

PUBLIC CONTRACTS REVIEW BOARD

Case No. 959 – GN/DPS/T/3031/2015: Negotiated Procedure for the Design, Supply, Delivery, Installation and Testing of a Fiscal Metering System at Delimara Power Station.

The Tender was published on the 22nd January 2016. The closing date was on the 14th March 2016. The estimated value of the Tender is €416,000.00 (Exclusive of VAT).

Five (5) offers had been received for this Tender.

On the 18th July 2016 Joseph Cachia & Son Limited filed an Objection against the decision of the Contracting Authority to recommend the award to Galleys Malta Limited for €300,173.08.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Dr Charles Cassar and Mr Carmel Esposito as members convened a hearing on Thursday the 28th July 2016 to discuss the Objection.

Present for the hearing were:

Joseph Cachia & Son Limited:

Ms Maronna Filletti	Representative
Ms Daniela Sciberras	Representative
Mr Nikolai Lubrano	Representative
Dr Adrian Camilleri	Legal Representative

Galleys' Malta Limited:

Mr Ruben Curmi	Representative
Dr Joseph Grech	Legal Representative

Enemalta plc:

Mr Ivan Bonello	Chairperson Evaluation Board
Mr Stephen Camilleri	Member Evaluation Board
Mr Mario Micallef	Member Evaluation Board
Mr Simon Gatt	Member Evaluation Board
Mr Darren Muscat	Member Evaluation Board
Mr Jason Kitney	Member Evaluation Board
Dr Marie Meli	Representative
Dr Stefano Filletti	Legal Representative

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

Dr Adrian Camilleri for Joseph Cachia & Son declared that the Objection is about their first option offer and not the second one as the Contracting Authority indicated in the Letter of Reply. The Appellant had submitted two separate offers. Dr Camilleri then made the following submissions about the Recommended Bidder's Financial Offer form:

- i) Galleys' Malta Ltd's Financial Offer form (EM1) was corrected and now shows the unit prices (EM3) whereas when the offers were opened these were not shown. This constitutes a new grievance since it means that the Tender was amended and rectified;
- ii) The Recommended Bidder had included in the total the cost of item 21 – testing. Dr Camilleri was contending that this was a mistake made by the Recommended Bidder when filling the Tender. The Contracting Authority had asked the Recommended Bidder to amend the Financial Bid form and as a result not only were the totals changed but the unit prices were put down.

This should not have been done because the Financial Offer is not rectifiable. The option not to use the testing, qualified by *** was available for the Contracting Authority and not to the bidders, who had to quote the cost of testing;

- iii) Clauses 7(d) and 17 of the Tender Document made it clear that the Financial Offer could not be rectified. The validity of the Recommended Bidder's Tender is in question because of these errors. This was not an arithmetical correction of an error and not a clarification, but the putting down of the wrong information in the wrong place on the financial form.

Dr Adrian Camilleri then rebutted the Contracting Authority's contention that the cheapest bidder should be awarded, saying that if the cheapest offer was not fully compliant it should be rejected. This amounted to substantial discarding of regulations by the Evaluation Board to the prejudice of Appellant.

Dr Stefano Filletti on behalf of the Contracting Authority insisted that this was not an error or a case of arithmetical correction. This Objection is based on the Financial Offer form which was the basis the Evaluation Board used to assess compliance and pricing. The main point is item 21.

The Recommended Bidder put down an amount in a column that was blacked out, thus should not have been filled in. This item was qualified by *** which stated that "*the testing cost was not to be considered for Financial Evaluation*" and therefore the Evaluation Board had no choice but to ignore this item.

The Evaluation Board had to exclude this item according to the dictates of the Tender Document. The Recommended Bidder's price was cheaper even when item 21 was taken into consideration, but the latter had to be removed to enable the comparison of like with like.

What the Appellant was demanding was stultifying the Tendering process Principle of

Substance over Form by wanting Form to overrule Substance by choosing a higher price. The Contracting Authority was correct to exclude item 21 from the total cost. The case quoted by the Appellant in the Letter of Objection was different to the present case since the bidder had failed to offer the Technical Offer.

In the present case, the Recommended Bidder had offered more than was requested. In the Darlington case – where offer had been excluded for providing extras – the Court had decided that exclusion of the offer was not in order and had decided for the removal of the extra items offered enabling comparison of like with like.

He contended that the ranking change because of correction did not constitute a prejudice. In the present case the Contracting Authority was obliged to ignore item 21 which was a simple objective analysis. Regarding the unit prices he said that the grand total of the offer was relevant and not the value of the individual items. In any case the non listing of the unit prices did not lead to rejection of the offer. Finally Dr Filletti for the Contracting Authority pointed out that since this was a negotiated procedure the Appellant should have reflected any discounts to be offered in the original bid.

Dr Adrian Camilleri for the Appellant did not agree that only minor impasses were corrected but insisted that the Recommended Bidder's Tender had been rectified against the directives given in the same Tender Document. By inserting the amount in the wrong column, and filling in the unit rates, the Recommended Bidder had changed the offer.

At this point the hearing was closed.

This Board,

Having noted the Appellant's Objection in terms of the "*Reasoned Letter of Objection*" dated 18 July 2016 and also their submissions during the Public Hearing held on 28 July 2016, in that:

- a) Joseph Cachia & Son contend that the "*Financial Offer Form*" of Galleys' Malta Ltd had been altered and corrected by Enemalta plc, hence an amendment and rectification had occurred. In this regard, the Appellants are referring to Item 21 of the Financial Offer Form,**

wherein, they were requested to quote for the cost of “*Testing Instrument*”.

The Contracting Authority disregarded the fact that the cost of testing was listed in the total column and not in the “*Unit Price*” column as requested to the effect that, if the Recommended Bidder’s Financial Offer was not rectified, the cheapest offer would have been the Appellant’s.

Having considered the Contracting Authority’s “*Letter of Reply*” dated 25 July 2016 and also their verbal submissions during the Public Hearing held on 28 July 2016, in that:

- a) Enemalta plc maintains that the fact that Galleys’ Malta Ltd filled in his quote in the Total Column which was blacked out. This was an eminent proof that the Bidders were not asked to quote a total cost for the cost of “*Testing Equipment*”.

The Contracting Authority is also contending that the three asterisks (***) alongside item 21 clearly explain that this item was not compulsory and that the elimination of the cost from the “*Totals Column*” of the “*Financial Offer*” of the Recommended Bidder did

not in any way effect the quoted Global Price of the Latter.

In this regard, the Contracting Authority contends that the principle of “*Substance Over Form*” should prevail.

b) Enemalta plc also maintain that there was no amendment or correction to the original submission made by Galleys Malta Ltd. In this regard, the Contracting Authority points out that the Grand total of the Bidder’s Financial Offer was correct in the first instance by not including the “*Cost of Testing*” in the actual addition.

c) The Contracting Authority contends that since this was a Negotiated Procedure, the latter had every right to negotiate a discounted price with the Recommended Bidder.

Reached the following conclusions:

1. With regards to the Appellant’s First Contention, this Board after having examined the relative documents and heard submissions from all parties concerned, justifiably opines that the non inclusion of the cost of Testing Equipment in the Total Amount of the Financial Bid Form was in actual fact correct and proper.

The Three Asterisks under item 2.1 specifically indicate the fact that this item “*was not to be considered for Financial Evaluation*” so that logically and without any reasonable doubt, the amount for item 21 was not to be included in the quoted global price.

In this regard, this Board opines that Galleys’ Malta Limited’s Financial Bid form was correct in total but included the cost of the shifting of Item 21 which was not to be quoted. The difference from the Total column to the “*Unit Price*” column did not in any credible way affect the Final Quoted Price or the ranking of the Recommended Bidder.

This Board contends that the shifting of Item 21 was not to be considered as a correction, amendment or rectification. From documentation and evidence provided, it is ample clear that to compare “*Like with Like*” the cost of Item 21 was not to be considered for the Financial Evaluation of the Recommended Bidder’s offer.

In this regard, this Board opines that the principle of “*Substance over Form*” should prevail and to this effect, this same Board does not uphold the Appellant’s Contention on this point of grievance.

- 2. This Board also credibly notes that it was proper and prudent for the Contracting Authority to negotiate a discounted price after the Recommended Bidder was established.**

In this regard, this Board notes that this was a Negotiated Procedure and negotiations were carried out after the Evaluation Process was completed.

In this particular case, the Contracting Authority requested a further discount after having established that the Recommended Bidder was fully compliant and the cheapest. In this regard, this Board justifiably opines that Enemalta plc acted in a just, transparent and prudent manner.

- 3. This Board would also like to point out that the cheapest offer on a “*Level Playing Field*” was the Recommended Bidder’s offer. The cost of Item 21 had to be excluded as it was clearly indicated in the Tender Document. This Board also confirm that the Recommended Bidder’s offer was the cheapest compliant bid.**

In view of the above, this Board finds against Joseph Cachia & Son Ltd and recommends that the deposit paid by the latter should not be refunded.

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Carmel Esposito
Member

2 August 2016