contracting Authority has the right to impose different conditions for the same supply of another tender, as long as, the conditions are as stated in Conclusion 1 above. The fact that a substantial number of buoys are to be supplied, delivered and installed justifies the intention of dealing with one bidder who will be totally responsible for the proper execution of the Tendered Works.**

This Board justifiably notes that the “Praxis” adopted by the Contracting Authority in this Tender does in fact, mean to achieve the best execution of the Tendered supply and installation. In this regard, this same Board does not

uphold the Appellant's Second Grievance.

In view of the above, this Board finds against the Appellant and recommends that this Pre-Contractual concern be dismissed and that the Tendering Process is to be continued.

Dr. Anthony Cassar
Chairman

Dr. Charles Cassar
Member

Mr. Lawrence Ancillieri
Member

18 September 2015