

PUBLIC CONTRACTS REVIEW BOARD

Case No. 922

CT 2031/2015

Tender for Supply and Delivery of Fire Appliances to the Civil Protection Department (MHAS).

The Tender was published on the 27th November 2015. The closing date was on the 25th February 2016. The estimated value of the Tender is €2,560,000.00 (Exclusive of Vat).

On the 15th February 2016 SR Services Limited filed an objection raising pre-contractual concerns in terms of Regulation 85 of the Public Contracts Procurement Regulations.

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 7th April 2016 to discuss the objection.

Present for the hearing were:

SR Services Limited:

Mr Ray Muscat	Representative
Mr David Muscat	Representative

Civil Protection Department – MHAS:

Mr John Rizzo	Head of Department
Mr Peter Paul Coleiro	Technical Expert

Department of Contracts:

Dr Christopher Mizzi	Legal Representative
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The Chairman made a brief introduction where he explained that the Board had already decided two other pre-contractual concerns regarding this Tender. He asked whether the Appellant was aware of these. The Chairman continued by pointing out that this Tender was of national interest for the country and should not be lengthened unnecessarily. He made it clear that this was the last time such a hearing would be held. The Chairman also pointed out that he would later explain in detail the last decision delivered. The Appellant's representative was then invited to make his submissions.

Mr Ray Muscat on behalf of the Appellant pointed out that in this Tender there were many clarifications which had been issued, and many changes had been made. These were spread throughout the Tender Document. This could cause confusion when bidders were compiling their offers and so he was suggesting to the Contracting Authority to include all these clarifications and changes into a new document which made the Technical Specifications clearer. This was because nearly all of these specifications had been changed from the original ones and would render the compilation of the relative offers easier.

The Chairman asked the Contracting Authority whether all the Board's previous recommendations, given in the previous two decisions, had been incorporated into clarifications as had been suggested by the Board.

Dr Christopher Mizzi on behalf of the Department of Contracts replied that they have. He referred to clarifications numbers 15 and 16. The Contracting Authority had also made it clear that the diagram shown in the Tender Document was for illustration purposes only. He said that if the Board was of the opinion that such changes should be made through clarifications then it should be decided, otherwise there would be other solutions.

Mr Ray Muscat for the Appellant asked that the matter be seen through the perspective of the bidders and overseas suppliers. Tenderers, when compiling their offers have to go through all the clarifications each time an item was being filled to see if the specifications for the item had been changed or not. He remarked that even the Tender title was confusing. Many suppliers used software searching for key words (data mining) to learn of any Tenders they could be interested in.

The Chairman remarked that bidders should compile Tenders according to the Technical Specifications and not according to the title.

Mr John Rizzo on behalf of the Contracting Authority pointed out that most clarifications arose from the requests and questions raised by the bidders themselves.

Mr Ray Muscat continued that the three most important issues Appellant wanted to raise were:

- i) The question of payment terms. Overseas suppliers needed some guarantees about payment after delivery. The Contracting Authority could remedy the issue by giving letters of credit, fixing retention fees as necessary. Mr John Rizzo explained that the financial regulations did not allow the Contracting Authority to make any advance payments. Dr Christopher Mizzi for the Department of Contracts explained that some advance payments had been authorized in Tenders using EU funds but since the funding of the present

Tender was local, funding had to be according to regulations, and payment terms should not be changed after the issue of the Tender;

- ii) The question of division into lots. It was not clear from the last decision what the Board had suggested in this regard. The Chairman explained that the Board had decided that generally where possible, Tenders should be divided into lots. But in the present case the subject, a fleet of vehicles, did not easily divide into lots. Mr John Rizzo for the Contracting Authority said that the authority was already following this. The whole fleet of vehicles was in the process of being changed and the authority had split the fleet into lots. The present Tender was one of these lots. He pointed out that the present fleet was fast becoming unusable and dangerous. Mr Ray Muscat for the Appellant contended that since the fire engines were made up of a chassis and the fire fighting equipment and there is no guarantee that the acquired vehicles would be from the same supplier entirely. Mr John Rizzo declared that following the award any difficulties would have to be settled by the contractor who won the Tender;
- iii) The last question was whether partial deliveries of the vehicles by the awarded bidder would be acceptable or not. Mr John Rizzo for the Contracting Authority said that this was not acceptable because of the urgency which was increasing daily.

Mr Peter Paul Coleiro on behalf of the Contracting Authority explained that if a fire engine stopped in the middle of an emergency, the firemen would still have to continue to use it at a great danger to themselves and others.

Dr Christopher Mizzi for the Department of Contracts said that if after the decision the matter could be settled through clarifications it would be so. Otherwise the department would consider other options.

At this point the hearing was closed.

This Board,

Having noted the Appellant's "*Pre-Contractual Concern*" as per letter dated 1 February 2016 and also through their verbal submissions during the Public Hearing held on 7 April 2016 whereby SR Services Limited raised the following pre-contractual concerns:

a) **The Appellant contends that since there were numerous clarifications, these can cause confusion among suppliers as to the exact Technical Requirements of the tendered vehicles. In this regard, the Appellant maintains that a new Tender Document be issued to incorporate all the clarifications;**

b) **The Appellant also raised concerns with regards to:**

i) **The mode of payment by the Contracting Authority, in that the system of payment did limit the issue of a “*Letter of Credit*” in favour of suppliers of the vehicles by the Recommended Bidder;**

ii) **Whether partial deliveries would be accepted by the Contracting Authority.**

Having considered the Contracting Authority’s “*Letter of Reply*” dated 22 March 2016 and also through their verbal submissions during the Public Hearing held on 7 April 2016, in that:

a) **The Contracting Authority contends that due to the considerable amounts of clarifications issued, the Authority would find no objection in the issue of a re-worked Tender Document to include all**

the Technical Clarifications in a “*Final Format*”.

Reached the following conclusions:

- 1. With regards to the Appellant’s First Concern, this Board acknowledged the fact that due to the numerous and voluminous amount of Clarifications issued, there might arise confusion or misinterpretation of the Technical Specifications from the Supplier’s Part**

This Board would like to point out that the reason why this same Board recommended that all amendments/explanations regarding the Technical Specifications be submitted to Tenderers via clarifications was simply to expedite the Evaluation Process for this Tender.

This Board would justifiably emphasise the urgency of this procurement and this Board’s sole intention is to eliminate undue lengthening of the whole process.

At the same instance, this Board was credibly indicated by the Contracting Authority that by re-working the Technical Specifications to include all the clarifications made and issue a new

Tender, this would facilitate a speedier process for this procurement. In this regard, this Board has no objection on the drafting of a new Tender as long as the process would be faster;

- 2. With regards to the mode of payment being suggested by the Appellant, this Board has no jurisdiction to discuss the merit of this particular issue;**
- 3. With regards to partial deliveries, this Board noted credible reasons why such a factor cannot be even considered by the Contracting Authority and for the very simple and justified reason of the urgency of this Procurement;**
- 4. With regards to the possible division of this Procurement into Lots, this Board, as has been dictated during the Public Hearing held on 7 April 2016, is in favour of splitting tenders into lots, wherever possible but in this particular case, splitting the Tender into lots, for the same type of equipment, would create unnecessary problems on the Contracting Authority with regards maintenance, spare parts and administration.**

In this regard, this Board gives the Contracting Authority the liberty of:

i) Either allow the clarifications issued to form part of the present Tender Document;

or

ii) Issue a Fresh Tender to incorporate all clarifications used.

However, the choice of the Contracting Authority is to be made on the “*maxim*” of the fastest procedure to procure the Tendered Equipment.

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Lawrence Ancilleri
Member

11 April 2016