

PUBLIC CONTRACTS REVIEW BOARD

Case No. 899

CT 2085/2015

Tender for the Leasing of 35 Low Emission New Motor Vehicles and 1 Low Emission New Self-Drive Van for Transport Malta, Marsa.

The Tender was published on the 17th November 2015. The closing date was on the 21st January 2016. The estimated value of the Tender was €507,288.12 (Exclusive of VAT)

On the 21st January 2016 Michael Attard Imports Limited filed an objection raising pre-contractual concern in terms of Regulation 85 of the Public Procurement regulations.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Richard A. Matrenza as members convened a hearing on Thursday the 4th February 2016 to discuss the objection.

Present for the hearing were:

Michael Attard Imports Limited:

Mr Adrian Scicluna Calleja	General Manager
Mr Michael Attard	Managing Director
Dr Reuben Farrugia	Legal Representative

Transport Malta:

Ms Liz Markham	Procurement Manager
Mr Ray Stafrace	Financial Controller
Mr Clifton Borg	Sr. Operations Officer
Mr Ian Minuti	Property Manager

Department of Contracts:

Dr Christopher Mizzi	Legal Representative
Ms Michelle Lunetti	Procurement Manager

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

Dr Reuben Farrugia on behalf of the Appellant said that surprisingly, in this Tender, while the Contracting Authority is requesting permission to alter the specifications because they make no sense and to be more open, the Department of Contracts is resisting and opposes any such change. The function of the Department of Contracts is to oversee and implement decisions taken by the Contracting Authority after the contract is signed. It cannot interfere in the setting of specifications.

Dr Farrugia continued that in the Letter of Reply, the Department of Contracts had cited the Auditor's report; but there is no connection with the present case since the case mentioned by the Report dealt with a post award change in specifications. It is clear that these specifications cannot be changed after the Tender was awarded. However in the present case, the Contracting Authority realized that the original specifications were defective and wanted to be allowed to change them; thus opening competition.

Dr Reuben Farrugia cited instances where the present specifications were restrictive or discriminatory:

- a) With regards to the van, the Tender asked specifically for a Transit which means that only one particular brand could qualify;
- b) With regards to the cars, the Contracting Authority had asked for Euro V as minimum whereas today it was mandatory to have Euro VI;
- c) The Contracting Authority wanted a 10 horsepower vehicle with a minimum BHP of 70. This type of vehicle does not exist. A segment A vehicle of 10 HP cannot have a BHP of more than 68;
- d) The Contracting Authority wanted adjustable headrests. Again this was not possible since homologation of Euro VI came with fixed head-rests;
- e) The Contracting Authority wanted adjustable seat belts. Again the homologation to the latest European standards does not allow adjustable seat belts because of the size of segment A vehicles which now have adjustable seats instead.

Thus these specifications either do not exist or exist only in one make of car thus eliminating competition. The Contracting Authority agreed with this and wanted to open the specifications. On the other hand, the Department of Contracts is resisting this because some bidders may have already chosen not to Tender because of these restrictions.

Dr Farrugia contended that the basic principles of the Public Procurement Regulations have to be followed and specifications cannot be satisfied by a particular brand only. The Department of Contracts had the power to cancel the Tender on the basis of these defective specifications, but chose instead to let the Public Contracts Review Board to decide the matter.

Dr Christopher Mizzi on behalf of the Department of Contracts contended that the Letter of Reply by the said department gave clear indications that rather than changing the

specifications the Tender should be cancelled. Changing the Tender Technical Specifications would lead to a breach of the principles of Public Procurement Regulations. The Department of Contracts is the regulator of Tenders and not just a rubber stamp for the Contracting Authority.

The Technical Specifications are the remit for the Contracting Authority but in the present case, two Pre-Contractual Concerns had been raised and the Contracting Authority had been informed by the Department of Contracts that the correct forum to clear the matter was through the Public Contracts Review Board.

This advice was procedurally correct. According to the Department of Contracts the only way out of the present situation was the cancellation of the present Tender and its re-issue with proper specifications.

At this point the hearing was closed.

This Board,

Having noted the Appellant's Pre-Contractual Concern, in terms of the "Reasoned Letter of Objection" dated 21 January 2016 and also through their verbal submissions during the Public Hearing held on 4 February 2016 and had objected to the contents of the Tender Document, in that:

- a) The Appellant maintains that the method adopted in formulating the Technical Specifications as dictated in the Tender Document, was restricting the spirit of open competition and favouring a particular importer of the Tendered vehicles. In this particular Tender, the Technical Specifications, outrightly indicated the obvious supplier who can conform with such conditions;**

- b) The Appellant Company contends that even the Contracting Authority wanted to rectify the Technical Specifications of the said Tendered vehicle, but the latter were restricted from doing so by the Department of Contracts.**

Having considered the Contracting Authority's "Letter of Reply" dated 3 February 2016 and also their verbal submissions during the Public Hearing held on 4 February 2016, in that:

- a) The Contracting Authority confirmed that due to this inadvertent dictation of the Technical Specifications in the Tender Document, this same Authority wanted to propose a cancellation of the Tender and a re-issue of the same with more open specifications.**

Reached the following conclusions:

- 1. With regards to the Appellant's First Grievance, this Board, after having examined the relevant documentation and heard credible submissions both from the Appellant and also from the Contracting Authority, is justifiably convinced that the Technical Specifications as dictated in the Tender Document does actually favour one importer/supplier of the Tendered Vehicles. At the same instance, this Board noted the detailed Technical items found in the Tender Document suffocated the spirit of open and fair competition.**

In this regard, this Board had on many occasions pointed out that the Technical Specifications should be drawn up by the Contracting Authority to suit its requirements and should not be formulated as to favour a particular bidder or restrict the principle of competitiveness.

This Board would also like to point out that the items found on the Technical Specifications should also allow for equivalent supplies,

provided that the prospective Bidder proves that the equivalent product will reap the same results.

- 2. With regards to the Appellant's Second Grievance, this Board would like to first of all treat the merit of the Department of Contracts in refusing to change the Technical Specifications as recommended by the Contracting Authority.**

In this regard, this Board credibly affirms the decision taken by the Director of Contracts not to rectify the Technical Specifications at the stage of the Evaluation Process. If the Department of Contracts did otherwise, there would have been a breach of the principles of the Public Procurement Regulations.

This Board also notes that had the Technical aspect been rectified, it would have disadvantaged other bidders who opted not to quote due to these Technical Specifications.

This Board would also like to register the Contracting Authority's confirmation that the Technical Specifications as laid out in the Tender Document had to be rectified. This Board credibly accepts the Contracting Authority's proposal, in that the Tender should be cancelled and a new one issued.

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

- i) The Tender is to be cancelled and a new one is to be issued. The Technical Specifications should be drawn up in a way, as not to**

suffocate open competition and at the same time does not limit the number of prospective Tenderers.

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Richard A Matrenza
Member

11 February 2016