

## PUBLIC CONTRACTS REVIEW BOARD

---

**Case 1145 – CT 2258/2017 – Tender for the Supply, Delivery and Installation of Environmentally Friendly School Furniture for the New School, St Thomas More College, Marsascala Primary.**

### **Remedies before Closing Date of a Call for Competition**

The publication date of the call for tenders was the 22<sup>nd</sup> December 2017 whilst the closing date of the call for tenders was the 1<sup>st</sup> March 2018. The estimated value of the tender (exclusive of VAT) was € 511,799.35.

F X Borg Furniture Ltd filed an appeal for a call for remedy on 26<sup>th</sup> January 2018 on the grounds that the tender was discriminatory as it was limited to one supplier.

On 15<sup>th</sup> March 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 – F X Borg Furniture Ltd**

Ms Jenny Cassar	Representative
Mr Joseph Borg	Representative

### **Contracting Authority – Foundation for Tomorrow’s Schools**

Mr Albert Muscat	Representative
Mr Franco Costa	Representative

### **Department of Contracts**

Dr Franco Agius	Legal Representative
-----------------	----------------------

Dr Anthony Cassar, Chairman of the Public Contracts Review Board welcomed both parties and invited them to make their submissions.

Ms Jenny Cassar, Representative of F X Borg Furniture Ltd, said that the tender covered several bids but submission had to be in one lot. Their appeal was based on two items in the specification (items 5.1.0 and 5.1.1.) which their normal suppliers advised them were not standard items in their range. They therefore sought alternative suppliers - the first two were not prepared to help as they were already represented by another firm – another further seven suppliers could not help as they did not produce the items in question. Appellants were thus in a situation where they would be losing a tender opportunity because of the lack of the two items.

Dr Franco Agius, Legal Representative for the Department of Contracts, sought permission to call a technical witness.

Mr Albert Muscat (435379M) testified on oath that he worked in the Design Department at the Future for Tomorrow's Schools and he was part of the team responsible for refurbishing of schools including the ordering of furniture. He explained that the tender was not split up into lots as it was required for one new school and they wanted homogenous furniture – they had therefore asked for one supplier for the whole lot. On receiving the objection from Appellant he had carried out a random search on line which indicated that there were several suppliers of similar items to the ones Appellants were having problems locating.

At this stage he tabled a document bearing pictures of items similar to the ones in question.

Mr Muscat continued by stating it was evident from his researches that there was one item which was compliant and others which needed a certain degree of customization to fit the tender requirements. He also pointed out that within limits there was a certain amount of tolerance in the sizes requested and this was shown on the drawings supplied which were more as guidelines rather than strict instructions.

Miss Jenny Cassar said that the specifications indicated certain specific requirements that had to be adhered to – for example the dome top unit. The manufacturers that they had contacted had indicated that they do not customize available products.

The Chairman of the Board mentioned that the Contracting Authority did not intend to limit competition and perhaps seeking earlier clarification would have prevented the need for this appeal.

Dr Agius agreed with Ms Cassar that if the specification could be relaxed slightly this matter could be resolved. He said the Authority had no objection to substituting the dome top with a flat top, as at the end of the day it did not make a difference to the finished product, and this issue could be settled by the Board.

Ms Cassar said that this left the question of the problem of customizing items from different manufacturers. She saw difficulty in one manufacturer trying to customize bits, for example shelves, on units that already exist – the variety in tolerances is bound to create problems. She accepted that this was also a matter for the Board to make a decision upon.

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

---

**This Board,**

**Having noted the call for remedies filed by F X Borg Furniture Limited, (hereinafter referred to as the Appellant), prior to the closing date for a call for competition on 26 January 2018, referring to the contentions made by the same Appellant with regards to the award of Tender of Reference CT 2258/2017 listed as Case No 1145 in the records of the Public Contracts Review Board, issued by the Foundation for Tomorrow’s Schools.**

**Appearing for the Appellant: Ms Jenny Cassar**

**Appearing for the Contracting Authority: Dr Franco Agius**

**Whereas, Appellants contend that:**

- a) **Their main concern refers to the stipulated specifications of items 5.1.0 and 5.1.1 of section 4 of the tender dossier, wherein such requirements are not standard but rather tailor made, so that F X Borg Furniture Limited are experiencing difficulties in finding suppliers for these two items. At the same instance, since the tender is not divided into lots, the**

**inclusion of such specifications will limit the participation of prospective bidders.**

**This Board also considered the Contracting Authority’s “*Letter of Reply*” dated 13 February 2018 and its verbal submissions during the Public Hearing held on 15 March 2018, in that:**

**a) The Foundation for Tomorrow’s Schools maintains that the specifications allowed reasonable tolerances so that it had not restricted such a “*call for competition*” from a wide participation of Prospective Bidders. In this regard, the Contracting Authority is aware that various manufacturers can cater for the custom built items namely, items 5.1.0 and 5.1.1.**

**b) The Contracting Authority also contend that due to the nature and objective of the product being requested, it is not practical to split the tender into lots, so that a single supplier will be more appropriate for the tendered supplies.**

**This same Board also noted the testimony of the witness, namely Mr Albert Muscat, Professional Officer II, duly summoned by the Foundation for Tomorrow’s Schools.**

**This Board has also taken note of the documents submitted by Mr Albert Muscat, which consisted of technical literature of available products from a manufacturer.**

**This Board, after having examined the relevant documentation pertaining to this concern and heard submissions made by the interested parties, including the testimony of the technical witness, opines that the items namely, 5.1.0 and 5.1.1 which F X Borg Furniture Limited are alleging that will limit participation, will be considered as follows:**

**1. Specifications of items 5.1.0 and 5.1.1**

**This Board would, first and foremost, emphasize that the technical specifications and other conditions in a tender dossier, are not capriciously stipulated. They are formulated in such a way as to suit the requirements of the Contracting Authority and at the same instance, create a yard stick to maintain a level playing field for all prospective Bidders. In this particular case, the requested procurement is to furnish a whole new school, so that consideration has been appropriately taken towards accommodating such an educational institution with standard uniform furnishings.**

**During the submissions, it was credibly established that the Foundation for Tomorrow's Schools, in its dictated specifications, allowed sufficient tolerances so as to widen the possibilities for participation of prospective Bidders. At the same instance, it was also credibly proven that the products as listed in items 5.1.0 and 5.1.1 could also be supplied by manufacturers. This Board also credibly established that if the standard product required some “*customization*”, such addition to the product, this can be easily carried out, as duly confirmed by the technical witness, in that:**

**Question: “*Jigifieri, kull ma jrid jagħmel il-producer kemm jagħmillhom bieb?*”**

**Answer: “*Eżatt. Jista’ jagħmel bibien u jiġi jingħalaq kif kien mitlub fit-Tender.*”**

**Question: “*Dan il-customisation, mill-esperjenza tiegħek hija xi haġa diffiċli jew xi haġa sempliċi?*”**

**Answer: “*Ma naħsibx li hija xi haġa diffiċli li tiġi customised għan-needs li kien hemm bżonn fit-Tender*”.**

**In this regard and in view of the above, this Board is credibly convinced that what is being requested in the tender dossier with regards to a possible need of customisation, represent minor and possible additions to the standard product and such requirements are completely justified for the proper utilisation of the product in the intended environment.**

- 2. With regards to the description of the item in clause 35.7.3.3 of the section 4 of the tender document, F X Borg Furniture Limited encountered difficulty in locating a manufacturer who can supply such a specification, which dictated that, “*The dome top is bolted to each end panel and rear panel*”. In this regard, although this Board justifiably notes that this particular item was not objected to, in the Appellants’ Letter of Objection, however, during the submissions it was noted that the difficulty arose due to the dome top. In this respect, this Board noted this issue will not affect the technical compliancy of the top, as duly confirmed by the technical witness, in that:**

**Question: “*Ha nistaqsi xi haga teknika. X’ differenza taghmel jew x’  
effett jista’ jkun hemm bejn “Dome Issue” u “Flat Issue?”*”**

**Answer: “*Xejn*”.**

**From the above testimony, this Board is credibly convinced that the top can be “*domed top*” or “*flat top*”, either which should not present a problem to the Appellants’ participation in the call for competition.**

- 3. With regards to the specifications of the trays, F X Borg Furniture Limited are maintaining that they also encountered difficulties of locating supplies as these items have to be complimentary to the specifications of the cupboards, the latter of which must be tailor made. From the submissions made by the Foundation for Tomorrow’s Schools and their technical witness, this Board noted that as long as these trays are functional and conform with the tolerance range, such items are compliant, as duly confirmed, in that:**

**Question: “*Ha nistaqsi daqsxejn lix-xhud. Taghmel differenza?”*”**

*Answer: “Il-container ma taghmilx differenza daqshekk. Jekk fl-aħħar mill-aħħar isir customisation b’ tali mod li l-container ikun functional ghax fl-aħħar mill-aħħar irid ikun functional, m’ ghandna problemi ta’ xejn.”*

- 4. This Board also noted F X Borg Furniture Limited’s concern with regards to the Tender not being split into lots. First and foremost, it must be made clear that the Foundation for Tomorrow’s Schools has the legal discretion to opt as to whether to split such a procurement into lots or not. Secondly, this Board opines that it would be appropriate to procure furniture having a uniform and standard design to furnish a whole school and it is also practical to deal with one successful bidder for the whole package of the procurement.**
- 5. This Board would respectfully point out that the issues raised by the Appellants, in this call for remedies, could have easily been ironed out through clarifications, the latter of which would have prevented unnecessary delay in the procurement process. On a general note, this Board does not find any credible evidence that the technical**

**specifications as stipulated in the tender dossier limit, in any way, the participation of prospective bidders.**

**In view of the above, this Board would however suggest some amendments to some clauses so as to clarify points raised in this appeal, as follows:**

**i) Section 35.7.3.3 is recommended to be amended to read as follows:**

*“The dome or flat top is bolted to each end panel and rear panel”*

**ii) Section 35.7.3.5 is recommended to be amended to read as follows:**

*“The centre panel supports are made 1.60 +/- 0.02 thick steel that are bolted to the top and hat channels.”*

**iii) Recommends that such adjustments be communicated through a clarification note.**

Dr Anthony Cassar  
Chairman

Mr Lawrence Ancilleri  
Member

Mr Richard A Matrenza  
Member

*22<sup>nd</sup> March 2018*