

PUBLIC CONTRACTS REVIEW BOARD

Case No. 980 – UM 1984: Tender for the Supply, Delivery, Installation, Testing and Commissioning of Specialised Lighting for the MITP Theatre at the Valletta Campus, University of Malta.

The Tender was published on the 4th March 2016. The closing date was on the 23rd March 2016. The estimated value of the Tender was €110,266.95 (Exclusive of VAT)

Two (2) bidders had made nine offers for this Tender.

On the 22nd June 2016 Nexos and Company Limited filed an Objection against the decision taken by the Contracting Authority to award the Tender to MST Audio Visual Limited for the amount of €60,050.28.

The Public Contracts Review Board composed of Dr Anthony Cassar (Chairman), Mr Lawrence Ancilleri and Mr Carmel Esposito as members convened a hearing on Tuesday the 20th September 2016 to discuss the Objection.

Present for the hearing were:

Nexos and Company:

Mr Jesmond Bondin	Representative
Ms Stefan Schiavone	Representative
Mr Karl Sammut	Representative
Dr Mark Vassallo	Legal Representative

MST Audio Visual Limited:

Mr Roberto Drago	Representative
Mr Andre Micallef	Representative
Dr Stefan Balzan	Legal Representative
Dr Franco Galea	Legal Representative
Dr Mark Grech	Legal Representative

University of Malta:

Mr Tonio Mallia	Chairman Evaluation Board
Ms Elaine Mangion	Secretary Evaluation Board
Mr Elton Baldacchino	Member Evaluation Board
Mr Lawrence Gellel	Member Evaluation Board
Mr Christopher Spiteri	Member Evaluation Board
Mr Carmel Cuschieri	Consultant Engineer
Dr Steffi Vella Laurenti	Legal Representative

The Chairman made a brief introduction wherein he explained that the Board's workload is such as to not allow any adjournments or postponements unless for grave reasons. He then invited the Appellant's representative to make his submissions on the Objection.

Dr Mark Vassallo on behalf of Nexos & Co Ltd asked that the testimony of Mr Carmel Cuschieri should be heard first.

Mr Carmel Cuschieri, ID No. 661556M, under oath said that he was a consultant engineer. John Cuschieri is a junior engineer employed with his office. The junior engineers at his firm work under supervision of one of the directors or himself. Any work Mr John Cuschieri words is vetted by him.

The Tender in question did not include spare parts. The parts were for another Tender. Items 2.17, 2.19 and 2.22 were spare parts for equipment issued under another Tender that was awarded to someone else. He explained that the other Tender had included spare parts for equipment in the present Tender while the other Tender included parts for equipment in the present one.

The witness explained further that in both instances the spare parts were included as an "*item rate*" only and bidders had only to quote their price but not supply them. The Tender just wanted a rate for the items in case of future needs when the warranty lapsed.

Dr Mark Vassallo contended that the University of Malta could not ask bidders to quote prices for items being spare parts for equipment they still did not know.

Mr Carmel Cuschieri continued that the Tender awarded to MST Audio Visual Ltd also included spares to equipment covered by this Tender and the argument brought by Dr Mark Vassallo hold for that Tender. It was unfortunate that the spare parts for the equipment in both Tenders were mixed up. However, the faders in question are available at any general electronic dealers, not only from the supplier.

The equipment was specialised but the spare parts for it were readily available. The item 2.17 offered by the Recommended Bidder was Technically Compliant with the specifications and was available from electrical supplies stores. He reiterated that these parts were not to be supplied with the Tender. Contracting Authority just wanted bidders to quote a rate for these parts; a rate that would bind them in the future if and when the parts were needed after the lapse of the warranty.

Interruptions – free for all.

Mr Carmel Cuschieri said that the parts could be purchased from any electronic dealer. Not necessarily local. He could not say the value of these parts because all the Contracting Authority was a rate that bound the bidder for the future.

Dr Steffi Vella Laurenti pointed out that the cost of these items in the present Tender was negligible. What the Appellant was pretending as a right was wrong. The award of one Tender does not necessarily mean that one has also to win the award for the parts.

Dr Carmel Cuschieri continued replying to questions by Dr Franco Galea on behalf of the MST Audio Visual Ltd, confirmed that the item 2.19 was easily obtainable from electronic

suppliers.

Mr Karl Sammut ID No. 496176M under oath testified that he was an independent consultant for Nexos & Co Ltd. In his opinion item 2.19 which was the fader or potentiometer with a certain range could be purchased from dealers and not just from one supplier. However items 2.17 and 2.22 have to be manufactured by the maker of the equipment as otherwise they may not fit. They have to be identified by their part number of the maker.

The Tender did not include sufficient information on these parts to enable bidders to make offers without clarification. He agreed that these parts were demanded just in case of future breakdown following the lapse of the warranty. Replying to questions by Mr Tonio Mallia on behalf of the University of Malta, Mr Sammut said that he agreed that one could buy parts of a particular car from other dealers as long as the number of the part was known. He also agreed that parallel trading exists which enables the purchase of parts from other dealers not from the original dealer.

The witness was not involved in the filling of the present Tender on behalf of the Appellant. He was just consulted on this. He did not know of the clarifications asked during the present Tender.

Dr Mark Vassallo on behalf of the Nexos & Co Ltd explained that the Objection was based on two grievances – the conflict of interests and the question of the spare parts. He declared that Appellant was withdrawing the first grievance of the conflict of interests. The Contracting Authority had made a mistake in asking for spare parts for equipment covered in another Tender. It should have included these parts in the other Tender. The spare parts in question – items 2.17, 2.19 and 2.22 needed bidders to know the trade mark of the equipment in order to be able to make offers.

Since MST Audio Visual Ltd had not formed part of the other Tender it has to be assumed that he did not know which parts were needed for this Tender and therefore could not offer the parts. Parts having generic specifications were not acceptable. The Recommended Bidder could never have made an offer for these three items. He contended that the first witness was in error. These items should not have been included in this Tender.

The Appellant's contention is not that the Recommended Bidder could not supply the parts in the future but that the latter could not offer them at the Tender stage since the Recommended Bidder should not have known the specifications of the same parts.

Dr Steffi Vella Laurenti for the University of Malta explained that these three items formed only a small part of the present Tender. Their price is small and would not be needed now. She contended that the Recommended Bidder had put down a rate and it would be up to them to supply the items in the future when the need arises.

The Appellant could have raised pre-contractual concerns if it was deemed that the Tender was not correct. It does not follow that if they had won one Tender it should also win the present one.

Dr Mark Vassallo for Nexos & Co Ltd said that the Objection was about the Technical Compliancy of the Recommended Bidder's Tender and not about the price.

Dr Franco Galea on behalf of MST Audio Visual Ltd said that when replying to the Chairman, the first witness stated that the Recommended Bidder's offer was Technically Compliant. It was at the Recommended Bidder's risk to supply these parts when needed.

The Appellant thought that there would be an automatic award of the Tender to him just because of these three items. He pointed out that the part numbers of spare parts were the same for both specific brands as well for generic brands.

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 June 2016 and also through their verbal submission during the Public Hearing held on 20 September 2016 had objected to the decision taken by the Pertinent Authority, in that:

- a) Nexos & Co Ltd contend that the University of Malta was not correct in requesting spare parts for equipment relating to another Tender. In this regard, the Prospective Bidders needed to know the make of the equipment in order to be able to offer, in particular items 2.17, 2.19 and 2.22**

The Appellants claim that MST Audio Visual Ltd could not have quoted for spare parts which were only designed for a specific type of brand of equipment, thus being Technically non-compliant.

Having considered the Contracting Authority's verbal submissions during the Public Hearing held on 20 September 2016, in that:

- a) The University of Malta maintains that MST Audio Visual Ltd was technically compliant and that they had quoted for the spare parts referring to items 2.17, 2.19 and 2.22 so that it was their responsibility to supply the same at the quoted parts should the need arises.**

Reached the following conclusions:

- 1. This Board, after having examined the relative documentation and heard submissions from all the parties concerned, justifiably notes that certain arguments brought forward by Nexos & Co Ltd were somewhat based on assumptions, in that, the Appellant is insisting that MST Audio Visual Ltd cannot supply these parts except from the original supplier.**

In this regard, without having seen the Recommended Bidder's submission, the Appellant is stating what might have happened which is not the case. This Board has reviewed the Recommended Bidder's submission and can confirm that they did in fact, quote for the spare

parts under Reference 2.17, 2.19 and 2.22.

The Tender Document requested a quote and not proof of capability of supply of these spare parts. This Board has firmly and credibly established that MST Audio Visual Ltd had quoted for these parts and was fully Technically Compliant.

2. It is to be noted that from the submissions made by the Technical Engineers, (under oath), it was also established that these spare parts were requested so that if the need arises, the supply of the same is guaranteed at a pre-established price.

Since MST Audio Visual Ltd quoted for these spare parts, it will be his responsibility to supply the same at the quoted price. The purpose of the request for such parts was simply to ensure a “*hedged*” price, since the requirement of the same would be in the future.

In this regard, this Board opines that the University of Malta acted in a diligent manner in requesting a “*Quote*” for these parts.

Although Nexos & Co Ltd are insisting that these spare parts can

only be supplied by the original maker of the equipment; it has been confirmed from the experts' testimony that these parts can be obtained from other dealers and not from the original dealer only.

This fact was also stressed upon by both Technical Experts summoned to give their Testimony under oath. This Board, after having heard the Technical Experts' Testimony, can credibly confirm that these spare parts could also be purchased from independent dealers other than the original maker. In this regard, this Board does not uphold the Appellant's Objections.

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

Dr Anthony Cassar
Chairman

Mr Lawrence Ancilleri
Member

Mr Carmel Esposito
Member

3 October 2016