

## **PUBLIC CONTRACTS REVIEW BOARD**

---

### **Case 1110 – MGOZ/MPU T 28/2017 – Tender for the Supply and Delivery of Road Marking Paint on a Period Contract Basis for the Directorate for Projects and Development, Ministry for Gozo**

The Publication Date of the Call for Tenders was 10 July 2017 whilst the Closing Date for Call of Tenders was 31 July 2017. The Estimated Value of the Tender, (Exclusive of VAT) was € 18,300.

Seven (7) Bidders have submitted Eight (8) offers for this Tender.

On 11 October 2017, S & R (Handaq) Limited filed an Objection against the decision taken by the Ministry for Gozo to award the Tender to Joseph Caruana Company Limited for the price of € 15,780 (Exclusive of VAT) 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 – S & R Handaq Limited**

Mr Bernard Edmond Brincat	Representative
Mr Gregory Brincat	Representative
Dr Joseph Camilleri	Legal Representative

#### **Recommended Bidder – Joseph Caruana Company Limited**

No representative from Joseph Caruana Company Limited was present for this Public Hearing.

#### **Contracting Authority – Ministry for Gozo**

Mr Saviour Tabone	Chairperson, Evaluation Board
Ms Sonia Mallia	Secretary, Evaluation Board
Mr Saviour Bonello	Member, Evaluation Board
Mr Mario Camilleri	Representative
Mr Marnol Sultana	Representative
Dr Francelle Saliba	Legal Representative

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

Dr Joseph Camilleri, the Legal Representative for S & R Handaq Limited said that this Tender was issued by the Ministry for Gozo regarding the Supply and Delivery of Road Marking Paint on a Period Contract Basis. There were seven Bidders who submitted eight Bids, since one of them had submitted alternative Bids. His clients have offered an offer below € 12,000, another one submitted an offer slightly over € 12,000 while the rest submitted offers worth over € 15,000.

S & R Handaq Limited has filed this Objection without knowing why their offer was discarded because the information which they were given in the Rejection Letter issued by the Ministry for Gozo on 6 October 2017 was that their Bid was rejected because,

*“The Technical Offer Form was not submitted as instructed in Section 1 – Instructions to Tenderers Article 7.1 (C) (i)”*

Dr Camilleri felt that this was not a clear enough reason to see whether his clients have reached the Technical Requirements or had any missing information or otherwise. This was clarified in the Reasoned Letter of Reply. What was being said by the Contracting Authority was that there was a particular document which had to be submitted as per Tender requirements but which was not submitted. The Appellants have brought a witness with them which was to testify under oath that when they were preparing their offer, this Document in question was not on the list.

Dr Francelle Saliba, the Legal Representative for the Ministry for Gozo, asked in what list this Document was included.

Dr Joseph Camilleri, the Legal Representative for S & R Handaq Limited replied that it was included in the notice and contract document. This list was downloaded after receiving the Reasoned Letter of Reply and the witness is ready to testify that this was not available at Tender Stage.

The Appellant's Legal Representative said that one cannot forget the Principle of Proportionality that the Public Contracts Review Board adopts as the cases Ballut Blocks vs Ministry for Resources and Rural Affairs decided by the Hon Court of Appeal on 4 March 2014 and the case Tideland Signal Limited vs Commission of the European Communities decided by the Hon European Courts of Justice on 27 September 2002 show.

S & R Handaq Limited were not contesting the fact that all documents were presented and this was clearly illustrated. Dr Joseph Camilleri was wondering whether this document was so necessary that it would have caused the Appellant to be excluded from this Tender.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board asked what does this document said for which Dr Joseph Camilleri, the Legal Representative for S & R Handaq Limited replied that the document included the product which they had to provide. The Technical Offer Form requested was going to say nothing new or more than what they have submitted.

Dr Francelle Saliba, the Legal Representative for the Ministry for Gozo said that in 2016, the Public Procurement Regulations were amended and one of these amendments included the European Single Procurement Document. The contended Document was in the list and the Appellant should have seen it.

Dr Anthony Cassar, the Legal Representative for the Public Contracts Review Board said that this Board was conscious about this Document and it was available for all Bidders.

Mr Mario Camilleri, a Representative for the Ministry for Gozo said that the Recommended Bidders have submitted this Document and without it, they would not have been awarded the Tender. He then proceeded by quoting Page 7 of the Tender Document which, "*inter alia*" stated,

*"Should the Tender Evaluation Committee deem that the Literature and/or Samples are required to supplement the Technical Offer already submitted, such a request will be sought from the Tenderer during the Adjudication Stage.*

*Should the Tenderer submit Literature and Samples at Publication Stage, such items/information shall NOT be taken into consideration"*

Dr Francelle Saliba, the Legal Representative for the Ministry for Gozo, added that the document included also a Signature.

Dr Joseph Camilleri, the Legal Representative for S & R Handaq Limited countered that there were other documents which had signatures. The fact that there was a missing document does not mean that the Appellant was not binding himself with the Tender, since he was already doing this with his participation.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board, asked whether the Tender Document required the Document to be signed for which Dr Joseph Camilleri, the Appellant's Legal Representative replied that Clause 7c (i) of the Tender Document said that this was not the case.

Mr Mario Camilleri, a Representative for the Ministry for Gozo pointed out that the Technical Offer indicated,

*"Tenderers that fail to complete, duly sign and upload the requested information will be deemed as non-compliant and will not be considered for final adjudication"*.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board asked the Appellants to confirm whether this Clause was in the Tender Document.

Mr Bernard Edmond Brincat, a representative for S & R Handaq Limited replied that they have seen it for the first time when the Ministry of Gozo sent their Reasoned Letter of Reply. He continued to explain that when the Tender was issued, he went on the Electronic Public Procurement System to download the Tender Document as he had done for the previous two times that this Tender was issued.

When he had downloaded the Tender Document, he noticed another section where there were other documents available, some of which had to be downloaded. Mr Brincat added that he

never saw the Technical Offer Form available for download. There was also another new section for which he downloaded and submitted all forms as requested. Mr Brincat concluded by confirming that he only saw the Technical Offer Form for the first time when the Contracting Authority sent their Letter of Rejection and they sent it as an attachment.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board, requested for somebody from the Evaluation Board to ask him for some questions.

At this point, Mr Saviour Tabone, a Senior Principal within the Ministry for Gozo and who was also the Chairperson of the Evaluation Board, holding ID Card Number 7564 G, was summoned by the Public Contracts Review Board to testify under oath before the same.

Following Mr Tabone's testimony, Dr Francelle Saliba, the Legal Representative for the Ministry for Gozo wanted to ask a question to the Appellant.

At this point, Mr Bernard Edmond Brincat, a representative for S & R Handaq Limited holding ID Card 162383 M was summoned by the Ministry for Gozo to testify under oath before the Public Contracts Review Board.

Following Mr Brincat's submission, Dr Joseph Camilleri, the Legal Representative for S & R Handaq Limited said that what he was saying does not apply with respect to the non-consideration of the Literature. The information requested could have been found on other documents.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board, asked whether the Literature was requested or not for which Dr Joseph Camilleri, the Legal Representative for S & R Handaq Limited replied that the Tender Document said that the Literature may be requested.

Dr Francelle Saliba pointed out that the Tender Document said in Clause 7c (iii),

*“Tenderers are NOT requested to supply Literature and Samples at Publication Stage”*

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board, commented that this was clear.

Dr Joseph Camilleri, the Legal Representative for S & R Handaq Limited insisted that the information requested was given with the Technical Specifications.

At this stage, the Public Hearing was adjourned to Thursday 14 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 S & R Handaq Limited (herein after referred to as the Appellant) on 11 October 2017, refers to the Contentions made by the latter with regards to the award of Tender of Reference MGOZ/MPU T 28/2017 listed as Case No 1110 in the records of the Public Contracts Review Board, awarded by the Ministry for Gozo (herein after referred to as the Contracting Authority).**

**Appearing for the Appellant: Dr Joseph Camilleri**

**Appearing for the Contracting Authority: Dr Francelle Saliba**

**Whereby, the Appellant contends that:**

- a) **The Contracting Authority did not submit adequate reasons, in their “*Letter of Rejection*” dated 6 October 2017. This prejudiced the Appellant’s rights in submitting his Objection as no identification of an alleged deficiency, in his offer, was indicated.**
  
- b) **S & R Handaq Limited also maintains that the information contained in the missing “*Technical Offer Form*” was included in his**

**submitted offer and in this respect, the Ministry for Gozo should have applied the principle of Proportionality**

**This Board also noted the Contracting Authority's "*Letter of Reply*" dated 18 October 2017 and its verbal submissions during the Public Hearing held on 5 December 2017, in that:**

- a) The Ministry for Gozo insists that, through its "*Letter of Rejection*", it gave clear and specific enough reasons to enable the Appellant to object on the Contracting Authority's decision. At the same instance, the Ministry for Gozo confirms that the rejection of the Appellant's offer was due to the non-submission of the "*Technical Offer Form*" as duly requested in the Tender Dossier.**
  
- b) The Contracting Authority also insists that the submission of the "*Technical Offer Form*" was a mandatory condition in the Tender Dossier and in this regard no rectification was possible so that this important missing documentation rendered S & R Handaq Limited's offer, technically non-compliant.**

**This same Board also noted the Testimonies of the witness namely:**

- 1. Mr Saviour Tabone summoned by the Chairman of this same Board;**
- 2. Mr Bernard Edmond Brincat summoned by S & R Handaq Limited.**

**This Board, after having examined the relevant documentation pertaining to this Appeal and heard submissions made by the parties concerned, including the testimonies of the Witnesses summoned by both the Appellant and this same Board, opines that the issues in this appeal are twofold, namely “*Reasons for Rejection*” of S & R Handaq Limited’s offer and “*Missing Information*” from the Appellant’s submissions. These are being considered as follows:**

- 1. Reasons for Rejection**

**This Board, as had on many occasions, would respectfully, emphasize the importance of denoting the specific and direct reasons as to why the offer was not successful, to the unsuccessful Bidder. Needless to point out that the detailed explanation should form the subject matter of the Objection itself.**

**In this particular case, the Appellant is contesting the fact that the indication given by the Contracting Authority for his offer's rejection was that "*Form was not submitted as instructed*". In this regard, this Board would like to refer to the "*Letter of Rejection*" dated 6 October 2017, wherein it was clearly and specifically stated that:**

***"The Technical Offer Form was not submitted as instructed in Section 1 – Instructions to Tenderers, article 7.1 (c)"***

**This Board would justifiably opines that the above reason was well explained by the Ministry for Gozo and S & R Handaq Limited should have been aware of the reason for the rejection of his offer, in that he failed to submit the Technical Offer Form.**

**This Board notes that the Contracting Authority also referred to the particular section and clause where the Appellant's Offer was deficient and with reference to Article 7.1 (c)(i), there is clearly stated that:**

***"Tenderers' Technical Offer in response to the specifications to submit online through the prescribed Tender Response Format and by using the Tender Preparation Tool Provided."***

**This Board credibly affirms the fact that the above mentioned clause, specifically dictates the procedure to submit such a form and that is a mandatory requirement apart from the fact that such documentation cannot be rectified as per Clause 7.1 (3). In this regard, this Board opines that such a form formed an important and integral part of the mandatory documentation of the Tender Dossier so that, this Board credibly establishes that S & R Handaq Limited failed to submit a mandatory document and the Ministry for Gozo gave clear reasons for rejecting his offer and in this respect, does not uphold the Appellant's First Grievance.**

## **2. Missing Documentation**

**With regards to the S & R Handaq Limited's Second Contention, in that, although the Technical Offer Form was missing, the same data contained in this form, was included in the Appellant's submissions, this Board would like to, first and foremost, justifiable confirm that a mandatory document was missing from the Appellant's submissions and this fact, on its own merits, justifies instant refusal of the Appellant's offer.**

**At the same instance, one has to acknowledge and appreciate the fact that conditions, in a Tender Dossier, are not capriciously dictated, but are formulated to create a fair level playing field for all prospective Bidders yet, at the same time, the Ministry for Gozo, through these conditions, will ensure that it will obtain the most advantageous offer to carry out its tendered works to its full satisfaction.**

**One must also realise that the Tender Document is a contract with all its dictated obligations, so that all clause and conditions stated therein must be strictly adhered to and respected. The fact that the Appellant is claiming that the information contained in the “*Technical Offer Form*” is the same as that duly submitted does not constitute a justification as to the non-submission of a mandatory document.**

**In this regard, this Board would like also to refer to the “*Technical Offer Form*” itself which stated that,**

***“Tenderers that fail to complete, duly sign and upload the requested information will be deemed as non-compliant”.***

**In actual fact, this note highlights the importance of the submission of such a form which formed part of the official offer.**

**On the other hand, the duty and obligation of the Evaluation Board is to assess each and every offer on the actual submissions made by each Bidder and not to perform a fact-finding exercise. In this regard, this Board does not uphold the Appellant's Second Grievance.**

**In view of the above, this Board finds confirms the decision taken by the Ministry for Gozo in awarding the Tender and therefore does not uphold S & R Handaq Limited's grievances. Moreover, this Board also recommends that the deposit paid by the Appellant should not be refunded.**

Dr Anthony Cassar  
Chairman

Mr Lawrence Ancilleri  
Member

Mr Richard A Matrenza  
Member

*14 December 2017*