

PUBLIC CONTRACTS REVIEW BOARD

Case 1053 – MCH PROC 111/12 V1 – Call for Quotes for the Supply of Office Chairs

The Publication Date of the Call for Tenders was 26 January 2017 whilst the Closing Date for Call of Tenders was 7 February 2017. The Estimated Value of the Tender, (Exclusive of VAT) was € 10,000.

Six (6) Bidders have submitted offers for this Tender.

On 26 May 2017, FXB Ltd filed an Objection against the decision of the Central Procurement and Supplies Unit to award the Tender to Invicta Ltd for the price of € 10,000 (Exclusive of VAT) against a deposit of € 400.

On 12 June 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 – FXB Ltd

Ms Jenny Cassar	Representative
Mr Patrick Spiteri	Representative
Dr Katja Psaila Savona	Legal Representative

Recommended Bidder – Invicta Ltd

No representative was present for the Recommended Bidder

Contracting Authority – Central Procurement and Supplies Unit

Ms Joyce Grech	Representative
Dr Alexia Farrugia Zrinzo	Legal Representative

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

Dr Katja Psaila Savona, the Legal Representative for FXB Ltd opened by saying that this Tender regarded the supply of office chairs. The specifications were simple that the office chairs had to be black and imitation leather. She referred to Article 7 of the Tender Document which said,

“The material of the seat and backrest should be black in colour and of imitation leather”.

Dr Psaila Savona continued by saying that there were four lots and that the specifications for each were the same but that was not an issue. Her clients offered black chairs with imitation leather. The Tender was published on 26 January 2017 with the closing date being 7 February 2017. When time has passed and FXB Ltd did not receive anything regarding the Tender, they contacted the Central Procurement and Supplies Unit to see what happened.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board asked whether the Contracting Authority has sent anything regarding how the Tender was going.

Dr Katja Psaila Savona, the Legal Representative for FXB Ltd replied that the only communication which they have received was on 11 May 2017. This was a notification saying that they were not awarded the Tender and nothing more. This was not acceptable for the Appellants and they contacted the Compliance Unit of the Central Procurement and Supplies Unit to see why their bid was rejected. Eventually, FXB Ltd received a Letter of Rejection on 17 May 2017 stating the reasons why their bid was eventually rejected. In this letter, they were told that,

“Your offer has been declared unsuccessful since it is not the cheapest technically compliant offer”

Dr Psaila Savona continued by saying that her clients appealed on this basis since their offer was according to specifications. Following checks by FXB Ltd to see whether there were any mistakes in the Tender Document, they noted that in Lots 1 and 2, although the words were not clearly stated that imitation leather was being offered, maybe the words submitted were not exact.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board remarked that the wording was in Italian.

Dr Katja Psaila Savona, the Legal Representative for FXB Ltd replied that the Letter of Rejection did not say this and that the Central Procurement and Supplies Unit should have asked for a clarification. This issue was never raised in the Letter dated 17 May 2017 but the Appellants were just told that they did not provide imitation leather.

She continued by saying that when comparing their financial offer to the one submitted by Invicta Ltd, the Recommended Bidders, the Appellants' offer was 25% cheaper.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board commented that the fact that the cheapest Bid in this context meant that the Bid was the cheapest fully compliant.

The Bid had to be also technically compliant. In this case, from the documents which were submitted, the Public Contracts Review Board understood that the price was not an issue.

Dr Katja Psaila Savona, the Legal Representative for FXB Ltd said that the catalog was in Italian.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board replied that the fact was that FXB Ltd's offer was not imitation leather as requested by the Tender Document.

Dr Katja Psaila Savona, the Legal Representative for the Appellants replied that there might be an argument for Lots 1 and 2. On the other hand for Lots 3 and 4 the Central Procurement and Supplies Unit should have asked for a clarification if there was something which was not clear.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board said that the Tender Document specified whether there was a need of a translation or not.

Dr Alexia Farrugia Zrinzo, the Legal Representative for the Central Procurement and Supplies Unit added that this was even indicated in the Electronic Public Procurement System.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board continued by saying that he was sure that somewhere there was indicated that any documentation submitted must be either in English or else in its natural language and also translated in English.

Ms Jenny Cassar on behalf of FXB Ltd said that the section of the Tender Document where there were the points' allocations requested that any Documentation should be either in Maltese or in English. There was nowhere in the Technical Specifications which suggested that Bids were to be rejected if they were not submitted in the latter languages.

In the case of the chairs, the CE Marking did not apply. The word, "*Ecopelle*" in Lots 3 and 4 were very specific. Ms Cassar continued by arguing that when they received the Letter of Rejection they objected because it stated that they did not specify whether the chairs were black and imitation leather. There was nowhere in this letter stating that their bid was rejected because the documents submitted were in Italian.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board noted that generally when there was a request for Technical Literature, there was always a request that these were to be submitted in English.

Ms Jenny Cassar, referred to the Reasoned Letter of Reply issued by the Central Procurement and Supplies Unit on 8 June 2017 which *inter alia* stated that,

"the quotation had to indicate that the chairs were actually going to be covered with imitation leather, and not have an open-ended proposal"

Ms Cassar continued by saying that if the Contracting Authority specifically requested chairs in black imitation leather, if these are supplied the latter had the right to return them back.

Dr Alexia Farrugia Zrinzo, the Legal Representative for the Central Procurement and Supplies Unit submitted that the offer had to be compliant administratively, technically and financially. With regards the financial compliance, her clients did not mention anything but with regards the administrative compliance there is an issue because the documents submitted were presented in Italian and as Clause 6.3 of the General Rules Governing Tenders v1.14 issued by the Department of Contracts on 4 January 2016 states,

“The Tender and all correspondence and documents related to the Tender exchanged by the Tenderer and the Central Government Authority/Contracting Authority must be written in English. Supporting documents and printed literature furnished by the Tenderer may be in another language, provided they are accompanied by an accurate translation into English. For the purposes of interpretation of the Tender, the English language will prevail”.

Dr Farrugia Zrinzo continued by saying that there was an issue regarding the Technical Compliance of the offer submitted by FXB Ltd. If one had to look at the documentation presented by the latter with regards Lots 1 and 2, they are submitted in a way but with regards to Lots 3 and 4 they were submitted in another way.

The Contracting Authority’s Legal Representative continued by saying that one cannot offer different options without specifying what these are. In no part of the Appellant’s offer there was indicated what the Central Procurement and Supplies Unit was requesting. When one was saying, *“fornito dal cliente”*, it looks as if the material was to be given by the Contracting Authority which was not the case.

With regards Lots 3 and 4, continued Dr Farrugia Zrinzo, there were different options available which can be offered with the price submitted by the Appellants. The Contracting Authority’s problem was with the compliance of the elements submitted.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board remarked that these points should have been raised when they sent the Letter of Rejection to FXB Ltd.

Dr Katja Psaila Savona, the Legal Representative for the latter said that what she did not understand was why a clarification was not sought given the huge disparity that there was in the price.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board replied that clarifications were to be sought on submitted documentation. For further questions, the Contracting Authority could have sought a rectification but this was not allowed by the Tender Document.

Ms Jenny Cassar, on behalf of FXB Ltd argued that maybe Lots 1 and 2 were not clear since the words *“cartella di colori”* meant a range of different colours but the material was very specific and it was black, imitation leather. This was specific in the four lots.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board countered that the Literature which the Appellants submitted did not say this.

Ms Jenny Cassar, for the Appellants, replied that in Lots 3 and 4 the *“Eco Pelle”* was available. She was wondering why a rectification was not sought when there was a disparity of 25% between the prices requested by the Appellant and the one by the Recommended

Bidder. There wasn't the necessity to confirm that the Document had to show which colours were available. The Central Procurement and Supplies Unit were clear in its request.

Dr Alexia Farrugia Zrinzo, the Legal Representative for the Contracting Authority said that her clients had to follow the specifications issued in the Tender Document.

Ms Jenny Cassar for FXB Ltd countered that that was the reason why the Central Procurement and Supplies Unit should have sought a rectification.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board said that the Public Procurement Regulations was clear in this context and that without the latter there was neither transparency nor fair play. According to the latter Regulations, the Central Procurement and Supplies Unit received documentation and nowhere in the latter was stated that the chairs were going to be submitted in imitation leather so they had to stay on what was submitted.

Both Ms Jenny Cassar and Dr Katja Psaila Savona who were representing FXB Ltd argued that the words "*Eco Pelle*" meant imitation leather and this meant that the material requested was available.

Dr Alexia Farrugia Zrinzo replied that it was important that the documentation submitted was to be clear. There was a General Rule Governing Tenders' ruling which binded the Contracting Authority. There was a value for the price but one had to point out that the amount of chairs indicated was to be an indicative one.

Ms Jenny Cassar for the Appellants could not understand why their offer was singled out because they offered more than one material and that the material requested was available.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board replied that this was not indicated in FXB Ltd's submission.

Ms Jenny Cassar for the Appellants replied that in their offer, they were neither indicating that they were not offering the requested material.

Dr Alexia Farrugia Zrinzo, the Legal Representative for the Central Procurement and Supplies Unit concluded by saying that the documents for Lots 1 and 2 did not show any indication while even the documentation submitted for Lots 3 and 4 was different.

At this stage, the Public Hearing was adjourned to Tuesday 20 June 2017 at 09:00 wherein the Public Contracts Review Board will transmit the decision taken for this Objection verbally and then distribute a hard copy of the same to all parties concerned.

This Board,

Having noted this Objection filed by FXB Ltd (herein after referred to as the Appellant) on 26 May 2017, refers to the Contentions made by the latter with regards to the award of Tender of Reference MCH PROC 111/12 V1 listed as Case No 1053 in the records of the Public Contracts Review Board, awarded by the Central Procurement and Supplies Unit (herein after referred to as the Contracting Authority).

Appearing for the Appellant: Dr Katja Psaila Savona

Appearing for the Contracting Authority: Dr Alexia Farrugia Zrinzo

Whereby, the Appellant contends that:

- a) His offer was discarded due to the alleged fact that his offer did not denote that the material of the seat was of imitation leather. In this regard, FXB Ltd contends that from the Technical Literature submitted, the Contracting Authority could have noted that the latter indicated various options of material, including the imitation leather.**

At the same instance, the Contracting Authority should have asked for a Clarification, if there were doubts as to the material which FXB Ltd was offering;

- b) The Appellant also contends that the Central Procurement and Supplies Unit did not state the specific reasons for the rejection of their offer.**

This Board also noted the Contracting Authority's "*Letter of Reply*" dated 8 June 2017 and its verbal submissions during the Public Hearing held on 12 June 2017, in that:

- a) The Central Procurement and Supplies Unit maintains that the Technical Documentation submitted by the Appellants was in the Italian Language. This goes against Clause 6.3 of the "*General Rules Governing Tenders*" v 1.14 issued by the Department of Contracts on 4 January 2016, since such technical information should have been in the English Language;**
- b) The Central Procurement and Supplies Unit also contend that the supporting documentation refer to different options and not**

specifically denoting the type of material being offered by the Appellants.

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

1. This Board, after having examined the related documentation and heard submissions from all the parties concerned, opines that the issues at stake are twofold, namely the “*Technical Submissions in Italian*” and the “*Offer of FXB Ltd*”, both of which can perhaps be considered as follows:

a) Technical Data submitted in the Italian Language

Where the supporting Technical Data and/or Information are submitted by a prospective Bidder, the latter forms part of the Original Technical Data as dictated in the Tender Document. In fact, the requisite of the Technical Literature is to enable the Evaluation Board to establish whether the product being supplied by the Bidder is the same as that which was declared to be provided.

In other words, the Technical Literature must form evidential proof that what the Bidder has promised to deliver, in actual fact is available and conforms to the Technical Specifications so declared by the Bidder in his offer, so that, it is justifiably established that the Technical Literature is credibly necessary and forms part of the Offer.

In this particular case, the Technical Literature submitted by FXB Ltd was in the Italian Language. In this regard, this Board respectfully refers to Clause 6.3 of the “*General Rules Governing Tenders*” v 1.14 issued by the Department of Contracts on 4 January 2016 which states,

“The Tender and all correspondence and documents related to the Tender exchanged by the Tenderer and the Central Government Authority/Contracting Authority must be written in English. Supporting Documents and printed Literature furnished by the Tenderer may be in another language, provided they are accompanied by an accurate translation into English. For the purposes of interpretation of the Tender, the English Language will prevail.”

The above mentioned clause is self explanatory and needs no further amplification. In this particular case, FXB Ltd did not abide by this important provision, hence in this Board's opinion, the Evaluation Board could have discarded the offer at face value, since the Technical Literature accompanying the Appellant's offer was in the Italian Language and the latter was not accompanied by an "*accurate translation*" into the English Language. This, in itself, was an administrative non compliant factor to discard FXB Ltd's offer.

With regards to the latter's Contention, that the Contracting Authority should have requested a clarification, it is most important to justifiably emphasize the fact that this was not an opportunity to seek Clarifications. As it had been decreed on many occasions, Clarifications can only be made by the Evaluation Board on submitted documentation or information.

In this particular case, the translated version into English of the Technical Literature was not in fact submitted by FXB Ltd and any clarification on missing documentation constitutes a rectification which is not allowable. In this regard, this Board does not uphold the Appellant's First Contention.

b) FXB Ltd's Offer

This Board, although in its opinion, does not see any credible justification to discuss this issue, would like to however point out that the Technical Literature which forms part of the Technical Specifications in the Tender Document, must specify which is the product and the composite of the same in order to enable the Evaluation Board to correlate its Technical Features with those which were declared to be delivered.

In this regard, this Board justifiably notes, even in the Technical Literature submitted, that no indication was made as to which type of material was being offered. The mode of narration in the Technical Literature with regards to the material was an open ended option.

This Board would like to point out that it is not the obligation of the Evaluation Board to choose from an option, but rather the duty of the Bidder to clearly specify which material is being offered. Again in this regard, this Board does not uphold the Appellant's Contention.

2. With regards to FXB Ltd’s Second Grievance, this Board credibly notes that the “*Letter of Rejection*” dated 17 May 2017 did not state properly the specific reasons why the Appellant’s offer was discarded. Again, this Board, as had on many occasions, would emphasize the importance of submitting the specific reasons for the rejection of an offer.

In this particular case, the Central Procurement and Supplies Unit did not mention the fact that no translated Literature was submitted. At the same instance, no mention of an open ended offer for the material was made. In this regard, this Board upholds the Appellant’s Second Grievance.

In view of the above, this Board finds against FXB Ltd. However, in view of point 2 above, this same Board recommends that the deposit paid by the latter should be refunded.

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Carmel Esposito
Member

20 June 2017