

## **PUBLIC CONTRACTS REVIEW BOARD**

### **Case 1159 – CT 2242/2017 - Tender for the Provision of Mechanical and Electrical Services using Environmentally Friendly Products for the new Marsaskala Primary School**

The publication date of the call for tenders was the 21<sup>st</sup> November 2107 whilst the closing date of the call for tenders was the 21<sup>st</sup> December 2017. The estimated value of the tender (exclusive of VAT) was € 984,206.

There were four (4) bidders on this tender.

Central Power Installations filed an appeal on 21st March 2018 against the Contracting Authority's decision to reject the tender on the grounds that the tender bid was non-complaint.. A deposit of € 4,921 was paid.

On 19<sup>th</sup> April 2018 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Mr Carmel Esposito and Mr Lawrence Ancilleri as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

#### **Appellant – Centre Power Installations Ltd**

Dr Mark Refalo	Legal Representative
Mr Nicholas Attard	Representative
Mr Dmitry Pechenkin	Representative

#### **Recommended Bidder – Megaline (M&E) Ltd**

Mr Emanuel Abela	Representative
Ing Joseph J Vassallo	Representative
Ing Andreas Aquilina	Representative

#### **Contracting Authority – Foundation for Tomorrow's Schools (FTS)**

Ing Simon Scicluna	Secretary Evaluation Board
Ms Alexia Sammut	Procurement Executive

#### **Department of Contracts**

Dr Chris Mizzi	Procurement Manager
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The Chairman of the Public Contracts Review Board, Dr Anthony Cassar, after a brief introduction invited Appellants to make their submission.

Dr Mark Refalo, Legal Representative of Central Power Installations Ltd said that his client's bid had been disqualified because of an unlawful correction of the tender document. Out of a very long list of items which the tender dossier asked for one letter had been incorrect. Through further clarification this error had to be corrected at a later date. In the literature supplied one letter of just one article was different – where the letters BX were stated it should have been BE; this was corrected after the second clarification. The Contracting Authority claim that this amounted to rectification. Dr Refalo quoted an Appeals Court case heard on the 13<sup>th</sup> April, which, he claimed differentiated between a genuine mistake and an administrative error. The gist of the sentence is that by not recognizing genuine mistakes the State was punishing itself not the tenderer.

The first witness called by Dr Refalo was Mr Nicholas Attard.

Mr Nicholas Attard (183083M) stated on oath that he is a mechanical engineer and has worked for Central Power Installations Ltd (CPI) for eleven years. His main role is to manage projects, submit tenders and generally assist in technical matters. Due to the fact that the firm they represent did not have up to date catalogues, CPI decided to use an alternative firm to supply the VRF Outdoor Unit requested in the tender document, which units they had previously used in other contracts and which they knew were technically complaint. Although the product was Eurovent Certified as specified, the actual model quoted, due to a slight oversight, was quoted as BX, which is not certified, instead of EX which is. Witness explained that the quoted product was not a different model but a derivative of the same model.

Ing Simon Scicluna (214374M) was next to testify under oath. He stated that he is Head of Procurement at the FTS and was Secretary of the Adjudication Board in this case. He explained that this tender was a turnkey contract and the air conditioning units formed part of the contract. He again re-iterated that the literature submitted referred to the BX unit and there was no reference to Eurovent certification, except in the case of the central controllers. It was only at the third attempt that the bidder finally indicated that he was supplying model EX and not BX. This led the Contracting Authority to conclude that bidder had replaced the original model. Since neither brand nor model could be altered, the Authority had no option but to reject the bid.

Mr Dimitry Pechenkin testified on oath that he was the General Manager at CPI and had overall supervision of the tendering process. Not to risk jeopardising the bid CPI went to a contractor they used in the past that had Eurovent complaint equipment and they relied on his knowhow to make sure they submitted the correct details. In good faith he had examined all the literature and it only transpired later that there were models with an E denomination. Witness contended that the Outdoor Unit was only a minor part of the air conditioning contract, which itself was only

about 10% of the overall contract's value. He confirmed that the Contracting Authority gave his Company the opportunity to clarify their submission and it was at that stage that the E model had been offered, thereby confirming a change in model.

The final witness, called by the FTS was Ing Melchisedech Zarb (196776M). Under oath he testified that the Bill of Quantities specified certain air conditioners which all had to be Eurovent compliant. The BX version model which they offered was not complaint. The documentation submitted was also not very clear. The Eurovent Compliance Certification submitted referred to system controllers not to the Outdoor Unit as requested. Due to the fragmentation of the documents supplied it was very difficult to relate the parts to the whole. After rectification the documents were submitted in full but they still related to the BX model. After the third clarification request the bidder submitted a full catalogue on the EX range of models. Witness stated that to make doubly sure about the non-compliance of the units offered he had consulted the manufacturers website and the local importers of the units. On being questioned by the Chairman, witness confirmed that there is a vast difference in technical performance between Euro compliant and non-compliant units.

In his closing submissions Dr Refalo said his client accepts that a discrepancy exists between what was asked for and what was offered. The offer was always meant to be Euro compliant and CPI had accepted in good faith the information that their sub-contractor had supplied. He mentioned that the PCRB had a strict policy of adhering to the terms of a tender but he again referred to the Court of Appeal case mentioned earlier wherein it was held that proportionality was to be considered.

Dr Mizzi, Legal representative of the Department of Contracts said that the Appeal Court case referred to was totally different to this case and one could not rely on that sentence to argue this case. There was a discrepancy in compliance in the offer and only after protracted clarification did the Appellant change the model offered. They persisted in their arguments because they realised that a change of model would prejudice their offer. He requested that the decision of the Evaluation Board stands.

Dr Cassar thanked both parties for their submissions and declared the hearing closed.

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**This Board,**

**Having noted this Objection filed by Central Power Installations Limited, (hereinafter referred to as the Appellant), on 23 March 2018, refers to the contentions made by the same Appellant with regards to the award of Tender of Reference CT 2242/2017 listed as Case Number 1159 in the records of the Public Contracts Review Board, awarded by the Foundation for Tomorrow's Schools, (hereinafter referred to as the Contracting Authority).**

**Appearing for the Appellant: Dr Mark Refalo**

**Appearing for the Contracting Authority: Ing Simon Scicluna**

**Appearing for the Department of Contracts: Dr Christopher Mizzi**

**Whereby, the Appellants contend that:**

- a) Through an inadvertent error, they quoted the incorrect code number of the VRF Outdoor Unit of the Airconditioning system, to verify that the product being offered was Eurovent compliant. In this regard,**

**Appellants maintain that such a misinterpretation was not, in fact, material to the project and the Contracting Authority should have applied the principle of the proportionality, taking also into account the fact that the Appellant's offer was the cheapest Bid. Central Power Installations Limited also maintains that such an error represented an insignificant part of the Tender.**

**This Board also noted the Contracting Authority's "*Letter of Reply*" dated 10 April 2018 and its verbal submissions during the Public Hearing held on 19 April 2018, in that:**

- a) The Foundation for Tomorrow's Schools insists that the discrepancy in the model code of the VRF Outdoor Unit arose during a rectification procedure, in that, the Appellants had missing literature documentation and upon the requested submission of the same, they indicated a different version of the product, so that they were technically non compliant. In this regard, the Contracting Authority could not apply the principle of proportionality as the error constituted a substantial and important segment of the Tender.**

**This same Board also noted the testimonies of the following Witnesses namely:**

- 1. Mr Nicholas Aquilina duly summoned by Central Power Installations Limited;**
- 2. Mr Dimitry Pechenkin duly summoned by Central Power Installations Limited;**
- 3. Ing Melchisedech Zarb duly summoned by the Foundation for Tomorrow's Schools;**
- 4. Ing Simon Scicluna duly summoned by the Public Contracts Review Board.**

**This Board has also taken note of the document submitted by the Foundation for Tomorrow's School which consisted of an article regarding the Introduction to Basic Features of Units**

**This Board, after having examined the relevant documentation to this Appeal and heard submissions made by the interested parties, including the testimony**

of the Technical Witnesses, opines that the issues to be considered in their own merits are:

**i) Submission of Literature;**

**ii) Application of the Principle of Proportionality;**

**iii) Central Power Installations Limited's offer being the cheapest Bid.**

**i) Submission of Literature**

**It is an established and accepted principle that the technical literature forms part of the technical offer in a Tender Document. Although such documentation is not always requested, when this is asked for, such as, in this particular case, the literature must represent all the technical features and elements as those submitted and declared in the technical offers so as to confirm that what is being offered complies with the specifications as duly dictated in the technical offer.**

**This Board notes that the issue arose from various rectification processes, in that, the Technical Literature originally submitted by the Appellants was not complete and lacked important information. Through such rectifications, the Appellants submitted the requested information, but indicating a different model from that so declared in the technical offer. At this stage of consideration, this Board also notes that through the rectification process and their original submissions, Central Power Installations Limited consistently indicated a BX Model for the outdoor unit and only during the last rectification and after pressure by the Evaluation Board did the Appellants submit the literature relating to an EX Model, which is evidently different from that indicated in the Appellants' Technical offer. This Board would point out that the Appellants indicated a Model BX for Outdoor Unit in their original offer. This was also confirmed in the rectification process and which was not Eurovent compliant. However through the last request of the Clarification Process, the Appellants submitted an EX Model, which did not relate to the declared BX Model in their offer. At this stage of consideration, this Board would refer to extracts from the testimony of Ing Melchisedech Zarb, as follows:**

**“Question: *Mela mmorru għar-rectification, l-aħħar wahda.***

**Witness: *Dejjem bqajna bil-BX hemmhekk. S’ hemmhekk dejjem bqajna jibghatulna informazzjoni fuq il-mudell BX, l-originali biex niftehmu.***

**Question: *Korrispondenza tal-20 ta’ Frar 2018 fejn l-Evaluation Committee baghat l-aħħar rectification lic-Central Power Installaitons. Kompli spjega, sur Zarb.***

**Witness: *Indicated fit-Technical Offer li tawna huma. The Evaluation Committee notes that page; hemm il-pages neqsin,***

***“Since Technical Literature is listed as Note 2B, you are kindly requested to submit missing pages and to corroborate Eurovent Certification for your offered Brand and Model.”***

***Jigifieri hemmhekk fl-aħħar tlabnieh speċifikament għax baqa ma tahlilniex.***

**Question: *Imbagħad x' ġara? U r-risposta għal dik? Jigifieri wara t-tielet rectification li tfaċċa l-mudell differenti, hux hekk?***

**Witness: *Iva, iva. Fejn imbagħad bagħtilna ċ-ċertifikati tal-prodotti li huma Eurovent li dejjem jispicċaw bl-EX mhux bil-BX u bagħtilna ukoll tal-EX Range.***"

**From the above credible testimony, it is evident that the Appellants' Literature did not comply with the same product which they indicated in their technical offer and this represented a change in their technical offer during evaluation stage, which is not permitted. In this regard, this Board upholds the Foundation for Tomorrow's School's decision in deeming Central Power Installations Limited's offer as being technically not compliant.**

**ii) Application of the Principle of Proportionality**

**This Board acknowledges the fact that the two most important features to be considered for the adoption of the Principle of Proportionality are:**

- a) Whether the measure at issue is appropriate for attaining the objective pursued;
- b) Whether the measure goes beyond what is necessary to achieve the objective.

In this particular case, the objective of the Contracting Authority was to procure all the necessary air-conditioning system, having components with a Eurovent certification. This objective was clearly dictated in the Tender Dossier so that the objective and the specifications of this Procurement were clearly defined. At the same instance, the Appellants' submitted literature did not corroborate with their original declared outdoor unit's model, so that, the principle of proportionality cannot be applied in cases where it is evident that Bidders fail to substantiate what they have declared in their Technical Offer. This Board would refer to extracts from the Testimony of Ing Melchisedech Zarb as follows:

**“Question: *Hemm differenza kbira mhux m' hemmx?*”**

**Witness:** *Hemm differenza kbira. Fil-fatt jekk tara il-values, l-energy values.*

**Question:** *Teknikament jgħifieri hemm differenza kbira bejn l-EX u l-BX?*

**Witness:** *Iva. It is more efficient.*

**Question:** *Meta baġhtulek il-Model Ex, il-Product Code kien differenti mill-product code tal-BX?*

**Witness:** *Iva.”*

**From the above testimony, it is evidently clear that there exists a technical difference between the model of the VRF Outdoor Unit as declared in the Appellants' Technical Offer and the latter's submission of Technical Literature. At the same instance, this Board notes that the Appellants' original dictated model is less efficient and does not meet the Technical Specifications as duly dictated in the Tender Dossier. In this regards, this Board opines that through the**

**Appellants' last submission, there was a clear change to their technical offer so that the principle of proportionality does not apply.**

**iii) Cheapest Offer**

**Central Power Installations Limited's argument that their offer was the cheapest is somewhat irrelevant, in this particular case. As the Appellants know well, there are three stages in the Evaluation process, namely the Administrative, Technical and Financial Compliancy. In this particular case, the Appellants' offer could not be financially assessed as the latter procedure is the last stage of consideration after being administratively and technically compliant and which in the opinion of this Board, the Appellants' offer did not reach the final stage.**

**In view of the above, this Board,**

- i) Does not uphold Central Power Installation Limited's Contention that, in this particular case, the Evaluation Board should have applied the principle of proportionality;**

**ii) Does not uphold the Appellants' Contention that their product was technically compliant;**

**iii) Recommends that the deposit paid by the Appellants should not be refunded;**

**iv) Upholds the Foundation for Tomorrow's Schools decision in the Award of the Tender.**

Dr Anthony Cassar  
Chairman

Mr Carmel Esposito  
Member

Mr Lawrence Ancilleri  
Member

*8 May 2018*