

PUBLIC CONTRACTS REVIEW BOARD

Case 1070 – FTS 108/2016 – Tender for the Supply, Installation and Commissioning of One (1) in Number Passenger Lift at the Secondary School, Tarxien

The Publication Date of the Call for Tenders was 14 October 2016 whilst the Closing Date for Call of Tenders was 4 November 2016. The Estimated Value of the Tender, (Exclusive of VAT) was € 30,278.30.

Two (2) Bidders have submitted offers for this Tender.

On 13 July 2017, Panta Marketing & Services Ltd filed an Objection against the decision of the Foundation for Tomorrow's Schools to award the Tender to High Rise Co Ltd for the price of € 27,805.95 (Exclusive of VAT) against a deposit of € 400.

On 1 August 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 – Panta Marketing & Services Ltd

Mr Charles Barbara	Representative
Ms Jessica Falzon	Representative
Dr Karl Tanti	Legal Representative

Recommended Bidder – High Rise Co Ltd

No representative from High Rise Co Ltd attended for this Public Hearing

Contracting Authority – Foundation for Tomorrow's Schools

Mr Duncan Mifsud	Chairperson, Evaluation Board
Mr Marco Cassar	Member, Evaluation Board
Mr Joseph Saetta	Member, Evaluation Board
Mr George Schembri	Member, Evaluation Board
Ms Alexia Sammut	Representative
Mr Simon Scicluna	Representative
Dr Lara Chetcuti	Legal Representative
Dr Jonathan Thompson	Legal Representative

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

Dr Karl Tanti, the Legal Representative for Panta Marketing Ltd, opened by saying that his clients have submitted an offer for this Tender but on 7 July 2017, they have received a Letter from the Foundation for Tomorrow's Schools informing them that their Bid was being discarded since it was not technically compliant as it referred to the EU Directive EC/95/16 issued on 29 June 1995 instead of the EU Directive 2014/33 issued on 26 February 2014 which superseded the former.

Dr Tanti continued by saying that his clients were the market leaders in the lift sectors and it was not the first time that they have won Tenders with the Contracting Authority. The Appellants observe that the reference to the incorrect EU Directive falls under Note 2, wherein the Evaluation Board could have sought for a clarification should the need arises.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board asked whether this EU Directive was published in the Tender Document for which Dr Jonathan Thompson, the Legal Representative for the Foundation for Tomorrow's Schools replied in the affirmative, indicating that this was part of the Technical Specifications.

Dr Karl Tanti, the Legal Representative for Panta Marketing Ltd, submitted that neither the adherence to the EU Directive 33/14 nor the fact that his clients referred to another directive were disputed. The EU directive EC/95/16 issued on 29 June 1995 was superseded by a new one. The Appellant could not refer to a product which was conform to the previous directive even if he wanted to because the latter was not in force anyway.

Dr Karl Tanti then quoted Article 47 of the EU Directive 2014/33 which states that,

“Directive 95/16/EC, as amended by the acts listed in Annex XIII, Part A, is repealed with effect from 20 April 2016, without prejudice to the obligations of the Member States relating to the time limits for transposition into national law and the dates of application of the Directives set out in Annex XIII, Part B.

References to the repealed Directive shall be construed as references to this Directive and shall be read in accordance with the correlation table in Annex XIV.”

The new EU Directive continued Dr Tanti makes it clear that the previous one does not have any strength and applicability before the Law. No one can have a lift which can be conform to the previous EU Directive and one cannot make a distinction between the two EU Directives.

Dr Jonathan Thompson, the Legal Representative for the Foundation for Tomorrow's Schools, argued that in this case, the situation was clear. Certain Technical Specifications were requested in this Tender which specifically included a Declaration from each Bidder that they were going to be conforming to the EU Directive 2014/33 issued on 26 February 2014.

The Evaluation Board, when evaluating Panta Marketing & Services Ltd's Technical Offer, did not find this declaration and thus was left with no choice but to discard their Bid. One can understand that there might have been an oversight by the Appellants but the Public Contracts' Review Board has issued previous decisions stating that the Tender Document must be followed *ad litteram*.

If the Contracting Authority had asked for a Declaration of Conformity, this had to be given. The Appellants had enough time to check that their Bid was in line with the Tender Document requirements but this did not happen, hence the Evaluation Board deeming the Tender as non compliant.

Dr Keith Tanti, the Legal Representative for Panta Marketing & Services Ltd, countered that he disagreed with what Dr Jonathan Thompson was saying. If factually one had to not consider the declaration, the Technical Specifications submitted by his clients were those requested by the Contracting Authority. No lift can be supplied in the market if it was not in line with the EU Directive 2014/33 and as Clause 47 said clearly, any previous directives were to be considered invalid.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board, said that to be fair, the Evaluation Board couldn't know whether the Appellant has made an oversight or not when submitting his bid.

Dr Karl Tanti, the Appellant's Legal Representative, added that the reality was that the Contracting Authority has requested a lift which was conform to the current EU Directive and that his clients were compliant to the latter. He insisted that this was submitted with the Technical Literature and therefore falls under Note 2.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board asked whether this was part of the Technical Specifications for which Dr Jonathan Thompson, the Contracting Authority's Legal Representative replied that it does indeed fall under the Technical Specifications, hence under Note 3.

Mr Simon Scicluna, on behalf of the Foundation for Tomorrow's Schools explained that the new EU Directive was enforced in April 2016 whilst the Evaluation Board started evaluating the Tenders in November 2016. Panta Marketing & Services Ltd had enough opportunities to realise that the EU Directive was changed and eventually compile. The latter explained how a lift was to be installed and certified amongst other things.

It was more than obvious that the Foundation for Tomorrow's Schools could not accept offers which fall under the previous EU Directives. The Contracting Authority added that there were two Bids for this Tender, one which was fully compliant and the Appellants who were compliant for everything except for this critical item for which they were disqualified.

Dr Karl Tanti, the Appellant's Legal Representative argued the fact that by mistake a previous Directive was mentioned does not mean that the lifts were going to be inferior to those submitted by other Bidders.

Dr Jonathan Thompson, the Contracting Authority's Legal Representative countered that he understood what Dr Tanti was saying but that the Foundation for Tomorrow's Schools asked for a Declaration of Conformity. In Public Procurement, one had to work on the documentation available and not on the obvious.

Mr Charles Barbara, representing Panta Marketing & Services Ltd, submitted that it was true that the Tender Document specified that the lifts had to be compliant with the EU Directive 2014/33 but since their documents were not updated, they have submitted the wrong documentation.

Although the Tender does specify this requirement, there was nowhere in it that was saying that they were not going to be compliant. The Documents requested were submitted with the

Technical Literature as per the requirements of the Tender Document. Therefore this fell under Note 2 where Clarifications could have been requested.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board asked whether the Documents submitted were part of the Technical Specifications for which Mr Simon Scicluna, on behalf of the Foundation for Tomorrow's Schools, replied that the Evaluation Board could have asked the Bidder for additional Literature but could not change what the latter submitted.

Mr Charles Barbara, for the Appellants, said that they were not going to change the product submitted. The problem regarded the certification of the product. The Literature submitted fell under Note 2 where a clarification could have been sought but this option was never considered by the Evaluation Board.

Mr Simon Scicluna, on behalf of the Foundation for Tomorrow's Schools countered that the latter have referred to the EU Directive 2014/33 in the Tender Specifications.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board added that one had to appreciate the fact that the latter has issued many decisions regarding the Technical Literature. The latter is requested to confirm that whatever was written in the Technical Specifications does in fact exist. If this forms part of the Technical Specifications, therefore it falls under Note 3.

Dr Karl Tanti, the Legal Representative for Panta Marketing & Services Ltd said that he had already explained earlier on why his clients do not agree with this interpretation. The EU Directive 2014/33 makes this clear in cases like this. One cannot say that the lift was being placed in the market under the previous EU Directive since this was not true. 2014/33 makes this clear that it is the only EU Directive which adheres to lifts.

Dr Jonathan Thompson, the Legal Representative for the Foundation for Tomorrow's Schools, countered that he completely disagrees with what Dr Tanti was saying, **in that**, because if a Tender was issued with the specifications for the EU Directive EC/95/16 issued on 29 June 1995 which nowadays does not exist anymore, the new EU Directive was to be taken into consideration.

If a Bidder declares that he was going to be compliant with the previous EU Directive, the Contracting Authority assumes that this was going to happen. It was the Appellant's onus to confirm under which EU Directive his offer was to be compliant.

Mr Charles Barbara, representing Panta Marketing & Services Ltd, remarked that unfortunately this happens easily when there is a transition period between one EU Directive and another. If a Directive was transposed, therefore everything was going to be transposed. A lift cannot be compliant with the previous EU Directive since it would fail the EU Tests required to get into the market.

Dr Karl Tanti, the Legal Representative for the Appellants, concluded that the discussion was not comparing a set of Technical Specifications with another set, but upgraded of Technical Specifications. The discussion was about a set of Technical Specifications which had to be compliant with one type of EU Directive. Panta Marketing & Services Ltd will supply products which were to be compliant with the EU Directive 2014/33.

At this stage, the Public Hearing was adjourned to Tuesday 8 August 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 Panta Marketing & Services Ltd (herein after referred to as the Appellant) on 13 July 2017, refers to the Contentions made by the latter with regards to the award of Tender of Reference eFTS 103/16 listed as Case No 1069 in the records of the Public Contracts Review Board, awarded by the Foundation for Tomorrow's Schools (herein after referred to as the Contracting Authority).

Appearing for the Appellant: Dr Karl Tanti

Appearing for the Contracting Authority: Dr Jonathan Thompson

Whereby, the Appellant contends that:

- a) His offer was disqualified as the Technical Literature which he submitted indicated an EU Directive EC/95/2016 instead of EU Directive 2014/33. In this regard, Panta Marketing & Services Ltd maintains that although such a submission did quote the incorrect directive, his offer was fully compliant and could only be supplied**

and installed under the most recent EU Directive, i.e. that of EU Directive 2014/33;

- b) The Appellants also insist that, the Contracting Authority should have asked for a Clarification in view of the fact, that the EU Directive quoted by the same, did not in fact exist as it was automatically superseded by the most recent version.**

This Board also noted the Contracting Authority's "*Letter of Reply*" dated 25 July 2017 and its verbal submissions during the Public Hearing held on 1 August 2017, in that:

- a) The Foundation for Tomorrow's Schools maintains that the Tender Document clearly and explicitly dictated that the product to be supplied and installed by the Appellant had to be in strict adherence to the EU Directive 2014/33/EU.**

In his submitted Literature, the Appellant indicated that his product and service will abide by the EU Directive EC/95/16 and in this regard, the Evaluation Board had no other option but to discard the Appellant's Offer on technical Grounds

b) The Contracting Authority also contends that the submitted information formed part of the Technical Specifications so that such information fell under Note 3 of Clause 7.1 of the “*Instructions to Tenderers*”

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

1. This Board, after having examined the relative documentation and heard submissions by all parties concerned would like to respectfully opine that this Appeal is centred round the submission of Technical Literature which mentions an older version of the EU Directive 2014/33. In this regard, this Board would like to consider this Appeal under two main issues namely:

i) The Technical Literature;

ii) The compliance of the Panta Marketing and Services Ltd’s Offer

i) Technical Literature

Since the Technical Adherence to the EU Directive was specified in the Literature submitted by the Appellants, one has to consider the

importance and weighting of the Technical Literature. This Board, as had on previous occasions, would like to emphasize that when the Technical Literature is requested in the Tender Process, the Technical Details submitted therein forms part of the Technical Specifications as dictated in the Tender Document.

This requirement is asked for, so that the Contracting Authority would be assured that the product or service being offered does in fact conform to the Technical Specifications as dictated by the Tender Document and as submitted by the Bidder.

This Board, therefore, asserts that the Technical Literature has to go hand in hand with the Technical Specifications of the Tender Document. In this regard, and at this stage of consideration, the submitted information stated that adherence has been made to EU Directive EC/95/16, which is not in force any longer and therefore, Evaluation Board had to assess on what was being submitted.

In this respect, the Evaluation Board had to perform its tasks in the most transparent manner so that the latter can only evaluate on what has been submitted. At the same instance, it is not the onus of the Evaluation Board to assume or presume what the intentions of the prospective Bidder might be but rather to evaluate each offer on the submitted documentation on a Level Playing Field.

In this regard, this Board notes that Panta Marketing Services Ltd submitted the Literature quoting adherence to the incorrect EU Directive, hence the latter was not compliant with the submitted Technical Requirements as laid out in the Tender Document.

On the other hand, this Board notes that the most recent directive, i.e. EU 2014/33, was issued on 26 February 2014 and therefore the Appellant had ample time to be aware of such new directive and submit an updated Technical Literature.

In this respect, this Board would like to stress the importance which must be given by the prospective Bidder in submitting the correct information as requested in the Tender Document and in this particular case, it was the responsibility of Panta Marketing and Services Ltd to ensure that the Technical Literature does in fact conform, in all respects, with the dictated Technical Specifications.

The fact that the Technical Literature was not updated is not a credible justification, taking into consideration the very fact that the most recent directive was issued on 26 February 2014 whilst at the same instance; the closing date for Call of Tenders was 4 November 2016.

ii) Panta Marketing and Services Ltd Offer's Technical Compliancy

Through the submissions made by both parties to this Appeal and through previous considerations taken by this Board, it is justifiably established that the Technical Literature should rank at equal terms with the Technical Specifications of the Tender Dossier.

In this regard, this Board would like to refer to the Specifications provided by the Foundation for Tomorrow's Schools in Section 4 – Technical Specifications as follows:

“Certificates, inspection and acceptance certificates of Lift System Installation relating to putting the Lift into service as per 2014/33/EU”

Part B – 12 of the Technical Specifications state:

“Any deviations from the Specifications, as well as valid reasons, must be clearly indicated by the Contractor at Tendering Stage. The list shall be supplied and installed as per MSA EN81/1 + A3, MSA EN 81/70 and 2014/33/EU”.

With regards to “Regulatory Requirement”:

“The Lift System design and installation shall comply with the Latest Version of the Transposed Directive 2014/33/EU”

With regards to the inspection and Testing, the Tender Documents dictate that:

“Lift Installer shall satisfy the requirements for CE Conformity regarding the placement of the Lift in service as per 2014/33/EU”

With regards to the installation, the Tender Dossier dictates that,

“1 Competent Lift Installations personnel in accordance with 2014/33/EU and MSA EN 81/1 + A3, Manufacturer’s Installation...”

With regards to field quality control, the Tender Document stipulates that:

“Acceptance Testing: Upon completion of the installation and before permitting use of lift, perform acceptance tests as required by 2014/33/EU”

From the above mentioned extracts from the Tender Document, this Board justifiably notes that Panta Marketing and Services Ltd was well pre-advised that the EU Directive 2014/33/EU was the measuring stick and not another directive, whether still existing or not.

In this respect, this Board is credibly convinced that the Evaluation Board carried out its Evaluation Process in a just, fair and transparent manner. At the same instance, this Board was not presented with credible proof that what was indicated in the Technical Literature was compliant with the dictated requirements in the Tender. In this regard, this Board does not uphold Panta Marketing and Services Ltd's First Contention.

- 2. With regards to the Appellant's Second Grievance, this Board, after having considered the issue of the Literature and after having credibly established that the Technical Literature forms part and parcel of the Technical Specifications, would like to justifiably point out that the Evaluation Board could not request clarifications as these would have amounted to a rectification and in accordance with Note 3 of Clause 7.1, such an action on the part of the Evaluation Board is not permissible.**

In this respect, this Board would like to, once again, stress that it was the duty and obligation of the Appellant to ensure that the information submitted was in accordance with the conditions as laid out in the Tender Dossier. In this regard, this Board does not uphold the Appellant's Second Grievance and at the same instance affirms the decision of the Foundation for Tomorrow's Schools.

In view of the above, this Board finds against Panta Marketing and Services 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

8 August 2017