

PUBLIC CONTRACTS REVIEW BOARD

Case 1109 – MGOZ T 14/2017 – Period Contract for the Hiring Services of Mobile Toilets for the Cleansing Services Section within the Projects and Development Directorate in the Ministry for Gozo

The Publication Date of the Call for Tenders was 24 April 2017 whilst the Closing Date for Call of Tenders was 15 May 2017. The Estimated Value of the Tender, (Exclusive of VAT) was € 50,847.

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

On 24 August 2017, Mr Franco Scicluna filed an Objection against the decision of the Ministry for Gozo against a deposit of € 400.

On 5 December 2017, the Public Contracts Review Board composed by Dr Anthony Cassar as Chairman, Mr Lawrence Ancilleri 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 – Mr Franco Scicluna

Mr Franco Scicluna	Representative
Dr Francois Dalli	Legal Representative

Contracting Authority – Ministry for Gozo

Mr Joseph Xiberras	Chairperson, Evaluation Board
Mr Silvio Cini	Secretary, Evaluation Board
Mr Mark Attard	Member, Evaluation Board
Ms Marie Louise Bajada	Member, Evaluation Board
Mr Lawrence Mizzi	Member, Evaluation Board
Mr Mario Camilleri	Representative
Mr Marnol Sultana	Representative
Dr Francelle Saliba	Legal Representative

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

Dr Francois Dalli, the Legal Representative for Mr Franco Scicluna, said that his client's Appeal was self explanatory. The Government launched an Electronic Public Procurement System in order to decrease the bureaucracy and abuses, whilst making it simple for Bidders to upload and submit their offers. The fact that the Appellant did not submit a signature does not mean that Mr Franco Scicluna has not presented the offer since it was uploaded by the Bidder himself.

One cannot create a system to reduce bureaucracy and keep certain rigidity. At the end of the day it is the substance that counts. Dr Dalli continued by saying that it did not make sense in losing a Tender because of a mere signature. The fact that the Bid was uploaded and presented it was an acknowledgement that Mr Scicluna was the person responsible for his offer. The Electronic Public Procurement System makes it clear that one could give his username and password to another person.

Dr Francois Dalli continued by saying that the fact that there was a missing signature should not be of a prejudice against the Appellant. He then referred to the Reasoned Letter of Reply issued by the Ministry for Gozo on 30 August 2017 where *inter alia* it was stated that:

“Whereas the user did not take full responsibility of the documentation submitted through the e-pps since he did not produce a signature as requested by the Contracting Authority's technical offer”

According to the Appellant, this was the argument raised by the Ministry. Dr Francois Dalli then proceeded to quote Section 5 of the General Terms of the Electronic Public Procurement System which *inter alia* states that:

“As a registered user, you shall:

- a. Agree to keep your login credentials (username and password) and transaction codes relating to the Service confidential. You are responsible for the security of your password and should avoid any abuse. All the activities carried throughout the Services, with the use of your username and password, are attributed to you.”*

Dr Francois Dalli argued that the fact that Mr Franco Scicluna accepted the way that the Electronic Public Procurement System was an asset that he took with full responsibility to whatever was attributed in the Website.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board asked what the Tender Document said regarding the matter.

Dr Francois Dalli, the Legal Representative for the Appellant replied that this was a careless mistake.

Mr Franco Scicluna, the Appellant himself, said that the login name that he used was his, and that the Electronic Public Procurement System requested the Bidders to sign a document followed by a given user name and password.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board said that this Board believed what Mr Scicluna said but this Board had to respect the Tender Document. If the latter requested something which had to be signed, that was what the Appellant had to submit. The Evaluation Board was bound by the Tender Conditions.

Mr Franco Scicluna, the Appellant, said that the Tender Document requested a signature but wondered how this had to be done from a computer.

Dr Francelle Saliba, the Legal Representative for the Ministry for Gozo said that the Contracting Authority confirmed what was written in the Reasoned Letter of Reply but reiterated the fact that the signature was important, in both Civil and Criminal Cases at the Hon Court of Appeal.

If the Tender requested the Bidders to sign a document and the Appellant did not sign it, he did not take responsibility for the Tender in the eyes of the Ministry. The Evaluation Board could not accept the Appellant's Bid since it would be unfair on the other Bidders.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board, pointed out that this Board was not going to make any justifications but was going to consider the facts.

Dr Francelle Saliba, the Legal Representative for the Ministry for Gozo said that this was a requirement in the Tender Document. The Contracting Authority did not put any excessive burden on the Appellant since he knew how the system worked with a digital signature but the Evaluation Board had to follow what the Tender said. If Mr Scicluna had a difficulty, he should have sought a Clarification. One could not be careless when submitting a Tender.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board, said that this Board was sure that the Appellant has submitted the Tender but on the other hand one had to respect the requirements in the Tender Document. If there were any doubts, the Bidders had every right to check prior in submitting their bid.

Mr Franco Scicluna, the Appellant said that what Dr Saliba said regarding the uploading of other documents was true but there was nowhere in the Tender Document which requested scanned documents. He felt that he was being penalised for something which was not shown anywhere.

The Electronic Public Procurement System was launched in order to decrease the documents. Wherever, Mr Scicluna uploaded a document he had written his name, guaranteeing the genuinely of his offer.

Mr Mario Camilleri, on behalf of the Ministry for Gozo, said that there were other Bidders who submitted their offers with signed documents.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board said that the system did not offer any deterrents for signatures.

Mr Franco Scicluna, the Appellant, said that he wrote his name on every document and that was the most that he could have done.

Dr Francelle Saliba, the Legal Representative for the Ministry for Gozo, countered that if her clients had an audit and the auditors would find documents without signatures, they would have been penalized.

Dr Francois Dalli, the Legal Representative for Mr Franco Scicluna, said that today digital signatures could be set up. The fact that Mr Scicluna did not physically sign the documents did not mean that he was not fully responsible of his bid.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board said that this Board should only check whether the Evaluation Board made their evaluations in the correct way.

At this stage, the Public Hearing was adjourned to Tuesday 12 December 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 Mr Franco Scicluna (herein after referred to as the Appellant) on 24 August 2017, refers to the Contentions made by the latter with regards to the award of Tender of Reference MGOZ T 14/2017 listed as Case No 1109 in the records of the Public Contracts Review Board, issued by the Ministry for Gozo (herein after referred to as the Contracting Authority).

Appearing for the Appellant: Dr Francois Dalli

Appearing for the Contracting Authority: Dr Francelle Saliba

Whereby, the Appellant contends that:

- a) **His offer was rejected due to the fact that he had failed to sign the Technical Offer Form in the Tender Document. In this regard, Mr Franco Scicluna is maintaining that although the mentioned form was inadvertently submitted unsigned, it is not a justification, on the part of the Contracting Authority, to discard his offer, as his submissions were proof enough that he will abide by all the conditions as dictated in the Tender Document.**

This Board also noted the Contracting Authority's "*Letter of Reply*" dated 30 August 2017 and its verbal submissions during the Public Hearing held on 5 December 2017, in that:

- a) **The Ministry for Gozo insists that the Evaluation Board acted in conformity with the conditions laid out in the Tender Document. In this regard, the Appellant was well aware that failure to sign the Technical Offer Form would render the submitted offer, technically non compliant.**

This Board, after having examined the relative documentation and heard the submissions made by the parties concerned, opines that the issue of this

appeal is the “*adherence to the conditions*” as laid out in the Tender Document.

1. **The Conditions in a Tender Document are formulated so that the Contracting Authority will ensure a Level Playing Field for all prospective Bidders. These conditions must be fair, attainable and must not limit or hinder fair competition. At the same instance, these Conditions will also ensure that the Authority will obtain value for money and safeguard the fact that the Recommended Bidder is capable to carry out the Tendered Works to the full satisfaction of the Ministry, at preset conditions.**

In this particular case, this Board would like to respectfully refer to the above principle in that; there was a condition that, the Technical Offer in Section 4, had to be manually signed and in this regard, this Board notes that Mr Franco Scicluna failed to sign such a document which formed part of his offer.

In this instance, the Argument brought about by the Appellant, in that the signature has become obsolete and is a mere formality, does not, in any credible way, justify the omission of the Signature, as duly requested by the Technical Offer in Section 4 of the Tender Dossier.

In this regard, this Board opines that a Bidder must respect and abide by the conditions as dictated in the Tender Document, the latter of which represents the contractual obligations of the Bidder towards the Contracting Authority. It must also be mentioned that if the conditions as laid out in the Tender Document are not respected, then the Tender Document has no relevance and there exist no contractual obligations between the parties concerned.

- 2. In this Appeal, Mr Franco Scicluna argued that although he did not sign the Technical Offer, as duly requested in the Tender Document, it does not imply that the Appellant is not assuming the responsibilities contained in the Tender Document. In this regard, this Board would like to opine that once the fact that the Tender Document is accepted to be a contract, (which is a basic fact), then such a contractual obligation has to be endorsed to signify acceptance of the conditions of the Tender Document and also to confirm that his offer is, as stated.**

At this stage of consideration, this Board would like to affirm the fact that the Evaluation Board can only assess an offer on the information duly submitted by the Bidder and as stated above, the Evaluation

Board are bound to adhere, in their deliberations, with the conditions of the Tender Document.

It is only through this procedure that will ensure a Level Playing Field for all Bidders. In this particular case, the Evaluation Board was faced with an offer which did not fully comply with the conditions as laid out in the Tender Document, and therefore, quite appropriately, the same Evaluation Board deemed the Appellant's offer as being non compliant. In this regard, this Board does not uphold the Appellant's Contentions.

In view of the above, this Board upholds the Ministry for Gozo's decision in the Award of the Tender and finds against Mr Franco Scicluna. This Board also recommends that the deposit paid by the same Appellant should not be refunded.

Dr Anthony Cassar
Chairman

Mr Lawrence Ancilleri
Member

Mr Richard A Matrenza
Member

12 December 2017