

PUBLIC CONTRACTS REVIEW BOARD

Case No. 941 – TD/T/3240/2015: Tender for the Supply of Low Voltage 3x300 + 1 x 150 XLPE Insulated Copper Cable.

The Tender was published on the 30th October 2015. The closing date is on the 2nd December 2015. The estimated value of Tender is €39,831.25 (Exclusive of VAT).

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

On the 26th February 2016 Electrical Supplies & Services Limited filed a Letter of Objection against the decision of the Contracting Authority to reject its Tender offer as being technically non-compliant.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Mr Richard A Matrenza and Mr Lawrence Ancilleri as members convened a hearing on Wednesday the 25th May 2016 to discuss the Objection.

Present for the hearing were:

Electrical Supplies and Services Limited:

Mr Duncan Agius	Representative
Mr Stephen Ciappara	Representative
Dr Reuben Farrugia	Legal Representative

J P Baldacchino and Company Limited:

Mr Adrian Baldacchino	Representative
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Enemalta Corporation:

Mr Ivan Bonello	Chairperson Evaluation Board
Mr Ruben Borg	Member Evaluation Board
Mr Brendan Harney	Member Evaluation Board
Dr Julianne Portelli Demajo	Legal Representative
Dr Antoine Cremona	Legal Representative

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

Dr Reuben Farrugia on behalf of the Electrical Supplies and Services Ltd explained that the facts of the case were uncontested. His client had erroneously omitted to fill in clause 2.7.2 of Section 4 (Technical Specifications). This required the bidders to confirm that their cables had the necessary markings.

Dr Farrugia said that the consequences of this were explained in the instructions to Tenderers in Section 4 of the Tender Document, which stated: "*all schedules are expected to be filled in with requested data and confirmations. In cases where data in schedules are left missing, offer may not be considered*". This meant that only if data is omitted the offer may be rejected not if confirmation was omitted.

This also meant that the Contracting Authority had the discretion of whether to disqualify the offer or not. This arises from the "may" in the instructions. There is enough jurisprudence both from this Board's decisions and the decisions of the European Court of Justice which show that the Contracting Authority is obliged to ask for clarifications.

In view of this it was contended that Enemalta should have asked the Appellants about the non-provided confirmation since the Appellant's offer, which was the cheapest, was discarded because of a tick box that had not been erroneously filled. He insisted that the Contracting Authority should have exercised the discretion of asking the Appellant to clarify.

Dr Antoine Cremona on behalf of the Contracting Authority pointed out that any jurisprudence about the Contracting Authority's obligation to seek clarification was in the context of MEAT Tenders. There was no such jurisprudence in Tenders that were awarded according to the 'cheapest compliant Tender' criterion; in such Tenders there were no obligations to seek clarification.

In the present case the Contracting Authority could not do anything more. The distinction made by the Appellant between data and confirmation does not result; data was given in print on the form and bidders had to fill and confirm 'yes' or 'no'. Some of the items were mandatory and identified with an 'M'.

Three offers were received for this Tender and the bidders had to bear the consequences of their mistakes. The Contracting Authority could not intervene to correct the submissions of any particular bidder because such action would have compromised the integrity of the Tendering process.

Dr Reuben Farrugia for the Appellant said that the general principles guiding discretion of public authorities were well known. The integrity of the process would not have been compromised had the authority asked the Appellant for clarification because their offer would have remained unchanged. It was that the Contracting Authority, who failed to use the discretion it was entitled to use to determine whether the requested markings existed or not.

Dr Antoine Cremona for Enemalta replied that the Appellant's offer would not have remained the same. Since clause 7.2 was left empty, this meant that the cable offered could either have or does not have the requested markings, and since this formed part of the selection criteria it could not be rectified or clarified.

At this point the hearing was closed.

This Board,

Having noted the Appellant’s Objection, in terms of the “*Reasoned Letter of Objection*” dated 26 February 2016 and also through their verbal submissions during the Public Hearing held on 25 May 2016 had objected to the decision taken by the Pertinent Authority, in that:

- a) Electrical Supplies and Services Ltd contend that its offer was discarded due to the simple fact that they had inadvertently failed to indicate whether the cables being offered by the latter, had the necessary markings as requested in Clause 2.7.2 of the Tender Document.**

- b) In this regard, with specific reference to section 4 of the Tender Document, the same clause states that in cases where data in schedules are left missing, the offer may not be considered to the effect that, the Appellant was maintaining that the Contracting Authority had the discretion whether to disqualify the offer or not.**

- c) The Appellants were maintaining that since their offer was the**

cheapest, the Contracting Authority was obliged to ask for clarifications as the same Authority did not exercise the discretion as stated in Clause 2.7.2 of the Tender Document.

Having considered the Contracting Authority's "*Letter of Reply*" dated 3 March 2016 and also through their verbal submissions during the Public Hearing held on 25 May 2016, in that:

- a) Enemalta maintains that since the "*Award Criteria*" was on the basis of the cheapest compliant bidder and that they were not obliged to ask for Clarifications. Some of the items were mandatory and were marked with an "*M*" item which the Appellant failed to conform with.**

- b) The Contracting Authority was not in a position to determine whether the Appellant's cables had the necessary markings and therefore no clarification was possible if the mandatory information data was missing or not submitted after the closure of submission of offers as this would have been a rectification.**

Reached the following conclusions:

1. With regards to the Appellant's First Contention, this Board, after having heard all the submissions made by both parties and after having examined the Contents of the Tender Document with particular reference to Clause 2.7.2, justifiably contend that the Confirmation which was mandatorily dictated, and specifically marked with the letter (M), (which meant a must submission), did, in fact, form part of the Technical Specifications.

Enemalta has the sacred right to impose certain mandatory conditions in a Tender. It was the duty and obligation of the Appellant to ensure that prior to the submission of his offer, the latter has to safeguard his chances of success by strictly adhering to the all respects of the Technical Requirements as dictated in the Tender Document.

In this particular case, this Board credibly contends that the confirmation which the Appellant failed to submit, apart from being a Mandatory condition, was also explicitly marked with the letter "M", which meant that this data/confirmation had to be submitted.

The Appellant failed to provide this information and there is no question of clarifications on the missing information from the Tender

Document. In this regard, this Board upholds the Contracting Authority's "*Line of Action*".

- 2. With regards to the Appellant's Second and Third Grievances, this Board would like to justifiably point out that the "*Award Criteria*" of this Tender was not "*MEAT*" but the cheapest compliant offer and therefore, the Contracting Authority cannot whatsoever seek clarification on missing information from a Tender. In this regard, this Board does not uphold the Appellant's Second and Third Grievances.**

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

Dr Anthony Cassar
Chairman

Mr Richard A Matrenza
Member

Mr Lawrence Ancilleri
Member

27 May 2016