

PUBLIC CONTRACTS REVIEW BOARD

Case 1114 – CT 3011/2017 – The Construction of the MCAST Resource Centre at the MCAST Main Campus in Corradino Using Various Environmentally Friendly and Energy Efficient Products

The Publication Date of the Call for Tenders was 4 August 2017 whilst the Closing Date for Call of Tenders was 19 September 2017. The Estimated Value of the Tender, (Exclusive of VAT) was € 6,897,522.

Three (3) Bidders have submitted offers for this Tender.

On 24 November 2017, Project Technik filed an Objection against the decision of the Malta College of Arts, Science and Technology to cancel the Tender against a deposit of € 7,501.

On 14 December 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 – Project Technik

Mr Kurt Abela	Representative
Dr Carl Grech	Legal Representative

Contracting Authority – Malta College of Arts, Science and Technology

Ing Vince Maione	Chairperson, Evaluation Board
Architect Deborah Borg	Member, Evaluation Board

Department of Contracts

Dr Franco Agius	Legal Representative
Dr Christopher Mizzi	Legal Representative

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

Dr Carl Grech, the Legal Representative for Project Technik Limited opened by saying that they filed an Objection for a € 44 discrepancy. The Tender was about finishing works at the Malta College for Arts, Science and Technology. The Appellants have submitted a second Bills for Quantity at the Evaluation Board's request following an arithmetical mistake on the original BoQ.

Dr Grech continued by saying that through a Letter dated 2 November 2017, his clients were accepting the corrections made in their calculations by the Evaluation Board and sent a revised Bills of Quantity which for technical reasons had to be re-written but that two mistakes were found on two items of the same.

The Appellants explained that they have filed their objections on two grounds. First and foremost they have confirmed the Adjustments made by the Evaluation Board through the Letter sent on 2 November 2017. Secondly they have neither changed nor intended to change their submission.

Dr Franco Agius, a Legal Representative for the Department of Contracts pointed out that in actual fact, the Bills of Quantity had two changes.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board asked whether in actual fact there were any changes to the Bills of Quantities.

Dr Carl Grech, the Legal Representative for Project Technik Limited replied that with regards to the Letter dated 2 November 2017, the only thing they had to do was to confirm what was done. The Appellants felt the need to attach a revised Bills of Quantity only for completeness' sake.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board pointed out that the latter was concerned since no changes to the Financial Offer were allowed and that this Board was looking for proof on whether the Bill of Quantity was changed or not.

Dr Carl Grech, the Legal Representative for Project Technik Limited reiterated that his clients in no moment wanted to change their Financial Offer and this was confirmed through the Letter dated 2 November 2017. The only reason why they attached the second Bill of Quantity was to clear things up.

Dr Grech then referred to Regulation 146 of the Public Procurement Regulations issued on 28 October 2016 which *inter alia* stated,

“Those Tenders may be clarified, specified and optimised at the request of the Contracting Authority. However, such clarification, specification optimisation or additional information may not involve changes to the essential aspects of the Tender.”

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board remarked that this Board acknowledged the fact that the Appellants made a genuine mistake. He then referred to Page 13 of the Evaluation Report which *inter alia* said,

“For Evaluation purposes, the Evaluation Board disregarded the attached Bill of Quantities and considered as valid the declaration”

Dr Franco Agius, a Legal Representative for the Department of Contracts said that the situation was a clear one since it is not a € 44 question but a question of principle. The Evaluation Board has the right to make his recommendations as does the General Contracts Committee and the Director of Contracts. All three parties might give a different recommendation but at the end of the day, it is the decision taken by the Director of Contracts which stands following discussions made with all parties.

Mr Carmel Esposito, a member of the Public Contracts Review Board noted that although the Evaluation Board has declared that they have accepted the mistake found in the Bills of Quantity submitted by the Appellant, it was the Department of Contracts who have rejected the offer submitted the same.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board asked whether the second Offer was different from the first one for which Dr Carl Grech, the Legal Representative for the Appellants replied in the affirmative.

Dr Franco Agius, a Legal Representative for the Department of Contracts remarked that the second Bills of Quantities submitted was different for two reasons. Firstly, arithmetical reasons and secondly there were changes in two items which were not included in the corrections.

Mr Kurt Abela, representing Project Technik Limited countered that they confirmed the amendments made by the Evaluation Board on the documentation and then agreed with them.

Dr Franco Agius, a Legal Representative for the Department of Contracts, insisted that factually there was an amendment.

Dr Carl Grech, the Legal Representative for the Appellants replied that that was not their intention.

Mr Carmel Esposito, a member of the Public Contracts Review Board said that there was no need for the Appellants to send a new Bills of Quantity.

Dr Carl Grech, the Legal Representative for Project Technik Limited said that his clients have sent a revised Bills of Quantity to reflect the corrections made by the Evaluation Board.

Dr Christopher Mizzi, a second Legal Representative for the Department of Contracts said that the Contracting Authority was sympathetic with the Appellants who tried to make life easier by submitting a revised Bill of Quantity which was to be part of the Contract.

Dr Carl Grech, the Legal Representative for Project Technik Limited stated that his clients never wanted the revised Bills of Quantity to be part of their contract.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board commented that one cannot discard a second submission if this influences the first offer. It would have to form part of the submission.

Dr Carl Grech, the Legal Representative for the Appellants referred to the Letter sent on 2 November 2017 where *inter alia* was stated,

“Attached is the Bill of Quantities with Adjustments as found.”

The Appellants’ Legal Representative continued by insisting that that was the reason why they feel that there was a typing error from their part. Nobody would have wanted to make an amendment for € 44 but that Project Technik Limited wanted to bind themselves with the original offer.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board, said that this Board wanted to ensure that the procedure for Adjudication was done correctly. It was an unfortunate situation which led the Department of Contracts with no choice but to modify the decision taken by the Malta College of Arts, Science and Technology Evaluation Board.

Dr Carl Grech, the Legal Representative for Project Technik Limited insisted that his clients were not modifying anything essential from a contract which was valued at € 1.4 million. Even if the Appellants had to bind themselves with the Second Bills of Quantity, there would have been nothing which can be deemed as discriminatory. The changes were so small that nobody would have been prejudiced.

Dr Grech then proceeded to refer to the Reasoned Letter of Reply issued by the Department of Contracts on behalf of the Malta College of Arts, Science and Technology issued on 4 December 2017 where the latter referred to previous cases issued by the Public Contracts Review Board in 2009 where similar appeals were rejected for similar discrepancies. Dr Grech felt that the comparisons made were not like with like since that time the Public Procurement Regulations have changed not once but twice.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board insisted that this Board wanted to assess whether the Principles of the Public Procurement Regulations were broken or not.

Dr Carl Grech, the Legal Representative for Project Technik Limited explained that if the contested Lot was to be cancelled and a new Tender would be issued, his clients would have been prejudiced since at that stage, every interested Bidder would know how much did they offer.

It was true that the Public Procurement Regulations does not allow any changes to bids but Dr Grech felt that his clients were going to be prejudiced for a € 44 million difference when compared to a € 1.4 million contract. Besides, the same regulations were created to make a level playing field between the Bidders, hence the Contracting Authority should have sought a Clarification from the Appellants and not just deem their offer as Financially Non Compliant.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board said that the Level Playing Field Principle must go hand in hand with the Public Procurement Regulations. This Board acknowledges the fact that the mistake done by the Appellants was a genuine one but if one mistake was accepted, the following mistakes had to be also accepted.

Dr Carl Grech, the Legal Representative for Project Technik Limited insisted that his clients didn't want to amend their offer but that when given the opportunity to confirm the mistake made by the Contracting Authority, they did so. On the other hand, it was also true that the Director of Contracts cannot accept mistakes but the Public Contracts Review Board could consider the fact that it was a genuine mistake.

Dr Franco Agius, a Legal Representative for the Department of Contracts noted that Article 146 of the Public Procurement Regulations regulates Competitive Dialogue and not an Open Call for Tenders as this one was. With regards the Appellant's Claims on the Second Bid Bond, Dr Agius remarked that the Contracting Authority requested only an arithmetical acceptance.

With regards Project Technik Limited's discriminatory claims, Dr Agius pointed out that all financial offers submitted by all Bidders were made public to everyone. With regards to the previous cases mentioned in their Reasoned Letter of Reply dated 4 December 2017, Dr Franco Agius remarked that these were mentioned on the basis of principle and on the basis that the Regulations were there to be observed.

Dr Anthony Cassar, the Chairman of the Public Contracts Review Board concluded by saying that the circumstances were known to everybody and that this Board was going to evaluate on the principle of the Public Procurement Regulations

At this stage, the Public Hearing was adjourned to Tuesday 19 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 Project Technik Limited (herein after referred to as the Appellant) on 24 November 2017, refers to the Contentions made by the latter with regards to the award of Tender of Reference CT 3011/2017 listed as Case No 1114 in the records of the Public Contracts Review Board, awarded by the Malta College of Arts, Science and Technology (herein after referred to as the Contracting Authority).

Appearing for the Appellant: Dr Carl Grech

Appearing for the Contracting Authority: Dr Franco Agius

Dr Christopher Mizzi

Whereby, the Appellant contends that:

- a) **Through their reply to the Letter sent on 2 November 2017, they had confirmed the arithmetical correction made by the Evaluation Board and through the same, they bound themselves to abide by all the conditions laid out in the Tender Document;**

- b) **By submitting a Revised Bill of Quantities, they did not change their original submissions and although there existed a difference of € 44 from the original global price, such an occurrence should not affect their overall offer in the Evaluation Process.**

This Board also noted the Contracting Authority's "*Letter of Reply*" dated 4 December 2017 and its verbal submissions during the Public Hearing held on 14 December 2017, in that:

- a) **The Malta College for Arts, Science and Technology contends that the Appellants' submission, by way of a second Bill of Quantities which included additional items, did, in actual fact, change the nature and price of the original offer. In this regard, such an action constituted a change of offer during the Evaluation stage which is not permissible;**
- b) **The Contracting Authority maintains that the difference of € 44 in the global price is not the issue for discarding the Appellants' offer but rather the fact that during the submissions, by way of clarifications, there were additional items in the Bill of Quantities which were not included in the original offer.**

.....

This Board, after having examined the relevant documentation pertaining to this Appeal and after having heard submissions by all the parties concerned, opines that the issue is the determination of whether the Offer submitted by Project Technik Limited was amended or not, upon the reply to the clarification dated 27 October 2017.

- 1. First and foremost, this Board would like to respectfully refer to the principle of self-limitation, whereby the conditions laid out in the Tender Dossier must be adhered to and respected in full by all parties to the tendering procedure, including the Contracting Authority. The principle of self-limitation safeguards the existence of fair level playing field and transparency, so that the conditions in a Tender Document represent contractual obligations which must be fulfilled by the prospective Tenderer and one of the prime conditions is that offers cannot be changed after the closing date for submission or at any stage of the Tendering Process.**

In this particular case, the Appellants were given the opportunity to clarify and confirm an arithmetical adjustment to their offer which the Contracting Authority pointed out. Quite appropriately, Project Technik Limited confirmed such an adjustment in price, however, in addition to this confirmation, the Appellants submitted a “*Revised Bill of Quantities*” wherein the additional items which were not included in the original Bill of Quantity were present so that the latter was different from the original one.

At this particular stage of consideration, this Board is ignoring the fact that the overall price difference resulted in € 44 only and rather

assess whether Project Technik Limited's offer, through the revised Bill of Quantity, was amended. One has to acknowledge the fact that the Bill of Quantity represents the core of the Technical Offer of a Bidder, so that the latter forms an integral part of the offer itself.

In this regard, this Board justifiably opines that, by doing so, the Appellants affected a change in their Technical Offer. In this respect, this Board would also refer to the clarification request dated 27 October 2017, with particular reference to Paragraph Two, whereby it was made vividly clear that:

“It is to be noted that no rectifications are allowed and the clarifications are to include only information which has been already submitted”

Through the above mentioned clause in the request for clarification, the Malta College for Arts, Science and Technology reminded the Bidder that only information on what has been submitted are to be clarified and not additions to the original offer. In this case, this Board has not been presented with any credible evidence that the revised Bill of Quantities did not change the Technical Offer apart from the price issue which will be considered later. However, this

Board cannot discard the fact that the submission of the revised Bill of Quantities changed the contents and nature of the original Technical Offer and in this regard, this Board does not uphold Project Technik Limited's First Contention.

- 2. With regards to the Appellants' Second Contention, this Board would respectfully emphasize that principles are not formulated on the nature of magnitude but rather on matters of procedures for attaining a particular objective, so that the fact that the difference in the overall prices is only € 44 should not form the justification for a revised submission, different from the original.**

This Board, would like to, again stress, that the principle of self-limitation must be fully adopted during all the stages of the Tendering Process, without any exception whatsoever. At the same instance, this Board, as had on many occasions, would like to remind prospective Bidders that it is their responsibility and obligation to ensure that their submissions are in adherence to all the conditions stipulated in the Tender Dossier. This Board does not consider the difference in price is sufficient justification to breach the principle of self-limitation and in this regard, does not uphold the Appellants' Second Grievance.

In view of the above, this Board finds confirms the decision taken by the Malta College of Arts, Science and Technology in cancelling the Tender for Lot 3 and therefore finds against Project Technik Limited.

In view of the fact that this Board is justifiably convinced that such an erroneous submission by the Appellants consisted of an inadvertent mistake, this same Board recommends that the deposit paid by Project Technik Limited is to be fully refunded.

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Carmel Esposito
Member

19 December 2017