

PUBLIC CONTRACTS REVIEW BOARD

Case No. 872

FO 6604/14/15

Tender for the Supply of Mercury Outboard Parts for Maritime squadron AFM.

The tender was published on the 28th July 2015. The closing date for the call was on the 27th August 2015. The estimated value of tender is €64,593.48 (Exclusive of Vat).

On the 23rd October 2015 C.J. Frendo Limited filed an objection against the decisions of the contracting authority to declare its offer to be non-compliant and to cancel the tender.

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

Present for the hearing were:

C.J. Frendo Limited:

Mr Bernard Frendo
Mr Mario Frendo

Representative
Representative

Armed Forces of Malta:

Lieutenant Colonel Andrew Mallia
Gunner Reuben Camilleri
Major Daren Micallef
Captain Peter Paul Debono
Lieutenant Christian Francica

Chairperson Evaluation Board
Secretary Evaluation Board
Member Evaluation Board
Member Evaluation Board
Member Evaluation Board

The Chairman made a brief introduction and invited appellant's representative to make his submissions.

Mr Mario Frendo on behalf of the appellant explained that appellant firm imports and stores parts from the manufacturers and keeps them in stock for sale as necessary. For this reason the manufacturer is not expected to issue certification each time some items are sold since there is no connection whatever between the manufacturer and the appellant's clients, the buyers. Appellant is the official representative in Malta of Mercury Outboard motors. The parts in question were not going to be imported specifically for this tender so appellant considered asking for certification by the manufacturer did not make any sense so appellant had declared that the parts were genuine original new parts for the Mercury Outboards. The tender document had listed all the required parts including the Part Number for the Mercury parts in the Bill of Quantity. These part numbers referred to parts manufactured by Mercury only.

Replying to a question by the Chairman, Mr Frendo said that appellant was offering original Mercury parts, including the code numbers for each item offered.

Lieutenant Colonel Andrew Mallia, the Chairperson, Evaluation Board explained that Volume 3, Technical Specifications, of the tender document, Clause 2 required that *"Tenderers are required to submit, with their tender offer, certification issued by the manufacturer clearly proofing that the parts and equipment being offered are brand new, original and authentic Mercury Parts."* Appellant had not produced this but provided certification issued by appellant itself that the parts were brand new, original and authentic Mercury parts. The Evaluation Board had accessed the Mercury website and discovered that appellant was listed as one of the dealers selling original certified Mercury products in Malta. The advice of the Departmental Contracts Committee was sought as the evaluation board had deemed the appellant's offer to be compliant. However, the reply given by the Departmental Contracts Committee was to reject the offer since certification had not been submitted and no rectification was allowable for technical requisites. The evaluation board then had no option but to reject the appellant's tender and recommend the cancellation of the procedure.

At this point the hearing was closed.

This Board,

Having noted the Appellant's objection, in terms of the 'Reasoned Letter of Objection' dated 22nd October 2015 and also through Appellant's verbal submissions during the hearing held on 17th November 2015, had objected to the decision taken by the pertinent authority, in that:

- a) Appellant's contends that the only reason given by the Contracting Authority why his offer was discarded was due to the fact, that Appellant did not submit a "Manufacturer's Certificate" confirming that 'Original spare parts' of mercury outboard parts are supplied to Appellant.

- b) Appellant confirms that he is the legally appointed representative of mercury outboard supplies and the declaration from Appellant confirming such a status should have sufficed.

Having noted the Contracting Authority's 'Letter of Reply' dated 2nd October 2015 and also through verbal submissions during the hearing held on 17th November 2015, in that:

- a) The Evaluation Committee of the Contracting Authority confirming that through documentation and evidence was submitted by Appellant to prove and affirm that he was the local representative of "Mercury Outboard Parts" and at the same time, he was also capable of supplying "Genuine and Authority Parts". However, the Adjudicating Committee were advising from higher Authority that their recommendation would amount to a rectification.

Reached the following conclusion:

1. With regards to Appellant's grievances this Board, after having examined the documentation submitted by Appellant, justifiably opines, that enough proven evidence was sustained by Appellant that he was a legally appointed agent/distributor of "Mercury outboard Parts". This Board also notes the requirements in the Tender Document with particular reference to paragraph two of the "Technical Specifications" which stated that: *"Tenderers are required to submit, with their tender offer, certification issued by the manufacturer clearly proofing that the parts and equipment being offered are brand new, original and authentic mercury parts"*, is somewhat confusing, in that the tenderer is not the manufacturer but rather the supplier of the tendering goods. The Evaluation Committee quite diligently took into consideration the fact that evidence was collected to confirm that Appellant was a supplier of 'Mercury Outboard Parts' and same had accepted assurances that Appellant would be able to supply 'Genuine Mercury Inflatable Boats and mercury precise on parts and accessories'. In this regard, this Board justifiably opines that, the recommendations made by the Evaluation Committee were, logical diligent and transparent, whilst at the same instance this Board does not uphold the higher Authority's advise that such a deficiency in the manufacturer's certificate is a "Rectification:

This Board justifiably and strongly opines that the principle of 'Substance over form' should prevail and same Board also notes that the Tenderer produced the

necessary declaration that if awarded the Tender, he would supply “Original and authenticated parts”. This Board opines, that clauses 2, of the Technical Specification was satisfied by Appellant’s status and declaration that he will supply the tendering parts to be as genuine and authentic” it is also this Board opinion, that it is up to the Contracting Authority to assure that the awarded bidder would provide the tendering goods, in accordance with tender specifications. In this regard, this Board upholds Appellant’s grievances.

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

- 1. Appellant’s offer be fully integrated in the evaluation stage.**
- 2. The deposit paid by Appellant Company be reimbursed.**

Dr Anthony Cassar
Chairperson

Dr Charles Cassar
Member

Mr Lawrence Ancilleri
Member

24 November 2015