

PUBLIC CONTRACTS REVIEW BOARD

Case 1139 – ATD LC 02/17 – Tender for the Provision of Street Lighting for Attard Local Council

The publication date of the call for tenders was the 19th May 2017 whilst the closing date of the call for tenders was the 30th June 2017. The estimated value of the tender (exclusive of VAT) was € 27,000.

There were two (2) bidders on this tender.

Enemalta plc filed an appeal on 5th February 2018 against the Contracting Authority's decision that their tender had been rejected as it was considered "not successful". A deposit of € 400 was paid.

On 6th March 2018 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Carmel Esposito as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellant – Enemalta plc

Dr Clement Mifsud Bonnici
Ing Etienne Lewis

Legal Representative
Services Manager Commercial Distribution

Contracting Authority – Attard Local Council

Mr Stefan Cordina
Ms Marica Mifsud
Mr Ralph Cassar

Chairperson Evaluation Board
Executive Secretary
Member Evaluation Board

Dr Anthony Cassar, Chairman of the Public Contracts Review Board, opened the hearing by stating that he wanted to make it clear that the law states that when a tender expires on a non-working day or on a public holiday the appropriate expiry day is the next working day. He regretted the type of letters which the Attard Local Council had sent which were insulting to the Board, as were the lack of co-operation in submitting documents. He then invited the parties to make their submissions.

Dr Clement Mifsud Bonnici, Legal Representative of Enemalta plc, said that in this tender there had been no involvement by the Contracts Authority, and no indication of the value of the contract. The attitude of the Council had been reprehensible throughout and totally contrary to the rules of public procurement. Evaluation was meant to be on best quality price ratio. After complaints by Enemalta plc the Council declared that it was based on prices per unit rate according to the schedule of rates. There were no quantities specified and half way through the evaluation the weighting criteria were changed after the offers were already in hand. He referred to Case 907 of the 9th March 2016 which dealt similarly with change of basis during evaluation.

Ms Marica Mifsud said that she was the Executive Secretary of the Attard Council and Head Contracting Authority. She described her role as ensuring that the tender process was properly carried out. She went on to describe the process of evaluation and said that the rates in the tenders varied – some were higher and some lower. She was ordered to produce a comparative rates template. The Council could not foresee the quantities of repairs, so they decided to base the evaluation on the services chiefly used. This led the Council to decide that the major problem was burnt lights.

The Chairman pointed out to the Council that at that stage they had changed the criteria. This demonstrated lack of knowledge of public procurement regulations and procedures. There was a fundamental error in the process of evaluating this tender. The Council had changed the goalposts, and he suggested the use of a legal adviser to ensure that the process was transparent. A fundamental principle had been abandoned. The EU was opening doors for prospective bidders and it was therefore important for tender documents to be properly drafted.

Dr Mifsud Bonnici said that there was gross negligence, maybe not intentional, in the handling of this tender. His client was seeking annulment of the Council's decision, the re-integration of his clients in the tender process and the re-assessment of his offer without any changes to the basis of evaluation.

The Chairman thanked the parties for their submissions and declared the hearing closed.

This Board,

Having noted this Objection filed by Enemalta plc, (hereinafter referred to as the Appellant) on 5 February 2018, refers to the contentions made by the same Appellant with regards to the award of the Tender of Reference ATD LC 02/2017, listed as Case No 1139 in the records of the Public Contracts Review Board, awarded by Attard Local Council, (hereinafter referred to as the Contracting Authority).

Appearing for the Appellant: Dr Clement Mifsud Bonnici

Appearing for the Contracting Authority: Ms Marica Mifsud

Whereas, the Appellants contend that:

- a) The Contracting Authority changed its award criteria during the evaluation process. In this regard, it is vividly evident that the Evaluation Board did not follow the correct procedure of adjudication and was in breach of the very fundamental rules of the Public Procurement Regulations.**

This Board also noted the Contracting Authority’s “*Letter of Reply*” dated 18 February 2018 and its verbal submissions during the Public Hearing held on 6 March 2018, in that:

- a) Attard Local Council insist that it had carried out its evaluation process based on the quantity of services which were considered to be, most likely to be utilised. In this respect, when the Evaluation Board identified these items and multiplied by the quoted rates, the Preferred Bidders’ offer was the cheapest.**

This Board, after having examined the relevant documentation and heard submissions made by the parties concerned, opines that the issue to be considered is the award criteria and the technical specifications so requested in the Tender Dossier.

1. Award Criteria

The Award Criteria, as stipulated in the Tender Document, specified that,

“Award Criteria for this Tender is the Lowest Rate per item for each price produced”.

In this regard, this Board would point out that the principle of self limitation should have been applied by the Local Council, in that, the same Authority was bound to adhere to the conditions as stipulated in the Tender Document itself.

In this particular case, the Award Criteria was the cheapest rate, so that, under the evaluation system of the “*Best Price Quality Ratio*”, only the rates quoted are to be assessed and deduced to arrive at a weighted average percentage. In this regard, this Board noted that during the evaluation stage, the Evaluation Committee ignored completely the award criteria by first taking into account an estimated quantity of a particular chosen item and then multiplied the corresponding rate by the cheapest rate.

First and foremost, this Board justifiably opines that such a change of award criteria is totally in breach of the basic principles of the Public Procurement Regulations and secondly, if the Local Council was aware, which of the items are to be required most, the Authority should have published such information in the Tender Dossier.

One must bear in mind that, the Contracting Authority is in duty bound to follow and abide by the conditions and regulations it dictated in the Tender Dossier. At no point in time, did the technical specifications dictate the quantity of items or units to be most utilised, so that the fact that the Evaluation Board, during the adjudication stage, considered quantities of particular items, the same Committee was in breach of the tender conditions themselves and of the Public Procurement Regulations. In other words, there was a change of goal posts and this goes against the fundamental principles of Public Procurement.

In this regard, this Board notes that Attard Local Council lacks knowledge of the basic, yet fundamental principles of Public Procurement, so that although this Board acknowledges the fact that, such deficiencies in the Evaluation Procedure were not intentional, at the same instance, this Board refers to the “*Reasoned Letter of Reply*” dated 18 February 2018, of which the contents therein, do not reflect a mode of reply to the Appellants’ objections, but rather allegations, and regrettably to note, even contempt addressed to this Board. This attitude demonstrates, in a very clear manner that the originator of this correspondence also lacks knowledge of the Appeals’ procedure.

2. Technical Specifications

Technical specifications are dictated, in a Tender Dossier, so that a Bidder has a clear understanding of what the Local Council is requesting. Two of the prime requisites in the drafting of the Technical Specifications in a Tender Dossier, are such that the specifications must be precise in the way that describe the requirements and must also have clearly defined, achievable and measurable objectives. In this particular case, this Board justifiably notes that the technical specifications were clear enough not to indicate quantities in the technical offer. The fact that bidders might have an indication of the quantities from past experience, does not, in any credible way, justify the fact that the Evaluation Board arrived at the successful offer whilst taking into consideration quantities of certain items in the technical offer and in this respect, the Bidders were requested to submit rates and not quantities in accordance with the dictated conditions of the Tender Document.

In view of the above, this Board,

- i) Upholds Enemalta plc's grievances;**

- ii) Recommends that the deposit paid by the Appellants is to be fully refunded;**

- iii) Revokes Attard Local Council's decision in the award of the contract;**

- iv) The Appellants' offer is to be re-assessed in accordance with the parameters of the Tender Document requirements;**

- v) Recommends that the Evaluation Board is to be composed of different members.**

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Carmel Esposito
Member

13th March 2018