

## **PUBLIC CONTRACTS REVIEW BOARD**

### **Case 1013 – TM 059/2016 – Tender for the Printing, Supply and Delivery of Motor Vehicle Licence**

The Publication Date of the Call for Tenders was 20 September 2016 whilst the Closing Date for Call of Tenders was 18 October 2016. The Estimated Value of the Tender, (Exclusive of VAT) was € 85,000.

Three (3) Bidders have submitted offers for this Tender.

On 23 December 2016, Galaxy Ltd filed an Objection against the decision of Transport Malta to award the Tender to A1 Security Print Ltd for the price of € 78,138.78 (Exclusive of VAT) against a deposit of € 425.

On 10 January 2017, the Public Contracts Review Board composed by Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Carmel Esposito as members convened a Public Hearing to discuss the Objection.

The Attendance for this Public Hearing was as follows:

#### **Appellant – Galaxy Ltd**

Mr Andrew Zarb	Representative
Mr Reuben Zarb	Representative
Dr Robert Tufigno	Legal Representative

#### **Recommended Bidder – A1 Security Print Ltd**

Ms Maronna Filletti	Representative
Mr Andrew Portelli	Representative
Dr Stefano Filletti	Legal Representative

#### **Contracting Authority – Transport Malta**

Ing Ronald Attard Pullicino	Chairperson, Evaluation Board
Mr Lynton Ellul	Secretary, Evaluation Board
Mr Lino Abela	Member, Evaluation Board
Mr Brian Farrugia	Member, Evaluation Board
Mr Kenneth Pace	Member, Evaluation Board
Mr Ray Stafrace	Representative
Dr Joseph Camilleri	Legal Representative

Following an introduction by The Public Contracts' Review Board Chairman, Dr Anthony Cassar, the Appellants were invited to make their submissions.

Dr Robert Tufigno, the Legal Representative for Galaxy Ltd, requested the Public Contracts Review Board to call the Chairman of the Evaluation Board as a witness as he had some questions to ask him. At this point, Ing Ronald Attard Pullicino, ID Card 157676 M who works as a Manager within Transport Malta but who was also the Chairman of the Evaluation Board for this Tender was called to testify under oath.

Following Ing Attard's Pullicino's testimony, Dr Robert Tufigno, on behalf of Galaxy Ltd requested the Public Contracts Review Board to call Mr Reuben Zarb as a second witness for this case. At this point, Mr Reuben Zarb, ID 60973 M, Director, Galaxy Ltd was called to testify under oath.

At the end of Mr Zarb's testimony, Dr Robert Tufigno, the Legal Representative for Galaxy Ltd submitted with regards the samples that one had to make a distinction since the *Tender Document* does so between the conviction that one is capable to do something and the Tender Document's requirements regarding what do you want to submit.

Such is the importance of this element that the Tender Document itself says that the samples had to be submitted by not later than 25 October 2016 and that no rectifications will be allowed. Independently from the intentions which the Evaluation Board can have and what the latter wanted to see, the same Evaluation Board was bound with the Tender Document.

Dr Tufigno continued arguing that if the Evaluation Board was not satisfied with the sample, he was supposed to make a very simple thing as there was a question in one of the clarifications wherein things were sent as they should have been sent, which said that the hologram shouldn't be a straight line.

This was most obvious, according to the Appellants. When such a sample is being submitted after two Clarifications circulated to all Bidders which was telling them how the hologram should have been submitted wherein if one had to see the first Clarification submitted showed clearly the line, which was not straight and when the second Clarification shows also a straight line when there are two Clarifications and the Tender Document saying that the samples cannot be rectified, it was clearly showing that it was going against Transport Malta's requests in the Tender Document. There was enough evidence to disqualify the Recommended Bidder according to Dr Robert Tufigno.

With regards the arithmetical issue, the contract was about the global amount but when one sees the template which every Bidder had to fill in, which tells you that the Unit Price had to be submitted and it also tells you that if there were any discounts, these had to be reflected in both the Unit Price and in the Global Sum, both sums had to agree continued the Appellants.

Dr Robert Tufigno, the Legal Representative for Galaxy Ltd said that it was during the procedures that his clients got aware of this fact since the published documentations mentioned only the Global Amount. When the Appellants saw that the latter was not a round figure, they reasoned that the Unit cost which was not published, cannot be of more than two decimal places as per requisites.

The Appellants felt that they were misled as there was the Unit Cost which had to be of two decimal places. During these procedures, it resulted that there was a Unit Cost which was 0.08 and a Global sum which supposedly is a multiple of a Unit Cost as per the Financial Bid

in Volume 5 which was not agreeing with the former. There was such a disagreement in the figures that the Evaluation Board felt that there was an arithmetical error during clarification stage and that they had decided to send a letter with the words:

*“The Evaluation Committee noted the following shortcomings”*

Dr Robert Tufigno, the Legal Representative for Galaxy Ltd argued that one cannot take the fact that the Evaluation Board, following consultations, had to write such a note. This showed that the latter was not convinced with what A1 Security Print was doing. The letter continued as followed:

*“The Evaluation Committee took note of your financial bid and in this regards notified you that it encountered an arithmetic error..... The Committee considers that the arithmetically correct Total price shall read as € 80,000 and has adjusted your Financial Bid accordingly”*

Therefore, continued Dr Tufigno, a decision was taken and an adjustment was made. If the other part did not agree with this adjustment, there was a procedure which the Recommended Bidder had to follow but they chose not to do so. Once a decision was taken, there was no turning back from it since there were other remedies such as filing an Appeal from that decision.

If the Evaluation Board, following consultations, was sure that there was an arithmetical error, they couldn't turn back from any guidelines given as they would have been deviating since the Bid as it is written shows clearly that the format of the Financial Bid shows that the number of unit cost has to be reflected into the global amount. In case of a discount, which in this case, it seems that there was, according to the mandatory documentations, that should have been reflected in both prices submitted.

Dr Robert Tufigno, the Legal Representative for Galaxy Ltd continued by saying that that would have made sense since it was not unusual that after the issuing of such a Tender, there would have been the need to issue more that the quantity stipulated in the Tender. The Contracting Authority had the interest to have such prices in order to prevent any backs-to-the-wall situation where it would later result that the Unit Price was a different one.

If there was a low consumption, given that there were to be three consignments, the consumption had to be divided according to the quantity which then had to be multiplied. Apart from that, as shown in Mr Zarb's testimony, when one would have stood by this system wherein the Financial Bid obliges the Bidders to stick by the Unit Price and if one doesn't make the Global Price from its multiple, that particular Bidder should have been disqualified, continued Dr Robert Tufigno.

Such was the case that the Evaluation Board had deemed that there was an arithmetical error in A1 Security Print Ltd's offer according to the Appellants. It was thanks to the Reasoned Letter of Reply sent by the latter that these facts were got to be known, hence the Appellants decided through evidence of witnesses, to draw the Public Contracts' Review Board's attention of these facts concluded the Appellants.

Dr Joseph Camilleri, the Legal Representative for Transport Malta opened his replies to the Appellant's submissions by stating that with regards to the pricing, one had to make a distinction between what you can't do legally and what you can't do because of technical limitations.

The Evaluation Board has found a form submitted by the Recommended Bidder which had the unit price of 8c and a total which do not reflect the sum of 8c multiplied by 1,000,000, the number of discs required by Transport Malta. When faced with this situation, the Evaluation Board has wrote to A1 Security Print Ltd asking for a clarification due to errors found in their bid.

The Recommended Bidder reacted to this by saying that in reality, the Unit Price was eventually reflected in the Global Price but when inputting the price of the system there were some difficulties as the system does not allow the Bidders to input at such details. This shows that there was a technical reason why there was such an error and the Evaluation Board understood the Recommended Bidder's situation and understood also what in reality the Unit Price was.

Dr Camilleri continued by explaining that if this made sense for the Evaluation Board and if the call was for a global price, the latter felt that there was no need to penalise this Bidder since after all he offered a cheaper price. In the case which is currently being discussed, the Recommended Bidder did not invent the Global Price but there was an explanation which made technically sense why there was this discrepancy in the offer.

With respect to the legal point of the issue, Dr Joseph Camilleri, the Legal Representative for Transport Malta said that in their Reasoned Letter of Reply dated 4 January 2017, the Contracting Authority wrote that there was no indication in the European Regulations which was quoted by the Appellants that at calculation stage decimal places were to be excluded.

On this basis, the Evaluation Board decided that in the case that there was the need to round up the figures, this had to be done at the Global Price stage. One had to keep in mind that with the quantity which was needed € 1,000,000 a 1c movement could mean that there would have been an extra € 10,000 expenditure, hence there was to be no flexibility as per the Appellant's arguments. When one looks at all the facts which the Evaluation Board had to face, the decision taken was one which made sense legally and which was also fair to the Bidders.

With regards to the issue of the samples, Dr Joseph Camilleri, on behalf of Transport Malta, reasoned that certain facts couldn't be checked since there was no reference in the Letter of Objection which was filed by the Appellants and this issue was only raised during the Public Hearing.

There were samples which were provided and which also showed commitment. The samples provided showed certain things since they weren't requested for questions of security features but they had to cover whatever the Contracting Authority requested. From the samples shown, the Evaluation Board was not convinced that these security features were to be provided.

The samples did not show that the A1 Security Print Ltd was not compliant but there were some points which were needed to be clarified. At this stage, the Evaluation Board has asked for samples which would clarify these issues since there was an element which was unclear whether they were to ask for these samples or not. On the other hand, Transport Malta felt that if there was a doubt, they should give the Bidders the benefit of the doubt as per normal procedures.

Dr Camilleri continued by saying that if the Public Contracts Review Board decided that the latter thing should not have been done, they would abide by the decision but the Chairman of

the Evaluation Board had explained well in his evidence why these decisions were taken. The samples were not replaced but the samples requested were additional and showed that the Bidder who gave the cheapest bid was in a position to provide everything according to how the same has promised to do in their original bid, hence showing that the commitment was there from the beginning.

Dr Robert Tufigno, the Legal Representative for Galaxy Ltd countered that with regards to the samples, Ing Attard Pullicino said during his evidence that the Evaluation Board asked for a rectification twice.

Secondly, these samples issues were important since they concerned security issues. When one has the first sign which clearly shows that it was not compliant and the Evaluation Board ignores the Tender Document which says that no rectifications were allowed, especially in the obvious case that the latter did not request a straight line, one would have to question even the intentions.

Dr Tufigno appreciated the fact that Transport Malta did not want to penalise A1 Security Print Ltd but in reality they penalised the other Bidders. If the Tender Document says that when you multiply the Unit Price by 1,000,000 you get the Global Price, he was wondering why the Contracting Authority was penalising whoever was observing the rules at the expense of who was not observing them.

Transport Malta had to stand by the Tender Document. If the latter asked for a Unit Price, one had to give a Unit Price which had to be reflected in the Global Price otherwise there is an indication that a discount is given. The Tender Document was saying that discounts cannot be given in that way.

The Appellants continued by saying that all the documentation issued by Transport Malta and the Department of Contracts' guidelines regarding the Financial Value in Euro show clearly that all multiples must be up to two decimal places. These are the rules which everybody was bound to follow independently of the intentions which one can have, argued Dr Tufigno.

Dr Stefano Filletti, the Legal Representative for A1 Security Print, argued that the Appellants were insisting on the fact that his clients made an arithmetic error. Effectively, this was not the case between the Unit Price and the Global Price. The latter was € 78,138.78. The Unit Price was the sum of the Global Price divided by 1,000,000, i.e. € 0.07813878.

If one had to ask school children to take that figure and multiply it to two decimal points according to the mathematical rules that would become € 0.08. The Rounding Up of the Unit Price was made correctly and this does not mean that the Recommended Bidders had to also modify the Global Price from € 78,000 to € 80,000.

The Recommended Bidder continued by saying that in this case the Policy Note does not apply, although it makes sense if the discussion resolved about one Unit Price for a Global Sum. The third decimal point has no monetary value. The third decimal point on a Unit Price x 1,000,000 generates an additional cost of € 1,800 and therefore if one had to apply the Appellant's reasoning, the Policy Note goes against the spirit of Public Procurement because instead of finding the best price to spec, one is finding the best rounded up price to spec, hence the taxpayer was going to pay € 1,800 in vain. Both sums are being reflected according to mathematical rules.

With regards to the Letter dated 25 November 2016 from Transport Malta mentioned by Galaxy Ltd, Dr Filletti felt that it would have been correct for Dr Tufigno had he mentioned the whole letter since the final paragraph stated that.

*“This clarification opportunity is being sent without any commitment whatsoever...”*

This shows clearly that this was a clarification request and the Recommended Bidder has answered back with an explanation which was the same one as the one Dr Filletti has made in this Public Hearing. The Evaluation Board has justly felt that their explanation was a reasoned one and he qualified it.

With regards to the samples, A1 Security Print Ltd said that the samples do not determine whether the Bidder is compliant or not. The word in itself, sample and shows what the Bidder can do. Whether one is compliant or not comes out from the declarations and documents submitted.

It was clear, according to Dr Filletti, that there was an ambiguity in the contract since there were parts of it which say that Bids cannot be rectified while others said that it can. The Recommended Bidders were saying that there wasn't a rectification but there was a clarification and the samples presented were a run of the mill of what they possessed at that moment as the Appellant has done although since the latter was the incumbent of the previous Tender, it was easier for them to issue a correct sample.

Finally, one had to understand that the whole aim of Public Procurement was not to bind the Contracting Authority to disqualify Bidders for the smallest infraction done in their bids as any disqualification would lead to a higher price for the Authority concerned. It was because of this that the Principle of Proportionality is adopted and this Principle has to be taken always when dealing with Public Procurement. If this was a Private Tender, every detail would have to be checked since no Director would have paid € 1,800 extra for nothing, continued Dr Stefano Filletti.

The Contracting Authority was prudent and acted in a *bonus pater familiae* and it resulted that A1 Security Print was not only technically compliant but also provided the samples requested which show their capacity in delivering the product needed. Therefore, if the Principle of Proportionality had to be taken, this was to be considered as a minor mistake which can't lead to the cancellation of the Recommendation to his clients at the expense of a more expensive offer concluded Dr Filletti.

Dr Robert Tufigno, the Legal Representative for Galaxy Ltd, replied that it was Transport Malta who made the mistake and not the Appellant. He referred to a document which was brought out by Dr Filletti in his Reasoned Letter of Reply.

Secondly, the Tender Document requested a Unit Price and a Global Price. If one had to make a discount, this had to be done in the proper way and not by submitting € 0.8 as a Unit Price and then submit a Global Price of € 0.78. Finally, if the samples, if the security features, which are essential, are being taken lightly, one was doing a disservice to both the consumer and the Contracting Authority

At this stage, the Public Hearing was closed.

**This Board,**

**Having noted this Objection filed by Galaxy Ltd (herein after referred to as the Appellant) on 23 December 2016, refers to the Contentions made by the latter with regards to the award of Tender of Reference TM 059/2016 listed as Case No 1013 in the records of the Public Contracts Review Board, awarded by Transport Malta (herein after referred to as the Contracting Authority).**

**Appearing for the Appellant: Dr Robert Tufigno**

**Appearing for the Contracting Authority: Dr Joseph Camilleri**

**Whereby, the Appellant contends that:**

- a) A1 Security Print Ltd failed to quote his offer in two decimal points as requested in the Financial Bid Form with special reference to the underlying note on the same form stating that**

***“N.B. Three Decimal Points do not exist as currency; therefore such offers cannot be accepted. Offers are to be submitted up to two decimal points”.***

**In this regard, Galaxy Ltd maintains that if the price quoted by the Recommended Bidder amounted to € 78,318.78 and the same is divided by the number of units, the resultant figure does not abide by the “*Two Decimal Point*” principle.**

- b) Galaxy Ltd maintains that the “*Global Price*” is compiled and owned by taking into account the “*Unit Price*” and the quantities being requested. In this regard, the Appellant is insisting that the “*Unit Price*” is an important feature and as such should also abide and by quoted in two decimal points.**

**The Appellant also points out that the Financial Bid Form did include the “*column*” for the “*Unit Price*” so that the latter had to be taken into account, especially when one takes into account the fact that the motor vehicle licence discs had to be delivered in separate batches.**

- c) Galaxy Ltd contend that A1 Security Print Ltd failed to provide the appropriate sample to prove that the product/service being offered by the latter is up to the required specifications.**

**This Board also noted the Contracting Authority’s “*Letter of Reply*” dated 4 January 2017 and its verbal submissions during the Public Hearing held on 10 January 2017, in that:**

a) **Transport Malta maintains that the Tender Document does not specify whether the “*Two Decimal Point*” principle should apply to the “*Unit Price*” or the “*Global Price*”, however, it had been made vividly clear that this Tender refers to a “*Global Price Contract*” and in this respect, it is only the “*Global Price*” which had to be taken into consideration by the Evaluation Board;**

b) **Transport Malta insist that the alleged contention that A1 Security Print Ltd did not submit all the requested documentation in time is somewhat vague. However, during the Public Hearing, it transpired that Galaxy Ltd was referring to the samples.**

**With regards to the latter issue, Transport Malta maintain that the samples were submitted on time by the Recommended Bidder but the Evaluation Board requested further clarifications to ensure that the security feature as presented by A1 Security Print Ltd does in fact satisfy the Technical Requirements.**

**This same Board also noted the Testimonies of the witnesses namely, Ing Ronald Attard Pullicino and Mr Reuben Zarb both duly summoned by Galaxy Ltd.**

**This Board has also taken note of the documents submitted by Galaxy Ltd and which consisted of:**

- i) A copy of Procurement Policy Note 10 issued by the Department of Contracts on 20 October 2014;**
- ii) Copies of the samples submitted by A1 Security Print Ltd**

**This Board, after having treated the merits of this case, arrived at the following conclusions:**

- 1. With regards to Galaxy Ltd's First and Second Contentions, this Board after having examined the Tender Document, justifiably confirms that note 1.4 of Section 1 of the Tender Document clearly dictates that "*This Tender is a Global Price Contract*". Therefore, the Evaluation Board could only adjudicate on the "*overall global quote*" and not the "*Unit Price*". In this context, this Board will treat the merits of Price on the criteria established in the Tender Document.**

**The fact that the Financial Bid Form did include a separate column for the unit price is somewhat misleading. However, this does not, in any credible way, alter the basis of the Award Criteria Policies, as vividly denoted in the Tender Document.**

**Having established the fact that the Tender specifically stated that this is a global price contract, it is the latter figure that is bound to be stated in two decimal places and not the unit price.**

**The submissions made by Galaxy Ltd, in that the Global Price is arrived at by multiplying the Unit Price by the quantity and that the delivery of the product will be affected in batches, does not prove that the Unit Price should be the deciding factor, in so far as pricing is concerned.**

**Under these circumstances, the stipulated criteria that this is a global price contract and that the latter should be quoted to two decimal places, still persists.**

**With regards to the arithmetical error on the Financial Bid Form as submitted by A1 Security Print Ltd, this Board opines that there existed no error but the discrepancy of the multiplication result did not correspond to the unit price, as quoted in a “*rounding up manner*” to quote the same up to two decimal places.**

**In fact, the unit price of Euros .78138 was correctly rounded up to € 0.08 but the global price was confirmed to remain as stated on the**

**Bid Form that is € 78,138.78. In this regard, this Board does confirm the action taken by the Evaluation Board in asking for a clarification, which in actual fact, was purely a verification of the total global price and also credibly establishes that the “two decimal point” principle was applicable to the global price. In this regard, this Board does not uphold the Appellant’s first and second contention.**

- 2. With regards to Galaxy Ltd’s Third Grievance, this Board would respectfully note that the reference to the issue in question was not originally stated in the Appellant’s “*Letter of Objection*”, but mentioned in a vague manner.**

**However, from the Appellant’s submissions during the Public Hearing, it transpired that Galaxy Ltd is contending that the original sample submitted by A1 Security Print Ltd was not technically compliant. Under these circumstances, the latter’s offer should have been discarded but at the same instance, they were asked to submit another sample and taking into account clause 7c ii, this was not allowed as it was a rectification of the original sample.**

**This Board would like to credibly treat the difference between the Technical Literature and the samples. The Technical Literature is composed of literary technical information describing the technical**

features and providing ancillary information to justify that what the Bidder offered was within the requirements of the Tender Specifications. This requirement is governed by note 2 to clause 7.1, wherein it can be clarified or rectified. On the other hand, when a Tender requests a sample, it is requesting an exact replica of how the offered product will be, so that in this particular instance, the Evaluation Board will have a “*hands on*” experience of the product itself. In this case, the samples are classified under “*Technical Specifications*”, in clause 7.1c (iia), wherein the submissions of the same are regulated by the fact that “*Samples are not subject to rectifications*”.

This Board would justifiably establish that, in this particular case, we are treating the supply of Samples and not Technical Literature, so that A1 Security Print Ltd was in duty bound to supply samples which are regulated by Clause 7.1c (iia), wherein the original sample submitted by the latter cannot be rectified.

In this context, this Board notes that the Recommended Bidder submitted a second sample. At this point in time, one has to delve whether such an action leads to a “*Clarification*” or a “*Rectification*”. This Board, as had on many occasions previously, would like to affirm that a “*Clarification*” represent an explanation of a particular

document already submitted by a Bidder. On the other hand, a *“Rectification”* is an adjustment/alteration to a particular document, thus a replacement to the original document.

In this particular case, it is amply clear that a document which was originally submitted was replaced by a compliant document and this Board opines that this amounts to a *“Rectification”*, which according to the Tender document, *“Samples were not subject to rectifications”*. The Board is justifiably convinced that the word *“Sample”* has been misinterpreted to fall under the section of *“Literature”*.

In this regard, this Board opines that the second submission of the sample by A1 Security Print Ltd constituted a rectification as the second sample was different from the original and in this context, this Board upholds the Appellant’s Third Grievance.

In view of the above, this Board recommends that:

- i) A1 Security Print Ltd’s offer should be discarded because it failed to include a sample compliant with the specifications and that the second sample submitted by the latter is regarded as a *“Rectification”* which is not allowed;

**ii) Galaxy Ltd's offer is to be reintegrated in the evaluation process;**

**iii) The deposit paid by the Appellant is to be refunded.**

Dr Anthony Cassar  
Chairman

Dr Charles Cassar  
Member

Mr Carmel Esposito  
Member

*17 January 2017*