

PUBLIC CONTRACTS REVIEW BOARD

Case No. 904

CT 3057/2015

Tender for the Extension of the Centre of Residential Restorative Services (CORRS) Using Environmentally Friendly Products and Materials at Imtahleb.

The Tender was published on the 28th August 2015. The closing date was on the 29th October 2015. The estimated value of the Tender is €1,230,553.00 (Exclusive of Vat).

Five (5) bidders had submitted offers for this Tender.

On the 11th February 2016 John Micallef Builders Limited filed an objection against the decision of the Contracting Authority to reject their offer because of technical non-compliance.

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 25th February 2016 to discuss the objection.

Present for the hearing were:

Micallef Builders Limited:

Mr Michael Cardona	Representative
Mr Lawrence Vassallo	Representative
Dr Alexia Farrugia Zrinzo	Legal Representative
Dr Benjamin Valenzia	Legal Representative

Central Power Installations Limited:

Ms Veronica Zammit	Representative
Dr Mark Refalo	Legal Representative
Dr Gabrielle Scicluna	Legal Representative

Ministry for Home Affairs and National Security:

Mr Simon Buttigieg	Chairperson Evaluation Board
Mr Charles Lia	Secretary Evaluation Board
Ms Mariella Camilleri	Member Evaluation Board
Mr Alexander Grech	Member Evaluation Board
Mr Stephen Vassallo	Member Evaluation Board
Mr Charles Vella	Representative
Mr Edwin Aquilina	Representative

Department of Contracts:

Dr Christopher Mizzi	Legal Representative
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The Chairman made a brief introduction and invited the Appellant's representative to make his submissions.

Dr Benjamin Valenzia on behalf of the Appellant suggested that the Contracting Authority's Technical Advisor could start by giving his testimony.

Mr Edwin Aquilina, ID No. 64683M under oath stated that he was the Contracting Authority's Technical Advisor in this Tender, having prepared the specifications and prepared the Evaluation Report. The Appellant's submission was not compliant in several points. One of these was the fire alarm system where they offered a smaller system that was required. The specifications asked for an addressable system, having a specific address for each unit, because of security reasons. The Appellant offered very limited simple equipment that was intended to be used in smaller premises and did not comply with the Tender requirements. The system offered was not addressable. This was established from the literature about the system submitted by the Appellant with the Tender. The literature was clear and it could be seen that what was being offered was not compliant with the specifications. Replying to Dr Benjamin Valenzia whether the Appellant had submitted Clause 7 C ii (a) – "*general environmental plan*" he said that that was not a technical matter and he was not involved in it and thus cannot state if Appellant had submitted (a) or not.

Dr Christopher Mizzi on behalf of the Department of Contracts explained that the witness was only involved in assessing the Technical Specifications, helping the evaluation committee decide.

Mr Charles Lia ID No.402381M, the secretary of the Evaluation Board under oath said that Appellant had submitted all the items requested as per Clause 7 C ii (a) to (e), that is the literature was submitted. The Letter of Rejection did not state that the reason for rejection was the non submission of these said items. The Letter of Rejection had given all the reasons why the Appellant's offer was deemed non-compliant. Where the offer was not compliant there was nothing to rectify and no clarification was requested from the Appellant.

This was because three items were clearly seen not to be compliant. In fact the Letter of Rejection lists some items that could have been rectified but since other items could not be rectified it was not deemed relevant to rectify the items that were not. The literature submitted did not agree with the specifications, and the literature should have corroborated the offer. There were three items that were non-compliant and could not be rectified, namely:

- i) The fire alarm system;
- ii) The nurse call system and
- iii) The cold water booster set.

Although some other items could have been rectified this was not done because if these were so, the Tender would still have been disqualified because of the items that were not rectifiable.

Dr Christopher Mizzi on behalf of the Department of Contracts explained that it would be useless to rectify some of the items that were not compliant just because of the literature, because other items that referred to the Technical Offer were not compliant and covered by note 3 that did not allow for any rectification.

Dr Benjamin Valenzia on behalf of the Appellant contended that clause 7 C, Technical Specifications (i) *“literature as per form marked “literature” to be submitted online through the prescribed Tender response format and by using the Tender preparation tool provided”* clearly allowed matters that dealt with literature to be rectified because this (i) was qualified by note 2. Clause 7 C (ii) referred to the Technical Offer and bidders had to submit items (a) to (e), which the Appellant had.

The latter had in fact submitted all the items (a) to (e) and this clearly shows that the Appellant’s offer was disqualified because on the submitted literature. He contended that the literature could have been rectified. The Contracting Authority’s Letter of Rejection clearly shows that the Appellant’s bid was disqualified because of issues with the literature submission. Note 2 states that issues on literature could be rectified.

Yet the Contracting Authority did not ask for clarifications on these points. The Letter of Reply by the Department of Contracts referred to certain items where the Appellant had only submitted only the Technical Literature whilst omitting certain parts of the Technical Offer. However no examples were cited. Furthermore the same letter asked this Board to try to find a fine line between the information submitted by the Appellant as pertaining to the Technical Offer and the information submitted as Technical Literature. He contended that there are two issues here. The Technical Specifications were submitted and the witnesses agreed on this. All the items stated in the Letter of Rejection were based on literature, and this allowed rectification.

Dr Christopher Mizzi for the Department of Contracts contended that the Technical Literature supports the bidders’ Technical Offer and such offer cannot be rectified. The Technical Offer cannot be changed. Technical Literature has lately been included under note 2 allowing rectification because certain products were updated from time to time and this allowed for the literature to be updated accordingly but the Technical Offer itself could never be changed.

In the present case, the Appellant had failed to submit some of the Technical Specifications and which fall under note 3. The Technical Offer had to be in response to specifications. The Evaluation Board had to assess which submissions consisted in literature and which literature consisted in the Technical Offer. Since some items submitted by the Appellant could not be rectified, the remaining items were thus also not corrected as explained above.

Dr Benjamin Valenzia for the Appellant reiterated that the witnesses had explained that the Appellant’s bid was compliant in the Technical Bid and that the issue for disqualification had been the literature submitted. They also confirmed that items (a) to (e) of Clause 7 C ii were submitted by the Appellant. He contended that the Letter of Rejection had only mentioned items that were not compliant regarding literature and therefore rectification of the Appellant’s bid was in order. He cited for example the Trace Heating wherein it was written *“the contractor shall submit all relevant literature.”* Thus the reason for rejection had been the literature. He finally contended that the Appellant should be given chance to rectify.

Dr Alexia Farrugia Zrinzo for the Appellant contended that since items (a) to (e) had all been submitted the other issues that remained concerned literature and thus clarification was in order.

Dr Christopher Mizzi said that the Technical Offers must be according to Section 4. The Technical Offer did not consist just of items (a) to (e). Furthermore the witnesses confirmed

that these items were submitted but did not say that these were all compliant. The Evaluation Report detailed which of the literature submitted was non-compliant.

Dr Mark Refalo on behalf of the Recommended Bidder said that he did not agree that there was any distinction between the Technical Literature and the Technical Offer. He also pointed out section 62 of the Tender Document said that “failure to provide this information could lead to the rejection of the offer”.

The hearing was at this point brought to an end.

This Board,

Having noted the Appellant’s Objection, in terms of the “*Reasoned of Objection*” dated 11 February 2016 and also through their verbal submissions during the Public Hearing on 25 February 2016, had objected to the decision taken by the Pertinent Authority, in that:

- a) The Appellant contends that the Literature which was submitted online, allowed the Contracting Authority to rectify and clarify under clause 7 c 2 (ii). The Contracting Authority did not apply this clause, hence the Appellant’s Literature was being declared as non-conforming with what was requested in the Tender Document and thus being disqualified;**

- b) The Appellant Company maintains that through the witnesses during the Public Hearing, it was evidently proved that their offer was fully compliant, yet the reason why the Appellant’s bid was discarded, was**

due to the fact that the Literature did not conform with the Technical Specifications as submitted by the same Appellant. In this regard, the Appellant contends that he was not given the opportunity to clarify.

Having considered the Contracting Authority's "*Letter of Reply*" dated 15 February 2016 and also their verbal submissions during the Public Hearing held on 25 February 2016, in that:

- a) The Contracting Authority contends that, as requested in the Tender Document, bidders had to submit the Technical Literature of the equipment being offered. Apart from the fact that the Literature did not conform to the Technical Specifications as submitted by the same, the Appellant's offer omitted a Technical Offer for certain components.**

- b) The Contracting Authority maintains that it would have been futile to ask for Clarifications on missing or non-compliant items as this would lead to a Clarification as stated in Note 7.1.3**

Reached the following conclusions:

1. With regards to the Appellant's First Contention, this Board, after having examined the relevant documentation and heard the submissions of all parties concerned, opines that the Appellant's Contention is not quite correct in stating that the only reason why their bid was discarded was that the Literature submitted by the latter did not conform with the Tender's Technical Specifications, in that:

a) First of all, this Board would like to refer to the "*Letter of Rejection*" dated 1 February 2016 wherein the reasons why the Appellant was technically not compliant were clearly stated and referred to specific components such as "*Trace Heating*", "*Second Class Booster Jet*", "*Cold Water Booster Set*", "*Sediment and Combination UV/Biological Filter*" etc. This is ample evidence that there were specific Technical reasons why the Appellant's offer was rejected;

b) This Board would like to treat also the importance of the Literature which was requested in the Tender Document. This Board had, on many occasions stated that the Technical Literature should corroborate with what had been submitted in the Technical Offer so that the Technical Literature should not replace or

supersede any missing information in the Technical Offer. The Technical Literature should reflect what has been submitted in the Technical Offer.

This Board justifiably opines that the Appellant failed to submit a Technical Offer for all the components as dictated in the Tender Document and this Board also credibly notes that the Contracting Authority vividly stated the reasons for discarding the Appellant's Offer. In this regard, this Board does not uphold the Appellant's first Contention.

- 2. With regards to the Appellant's Second Contention that he was not given the opportunity to clarify any Technical issues, this Board, after establishing the reasons why their offer was discarded, would justifiably refer to "*Notes to Clause 7.1.3*" of the Tender Document wherein it is clearly dictated that the Technical Specifications, with particular reference to Clauses 7.1 (c) (ii), (a), (b), (c), (d), (e) fall under Clause 7.1 note 3 i.e. "*No Rectification shall be allowed.*"**

In this regard, it has been clearly established that apart from the issue of the Technical Literature there were clear Technical reasons why the Appellant was deemed as non-compliant. This Board would

also like to point out that the Evaluation Board did not ask for any clarifications. If so, this would have lead to a “Rectification”, which is not allowed.

The same Evaluation Board had to evaluate the Appellant’s offer on documentation submitted by the latter. In this regard, this Board does not uphold the Appellant’s Second Contention, which stated that the Appellant was not given the opportunity to clarify any Technical issues.

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

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Lawrence Ancilleri
Member

4 March 2016