

PUBLIC CONTRACTS REVIEW BOARD

Case No. 935 – WSD 2/2016: Tender for the Design and Installation of a Floodlighting System for Birzebbuga Water Polo Pitch.

The Tender was published on the 26th January 2016. The closing date is on the 16th February 2016. The estimated value of Tender is €40,000.00 (Exclusive of VAT).

Three (3) offers from two bidders had been received for this Tender.

On the 22nd February 2016 Projekte Global Limited filed a Letter of Objection against the decision of the Contracting Authority to refuse to accept its Tender on the 16th February 2016.

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 28th April 2016 to discuss the objection.

Present for the hearing were:

Projekte Global Limited:

Mr Desmond Mizzi	Representative
Ms Martina Pace	Representative
Dr Matthew Paris	Legal Representative

Ministry for Transport and Infrastructure:

Mr Marco Cassar	Representative
Ms Josephine Dimech	Representative
Mr Simon Ellul	Representative

The Chairman made a brief introduction and asked Appellant's representative to make his submissions on the Letter of Objection.

Dr Matthew Paris on behalf of the Appellant explained that his client was objecting because the Tender that was intended to be submitted by Appellant was refused by the Contracting Authority because it was considered as a late submission.

He contended that the Tender Document clearly explained at clause 2.1.1 that “.....*Tenderers are expected to examine carefully and comply with all instructions, forms, contract provisions and specifications contained in this Tender Document.*” This meant in fact that only the parameters contained in the Tender Document is valid. Article 3.1.1 of the Tender method of submittals contained the information that “Winter Office hours from 08.00 till 14.00”.

Dr Paris continued by saying that only the Tender Document should prevail in guiding and limiting the Tendering process and that the Government Gazette was just a notice for information, it was not part of the Tender Document. He referred to Articles 1.1.4 and 2.1.7 and the latter stated that “*any interpretations, corrections or changes to the Tender Document by the Contracting Authority shall be made by an official addendum. Interpretations, corrections or changes made in any other manner shall not be valid, and Tenderers shall not rely upon such interpretations, corrections or changes.*” Thus he contended that anything written in the Government Gazette was not relevant. It was the Tender Document which was supreme, and this stated that the hours of acceptance were until 14.00.

Furthermore, the Government Gazette, to increase the confusion gave two other times for the closing of the Tender – 3.00pm and 10.00am. This confusion was created by the Contracting Authority itself. Yet when a representative from his client went to deliver the Tender personally at 10.30am this was refused because it was too late for submission. He had advised client to abide with the Tender Documentation and had emailed the Contracting Authority at 11.58am to explain.

However, it resulted that the other Tenders had already been opened. Also the Tender Document at article 3.2.1 had given the procedure that had to be used in case of late submissions that is “*all Tenders received after the deadline for submission specified in the contract notice or these instructions shall be kept by the Contracting Authority.....*” The Contracting Authority failed to abide by this and refused to accept his client's Tender. It should never have been refused.

Dr Matthew Paris continued that the situation was now difficult since the Tenders had already been opened and the Public Contracts Review Board cannot order the acceptance and opening of his client's Tender. Since some time had elapsed since the episode the only solution would be the cancellation of the Tender procedure.

Ms Josephine Dimech on behalf of the Contracting Authority said that she had been present during the opening of the Tenders. She explained that the Government Gazette Notice specifically stated that “*Sealed Tenders will be received at the Procurement and Supplies Directorate, Support and Services Department, Floriana up to 10.00 am of Tuesday 16th February 2016*”. She contended that the time shown in 3.1.1 from 08.00 till 14.00 did not refer to the closing time of the Tender but was just explaining that the offices in winter would receive the public only during those hours.

Ms Dimech also said that the Government Gazette advert for the Tender clearly stated that the closing time was 10.00am. Article 3.2.2 made it clear to bidders that late submissions would be rejected and not evaluated.

The Chairman pointed out that the notice in the Government Gazette also said that “**L-offerti għandhom jintbagħtu f’dawn il- hinijiet: Hinijiet tax-Xitwa mit- 8.00 am sat- 3.00 pm**”.

Mr Marco Cassar on behalf of the Contracting Authority contended that the second time in the Government Gazette notice just referred to office hours and not the Tender submissions. The Tender said that to be submitted by the date and time shown on the Government Gazette which showed 10.00 am.

Ms Josephine Dimech for the Contracting Authority said that the second time in the Government Gazette notice was not contained in the first time publication of the notice on the 26th January 2016. But a printout of the relevant page 538 of the Government Gazette number 19528 show that it was. She contended that article 3.2.2 directed that late Tenders shall be rejected.

Dr Matthew Paris for the Appellant reiterated that the Government Gazette was not the binding document but the Tender Document itself was.

Ms Josephine Dimech for the Contracting Authority insisted that the intention of the second time in the Government Gazette notice was just intended to help intended bidders by showing the office opening hours.

At this point the hearing was closed.

This Board,

Having noted the Appellant’s Objection, in terms of the “*Reasoned Letter of Objection*” dated 22 February 2016 and also through their verbal submissions during the Public Hearing held on 28 April 2016, and had objected to the decision taken by the Pertinent Authority, in that:

- a) The Appellant contends that his offer submission was refused despite the Tender Document clearly indicating a separate date, by which**

date and time the Appellant abided, but was still refused submission;

- b) The Appellant also maintains that various dates were mentioned for the submission of the offers, however, the Tender Document clearly indicated a separate date, by which date and time the Appellant abided, but was still refused submission.**

Having considered the Contracting Authority's verbal submissions during the Hearing held on 28 April 2016, in that:

- a) The Contracting Authority contends that the Government Notice clearly stated that sealed tenders are to be received by 10:00am on Tuesday 16 February 2016. The Appellant did not submit his offer within the above quoted time of that date and that the Tender Document clearly dictated that late submissions would be rejected.**

Reached the following conclusions:

- 1. This Board would like to treat the main two issues regarding this Appeal as follows:**

i) **Late Submission of the Appellant's Offer**

This Board, first of all, would like to treat the issue of different dictated times for the submission of Tenders. This Board, would like to in the first instance, enquire why the closing date and time was not shown in the Tender Document itself.

This Board does not recommend that such important issues of the Tender Document should be taken to be relied on the Government Gazette.

The Tender Document is the Contractual Document and in this regard, the date and time for submissions of offer was rather vaguely indicated in the Government Gazette. This Board would like to justifiably point out that even the dates and times for submission of offers were not only confusing but also conflicting.

In this regard, this Board refers to the Government Gazette number 19535 wherein the notice issued reads as follows: “*Submissions of Tenders/Quotation. Winter Office Hours 8.00am till 3.00pm*”.

This Board credibly notes that if the Contracting Authority, by publishing the date and time for submission of offers clarified the whole situation and it would help to clear the issue of dates and times for submissions.

ii) Opening of Tenders

Since this Board is aware of the fact that these offers, which in the opinion of the Contracting Authority, abided by the time of submission; were actually opened and made public, this Board justifiably recommends that the Appellant's Offer cannot be integrated, in the process.

In view of the above, this Board recommends that:

- a) The Present Tender is to be cancelled;**

- b) The Contracting Authority is to ensure that the exact date and time for the submissions of offers are clearly and distinctively annotated in the Tender Document, without fail, so as to avoid such confusing and complications with regards to the establishment of the proper date**

and time for submission of offers;

c) The deposit paid by the Appellant Company should be fully refunded

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Lawrence Ancilleri
Member

17 May 2016