

PUBLIC CONTRACTS REVIEW BOARD

Case 1093 – CT 2056/2017 – Tender for Energy Efficient Printing and Multi-Function Metered Services

The Publication Date of the Call for Tenders was 25 July 2017. The Estimated Value of the Tender, (Exclusive of VAT) was € 134,750.

On 28 August 2017, Office Group Limited filed a Remedy before the Closing Date of a Call for Competition against the Malta Financial Services Authority.

On 24 October 2017, the Public Contracts Review Board composed by Dr Anthony Cassar as Chairman, Mr Carmel Esposito and Mr Richard A Matrenza as members convened a Public Hearing to discuss the Objection.

The Attendance for this Public Hearing was as follows:

Appellant – Office Group Ltd

Mr Robert Micallef	Representative
Mr Christian Vassallo Manche	Representative

Contracting Authority – Malta Financial Services Authority

Mr Joseph Demanuele	Representative
Mr Glen Ellul	Representative
Mr Carl Mifsud	Representative
Mr Clyde Sciberras	Representative
Dr Adrian Buhagiar	Legal Representative

Department of Contracts

Ms Alicia Vella-Lethridge	Procurement Manager
Dr Franco Agius	Legal Representative

Dr Anthony Cassar, the Chairman of the Public Contracts' Review Board opened by saying that when a Bidder files a Remedy before the Closing Date of a Call for Competition, the Board wanted to know the Remedy proposed by the Appellants.

Mr Robert Micallef, on behalf of Office Group Limited, said that they have submitted their concerns in their letter of objection.

Dr Anthony Cassar, the Chairman of the Public Contracts' Review Board remarked that the Appellants did not state which paragraph or section in the Tender Document was prejudicing the Appellants.

Mr Robert Micallef, on behalf of Office Group Limited, said that there were some specifications which were going against his company.

Dr Franco Agius, the Legal Representative for the Department of Contracts pointed out that this point was raised in the Reasoned Letter of Reply which they issued on 5 September 2017.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board said that this Board would not accept Objections being used to make fishing expeditions. The reasons for objecting should be clearly stated in the Letter of Objection.

Dr Franco Agius, the Legal Representative for the Department of Contracts said that, the way which the Letter of Objection dated 28 August 2017, was presented, did not enable the Evaluation Board to prepare correctly for the Public Hearing. If the Appellant raised any further points during the Public Hearing, they should have consulted a technical person to be present.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board said that this Board would give a chance to the Appellants to declare, concerning the specifications, in their opinion that had to be changed.

Mr Robert Micallef, on behalf of Office Group Limited, said that their main point of concern was regarding the scanning speed.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board, said that this point should have been written in the Letter of Objection, so that all interested parties would be able to respond to the Appellant's concerns.

Dr Franco Agius, the Legal Representative of the Department of Contracts, said that in reality the Contracting Authority could have asked the Public Contracts Review Board to reject the Objection raised by Office Group Limited.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board, added that it was unfair for the Contracting Authority, not to know on what grounds the Call for Remedy was raised. He also advised the Appellants to study the Public Procurement Regulations for future reference.

Mr Robert Micallef, on behalf of Office Group Limited, said that the types of machinery available are identical between a brand and another but the specifications found in the Tender

Document favoured one type of brand of machinery. According to the Reasoned Letter of Reply issued by the Department of Contracts and the Malta Financial Services Association on 5 September 2017, the Contracting Authority made its market research but it was not done by picking different elements from different brands for a single machine.

Mr Micallef added that a meeting was held to all interested parties by the Contracting Authority wherein Mr Claudio Scerri emphasised that any offers submitted had to be up to specifications with the Tender Document requests.

Mr Robert Micallef, on behalf of Office Group said that the scanning speed as indicated in the Tender Document was applicable only to one brand

Dr Franco Agius, the Legal Representative of the Department of Contracts asked the Public Contracts Review Board to postpone the Public Hearing so that the Contracting Authority could consult its technical people regarding the matter.

The Public Contracts Review Board granted this request and gave the Malta Financial Services Association and the Department of Contracts a quarter of an hour in order to make the necessary consultations.

At this point, the Public Hearing was suspended so that the Contracting Authority could make the necessary consultations.

When the Public Hearing resumed, Dr Franco Agius, the Legal Representative for the Department of Contracts said that the Contracting Authority would like to summon a technical witness on their behalf to testify under oath. Before that, Dr Agius asked whether the Appellants had any proof to sustain their submissions.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board asked the Appellants whether they had any proof to support their arguments for which Mr Robert Micallef, on behalf of Office Group Limited said that they had proof from other companies. On the other hand, these proofs were not present during the Public Hearing.

Dr Franco Agius, the Legal Representative for the Department of Contracts argued that without these proofs he could not proceed and therefore either the Appellant had to declare that there were no proofs available, or else the Public Contracts Review Board had to declare that the stage for submission of proofs was closed. He also added that whoever made the allegations had to submit proofs to sustain them.

Mr Robert Micallef, on behalf of Office Group Limited, requested a deferment so that he could submit the necessary proofs. This request was denied by the Public Contracts Review Board as this claim was not in the Appellant's Letter of Objection.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board added that technically, this Board could reject the call for Remedies made by the Appellants since there were no valid reasons submitted.

Mr Robert Micallef, on behalf of Office Group Limited, said that he had a brochure of a particular brand available with him which he could present.

Dr Franco Agius, the Legal Representative for the Department of Contracts said that this could be presented as a proof.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board, asked Mr Micallef to submit the document under oath.

At this point, Mr Robert Micallef, the Chief Executive Officer of Office Group Limited, holding ID Card Number 137874 M, was summoned by the Public Contracts Review Board to testify under oath before the same.

Following Mr Micallef's testimony, Dr Franco Agius, the Legal Representative of the Department of Contracts said that he had the technical person available for cross-examination.

At this point, Mr Joseph Demanuele, the Chief Operations Officer for the Malta Financial Services Association, holding ID Card Number 86955 M was summoned by the Department of Contracts to testify under oath before the Public Contracts Review Board.

At this stage, the Public Hearing was adjourned to Thursday 2 November 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 “*Call for Remedy before the Closing Date of Competition*” filed by Office Group Limited (herein after referred to as the Appellant) on 28 August 2017, refers to the Contentions made by the latter with regards to the Tender of Reference CT 2056/2017 listed as Case No 1093 in the records of the Public Contracts Review Board, issued by the Malta Financial Services Authority (herein after referred to as the Contracting Authority).

Appearing for the Appellant: Mr Robert Micallef

Appearing for the Contracting Authority: Dr Franco Agius

Whereby, the Appellant contends that:

- a) **The Technical Specifications, as drafted in the Tender Dossier, limit the scope of competition. In this regard, Office Group Limited also insists that the dictated scanning speed of the machine was applicable to only one Brand of such machinery on the market.**

This Board also noted the Contracting Authority's "*Letter of Reply*" dated 5 September 2017 and its verbal submissions during the Public Hearing held on 24 October 2017, in that:

- a) **The Malta Financial Services Authority maintains that the Appellant submitted his "*Call for Remedies*" without giving the reasons to justify his alleged claims. At the same instance, the Appellant was fully aware of the Technical Specifications of the Tender Dossier and during the Clarification Meeting, he had all the opportunities to raise any concerns which he felt would preclude his participation. In this regard, Office Group Limited did not avail itself of such a remedy.**

This same Board also noted the Testimonies of the witnesses namely:

- 1. Mr Robert Micallef duly summoned by the Public Contracts Review Board;**
- 2. Mr Joseph Demanuele duly summoned by the Department of Contracts**

This Board has also taken note of the following documents

- a) Specifications of Ricoh Machines MP 2555/MP 3055/MP 3555/MP 4055/MP 5055/MP 6055 duly submitted by Mr Robert Micallef;**
- b) Specifications of Ricoh Machines MP 4054/MP 5054/MP 6054, Kyocera and Xerox Work Centre 5945i/5955i duly submitted by Mr Joseph Demanuele.**

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

- 1. This Board would like to justifiably point out that the Appellant submitted a “*Call for Remedy*” without specifying the reasons for**

such a concern and without indicating which specific Technical Clause or Item in the Tender Document that was prejudicing him from participating in the Tendering Process.

At this stage of consideration of this case, this Board had all the remit to dismiss this request, however, to avoid unnecessary delays in the award of this Tender, this same Board proceeds with its consideration of the facts which were revealed during the Public Hearing. However, this Board would justifiably state that such instances are not tolerable, as this Board is not the opportune stage for Fishing Expeditions.

This Board was made aware, during the Public Hearing that Office Group Limited's grievance was due to the fact the dictated scanning speed of the machine had to be a minimum of 110 scans per minute whilst the Appellants can only supply such machines with a scanning speed of 100 scans per minute.

This Board opines that Office Group Limited has all the rights to raise this request, although consideration must be taken to the fact that during the "*Clarification Meeting*", held by the Contracting Authority for this purpose, the Appellants did not raise such an issue,

when they were themselves fully aware of the Technical Specifications indicated in the Tender Document.

This Board also notes the very basic default in this request, in that the Appellant did not specify which of the Technical Specifications was the limiting factor in his capacity to submit the offer.

- 2. During the Public Hearing, Office Group Limited alleged that proper market research was not carried out by the Malta Financial Services Authority. In this regard, as credibly confirmed by the Technical Witness summoned by the latter, it was confirmed and comfortably asserted that the Contracting Authority did in fact search the market and the minimum dictated scanning speed was based on past experience and expected usage capacity of the machine. In this regard, this Board, from the testimony of the Witness, is convinced that prior to the establishment of the dictated scanning speed, proper research was carried out without hindering the scope of fair competition.**

It was also credibly proven that the Technical Specifications in the Tender Document does not favour one type of Brand of machinery

and at the same instance, the Appellant did not provide any proof or evidence which justifies his claim in this regard.

In this particular aspect, this Board would like to emphasize the fact that the Malta Financial Services Authority had the right and obligation to dictate the Technical Requirements in a Tender which does not preclude competition yet, at the same time, to cater for the requirements of the same Authority and in this regard, it was credibly proven that the Contracting Authority abided by this principle in a fair and transparent manner.

- 3. This Board has also considered the “*Clarification Meeting*” which was held on 4 August 2017, during which the prospective Bidder had the opportunity to discuss or indicate his grievances with regards to the Clauses as dictated in the Tender Document. This Clarification meeting was dictated in the Tender Document for the purpose of formulation of any justified clarifications which are deemed necessary, so that such concerns as expressed by the Appellant could be evened out and thus avoid unnecessary trivial matters being raised in front of this Board.**

At the same instance, this Board is justifiably aware that during the “*Clarification Meeting*” it was confirmed and asserted that the Technical Specifications as dictated in the Tender Document are to stay as they are and that there will be no tolerance allowed by the Contracting Authority from the minimum requirements in the Tender Document. This Board credibly opines that all prospective Bidders including the Appellant, who was also present at this meeting, were aware of the minimum Technical Specifications and that any deviation from these will not be acceptable to the Contracting Authority.

4. On a general note, this Board, after having considered the facts as presented by both parties, opines that, first and foremost, “*concerns*” or “*Objections*” should be specifically indicated and justified in the “*Letter of Request*” or “*Letter of Objection*”. In this particular case, such a basic condition was missing.

At the same instance, this Board, after having heard the credible testimony of the Technical Witness, convincingly opines that the conditions as dictated in the Tender Document, did not, in any credibly way, limit the scope of fair and transparent competition and

at the same time, the same dictate conditions/specifications were fully justified.

In view of the above, this Board finds against Office Group Limited and recommends that the Tendering Process is to be resumed without delay.

Dr Anthony Cassar
Chairman

Mr Carmel Esposito
Member

Mr Richard A Matrenza
Member

2 November 2017