

PUBLIC CONTRACTS REVIEW BOARD

Case 1127 – MEDE/MPU/FTS/022/2017 – Provision of Passenger Lifts at the new St Paul’s Bay School

The publication date of the call for tenders was the 1st November 2017 whilst the closing date of the call for tenders was the 1st December 2017. The estimated value of the tender (exclusive of VAT) was € 143,220.

T-Rex Investments Ltd filed an appeal on 25th January 2018 against the Contracting Authority on the basis that their tender was rejected as it was considered to be technically non-compliant and recommended that the tendering process be cancelled.

On 6th February 2018 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Mr Lawrence Ancilleri and Mr Richard A Matrenza as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellant – T-Rex Investments Ltd

Dr Franco Galea	Legal Representative
Mr Marcus Lauri	Representative

Contracting Authority – Foundation for Tomorrow’s Schools

Dr Jonathan Thompson	Legal Representative
Dr Lara Chetcuti	Legal Representative
Perit Duncan Mifsud	Chairman Evaluation Board
Ing Simon Scicluna	Secretary Evaluation Board
Mr Joel Fenech	Member Evaluation Board
Mr Marco Gauci	Member Evaluation Board
Ms Alexia Sammut	Member Evaluation Board
Mr Andrew Brooke	Representative

In a brief introduction, the Chairman, Dr Anthony Cassar, welcomed the parties and asked Appellant's representative to make their submission.

Dr Franco Galea, Legal Representative on behalf of T-Rex Investments, stated that this appeal hinged on a simple point. His client's firm which was the only bidder admits that the tender technical literature was submitted in Italian without a translation into English as stipulated in the tender requirements. The Contracting Authority did not ask his client to submit a translation as clarification. Instead they had received a letter advising them that their tender did not qualify on two counts – non-compliance, and since it was the only offer received the tender had been cancelled. The Contracting Authority claim that there were documents missing in his clients' submission. In Dr Galea's view the Authority should have asked for clarification and evaluated the tender accordingly.

Dr Jonathan Thompson, Legal Adviser for the Foundation for Tomorrow's Schools, said that this was a case where the information requested had not been supplied. T-Rex offer was technically non-compliant as it was up to the tenderer to ensure that they follow the guidelines on the issue of tenders - in this instance the literature was not in the stipulated language and it was not the function of the Contracting Authority to correct deficiencies on the part of tenderers.

In his counter-argument Dr Galea referred to a case heard by the Public Contracts Review Board on the 17th January 2018 where rectification of a tender had been allowed. His clients had supplied the necessary documents – it was merely the translation that was missing, hence this was a case of rectification rather than missing documents.

Ing. Simon Scicluna asked the Chairman of the Board if he could intervene and confirmed that the Contracting Authority was not able to clarify any points since the tender had failed from the start of the process and could not be considered.

In conclusion the Chairman commented that rectification could not be sought at that stage, thanked both parties for their submissions and confirmed the hearing closed.

This Board,

Having noted this Objection filed by T-Rex Investments Limited (herein after referred to as the Appellant) on 25 January 2018, refers to the Contentions made by the latter with regards to the award of Tender of Reference

MEDE/MPU/FTS/022/2017 listed as Case No 1127 in the records of the Public Contracts Review Board, issued by the Foundation for Tomorrow's Schools (herein after referred to as the Contracting Authority).

Appearing for the Appellant: Dr Franco Galea

Appearing for the Contracting Authority: Dr Lara Chetcuti

Dr Jonathan Thompson

Whereby, the Appellant contends that:

- a) The Technical literature was submitted in the Italian Language and not accompanied by a translation in the English Language. Although the Appellants acknowledge that the tender dossier requested an English version, the same maintain that the Contracting Authority should have requested a clarification as the document itself was in fact submitted but not translated in English.**

This Board also noted the Contracting Authority's "*Letter of Reply*" dated 30 January 2018 and its verbal submissions during the Public Hearing held on 6 February 2018, in that:

- a) The Foundation for Tomorrow's Schools insists that the translated version in English of the Technical Literature formed part of the**

requested submission. In this regard, the Contracting Authority had no other option but to consider the Appellants' submission as incomplete and incorrect.

This Board, after having examined the relevant documentation pertaining to this appeal and after having heard submissions made by all interested parties, opines that the sole issue to be considered in this case is the submission of the technical literature.

- 1. This Board would respectfully point out that, in such cases, the principle of “*self-limitation*” must be justifiably applied. One should also acknowledge the fact that conditions in a Tender Dossier are not capriciously stipulated, but rather to ensure a fair level playing field and transparency and above all to identify the best and most advantageous offer which will perform the tendered requirements to the full benefit of the Contracting Authority. In this regard, it is the imperative duty and obligation of the prospective bidder to ensure that, prior to the submission of his offer; all conditions dictated in the tender dossier have been strictly adhered to. At the same instance, the Foundation for Tomorrow's Schools, in its evaluation process, must ensure that the offers submitted are in accordance with the same**

conditions as stipulated in the tender dossier, hence the principle of self-limitation.

In this particular case, the tender dossier clearly indicated that the technical literature, if in a foreign language, must be accompanied by an English version, as per the General Rules Governing Tenders, in that:

“All correspondence and documents to the procurement document exchanged by the Economic Operator and the Contracting Authority must be written in English. Supporting documents and printed literature furnished by the Economic Operator may be in another language provided they are accompanied by an accurate translation into English.”

In this regard, this Board justifiably notes that T-Rex Investments Limited were well aware that if the literature was in a foreign language other than English, there had to be accompanied by an English version. At the same instance, one has to consider the fact that the Literature, as such, was in fact submitted by the Appellants but it was in the Italian language and it was not accompanied by the English version, so that the information submitted was incomplete and not according to the dictated condition of the tender dossier. In actual fact, a situation where the submission of incomplete information was created by the Appellants

and in this respect, quite appropriately, the Evaluation Committee had no other option but to discard the offer submitted by T-Rex Investments Limited.

- 2. This Board would respectfully point out that, given such circumstances and events, it is being credibly established that the English version of the Literature was a prime requirement and at the same instance, the Appellants were well advised that such an information had to be submitted with the original Literature. In this context, this Board does not consider the Appellants' claim, in that, "*The Authority should have sought a clarification*", to justify the omission, on the part of the Appellants, in submitting what was clearly requested in the Tender dossier and which submission made by the latter represented incomplete information.**

In this regard, this Board would emphasize that, in this particular case, the English version, should have formed part of the original literature in the Italian language so that the latter as sent was incomplete and incorrect information. In this regard, this Board would remind all prospective Bidders that it is their responsibility to ensure that, prior to the submission of their offer, all dictated documentation requested in the tender dossier, had been collated.

3. This Board would like to also point out that although the “*Letter of Rejection*” dated 17 January 2018 did specify the reason for the rejection of the Appellants’ offer, perhaps more appropriate wording could have been adopted in describing the Appellants’ offer being deemed as non-technically compliant.

In view of the above, this Board:

- i) Does not uphold, T-Rex Investments Limited’s contention that since the English version of the literature was a missing document, the Foundation for Tomorrow’s Schools should have sought clarification;**

- ii) Opines that since there was only one Bidder and the latter was technically non-compliant, confirms the Contracting Authority’s decision to cancel the Tender;**

- iii) Opines that, since the Tender is being cancelled, the deposit paid by T-Rex Investments Limited should be fully refunded.**

Dr Anthony J Cassar
Chairman

Mr Lawrence Ancilleri
Member

Mr Richard A Matrenza
Member

13 February 2018